



Joint Standing Committee on the Corruption and Crime Commission

**Corruption and Crime Commission
voluntary interviews with WA police officers**

**Report No. 16
August 2014**

Parliament of Western Australia

Committee Members

Chairman	Hon. Nick Goiran, BCom, LLB, MLC Member for South Metropolitan Region
Deputy Chairman	Mr Peter Watson, MLA Member for Albany (member from 11 February 2014)
	Mr Paul Papalia CSC, MLA Member for Warnbro (member until 7 February 2014)
Members	Hon. Adele Farina, BA, LLB, MLC Member for South West Region
	Mr Nathan Morton, BSc, GradDipEd, MLA Member for Forrestfield (member from 19 March 2014)
	Mr Sean L'Estrange, BEd, DipT, MEd, GradDipResourceMan, GraDipMan, psc(j), MLA Member for Churchlands (member until 19 March 2014)

Committee Staff

Principal Research Officer	Dr David Worth, DipAeroEng, MBA, PhD
Research Officer	Ms Jovita Hogan, BA (Hons)
Legislative Assembly	Tel: (08) 9222 7469
Parliament House	Fax: (08) 9222 7804
Harvest Terrace	Email: jscccc@parliament.wa.gov.au
PERTH WA 6000	Website: www.parliament.wa.gov.au/jscccc

Published by the Parliament of Western Australia, Perth.

August 2014.

ISBN: 978-1-921865-99-2

(Series: Western Australia. Parliament. Legislative Assembly. Committees.
Joint Standing Committee on the Corruption and Crime Commission. Report 16)

Joint Standing Committee on the Corruption and Crime Commission

Corruption and Crime Commission voluntary interviews with WA police officers

Report No. 16

Presented by

Hon Nick Goiran, MLC and Mr Peter Watson, MLA

Laid on the Table of the Legislative Assembly and the Legislative Council on
21 August 2014

Chairman's Foreword

The genesis of this report is a recommendation from the President of the WA Police Union of Workers (WAPU) in July 2013 to its members that they cease participating in voluntary interviews with the Corruption and Crime Commission (CCC). The impact of the consequential action taken by members of the police union on the work of the CCC was immediate. Following the WAPU directive no police officer agreed to participate in a voluntary interview with the CCC, whereas prior to the directive the vast majority of CCC interactions with police officers over the previous year had been by way of voluntary interview.¹

During the 2012-13 year, the CCC undertook about 30 investigations involving police officers that involved about 80 voluntary interviews. The Committee was advised by the CCC in September 2013 that it was undertaking 13 investigations involving 34 police officers. Eight officers had been asked to attend a voluntary interview and “[a]ll eight of the aforementioned police [officers] refused to attend a voluntary interview.”²

Given the complex nature of this issue, and the level of media interest in the ‘Mexican stand-off’ between the union and the Commission over the issue of voluntary interviews and CCC oversight, the Joint Standing Committee resolved on 24 October 2013 to undertake a broader inquiry into the tension between WAPOL and the CCC. That inquiry remains onfoot with a scheduled tabling date of 4 December 2014.

The Committee was provided in early August 2013 with a copy of the WAPU letter to the CCC about its directive to members. Chapter One outlines the correspondence and hearings established by the Committee to assist in resolving this issue, including obtaining advice from the Director of Public Prosecutions and discussing it with the Police Commissioner, Dr Karl O’Callaghan. Regrettably, the parties themselves had not communicated about this issue since mid-August 2013 until the Committee intervened and held its hearings.

The then-Commissioner of the Corruption and Crime Commission, Mr Roger Macknay QC, advised the Committee that although there were other means by which the CCC could proceed with an inquiry, voluntary interviews were the most useful way of gathering information, particularly in the early stages of investigating a matter, and that compulsory examinations are “relatively unwieldy” and costly.³

1 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 September 2013, p7.

2 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Letter, 18 September 2013, p1.

3 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 September 2013, p3.

The Committee understands that one of the circumstances that led WAPU to make this directive to its members were claims from its members about the conduct of CCC staff during voluntary interviews. These claims included the manner in which initial contact was made by CCC staff as well as their conduct during the interviews.

Another factor behind the WAPU directive is the uncertainty surrounding legal protections offered to WA Police when participating in voluntary interviews. The *Corruption and Crime Commission Act 2003 Act*⁴ (CCC Act) provides protections for police officers if they attend a CCC interview under compulsion. Similar to other Australian jurisdictions, however, the CCC Act makes no specific mention of voluntary interviews as a process to be used by the Commission to gather information.

Chapter Three includes information from other Australian jurisdictions on the protection their anti-corruption legislation offers police officers against self-incrimination during interviews. The Committee has been provided with a range of legal interpretations of protections available to WA police officers during the voluntary interview stage and these are included in Chapter Four.

The impact on the common law rights of police officers of giving information during a voluntary interview with the CCC was explored with both the Parliamentary Inspector, Hon Michael Murray QC; and the Director of Public Prosecutions, Mr Joseph McGrath SC, in closed hearings with the Committee this year. Their evidence is reported in Chapter Five.

The Committee considers that to provide certainty to WA police officers the *Corruption and Crime Commission Act 2003* should be amended to ensure that anything provided by police in a voluntary interview with the CCC cannot be used in a later criminal prosecution, except in the ordinary exceptions such as to prove a prior inconsistent statement.

The WAPOL Commissioner and the former CCC Commissioner provided on 19 February 2014 a joint submission to the Attorney General to request an amendment to the CCC Act. The proposed amendment is supported by the Police Commissioner and confers an additional power on CCC investigators to compel police officers to answer questions during interviews. This power would be in addition to existing powers enabling the CCC to issue a notice (requiring written answers to questions or the production of documents) or summons a police officer to an examination in which the officer is compelled to answer questions.

The CCC Act provides the Commissioner with the power to compel a public officer to attend a compulsory hearing and, under a criminal caution, answer any question and

4 AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/. Accessed on 4 February 2014.

provide any document. The Commissioner attends the hearing to ensure judicial fairness. Section 14(1)(b) and (c) of the CCC Act allows these powers of the Commissioner to be delegated to an Acting Commissioner only when the Commissioner “is unable to perform the functions of that office or is absent from the State”.⁵

The CCC’s voluntary hearings are currently undertaken by two CCC officers, without a criminal caution and with audio-only recording of the interviews. It would be a significant extension of the CCC’s current powers if, under the joint proposal made by the Police Commissioner and the former CCC Commissioner, its officers were delegated powers to compel the State’s police officers to attend ‘voluntary’ hearings with neither the Commissioner nor Acting Commissioner in attendance.

Instead the Committee recommends to the Attorney General that he should amend the CCC Act to create a new class of voluntary interviews which creates a privilege on evidence provided when police officers answer questions during interviews with the CCC. If the Attorney General accepts this recommendation, the CCC would have three options to interview police:

1. A section 137 compulsory private or public examination before a Commissioner or Acting Commissioner;
2. A voluntary private interview undertaken by CCC staff wherein the evidence given would be privileged as against the interviewee; or
3. A voluntary private interview undertaken by CCC staff during which a criminal caution is given and the evidence may be used against the interviewee.

I would like to thank the Parliamentary Inspector, Hon Michael Murray QC; the Commissioner of Police, Dr Karl O’Callaghan; the Director of Public Prosecutions, Mr Joseph McGrath SC; the President of the WA Police Union of Workers, Mr George Tilbury, and the now former-CCC Commissioner, Mr Roger Macknay QC, for assisting the Committee over the past year to produce this report.

⁵ AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s14.html. Accessed on 6 August 2014.

I would also like to acknowledge the work on this report by my Committee colleagues: the Deputy Chairmen, Mr Paul Papalia CSC MLA (who resigned from the Committee on 7 February 2014) and Mr Peter Watson MLA (who joined the Committee on 11 February 2014), the Member for Churchlands, Mr Sean L'Estrange MLA (who resigned from the Committee on 19 March 2014), the Member for Forrestfield, Mr Nathan Morton MLA (who joined the Committee on 19 March 2014), and the member for the South West Region, Hon Adele Farina MLC. Finally, I wish to thank the Committee's Secretariat, Dr David Worth and Ms Jovita Hogan, for their efforts in completing this report.

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

Executive Summary	i
Ministerial Response	xi
Findings and Recommendations	xiii
1 Overview of Joint Standing Committee’s deliberations	1
Introduction	1
Timeline of activities	2
The CCC’s role in investigating misconduct within WAPOL	4
2 Impact of the WAPU directive	7
Impact of the WAPU directive on the work of the CCC	7
Reasons behind WAPU’s actions	9
Action by the Police Commissioner on the WAPU letter	13
Treatment of WA police by CCC staff	13
Impact of CCC investigations into the Broome lockup incidents	15
3 Police protection against self-incrimination in other jurisdictions	17
Introduction	17
NSW	18
Queensland	19
Victoria	20
South Australia	22
Tasmania	22
4 Interpretations of legal protections available to WA police	23
Request to the Parliamentary Inspector from the CCC	23
Evidence from CCC Commissioner	26

Advice from the Director of Public Prosecutions	27
Joint CCC-WAPOL submission to the Attorney General	27
5 Intersection of the CCC Act with the common law	35
<hr/>	
Introduction	35
The DPP's evidence on the common law	35
Evidence from the Parliamentary Inspector	40
CCC practice in conducting voluntary interviews	42
Appendices	47
<hr/>	
1 Letter from WAPU to the Corruption and Crime Commissioner- 22 July 2013	47
2 Letter from the Corruption and Crime Commissioner to the Police Commissioner - 26 July 2013	49
3 Reply from the Corruption and Crime Commissioner to WAPU- 29 July 2013	51
4 Letter from the Police Commissioner to the Corruption and Crime Commissioner - 5 August 2013	53
5 Letter from the Parliamentary Inspector to the Corruption and Crime Commissioner - 15 August 2013	55
6 Letter from the DPP - 18 December 2013	57
7 Proposed legislative amendment	61
8 Hearings	67
9 Committee's functions and powers	69

Executive Summary

On 22 July 2013 the President of the WA Police Union of Workers (WAPU), Mr George Tilbury, wrote to the former Corruption and Crime Commissioner, Mr Roger Macknay QC, advising him that “WAPU will recommend ...that our Members exercise their rights and decline to participate in all voluntary interviews conducted by the CCC.” Commissioner Macknay responded to WAPU and provided a copy of the union’s letter to the WA Police (WAPOL) Commissioner, Dr Karl O’Callaghan, and the Parliamentary Inspector (PICCC), Hon Michael Murray QC.

Given the WAPU directive to police officers, the CCC Commissioner sought a hearing with the Joint Standing Committee to apprise it of the impact it was having on the work of the Commission. The Committee has since held two public and two closed hearings on this matter, and has had regular written communication with the WAPOL Commissioner and the CCC Commissioner to assist in resolving it.

The Committee also held closed hearings with the PICCC and the Director of Public Prosecutions, Mr Joseph McGrath SC, on their opinion of the impact of the common law on the legal privileges of police officers participating in voluntary interviews with the CCC.

Chapter One

Chapter One provides a timeline of the Committee’s activities in regard to this matter and an overview of the position of both the WAPU and CCC as to whether the legal privileges of police officers are at risk under the current processes used by the CCC to conduct voluntary interviews. The Committee met with the Corruption and Crime Commissioner and with the WA Police Union of Workers. In addition, it took evidence from both the PICCC and the CCC Commissioner in hearings focused on their annual reports. The Committee also raised the progress of resolving this issue with the Police Commissioner in hearings in late 2013 relating to other inquiries. Closed hearings with the DPP and the PICCC were held in early 2014 to hear their opinions whether statements given by police officers to the CCC attract the same protections available at common law as would be available if the statements are provided in a voluntary interview.

Chapter Two

The former CCC Commissioner told the Committee that the vast majority of the CCC’s interactions with police officers over the previous year before the WAPU directive had been by way of voluntary interview. Chapter Two provides an overview of the impact of the WAPU directive on the CCC’s work. Commissioner Macknay told the Committee that of the four ways in which the Commission can obtain information from the State’s

public officers when carrying out its misconduct function, voluntary interviews were the most useful and provided three advantages over the other methods:

- The use of section 94 notices is “clearly very limited in terms of its utility”;
- The decision to participate in an interview under criminal caution is “a matter for the individual” and a person can decide not to participate in them; and
- The compulsory examination is “relatively unwieldy” and costly.⁶

Commissioner Macknay outlined why compulsory examinations were costly:

We have to provide counsel, either engage external counsel or use internal counsel; we have to use a hearing room; we record these things by audio and visual recording, so we have to have monitors there from Spark & Cannon, or whoever the independent contractor is. ...It means I am spending five hours a day sitting there observing, if you like, the taking of evidence when it could usefully be done by two investigators. It is expensive and it is time consuming and it will make our job much harder.⁷

During his hearing, the Commissioner confirmed to the Committee that since the WAPU directive no police officers had agreed to participate in a voluntary interview with the CCC whereas prior to that “the vast majority of our interactions with police officers over the previous year would have been by way of voluntary interview.”⁸

In finalising this report, the Committee wrote to the CCC to confirm its view that voluntary interviews were a useful process for the Commission. Acting Commissioner Shanahan SC confirmed that the Commission did wish to continue to undertake voluntary interviews with police officers as they are efficient, “they require minimal resources, can be conducted at short notice and are effective, in that facts can be established or material identified that enable a Commission investigation to be progressed in a timely manner.”⁹

⁶ Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Transcript of Evidence, 9 September 2013, p3.

⁷ Ibid, p7.

⁸ Ibid.

⁹ Mr Christopher Shanahan SC, Acting Commissioner, Corruption and Crime Commission, Letter, 18 July 2014, p1.

WAPU concerns with the actions of the CCC

The WAPU President, Mr George Tilbury, told the Committee that the union believed that:

...the CCC is implementing its own mandate to increase the scrutiny on police, and the number of investigations it is carrying out has increased dramatically over the last 18 months. It has clearly gone from an oversight body to an interventionist organisation.¹⁰

In his reply to the WAPU letter, the then-CCC Commissioner said that the Police Commissioner “is first and foremost responsible and accountable for preventing and dealing with police misconduct” and that the CCC’s role in overseeing the way WAPOL deals with misconduct was not contentious. He said that sections 7B(3), 28 and 32 of the CCC Act addressed this relationship between the Police Commissioner and the CCC.¹¹

The Committee was surprised to learn that another reason for the WAPU directive to its members was a growing number of member complaints about the way they had been treated by CCC staff while participating in voluntary interviews. The WAPU President, Mr George Tilbury, told the Committee:

Since I became President last year, the number of complaints from members regarding the behaviour and tactics of the CCC has been astonishing. The vast majority of complaints have been given to me and my fellow directors orally, as members fear fallout if they reduce their experiences to writing.¹²

Mr Tilbury confirmed to the Committee that the complaints from police officers about the conduct of CCC staff had not been notified to either the PICCC or the CCC.¹³ The JSCCCC Chairman invited WAPU to make a submission about the conduct of CCC staff to the Committee to provide more details about the claims from police officers.¹⁴ A submission was provided to the Committee by WAPU on 17 January 2014 and was referred to the PICCC for investigation on 9 May 2014.

Chapter Three

Chapter Three summarises the information provided to the Committee by integrity agencies in NSW, Victoria, Queensland, SA and Tasmania on their use of voluntary interviews.

¹⁰ Mr George Tilbury, President, WA Police Union, *Transcript of Evidence*, 4 December 2013, p2.

¹¹ Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Letter, 29 July 2013, p1.

¹² Mr George Tilbury, President, WA Police Union, *Transcript of Evidence*, 4 December 2013, p2.

¹³ *Ibid*, p3.

¹⁴ Mr George Tilbury, President, WA Police Union, Letter, 17 January 2014.

Chapter Four

Chapter Four outlines the legal opinion of the former CCC Commissioner, the PICCC and the DPP on the impact on the privileges of police officers if they participate in voluntary interviews with the CCC. The position agreed to by the WAPU's barrister, Commissioner Macknay and the DPP was that police who participate in voluntary interviews may have their evidence used in later court proceedings.

Commissioner Macknay had provided the PICCC with copies of the correspondence between him, WAPU and the Police Commissioner on this matter. The PICCC replied to the Commissioner that his position was that the CCC Act did not allow the evidence to be used in this way:

...that the position under the CCC Act is clear:

Legal professional privilege (but not public interest immunity), the privilege against self-incrimination and the like are all preserved: ss147(3), 144, and 223.

The answers of the witness are not admissible in any criminal or quasi-criminal proceeding, except for contempt of the Commission or otherwise for an offence against the CCC Act: s145.

The answers are admissible in disciplinary proceedings: s145.¹⁵

The PICCC elaborated on his interpretation of the CCC Act in a later hearing with the Committee:

To my mind, the legislative scheme is abundantly clear about that: cooperation in the process does not, to my mind, deprive the individual of the protections that the law otherwise allows in relation to the use of information against them. ...

Whether or not the information is provided under compulsion or voluntarily is really just like saying that a witness would lose the protection of the law because they did not demand that a summons to attend the court was served but they voluntarily came along. It operates in just the same way.¹⁶

The PICCC's views expressed in his letter to Commissioner Macknay led the WAPU to tell the Committee that it now questioned the impartiality of the PICCC. During the hearing, the union was asked to correspond further with the Committee about its claims. WAPU provided a written complaint about the partiality of the PICCC to the Committee on 20 January 2014.¹⁷ The PICCC's response to WAPU's claims, and a

¹⁵ Hon Michael Murray, QC, Parliamentary Inspector, Letter, 15 August 2013, p2.

¹⁶ Hon Michael Murray, QC, Parliamentary Inspector, *Transcript of Evidence*, 16 October 2013, p6.

¹⁷ Mr George Tilbury, President, WA Police Union, Letter, 20 January 2014.

further response from the WAPU, was reported to Parliament by the Committee on 8 May 2014.¹⁸ In this report, the Committee found that:

- in the matter raised by WAPU, the Parliamentary Inspector acted in accordance with sections 195 and 196 of the *Corruption and Crime Commission Act 2003*;
- the assertion by WAPU that the Parliamentary Inspector acted outside of his statutory functions, is incorrect;
- the WAPU allegation of the partiality of the Parliamentary Inspector, is without foundation; and
- the Parliamentary Inspector continues to have the bi-partisan support of the Joint Standing Committee.¹⁹

Former CCC Commissioner Macknay's opinion on the later use of information from a voluntary interview differed to that of the PICCC:

*There is nothing in the Corruption and Crime Commission Act 2003 that provides any form of privilege for answers given in a voluntary interview in the same way that our Act provides certain limitations on the use that can be made of answers given during a sworn examination, for example, where there is a limited use that can be made. For example, in criminal proceedings the answers that a person gives in the course of a sworn examination under the Corruption and Crime Commission Act 2003 cannot be led in evidence by a prosecution.*²⁰

The Committee wrote to the DPP and requested his interpretation of this matter. In particular, the Committee enquired whether or not he shared the view of the PICCC that statements voluntarily given by police officers to the CCC attracted the same protections available at law as would be available had the statement been provided under compulsion.

¹⁸ Joint Standing Committee on the Corruption and Crime Commission, Report 12- *WA Police Union complaint in regard to the partiality of the Parliamentary Inspector of the Corruption and Crime Commission*, May 2014. Available at: [www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/2D6528B5C2C6838D48257CD1001B3DCC/\\$file/Report+12-+WAPU+complaint+re+PICCC-+Final+May+2014.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/2D6528B5C2C6838D48257CD1001B3DCC/$file/Report+12-+WAPU+complaint+re+PICCC-+Final+May+2014.pdf). Accessed on 8 May 2014.

¹⁹ Ibid, p8.

²⁰ Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 September 2013, p4.

The DPP replied:

*In circumstances where a privilege is not afforded to a witness pursuant to section 145 of the Act (that is, the witness was not subject to compulsion), the State of Western Australia may use the answers provided by that person (if otherwise, admissible) in its entirety in prosecuting that person for any criminal offence.*²¹

Joint submission to the Attorney General

In November 2013 the WA Police Commissioner, Dr Karl O’Callaghan, told the Committee that he and the CCC Commissioner had agreed to prepare a joint approach to the Attorney General (AG) with a view to amending the CCC Act. This amendment would provide a specific reference to allow anything provided by police in a voluntary interview with the CCC not to be used in a criminal prosecution. Dr O’Callaghan said “[o]nce we get that amendment in place, I think that will solve the problem.”²²

The former CCC Commissioner said that the proposed amendment was based on existing legislation being considered by Parliament:

*The form of the Custodial Legislation (Officers Discipline) Amendment Bill 2013, currently before the Parliament of Western Australia, could be a useful model for any amendment.*²³

In January 2014 the Police Commissioner confirmed to the Committee that the CCC had prepared a draft submission to the AG and that he was hopeful the AG would be supportive of the proposed measures. Dr O’Callaghan also said that both he and the then-CCC Commissioner “have agreed that these voluntary interviews are a valuable investigative tool for the Commission, and therefore the presence of police officers is often vital to the work undertaken by the Commission.”²⁴

The former CCC Commissioner told the Committee that the amendment was specifically for police officers and:

...at the moment there is provision in the Police Regulations for interview of police officers not on caution, but a compulsory interview. The Commission has never had that power, but there seemed no reason why it ought not have that power. After discussions with the

²¹ Mr Joseph McGrath, SC, Director of Public Prosecutions, Letter, 18 December 2013, p2.

²² Dr Karl O’Callaghan, Commissioner, WA Police, *Transcript of Evidence*, 13 November 2013, p11.

²³ Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Letter, 12 December 2013.

²⁴ Dr Karl O’Callaghan, Commissioner, WA Police, Letter, 14 January 2014, p1.

*Attorney General and the Minister for Police, we put forward a draft proposal for amendments to WA Police.*²⁵

Acting Commissioner Mr Christopher Shanahan SC confirmed to the Committee that the joint submission prepared by the CCC and supported by WAPOL had been provided on 19 February 2014 to the Department of the Attorney General.

The CCC Act provides the Commissioner with the power to compel a public officer to attend a compulsory hearing and, under a criminal caution, answer any question and provide any document. The Commissioner attends the hearing to ensure judicial fairness. Section 14(1)(b) and (c) of the CCC Act allows these powers of the Commissioner to be delegated to an Acting Commissioner only when the Commissioner “is unable to perform the functions of that office or is absent from the State”.²⁶

The CCC’s voluntary hearings are currently undertaken by two CCC officers, without a criminal caution and with audio-only recording of the interviews. It would be a significant extension of the CCC’s current powers if, under the joint proposal made by the Police Commissioner and the former CCC Commissioner, its officers were delegated powers to compel the State’s police officers to attend ‘voluntary’ hearings with neither the Commissioner nor Acting Commissioner in attendance.

Instead the Committee recommends to the Attorney General that he should amend the CCC Act to create a new class of voluntary interviews which creates a privilege on evidence provided when police officers answer questions during interviews with the CCC. If the Attorney General accepts this recommendation, the CCC would have three options to interview police:

1. A section 137 compulsory private or public examination before a Commissioner or Acting Commissioner;
2. A voluntary private interview undertaken by CCC staff wherein the evidence given would be privileged as against the interviewee; or
3. A voluntary private interview undertaken by CCC staff during which a criminal caution is given and the evidence may be used against the interviewee.

²⁵ Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 19 February 2014, p15.

²⁶ AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s14.html. Accessed on 6 August 2014.

Chapter Five

The PICCC provided his opinion of what impact that the CCC Act has on the ‘common law’ rights of police appearing at CCC voluntary interviews when he wrote to the Committee in late March 2014:

The Act modifies to some extent the application of the common law privileges in relation to the use of its compulsory processes. It says nothing at all about the application of those rights and privileges where the person concerned has voluntarily participated in the process of investigation. They must remain fully available, including the right to silence and the privilege against self-incrimination in subsequent proceedings in a court.²⁷

The DPP provided an alternative opinion in regard to the PICCC’s views:

...in that sense I agree with the Parliamentary Inspector. If a citizen is asked by an investigator, whether the investigator is a member of the Western Australian police service or the Corruption and Crime Commission, to attend and answer questions voluntarily, that citizen can decline in exercise of their rights. If they commence an interview and questions are asked to which they do not wish to provide an answer, they can claim a privilege and say “I do not wish to answer this question” and it is not possible for the interviewer to compel an answer. That is clear.

...That type of immunity does not apply in the record of interview conducted by an investigator. If a person chooses to answer a question voluntarily, then that answer, if otherwise admissible, would be used by the Office of the Director of Public Prosecutions during evidence in chief to prosecute that person if an offence is being alleged.²⁸

The DPP said that if a person was being interviewed by a CCC or WAPOL investigator, and there was a reasonable suspicion that the person might have committed some misconduct or crime, there was an obligation under Part 11, sections 115-124 of the *Criminal Investigation Act 2006*²⁹ on the investigator to make an ‘audiovisual’ record of the interview.

²⁷ Hon Michael Murray, QC, Parliamentary Inspector, Letter, 28 March 2014, pp2-3.

²⁸ Mr Joseph McGrath, SC, Director of Public Prosecutions, *Transcript of Evidence*, 7 May 2014.

²⁹ AustLII, *Criminal Investigation Act 2006*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cia2006243/. Accessed on 21 July 2014.

The DPP later clarified his earlier evidence to the Committee:

I reiterate that the voluntary record of interview conducted by the CCC must be otherwise admissible.

I also reiterate that the using of the statement in the voluntary interview against the officer in subsequent proceedings must be understood to be a reference to proceedings in which the police officer is a respondent or defendant (or the accused person in criminal proceedings). That is, the police officer is a party to the proceedings.³⁰

At the commencement of his closed hearing the PICCC stated:

The point I have been concerned to make is a simple one really; it is that no witness or person examined or questioned before the CCC who participates voluntarily in that process is going to find themselves in a worse position than if they were compulsorily required to cooperate in the process.

It would be an extraordinary outcome in my view, that if somebody was prepared to participate voluntarily, they would find that they were actually in a worse position legally and in relation to the admissibility of evidence at any subsequent proceedings than if they required the Commission to use coercive processes to get them to participate.³¹

According to the PICCC:

...the view that is held in common by both the DPP and myself, that the statements that the witness makes would only be admissible against them in the limited and highly controlled circumstances which now apply under the Criminal Investigation Act and the Evidence Act.³²

That is, the DPP and PICCC both agree that if evidence from police officers is to be used in later proceedings, then the police need to be given a criminal caution by CCC staff at the commencement of, or during, voluntary interviews, and the interviews should be electronically recorded on video equipment.

³⁰ Mr Joseph McGrath SC, Director of Public Prosecutions, Letter, 19 May 2014.

³¹ Hon Michael Murray, QC, Parliamentary Inspector, *Transcript of Evidence*, 18 June 2014.

³² *Ibid.*

Conclusion

The Committee did not receive during this inquiry any evidence that information gathered by the CCC from past voluntary interviews with police officers has been used in later court proceedings.

The Committee received evidence from both the DPP and PICCC that should assure the WA Police Union that its members will be protected by not having their evidence used later if they participate in CCC interviews where the police officer is a party to the later proceedings and these processes comply with the State's *Criminal Investigation Act 2006* and the *Evidence Act 1906*. This would require the police to be given a criminal caution by CCC staff at the commencement of, or during, voluntary interviews, and the interviews should be audiovisually recorded.

In terms of their current processes, the Committee was told by Acting Commissioner Shanahan SC that:

*The Commission seeks to conduct voluntary interviews with WAPOL officers for the purposes of an investigation of alleged misconduct or of matters concerning reviewable police action. In those circumstances **it is not standard practice** for the Commission to issue a criminal caution at the commencement of the interview.*

*It is standard practice for the Commission **to make an audio-recording of voluntary interviews** with WAPOL officers for the purposes of an investigation of alleged misconduct or of matters concerning reviewable police action, but not a video-recording. (emphasis added)³³*

The current CCC process for conducting voluntary interviews of not providing a criminal caution nor making an audiovisual recording of the proceedings is likely to ensure that any evidence gathered during these interviews would not be admissible in later court proceedings.

The acceptance by the Attorney General of the Committee's recommendation in this report will ensure this protection for police officers.

³³ Mr Christopher Shanahan SC, Acting Commissioner, Corruption and Crime Commission, Letter, 18 July 2014, p2.

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 Minister representing 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

Finding 1

Page 9

The WA Police Union directive for its members not to participate in voluntary Corruption and Crime Commission (CCC) interviews had an immediate adverse impact on the number of police officers agreeing to undertake these interviews, and on the effectiveness of the CCC in undertaking its investigations.

Finding 2

Page 9

The Corruption and Crime Commission wishes to continue to undertake voluntary interviews with police officers as they are an efficient process to assist in establishing facts and identifying material to enable a Commission investigation to be progressed.

Finding 3

Page 11

Queensland's *Crime and Corruption Act 2001* is more specific than Western Australia's *Corruption and Crime Commission Act 2003* about the relationship between the Crime and Corruption Commission and the Queensland Police Service, and its monitoring role for police misconduct.

Finding 4

Page 13

The Corruption and Crime Commission has increased its independent investigations of allegations involving police officers since a report by the Joint Standing Committee to the 38th Parliament, especially of those allegations involving the excessive use of force.

Finding 5

Page 15

WA Police Union gave evidence that it was not aware of a situation where a police officer had requested to have somebody with them during a voluntary interview with the Corruption and Crime Commission (CCC) and that request was refused. It was also not aware of any circumstance where a police officer had not been offered the opportunity by the CCC to have a union officer, a lawyer or another officer present with them.

Finding 6

Page 15

At the time of the WA Police Union (WAPU) directive to its members, there had been no complaints made to either the Corruption and Crime Commission (CCC) or the Parliamentary Inspector by WAPU about the conduct of CCC staff during voluntary interviews. WAPU subsequently made a written submission on 14 January 2014 to the Joint Standing Committee about complaints it had received from its members.

Finding 7**Page 22**

Legislation in other Australian jurisdictions has taken different approaches to providing protections against self-incrimination for public officers giving information to their anti-corruption organisation. However, most of these Acts define procedures where a public officer is required to attend an examination, rather than providing information during a voluntary interview.

Finding 8**Page 27**

The former Corruption and Crime Commissioner and the Director of Public Prosecutions concur that no privilege is provided in the *Corruption and Crime Commission Act 2003* for police being interviewed voluntarily by the Corruption and Crime Commission.

Finding 9**Page 31**

The Police Commissioner and the former Corruption and Crime Commissioner prepared a joint submission to the Attorney General on 19 February 2014 to amend the *Corruption and Crime Commission Act 2003* (CCC Act) to create a privilege on evidence given by police when they are compelled to answer questions during interviews with the Corruption and Crime Commission that are not undertaken under section 137 of the CCC Act.

Recommendation 1**Page 32**

The Attorney General should reject the proposed amendment to the *Corruption and Crime Commission Act 2003* (CCC Act) made by the Police Commissioner and the former CCC Commissioner that seeks to create a privilege on evidence provided when police officers are compelled to answer questions during interviews with the Corruption and Crime Commission. Instead the Attorney General should amend the CCC Act to create a new class of voluntary interviews which creates a privilege on evidence provided when police officers answer questions during interviews with the Corruption and Crime Commission.

Finding 10**Page 38**

The Director of Public Prosecutions agrees with the Parliamentary Inspector that police officers and other public officers have a common-law right not to participate in voluntary interviews with the Corruption and Crime Commission.

Finding 11**Page 39**

The Director of Public Prosecutions (DPP) agrees with the advice provided by the independent counsel for the WA Police Union of Workers, but disagrees with the Parliamentary Inspector, that if police officers and other citizens agree to participate in voluntary interviews with the Corruption and Crime Commission then any statements they provide do not have a common law privilege against self-incrimination. The DPP

confirmed that statements given in voluntary interviews may in fact be used by the Office of the DPP in later prosecutions in which the police officer is a party to the proceedings, and if they have been conducted in line with provisions of the *Evidence Act 1906* and the *Criminal Investigation Act 2006*.

Finding 12

Page 43

It is not standard practice for the Corruption and Crime Commission to issue a criminal caution at the commencement of a voluntary interview with a police officer. This is likely to ensure that any evidence gathered would not be admissible in later court proceedings.

Finding 13

Page 44

The Parliamentary Inspector's opinion is that the use of audio-only recordings of voluntary police interviews by the Corruption and Crime Commission is likely to lead to the evidence being found to be inadmissible in later court proceedings.

Chapter 1

Overview of Joint Standing Committee's deliberations

WAPU will recommend that our Members exercise their rights and decline to participate in all voluntary interviews conducted by the CCC. WAPU President, Mr George Tilbury.

Introduction

On 22 July 2013 the President of the WA Police Union of Workers (WAPU), Mr George Tilbury, wrote to the former Corruption and Crime Commissioner, Mr Roger Macknay QC, advising him that “WAPU will recommend ...that our Members exercise their rights and decline to participate in all voluntary interviews conducted by the CCC.” A copy of this letter is included in Appendix One.

Commissioner Macknay responded to WAPU on 29 July 2013. He also provided a copy of the union’s letter to the WA Police (WAPOL) Commissioner, Dr Karl O’Callaghan, and the Parliamentary Inspector (PICCC), Hon Michael Murray QC. A copy of the CCC Commissioner’s letter is included in Appendix Three and a timeline of the communication activities around this issue is provided below.

Given this directive to police officers from the WAPU, the CCC Commissioner sought a hearing with the Joint Standing Committee to apprise it of the impact it was having on the work of the Commission. Since then the Committee has held two public and two closed hearings on this matter, and had regular written communication with the WAPOL Commissioner and the CCC Commissioner to assist in resolving it. This report provides an overview of the Committee’s actions and provides a summary of the work of the WAPOL Commissioner and the CCC Commissioner to provide a joint submission to the Attorney General to amend the *Corruption and Crime Commission Act 2003*.

This amendment would protect police officers providing information in interviews with the CCC so that the information cannot be used against them in any future legal action, unless they have made a prior inconsistent statement.

Chapter 1

Timeline of activities

Following is a summary of the correspondence and hearings associated with the Joint Standing Committee's enquiries into this matter.

Correspondence

22 July 2013- WAPU correspond with the CCC Commissioner (Appendix One)

26 July 2013- CCC Commissioner provides WAPU letter to PICCC and the Police Commissioner (Appendix Two)

29 July 2013- CCC Commissioner replies to WAPU (Appendix Three)

5 August 2013- Police Commissioner replies to CCC Commissioner (Appendix Four)

15 August 2013- Parliamentary Inspector (PICCC) replies to CCC Commissioner (Appendix Five)

22 August 2013- CCC Commissioner provides WAPU with response from PICCC

5 September 2013- CCC Commissioner provide JSCCCC with background correspondence on this issue

18 December 2013- The Director of Public Prosecutions (DPP) provides JSCCCC with an interpretation of provisions within the CCC Act affecting voluntary police interviews (Appendix Six)

12 December 2013- CCC Commissioner provides JSCCCC with progress on developing a joint WAPOL submission to the Attorney General

14 January 2014- Police Commissioner provides JSCCCC with update on joint submission to the Attorney General

17 January 2014- WAPU provides JSCCCC with information on police complaints about CCC staff

20 January 2014- WAPU provides JSCCCC with complaint about PICCC's partiality

19 February 2014- CCC Commissioner provides JSCCCC with draft joint submission to the Attorney General

7 March 2014- Police Commissioner provides JSCCCC with decision of WAPOL Executive to support the joint submission with CCC to the Attorney General

7 May 2014- The DPP provides evidence to the JSCCCC

18 June 2014- PICCC provides evidence to the JSCCCC

18 July 2014- CCC Acting Commissioner provides Committee with updated information about the current use of voluntary interviews

Public hearings

Two public hearings were held on this matter. On 9 September 2013 the Committee met with the Corruption and Crime Commissioner³⁴ and on 4 December 2013 with the WA Police Union of Workers.³⁵

The WAPU hearing was delayed due to difficulties in scheduling witnesses. In addition, the Joint Standing Committee took evidence in public on this issue with both the PICCC and the CCC Commissioner in hearings focused on their annual reports on 16 and 23 October 2013 respectively. The Committee raised the progress of resolving this issue with the Police Commissioner in hearings relating to other inquiries on 13 November and 9 December 2013.

The WAPU President confirmed with the Committee that there had been no further formal communication between WAPU and the CCC since Commissioner Macknay's letter of 22 August 2013, and there had been no communication or meeting about this issue with the Police Commissioner at all.³⁶

Closed hearings

A closed hearing with the DPP, Mr Joseph McGrath SC, on 7 May 2014 was held to hear his views in respect of the opinion of the PICCC that voluntary statements given by police officers to the CCC attract the same protections available at common law as would be available had the statement been provided under compulsion.

A closed hearing was also held on 18 June 2014 with the PICCC in regard to his views about the intersection between the common law and the provisions of the CCC Act. The views of the DPP and PICCC on this matter are discussed in Chapter Five below.

Both the Parliamentary Inspector and the Director of Public Prosecutions agreed to the Committee using suitable sections of their hearing evidence in this report.

Appendix Eight lists the witnesses who gave evidence to the Committee.

34 Joint Standing Committee on the Corruption and Crime Commission, *Transcript of Evidence*, 9 September 2013. Available at: [www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/A0790FB4A121F21C48257BEB000CF250/\\$file/99484563.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/A0790FB4A121F21C48257BEB000CF250/$file/99484563.pdf). Accessed on 4 February 2014.

35 Joint Standing Committee on the Corruption and Crime Commission, *Transcript of Evidence*, 4 December 2013. Available at: [www.parliament.wa.gov.au/Parliament/commit.nsf/\(Evidence+Lookup+by+Com+ID\)/3284DB154BC735B848257C38002D21AF/\\$file/75651084.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Evidence+Lookup+by+Com+ID)/3284DB154BC735B848257C38002D21AF/$file/75651084.pdf). Accessed on 4 February 2014.

36 Mr George Tilbury, President, WA Police Union, *Transcript of Evidence*, 4 December 2013, p10.

Chapter 1

The CCC's role in investigating misconduct within WAPOL

The WAPU raised in their letter to the then-CCC Commissioner the role of the CCC in overseeing WAPOL, saying “[r]ather than being primarily focussed on an oversight role, it is clear that the CCC is now actively involved in investigations which appear to be undertaken independently of WA Police.”

WAPU explained that:

Unless extraordinary circumstances dictate otherwise, it is our view that WA Police should be given the first opportunity to conduct internal investigations, given that Professional Standards personnel possess the requisite knowledge and expertise to deal with all matters involving Police Officers.³⁷

The then-CCC Commissioner, Mr Roger Macknay QC, responded to this point in detail in his reply to the WAPU:

That the Commissioner of Police, as a chief executive officer, is first and foremost responsible and accountable for preventing and dealing with police misconduct is not contentious. ...

In accordance with the intention of the CCC Act, WAPOL deals with most complaints concerning police misconduct, albeit while subject to monitoring and review by the Commission. Section 33 of the CCC Act enables the Commission to itself conduct investigations. Section 34 describes the circumstances in which those investigations might occur. The requirement for the Commission to give particular attention to WAPOL arises from its origins in the Police Royal Commission and from a number of reports and recommendations in recent years from the Joint Standing Committee on the Corruption and Crime Commission and the Commission's Parliamentary Inspector. Clearly the conduct of investigations of WAPOL by the Commission was intended by the Parliament and expected by the people of Western Australia.³⁸

Commissioner Macknay also addressed the union's claims that these CCC investigations are a recent phenomenon. He said that the Commission has regularly conducted inquiries independently of WAPOL and provided three high-profile examples of these

37 Mr George Tilbury, President, WA Police Union, Letter, 22 July 2013, pp1-2.

38 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Letter, 29 July 2013, p1.

investigations. Mr Macknay quite correctly concluded that “[t]he capacity to conduct such investigations is critical to public confidence in the police.”³⁹

The WAPU and then-CCC Commissioner in their subsequent hearings with the Committee provided similar evidence to that contained in their letters on their position on the CCC’s role in overseeing WAPOL.

Given the complex nature of this issue, and the level of media interest in the ‘Mexican stand-off’ between the union and the Commission over the issue of voluntary interviews and CCC oversight⁴⁰, the Joint Standing Committee resolved on 24 October 2013 to undertake a broader inquiry into the tension between police and the CCC in Western Australia.⁴¹ That inquiry remains onfoot with a scheduled tabling date of 4 December 2014.

39 Ibid, p2.

40 *The West Australian*, ‘Police union blocks CCC probe’, 9 September 2013. Available at: <http://au.news.yahoo.com/thewest/latest/a/18848207/police-union-blocks-ccc-probe/>. Accessed on 4 February 2014.

41 Joint Standing Committee on the Corruption and Crime Commission, *Inquiry into improving the working relationship between the Corruption and Crime Commission and the Western Australia Police*. Available at: [www.parliament.wa.gov.au/Parliament/commit.nsf/\(EvidenceOnly\)/2A75AFF461BDC1CC48257C0E000AEDC6?opendocument](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/2A75AFF461BDC1CC48257C0E000AEDC6?opendocument). Accessed on 4 February 2014.

Chapter 2

Impact of the WAPU directive

The vast majority of our interactions with police officers over the previous year [before the WAPU directive] would have been by way of voluntary interview.
Former CCC Commissioner, Mr Roger Macknay QC.

Impact of the WAPU directive on the work of the CCC

Former CCC Commissioner, Mr Roger Macknay QC, told the Joint Standing Committee of the four ways in which the Commission can obtain information from the State's public officers when carrying out its misconduct function:

Firstly, there is the request for a public officer, be it a police officer or any other kind of public officer, or indeed a member of the public, to participate in a voluntary interview and to sit down with an investigator or investigators and, while a recording is going, provide information about a particular matter.

The second way is by notice under section 94 of the Corruption and Crimes Commission Act 2003, which is where a list of questions is set out and then served on a public officer and there is an obligation to provide answers to those questions. The third way is an interview under criminal caution. A caution is given in the same way that a police officer would give a caution. You are not obliged to say anything, but anything you do say will be taken down and may be given in evidence. The fourth way is by compulsory examination. That can be a public examination or a private examination.⁴²

Commissioner Macknay said the first method, voluntary interviews, "is obviously the most useful" particularly in the early stages of investigating a matter. He outlined the difficulties with the other three methods of gathering information:

- The use of section 94 notices is "clearly very limited in terms of its utility";
- The decision to participate in an interview under criminal caution is "a matter for the individual" and a person can decide not to participate in them; and

⁴² Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 September 2013, p3.

Chapter 2

- The compulsory examination is “relatively unwieldy” and costly.⁴³

Commissioner Macknay outlined why compulsory examinations were costly:

We have to provide counsel, either engage external counsel or use internal counsel; we have to use a hearing room; we record these things by audio and visual recording, so we have to have monitors there from Spark & Cannon, or whoever the independent contractor is.

The Commission’s officers have to sit there; the security officer has to act as an orderly. It means I am spending five hours a day sitting there observing, if you like, the taking of evidence when it could usefully be done by two investigators. It is expensive and it is time consuming and it will make our job much harder.⁴⁴

In his reply to WAPU, Commissioner Macknay stated the value of voluntary interviews with police officers in assisting the Commission’s work:

The Commission has frequent interactions with individual police officers. Predominately these interactions are for the purpose of establishing the facts about the conduct of other persons, some of whom are police officers. While the Commission’s inquiries may result in adverse consequences for some police officers, overwhelmingly this is not the case for most of those who have contact with it. Not infrequently the Commission’s inquiries identify material that supports the appropriateness of police actions. Commission investigations also identify weaknesses or failures in police support systems and processes so that improvements can be made to make the work of police safer and more effective.⁴⁵

During his hearing, the Commissioner confirmed to the Committee that since the WAPU directive no police officers had agreed to participate in a voluntary interview with the CCC whereas prior to that “the vast majority of our interactions with police officers over the previous year would have been by way of voluntary interview.”⁴⁶

Over the 2012-13 year, the CCC had undertaken about 30 investigations involving police officers and had undertaken about 80 voluntary interviews.⁴⁷ After his hearing with the Committee, the Commissioner provided information that the CCC was

43 Ibid.

44 Ibid, p7.

45 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Letter, 29 July 2013, p2.

46 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 September 2013, p7.

47 Ibid, p9.

undertaking 13 investigations involving 34 police officers. Eight officers had been asked to attend a voluntary interview and “[a]ll eight of the aforementioned WAPOL [officers] refused to attend a voluntary interview.”⁴⁸

Finding 1

The WA Police Union directive for its members not to participate in voluntary Corruption and Crime Commission (CCC) interviews had an immediate adverse impact on the number of police officers agreeing to undertake these interviews, and on the effectiveness of the CCC in undertaking its investigations.

In finalising this report, the Committee wrote to the CCC to confirm its view that voluntary interviews were a useful process for the Commission. Acting Commissioner Shanahan confirmed that the Commission did wish to continue to undertake voluntary interviews with police officers as they are efficient, “they require minimal resources, can be conducted at short notice and are effective, in that facts can be established or material identified that enable a Commission investigation to be progressed in a timely manner.”⁴⁹ He also noted:

*While a voluntary interview may result in adverse consequences for some police officers, overwhelmingly this is not the case. Not infrequently information is acquired during a voluntary interview that assists in the identification of material that supports the appropriateness of police actions.*⁵⁰

Finding 2

The Corruption and Crime Commission wishes to continue to undertake voluntary interviews with police officers as they are an efficient process to assist in establishing facts and identifying material to enable a Commission investigation to be progressed.

Reasons behind WAPU’s actions

In its original letter to Commissioner Macknay, WAPU did not clearly state what had caused them to prepare its directive to its members about voluntary interviews, but said that:

Rather than being primarily focussed on an oversight role, it is clear that the CCC is now actively involved in investigations which appear to be undertaken independently of WA Police.

48 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Letter, 18 September 2013, p1.

49 Mr Christopher Shanahan SC, Acting Commissioner, Corruption and Crime Commission, Letter, 18 July 2014, p1.

50 Ibid.

Chapter 2

As part of this process, your preferred method of engagement with our Members is to seek participation in voluntary interviews, as outlined above at point 2. ...

Given recent incidents, the belief that our Members should be treated fairly and reasonably and knowing that the CCC and WA Police have adequate powers to compel Police Officers to participate in interviews, WAPU will recommend...⁵¹

The WAPU President, Mr George Tilbury, told the Committee in his hearing that the union believed that:

...the CCC is implementing its own mandate to increase the scrutiny on police, and the number of investigations it is carrying out has increased dramatically over the last 18 months. It has clearly gone from an oversight body to an interventionist organisation.⁵²

In his reply to the WAPU letter, the then-CCC Commissioner said that the Police Commissioner “is first and foremost responsible and accountable for preventing and dealing with police misconduct” and that the CCC’s role in overseeing the way WAPOL deals with misconduct was not contentious. He said that sections 7B(3), 28 and 32 of the CCC Act addressed this relationship between the Police Commissioner and the CCC.⁵³

The CCC Act was prepared so that the CCC could oversight both the WA public service as well as WAPOL and sections 7B(3), 28 and 32 of the Act do not make specific reference to police officers. The *Crime and Misconduct Act 2001* in Queensland is more specific about the relationship between the Crime and Misconduct Commission (CMC) and the Queensland Police Service, and the CMC's role for monitoring police misconduct:

(1) The commission may, having regard to the principles stated in section 34—

- (a) issue advisory guidelines for the conduct of investigations by the commissioner of police into police misconduct; or*
- (b) review or audit the way the commissioner of police has dealt with police misconduct, in relation to either a particular complaint or a class of complaint; or*
- (c) assume responsibility for and complete an investigation by the commissioner of police into police misconduct.*

51 Mr George Tilbury, President, WA Police Union, Letter, 22 July 2013, pp1-2.

52 Mr George Tilbury, President, WA Police Union, *Transcript of Evidence*, 4 December 2013, p2.

53 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Letter, 29 July 2013, p1.

(2) The commissioner of police must give the commission reasonable help to undertake a review or audit or to assume responsibility for an investigation.

(3) If the commission assumes responsibility for an investigation, the commissioner of police must stop his or her investigation or any other action that may impede the investigation if directed to do so by the commission.

(4) In this section— complaint, about police misconduct, includes information or matter involving police misconduct.⁵⁴

The *Crime and Misconduct and Other Legislation Amendment Act 2014* was passed by the Queensland Parliament in May 2014 and amends the *Crime and Misconduct Act 2001*, the *Public Service Act 2008* and the *Public Service Regulation 2008*.⁵⁵ One of the amendments was to rename the *Crime and Misconduct Act 2001* to the *Crime and Corruption Act 2001*. The CMC was also renamed the Crime and Corruption Commission (QCCC) as from 1 July 2014.⁵⁶ The Amendment Act did not alter section 47 of the CMC Act 2001 in regard to the QCCC's role in overseeing police misconduct.

Finding 3

Queensland's *Crime and Corruption Act 2001* is more specific than Western Australia's *Corruption and Crime Commission Act 2003* about the relationship between the Crime and Corruption Commission and the Queensland Police Service, and its monitoring role for police misconduct.

In his hearing with the Committee, Commissioner Macknay agreed with WAPU that the CCC had been more active in investigating allegations of WA police misconduct over the previous two years:

...we have strategic aims that we sat down and looked at how we ought go about our task of police oversight. We created certain priorities. Although not at the top end of misconduct, pursuant to that strategic purpose we might decide to have a look at a particular matter because we have formed the view that we need to be more active in a particular area because by being more active in a particular area, we will create a deterrence to further conduct of that kind. Use of force is clearly the most outstanding example.

54 AustLII, *Crime and Misconduct Act 2001 - Sect 47*, nd. Available at: www.austlii.edu.au/au/legis/qld/consol_act/cama2001191/s47.html. Accessed on 6 February 2014.

55 Parliament of Queensland, *Crime and Misconduct and Other Legislation Amendment Act 2014*, 21 May 2014, p11. Available at: www.legislation.qld.gov.au/LEGISLTN/ACTS/2014/14AC021.pdf. Accessed on 21 July 2014.

56 Ibid, pp12-13.

Chapter 2

*... it is a matter of record that the Commission was the subject of some criticism as to the number of matters it investigated itself. Over the last 21 months or so the Commission has taken on a significant number of matters itself. Again, the matters it takes on certainly would tend to be more serious ones, but issues of whether or not it is likely to be a fruitful exercise of course are also relevant.*⁵⁷

The criticism the then-Commissioner referred to was contained in Report 18 of the Joint Standing Committee in the 38th Parliament. In this report the then-PICCC, Hon Chris Steytler QC, said that “between 1 July 2009 and 31 March 2011 [the CCC has received] 381 complaints of the use of excessive force by [police officers] but has independently investigated only one of these.”⁵⁸

The Hon Chris Steytler’s assessment of the situation as it existed in 2011 was:

*The information provided by the CCC is indicative of a serious problem in respect of the CCC’s performance of its important function of investigating complaints concerning the use of excessive force by police. Police officers are in many ways the front line of the justice system. Abuses of power by police officers, especially those involving the use of excessive force, undermine the integrity of, and respect for, the justice system. The system is further undermined when the body relevantly tasked with the external oversight of WAP fails, almost entirely, to conduct independent investigations into serious and credible allegations concerning the use of excessive force. There can be no public confidence in the justice system in the absence of a vigorous, independent investigation of complaints of this kind.*⁵⁹

In tabling Hon Chris Steytler’s report, the JSCCCC recommended that consideration should be given to amending s7B of the CCC Act so as “to ensure that greater importance is accorded by the CCC to the need to conduct independent investigations into allegations of the kind identified in recommendation 1.” Recommendation 1 was that:

The CCC should change its procedures so as to implement the emphasis placed by the CCC Act on police misconduct by independently

57 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 September 2013, p9.

58 Joint Standing Committee on the Corruption and Crime Commission, *Parliamentary Inspector’s Report Concerning the Procedures Adopted by the Corruption and Crime Commission when Dealing with Complaints of the Excessive Use of Force by Police*, 8 September 2011, p28. Available at:

[www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/9727740575952A0B48257905000664AB/\\$file/26806640.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/9727740575952A0B48257905000664AB/$file/26806640.pdf). Accessed on 7 February 2014.

59 Ibid, p31.

*investigating instances at the upper end of the category of serious and credible complaints concerning the use of excessive force by police...*⁶⁰

Compared to only one investigation in the nearly two year period between 2009-11, in the year 2012-13 the CCC undertook approximately 30 investigations involving police officers and completed about 80 voluntarily interviews with police officers.⁶¹

Finding 4

The Corruption and Crime Commission has increased its independent investigations of allegations involving police officers since a report by the Joint Standing Committee to the 38th Parliament, especially of those allegations involving the excessive use of force.

Action by the Police Commissioner on the WAPU letter

The Police Commissioner, Dr Karl O'Callaghan, told a hearing of the Legislative Council's Estimates and Financial Operations Committee (EFOC) on 26 September 2013 that his response to the WAPU letter in regard to voluntary interviews with the CCC was that he had:

*...put out a direction to police officers saying that generally we expect them to cooperate with inquiries, whether it is a Corruption and Crime Commission inquiry, a coroner's inquiry or any other inquiry, but that they should seek legal advice if they believe that the process might incriminate them. I certainly have encouraged police to cooperate, but the union is taking quite a hardline view on this, as you are probably aware.*⁶²

In answer to a Question On Notice Supplementary Information from the EFOC, the Police Commissioner said that he "believed that a direction had been made via an internal broadcast which was also publicly broadcast on 9 May 2013 via media as to his expectations of all police members." The Police Commissioner had subsequently established that no internal broadcast had actually been issued. On 3 October 2013 such an internal broadcast was issued to all police members.⁶³

Treatment of WA police by CCC staff

The Joint Standing Committee was surprised to learn that another reason for the WAPU directive to its members was a growing number of member complaints about

60 Ibid, pxiii.

61 Mr John Lynch, Acting Deputy Director, Operations, Corruption and Crime Commission, *Transcript of Evidence*, 9 September 2013, p9.

62 Dr Karl O'Callaghan, Commissioner, WA Police, *Question On Notice Supplementary Information*, Legislative Council, Estimates and Financial Operations Committee, Question No A3, 26 September 2013, p3.

63 Ibid.

Chapter 2

the way they had been treated by CCC staff while participating in voluntary interviews. The WAPU President, Mr George Tilbury, told the Committee:

Since I became President last year, the number of complaints from members regarding the behaviour and tactics of the CCC has been astonishing. The vast majority of complaints have been given to me and my fellow directors orally, as members fear fallout if they reduce their experiences to writing.

One of my members has been courageous enough to send me an email outlining some recent behaviour from CCC investigators while interviewing my members in the metropolitan area. He said officers under his command were complying with CCC investigators' requests for voluntary interviews until some of his staff were brought to tears because of the intimidation of the CCC. One member even had to go on stress leave as a result of the interview with the CCC.⁶⁴

Mr Tilbury claimed that the number of complaints from police officers had increased since mid-2013:

In May, the number of complaints I referred to earlier from my members and staff about the CCC and its investigators' bullying tactics escalated. It is our view that police officers deserve natural justice, are afforded due process and are treated fairly. This was clearly not occurring. Police have a statutory requirement to abide by rules and regulations in regard to their behaviour and conduct. The CCC's investigators should also be compelled to do the same.⁶⁵

The WAPU explained to the Committee the process for the CCC contacting police officers to request a voluntary interview, and that "officers can be contacted directly, it can be a request through internal affairs or professional standards, or the officer in charge of a particular area can be contacted." In some cases the CCC staff may just arrive at the officer's workplace. The interviews are generally conducted in private.

The opportunity for police officers to have a union or legal representative or a colleague present during those voluntary interviews varied, but in the majority of cases the police officer "will contact the union for advice or go to one of their supervisors or OIC". Mr Tilbury said he was not aware of a situation where an officer had requested to have somebody with them and that request was refused by the CCC, nor of any circumstance where a police officer has told WAPU that they have not been offered the opportunity by the CCC to have a union officer, a lawyer or another officer present with them.⁶⁶

64 Mr George Tilbury, President, WA Police Union, *Transcript of Evidence*, 4 December 2013, p2.

65 Ibid.

66 Ibid, pp7-8

Finding 5

WA Police Union gave evidence that it was not aware of a situation where a police officer had requested to have somebody with them during a voluntary interview with the Corruption and Crime Commission (CCC) and that request was refused. It was also not aware of any circumstance where a police officer had not been offered the opportunity by the CCC to have a union officer, a lawyer or another officer present with them.

Mr Tilbury also confirmed to the Committee that the complaints from police officers about the conduct of CCC staff had not been notified to either the PICCC or the CCC:

Our members did not want us to progress the matter any further for fear of reprisals. There have been complaints made to the CCC in the past, and they have asked for specific examples, which cannot be given without identifying the individual members.⁶⁷

The JSCCCC Chairman invited WAPU to make a submission about the conduct of CCC staff to the Committee to provide more details about the claims from police officers.⁶⁸ A submission was provided to the Committee by WAPU on 17 January 2014 and was referred to the PICCC for investigation on 9 May 2014.

Finding 6

At the time of the WA Police Union (WAPU) directive to its members, there had been no complaints made to either the Corruption and Crime Commission (CCC) or the Parliamentary Inspector by WAPU about the conduct of CCC staff during voluntary interviews. WAPU subsequently made a written submission on 14 January 2014 to the Joint Standing Committee about complaints it had received from its members.

Impact of CCC investigations into the Broome lockup incidents

In late 2013 the CCC reported on two incidents of alleged excessive use of force by the same police officer at the Broome Police Station lockup in March and April 2013.⁶⁹ The CCC took over the investigation from WAPOL's Internal Affairs Unit. At its hearing, WAPU stated that two aspects of the CCC investigation impacted on police morale in Broome. These factors were the voluntary interview process and the requirement for all attendees at the CCC hearing to give their details and sign in, whereas people attending a court are free to come and go.

67 Ibid, p3.

68 Mr George Tilbury, President, WA Police Union, Letter, 17 January 2014.

69 Corruption and Crime Commission, *Incidents at Broome Police Station*, 23 December 2013.

Available at:

www.ccc.wa.gov.au/Publications/Reports/Published%20Reports%202013/Incidents%20at%20Broome%20Police%20Station.pdf. Accessed on 7 February 2014.

Chapter 2

The WAPU Deputy Vice President said:

I actually travelled up to Broome for the initial round of CCC voluntary interviews that took place. Certainly there were some concerns conveyed to me about that, certainly concerns due to the nature of what was alleged to have occurred, and payback occurring in the community. So yes, those things were expressed to me. And our role primarily up there was of course one of welfare. And let me say, the whole process, the voluntary interview-type process that involved a significant number of police officers from a relatively small police station in Broome certainly did cause significant effects on morale.⁷⁰

The WAPU President said:

When that particular public hearing was being held, everyone coming into the hearing was required to write down their name, details and sign in when they actually went into the building, which identified every person that actually went in there, including people in the public gallery, which I do not think is acceptable.

...That certainly does not occur in a court of law. Particularly in the public arena, people are free to come and go as they please.⁷¹

Mr Tilbury confirmed to the Committee that, despite concerns being expressed by police about these procedures used by the CCC in Broome, neither WAPU nor any of its members had made complaints to either the CCC or the PICCC.⁷²

70 Mr Jonathan Groves, Deputy Vice President, WA Police Union, *Transcript of Evidence*, 4 December 2013, p5.

71 Mr George Tilbury, President, WA Police Union, *Transcript of Evidence*, 4 December 2013, p5.

72 *Ibid*, pp5-6.

Chapter 3

Police protection against self-incrimination in other jurisdictions

The Commission may consult any person or body about an allegation or other matter. Section 32(3) of the Corruption and Crime Commission Act 2003.

Introduction

Similar to other Australian jurisdictions, the Western Australian *Corruption and Crime Commission Act 2003*⁷³ makes no specific mention of voluntary interviews as a process to be used by the CCC to gather information. In undertaking their own tasks, police officers use section 16(2) of Western Australia's *Criminal Investigation (Identifying People) Act 2002* to request a person's name and address but they can only obtain further information (eg in relation to a car crash) if that person volunteers to provide it.⁷⁴

The former CCC Commissioner told the WAPU in his reply to their initial letter that "Section 33 of the CCC Act enables the Commission to itself conduct investigations. Section 34 describes the circumstances in which those investigations might occur."⁷⁵ Section 32(3) of the CCC Act gives the CCC wide powers to deal with allegations of misconduct- "[t]he Commission may consult any person or body about an allegation or other matter."⁷⁶

73 AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/. Accessed on 4 February 2014.

74 AustLII, *Criminal Investigation (Identifying People) Act 2002*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cipa2002417/index.html. Accessed on 10 February 2014.

75 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Letter, 29 July 2013, p1.

76 AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/. Accessed on 4 February 2014.

Chapter 3

WAPU is aware that the CCC Act currently provides protections for its members if they attend a CCC interview under compulsion, and told its members that:

Any statement made by a Police Officer in answer to a question under compulsion cannot be used in evidence against the Officer in subsequent criminal or civil proceedings, but may be used in disciplinary proceedings, proceedings for contempt of the CCC or for offences against the Corruption and Crime Commission Act...⁷⁷

The Committee sought information on this topic from other Australian jurisdictions.

NSW

NSW was the first jurisdiction to legislate for an anti-corruption organisation. Section 26 (self-incrimination) of NSW's *Independent Commission Against Corruption Act 1988* (ICAC Act) provides a protection against evidence being used in other proceedings:

(1) This section applies where, under section 21 or 22, the Commission requires any person:

(a) to produce any statement of information, or

(b) to produce any document or other thing.

(2) If the statement, document or other thing tends to incriminate the person and the person objects to production at the time, neither the fact of the requirement nor the statement, document or thing itself (if produced) may be used in any proceedings against the person (except proceedings for an offence against this Act or except as provided by section 114A (5)).

(3) They may however be used for the purposes of the investigation concerned, despite any such objection.⁷⁸

The wording of section 28 of NSW's *Police Integrity Commission Act 1996* (self-incrimination) mirrors that contained in section 26 of the ICAC Act.⁷⁹

The Police Integrity Commissioner, Hon Bruce James QC, responded to the Committee's request for information on this matter and said that NSW Police Force officers and other potential witnesses, such as NSW Police administrative officers, are

77 Mr George Tilbury, President, WA Police Union, Letter, 22 July 2013, p1.

78 AustLII, *Independent Commission Against Corruption Act 1988*, 21 November 2013. Available at: www.austlii.edu.au/au/legis/nsw/consol_act/icaca1988442/index.html. Accessed on 4 February 2014.

79 AustLII, *Police Integrity Commission Act 1996*, 21 November 2013. Available at: www.austlii.edu.au/au/legis/nsw/consol_act/pica1996312/index.html. Accessed on 4 February 2014.

“often invited to attend voluntary interviews with Commission investigators.”⁸⁰ In terms of any privilege attached to these voluntary interviews, Mr James said:

The answer to this question depends on the type of privilege which is contemplated.

If the interview was given under inducement it would be on the basis that it could not be used in evidence against the member in any civil or criminal proceeding, other than proceedings for providing information that is false or misleading or designed to mislead.

*If the interview was given under criminal caution it could be used in civil and criminal proceedings.*⁸¹

Queensland

The amended *Crime and Corruption Act 2001* (CCC Act) gives Queensland’s renamed Crime and Corruption Commission power to investigate both corrupt conduct, particularly more serious cases of corrupt conduct, and organised crime.⁸² Section 197 outlines restrictions on the use of answers, documents, or statements disclosed or produced by public officers being interviewed under compulsion:

(2) The answer, document, thing or statement given or produced is not admissible in evidence against the individual in any civil, criminal or administrative proceeding.

(3) However, the answer, document, thing or statement is admissible in a civil, criminal or administrative proceeding—

(a) with the individual's consent; or

(b) if the proceeding is about—

(i) the falsity or misleading nature of an answer, document, thing or statement mentioned in subsection (1) and given or produced by the individual; or

(ii) an offence against this Act; or

(iii) a contempt of a person conducting the hearing; or

80 Hon Bruce James QC, Commissioner, Police Integrity Commission, Letter, 9 April 2014.

81 Ibid.

82 AustLII, *Crime and Misconduct Act 2001*, nd. Available at: www.austlii.edu.au/au/legis/qld/consol_act/cama2001191/. Accessed on 4 February 2014.

Chapter 3

(c) if the proceeding is a proceeding, other than a proceeding for the prosecution of an offence, under the Confiscation Act and the answer, document, thing or statement is admissible under section 265 of that Act.

(4) Also, the document is admissible in a civil proceeding about a right or liability conferred or imposed by the document.⁸³

Sections 201 and 202 of Queensland's CCC Act allows the CCC to provide evidence from a Commission hearing if it is relevant evidence for a public officer's defence against a charge, or it was given at a public hearing and its publication is not contrary to a CCC order.⁸⁴

The Acting Chairperson of the CMC (as it was then known), Dr Ken Levy, wrote to the Committee to say that his staff "generally seek to interview [non-police public officers] voluntarily" and "[a]t times police officers may be invited to be interviewed voluntarily by commission officers". If these officers, however, are considered to have committed misconduct or a criminal offence "they would generally refuse to answer questions on the basis of self-incrimination."⁸⁵ Dr Ken Levy said that where a police officer is interviewed voluntarily their answers would not be considered privileged, although other Queensland legislation such as the *Police Powers and Responsibilities Act 2000* would be relevant in determining the admissibility of answers in a criminal proceeding.⁸⁶

Victoria

Section 84(2) of Victoria's *Independent Broad-Based Anti-Corruption Commission Act 2011* (IBAC Act) gives IBAC specific powers to require police to give information, documents and answer questions about possible breaches of discipline involving personnel and corrupt conduct, when directed to by IBAC:

(2) For the purposes of an investigation to which this section applies, the IBAC may direct any member of the police force to—

- (a) give the IBAC any relevant information; or
- (b) produce any relevant document to the IBAC; or
- (c) answer any relevant question.

83 AustLII, *Crime and Misconduct Act 2001 - Sect 197*, nd. Available at: www.austlii.edu.au/au/legis/qld/consol_act/cama2001191/s197.html. Accessed on 4 February 2014.

84 AustLII, *Crime and Misconduct Act 2001*, nd. Available at: www.austlii.edu.au/au/legis/qld/consol_act/cama2001191/. Accessed on 4 February 2014.

85 Dr Ken Levy RFD, Acting Chairperson, Crime and Misconduct Commission, Letter, 31 March 2014.

86 Ibid, p2.

(3) Any information, document or answer given or produced in accordance with a direction under subsection (2) is not admissible in evidence before any court or person acting judicially, except in proceedings for—

- (a) perjury or giving false information; or*
- (b) a breach of discipline by a member of the police force; or*
- (c) an offence under this Act concerning failure to comply with a direction of the IBAC; or*
- (d) review proceedings under Division 1 of Part IV of the Police Regulation Act 1958.*

In a similar fashion to the Western Australian CCC Act, section 144(2) of the IBAC Act provides a protection against evidence gathered from a witness during an examination from being used in most court proceedings:

(2) Any answer, information, document or thing that might tend to incriminate the person or make the person liable to a penalty is not admissible in evidence against the person before any court or person acting judicially, except in proceedings for—

- (a) perjury or giving false information; or*
- (b) an offence against this Act; or*
- (c) an offence against the Victorian Inspectorate Act 2011; or*
- (d) an offence against section 72 or 73 of the Protected Disclosure Act 2012; or*
- (e) contempt of the IBAC under this Act; or*
- (f) a disciplinary process or action.⁸⁷*

IBAC's Commissioner, Mr Stephen O'Bryan SC, confirmed to the Committee that IBAC conducts voluntary interviews with both police officers and other Victorian public officers. He said that if a person participates in a voluntary interview:

...they have the right to choose whether or not to answer a question. Therefore, if they choose to answer a question and the answer contains information that may be the subject of privilege, they may waive the right to claim the privilege.⁸⁸

87 AustLII, *Independent Broad-Based Anti-Corruption Commission Act 2011*, nd. Available at: www.austlii.edu.au/au/legis/vic/consol_act/ibaca2011479/index.html. Accessed on 4 February 2014.

88 Mr Stephen O'Bryan, SC, Commissioner, Independent Broad-Based Anti-Corruption Commission, Letter, 8 April 2014.

Chapter 3

South Australia

The *Independent Commissioner Against Corruption Act 2012* established South Australia's Independent Commissioner Against Corruption and the Office for Public Integrity. Schedule 2 of SA's ICAC Act describes the procedures for the examination of public officers (including police officers) and the production of relevant documents. This schedule does not make provisions in regard to the protection of public officers from self-incrimination.⁸⁹

Tasmania

Similar to the situation in South Australia, the Tasmanian *Integrity Commission Act 2009* makes no specific provisions in regard to the protection from self-incrimination for police officers required to give evidence to an investigation.⁹⁰

Finding 7

Legislation in other Australian jurisdictions has taken different approaches to providing protections against self-incrimination for public officers giving information to their anti-corruption organisation. However, most of these Acts define procedures where a public officer is required to attend an examination, rather than providing information during a voluntary interview.

89 AustLII, *Independent Commissioner Against Corruption Act 2012 - Schedule 2*, nd. Available at: www.austlii.edu.au/au/legis/sa/consol_act/icaca2012463/sch2.html. Accessed on 4 February 2014.

90 AustLII, *Integrity Commission Act 2009*, nd. Available at: www.austlii.edu.au/au/legis/tas/num_act/ica200967o2009304/index.html. Accessed on 4 February 2014.

Chapter 4

Interpretations of legal protections available to WA police

...the State of Western Australia may use the answers provided by that person (if otherwise, admissible) in its entirety in prosecuting that person for any criminal offence. Mr Joseph McGrath SC, Director of Public Prosecutions.

Request to the Parliamentary Inspector from the CCC

The issue of police participating in voluntary interviews with the CCC was initiated by the WAPU's letter in which they quote advice from an independent barrister that:

...2. Officers are not obliged to participate in a voluntary interview with the CCC that is conducted without a notice or summons first being issued to the Officer; and

3. Officers have a lawful right to refuse to participate in interviews which are not compulsory;

4. If an Officer voluntarily elects to participate in an interview which is not compulsory, any statements made by the Officer can be used against them in subsequent criminal or civil proceedings;...⁹¹

In its hearing with the Joint Standing Committee, WAPU's President, Mr George Tilbury, confirmed that barrister Ms Karen Vernon gave the WAPU board her advice in June and it was then distributed with the approval of the WAPU Board to its members on 22 July 2013.⁹²

The former CCC Commissioner provided the Parliamentary Inspector of the CCC (PICCC), Hon Michael Murray QC, with copies of all of the correspondence between him, WAPU and the Police Commissioner on this matter. The PICCC replied to the Commissioner on 15 August 2013 (see Appendix Five) and said:

...that the position under the CCC Act is clear:

Legal professional privilege (but not public interest immunity), the privilege against self-incrimination and the like are all preserved: ss147(3), 144, and 223.

91 Mr George Tilbury, President, WA Police Union, Letter, 22 July 2013, p1.

92 Mr George Tilbury, President, WA Police Union, *Transcript of Evidence*, 4 December 2013, p2.

Chapter 4

The answers of the witness are not admissible in any criminal or quasi-criminal proceeding, except for contempt of the Commission or otherwise for an offence against the CCC Act: s145.

The answers are admissible in disciplinary proceedings: s145.⁹³

In conclusion, the PICCC said that:

... in light of the recent decision of the High Court, I have no doubt that point 4 of the letter dated 22 July from the President of the Union to you is wrong. The CCC Act would not be interpreted as having the effect that the protections otherwise provided by the Act would be lost because the person concerned elected to co-operate with a CCC investigation, rather than hold out until he or she was compelled to do so.⁹⁴

The PICCC elaborated on his interpretation of the CCC Act in a hearing with the Joint Standing Committee held in October 2013 to inquire into his annual report:

To my mind, the legislative scheme is abundantly clear about that: cooperation in the process does not, to my mind, deprive the individual of the protections that the law otherwise allows in relation to the use of information against them. ...

Whether or not the information is provided under compulsion or voluntarily is really just like saying that a witness would lose the protection of the law because they did not demand that a summons to attend the court was served but they voluntarily came along. It operates in just the same way.⁹⁵

On 22 August 2013, the then-CCC Commissioner wrote to the WAPU providing it with a copy of the PICCC's letter of 15 August 2013. The views expressed by Hon Michael Murray QC in his letter led the union to tell the Joint Standing Committee at its later hearing that it now questioned the impartiality of the PICCC. The WAPU President, Mr Tilbury, explained the union's reasons for this approach:

Just in reference to the letter that was sent to us from the Parliamentary Inspector, he does cite examples and instances where he has taken a firm view which is clearly wrong in parts of this. He does make reference to a [High Court] matter titled X7, which is not relevant in this particular case, and was less than helpful in relation to the issue at hand.

93 Hon Michael Murray, QC, Parliamentary Inspector, Letter, 15 August 2013, p2.

94 Ibid.

95 Hon Michael Murray, QC, Parliamentary Inspector, *Transcript of Evidence*, 16 October 2013, p6.

*With him having such strong views in relation to that and referring to my letter, which is the issue at hand, that is our view, yes.*⁹⁶

During the hearing, the union was asked to correspond further with the Committee about its claims. WAPU provided a written complaint about the partiality of the PICCC to the Committee on 20 January 2014.⁹⁷ The PICCC's response to WAPU's claims, and a further response from the WAPU, was reported to Parliament by the Committee on 8 May 2014.⁹⁸ In this report, the Committee found that:

- in the matter raised by WAPU, the Parliamentary Inspector acted in accordance with sections 195 and 196 of the *Corruption and Crime Commission Act 2003*;
- the assertion by WAPU that the Parliamentary Inspector acted outside of his statutory functions, is incorrect;
- the allegation by the WA Police Union of Workers about the partiality of the Parliamentary Inspector, is without foundation; and
- the Parliamentary Inspector continues to have the bi-partisan support of the Joint Standing Committee.⁹⁹

In his response to the claims from WAPU about his actions, the PICCC returned to the issue of privilege during a CCC interview with police officers. He expanded his earlier argument by outlining the impact that the CCC Act might have on the existing 'common law' rights of police officers:

The [CCC] Act says nothing about how the process of investigation is to be carried out until... it provides mechanisms by which people may be compelled to participate.

There may be a formal process of examination of witnesses, and it does not matter whether they attend voluntarily or in obedience to a summons or notice to produce procedure. What is usually described as public interest immunity is abrogated, but otherwise all the ordinary privileges and immunities afforded by the law to a witness in court proceedings are preserved expressly. ...

96 Mr George Tilbury, President, WA Police Union, *Transcript of Evidence*, 4 December 2013, p4.

97 Mr George Tilbury, President, WA Police Union, Letter, 20 January 2014.

98 Joint Standing Committee on the Corruption and Crime Commission, Report 12- *WA Police Union complaint in regard to the partiality of the Parliamentary Inspector of the Corruption and Crime Commission*, May 2014. Available at: [www.parliament.wa.gov.au/Parliament/commit.nsf/\(Report+Lookup+by+Com+ID\)/2D6528B5C2C6838D48257CD1001B3DCC/\\$file/Report+12--+WAPU+complaint+re+PICCC-+Final+May+2014.pdf](http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/2D6528B5C2C6838D48257CD1001B3DCC/$file/Report+12--+WAPU+complaint+re+PICCC-+Final+May+2014.pdf). Accessed on 8 May 2014.

99 *Ibid*, p8.

Chapter 4

*The Act modifies to some extent the application of the common law privileges in relation to the use of its compulsory processes. It says nothing at all about the application of those rights and privileges where the person concerned has voluntarily participated in the process of investigation. They must remain fully available, including the right to silence and the privilege against self-incrimination in subsequent proceedings in a court.*¹⁰⁰

This issue of the interaction between the common law and the CCC Act is discussed further in the next chapter.

Evidence from CCC Commissioner

In light of the differing interpretations of the CCC Act from the WAPU and PICCC on the privilege of police when providing information to the CCC in voluntary interviews, the position of the former CCC Commissioner was sought during his hearing with the Committee on 9 September 2013. Mr Macknay replied:

*There is nothing in the Corruption and Crime Commission Act 2003 that provides any form of privilege for answers given in a voluntary interview in the same way that our Act provides certain limitations on the use that can be made of answers given during a sworn examination, for example, where there is a limited use that can be made. For example, in criminal proceedings the answers that a person gives in the course of a sworn examination under the Corruption and Crime Commission Act 2003 cannot be led in evidence by a prosecution.*¹⁰¹

Mr Macknay said, in regard to the High Court's decision in *X7 v Australian Crime Commission* that was handed down in June 2013¹⁰², he took a more conservative approach than the PICCC on what this judgement meant for the operation of the CCC Act:

What I said to you earlier, with respect to [the PICCC], would still currently be my view; that is, there is nothing in the [CCC] Act that speaks of voluntary examinations and, therefore, nothing that one

100 Hon Michael Murray, QC, Parliamentary Inspector, Letter, 28 March 2014, pp2-3.

101 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 September 2013, p4.

102 *AustLII, X7 v Australian Crime Commission [2013] HCA 29 (26 June 2013)*, 8 August 2013. Available at: www.austlii.edu.au/au/cases/cth/HCA/2013/29.html. Accessed on 6 February 2014.

*could immediately say creates a privilege in relation to unsworn interviews.*¹⁰³

Advice from the Director of Public Prosecutions

On 25 October 2013, the Committee wrote to Mr Joseph McGrath SC, Director of Public Prosecutions, and said that it would be grateful to hear from him regarding his interpretation of this matter. In particular, the Committee enquired whether or not he shared the view of the PICCC that statements voluntarily given by police officers to the CCC attracted the same protections available at law as would be available had the statement been provided under compulsion.

The DPP replied in December 2013 (see Appendix Six) and, while not making “comment in respect to policy questions as to whether police officers should or should not provide answers to the Corruption and Crime Commission in the absence of a compulsory examination”, said:

*In circumstances where a privilege is not afforded to a witness pursuant to section 145 of the Act (that is, the witness was not subject to compulsion), the State of Western Australia may use the answers provided by that person (if otherwise, admissible) in its entirety in prosecuting that person for any criminal offence.*¹⁰⁴

Finding 8

The former Corruption and Crime Commissioner and the Director of Public Prosecutions concur that no privilege is provided in the *Corruption and Crime Commission Act 2003* for police being interviewed voluntarily by the Corruption and Crime Commission.

The DPP later discussed his views on the impact on the common law rights of police attending CCC voluntary interviews in his hearing with the Committee on 7 May 2014. His views and that of the PICCC on this issue are outlined in the next chapter.

Joint CCC-WAPOL submission to the Attorney General

In a public hearing with the Joint Standing Committee in November 2013 on another matter, the WA Police Commissioner, Dr Karl O’Callaghan, told the Committee that he and the CCC Commissioner had agreed to meet to prepare a joint approach to the Attorney General (AG) with a view to amending the CCC Act. This amendment would provide a specific reference to allow anything provided by police in a voluntary

103 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 September 2013, p5.

104 Mr Joseph McGrath, SC, Director of Public Prosecutions, Letter, 18 December 2013, p2.

Chapter 4

interview with the CCC not to be used in a criminal prosecution. Dr O’Callaghan said “[o]nce we get that amendment in place, I think that will solve the problem.”¹⁰⁵

In a reply to the Committee about the preparation of a suitable amendment to the CCC Act, the then-CCC Commissioner said that the proposed amendment was based on existing legislation being considered by Parliament:

*The form of the Custodial Legislation (Officers Discipline) Amendment Bill 2013, currently before the Parliament of Western Australia, could be a useful model for any amendment.*¹⁰⁶

Subsections (5) and (6) of section 101 ‘Removal action’ of this Bill state:

(5) The prison officer is not excused from giving information, answering any question or producing a document when required to do so under subsection (4) on the ground that the information, answer or document might —

(a) incriminate the prison officer; or

(b) render the prison officer liable to a disciplinary measure under Division 2 or removal under this Division.

*(6) The information, answer or document is not admissible in evidence against the prison officer in any criminal proceedings except in proceedings for an offence under subsection (7).*¹⁰⁷

In a letter on 14 January 2014, the Police Commissioner confirmed to the Committee that the CCC had prepared a draft submission to the AG and that he was hopeful the AG “will be supportive of the proposed measures”. Dr O’Callaghan also said that both he and the then-CCC Commissioner “have agreed that these voluntary interviews are a valuable investigative tool for the Commission, and therefore the presence of police officers is often vital to the work undertaken by the Commission.”¹⁰⁸

On 20 February 2014 the then-CCC Commissioner provided the Committee with a copy of the draft paper it proposed to forward to the Attorney General, and which they had provided to the Police Commissioner on 11 December 2013 (see Appendix Seven). Rather than creating a privilege on evidence given by police during voluntary interviews

105 Dr Karl O’Callaghan, Commissioner, WA Police, *Transcript of Evidence*, 13 November 2013, p11.

106 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Letter, 12 December 2013.

107 Parliament of Western Australia, *Custodial Legislation (Officers Discipline) Amendment Bill 2013*, 20 November 2013, p7. Available at: [www.parliament.wa.gov.au/Parliament/bills.nsf/203C01673C352E7E48257C290020BF32/\\$File/Bill047-1B.pdf](http://www.parliament.wa.gov.au/Parliament/bills.nsf/203C01673C352E7E48257C290020BF32/$File/Bill047-1B.pdf). Accessed on 17 February 2014.

108 Dr Karl O’Callaghan, Commissioner, WA Police, Letter, 14 January 2014, p1.

with the CCC, the paper proposed legislative amendments that would compel police officers to answer questions during these interviews. This approach reflects the requirement contained in the *Custodial Legislation (Officers Discipline) Amendment Bill 2013* (CLA Bill) for prison officers to answer questions. This additional power would also confer protection on police officers by way of a “direct use immunity such that an answer to a question or a document produced is not admissible against the police officer in any criminal proceedings.”¹⁰⁹ As at the end of July 2014, the CLA Bill has passed through the Legislative Assembly and is at the second reading stage in the Legislative Council.¹¹⁰

Commissioner Macknay told the Committee in January 2014, “[t]he Commission is awaiting a formal response from the Commissioner of Police although I am informed Commission officers have been informed verbally of the Commissioner of Police’s support.”¹¹¹ Police Commissioner O’Callaghan wrote to the Committee on 7 March 2014 and said:

*WA Police has now reviewed the draft Submission from the Corruption and Crime Commission and we have indicated our support for their proposals in relation to giving greater protection to police officers participating in voluntary interviews before the Commission. I am hopeful that the drafting of the necessary legislative reforms will commence shortly, subject of course to the Commission’s proposal being supported by the Attorney General and being approved by Cabinet.*¹¹²

The Committee is not aware whether either the CCC or WAPOL has discussed the proposed amendment with the WA Police Union. The former CCC Commissioner told the Committee that the amendment was “specifically for police officers” and:

...at the moment there is provision in the Police Regulations for interview of police officers not on caution, but a compulsory interview. The Commission has never had that power, but there seemed no reason why it ought not have that power. After discussions with the

109 Mr Paul O’Connor, Director Legal Services, Corruption and Crime Commission, Letter, 11 December 2013, p1.

110 Parliament of Western Australia, *Custodial Legislation (Officers Discipline) Amendment Bill 2013*, 2014. Available at: www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=203C01673C352E7E48257C290020BF32. Accessed on 6 August 2014.

111 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, Letter, 19 January 2014, p1.

112 Dr Karl O’Callaghan, Commissioner, WA Police, Letter, 7 March 2014, p1.

Chapter 4

*Attorney General and the Minister for Police, we put forward a draft proposal for amendments to WA Police.*¹¹³

Commissioner Macknay justified the preparation of the amendment being focused on police officers rather than all of Western Australia's public officers as:

Police officers have great powers and they have great responsibilities, and I think it is easy to argue that their obligation to give an account is awfully substantially higher than it is for somebody sending the mail out in the finance department.

*... For example, two police officers are present when there is interaction between one of them and a citizen. The only person who is present apart from the two participants in the action is the other police officer. In my view— it is only a personal view— it would be hard to argue against the proposition that that police officer ought be required to provide information as to what he or she observed.*¹¹⁴

During the 2012-13 financial year, the CCC received 3,087 allegations in relation to the activities of WA police officers, of which 361 related to the alleged excessive use of force.¹¹⁵ The CCC argued (see Appendix Seven) that one of the purposes of the proposed amendment was to enable the continuation of interviews by CCC staff not conducted under section 96(3) of the CCC Act to help speedily resolve most of these allegations:

*This may involve speaking to the officer the subject of the allegation, in addition to his or her colleagues who may have been present at or who may have witnessed the alleged incident. These conversations are voluntary and typically take place at an early phase of the investigation. Frequently this process reveals sufficient credible information enabling the investigators to be satisfied that the allegation cannot be substantiated enabling the investigation to be completed with minimal disruption to police operations, providing certainty for the officer the subject of the investigation and closure for the complainant.*¹¹⁶

113 Mr Roger Macknay, QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 19 February 2014, p15.

114 *Ibid*, pp16-17.

115 Corruption and Crime Commission, *Annual Report 2012-2013*, 27 September 2013, Table 4, p11. Available at:

www.ccc.wa.gov.au/Publications/Reports/Annual%20Reports/Corruption%20and%20Crime%20Commission%20Annual%20Report%202012-2013.pdf. Accessed on 6 August 2014.

116 Mr Paul O'Connor, Director Legal Services, Corruption and Crime Commission, Letter, 11 December 2013, p2.

Acting Commissioner Mr Christopher Shanahan SC confirmed to the Committee that the joint submission prepared by the CCC and supported by WAPOL had been provided on 19 February 2014 to the Senior Policy Officer of the Department of the Attorney General (DoTAG) who is responsible for the coordination of the preparation of drafts of Bills for Ministers. He said that as at 18 July 2014, “[t]he Commission has not received any formal response from DoTAG, or the Attorney General, in relation to this matter.”¹¹⁷

Finding 9

The Police Commissioner and the former Corruption and Crime Commissioner prepared a joint submission to the Attorney General on 19 February 2014 to amend the *Corruption and Crime Commission Act 2003* (CCC Act) to create a privilege on evidence given by police when they are compelled to answer questions during interviews with the Corruption and Crime Commission that are not undertaken under section 137 of the CCC Act.

The joint proposal to amend the CCC Act to allow the CCC to continue its voluntary interviews with police officers (see Appendix Seven) does not contain the proposed wording of any amendment, but refers to the *Custodial Legislation (Officers Discipline) Amendment Bill 2013*, currently before the Parliament. In this Bill, the authority to require prison officers to attend an interview is provided to the Department of Corrective Service’s Chief Executive Officer in section 101(3) and (4):

(3) The chief executive officer may conduct any necessary investigation to determine a prison officer’s suitability to continue as a prison officer.

(4) For the purpose of the investigation the chief executive officer may require the prison officer to do all or any of the following —

(a) provide the chief executive officer with any information or answer any question that the chief executive officer requires;

*(b) produce to the chief executive officer any document in the custody or under the control of the prison officer.*¹¹⁸

117 Mr Christopher Shanahan SC, Acting Commissioner, Corruption and Crime Commission, Letter, 18 July 2014, p3.

118 Parliament of Western Australia, *Custodial Legislation (Officers Discipline) Amendment Bill 2013*, 2014, p7. Available at: [www.parliament.wa.gov.au/Parliament/Bills.nsf/203C01673C352E7E48257C290020BF32/\\$File/Bill047-1B.pdf](http://www.parliament.wa.gov.au/Parliament/Bills.nsf/203C01673C352E7E48257C290020BF32/$File/Bill047-1B.pdf). Accessed on 6 August 2014.

Chapter 4

The purpose of this section of the CLA Bill is to allow the CEO to remove a prison officer from the prison service, in a similar fashion to the Police Commissioner's powers to remove a police officer in which he has lost confidence.

In a similar fashion, the CCC Act provides the Commissioner with the power to compel a public officer to attend a compulsory hearing and, under a criminal caution, answer any question and provide any document. The Commissioner attends the hearing to ensure judicial fairness. Section 14(1)(b) and (c) of the CCC Act allows these powers of the Commissioner to be delegated to an Acting Commissioner only when the Commissioner "is unable to perform the functions of that office or is absent from the State".¹¹⁹

The CCC's voluntary hearings are currently undertaken by two CCC officers, without a criminal caution and with audio-only recording of the interviews (see the discussion in the next chapter on these issues and the admissibility of evidence from these interviews). It would be a significant extension of the CCC's current powers if, under the joint proposal made by the Police Commissioner and the former CCC Commissioner, its officers were delegated powers to compel the State's police officers to attend 'voluntary' hearings with neither the Commissioner nor Acting Commissioner in attendance.

Recommendation 1

The Attorney General should reject the proposed amendment to the *Corruption and Crime Commission Act 2003* (CCC Act) made by the Police Commissioner and the former CCC Commissioner that seeks to create a privilege on evidence provided when police officers are compelled to answer questions during interviews with the Corruption and Crime Commission. Instead the Attorney General should amend the CCC Act to create a new class of voluntary interviews which creates a privilege on evidence provided when police officers answer questions during interviews with the Corruption and Crime Commission.

If the Attorney General accepts the Committee's recommendation, the CCC would have three options to interview police:

1. A section 137 compulsory private or public examination before a Commissioner or Acting Commissioner;
2. A voluntary private interview undertaken by CCC staff wherein the evidence given would be privileged as against the interviewee; or

¹¹⁹ AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s14.html. Accessed on 6 August 2014.

3. A voluntary private interview undertaken by CCC staff during which a criminal caution is given and the evidence may be used against the interviewee.

Chapter 5

Intersection of the CCC Act with the common law

...no witness or person examined or questioned before the CCC who participates voluntarily in that process is going to find themselves in a worse position than if they were compulsorily required to cooperate in the process. Parliamentary Inspector, Hon Michael Murray QC.

Introduction

The Parliamentary Inspector, Hon Michael Murray QC, expanded his argument of the impact that the CCC Act might have on the ‘common law’ rights of police appearing at CCC interviews when he wrote to the Committee in late March 2014:

The Act modifies to some extent the application of the common law privileges in relation to the use of its compulsory processes. It says nothing at all about the application of those rights and privileges where the person concerned has voluntarily participated in the process of investigation. They must remain fully available, including the right to silence and the privilege against self-incrimination in subsequent proceedings in a court.¹²⁰

The PICCC’s correspondence on this matter was provided, with his approval, to the DPP to allow him to provide evidence to the Committee about his views at a closed hearing on 7 May 2014.

The DPP’s evidence on the common law

The DPP provided evidence in regard to the PICCC’s views on the application of common law to the matter of voluntary interviews, that:

...in that sense I agree with the Parliamentary Inspector. If a citizen is asked by an investigator, whether the investigator is a member of the Western Australian police service or the Corruption and Crime Commission, to attend and answer questions voluntarily, that citizen can decline in exercise of their rights. If they commence an interview and questions are asked to which they do not wish to provide an answer, they can claim a privilege and say “I do not wish to answer

120 Hon Michael Murray, QC, Parliamentary Inspector, Letter, 28 March 2014, pp2-3.

Chapter 5

this question” and it is not possible for the interviewer to compel an answer. That is clear.

And that can be contrasted to when a person is compelled to attend a court of law in Western Australia, where a person may incriminate themselves, the judge will direct using section 11 of the Evidence Act 1906 that an answer should be provided and that if the answer is understood to be a fulsome, truthful answer then there will be an immunity in respect to which that answer can be used against that person. That is, that witness could not be prosecuted for the underlying offending they have disclosed.

That type of immunity does not apply in the record of interview conducted by an investigator. If a person chooses to answer a question voluntarily, then that answer, if otherwise admissible, would be used by the Office of the Director of Public Prosecutions during evidence in chief to prosecute that person if an offence is being alleged.¹²¹

The DPP confirmed that section 145 of the *Corruption and Crime Commission Act 2003* provided the framework for CCC compulsory examinations. If a person attends an examination before the Commission and is required to answer a question, then at that point the witness must answer it, “but if the witness is compelled to answer it, then that immunity is provided by that section with the exception, obviously, that it could be used in any contempt proceedings or proceedings under the Act such as perjury or false statement.”¹²² The DPP agreed that in this case the CCC Act abrogates the normal common law right to silence, but retains a privilege against self-incrimination.

For voluntary interviews undertaken by the CCC, the DPP explained:

...in the vast majority of cases where any citizen is asked by a police officer or member of the Corruption and Crime Commission to provide assistance or information, they are being asked to do so as a citizen who in no shape or form is a suspect and would never be a suspect. An illustration may be, anyone of us may see within government or the public service or within my office, that a wayward officer is engaging in fraud.

The Corruption and Crime Commission would speak to a large number of people in my office, including me, about what did they hear, what did they see, how did I have compliance and to provide bank statements. They may wish to speak to me about it. As a citizen,

121 Mr Joseph McGrath, SC, Director of Public Prosecutions, *Transcript of Evidence*, 7 May 2014.

122 *Ibid.*

ordinarily, we provide and assist in respect to that. But, of course, if a person is interviewed in respect to it and says things and then to the extent of the investigation and what is being alleged, then any utterance could be used against them. ...

I do stress that, as I said, in the vast majority cases, we all as citizens do speak to police. If a police officer speaks to someone who they have a reasonable suspicion may be an offender, then there is under the Criminal Investigation Act, certain obligations that it should be electronically recorded to make it admissible. But once again if the citizen is spoken to not as a suspect, provides a statement, provides information and subsequently is found to be involved with the offence or an offence, it would be used against them.¹²³

The DPP said that if a person was being interviewed by a CCC or WAPOL investigator, and there was a reasonable suspicion that the person might have committed some misconduct or crime, there was an obligation under Part 11, sections 115-124 of the *Criminal Investigation Act 2006*¹²⁴ on the investigator to make an 'audiovisual' record of the interview:

The obligation arises when the investigator has a person as a suspect and there is a reasonable suspicion, then certain rights are afforded. Under the Criminal Investigation Act, number one is it should be electronically recorded. If a police officer speaks to a suspect and does not electronically record it, then it would ordinarily be inadmissible unless there is a reasonable excuse.¹²⁵

For public officers, such as police, who agree to a voluntary interview with the CCC, the DPP said:

If an answer is given in a voluntary record of interview and that is otherwise admissible— for example, accorded with certain requirements— then the person has chosen to provide that answer and it would be admissible against that person or could be used in other ways, so they have chosen to abrogate their [common law] right.

... In many respects a person has the right to say, "I'm not answering this." But if any one of us would ask the question, "Do I need to exercise a right of self-incrimination? Do I have any concerns?", if you say "No" and choose to provide an answer and you were wrong in your

123 Ibid.

124 AustLIi, *Criminal Investigation Act 2006*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cia2006243/. Accessed on 21 July 2014.

125 Mr Joseph McGrath, SC, Director of Public Prosecutions, *Transcript of Evidence*, 7 May 2014.

Chapter 5

*determination, then they have got the fruits of your answers and it could be used.*¹²⁶

Finding 10

The Director of Public Prosecutions agrees with the Parliamentary Inspector that police officers and other public officers have a common-law right not to participate in voluntary interviews with the Corruption and Crime Commission.

The DPP agreed that his view on the possible later use of answers given in voluntary interviews to the CCC put him at odds with the view of the PICCC:

...my view is somewhat different, but I agreed with him to the extent that for a citizen these rights still exist. It could be said this: how is a police officer, who is being spoken to as a witness or suspect, any different from any other citizen? If the Corruption and Crime Commission speaks to a public servant who has allegedly engaged in fraud and gives a record of interview and goes ahead, then that record of interview would be used, if voluntarily given, by my office in prosecuting on behalf of the State.

*It would not be that the citizen or the public servant could come to the court room later and say, "I am now claiming privilege in respect to my voluntary record of interview." I see the issues surrounding police officers similar to citizens and apply a broad approach. It is a matter of statutory interpretation. But I do certainly agree with the Parliamentary Inspector that police officers and citizens have this right not to participate in this use of non-coercive powers.*¹²⁷

The DPP later clarified his earlier evidence to the Committee, in regard to the later use of statements made by police in voluntary interviews with the CCC, when he returned his corrected hearing transcript to the Committee:

I reiterate that the voluntary record of interview conducted by the CCC must be otherwise admissible.

I also reiterate that the using of the statement in the voluntary interview against the officer in subsequent proceedings must be understood to be a reference to proceedings in which the police officer is a respondent or defendant (or the accused person in criminal proceedings). That is, the police officer is a party to the proceedings.

126 Ibid.

127 Ibid.

If a police officer voluntarily provides a record of interview to the Corruption and Crime Commission and then is called solely as a witness by a party to the proceedings (whether by the prosecution or defence) that police officer may be cross-examined by counsel for a party to the proceedings by using the statement of the police officer made in the voluntary record of interview.

In that narrow sense the voluntary record of interview is being used against the police officer in that officer's capacity as a witness in someone else's proceedings by way of cross-examination to impugn their credibility pursuant to section 21 of the Evidence Act 1906.¹²⁸

My evidence to the Committee was based on the understanding that when the counsel for the Police Union gave advice that any statement made by the officer in the voluntary interview may be used against the officer in subsequent criminal or civil proceedings that was a reference to the circumstance in which the police officer is a party to the proceedings (that is the defendant, accused or respondent).

The voluntary interview, which is admissible, would be used by the Office of Director of Public Prosecutions as part of the prosecution case against the police officer by leading that interview in the evidence in chief of the investigating officer who conducted the interview. Further, if the police officer then gave evidence in chief in his defence, the prosecutor could use the interview in cross examining the officer.¹²⁹

Finding 11

The Director of Public Prosecutions (DPP) agrees with the advice provided by the independent counsel for the WA Police Union of Workers, but disagrees with the Parliamentary Inspector, that if police officers and other citizens agree to participate in voluntary interviews with the Corruption and Crime Commission then any statements they provide do not have a common law privilege against self-incrimination. The DPP confirmed that statements given in voluntary interviews may in fact be used by the Office of the DPP in later prosecutions in which the police officer is a party to the proceedings, and if they have been conducted in line with provisions of the *Evidence Act 1906* and the *Criminal Investigation Act 2006*.

128 See AustLII, *Evidence Act 1906*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/ea190680/. Accessed on 21 July 2014.

129 Mr Joseph McGrath, SC, Director of Public Prosecutions, Letter, 19 May 2014.

Evidence from the Parliamentary Inspector

At the commencement of his hearing in June 2014, the PICCC stated his position clearly that:

The point I have been concerned to make is a simple one really; it is that no witness or person examined or questioned before the CCC who participates voluntarily in that process is going to find themselves in a worse position than if they were compulsorily required to cooperate in the process.

It would be an extraordinary outcome in my view, that if somebody was prepared to participate voluntarily, they would find that they were actually in a worse position legally and in relation to the admissibility of evidence at any subsequent proceedings than if they required the Commission to use coercive processes to get them to participate.¹³⁰

The PICCC had previously referred to the High Court's *X7 v Australian Crime Commission* [2013] HCA 29 case¹³¹ in his evidence to the Committee, but at this later hearing he referred to a more recent High Court decision, *Lee v The Queen* [2014] HCA 20.¹³² This case involved the New South Wales Crime Commission undertaking compulsory examinations in December 2009 for the purpose of aiding the investigation of serious and organised crime, and not for the purposes of prosecution. The transcripts were later used by the NSW DPP to lay charges.¹³³

The PICCC clarified that in his earlier correspondence with the Committee he was "endeavouring to make in qualification and refutation of the [bold] statement made in the correspondence that came from the union".¹³⁴ He quoted from the HCA *Lee v The Queen* [2014] decision that for common law rights to be removed, then the legislation needed to state this clearly:

... would be to depart from the accusatorial nature of the criminal justice system in a fundamental respect. Clear words or those of

130 Hon Michael Murray, QC, Parliamentary Inspector, *Transcript of Evidence*, 18 June 2014.

131 AustLII, *X7 v Australian Crime Commission* [2013] HCA 29, 26 June 2013. Available at: www.austlii.edu.au/au/cases/cth/HCA/2013/29.html. Accessed on 6 February 2014.

132 AustLII, *Lee v The Queen* [2014] HCA 20, 21 May 2014. Available at: www.austlii.edu.au/au/cases/cth/HCA/2014/20.html. Accessed on 22 July 2014.

133 Rule of Law Institute of Australia, *HCA delivers formidable judgment against unlawful use of Crime Commission evidence*, 21 May 2014. Available at: www.ruleoflaw.org.au/hca-formidable-in-lee/. Accessed on 22 July 2014.

134 Hon Michael Murray, QC, Parliamentary Inspector, *Transcript of Evidence*, 18 June 2014.

*necessary intendment were therefore necessary and neither were present in the legislation in question.*¹³⁵

In this recent decision, the HCA also referred to the earlier X7 case:

*Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in X7. The principle is so fundamental that "no attempt to whittle it down can be entertained" albeit its application may be affected by a statute expressed clearly or in words of necessary intendment. The privilege against self-incrimination may be lost, but the principle remains. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice.*¹³⁶

The PICCC referred the HCA decisions back to the case of a police officer called before the CCC:

They may take the privilege against self-incrimination unless they are compulsorily required to be there, and in that case section 145 and, for the notice process, section 94 govern the situation, otherwise they may take the privilege, and their entitlement not to answer in that regard before the CCC is completely preserved.

*The other aspect then is that if they choose to answer then I think it is clear that the courts would not automatically prevent or at all prevent the raising of the privilege against self-incrimination in later proceedings. It seems to me that that would be in the category of the 'dirty trick', which the law of evidence would not contemplate, that because you cooperate in the context of one process it means that you have fatally screwed yourself for all future processes.*¹³⁷

The PICCC agreed with the DPP on the need for a caution to be given as one essential factor to ensure any evidence taken in an interview could be used at a later date, but disagreed with the DPP's assertion that if a police officer agreed to a voluntary interview they had forgone their privilege against self-incrimination:

135 High Court of Australia, *Lee v The Queen* [2014] HCA 20, 21 May 2014. Available at: www.lexisnexis.com.au/aus/services/high_court/201403674.pdf, pp9-10. Accessed on 22 July 2014.

136 Ibid, pp10-11.

137 Hon Michael Murray, QC, Parliamentary Inspector, *Transcript of Evidence*, 18 June 2014.

Chapter 5

*The point that I have been endeavouring to try to make is that the ordinary protections of the law that come out of these other statutory processes, which are built on the common law, remain in full force—thank God. I think that is the only observation that I would add, and the fact that there is a serious accusation made I think makes it even more important that the processes which safeguard the rights of the individual before the law are left in full force and effect.*¹³⁸

According to the PICCC:

*...the view that is held in common by both the DPP and myself, that the statements that the witness makes would only be admissible against them in the limited and highly controlled circumstances which now apply under the Criminal Investigation Act and the Evidence Act.*¹³⁹

That is, the DPP and PICCC both agree that police officers need to be given a criminal caution by CCC staff at the commencement of voluntary interviews, and the interviews should be electronically recorded on video equipment. The principle of the need for a caution has long been recognised by Australian Courts.¹⁴⁰

CCC practice in conducting voluntary interviews

Given the common evidence from both the PICCC and the DPP on the need for a criminal caution to be given to interviewees, and for any voluntary interview to be audiovisually recorded, the Committee sought advice from the CCC on their 'normal practice' of conducting voluntary interviews with police officers. Acting Commissioner Shanahan SC replied that:

*The Commission seeks to conduct voluntary interviews with WAPOL officers for the purposes of an investigation of alleged misconduct or of matters concerning reviewable police action. In those circumstances **it is not standard practice** for the Commission to issue a criminal caution at the commencement of the interview.*

*It is standard practice for the Commission **to make an audio-recording of voluntary interviews** with WAPOL officers for the purposes of an investigation of alleged misconduct or of matters concerning*

138 Ibid.

139 Ibid.

140 For example, see AustLII, *Lee v R* [1998] HCA 60, 30 September 1998. Available at: www.austlii.edu.au/au/cases/cth/HCA/1998/60.html. Accessed on 6 August 2014.

*reviewable police action, but not a video-recording. (emphasis added)*¹⁴¹

The DPP in his evidence to the Committee addressed the possible scenario whereby a person undertaking a voluntary interview without a criminal caution might then provide information that creates the reasonable suspicion that an offence has occurred:

If a person has been spoken to and there is no basis for a suspicion and they are not being interviewed as a suspect, and that is held to be bona fide, and then subsequently more information comes forward, that interview ordinarily would be admissible. If you are referring to a situation where halfway through it occurs, then at that point the investigator should commence either recording or give a caution and approach it in that way. ...

*Rarely would that occur, Mr Chairman, because ordinarily there would not be some 'golden information' arising during that. It often is the case that someone might provide a voluntary record of interview, and subsequently more information becomes available.*¹⁴²

It is not standard practice for the Corruption and Crime Commission to issue a criminal caution at the commencement of a voluntary interview with a police officer. The evidence from both the Director of Public Prosecutions and the Parliamentary Inspector is that a lack of a criminal caution is likely to ensure that any evidence gathered in such a voluntary interview would not be admissible in later court proceedings.

Finding 12

It is not standard practice for the Corruption and Crime Commission to issue a criminal caution at the commencement of a voluntary interview with a police officer. This is likely to ensure that any evidence gathered would not be admissible in later court proceedings.

141 Mr Christopher Shanahan, SC, Acting Commissioner, Corruption and Crime Commission, Letter, 18 July 2014, p2.

142 Mr Joseph McGrath, SC, Director of Public Prosecutions, *Transcript of Evidence*, 7 May 2014.

Chapter 5

The PICCC raised with the Committee the need for any evidence from interviews that were to be used in later court proceedings to be not only done under caution, but that they needed to be videoed as well to ensure that they were not conducted under coercion:

I think the processes are there because the law has wanted to take a very careful stance about the use of evidence of guilt against the person while making a statement by that person. The other aspect of it, of course ... is that the law goes on to say that the statement must be made in a form which is independently verifiable, so it must be videoed. You must be able not only to hear the person making the statement speak, but also see them and the surroundings and see that there is material which negates any pressure, undue influence or anything of that kind.¹⁴³

The PICCC said that this legal requirement for video recordings could be departed from but:

...you could only do so if there are reasonable grounds for the conclusion that it was impracticable to use the video procedure. I cannot imagine that any inquiry or investigation by CCC officers would be able to get up on that basis.¹⁴⁴

Finding 13

The Parliamentary Inspector's opinion is that the use of audio-only recordings of voluntary police interviews by the Corruption and Crime Commission is likely to lead to the evidence being found to be inadmissible in later court proceedings.

While the PICCC and DPP provided their opinions on the need for a caution and the audiovisual recording of interviews to ensure that any evidence is admissible in later proceedings, the question of the admissibility of evidence is not clear-cut. This was a key consideration in the recent decision from *Wright -V- The State of Western Australia* [2010] WASCA 199.¹⁴⁵ In this judgement, Justice McLure discussed the statutory requirements of the *Criminal Investigation Act 2006* and the common law rights of people being interviewed by police:

The position in relation to the discretion to exclude on the grounds of unfairness or public policy is not as clear. If the only matter relied on was a contravention or contraventions of the Act, there must be no

143 Hon Michael Murray, QC, Parliamentary Inspector, *Transcript of Evidence*, 18 June 2014.

144 Ibid.

145 AustLII, *Wright -V- The State of Western Australia* [2010] WASCA 199 (27 October 2010), 11 November 2010. Available at: www.austlii.edu.au/au/cases/wa/WASCA/2010/199.html. Accessed on 7 August 2014.

*scope for the application of the common law discretion. That may also be so if all matters relevant to the exercise of the common law discretion were relevant to the statutory discretion in s 155.*¹⁴⁶

Section 155 of the *Criminal Investigation Act 2006* allows courts to not exclude evidence even if it may be seen as inadmissible as it does not meet the statutory requirements of the earlier sections 107 to 108 on the admissibility of evidence, and sections 116 to 124 on the conduct of interviews:

(1) This section applies if under another section a court may make a decision under this section in relation to evidence that is not admissible in proceedings in the court.

(2) The court may nevertheless decide to admit the evidence if it is satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.

(3) In making a decision under subsection (2) the court must take into account —

(a) any objection to the evidence being admitted by the person against whom the evidence may be given;

(b) the seriousness of the offence in respect of which the evidence is relevant;

(c) the seriousness of any contravention of this Act in obtaining the evidence;

(d) whether any contravention of this Act in obtaining the evidence

—

(i) was intentional or reckless; or

(ii) arose from an honest and reasonable mistake of fact;

(e) the probative value of the evidence;

(f) any other matter the court thinks fit.

*(4) The probative value of the evidence does not by itself justify its admission.*¹⁴⁷

146 Ibid, paragraph 48.

147 AustLII, *Criminal Investigation Act 2006 - Sect 155*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cia2006243/s155.html. Accessed on 7 August 2014.

Appendix One


Letter from WAPU to the Corruption and Crime Commissioner- 22 July 2013

WAPU
WA POLICE UNION OF WORKERS

02269/2013

22 July 2013

Mr R. Macknay QC
Commissioner
Corruption and Crime Commission
186 St Georges Terrace
PERTH WA 6000



Dear Mr Macknay

VOLUNTARY INTERVIEW REQUESTS BY THE CORRUPTION AND CRIME COMMISSION – ADVICE TO MEMBERS


We have received a number of enquiries from Members who are concerned about their rights and options, with respect to requests to participate in voluntary interviews with Officers from the Corruption and Crime Commission (CCC).

Following receipt of advice from independent counsel, WAPU intends to inform Members that:

1. Any statement made by a Police Officer in answer to a question under compulsion cannot be used in evidence against the Officer in subsequent criminal or civil proceedings, but may be used in disciplinary proceedings, proceedings for contempt of the CCC or for offences against the *Corruption and Crime Commission Act*;
2. Officers are not obliged to participate in a voluntary interview with the CCC that is conducted without a notice or summons first being issued to the Officer;
3. Officers have a lawful right to refuse to participate in interviews which are not compulsory;
4. If an Officer voluntarily elects to participate in an interview which is not compulsory, any statements made by the Officer can be used against them in subsequent criminal or civil proceedings;
5. No disciplinary action can be taken against an Officer who exercises their lawful right to refuse to participate in a voluntary interview with the CCC.

Rather than being primarily focussed on an oversight role, it is clear that the CCC is now actively involved in investigations which appear to be undertaken independently of WA Police.

As part of this process, your preferred method of engagement with our Members is to seek participation in voluntary interviews, as outlined above at point 2.

CCC 89952


639 Murray Street West Perth WA 6005 ■ Ph: 08 9321 2155 Fax: 08 9321 2177 ■ ABN 11 005 082 386 ■ admin@wapu.org.au ■ www.wapu.org.au

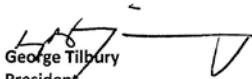
Unless extraordinary circumstances dictate otherwise, it is our view that WA Police should be given the first opportunity to conduct internal investigations, given that Professional Standards personnel possess the requisite knowledge and expertise to deal with all matters involving Police Officers.

Given recent incidents, the belief that our Members should be treated fairly and reasonably and knowing that the CCC and WA Police have adequate powers to compel Police Officers to participate in interviews, WAPU will recommend (as outlined at Point 3) that our Members exercise their rights and decline to participate in all voluntary interviews conducted by the CCC.

This action has been endorsed by the WAPU Board of Directors and is based on sound legal advice.

Prior to advising our Members of their rights, I have extended the courtesy of this early notification to both you and the Commissioner of Police.

Yours sincerely


George Tilbury
President

Corruption and Crime Commission	
	Obj Ref
Commissioner	<input checked="" type="checkbox"/>
Exec. Director	<input checked="" type="checkbox"/>
General Counsel	<input checked="" type="checkbox"/>
Director <i>DO, DDC</i>	<input checked="" type="checkbox"/>
Manager <i>ES</i>	<input checked="" type="checkbox"/>
Case Officer	<input type="checkbox"/>
Other	<input type="checkbox"/>



Commissioner

cc *M. Silverstone, C. McGowan*
S Lynch, M Powell

Appendix Two

Letter from the Corruption and Crime Commissioner to the Police Commissioner - 26 July 2013

00054/2010

  CORRUPTION
AND CRIME
COMMISSION

Your Ref:
Our Ref: RM:MS

26 July 2013

Dr Kari O'Callaghan, APM, Himself
Commissioner of Police
Western Australia Police
2 Adelaide Terrace
EAST PERTH WA 6004

COPY

PRIVATE AND CONFIDENTIAL

Dear Commissioner

WA POLICE UNION OF WORKERS

I refer to the letter to me of 22 July 2013 from the W/A Police Union of Workers (WAPU), a copy of which I enclose. I understand that you may have received a similar letter.

The decision of WAPU to advise its members not to participate in any voluntary interviews conducted by the Commission is already adversely affecting Commission investigations. That advice is a retrograde step and is contrary to the interests of police officers themselves, the Western Australia Police (WAPOL) and the people of Western Australia.

That you are responsible and accountable for preventing and dealing with police misconduct is not a contentious point. Nor is the Commission's role in overseeing the way WAPOL deals with misconduct. This relationship is addressed at sections 7(B)(3), 28 and 32 of the *Corruption and Crime Commission Act 2003* ("the CCC Act").


WAPU's letter contains a number of misperceptions about the Commission's role and how it performs its functions. That the Commission routinely conducts investigations and inquiries independently of WAPOL is a matter of fact.

The CCC Act enables the Commission to conduct investigations, at section 33. Section 34 describes the circumstances in which those investigations might occur. The requirements for the Commission to give particular attention to WAPOL arises from its origins in the Police Royal Commission and a number of reports and recommendations in recent years from the Joint Standing Committee on the Corruption and Crime Commission and the Commission's Parliamentary Inspector. Clearly the conduct of investigations of WAPOL by the Commission was intended by the Parliament and expected by the people of Western Australia.

CORRUPTION AND CRIME COMMISSION

186 St Georges Terrace
PERTH WA 6000
PO Box 7667, Cloisters Square
PERTH WA 6000

Telephone: +61 8 9215 4688
Toll Free: 1800 809 000
Fax: +61 8 9215 4884
1150/2000.wa.gov.au
www.ccc.wa.gov.au

CCC 90089


The Commission has regularly conducted investigations and inquiries independently of WAPOL. Its investigations of such matters as those associated with the wrongful arrest, trial and imprisonment of Mr Andrew Mallard, the treatment of Mr Kevin Spratt in the Perth Watch House and, more recently, of issues associated with former First Class Constable Clinton McDonald's conduct at the Broome Lock-Up are but three prominent examples of this. They are also indicative of the fact that due to the nature of policing from time-to-time allegations of particularly serious misconduct arise that require rigorous, independent investigation. The capacity to conduct such investigations is critical to public confidence in the police.

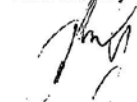
The Commission has frequent interactions with individual police officers. Predominately these interactions are for the purpose of establishing the facts about the conduct of other persons, some of whom are police officers. While the Commission's inquiries may result in adverse consequences for some police officers, overwhelmingly this is not the case for most of those who have contact with it. Not infrequently the Commission's inquiries identify material that supports the appropriateness of police actions. Commission investigations also identify weaknesses or failures in police support systems and processes so that improvements can be made to make the work of police safer and more effective.

The Commission intends to continue to investigate police misconduct. If police officers decline to participate in voluntary interviews then the Commission will use its various powers and conduct more hearings if necessary. This will inevitably slow the work of the Commission but will also likely lead to significant cost and disruption to WAPOL. This is undesirable.

The vast majority of your members do a great job in trying circumstances. There are a small number of officers who act dishonestly or improperly and they need to be dealt with appropriately. WAPU's advice will simply protect police who behave badly while making life more difficult for honest, hard-working officers.

Over the long term the Commission's activities that hold WAPOL and its members to account makes the police more effective and contributes to sustaining public trust and confidence in them. Clearly all police and WAPU expect and deserve community support. It is therefore difficult to understand how WAPU can believe that its recent advice to members can do anything other than erode that support.

Yours faithfully



Roger Macknay, QC
COMMISSIONER



Encl.

cc: Hon. Michael Murray, QC, Parliamentary Inspector of the Corruption and Crime Commission.

Appendix Three

Reply from the Corruption and Crime Commissioner to WAPU- 29
July 2013

02269/2013



CORRUPTION
AND CRIME
COMMISSION

Your Ref: -
Our Ref: 02269/2013:MS:MP

29 July 2013

Mr George Tilbury
President
WA Police Union of Workers
639 Murray Street
WEST PERTH WA 6005

COPY

Dear Mr Tilbury

WA POLICE UNION OF WORKERS ADVICE TO ITS MEMBERS

I refer to the WA Police Union of Workers ("the Union") letter to the Corruption and Crime Commission ("the Commission") of 22 July 2013.

The decision of the Union to advise its members not to participate in any voluntary interviews conducted by the Commission is already adversely affecting Commission investigations. That advice is a retrograde step and is contrary to the interests of police officers themselves, the Western Australia Police (WAPOL) and the people of Western Australia.

Your letter contains a number of misperceptions about the Commission and the way it performs its functions.

That the Commissioner of Police, as a chief executive officer, is first and foremost responsible and accountable for preventing and dealing with police misconduct is not contentious. Nor is the role of the Commission in overseeing the way WAPOL deals with misconduct. Sections 7B(3), 28 and 32 of the *Corruption and Crime Commission Act 2003* ("the CCC Act") addresses this relationship.


In accordance with the intention of the CCC Act, WAPOL deals with most complaints concerning police misconduct, albeit while subject to monitoring and review by the Commission. Section 33 of the CCC Act enables the Commission to itself conduct investigations. Section 34 describes the circumstances in which those investigations might occur. The requirement for the Commission to give particular attention to WAPOL arises from its origins in the Police Royal Commission and from a number of reports and recommendations in recent years from the Joint Standing Committee on the Corruption and Crime Commission and the Commission's Parliamentary Inspector. Clearly the conduct of investigations of WAPOL by the Commission was intended by the Parliament and expected by the people of Western Australia.

The Union's letter appears to suggest that the Commission's conduct of investigations of the police is a recent phenomenon. Since its inception the

CORRUPTION AND CRIME COMMISSION

186 St Georges Terrace
PERTH WA 6000
PO Box 7667, Cloisters Square
PERTH WA 6850

Telephone: +61 8 9215 4888
Toll Free: 1800 809 000
Fax: +61 8 9215 4884
info@ccc.wa.gov.au
www.ccc.wa.gov.au

CCC 60071


Commission has regularly conducted investigations and inquiries independently of WAPOL. Its investigations of such matters as those associated with the wrongful arrest, trial and imprisonment of Mr Andrew Mallard, the treatment of Mr Kevin Spratt in the Perth Watch House and, more recently, of issues associated with former First Class Constable Clinton McDonald's conduct at the Broome Lock-Up are but three prominent examples of this. They are also indicative of the fact that due to the nature of policing from time-to-time allegations of particularly serious misconduct arise that require rigorous, independent investigation. The capacity to conduct such investigations is critical to public confidence in the police.

The Commission has frequent interactions with individual police officers. Predominately these interactions are for the purpose of establishing the facts about the conduct of other persons, some of whom are police officers. While the Commission's inquiries may result in adverse consequences for some police officers, overwhelmingly this is not the case for most of those who have contact with it. Not infrequently the Commission's inquiries identify material that supports the appropriateness of police actions. Commission investigations also identify weaknesses or failures in police support systems and processes so that improvements can be made to make the work of police safer and more effective.

The Commission intends to continue to investigate police misconduct. If police officers decline to participate in voluntary interviews then the Commission will use its various other powers and will conduct more hearings if necessary. This will inevitably slow the work of the Commission but will also likely lead to significant cost and disruption to WAPOL. This is undesirable.

The vast majority of your members do a great job in trying circumstances. There are a small number of officers who act dishonestly or improperly and they need to be dealt with appropriately. The Union's advice will simply protect police who behave badly while making life more difficult for honest, hard-working officers.

Over the long term the Commission's activities that hold WAPOL and its members to account makes the police more effective and contributes to sustaining public trust and confidence in them. Clearly all police and the Union expect and deserve community support. It is therefore difficult to understand how the Union can believe that its recent advice to members can do anything other than erode that support.

Yours faithfully




Roger Macknay, QC
COMMISSIONER

cc: Hon. Michael Murray, QC, Parliamentary Inspector of the Corruption and Crime Commission.

Appendix Four

Letter from the Police Commissioner to the Corruption and Crime Commissioner - 5 August 2013


00056/2010



WESTERN AUSTRALIA POLICE
OFFICE OF COMMISSIONER OF POLICE
 POLICE HEADQUARTERS
 8TH FLOOR
 2 ADELAIDE TERRACE, EAST PERTH
 WESTERN AUSTRALIA 6004
 TELEPHONE : (08) 9222 1978
 FACSIMILE : (08) 9222 1717

Your Ref: RM:MS
 Our Ref: EA1046762
 Inquiries:

Commissioner Roger Macknay QC
 Corruption and Crime Commission
 PO Box 7667
 Cloisters Square
 PERTH WA 6850



Dear Commissioner Macknay

WA POLICE UNION OF WORKERS


I refer to your correspondence dated 26 July 2013 expressing concern about a letter circulated by the Western Australian Police Union of Workers (WAPU) to its membership.

The letter advises WAPU members of their right not to participate in voluntary interviews with Corruption and Crime Commission investigators.

Whilst I am sympathetic to the impact of this advice upon the day to day operations of the Corruption and Crime Commission, it is not within my remit to direct the Executive of WAPU as to what advice should be provided to the membership.

You may consider that contact and discussions with the WAPU Board of Directors would be of benefit in allaying your concerns.

Yours sincerely



KARL J O'CALLAGHAN APM
 COMMISSIONER OF POLICE

5 August 2013

Corruption and Crime Commission
 Obj Ref

Commissioner	<input checked="" type="checkbox"/>
Exec. Director	<input checked="" type="checkbox"/>
General Counsel	<input type="checkbox"/>
Director	<input checked="" type="checkbox"/> <i>DD, DDO, DP</i>
Manager	<input checked="" type="checkbox"/> <i>ES</i>
Case Officer	<input type="checkbox"/>
Other	<input type="checkbox"/>

Commissioner

cc M. Silverstone, C. McGowan
J Lynch, R. Watson, M. Powell
J Evans-Roland


Mission Statement: "To enhance the quality of life and wellbeing of all people in Western Australia by contributing to making our State a safe and secure place."

CCG 90138


Appendix Five

Letter from the Parliamentary Inspector to the Corruption and Crime Commissioner - 15 August 2013


02767/2012


**PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

Our ref: 412/13
Your ref: 02269/2013

15 August 2013

Commissioner Roger Macknay QC
Corruption and Crime Commission of Western Australia
PO Box 7667
CLOISTERS SQUARE WA 6850



Dear Commissioner,

RE: WA Police Union of Workers Advice to Members

Thank you for referring the above matter for my information. I agree with you that the advice proposed to be given by the Union to its members concerning their rights when the subject of an investigation by the Commission (CCC) would be unfortunate because it would hinder the timeliness of the process and I cannot see that it would produce any benefit to a police officer who was called upon to assist.


Forgive me for what follows, of which I am sure you are well aware, but I thought it would assist me to grasp the point if I considered the relevant statutory provisions. I was assisted also by reading the judgments of the High Court in the decision delivered on 26 June 2013, *X7 v Australian Crime Commission [2013]HCA 29*. The case is concerned with the point that such legislation will only be interpreted as abrogating protections otherwise provided by the law if that was clearly the legislative intention.

By a majority, Hayne, Kiefel and Bell JJ, French CJ and Crennan J dissenting, the Court held that an examiner appointed under the provisions of the ACC Act could not question a witness about matters into which an inquiry was being held, to the extent that they constituted the subject matter of an offence with which the person had already been charged, because to do so would infringe upon the right to silence and the privilege against self-incrimination which had not been expressly abrogated by the legislation. Of course the position may be different at an earlier stage in the process before any charge has been laid. I attach a copy of the reasons for ease of reference.

The Union says that it is acting consistently with its legal advice, but it seems to me that the position under the CCC Act is clear:

- A witness at an examination is compellable to answer questions which are considered by the Commissioner to be relevant and permissible: s143.
- It matters not that the witness has been summoned to attend or appears voluntarily: s3(1), definition of "witness".

Locked Bag 123, Perth Business Centre, 6849
Telephone: (08) 9264 9570
Email: piccc@piccc.wa.gov.au

CCC 90212


- Legal professional privilege (but not public interest immunity), the privilege against self-incrimination and the like are all preserved: ss147(3), 144, and 223.
- The answers of the witness are not admissible in any criminal or quasi-criminal proceeding, except for contempt of the Commission or otherwise for an offence against the CCC Act: s145.
- The answers are admissible in disciplinary proceedings: s145.
- Outside the area of formal examination, during an investigation into alleged misconduct, etc., the CCC has the power to compel the provision of information, records and other evidentiary material directly by a public officer or by the appropriate authority, by notice or summons: Part 6, Division 1.
- Referral of the matter to an appropriate authority may precede or follow such an investigation, with or without a recommendation as to the action to be taken: ss 33, 37 and 43.
- If a statement is made under compulsion it is inadmissible except to the extent provided by s145: s94, but, of course, it may be used to test the evidence of a witness as a prior inconsistent statement.

Given that an investigation, or evidence as a witness, will not necessarily have the potential to require a declaration against interest or of a confessional nature, and given the retention of relevant privileges and the very restricted admissibility of any information provided in other proceedings, I cannot see the point in adopting a general stance of denial of co-operation with CCC officers.

In light of the fact that information denied upon a request may be obtained by compulsion there would seem to be little point in refusing to co-operate.

Finally, in light of the recent decision of the High Court, I have no doubt that point 4 of the letter dated 22 July from the President of the Union to you is wrong. The CCC Act would not be interpreted as having the effect that the protections otherwise provided by the Act would be lost because the person concerned elected to co-operate with a CCC investigation, rather than hold out until he or she was compelled to do so.

If you were proposing to write further on this subject to the President of the Union and to the Commissioner of Police, you are at liberty to forward a copy of this letter to them or to make such other use of it as you may see fit.

Yours sincerely,


THE HON MICHAEL MURRAY QC
PARLIAMENTARY INSPECTOR

Corruption and Crime Commission	
	Obj Ref
Commissioner	<input checked="" type="checkbox"/>
Exec. Director	<input checked="" type="checkbox"/>
General Counsel	<input type="checkbox"/>
Director <i>LS</i>	<input checked="" type="checkbox"/>
Manager <i>ES</i>	<input checked="" type="checkbox"/>
Case Officer	<input type="checkbox"/>
Other	<input checked="" type="checkbox"/>
<i>J. Wilby</i>	

cc Commissioner, M. Silverstone
 P O'Connor, M Powell, Vicki Walsh

Appendix Six

Letter from the DPP - 18 December 2013



DIRECTOR OF PUBLIC PROSECUTIONS
for WESTERN AUSTRALIA

Level 1, 26 St Georges Terrace, PERTH WA 6000

Office of the Director

Your ref: N/a
Our Ref: JMG:YAB:mf
DPP Related file: 13/355
Contact: Yanina Boschini
Legal Administrator for the Director of Public Prosecutions
Telephone: (08) 9425 3747
Facsimile: (08) 9425 3611
Email: yanina.boschini@dpp.wa.gov.au

The Hon Nick Goiran, MLC
Chairman
Joint Standing Committee
on the Corruption and Crime Commission
Parliament of Western Australia
Parliament House
PERTH WA 6000

Dear Mr Goiran

Clarification on use of statements given by police officers to the CCC

I refer to your letters dated 25 October 2013 and 15 November 2013 respectively.

In your letter of 25 October 2013 you ask whether I "share the view of the Hon. Mr Michael Murray QC that statements given by police officers to the Corruption and Crime Commission attract the same protections available at law as would be available had the statement been provided under compulsion."

In providing a response to your question, I do not make comment in respect to public policy issues regarding whether police officers, on some or on all occasions, when requested to provide answers to an anti-corruption body should do so only when compelled. This is a matter of policy and in respect to which I make no comment. In this regard I have been provided with no information regarding the underlying reasoning of the Police Union.

I have been provided with the following:

1. An extract of the public hearing with the Hon. Mr Michael Murray QC dated 16 October 2013 (being five paragraphs);
2. An extract from the closed hearing of the Commissioner, Mr Roger Macknay QC on 16 October 2013 (being nine paragraphs);

ABN: 33 585 197 892

Ph: (08) 9425 3999 Fax: (08) 9425 3600
Email: dpp@dpp.wa.gov.au

3. A copy of a letter from the Western Australia Police Union of Workers to the Commissioner of the Corruption and Crime Commission dated 22 July 2013.

I have not been provided with the full transcript of the examination of Commissioner Mr Macknay QC. Nor have I consulted Commissioner Mr Macknay QC or the Parliamentary Inspector.

I am unable to discern with clarity the view of the Parliamentary Inspector. I rely upon your interpretation of the Parliamentary Inspector's evidence. Accordingly, I answer the question posed.

I understand that the words "under compulsion" in the question posed is a reference to the compulsory powers of the Commission under Part 6 and Part 7 of the *Corruption and Crime Commission Act 2003*.

Section 94 (5) and section 145 *Corruption and Crime Commission Act 2003* affords a protection to a person subject to the exercise of the compulsory powers by the Commission under Part 6 and Part 7 under the Act.

Sections 94 and 145 are clear in their terms. A statement made by a witness, whether a police officer or not, to a question that the Commission requires the witness to answer is not admissible in evidence against the person making the statement, in any criminal proceedings or proceedings for the imposition of a penalty, other than contempt proceedings, proceedings of offence under the *Corruption and Crime Commission Act 2003*, or a disciplinary action.

Therefore, a witness who is compelled to answer a question is afforded a privilege in respect to the answer given. In contrast, in the absence of the Commission exercising its compulsory powers, a statement voluntarily given is admissible in all criminal proceedings against the person.

In circumstances where a privilege is not afforded to a witness pursuant to section 145 of the Act (that is, the witness was not subject to compulsion), the State of Western Australia may use the answers provided by that person (if otherwise, admissible) in its entirety in prosecuting that person for any criminal offence.

If the witness is compelled to provide answers to the Corruption and Crime Commission then the answers may only be used in cross examination of a witness, in any criminal proceedings, in order to impeach the credibility of the witness. That is, the transcript of the compulsory answers may be used pursuant to section 21 of the *Evidence Act 1906*. That limited use is permitted by section 145(2) of the *Corruption and Crime Commission Act 2003*.

I reiterate that I provide only my interpretation of sections 94(5) and 145 of the *Corruption and Crime Commission Act 2003*. I do not make comment in respect to policy questions as to whether police officers should or should not provide answers to the Corruption and Crime Commission in the absence of a compulsory examination.

- Page 3 -

I note that Commissioner Macknay QC appears, during his hearing of 16 October 2013, to express an interpretation of section 145 that is in accordance with my interpretation of that section.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Joseph McGrath', with a stylized flourish at the end.



Joseph McGrath SC
DIRECTOR OF PUBLIC PROSECUTIONS

18 December 2013

Appendix Seven

Proposed legislative amendment

20054/2010

  CORRUPTION
AND CRIME
COMMISSION

Your Ref:
Our Ref: 00054/2010 PQ/vow

COPY

11 December 2013

Mr Malcolm Penn
Assistant Director
Legal & Legislative Services
Western Australia Police
Police Headquarters
2 Adelaide Terrace
EAST PERTH WA 6004

Dear Mr Penn


PROPOSED LEGISLATIVE AMENDMENT: INVESTIGATORS POWER TO DIRECT ANSWERS

Further to the recent meeting between the Commissioner, the Attorney, the Commissioner of Police and the Minister for Police I enclose for your consideration and comment a paper the Commissioner proposes to forward to the Attorney.

The paper seeks the Attorney's agreement to bring forward a proposed legislative amendment conferring an additional power on Commission investigators to compel police officers to answer questions during interviews. The power would be in addition to existing powers enabling the Commission to issue a notice (requiring written answers to questions or the production of documents) or summons a public officer to an examination in which the officer is compelled to answer questions.

However the additional power will confer protection on police officers by way of a direct use immunity such that an answer to a question or a document produced is not admissible against the police officer in any criminal proceedings.

The Commission seeks the Commissioner of Police's support for the legislative amendments to the *Corruption and Crime Commission Act 2003*.


Yours faithfully

Paul O'Connor
Director Legal Services

Encls

CORRUPTION AND CRIME COMMISSION

186 St Georges Terrace
PERTH WA, 6000
PO Box 7667, Cloisters Square
PERTH WA 6850

Telephone: +61 8 9215 4888
Toll Free: 1800 509 000
Fax: +61 8 9215 4854
info@ccc.wa.gov.au
www.ccc.wa.gov.au

CCC 95441


Purpose

This paper seeks Ministerial endorsement to bring forward a Cabinet Submission seeking approval for a legislative amendment to the *Corruption and Crime Commission Act 2003* (the CCC Act) to confer a power on Commission investigations to compel WA police officers to orally answer questions and to produce documents at that time, notwithstanding that the answers or documents might incriminate them and render them liable to a disciplinary measure.

The proposed amendment is modelled on amendments sought to be effected by the *Custodial Legislation (Officer Discipline) Amendment Bill 2013* (the Bill) which was introduced into the Legislative Assembly on 20 November 2013.

Commission Oversight of Police

The Commission's oversight of police centres around what is defined in the CCC Act as reviewable police action and/or misconduct.

For the 2012-2013 Financial Year the Commission received 3085 allegations in relation to police of which 361 allegations were in relation to "Assault - Excessive Use of Force".

In investigating allegations against police Commission investigators seek information from all persons who may have information which may assist in resolving the allegation. This may involve speaking to the officer the subject of the allegation, in addition to his or her colleagues who may have been present at or who may have witnessed the alleged incident. These conversations are voluntary and typically take place at an early phase of the investigation. Frequently this process reveals sufficient credible information enabling the investigators to be satisfied that the allegation cannot be substantiated enabling the investigation to be completed with minimal disruption to police operations, providing certainty for the officer the subject of the investigation and closure for the complainant. The speedy resolution of such matters adds to the community's confidence in the accountability of the police service and its officers.

The Commission's Current Coercive Powers

If these informal approaches to potential witnesses reveal matters of concern which warrant further inquiry the Commission currently has powers enabling it to progress the investigation into a coercive phase which may involve the issue of a notice to produce a statement of information, or documents, or the summoning of a witness to an examination before the Commission.

Obtaining information by notice is necessarily limited as to its utility.

Examinations are generally held in private although when the Commissioner is satisfied there is sufficient public interest in the subject matter of the investigation the examination may be conducted in public. The Commission's investigation into allegations of excessive use of force by police officers at the Broome Police Station is a recent illustration of the public examination process.

The Commission's Conduct of Examinations

The examination process begins when a witness is served with a summons to attend before the Commission at a nominated time and date. A person who has been served with a summons and fails to attend as required is in contempt of the Commission.

The conduct of an examination entails formality and considerable co-ordination. The examinations must be held before the Commissioner or an Acting Commissioner, and a Commission lawyer or a member of the independent bar is briefed to appear as Counsel Assisting the Commissioner. Witnesses can request legal representation and the proceedings are filmed and a transcript of the proceedings is produced.

Witnesses are compelled to answer all questions as failure to do so would also constitute a contempt of the Commission. Importantly, although a witness may be compelled to answer all questions which may be put by Counsel Assisting, including those the answer to which may tend to incriminate the witness, in such

circumstances, the CCC Act confers the protection of a direct use immunity. Section 145 of the CCC Act relevantly provides that a statement made by a witness in answer to a question that the Commissioner requires the witness to answer is not admissible in evidence against the person in any criminal proceeding or disciplinary action. However, the statement may be used in any civil or criminal proceeding as a prior inconsistent statement.

WA Police Union of Workers Advice to Members

In the course of the Commission's investigation into allegations of excessive use of force by police of the Broome Police Station the WA Police Union of Workers (the union) wrote to its members and encouraged them to decline any request to participate in any voluntary interview with Commission investigators. The union noted that it remained open to the Commission to exercise its coercive powers and to summons union members to an examination under oath.

In response to this advice a number of police officers declined to assist Commission investigators in subsequent investigations. The effect was to frustrate and delay the resolution of those investigations as the Commission was left with no option but to proceed to issue summonses and conduct examinations in order to progress investigations, thereby adding considerably to the duration and cost of the investigation. This outcome is unsustainable having regard to the number of allegations of police misconduct received by the Commission and should it continue the Commission would be frustrated in achieving its function in relation to effective police oversight.

An Additional Power to Compel Answers

To avoid such an outcome, the Commission seeks the power to compel WA police officers to participate in interviews with Commission investigators and to answer any question put in the course of such interviews and to produce any document requested during an interview.

The powers mirror those which are sought by an amendment to the *Prisons Act 1981* to be effected by the *Custodial Legislation (Officers Discipline) Amendment Bill 2013* which was introduced into the Legislative Assembly on 20 November 2013.

The Custodial Legislation (Officers Discipline) Amendment Bill 2013

The Bill seeks to reform the current disciplinary process for prison officers and youth custodial officers with its outdated focus on an adversarial hearing-based process relieving the Department of Corrective Services of the need to hold costly and time-consuming oral hearings.

In the course of the Second Reading of the Bill on 20 November 2013 the Hon J.M. Francis, Minister for Corrective Services said:

The proposed legislative amendments are intended to engender internal and external trust in the corrections system, reduce difficulties and technical delays currently encountered in removing corrupt or seriously disruptive officers and diminish the risk of prison officers and youth custodial officers misusing their special powers.

Public accountability rests on both giving an account and being held to account. Accountability prevents the abuse of power and ensures that power is instead directed towards the achievement of efficiency, effectiveness, responsiveness and transparency. Public sector agencies, such as Western Australia Police and the Department of Corrective Services in particular, are continually subjected to public scrutiny due to the nature of the services they provide to the public. This scrutiny is due to the powers these officers have over members of the public that they serve. One of these powers is the power to use lawful force. The potential for abuse of this power, in itself, demands high standards of accountability. ...

The third significant change proposed in the bill is the subrogation of the privilege against self-incrimination. The proposed amendments mean that a prison officer or youth custodial officer could be compelled to provide information to the Commissioner [of Corrective Services] that might incriminate them when the commission conducts an investigation to determine the suitability of that officer. This provision is included on the grounds of public interest. The Commissioner [of Corrective Services] must be able to obtain any information that may be of concern. ... Safeguards do apply. Importantly, the compelled information will not be used in any other proceedings, and the officer must be advised of the implications of the abrogation, and the relevancy of the required information. ...

Scope of the Proposed Additional Power

The Commission shares the view that agencies such as the Western Australian Police ought to be subject to continual public scrutiny due to the nature of the powers they exercise, especially the power to use lawful force. The Commission also agrees that the potential for abuse of this power in itself, demands high standards of accountability.

The Commission, unlike the Commissioner of Corrective Services, does have the power to require information by notice, and to summons witnesses, including police officers, to attend before the Commission and answer all questions. The Commission, however, seeks an additional power so as to avoid delay, additional costs and the frustration of the achievement of its police oversight function should the union maintain its opposition to its members participating in voluntary interviews.

Direct Use Immunity

The Commission also recommends that the additional power be subject to a direct use immunity similar to that provided in s145 of the CCC Act such that an answer to a question or a document produced is not admissible in evidence against the person in any criminal proceedings or proceeding for the imposition of a penalty other than:

- (i) Contempt proceedings;
- (ii) Proceedings for failing to answer or produce the document; or
- (iii) Disciplinary action.

The answer may, however be used in any civil or criminal proceedings as a prior inconsistent statement.

Agreed/Not Agreed

Hon. Michael Mischin MLC
Attorney General

Appendix Eight

Hearings

Date	Name	Position	Organisation
9 September 2013	Mr Roger Macknay, QC	Commissioner	Corruption and Crime Commission
	Mr John Lynch	Acting Deputy Director, Operations	
	Ms Michelle Harries	General Counsel	
4 December 2013	Mr George Tilbury	President	WA Police Union of Workers
	Mr Brandon Shortland	Vice President	
	Mr Jonathan Groves	Deputy Vice President	
7 May 2014	Mr Joseph McGrath, SC	Director of Public Prosecutions	
18 June 2014	Hon Michael Murray, QC	Parliamentary Inspector of the Corruption and Crime Commission	

Appendix Nine

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.