

**Submission
No 8**

**REVIEW OF THE INSPECTOR'S REPORT TO THE
PREMIER: THE INSPECTOR'S REVIEW OF THE
ICAC**

Organisation: Parliamentary Inspector of the Corruption and Crime
Commission of Western Australia

Name: The Hon Michael Murray AM QC

Position: Parliamentary Inspector

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PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

Our ref: 649/16

11 July 2016

Mr D Tudehope MP
Chair
Parliamentary Committee on the ICAC
Parliament of New South Wales
Macquarie St.
Sydney, NSW, 2000

Dear Chairman,

ICAC Inspector's Report on his Review of the ICAC

Thank you for your letter dated 6 June 2016, inviting me to make a submission upon the Inspector's Report to the Premier upon his Review of the ICAC. I am pleased to take up your invitation and I note the wide-ranging terms of reference for the Inquiry.

I do not propose to address them seriatim, but I thought that it may be of assistance to the Committee if I concentrated upon the recommendations made by the ICAC Inspector which appear to relate to the terms of reference in a manner which goes beyond an essentially local relevance to the Inspector's relationship and dealings with the ICAC.

I will then indicate how the subject matter of those recommendations is dealt with in WA in the hope that to do so may provide the Committee with an insight into local practice here. Consideration of the processes adopted in WA and other like jurisdictions may assist the Committee to evaluate the recommendations made by the ICAC Inspector.

In what follows, unless I indicate to the contrary, references to sections of an Act will be references to the *Corruption, Crime and Misconduct Act 2003 (WA)*, which has been substantially amended with effect from 1 July 2015. I will refer briefly to the effect of those amendments in so far as they affect the operational jurisdiction of the integrity agency here, the Corruption and Crime Commission (CCC).

The function of the CCC is to investigate and report upon 'serious misconduct', defined in s 3(1) and s 4(a), (b), and (c) to mean corrupt conduct by a public officer, or the commission of an offence punishable by 2 or more years imprisonment while acting in

the officer's official capacity. I put to one side the role, such as it is, of the CCC in respect of dealing with organised crime.

The term also includes 'police misconduct' which is defined in effect as any misconduct, whether serious or minor, by a police officer or any person in the employ of the WA Police.

'Minor misconduct' is defined in s 3(1) and s 4(d) as conduct of a public officer which may adversely affect the honest or impartial performance of the functions of their office, involves a breach of trust, or the misuse of official information, and is sufficiently serious that it might provide reasonable grounds for the termination of the office or employment. Of course, that will not include such conduct by a police officer or employee of the WA Police.

Nor will it include such conduct by a member of Parliament or a member of a local government, which is not misconduct within the meaning of this Act, but is to be dealt with under quite separate statutory regimes.

Under Part 4A of the Act, minor misconduct is to be dealt with by the Public Sector Commission (PSC), but not if it involves an allegation of such misconduct by an officer of the CCC: s 45G(b). I am the only officer who may deal with such an allegation, if necessary by referring it to the Police for investigation and, where appropriate, prosecution, particularly if an allegation of minor misconduct is accompanied by, or part of, alleged serious misconduct by a CCC officer.

My role, however, is essentially, as in the case of the ICAC Inspector, the oversight of the conduct of the CCC and its processes in the exercise of its functions, so that I may assess the effectiveness and appropriateness of its procedures, make recommendations to the CCC, and report and make recommendations to the Parliament, generally through the Joint Standing Committee (JSC) on the CCC.

Cooperative processes

I may initiate inquiries and obtain access to the files and records of the CCC. I may require officers of the CCC to appear before me to provide information and produce documents. I monitor investigation by the CCC of the conduct of its officers whenever an allegation is made which concerns, or may concern, an officer of the CCC and I may take over such an investigation and make my own determination of an appropriate remedy: s 196(4)-(8).

In relation to the last-mentioned process, the CCC is obliged to notify me when any such allegation arises. The Commissioner, Mr John McKechnie QC, and I have formulated a Protocol, cast widely to ensure that I see everything of this character which is more than merely an expression of dissatisfaction with the determination of a matter by officers of the CCC: Report No. 20 by the JSC dated June 2015.

Otherwise, matters come before me most frequently by way of complaint, although the Commissioner will advise me of matters which may require my involvement. If a matter within my statutory responsibility comes before the PSC, again I have entered into a Protocol with the Public Sector Commissioner, Mr M C Wauchope, which ensures that I am notified of all such matters, which, as I have said, cannot be dealt with by the PSC in any event: Report No. 27 by the JSC dated March 2016.

Finally, in this regard, I note that on 21 July 2015 the CCC and the PSC entered into a Memorandum of Understanding to promote cooperation between the two agencies in the discharge of their respective statutory functions, a matter of real significance, not only in respect of functions which are intended to be exercised together, but also in respect of matters of conduct which may involve both serious and minor misconduct in the same factual context, thereby involving both agencies in the separate exercise of their powers in closely related areas of fact.

I have set out the above matters to make the point that in WA the legislative framework is such that it could not operate effectively without the cooperative endeavour of both integrity agencies and myself, as well as with the CCC and the Police, who govern their relationship with the CCC by a Memorandum of Understanding in much the same way as between the CCC and the PSC.

The ICAC Inspector's Report to the Premier of NSW

As I have said, I do not propose to refer to all the recommendations made in the Report, purely parochial as many of them are. I will confine my attention to those which resonate with the WA statutory scheme, or where comment from a WA point of view may assist the Committee on the ICAC in its deliberations. I will identify the recommendations upon which I offer some comment by the numbers used by the Hon David Levine AO RFD QC in his Report.

1. Private examinations by the CCC are the general rule. The CCC may open all or part of an examination to the public *'if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.'*: ss 139, 140.

Any inquiry by me is required to be in private: s 197(4). Of course, a report by either the CCC or me to the Parliament, generally through the JSC, may publicly identify people, but both the Commissioner and I consider that we should not identify people who are, in one way or another, the subjects of a Report, unless to do so is deemed necessary to properly perform our statutory functions in the particular circumstances of the case.

2. A person who is given a notice to produce something or summonsed to give evidence or attend an investigation and answer questions will be told in general terms what is the subject matter of the inquiry by the CCC, but they may be prohibited from further disclosure if the CCC is satisfied that disclosure in the terms specified would or might

prejudice the safety or reputation of a person, the fairness of a trial for a criminal offence, or the effectiveness of an investigation: s 99.

The same approach is taken in respect of a private or public examination. The CCC is *'to inform the witness of the general scope and purpose of the examination'* unless it *'considers that in the circumstances it would be undesirable to so inform the witness'*. That might be considered to be an unduly broad test, but in my view, in the context of the Act, undesirability would have to be measured having regard to the sort of matters informing a decision under s 99.

So far as I am concerned, by notice, summons or at a private inquiry which I might conduct, the relevant consideration would be the fairness of the inquiry and its capacity to elicit reliable information. I have in that regard the powers of a Royal Commission: s 197.

3. and 4. There is no requirement in WA, absent a demand by me for information touching upon a matter before me, for the CCC, in every case where it exercises a power of the kind mentioned above to restrict the provision of information to or by a suspect or witness, to tell me what its decision was in that regard and the grounds upon which it acted.

5. In WA it is an offence to disclose any information contrary to a non-disclosure direction under s 99, except to or by a lawyer or for legal purposes: s 167. Under s 3(1) the word 'disclose' is defined to mean any publication or divulging or communicating in any way.

As at present advised, I do not believe that to complain or report a grievance in respect of any aspect of the procedure under discussion to me, or to raise a matter with me, would constitute disclosure within the meaning of the Act. If that were so, it would set at nought the person's right to seek the exercise of my functions to investigate, assess, to report upon, and to make recommendations to the CCC in respect of the appropriateness of its procedures in this regard, generally or in respect of a particular case. No such suggestion has been made, to my knowledge.

7. Under ss 94 and 95 of our Act notices to provide a statement of information or produce a record or other thing must not only describe what is required, but must specify the date, time and place when and where the notice is to be complied with. To say that the notice was to be complied with 'forthwith' would not satisfy the law.

9. and 10. The CCC has the power under s 33(1)(d) to take no action to investigate a matter itself or to refer it to another appropriate authority, but it may only do so once it has made an assessment, if necessary after a preliminary investigation, of the worth and merit of the allegation, and so it must at least act upon the matter to that extent. When deciding whether 'further action' is warranted in respect of a matter it is to have regard to its seriousness, whether it is frivolous or vexatious or made in good faith, whether it

has already been adequately dealt with outside the Act, and whether, in all the circumstances, further action is justified or in the public interest: s 18(3).

That is the prescribed procedure and I have the function under s 195(1)(c) '*to assess the effectiveness and appropriateness of the Commission's procedures*'. I have, in fact, on occasions, raised with the CCC the appropriateness of decisions to take no further action in matters, sometimes with the effect that the CCC has continued its investigation and assessment process as I have recommended. On other occasions the CCC has held firm to its original decision.

It will be observed that there is no requirement under our Act for the CCC to notify me on every occasion when it decides to take no action. I have no plan to seek such an outcome, being able, I think, to rely on disappointed interested persons to bring such matters to my attention when they feel that the CCC has made a wrong decision on the merits in all the applicable circumstances.

15. I understand the reasoning behind the establishment of an 'Exoneration Protocol', but it is not for me to express a view about such a matter, which is clearly responsive to the situation in NSW.

I hope the above may be of some assistance. I have provided copies to my colleagues in NSW, Victoria and Queensland, and I have provided a copy to the JSC on the CCC here, in view of the views I have expressed about various aspects of the WA Act.

Yours sincerely,



HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR