

Joint Standing Committee on the Corruption and Crime Commission

**The operation of section 196(4) of the
*Corruption and Crime Commission Act 2003***

**Report No. 20
June 2015**

Parliament of Western Australia

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Joint Standing Committee on the Corruption and Crime Commission

The operation of section 196(4) of the *Corruption and Crime Commission Act 2003*

Report No. 20

Presented by

Hon Nick Goiran, MLC and Mr Peter Watson, MLA

Laid on the Table of the Legislative Assembly and Legislative Council
on 18 June 2015

Chairman's Foreword

This is a landmark report. Its uniqueness is demonstrated in it being co-signed by the Parliamentary Inspector of the Corruption and Crime Commission (PICCC), Hon Michael Murray QC, and the Commissioner of the Corruption and Crime Commission, Hon John McKechnie QC. It finalises a long-standing issue centred on the interpretation and application of the Corruption and Crime Commission's (CCC) notification obligation under section 196(4) of the *Corruption and Crime Commission Act 2003* (CCC Act).

Under this section the CCC is obliged to notify the PICCC whenever it receives an allegation that concerns, or may concern, an officer of the Commission. The PICCC discovered in 2013 that he and the CCC had differing interpretations of the word "allegation" contained in this section. This had resulted in the CCC restricting the notification of allegations to the PICCC to those circumstances in which the CCC determined that the subject-matter of an allegation could constitute misconduct.

The PICCC has had a number of discussions over the past two years about this matter with then-Commissioner, Mr Roger Macknay QC, and the Commission's two Acting Commissioners, Mr Neil Douglas and Mr Christopher Shanahan SC. In June 2013 then-Commissioner Macknay wrote to the PICCC and said that, while the CCC did not accept his interpretation of section 196(4), he made an undertaking to refer matters, other than those of a trivial kind, to the PICCC in accordance with the PICCC's interpretation.

Through the agreement between the PICCC and Commissioner McKechnie published in this joint report, a formal Protocol has now been established that will see the Parliamentary Inspector notified in all circumstances other than the most trivial. This Protocol is included as an annexure to this joint report.

Over the past two years the Committee has raised this matter with the PICCC in multiple hearings. The Committee is pleased the matter is now resolved and foreshadows it will continue to oversee the new arrangement in its usual manner.

I would like to thank the Parliamentary Inspector, Hon Michael Murray QC, and his Executive Assistant, Mr Murray Alder, and the Corruption and Crime Commissioner, Hon John McKechnie QC, for completing this joint report and providing the Committee with their agreed Protocol.

A handwritten signature in blue ink, consisting of a stylized 'N' and 'G' with a horizontal line extending to the right.

HON NICK GOIRAN, MLC
CHAIRMAN

Contents

Findings and Recommendations	i
1 Agreement upon a Protocol between the CCC and the PICCC in respect of the scope of the CCC's obligations under s 196(4) of the CCC Act	1
<hr/>	
Introduction	1
Background to report	1
Committee interaction with the PICCC and the CCC	4
Appendices	7
<hr/>	
1 Parliamentary Inspector's Report	7
1. PURPOSE	7
2. S 196(4)-(8) OF THE ACT	7
3. THE REASON FOR SEEKING A PROTOCOL	9
4. CORRESPONDENCE WITH THE COMMISSION	9
5. THE AGREEMENT ON A PROTOCOL	13
ANNEXURE A – PROTOCOL	18
2 Committee's functions and powers	19

Findings and Recommendations

Finding 1

Page 6

The Protocol developed by the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission is intended to ensure that there is clarity between the two agencies over the operation of section 196(4) of the *Corruption and Crime Commission Act 2003*.

Recommendation 1

Page 6

The Parliamentary Inspector of the Corruption and Crime Commission should report to Parliament, no later than in his 2015-16 Annual Report, on the effectiveness of the Protocol developed with the Corruption and Crime Commission on the operation of section 196(4) of the *Corruption and Crime Commission Act 2003*.

Chapter 1

Agreement upon a Protocol between the CCC and the PICCC in respect of the scope of the CCC's obligations under s 196(4) of the CCC Act

This ensures proper external and transparent oversight of the CCC's procedures and its integrity. It also offers a form of protection to a CCC officer who might feel that he or she has been unfairly treated by an unjustified response from the Commission.
Hon Michael Murray AM QC and Hon John McKechnie QC

Introduction

This report by the Joint Standing Committee provides the Parliament with a joint report prepared by the Parliamentary Inspector of the Corruption and Crime Commission (PICCC), Hon Michael Murray QC, and the Commissioner of the Corruption and Crime Commission, Hon John McKechnie QC (see Appendix A). It finalises an issue that has been a source of tension between the two agencies for more than two years.

Background to report

The tension between the PICCC and the Corruption and Crime Commission (CCC) was centred on the interpretation and application of the CCC's notification obligation under section 196(4) of the *Corruption and Crime Commission Act 2003* (CCC Act). This section is contained in 'Division 2 -- Functions of the Parliamentary Inspector' of the CCC Act:

*The Commission is to notify the Parliamentary Inspector whenever it receives an allegation that concerns, or may concern, an officer of the Commission and at any time the Parliamentary Inspector may review the Commission's acts and proceedings with respect to its consideration of such an allegation.*¹

In May 2013 the PICCC became aware that the Commission had adopted an interpretation of this section different to his, and it hinged on its definition of what was an 'allegation' that needed to be reported to him. This joint report notes that the CCC told the PICCC that it had used its interpretation to manage its procedures of making reports to the PICCC since the establishment of the CCC in early 2004. The CCC had

1 AustLIJ, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s196.html. Accessed on 10 June 2015.

Chapter 1

restricted the notification of allegations to the PICCC to those circumstances in which the CCC itself “unilaterally determined that the subject-matter of an allegation would constitute misconduct if substantiated.”²

In June 2013 then-Commissioner Macknay QC wrote to the PICCC and said that the CCC did not accept his interpretation of s 196(4). During the months following Commissioner Macknay QC’s letter, however, the number of notifications made by the CCC under s 196(4) to the PICCC increased as it had made an undertaking to refer matters in accordance with the PICCC’s view of the sub-section, other than those of a trivial kind.

A positive outcome of the agreement reached in 2013 between the PICCC and the CCC was the Commission’s creation and maintenance of a centralised record of all allegations made against Commission officers.

Following the resignation of then-Commissioner Macknay QC in April 2014, the PICCC continued his dialogue with the two Acting Commissioners, Mr Neil Douglas and Mr Christopher Shanahan SC, to try to settle the “practicalities of the process of notification to be adopted, timing the process to accommodate a preliminary assessment of an allegation by the CCC.” According to the PICCC, this process ended by the end of June 2014, to the satisfaction of both parties.³

In July 2014, Acting Commissioner Shanahan SC proposed that the matters already agreed upon should be incorporated into a formal Protocol for the purposes of clarity and certainty, and a six-page draft of a proposed Protocol was provided to the PICCC by the Commission. A process of negotiation continued until the new Commissioner, Hon John McKechnie QC, took office on 28 April 2015.

2 Hon Michael Murray QC, *Report on a Protocol for Notifications by the Corruption and Crime Commission to the Parliamentary Inspector of Matters Concerning or Which May Concern Officers of the Commission*, Perth, 10 June 2015, p3.

3 Ibid, p6.

Soon thereafter Commissioner McKechnie wrote to the PICCC about how a Protocol of notification should be expressed:

1. *An agreed Protocol for the notification by the CCC to the PI of adverse matters concerning, or which may concern, CCC officers, was clearly necessary;*
2. *The Protocol should provide for the notification of all such matters, no matter how received by the CCC, and even though a matter may already have been notified to the PI, wholly or in part, by a complainant or by reference by the Joint Standing Committee, when it comes to the notice of the CCC;*
3. *However, the term 'allegation' used in s 196(4) has the meaning given to the term by the definition in s 3(1);*
4. *That is immaterial because the CCC will notify the PI of all adverse matters of the kind described in [1] above;*
5. *It is not for the CCC to filter or decide whether a particular matter of the kind described is required to be notified under s 196(4), or which otherwise may require the PI to exercise a function of his office under s 195(1);*
6. *That decision is the responsibility of the PI upon his review of the matter after he has determined that the matter is not of a kind provided for in s 196(9);*
7. *When conducting that review the PI will need to decide whether or not the matter is to be removed to the PI for consideration and determination;*
8. *The process of notification should be dealt with as promptly as is reasonably possible, but strict time limits should not be imposed.⁴*

The agreed Protocol is provided as Annexure A to the joint report. In their joint report, the PICCC and the Commissioner agree that:

The point is that it is agreed that the PICCC should be notified of such matters to ensure that the CCC's response to them is adequate, even though none, of themselves, may be capable of constituting misconduct. This ensures proper external and transparent oversight of the CCC's procedures and its integrity. It also offers a form of

4 Ibid, p8.

Chapter 1

protection to a CCC officer who might feel that he or she has been unfairly treated by an unjustified response from the Commission.

As previously mentioned the agreed Protocol is also designed to operate so as to prevent the possibility of conflicting outcomes and conclusions in respect of investigations conducted at the same time by the PICCC, in respect of a matter before him by complaint, reference by the Committee or otherwise, and by the CCC in respect of the same, or a related matter or matters.⁵

Committee interaction with the PICCC and the CCC

The PICCC raised the issue he had with the CCC over the operation of section 196(4) of the CCC Act in his 2012-13 Annual Report tabled on 15 October 2013. He said:

The Commissioner and I are presently working through a difference of opinion about the operation of s 196(4) of the Act. The Commission takes the view that it should only notify me if the allegation concerning, or which may concern, an officer of the Commission, is one capable of amounting to an allegation of misconduct within the meaning of s 4 of the Act.

... I am confident that discussion with the Commissioner will resolve the matter so that I may be assured that I am notified of all allegations which may require me to act under s 196.⁶

The Committee raised this matter with the PICCC in a public hearing. The PICCC updated the Committee on his discussions with the then-Commissioner, Mr Roger Macknay QC:

Here the more hands-on activity on the part of my office is required so that effective dealing with allegations of that kind can be seen to occur independently of the Commission, being the agency about whose officers the allegation is made.

...It gives it that independence. I have been very concerned to see that the decision that is ultimately required to be made as to whether or not the complaint concerns misconduct on the part of Commission officers, which may be dealt with within the framework of the statute, is a decision which I make. I think in the past it may be fair to say that

5 Ibid, p9.

6 Parliamentary Inspector of the Corruption and Crime Commission, *Annual Report 1 July 2012 – 30 June 2013*, nd, p9. Available at: www.piccc.wa.gov.au/files/Annual_Report_PICCC_2012-2013.pdf. Accessed on 10 June 2015.

a certain filtering has gone on where they have not troubled me with allegations which seem to be at first-sight entirely without merit or incapable of leading to a view that misconduct has occurred on the part of Commission officers.

I have expressed the view to the Commissioner that that is my job, thank you for their help but it is not a job with which I may be assisted. The point that has been reached is, I think, an effective one. He says to me, "I understand the view you put. I think we have been doing the thing correctly but if you wish, and I have confirmed that I do, we will refer to you everything that is an allegation rather than simply an expression of dissatisfaction about the outcome of an investigation that is being conducted or an oversight that has been undertaken by commission officers..." I have to say that it has led to this being what seems to me to be an increasingly central and important part of my function on behalf of the Parliament and this Committee.⁷

In his 2013-14 Annual Report, the PICCC reported that his Office undertook 76 matters during the financial year, 36 more than the previous year. The PICCC attributed most of this increase to the Commission's agreement that it had an obligation under s 196(4) of the CCC Act to notify him of any allegation it receives which involves, or may involve, a Commission officer.⁸

The Committee discussed the increase in these notifications with the PICCC in a public hearing, and the impact it had had on his Office. The PICCC agreed that all of the matters referred under section 196(4) from the CCC were investigated:

Sometimes the investigation is incredibly simple; it just simply requires looking at and understanding what the nature of the allegation is, to know that it is a matter that does not attract the need for further attention within the framework of the statute. Others require a more complex process, but they are all, in one way or another, or to some degree, investigated. None is ever simply rejected on the grounds that we are too busy or something of that kind, if that is the direction in which the question was to go.⁹

7 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 16 October 2013, p9.

8 Parliamentary Inspector of the Corruption and Crime Commission, *Annual Report 2013 –2014*, nd, p2. Available at: [www.piccc.wa.gov.au/ files/PICCC_Annual_Report_2013_2014.pdf](http://www.piccc.wa.gov.au/files/PICCC_Annual_Report_2013_2014.pdf). Accessed on 10 June 2015.

9 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Transcript of Evidence*, 22 October 2014, p7.

Chapter 1

The PICCC stressed to the Committee the importance of him being aware of all but the most trivial allegations made against Commission officers:

... importantly, my processes and functions include assessment of the effectiveness and appropriateness of the Commission's procedures, and to make recommendations to the Commission. Those things might come to light and be dealt with because there are systemic problems that have emerged without the need to establish any particular misconduct on the part of any particular officer or group of officers. I have taken the view that those matters may properly be regarded as matters which are the subject of allegations. So it becomes then a more complete mechanism for involving me in the performance of my statutory duties, if you like, rather than simply restricting it to matters of alleged misconduct, or allegations which may amount to serious misconduct.¹⁰

The PICCC later confirmed to the Committee that he had finalised 31 of the 41 matters referred to him during 2013-14 by the CCC under section 196(4) of the CCC Act.¹¹

The Committee congratulates the PICCC and the CCC for taking a collaborative approach to determining a solution to this ongoing issue. Given its importance and long-standing nature, a formal assessment on the effectiveness of the solution would be both prudent and expected.

Finding 1

The Protocol developed by the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission is intended to ensure that there is clarity between the two agencies over the operation of section 196(4) of the *Corruption and Crime Commission Act 2003*.

Recommendation 1

The Parliamentary Inspector of the Corruption and Crime Commission should report to Parliament, no later than in his 2015-16 Annual Report, on the effectiveness of the Protocol developed with the Corruption and Crime Commission on the operation of section 196(4) of the *Corruption and Crime Commission Act 2003*.

¹⁰ Ibid, p9.

¹¹ Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Letter, 27 October 2014.

Appendix One

Parliamentary Inspector's Report

REPORT ON A PROTOCOL FOR NOTIFICATIONS BY THE CORRUPTION AND CRIME COMMISSION TO THE PARLIAMENTARY INSPECTOR OF MATTERS CONCERNING OR WHICH MAY CONCERN OFFICERS OF THE COMMISSION

Sections 88, 89, 199 and 201 of the *Corruption and Crime Commission Act 2003* (WA)

9 June 2015

1. PURPOSE

The purpose of this report is to inform the Joint Standing Committee for the Corruption and Crime Commission of Western Australia of efforts made by the Parliamentary Inspector and various Commissioners and Acting Commissioners of the Corruption and Crime Commission to agree upon a Protocol between the Commission (CCC) and the Office of the Parliamentary Inspector (PI) in respect of the scope of the CCC's obligations under s 196(4) of the *Corruption and Crime Commission Act 2003* (WA) (the Act) and in respect of an appropriate procedure to give effect to those obligations, and generally to provide for the notification to the PI of all matters concerning, or which may concern the conduct of an officer of the Commission, no matter how they originated.

2. S 196(4)-(8) OF THE ACT

Section 196(4) of the Act states:

The Commission is to notify the Parliamentary Inspector whenever it receives an allegation that concerns, or may concern, an officer of the Commission and at any time the Parliamentary Inspector may review the Commission's acts and proceedings with respect to its consideration of such an allegation.

The term 'allegation' is defined, 'unless the contrary intention appears', by s 3(1) to mean a report made to the CCC, a proposition initiated by the CCC, a matter notified to the CCC, or a received matter. This is a roll-call of the various ways in which, under the Act, the CCC may become seized of a matter which is reportedly, or may be, misconduct by a public officer (including a CCC officer).

Upon the proclamation of the *Corruption and Crime Commission Amendment (Misconduct) Act Part II 2014* the definition will be amended to add similar provisions expanding the meaning of the term 'allegation' to include the various ways in which the

Public Sector Commissioner will become seized of matters which are reportedly, or may be 'minor misconduct' by a public officer, unless (in passing) the matter concerns police misconduct, which will inevitably be a matter to be dealt with by the CCC.

Again, upon the proclamation of the 2014 amending Act, the definition of the term 'allegation', so far as it refers to processes by which matters may come before the CCC, will refer to sections of the Act marking out the CCC's jurisdiction by reference to the power to deal with 'serious misconduct', itself defined in s 3(1) as misconduct of a kind described in s 4(a), (b) or (c) by a public officer, or police misconduct.

The term 'minor misconduct' is also defined in s 3(1) generally as the conduct described in s 4(d) which is not police misconduct. The all-encompassing term 'misconduct' is, by reference to s 3 (1), all the conduct described in s 4. The provisions relating to the functions and powers of the PI, Part 13, Division 2, including s 196(4), were not amended by the 2014 amending Act

Section 196(4) is followed by four other sub-sections. Three of them give powers to, and impose obligations on, the PI and impose further obligations upon the CCC.

The PI may, upon reviewing the CCC's acts and proceedings performed in respect of the allegation, remove the matter for consideration and determination (s 196(5)). Should the PI serve a notice on the CCC under s 196(5) which removes the matter, the CCC must comply with the terms of the notice (s 196(6)). Thereupon, the CCC has no function or power to deal with the matter, but it retains its full functions and powers in respect of a matter up to that point.

After the removal of a matter from the CCC, the PI may annul the CCC's determination and substitute another (s 196(7)(a)), or make any decision the PI might otherwise have made had he exercised an original jurisdiction (s 196(7)(b)), or make any ancillary order, whether final or provisional, that is remedial or compensatory (s 196(7)(c)).

In passing it is noteworthy that this is the only circumstance in which the PI is given a power to make orders directly affecting the disposition of a matter. Generally his function is to make recommendations in respect of a matter to the CCC, other agencies and appropriate authorities, and to the Parliament or the Committee.

If the PI proposes to act under s 196(7)(a) then he must give the CCC a reasonable opportunity to show cause why its determination should not be annulled (s 196(8)).

The only limit imposed on the exercise of this power by the PI arises under s 196(9) which prevents the PI from reviewing any matter 'that arises from, or can be dealt with under, a jurisdiction created by, or that is subject to, the *Industrial Relations Act 1979*.'

The PI notes that the prohibition applies to his capacity to review the CCC's processes in dealing with the matter, rather than the obligation to notify the PI of an allegation under s 196(4) and, for the avoidance of doubt, the CCC agrees that it will notify the PI of all matters. Where the CCC is of the opinion that an allegation is about an industrial matter it will so advise affected parties and deal with it accordingly.

3. THE REASON FOR SEEKING A PROTOCOL

In May 2013 the PI became aware of the interpretation and application of its notification obligation under s 196(4) adopted by the CCC. This was during the investigation of a complaint made to the OPICCC which questioned the CCC's assessment of a complaint made to it in respect of the actions of a Police officer.

The PI obtained a copy of that part of the CCC Corruption Prevention Directorate Manual in place in 2013 which described the directorate's procedure to be followed in order to give effect to the CCC's interpretation of its notification obligation under s 196(4). The two relevant parts of the manual stated:

Any written complaint (email, letter or form) about a Commission officer should be forwarded to a Manager CP who will determine whether it is an allegation of misconduct or a grievance about the outcome of a matter. The decision on this will be made in conjunction with the Director CP and Legal Services Directorate.

If the complaint appears to be an allegation of misconduct it will be forwarded by the Manager CP to Legal Services who will send it to the Parliamentary Inspector.

The CCC explained that the procedure had been followed by the CCC since its inception, but it restricted the notification of an allegation to the PI to those circumstances in which the CCC itself unilaterally determined that the subject-matter of an allegation would constitute misconduct if substantiated.

4. CORRESPONDENCE WITH THE COMMISSION

On 14 May 2013 the PI wrote to Commissioner Macknay QC to express concerns held in relation to the portion of the Corruption Prevention Directorate Manual, described in Part 3 of this Report. Later, the CCC asked what it should do with an allegation in respect of one of its officers which could not, on any view, putting it at its highest, constitute misconduct, or which, in the CCC's view, lacked credibility and/or was unsubstantiated by other evidence. The PI was of the view that:

1. s 196(4) requires the CCC to notify the PI of any allegation concerning, or which may concern, a CCC officer;

2. an allegation will be about the conduct, by way of act or omission, of the officer;
3. the conduct in question needs to be of a kind which would, or might, activate the performance of any of the PI's functions under s 195, and
4. the CCC must notify the PI of all allegations, and does not have a discretion to withhold an allegation on the basis that the CCC considers it to lack credibility, or on the basis that it is unsubstantiated by other evidence.

On 20 June 2013 Commissioner Macknay QC wrote and said that the CCC did not accept that view of s 196(4).

Commissioner Macknay QC also informed the PI that there was no possibility that the CCC could conduct a search of their records in order to identify allegations which had been received by the CCC prior to 14 May 2013 of which the PI had not been notified because they did not, in the opinion of the CCC, involve misconduct on the part of a CCC officer.

During the months following Commissioner Macknay QC's letter dated 20 June 2013, the number of notifications made by the CCC under s 196(4) increased, the CCC having undertaken to refer matters in accordance with the PI's view of the sub-section.

As the CCC's new practice, in the view of the PI, reflected an adequate fulfilment of its obligation under s 196(4) there was no necessity to clarify the basis of the disagreement about the proper application of the sub-section. However, it did later appear that, at least in some cases, the CCC continued to apply the old policy and, by letter dated 12 September 2013 the PI said to Commissioner Macknay QC that in respect of the scope of s 196(4):

All that is necessary is that an allegation, within the ordinary meaning of that word, is made concerning, or which may concern, a Commission officer. It then becomes my responsibility to consider what should be done about it, if anything.

Again, with respect to you, that approach seems to me to be that best calculated to ensure that the Commission has the protection of my independent review of allegations which arise in the course of the activities of people who happen to be Commission officers, and it obviously ensures that I am placed in a position to exercise my statutory responsibilities to review such allegations and ensure that, where it is found to be necessary, they are dealt with independently.

Commissioner Macknay QC said, in a letter dated 14 March 2014 that:

1. all records of allegations made against Commission officers are held on the complaint file to which the allegation relates;
2. the allegations deal with a number of issues including misconduct, delay and general dissatisfaction with the outcome of an assessment;
3. prior to July 2013 any allegation assessed by the Commission to be an allegation of misconduct by a Commission officer was notified to the Parliamentary Inspector. Any matters that were not assessed as such were documented accordingly and recorded on the allegation file;
4. under the newly-agreed scope of s 196(4) all of the allegations would have required notification;
5. records had not been kept by the Commission in a form which could readily facilitate an audit of allegations which the Commission had determined would not amount to misconduct, and if an audit was to be conducted of such allegations it would involve a physical search of files numbering in excess of 30,000, and
6. such records had not been kept because 'previous Parliamentary Inspectors had taken quite a different view in respect of the matter'.

Commissioner Macknay QC said that neither the CCC, nor previous PI's, were of the view that any complaint generally against a CCC officer which may give rise to the exercise of the PI's functions under s 195 sufficed for the purposes of s 196(4). He added that since our agreement over the scope of the Commission's obligation under s 196(4), the Commission had maintained a centralised record of allegations made against Commission officers.

In May 2014, on the basis that it would be beneficial for the CCC and the PI to reach an agreement defining the process by which notifications under s 196(4) were made by the CCC to the PI, the PI reiterated the basis of the agreement reached with the former Commissioner, by which the CCC had abided since July 2013 – that the PI should be notified of all allegations, other than those of a trivial kind, and that he need not be told of general expressions of dissatisfaction with assessments made by the CCC.

The PI wanted a formal Protocol to be agreed, as simple as possible, and for it to work with the least possible demand upon administrative resources on the part of the CCC and OPICCC. It was therefore suggested that a notification by the CCC under s 196(4) should be made immediately upon, or as soon as possible after, the receipt of an allegation and should:

1. be made in writing by a senior CCC officer;
2. include a copy of the allegation when it is made in writing, or a record of the allegation if it was made verbally;
3. describe the actual, or proposed, course of action by the CCC in response to the allegation, and
4. include any other information that may be relevant to the PI's review of the matter.

It was thought that a Protocol in these terms would place the PI in a position to effectively review the CCC's acts and proceedings concerning the allegation at the earliest possible stage of any investigation and, where necessary, to remove the allegation from the CCC so that the appropriate action described in s 196(7) could be taken. Intervention by the PI at an early stage would allow the matter to be diverted from a course that was not considered to be the most appropriate.

After examining the registers and records maintained by the Commission as described by Acting Commissioner Shanahan SC in a letter dated 7 May 2014, the PI wrote to the CCC on 29 May 2014 and recommended the creation of a new register which recorded the following information in respect of allegations received by the CCC and which would address the lacuna in its existing records:

1. the name of the officer;
2. the name of the maker of the allegation;
3. the date the allegation was made;
4. a description of the allegation and the CCC's file number, if applicable, from which the allegation arises;
5. how and when the allegation was finally dealt with, and
6. a timeline in relation to notifications and other action under s 196 so that it was apparent which agency dealt with the matter.

Such a register would provide the CCC with the capacity to easily identify all allegations and their outcomes, trends in the nature of allegations made, repetitious complaints and issues concerning a particular officer (which may include protection from unjustified criticism), and that the recording of such serious matters would be a sensible accountable business mechanism of the CCC.

An exchange of correspondence then occurred for the purpose of settling the practicalities of the process of notification to be adopted, timing the process to

accommodate a preliminary assessment of an allegation by the CCC. That process ended by the end of June 2014, to the satisfaction of both parties.

5. THE AGREEMENT ON A PROTOCOL

On 23 July 2014 the PI met with Acting Commissioner Shanahan SC. He said that the CCC proposed that the matters agreed should be incorporated into a formal Protocol for the purposes of clarity and certainty. The PI agreed. A six page draft of a proposed Protocol was provided. After consideration, the PI suggested that:

1. an 'allegation' need not involve misconduct on the part of a CCC officer, but may be of a kind which may trigger one or more of the PI's functions under s 195. Further, when an allegation does relate to the possibility of misconduct, the question whether it does or does not is to be determined by the PI pursuant to the misconduct function in s 195(1)(b);
2. 'allegation' is not restricted to the definition of the term in s 3, but is to be given its natural meaning of an assertion, contention or other matter concerning, or which may concern, an officer of the CCC in an adverse way, and
3. there should be a single notification to be made within three days of its receipt by the CCC, which should include as much of the information previously agreed upon as was available. In circumstances when some of that information was not available (most likely to be the action intended to be taken by the CCC in response to the allegation) that information should be provided within 14 days.

During the period following this there were, from time to time, as the pressure of other work allowed, (including particularly matters involving both the CCC and the PI) further exchanges of letters and meetings with each of the Acting Commissioners and the PI, during which firmly held, different, views emerged as to the proper interpretation of s 196 in relation to the circumstances in which the obligation of notification arose and the manner in which that duty should be discharged.

Both parties remained of the view that an agreed Protocol was desirable to avoid future disagreements about the obligation to make a notification, but it became evident that there was an incapacity to resolve the different views and to proceed to an agreement upon the terms of a Protocol, particularly where, upon one view, a Protocol in terms desired by the PI would have effect in circumstances not envisaged by the Act, or where the PI thought it was desirable that it should operate, even though it was accepted that the circumstances were not contemplated by the Act.

But, as time allowed, the attempt to reach agreement did continue and on 10 February 2015 the PI wrote to both Acting Commissioner Shanahan SC and Acting Commissioner Douglas to express his view upon the desirable operation of the Protocol in one such case, as follows:

We agree that the effect of s 196(4)-(8) of the Act is to give my misconduct function precedence over the Commission's general misconduct function in respect of an allegation which I have removed from the Commission under s 196(5).

However, the situation is procedurally different when I have received an allegation directly from a complainant, or from the Joint Standing Committee as a reference. In such cases, and except in the most sensitive of circumstances, I alert the Commission to my investigation and proceed with it. However, the Act does not provide me with an express power to direct the Commission not to investigate the allegation itself. In theory, therefore, the Commission could conduct an investigation of it simultaneously with my investigation.

Such circumstances produce an obvious possibility that the two investigations could produce conflicting conclusions. The Act provides no mechanism for conclusively resolving such a situation. An outcome of this kind would be unenviable for the Commission officer involved and for the State's misconduct statutory framework.

The PI said that he thought that the Protocol should be written so as to prevent this possibility.

On 27 February 2015 Acting Commissioner Douglas replied and said that should circumstances arise in which the CCC considered that it should investigate a matter (or perhaps part of a matter) that was the subject of an investigation by the PI (but which had not originated under s 196(4)), he would expect the CCC would not do so 'without using its best endeavours to discuss the matter with you, with a view to reaching a mutually agreeable outcome.'

Finally, on 12 March 2015 Acting Commissioner Shanahan SC wrote to the PI to say that the development of a Protocol, although important, was now best left until after the new Commissioner was appointed, to ensure that that person was content with any administrative arrangements agreed upon, and how such arrangements may work following the proclamation of the 2014 amendments to the Act.

Soon after he took office on 28 April 2015 Commissioner McKechnie QC, by letter dated 11 May 2015, gave his views upon the relevant provisions of the Act and about

how a Protocol of notification, to which the CCC would agree, should be expressed.

He said:

1. An agreed Protocol for the notification by the CCC to the PI of adverse matters concerning, or which may concern, CCC officers, was clearly necessary;
2. The Protocol should provide for the notification of all such matters, no matter how received by the CCC, and even though a matter may already have been notified to the PI, wholly or in part, by a complainant or by reference by the Joint Standing Committee, when it comes to the notice of the CCC;
3. However, the term 'allegation' used in s 196(4) has the meaning given to the term by the definition in s 3(1);
4. That is immaterial because the CCC will notify the PI of all adverse matters of the kind described in [1] above;
5. It is not for the CCC to filter or decide whether a particular matter of the kind described is required to be notified under s 196(4), or which otherwise may require the PI to exercise a function of his office under s 195(1);
6. That decision is the responsibility of the PI upon his review of the matter after he has determined that the matter is not of a kind provided for in s 196(9);
7. When conducting that review the PI will need to decide whether or not the matter is to be removed to the PI for consideration and determination;
8. The process of notification should be dealt with as promptly as is reasonably possible, but strict time limits should not be imposed.

While maintaining the view he has expressed as to the proper construction of s 196(4), the PI agrees that it is unnecessary to seek to have that question finally determined because a properly formulated, agreed Protocol will, by giving effect to the process set out by the Commissioner, with which the PI agrees, ensure that the conduct of CCC officers, whether by act or omission, related to the office they hold, will not be dealt with entirely 'in-house', but will be subject to independent scrutiny by the PI.

The acts or omissions of CCC officers are related to the office they hold when they raise questions concerning their honesty or probity, their impartiality, their capacity to properly perform the duties of office; generally their fitness to hold the office they occupy.

The Protocol will ensure that those matters which are not of an 'industrial' kind, but which may be effectively dealt with by the CCC under the ongoing oversight of the PI, will be so dealt with, those matters which need to be removed to the PI to provide

necessary transparency and accountability for the officer's conduct, will be so removed, and matters which may need to be referred to other agencies to be dealt with, may be so referred by the PI.

It may well be the case that the subject-matter of a matter of concern raised with the CCC about one of its officers which does not involve misconduct, nevertheless may cause concern in the CCC about the officer's capacity to properly fulfil his or her professional responsibilities. For instance, within the workplace, an allegation may be made about an officer, or group of officers, in respect of poor behaviour which in itself may not justify dismissal (and is therefore not misconduct), but nevertheless requires remedial action because of its systemic character or otherwise.


The Protocol will enable remedial action by the CCC to be reviewed by the PI, will enable removal to the PI where necessary, and will enable the exercise of his functions to assess the effectiveness and appropriateness of the CCC's procedures, to make recommendations accordingly, and, where necessary, to report to the Parliament via the Joint Standing Committee.

All of those functions, of course, impose duties upon the PI which may need to be discharged whether or not the matter concerning, or which may concern, an officer or officers of the CCC, might involve an exercise of the PI's functions under s 195(1)(b) to deal with matters of misconduct, as defined by s 4.

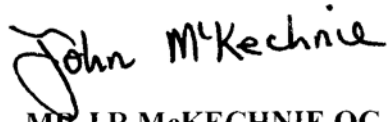
The point is that it is agreed that the PI should be notified of such matters to ensure that the CCC's response to them is adequate, even though none, of themselves, may be capable of constituting misconduct. This ensures proper external and transparent oversight of the CCC's procedures and its integrity. It also offers a form of protection to a CCC officer who might feel that he or she has been unfairly treated by an unjustified response from the Commission.

As previously mentioned the agreed Protocol is also designed to operate so as to prevent the possibility of conflicting outcomes and conclusions in respect of investigations conducted at the same time by the PI, in respect of a matter before him by complaint, reference by the Committee or otherwise, and by the CCC in respect of the same, or a related matter or matters.

The Protocol is attached as Annexure A.



**THE HON M J MURRAY AM QC
PARLIAMENTARY INSPECTOR
of the CORRUPTION AND CRIME
COMMISSION**



**MR J R McKECHNIE QC
COMMISSIONER
CORRUPTION AND CRIME
COMMISSION**

ANNEXURE A – PROTOCOL

The Parliamentary Inspector of the Corruption and Crime Commission

And

The Commissioner of the Corruption and Crime Commission

HEREBY AGREE:

1. The subject of this Protocol is any matter or information received in any way by the Commission which concerns, or may concern, the conduct, by act or omission, publicly or privately, of an officer of the Commission in an adverse manner in that it may, directly or indirectly, reflect adversely upon the person's fitness for office as an officer of the Commission.
2. This Protocol will not operate in respect of a matter or information which is merely the expression of dissatisfaction with the determination of a matter by an officer or officers of the Commission performing the duties of their office.
3. As soon as reasonably practicable after the Commission receives a matter or information to which this Protocol applies, a senior officer will notify the Parliamentary Inspector, in writing of:
 - the date of receipt of the matter or information,
 - from whom it was received,
 - the particulars of the matter or information (a copy of any written record is to be provided),
 - any other information which may be relevant for the Parliamentary Inspector to know, and
 - how the Commission is dealing, or proposes to deal with the matter.
4. If, when the above notification is made, the information last-mentioned in [3] is not known, the Parliamentary Inspector is to be provided with that information as soon as it is available.
5. If, upon his review of the matter, the Parliamentary Inspector does not remove it from the Commission to himself for consideration and determination, the Commission will inform the Parliamentary Inspector of its final determination of the matter.
6. If the Commission becomes aware of a matter or information of a kind described in [1] from other than a source external to the Commission, the Parliamentary Inspector is to be notified of it in accordance with [3] and [4] of this Protocol.

Appendix Two

Committee's functions and powers

On 21 May 2013 the Legislative Assembly received and read a message from the Legislative Council concurring with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

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 and Crime Commission Act 2003*.

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