

40TH PARLIAMENT



Joint Standing Committee on the
Corruption and Crime Commission

Report 12

An unreasonable suspicion - Parliamentary Inspector's report

Presented by
Ms M.M. Quirk, MLA and Hon J.E. Chown, MLC
October 2019

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**Joint Standing Committee on the Corruption
and Crime Commission**

**An unreasonable suspicion –
Parliamentary Inspector's report**

Report No. 12

Presented by

Ms M.M. Quirk, MLA and Hon. J.E. Chown, MLC

Laid on the Table of the Legislative Assembly and of the Legislative Council
on 24 October 2019

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Ministerial Response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Joint Standing Committee on the Corruption and Crime Commission directs that the Attorney General report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Findings and Recommendations

Recommendation 1

That the Attorney General give consideration to the matters raised in the attached report of the Parliamentary Inspector of the Corruption and Crime Commission.

Chapter 1

Committee's consideration of the PICCC's report

The importance of oversight

The Committee welcomes this report by the Parliamentary Inspector of the Corruption and Crime Commission (PICCC). The report once again demonstrates the importance of having an independent oversight body such as the Office of the Parliamentary Inspector to scrutinise the actions of the Corruption and Crime Commission (CCC) as it, in turn, reviews police misconduct.

This particular examination by the PICCC is of the way in which the CCC handled a complaint about the treatment of Mr Denys Martin at the hands of WA Police.

The PICCC's report is made pursuant to the functions of the PICCC as set out in s 195(1) of the *Corruption, Crime and Misconduct Act 2003* (the CCM Act). The functions relevant here are those which allow the PICCC to assess the effectiveness and appropriateness of the procedures of the CCC, and to make recommendations to this Committee.

The PICCC's report—a summary of events

The PICCC's report details what was, in his opinion, the wrongful arrest of Mr Martin on 30 August 2017. A summary of events is provided following—see the attached report at Appendix One for more detail.

The PICCC states that Mr Martin was 'wrongfully arrested by police officers when suspected of behaving in a manner which did not constitute the offence of possession of child exploitation material, or any offence at all.'¹

He was then, in the PICCC's opinion, 'wrongfully deprived of his liberty for an appreciable period; wrongfully and forcibly fingerprinted; wrongfully prosecuted for refusing to provide his personal details to the police; convicted, fined and ordered to pay costs.'²

Initially Mr Martin complained to WA Police about his treatment. The CCC was notified of the allegations made by Mr Martin, as per standard practice whereby any complaints about alleged police misconduct are notified to the CCC. The CCC, on two separate

¹ See Appendix One – PICCC's report – p. 7.

² See Appendix One – PICCC's report – p. 7.

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occasions, referred specific matters relating to the complaint back to WA Police for further internal investigation.

On 9 November 2017 WA Police informed Mr Martin that his allegations 'were unsubstantiated except for some 'minor procedural matters' for which the officers concerned received verbal correction.'³

At this point Mr Martin took his grievance to the CCC. The CCC, on 18 January 2018, informed Mr Martin that 'in their view there were no grounds upon which to form an opinion of serious (police) misconduct.'⁴

Mr Martin then lodged a complaint with the PICCC on 24 January 2018. The PICCC recommended to the CCC that it conduct its own investigation and assessment of the matter, to which the Corruption and Crime Commissioner agreed.

The CCC came to the conclusion that Mr Martin's arrest and subsequent detention was unlawful, although it could not substantiate some of the complaints about the alleged denial of his rights and his alleged mistreatment while incarcerated.

The CCC referred the matter back to WA Police for action⁵ subject to the CCC undertaking a monitor and review function.⁶

It seems that by this time WA Police had already instigated a re-investigation, the result of which was that the Senior Police Solicitor had arrived at the opinion that Mr Martin's arrest was unlawful. After further review by a Police Inspector it was recommended that Mr Martin be advised of this conclusion and 'that he be given a formal apology, and that he be provided with assistance to appeal against his conviction, resulting in his conviction being expunged and the fine and costs being repaid.'⁷

The matter would have ended here except that WA Police decided to obtain independent legal advice from the State Solicitor's Office (SSO). A lawyer from the SSO came to a different conclusion about the reasonableness of the arresting officer's actions, the details of which are outlined in the attached report.⁸

It appears then that WA Police took this advice on board and 'arrived at the conclusion that the arrest was lawful and that no remedial action was required.'⁹

3 See Appendix One – PICCC's report – p. 10.

4 See Appendix One – PICCC's report – p. 10.

5 *Corruption, Crime and Misconduct Act*, (WA), s. 33(1)(c).

6 *Corruption, Crime and Misconduct Act*, (WA), ss. 40 and 41.

7 See Appendix One – PICCC's report – p. 11.

8 See Appendix One – PICCC's report – p. 11.

9 See Appendix One – PICCC's report – p. 11.

Committee's consideration of the PICCC's report

The CCC, while not taking a position on whether or not it agrees with the legal advice sought by WA Police, determined that WA Police dealt with the allegations made by Mr Martin in an adequate manner.

The Corruption and Crime Commissioner advised that while he does 'not disagree' with the opinion of the PICCC expressed in the attached report, he considers 'the issue beyond the remit of the Commission's functions in relation to misconduct.'¹⁰

The PICCC's assessment and recommendations

The PICCC takes the view that this has not constituted 'a sufficient response' by the CCC in the discharge of its role to monitor and review police action in dealing with Mr Martin's complaint. The PICCC notes that Mr Martin 'has suffered an injustice for which no remedy has been provided' and that this in 'itself demonstrates the ineffectiveness of the Commission's review process.'¹¹ He does not seek to change the assessment of the CCC, but looks to the Committee to assist in redress of the injustice done.

The PICCC has requested that the Committee submit these matters to the Government and the responsible Minister, with a view to the State supporting 'an application for leave to appeal by Mr Martin against his conviction and sentence, should he wish to make such an appeal.'¹²

Alternatively, the PICCC recommends that:

- The responsible Minister should advise Executive Council to issue a pardon in respect of the conviction and sentence, the effect of which is set out in s. 138 of the *Sentencing Act 1995*.
- The conviction should be expunged from the record.
- The fine and costs should be repaid.
- Mr Martin should receive an apology for what has occurred.¹³

The Committee notes these recommendations.

The Committee has not conducted its own independent assessment of the matter. For this reason, it neither endorses nor rejects the findings and recommendations made by the PICCC.

¹⁰ See Appendix One – PICCC's report – p. 12.

¹¹ See Appendix One – PICCC's report – p. 12.

¹² See Appendix One – PICCC's report – p. 13.

¹³ See Appendix One – PICCC's report – p. 13.

Chapter 1

The Committee hereby tables the report for the consideration of the Parliament and requests that the Attorney General, as the responsible Minister, gives consideration to the matters raised therein.

Recommendation 1

That the Attorney General give consideration to the matters raised in the attached report of the Parliamentary Inspector of the Corruption and Crime Commission.

A handwritten signature in black ink, appearing to read 'M.M. Quirk', is positioned below the recommendation text.

MS M.M. QUIRK, MLA
CHAIR

Appendix One

Parliamentary Inspector's Report

DENYS MARTIN AND AN UNREASONABLE SUSPICION

Sections 199 and 201 of the *Corruption, Crime and Misconduct Act 2003 (WA)*

14 August 2019

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1. EXECUTIVE SUMMARY

This report is made pursuant to my functions set out in s 195(1) of the *Corruption, Crime and Misconduct Act 2003 (WA)* (the Act) to assess the effectiveness and appropriateness of the procedures of the Commission, and to make recommendations to the Joint Standing Committee to move the Government to act so as to provide a measure of redress to Mr Martin for the harm he has suffered at the hands of the Police.

He was, in my view, wrongfully arrested by police officers when suspected of behaving in a manner which did not constitute the offence of possession of child exploitation material, or any offence at all; wrongfully deprived of his liberty for an appreciable period; wrongfully and forcibly fingerprinted; wrongfully prosecuted for refusing to provide his personal details to the police; convicted, fined and ordered to pay costs; and he should now be provided with such remedies as are in the power of the State to afford him.

I do not propose to identify the police officers concerned in the incident the subject of this report. The statutory restrictions upon disclosure generally apply to me as they do to the Commission. Sections 205 and 208 make clear the circumstances where disclosure by me of material is required or permitted, including in reports to the Committee or to Parliament.

Guided by those provisions I only make disclosure of material and identify individuals where I consider that the proper performance of my functions or duties demands it. It is a discretionary judgment upon which, in a given case, views may differ, but, as will be seen, in this case, in my view, there is no requirement to identify the police officers concerned.

I should advert, briefly, to the statutory scheme under which what is described in the Act as 'police misconduct' may be dealt with. The Police maintain their capacity to investigate and deal with 'misconduct' (as defined in s 4) by police officers, but the Commission must be notified, because it is the agency primarily concerned to investigate and deal with 'serious misconduct' which, as defined in s 3, includes 'police misconduct'. Relevantly for present purposes, that is misconduct by a police officer.

Therefore, any alleged misconduct by police may be investigated and dealt with by the investigative units of the Police Force, but must be notified to and may be dealt with by the Commission, by its oversight of the Police processes, or by its own independent investigation. As a result of either process, in an appropriate case, there may be a referral to an appropriate authority with a recommendation as to the action to be taken. That oversight function insures that there can be no perceived conflict for the Police.

2. THE RELEVANT LAW

The power of arrest without warrant exercisable by a police officer is to be found in s 128 of the *Criminal Investigation Act 2006* which, so far as material, by s 128(2), provides that a person may be arrested for a 'serious offence', 'if the officer reasonably suspects that the person has committed, is committing, or is just about to commit, the

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offence.' A 'serious offence' is defined in s 128(1), relative to this case, as one for which the penalty 'is or includes imprisonment for 5 years or more'.

Section 128(3), so far as material, provides that 'a police officer...may arrest a person for an offence that is not a serious offence if the officer reasonably suspects –

- (a) that the person has committed, is committing, or is just about to commit, the offence; and
- (b) that if the person is not arrested –
 - (i) it will not be possible, in accordance with law, to obtain and verify the person's name and other personal details;

It can be seen that in both cases the test as to when an arrest may be made is both subjective and objective. The arresting officer must in fact have the relevant suspicion and there must objectively be reasonable grounds for that suspicion. I will not discuss the numerous authorities bearing upon the matter.

Suffice it to say that suspicion is a less certain state of mind than belief, and that, importantly in this case, for the suspicion to be reasonably held there must, whether by hearsay or direct observation available to the arresting officer, be some factual material capable of rationally supporting the suspicion held. That factual material must be capable of positively supporting the reasonableness of the suspicion held, not simply that the suspected facts may, or equally might not, exist.

There are two offences which may be relevant to the exercise of a power of arrest in this case. In the first place, in relation to a child under the age of 16 years, by *The Criminal Code* s 220... 'A person who has possession of child exploitation material is guilty of a crime and is liable to imprisonment for 7 years.' The thing might be a picture, including a photographic image, and the term 'possession' is, in my opinion, to be given its ordinary meaning of physical possession or having the thing so placed that the accused may exercise control over it.

The term 'child exploitation material' is defined in s 217A. It is sufficient to say that it means, so far as is relevant to this case, 'material that, in a way likely to offend a reasonable person...depicts...a child...in an offensive or demeaning context...' It is clear from the context and the authorities that whether material is offensive or demeaning in the circumstances of the case is to be judged having regard to commonly accepted community standards.

Then, in relation to the duty to provide police with a person's 'personal details', there is s 16 of the *Criminal Investigation (Identifying People) Act 2002*. By s 16(2), so far as material to this matter, 'If an officer reasonably suspects that a person...has committed...an offence...the officer may request the person to give the officer any or all of the person's personal details.' By s 16(6) it is an offence to fail to comply with that request 'without reasonable excuse'. The maximum penalty is imprisonment for 12 months.

3. THE EVIDENCE CONCERNING AN INCIDENT

Mr Martin has a disability which has adverse physical effects upon him. He lives in Cottesloe, within walking distance from the beach, and he regularly swims in the ocean.

He requires regular hydration. On 30 August 2017 at about 3.30pm Mr Martin was walking home from the beach. He passed a primary school. He had no camera, mobile phone or other property with him except the clothes he was wearing and the inner soles of his shoes, which he was carrying.

Three people, parents, a man and two women, were later interviewed. One lady said she observed Mr Martin near a pedestrian crossing adjacent to the school. He appeared to her to be filming cars leaving the school and travelling along the road, holding in front of his face something which appeared to her to be a mobile phone.

It seems that Mr Martin was in fact pretending to photograph cars which appeared to him to be exceeding the speed limit in the school traffic zone. Why he did that he has not said, but it may have been intended as a warning to drivers not to cause a hazard to the children by their excessive speed.

The other woman and the man, who were also interviewed later, were concerned that Mr Martin might have been taking photographs of school-children. They approached him and he appeared to endeavour to put something in the back of his pants. What that might have been they could not say. He denied any wrongdoing, but they called the local police and the male witness followed Mr Martin as he walked off.

Three police officers attended. They spoke to at least two of the witnesses and then to Mr Martin, who again denied any wrongdoing and refused to identify himself, saying that as he had done nothing wrong the law did not oblige him to do so. He was searched at the scene, but, of course, nothing was found.

The arresting officer says that he was given information by the Police dispatch system and another officer at the scene that Mr Martin had been seen using a phone to photograph children at the school. He was not a parent and refused to say why he was filming, the officer was told. He refused to show the footage on his phone, which he placed down the back of his pants - a clear account of direct observations.

No inquiry was made to ascertain what exactly had been seen to determine whether the factual account provided to the arresting officer actually reflected the observations made by eye witnesses. It is noteworthy that he was given an account of observations made by witnesses, but no attempt was made to enable the officer to come to a reasonable judgment about how reliable that account was.

Mr Martin was arrested on suspicion of being in possession of child exploitation material. He was cautioned and informed of his rights as a person in custody. While one of the officers remained behind to search, fruitlessly, bushland and rubbish bins adjacent to the road, the other two officers conveyed Mr Martin to the Perth police station.

At the police station Mr Martin was strip-searched without result and placed in a holding cell. He continued to refuse to identify himself. He has a number of complaints about his treatment by the police while in custody, as he was for some five hours, particularly concerned with their failure to provide sufficient water for his condition, failure to provide medical aid when he felt ill, and their refusal to allow him to make a

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telephone call. He was also, admittedly, forcibly finger-printed in an endeavour to identify him, but that was unsuccessful because he did not have a criminal record.

After some time the male witness from the school contacted the police and said that he was concerned that what Mr Martin said about the matter might be true, having regard to the way in which he conducted himself. The arresting officer told Mr Martin then that they would not proceed with the charge for which he had been arrested, but he would be charged and prosecuted on notice for failing to provide his identifying details, which he then, finally, provided. He was then driven home.

Mr Martin was so prosecuted, convicted and fined \$500, with costs of \$190. He complains that the police statement of material facts as read to the court was misleading because it said he was arrested 'as a suspect...in relation to another matter', his fingerprints were taken 'by force' and he was 'taken to a holding cell while further enquiries were conducted'. He says that to put it in those terms was to suggest to the court that there was substance in the other matter sufficient to raise the statutory obligation to provide his personal details, but in any event he pleaded guilty.

4. THE COURSE OF INVESTIGATIONS

Mr Martin complained to the Police about his treatment and then to the Commission about the way in which the Police were handling the matter. On 15 September 2017 the Commission, which had been notified of the allegations by the Police, referred specific allegations to the Police for further internal investigation. But those matters did not include the question of the lawfulness of the arrest, the question whether Mr Martin had suffered the deprivation of his liberty (as the offence is colloquially called) and the question whether he had been assaulted. The Commission referred further matters of complaint to the Police for investigation on 23 October 2017, and at this time there were other exchanges in which Mr Martin aired his dissatisfaction with the investigation process.

On 9 November 2017 the Police told Mr Martin that his complaints were unsubstantiated except for some 'minor procedural matters' for which the officers concerned received verbal correction. He complained about that to the Commission. On 18 January 2018 the Commission told him that in their view there were no grounds upon which to form an opinion of serious (police) misconduct. Mr Martin then complained about that to me on 24 January 2018.

On 8 February 2018 I wrote to the Commission to say that in my view, following my investigation, there had been a failure to properly deal with Mr Martin's complaints about the matters of considerable substance concerning his arrest, detention and prosecution. I recommended that the Commission conduct its own investigation and assessment of those matters. On 13 February 2018 the Commissioner, Mr John McKechnie QC, agreed.

On 21 March 2018, senior lawyers of the Commission's legal services directorate provided what seems to me to be a comprehensive, thoroughly researched, legal opinion, arriving at the conclusion that Mr Martin's arrest and subsequent detention was unlawful, there being no reasonable grounds to suspect that he was in possession of child exploitation material; that he was not legally obliged to provide his personal

details to the police; that there was no proper basis to charge him with the offence of failure to do so, and there was no lawful basis to forcibly take his fingerprints. As will appear, I can only say, with respect, I agree.

The Commission conducted a comprehensive review and assessment of the matter, including Mr Martin's numerous complaints about the alleged denial of his rights and his alleged mistreatment by the police during the period of his incarceration. It found that a number of the complaints so made could not be supported as a matter of fact, or were otherwise unable to be substantiated, despite reviewing statements which had been made and viewing CCTV coverage of aspects of his treatment

I do not propose to focus upon those matters in this report, but to give my attention to the major matters of the lawfulness of the arrest and the consequent deprivation of his liberty, the charge brought against him and his prosecution (without being distracted by his complaints about the information placed before the court by way of the statement of material facts).

By letter dated 15 May 2018 the Commissioner advised me that it had been decided to refer the matter to the Police for action under s 33(1)(c) of the Act subject to its monitoring and review under ss 40 and 41. While I had some concerns about some aspects of the law as set out by the Commission, I approved this decision and wrote to the Police, at the Commission's invitation, on 19 July 2018 to give my views about the nature of any investigation which it was decided would now be conducted by the Police.

By then the Police internal re-investigation was well under way and it appears, as I was later advised by the Commission, that on 28 May 2018 the Senior Police Solicitor had provided his opinion that Mr Martin's arrest was not lawful. I have not seen that document. The investigation continued by way of a review by an Inspector who ultimately concluded that, although the arresting officer appeared to have acted in good faith and without malicious intent, there was a lack of evidence to support a reasonable suspicion of the commission of the relevant offence.

It was recommended that Mr Martin be advised of that conclusion, that he be given a formal apology, and that he be provided with assistance to appeal against his conviction, resulting in his conviction being expunged and the fine and costs being repaid. However, the Police decided to obtain independent legal advice and on 12 September 2018 a comprehensive legal opinion by a solicitor in the State Solicitor's Office was provided.

The law and the facts as they were said by the arresting officer to have been known at the time were carefully reviewed before the lawyer came to the conclusion that it was objectively reasonable for the officer to have suspected that Mr Martin was in possession of photographic images which 'may have contained offensive or demeaning depictions of the children by way of their inclusion or focus upon the underwear of the children, inadvertently revealed whilst playing.'

Relying upon that advice, the Police arrived at the conclusion that the arrest was lawful and that no remedial action was required. I need not discuss here the claim of legal professional privilege made by the Police which delayed for some time the provision of the legal opinion to me by the Commission.

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The Commission, by letter dated 9 May 2019 advised me of its conclusion, as follows:
‘The Commission may or may not agree with the legal advice the WA Police Force received, but that is beside the point...The Commission concluded the way the WA Police Force dealt with the allegations in this case, being in accordance with independent legal advice appropriately sought and received, was adequate.’

In this case the process of circulation of a draft of this report to provide an opportunity to make representations about its terms, resulted in letters from Commissioner McKechnie QC and Commissioner of Police Dawson dated 12 August 2019 and 9 August 2019 respectively.

Commissioner Dawson adheres to the outcome of the Police investigation to which I have referred. He asks me to ensure that a full account of the procedures of the original investigating Police officers and of the information available to the arresting officer, is included in this report, and I have done so.

Commissioner McKechnie QC concludes his letter by saying that the Commission maintains the conclusion to which I have referred above. As to the recommendations which follow in this Report he added the observation that: ‘I do not disagree with your opinion but consider the issue beyond the remit of the Commission’s functions in relation to misconduct.’

5. MY ASSESSMENT AND RECOMMENDATIONS

To my mind, exercising my function under s 195(1)(c) to assess the effectiveness and appropriateness of the Commission’s procedures, that cannot be accepted as a sufficient response in the discharge of the Commission’s role to monitor and review the Police action in dealing with Mr Martin’s grievances. He has suffered an injustice for which no remedy has been provided. That of itself demonstrates the ineffectiveness of the Commission’s review process.

The power of arrest must be framed so as to facilitate reasonably the process of the Police and other public officers investigating and dealing with crime so that those who may be guilty of a criminal offence are brought to account. But at the same time it is recognised that care must be taken because what is provided is a power of arrest by which the liberty of the citizen may be taken from them before guilt is established by legal process. The provisions of s 128 of the *Criminal Procedure Act* reflect that balance. It is only in serious cases that a reasonably based suspicion that an offence may have been committed, without more, will suffice.

Here there is evidence that the arresting officer suspected that Mr Martin was in possession of child exploitation material in the form of photographic images in a camera, or more likely a mobile phone, of children at play caught showing their underwear – offensive or demeaning images, within the meaning of the sections of *The Criminal Code* to which I have referred.

If one accepts, for the sake of the argument, that he had reasonable grounds to suspect that Mr Martin had a mobile phone secreted on his person with which he had been

taking photographs, there was absolutely no evidence from what the parents told the police, or otherwise, that he was photographing children or was doing so to capture images of their underwear. Rather, he may have been simply photographing cars in the vicinity of the cross-walk. In short, there was no rational account or evidence to reasonably support the suspicion of the commission of the relevant offence.

Mr Martin should not have been arrested and there was no basis to require him to provide his personal details. He had a reasonable excuse for his failure to comply with the request – he had done nothing wrong. He should not have been prosecuted for this offence, convicted, fined and ordered to pay costs.

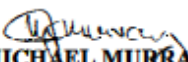
What, then, is now to be done to provide some redress? I have no power to change the final conclusion to which the Commission has come and it seems to me that no point would now be served by a recommendation that the Commission should change its assessment to accord with mine. But my function, in a case such as this, I think, is to report and make recommendations to the Parliament, preferably through the Joint Standing Committee, pursuant to s 195(1)(e) of the Act.

My recommendations are in line with what at one stage was proposed by a Police investigator. The Committee, in my respectful opinion, should place the matter before government and the responsible Minister, for the State to support an application for leave to appeal by Mr Martin against his conviction and sentence, should he wish to make such an appeal. Alternatively –

- The responsible Minister should advise Executive Council to issue a pardon in respect of the conviction and sentence, the effect of which is set out in s 138 of the *Sentencing Act 1995*.
- The conviction should be expunged from the record.
- The fine and costs should be repaid.
- Mr Martin should receive an apology for what has occurred.

I close with an important observation. I have not consulted Mr Martin with respect to this Report, my assessment or the recommendations I have made. Although this Report is very much concerned with what happened to him and the rectification of what resulted from his arrest, the deprivation of his liberty, his prosecution and conviction, and the creation of a criminal history concerning him, it is not concerned with any private interest he may have to seek monetary compensation.

Rather, if I am right in my assessment of what occurred, the purpose of this Report is to give effect to the public interest to ensure the proper administration of the criminal law and the exercise of the considerable powers given to law enforcement agencies, while giving due weight to our capacity to exercise our liberties as citizens and members of the community, subject to the harm which criminal wrongdoing may do.


HON MICHAEL MURRAY AM QC,
PARLIAMENTARY INSPECTOR

Appendix Two

Committee's functions and powers

By concurrence between the Legislative Assembly and the Legislative Council, the Joint Standing Committee on the Corruption and Crime Commission was established on 15 June 2017.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

- a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;
- b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and
- c) carry out any other functions conferred on the Committee under the *Corruption, Crime and Misconduct Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.



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