

**REPORT ON ACTIVITIES IN THE CORRUPTION
AND CRIME COMMISSION RELATING TO
ASSUMED IDENTITIES,
TRAFFIC INFRINGEMENT NOTICES AND
SPECIAL CONSTABLE APPOINTMENTS**

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

4 December 2015

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1 PURPOSE

The purpose of this Report is to inform the Joint Standing Committee for the Corruption and Crime Commission of Western Australia under s 199 and s 201 of the *Corruption, Crime and Misconduct Act 2003 (WA)* (the Act) of the outcome of my investigation of allegations of past abuses within the Operations Support Unit¹ of the Commission, and deficient Commission procedures generally in the activities of assumed identities, the incurring of traffic infringement notices, and the Commission's applications to the Commissioner of Police for the appointment of its officers as special constables.

This Report is made separately from my previous Report into allegations of misconduct in the OSU² because it has involved particular legal and factual issues, systemic abuses and particular procedural deficiencies which have existed over a lengthy period of time, and because the remedial actions taken by the Commission to rectify these problems have required my extended oversight to properly assess their effectiveness and appropriateness.

2 EXECUTIVE SUMMARY

During my previous investigation of allegations of misconduct made against some officers in the OSU, I had cause to investigate particular abuses of power and deficient procedures in the three areas of Commission activities described in Part 1. Common to the abuses and procedural deficiencies were misrepresentations of fact and misstatements of law made to other government agencies.

Assumed identities

An 'assumed identity' is a false identity which may be issued under the Act by the Commission to a Commission officer, and which may be used by the officer in the course of, or incidental to, the performance of his or her duty. Evidence of an assumed identity includes driver's licences, Medicare cards, credit cards, and other documents which record the false particulars assumed by the Commission officer.

The general purpose of an assumed identity is to allow the Commission officer to conceal his or her true identity for operational reasons.

Since June 2014 I have investigated systemic abuses and procedural deficiencies in the OSU, and associated issues generally within the Commission, in this field of activity. The abuses and deficiencies principally related to the:

1. obtaining and use of evidence of assumed identities outside the power granted by the Act, and

¹ Since the time of the events reported on my previous Report, the OSU has been renamed the Investigation Support Services. However, I will in this Report refer to that unit as the OSU to maintain consistency with my correspondence with the Commission to which I will refer.

² My Report in respect these matters is titled *Report on misconduct and related issues in the Corruption and Crime Commission* and was tabled with the Committee on 10 June 2015.

2. conversion of evidence of assumed identities into other forms of evidence of assumed identities outside the power granted by the Act, and the subsequent use of such identities.

The means by which the abuses were carried out were the misrepresentation to licencing agencies in the Australian Capital Territory, and in Tasmania, of the powers of the Commission and of the legal effect of a Commonwealth statute, in order to induce the issuing of driver's licences from those agencies in the assumed identity of Commission officers; and the presentation of those driver's licences to the licencing authority in this State under the pretext of changing domicile to this State to induce the issuing of driver's licences in this State under the assumed identity.

No law authorised the Commission to use either means to achieve the outcome of a driver's licence issued in this State under a Commission officer's assumed identity.

Traffic infringement notices

The incurring by a Commission officer of a traffic infringement notice for an offence committed while driving a Commission vehicle is not a problem within the Public Sector which is unique to the Commission. However, as with all Public Sector organisations, efforts should be made by every Commission officer to abide by the law when driving a Commission vehicle, and when an officer does incur demerit points, they should be recorded against his or her personal driver's licence.

In May 2014 the Police were investigating allegations of criminal conduct by some OSU officers when they discovered, and informed me of, abuses in the OSU's practices and procedures governing the issue of traffic infringement notices. Upon investigation it was discovered that some OSU officers had accumulated, and continued to accumulate, demerit points for traffic offences in excess of the 12 point total necessary to trigger the suspension of a driver's licence, but were using simultaneously held multiple driver's licences possessed under multiple assumed identities to avoid the point accumulation being attributed to any one driver's licence.

This systemic abuse of the assumed identity power resulted in a situation where OSU officers would have been driving Commission vehicles on the State's roads without the legal right to do so had the accumulated demerit points been attributed to the officer's driver's licence held in the officer's natural name. Further, the OSU and the Commission failed to have any records or means by which the OSU's middle, and the Commission's executive, management could instantly assess any OSU officer's total of accumulated demerit points, and therefore the officer's legal right to drive on the State's roads.

During my investigation I discovered that non-OSU Commission officers also possessed multiple assumed identities in the form of driver's licences.

Appointment as a Special Constable

The Commissioner of Police has power under s 35 of the *Police Act 1892 (WA)* to appoint any person as a special constable. He has exercised his power in favour of Commission officers at various times since the inception of the Commission in 2004.

The general purpose of an appointment as a special constable is to confer upon the person the privilege of the powers, duties and obligations of a Police officer, including any authorisation, exemption or exception in any written law (other than the *Police Act*) that applies to a police officer, or to a member of the W.A. Police. When a Commission officer has been appointed as a special constable, the powers, duties and obligations of a police officer are then used by that officer in the execution of his or her duties within the Commission.

In January 2014 the Commissioner of Police provided me with a copy of a letter he had sent to Commissioner Macknay QC in which he protested about an OSU officer who, shortly before an application for appointment as a special constable was made on the officer's behalf by Deputy Director Craig McGowan of the Commission, had been charged by the Police and fined at Fremantle Magistrates Court for possessing a prohibited drug at a public music festival.

The Commissioner of Police's points of protest were, first, that Deputy Director McGowan had represented in his application that a thorough integrity check of the OSU officer had been conducted by the Commission, and that the officer had no criminal convictions or findings of serious misconduct made against him; and, second, that Deputy Director McGowan had made the application, not in the natural name of the officer, but in the officer's assumed identity, without alerting the Commissioner of Police.

The Commission's actions led to the Commissioner of Police cancelling all special constable status authorities issued to Commission officers.

The discovery of these matters led me to investigate the past practices of the Commission in the appointment process for special constable status. My investigation revealed systemic problems within the Commission's procedures, the most serious being that the Commission, since its inception, had never carried out a criminal history check of any of its officers before an application was made on the officer's behalf.

It is unnecessary that I should now make recommendations in respect of this matter, because the Commissioner of Police and the Commissioner of the CCC formed a working group to address the issues, and the Commissioner of Police introduced new procedures to govern his issuing of special constable applications made by the Commission.

In respect of the abuses and procedural deficiencies concerning assumed identities and traffic infringement notices which will be detailed in Parts 3 and 4 of my Report, I make the following recommendations to the Commission in Part 6:

RECOMMENDATION 1

A Commission officer should only hold one assumed identity at any one time.

RECOMMENDATION 2

The Department of Transport should be notified in writing of the number of demerit points accumulated during the three years prior to the date of my Report by each Commission officer who possessed, during that period, an assumed identity so that all accumulated demerit points can be recorded against the driver's licence held in the officer's natural name.

RECOMMENDATION 3

The Commission should notify the Department of Transport in writing within seven days of the payment of a fine imposed for any traffic offence committed by a Commission officer in the name of an assumed identity to enable the offence to be recorded against the driver's licence held in the officer's natural name.

3 ASSUMED IDENTITIES

The statutory scheme

The Commission's power to issue assumed identities to its officers is granted by Part 6, Division 2 of the Act, and is an activity which is tightly-controlled by the statute. The following sections in that Division are those which are most relevant to my investigation and Report.

Section 104 of the Act authorises an officer who has lawfully been issued with an assumed identity by the Commission to use it in the course of, or incidental to, the performance of the officer's duty, including the making of false or misleading representations to another person concerning the officer's identity.

Section 105 of the Act authorises the Commission to request a government, or non-government, agency operating in Western Australia to provide a Commission officer, who has been granted an assumed identity, with evidence of that identity (for example, a driver's licence from the Department of Transport of Western Australia, or a credit card from a banking institution).

Section 106 of the Act authorises a judge of the Supreme Court to order the Registrar to make an entry in a register under the *Births, Deaths and Marriages Registration Act 1998 (WA)* in relation to an assumed identity.

Section 108 of the Act requires an agency which has provided evidence of an assumed identity to a Commission officer to cancel that evidence if so directed in writing by the Commission.

Importantly, under s 111 of the Act, if a Commissioner officer who has been granted an assumed identity does something that, apart from this section, would be an offence, then the officer is not criminally responsible for the offence if the thing done is in accordance with the approval granted by the Commission, is done in the course of the

officer's duty, and would not be an offence if the assumed identity was the officer's real identity.

Further, s 112 of the Act obliges the Commission to indemnify an officer for any liability incurred by the officer when acting under an assumed identity in the way described by s 111.

Section 115 of the Act says that a person who either directly or indirectly makes a record of, or discloses, to another person any information which relates to the provision of evidence of identity, or the making of an entry in a register or other record of information under Division 2 of the Act, unless it is necessary to do so for the purposes of the division, is guilty of a crime.

Section 116 of the Act makes it a crime for a Commission officer to whom an assumed identity is issued to misuse the identity by using it otherwise than in accordance with the approval given.

Section 118 of the Act places an obligation on the Commission to review each assumed identity approval granted to a Commission officer at least once every six months while the approval is in force.

The Commission's notification of the irregularities

In June 2014 the Commission's Director of Legal Services notified me of a report that had been received from a senior officer to the effect that, from the Commission's inception in 2004 to at least 2011, the issue of many assumed identities to OSU officers in the form of driver's licences was not conducted in accordance with the provisions of the Act.

The officer explained that instead of obtaining driver's licences as evidence of assumed identities directly from the State's then-named Department of Planning and Infrastructure, OSU officers obtained driver's licences in the name of their assumed identity from government licencing offices in the Australian Capital Territory and in Tasmania, then presented those driver's licences to the Department of Planning and Infrastructure in this State, and, on the pretext of having moved domicile to this State, converted the interstate driver's licences to Western Australian licences.

The Commission did not tell the Department of Planning and Infrastructure how the interstate driver's licences were obtained, that the identities on the licences were false, or that the purpose of the conversion was to create driver's licences in this State as if the false details were created pursuant to the Commission's powers under the Act. This deceit by omission denied the Department knowledge of the true nature of the driver's licences it was creating, and the opportunity for its own records to be properly endorsed.

The senior officer also said that the Commission had not cancelled 48 driver's licences issued to OSU officers under assumed identities which were no longer being used, despite the fact that the Commission had cancelled the assumed identity approvals to which the licences had applied.

As at the time of the senior officer's report, a total of 16 assumed identity driver's licences which had been obtained via the interstate process were still being used by OSU officers.

My investigation

On 19 June 2014 I commenced an investigation into these matters, and during the ensuing months the Commission provided me with its explanations of the bases upon which it had obtained driver's licences under assumed identities in this State, in the Australian Capital Territory, and in Tasmania.

The Commission provided its relevant records, including copies of the letters it used to apply for and obtain driver's licences in the Australian Capital Territory and in Tasmania, and it advised that it had acted immediately to cancel, or withdraw from use, the 16 current driver's licences which had been obtained via the interstate process, upon receipt of the senior officer's report.

On 28 August 2014 the Commission detailed its rationale and history for applying to the motor registries in the Australian Capital Territory and Tasmania for driver's licences in assumed identities, saying:

- Upon enquiry, Commission officers with lengthy service suggested that the Commission's practice had emanated from a fear that its applications to the Department of Planning and Infrastructure for driver's licences in assumed identities could be compromised, because other law enforcement agencies, such as the Police, also made similar applications to the Department.

The practice was said to have been introduced to the OSU by investigators who had also been employed by the Kennedy Royal Commission, and the practice continued to be used between 2004 and 2011. In contrast, officers in the Commission's Investigations Directorate did not use this practice, but instead, based on legal advice from the Commission's Legal Services Directorate, applied in this State for driver's licences under assumed identities directly to the Department of Planning and Infrastructure;

- I was provided with a copy of a letter dated 1 April 2011 from the Commission to the Department of Infrastructure, Energy and Resources in Tasmania. It said:

The Commission has extensive investigative powers under the *Corruption and Crime Commission Act 2003*, including the power to authorise and use 'assumed identities' (Division 3 – Assumed Identities). Under this division, the Commission is authorised to request assumed identity evidence, or documentation, from an 'issuing agency', including public authorities (s. 105). This authority is further enhanced by the *Crimes Legislation (Serious and Organised Crime) Amendment Act 2010 (Cth)*, of which Part 3 (General Application and transitional provisions), at Item 20, permits the Commission to continue to exercise its assumed identity powers at the Commonwealth level as a 'participating agency' pursuant to Part IAC Division 2

Section 15XB of the *Crimes Act 1914 (Cth)*. This documentary 'assumed identity' evidence is essential for the effective operation of the Commission's investigative functions.

As a state-based oversight and integrity agency, entities within the Commission's jurisdiction include all local, state-based government departments and agencies.... To achieve this, the Commission, on occasion, seeks support from external sources, be they interstate or Commonwealth agencies, when suitable local solutions to operational issues are not achievable. On this occasion, the Commission seeks support from the Department of Infrastructure, Energy and Resources in the form of the provision of Tasmanian driver's licences to facilitate covert investigative activities.

The reason the Commission seeks the department's support is that our local, operational circumstances preclude a request for the issue of these particular 'assumed identity' driver's licences directly from our local licensing body, the Department of Transport. Regrettably, it is our view that the Department of Transport is not currently in a position to offer a robust, secure and workable mechanism to surreptitiously obtain driver's licences for our covert surveillance staff. These circumstances introduce concerns about risks to operational security and officers' personal safety. In time, we hope that these impediments will be removed and the risks mitigated. However, without currently achieving the required level of confidence locally, we are seeking support from your department.

- The letter concluded by referring to telephone conversations previously held between the Commission's Deputy Director Operations, Mr Craig McGowan, and the Department of Infrastructure, Energy and Resources' Director of Registration and Licencing in relation to the Commission obtaining the department's agreement.

After considering the legislative provisions referred to by the Commission in its letter, I replied on 16 September 2014 saying that its legal reasoning was clearly incorrect and did not support the Commission's representations made to the Department of Infrastructure, Energy and Resources. I expressed the view that the Commonwealth statute upon which it had relied did not at the time of the Commission's letter, or at any time, authorise the Commission to lawfully obtain evidence of assumed identities from the agencies of other State or Territory governments.

I asked the Commission for further documents and information, including:

1. the identity of the Commission officers with 'lengthy service' who had explained the rationale for the Commission's practice;
2. the identity of the Commission officer who made the decision to obtain interstate driver's licences in assumed identities instead of using this State's Department of Planning and Infrastructure, and whether the decision was documented;

3. whether the Commission ever consulted this State's Department of Planning and Infrastructure over the Commission's purported fears that its application process for driver's licences under assumed identities lacked security and threatened the personal safety of Commission officers;
4. whether the Commission ever made an application to this State's Department of Planning and Infrastructure for driver's licences under assumed identities between 2004 and 2011, and
5. a copy of the legal advice given by the Commission's Legal Services Directorate to the Commission's Operations Directorate to cause it to make applications for driver's licences under assumed identities to this State's Department of Planning and Infrastructure, rather than using the practice adopted by the OSU.

On 21 November 2014 the Commission responded as follows:

- The officers with 'lengthy service' were officers in the OSU and in the Investigations Unit who had been with the Commission from its inception;
- As to [2] above, the Commission's records did not indicate who the officer was;
- The Commission could find no record that indicated whether its concerns were ever raised with the Department of Planning and Infrastructure;
- The Commission's Investigations Unit's applications for driver's licences under assumed identities were made to the Department of Planning and Infrastructure, but only some were made to it by the OSU, and
- The Commission could find no record of any consultation, or request for written advice, from the Legal Services Directorate to Commission investigators.

The Commission accepted that it had no legislative basis to make the applications for driver's licences under assumed identities in the Australian Capital Territory or in Tasmania, and added that its search for documents did not locate any legal advice that the Commission did have such a legislative basis.

In response to a subsequent letter to the Commission dated 27 November 2014, the Commission replied on 19 December 2014 with additional information concerning questions 1 and 2 above. Two Commission officers were identified in relation to question 1 (Their identities are irrelevant to my Report), and the officer's identity in relation to question 2 could not be ascertained.

Remedial action taken and monitoring

The Commission swiftly cancelled those driver's licences which had been obtained from the Australian Capital Territory and Tasmania, and which had been converted into driver's licences in this State. It also swiftly cancelled those driver's licences

which it had obtained under assumed identities lawfully in this State, and which remained in place despite being unused by the Commission, but which the Commission had failed to cancel.

I recommended to the Commission that it should create and maintain a register to record the demerit points incurred by every officer of the Commission in their natural name, and in the name of an assumed identity, and that the Commission should provide me with a monthly report detailing the demerit points incurred under each driver's licence. The Commission accepted my recommendations, and the first monthly report was received by me in February 2015. This monitoring mechanism remains in place.

The granting of assumed identity approvals by the Commission remains an action which is audited by my office on a quarterly basis.

I am satisfied that the Commission's procedures used to grant assumed identities and to issue evidence of such identities in the form of a driver's licence in this State are now effective and appropriate, and accord with the Act. However, as will be seen in the next Part of my Report, other issues which relate to assumed identities, but are of a different nature to those identified in this Part, remain unresolved.

Conclusion

The most serious aspect of this matter concerns the Commission's misrepresentations to the licencing agencies in the Australian Capital Territory and in Tasmania between 2004 and 2011 that the Commission had the legal power to obtain evidence from those agencies of assumed identities in the form of driver's licences when in fact it did not, and the Commission's misinterpretation and misapplication of the *Crimes Legislation (Serious and Organised Crime) Amendment Act 2010 (Cth)* and Part IAC, Division 2, s 15XB of the *Crimes Act 1914 (Cth)* on 1 April 2011 to the licencing agency in Tasmania for the same purpose.

Prior to its repeal, Part IAC, Division 2 of the *Crimes Act 1914 (Cth)* did not provide the Commission with a power to obtain evidence from an instrumentality of another State or Territory of an assumed identity. Rather, the provisions of the Division gave power to a State or Territory agency to acquire evidence of an assumed identity issued by a Commonwealth instrumentality, and for a Commonwealth agency to acquire evidence of an assumed identity from a State or Territory instrumentality. The *Crimes Legislation (Serious and Organised Crime) Amendment Act 2010 (Cth)* did not alter the scope of this power.

The Commission's representation in its letter that its officers were in 'personal danger' if they made an application to this State's Department of Planning and Infrastructure for a driver's licence under an assumed identity appears to me to be a gross exaggeration designed to induce a favourable response from the licencing agencies in the Australian Capital Territory and in Tasmania. No evidence was

provided to substantiate the claim. In fact, the Commission never raised its concerns with the Department in this, or in any other, respect.³

As seen, the Commission's records do not hold evidence of legal advice being requested, or given, in relation to the issue.

I have considered whether an officer of the Commission may have committed serious misconduct by committing a criminal offence under s 116 of the Act by obtaining a driver's licence from the licencing agencies in the Australian Capital Territory or in Tasmania.

I have also considered whether there is sufficient evidence to suggest that the offence of fraud may have been committed in Western Australia under s 409 of the *Criminal Code 1913 (WA)* on each occasion when a driver's licence from the Australian Capital Territory, or from Tasmania, was presented by a Commission officer to the Department of Planning and Infrastructure for conversion to a Western Australia driver's licence.

Section 116(1) of the Act states:

An officer of the Commission to whom an assumed identity approval applies must not misuse an assumed identity covered by the approval.

Penalty: Imprisonment for 3 years and a fine of \$60,000.

Section 116(2) of the Act states:

For the purposes of subsection (1), an officer of the Commission misuses an assumed identity covered by an approval if –

- (a) the officer acquires evidence of, or uses, the assumed identity; and
- (b) the acquisition or use is not –
 - (i) in accordance with the approval; and
 - (ii) in the course of duty.

The information provided by the Commission establishes that one or more OSU officers, having lawfully acquired an assumed identity approval from the Commission, then used the assumed identity to apply for, and to obtain, in the name of that identity, a driver's licence from the Australian Capital Territory or from Tasmania. As OSU officers had no power to do so, it cannot properly be said that that use of the assumed identity was in accordance with the approval of the assumed identity, or in the course of the officer's duty.

³ In its representations made to me under s 200 of the Act, the Commission reiterated its belief that its officers would have been in personal danger if they had used the Western Australian Department of Planning and Infrastructure for this purpose, and maintained that the source of this belief was a 'perceived risk of compromise' within that department.

However, there are evidentiary difficulties for the Police in successfully conducting a criminal investigation and prosecution of any particular Commission officer due to the apparent absence of Commission records to clearly identify:

- a) the decision-maker for the commencement of the OSU's practice;
- b) the OSU officer(s) who first carried out the practice and how it was achieved;
- c) any legal basis upon which the OSU officer(s) purported to act, and
- d) proof of the requisite criminal intent of the OSU officer(s) involved who acted in good faith in furtherance of a practice represented to them as being lawful.

For these reasons I am not satisfied that a referral of the matter to the Police for criminal investigation is likely to result in a successful prosecution for an offence under s 116(1) of the Act, or is otherwise in the public interest. For the same reasons, I am not satisfied that there are sufficient grounds upon which I am able to make a finding of misconduct against any identifiable OSU officer in this regard.

In respect of the subsequent presentation of interstate driver's licences to the Department of Planning and Infrastructure by OSU officers for conversion into Western Australia driver's licences, the relevant part of s 409(1) of the *Criminal Code 1913 (WA)* states:

Any person who, with intent to defraud, by deceit or by any fraudulent means:

- (a) obtains property from any person; or
- (b) induces any person to deliver property to another person; or
- (c) gains a benefit, pecuniary or otherwise, for any person; or
- (d) causes a detriment, pecuniary or otherwise, to any person; or
- (e) induces any person to do any act that the person is lawfully entitled to abstain from doing; or
- (f) induces any person to abstain from doing any act that the person is lawfully entitled to do,

is guilty of a crime and is liable –

- (g) if the person deceived is of or over the age of 60 years, to imprisonment for 10 years; or
- (h) in any other case to imprisonment for 7 years.

The information provided by the Commission establishes that OSU officers presented interstate driver's licences to the Department of Planning and Infrastructure on the pretence that the officers were changing domicile to this State, thereby inducing the Department's staff to convert the interstate licence into a Western Australia driver's licence in the name of the officer's assumed identity.

It cannot be said that the officers were acting in accordance with the Act in obtaining evidence of an assumed identity in this fashion; nor were they acting in the course of their duties; nor were they acting in accordance with the assumed identity authority first provided by the Commission. They thereby induced the Department to provide the evidence of the assumed identity, an act which they were entitled to refrain from doing.

I am satisfied that the presentation of the interstate licence in these circumstances is capable of constituting deceit or fraudulent means for the purpose of s 409(1) of the *Criminal Code*.

However, I am not satisfied that the requisite criminal intent – an intent to defraud – on the part of an OSU officer who presented an interstate driver's licence to the Department is likely to be proved beyond reasonable doubt in any criminal investigation or prosecution. To prove the requisite intent it would be necessary to prove that an officer acted dishonestly by knowing that he or she was not lawfully entitled to obtain the Western Australian driver's licence from the Department of Planning and Infrastructure in such a manner, or that the officer acted so recklessly in this respect that the necessary criminal intent should be attributed to the officer.

Nor am I satisfied that, in this respect, there are sufficient grounds upon which I am able to make a finding of misconduct against any identifiable OSU officer.

Finally, it must be said that the absence of Commission records which prove the origins and decision-making process involved in creating a scheme of obtaining interstate driver's licences under assumed identities, and concealing their nature from the staff in the Department of Planning and Infrastructure in obvious contravention of s 105 of the Act, invites the inference that the creator(s) of the scheme acted with deliberate concealment, but it is unnecessary for the purposes of this report that I should arrive at a concluded view about that.

The OSU's conduct was an historic and systemic failure of a serious kind, which misled and deceived the licencing agencies in the Australian Capital Territory and in Tasmania as to the scope of the Commission's legislative powers in this field, and deceived this State's Department of Planning and Infrastructure.

4 TRAFFIC INFRINGEMENT NOTICES

Police correspondence

On 14 May 2014 Assistant Commissioner Budge APM of the W.A. Police wrote to tell me of irregularities, discovered by his investigators, in the Commission's systems and practices relating to OSU officers incurring traffic infringement notices for offences committed under the *Road Traffic Act 1974 (WA)* during, and outside, work commitments.

Assistant Commissioner Budge also told me that newly-appointed senior management officers in the OSU were working with the Police to investigate the issues, and to determine whether the adoption of procedures contained in the Police Policy and

Standard Operating Procedures may assist the future governance of the OSU's activities in this area.

I subsequently asked him to provide me with the full details of the outcome of his investigators' examination. Prior to his response, the Commission wrote to me on 16 May 2014 and informed me of the OSU's broad review of its policies and procedures concerning the incurring of infringement notices, the recording of demerit points accumulated by its officers, and the buying and leasing of motor vehicles by the OSU for use by its officers.

On 20 June 2014 Assistant Commissioner Budge wrote to me and identified specific concerns about the historic practices and procedures in three areas of OSU activities:

- the accumulation of infringement notices in the natural name, and in the name of the assumed identity, of its officers;
- the management of its motor vehicle fleet, and
- the legal status of the driver's licence of Deputy Director of the Operations Mr Craig McGowan, who had executive managerial responsibility for the OSU (and whose contract of employment with the Commission had not been renewed earlier that year).

The accumulation of infringement notices in the natural name, and in the name of the assumed identity of OSU officers

The principal issue arising out of the OSU's procedures and practices in this regard was that its officers were granted multiple assumed identities by the Commission pursuant to the powers described in the previous Part of my Report, and each of those identities was evidenced by a driver's licence issued in this State by the means also described in the previous Part of my Report.

When any particular OSU officer incurred a traffic infringement notice for a driving offence, the associated demerit points would accumulate against the driver's licence used by the officer at the time of the offence. For example, OSU officer A who held driver's licences in assumed identities B, C & D would be able to use any of them, at random, to take responsibility for the offence.

Therefore, OSU officer A, over a period of three years, could distribute the accumulation of demerit points for various offences over some, or all, of the driver's licences held under his real name and an assumed identity (for example, assumed identity B may have accumulated eight demerit points, C six points, and D five points).

While no one assumed identity driver's licence may have exceeded the statutory amount of 12 demerit points in a three year period which would ordinarily trigger the suspension of the driver's licence, the collective effect would be that officer A had personally accumulated 19 demerit points in the relevant period, but nevertheless remained driving.

In this regard, Assistant Commissioner Budge referred to 38 traffic infringement notices incurred by four OSU officers under their natural, and assumed, identities:

- In one instance a (now former) OSU officer incurred 13 demerit points in the officer's real name and in the officer's one assumed identity within a three year period to 2012. At the time that the officer had accumulated 10 demerit points, the Commission granted the officer another assumed identity, after which the additional three demerit points were incurred.

Had the first 12 demerit points been attributed to the officer's natural identity, and therefore his personal driver's licence, then that licence would have been suspended;

- In another instance a (now former) OSU officer accumulated 15 demerit points under two of the officer's four assumed identity driver's licences in a three year period to 2011. In June 2010, when the officer had incurred 10 demerit points, the Commission granted the officer a second assumed identity, but in January 2011 the officer had accumulated 12 demerit points and, as a consequence, commenced a 12 month good behaviour period imposed by the Department of Transport in lieu of suspension. Then, in 2012 and in 2013, the Commission granted the officer two further assumed identities;⁴
- In another instance a (now former) OSU officer incurred 11 demerit points under the officer's natural and two of the officer's three assumed identity driver's licences in a three year period to 2012. In August 2012, the Commission issued the officer with a third assumed identity after having incurred nine demerit points under the officer's second assumed identity.

At the time of the officer's employment with the Commission, the officer lived in a relatively remote country area approximately 43 kilometres from the OSU's covert premises. Four of the infringement notices incurred by the officer from 2011 to 2013 occurred on the main road to, and a relatively short distance from, the officer's home, the implication being that the officer had committed the four offences driving to, or from, work;

- In another instance an OSU motor vehicle was detected speeding and an infringement notice was issued to the registered owner of the vehicle. The owner's details were recorded under the particulars of an OSU officer's assumed identity. The fine was not paid, and as a consequence a fines

⁴ On 14 April 2015 I referred to the Police for criminal investigation three allegations of suspected criminal conduct involving the former OSU officer to whom this point relates. The allegations related to his conduct concerning traffic infringement notices issued to him for three separate speeding offences in 2011, 2012 and 2013. On 20 October 2015, after an exhaustive investigation, the Police reported to me that criminal charges would not likely lead to a conviction for a number of reasons, including that the OSU's surveillance records at the time of the offences were flawed and did not accurately reflect an officer's true whereabouts during surveillance operations, and that the action taken by the Commission to end the officer's employment – by conducting a disciplinary rather than a criminal investigation into the officer's conduct when *prima facie* evidence of criminality clearly existed, and providing the officer with the evidence the Commission held against him before a criminal investigation interview could be conducted – undermined any subsequent criminal investigation which might be conducted. The matter cannot now be further pursued in the public interest.

enforcement suspension was incurred in the name of the assumed identity. The officer is no longer employed by the Commission.

- Of the 38 infringement notices mentioned earlier, 30 were paid in cash, and were mostly paid at the same Australia Post Business Centre. The balance of notices was paid by credit card. It is not known if the Commission-owned petty cash held by the OSU was used to pay for the 30 infringement notices.

The management of the OSU fleet

The principal problem with the OSU procedures and practices was that the unit, in respect of its acquisition and disposal of motor vehicles used by its officers to conduct the unit's covert operations, used a 'buy and sell' model which did not accord with the State Government Fleet Policy. In contrast, the acquisition and disposal of the balance of Commission motor vehicles did accord with that policy.

The OSU's fleet maintenance practices allowed its motor vehicles to be transferred among the unit's officers when those vehicles were replaced, or when a new assumed identity was granted by the Commission to one of its officers (as the registered particulars of a vehicle used by a particular officer were attributed to the officer's assumed identity). In this respect, it was the opinion of the Police that the OSU's fleet maintenance practices incurred substantial and unnecessary costs to the State, but that was a matter for the Commission to resolve.

The legal status of Deputy Director Craig McGowan's driver's licence

Deputy Director Craig McGowan arrived in this State in March 2004 from Victoria, and was instrumental in establishing and managing the OSU. The Commission did not renew Mr McGowan's contract of employment at its expiration in 2013.⁵

Regulation 62(3)(b) of the *Road Traffic (Authorisation to Drive) Regulations 2008* requires an interstate visitor to possess a Western Australia driver's licence within three months of becoming a permanent resident in this State. As part of their investigations the Police examined their records and discovered that Mr McGowan had never held a driver's licence in his natural name in this State.⁶ However, a licence had been issued to each of his two assumed identities granted to him by the Commission.

The Police discovered that Mr McGowan committed speeding offences in 2004, 2010 and in 2013. On each occasion the infringement notice was issued to, and paid under the particulars of, one of his assumed identities. The last offence was of particular concern, as he was not performing covert duties at that time due to the Police and Commission investigations into his conduct, and therefore had no obvious justification for using his assumed identity.

⁵ See pages 4 and 25-26 of my Report titled *Report on misconduct and related issues in the Corruption and Crime Commission* which was tabled with the Committee on 10 June 2015.

⁶ A fact which Mr McGowan did not challenge in his representations to me under s 200 of the Act.

The action taken

As I have said, the Commission's response to the allegations and Police investigations into the OSU included the appointment of new senior management to that unit. In May 2014 a senior Police investigator met with the OSU management to consider the matters identified above, and other matters (such as the Commission's adoption of procedures contained in the Police Policy and Standard Operating Procedures) to assist the future governance of the OSU's activities. Given the level of interaction between these officers, I was content to allow this process to continue, and to be given regular reports concerning their progress.

The interaction between the OSU management and the investigating Police led to the Police Specialist Support Unit assisting the Commission to address its procedural and practice deficiencies. A working group made up of officers of the two organisations was formed to facilitate the use by the Commission of the Police Policy and Standard Operating Procedures.

An important action taken by the OSU management was to immediately ban from driving, those officers about whose driver's licence status doubt existed, and to confine those officers to administrative duties within the unit pending the finalisation of the investigations. Those officers, and others, have since been dismissed, or have resigned.

On 24 June 2014 I wrote to the Commission and asked, whether any Commission officer was currently in possession of more than one driver's licence issued under an assumed identity and, if so, why that was allowed to continue.

On 31 July 2014 Acting Commissioner Douglas replied that five OSU officers held two driver's licences under assumed identities, and one officer held three such licences. He explained that the licences issued to the last of these officers were linked to the registration of particular OSU vehicles, and would be surrendered as the vehicles were transitioned from the acquisition model of buy and sell to the lease model designed to comply with the State Fleet Policy.

Acting Commissioner Douglas said that the Commission's justification for the possession by its officers of multiple driver's licences under assumed identities was that it 'enables multiple investigations to be conducted while reducing the risk, as, if an assumed identity in a particular investigation is compromised the officer will be isolated from that compromise in relation to other investigations by utilisation of an alternative assumed identity.'

Acting Commissioner Douglas added that the practice of holding multiple assumed identities was consistent with s 47(2) of the *Criminal Investigation (Covert Powers) Act 2013 (WA)* which requires separate applications in respect of each assumed identity to be acquired by an officer (to whom that legislation relates), and that this section 'supports the proposition that a Commission officer may concurrently hold multiple assumed identities (and evidence thereof such as driver's licences).'

I replied to Acting Commissioner Douglas on 30 September 2014 by saying that:

1. the question in my previous letter as to whether any Commission officer was currently in possession of more than one driver's licence issued under an assumed identity was not confined to officers in the OSU, and I once again requested the same information in respect of all officers in the Commission;
2. the Commission's justification for the possession of multiple assumed identities seemed to me to be flawed. I observed that:
 - (a) if one assumed identity was compromised in one investigation, then it was unlikely that the officer would need to use a second assumed identity in a different, unrelated investigation, and
 - (b) if the person or persons the object of both investigations did correspond, then an officer whose assumed identity was compromised in one could not take part in the other due to the risk of facial recognition,
 - (c) In any event, a compromised assumed identity would have to be cancelled because it could no longer be used in another investigation;
3. if the Commission's justification offered to me was based on practical experience, I would appreciate being given a description of the instances in which an officer's assumed identity had been compromised, how the compromise occurred, and the action taken in response to it;
4. the *Criminal Investigation (Covert Powers) Act 2013 (WA)* does not apply to the Commission and its officers, but rather to 'law enforcement agencies'. The Commission's powers in respect of assumed identities are to be found solely in the Act.

Under s 103(1) the Commission may approve the acquisition and use 'of an assumed identity by an officer': i.e. one assumed identity per officer. Section 103(3) provides that 'A single approval may be given for one or more assumed identities.': i.e. one approval document may be for one assumed identity for one officer, or more than one assumed identity for more officers than one;

5. the abuses found within the OSU were facilitated by its officers holding more than one assumed identity, and that future abuses of this kind could only occur if officers remained authorised by the Commission to possess more than one assumed identity. The continuation of this risk should be eliminated, rather than reduced, and
6. I would appreciate it if the Commission provided me with the following information:
 - (a) whether the authorisation for an assumed identity was made in relation to a specific investigation in which the recipient was involved, terminated upon the completion of that investigation, or

whether the authorisation was made for general use by a Commission officer in his or her duty;

- (b) whether Commission officers who held multiple driver's licences under assumed identities were free to produce, or otherwise utilise, any of those licences in the event of a breach of traffic law, or for any other purpose connected to driving, and
- (c) whether it was an operational imperative for an OSU surveillance officer to hold an assumed identity, and if it was thought to be so, why that view was held.

On 14 November 2014 Acting Commissioner Shanahan SC replied, listing 10 Commission officers who held more than one driver's licence under an assumed identity (in addition to the OSU officers who fell into this category), and provided his view as to why s 103 of the Act does authorise the Commission to grant multiple assumed identities to a Commission officer. In response to my three questions, he advised:

- authorisations for assumed identities are made for general use by Commission officers in the course of duty;
- Commission officers who hold multiple drivers' licences under assumed identities were free to produce and use any of those licences if acting in the course of duty.
- In January 2014 the Commission made an arrangement with the Police whereby an OSU officer must accrue demerit points in their natural name if the offence was not committed while acting in the course of duty. Further, the Commission had adopted a policy of regular reporting to senior management on the demerit point status of each OSU officer's both natural and assumed identity driver's licence. The Commission's computer systems permitted senior management to access those details for the purpose of audit, and
- it was imperative for an OSU surveillance officer to hold an assumed identity because it protected the Commission from being associated with the officer should the assumed identity be compromised, because it provided a continuous simple identifier of an officer's involvement in covert operations, and because it protected the officer's true identity in court proceedings.

I replied to Acting Commissioner Shanahan SC on 2 December 2014. I continued the debate about the proper interpretation of the provisions of the Act as to whether it may support the practice of a Commission officer being authorised by the Commission to hold two or more assumed identities, and I said that my objectives in relation to the Commission's procedures in this area were:

1. generally to ensure that the procedures of the Commission reduce or eliminate the scope for abuse of assumed identities in the form of driver's licences where an offence is committed against the law of this State;

2. to ensure that all Commission officers are lawfully entitled to drive;
3. to reduce or eliminate the increased risk of abuse which is inherent in a Commission officer possessing two or more assumed identities;
4. to ensure that a Commission officer who breaches a traffic law of this State, in any circumstance while driving a Commission motor vehicle pays the associated fine and has recorded against his or her personal driver's licence any demerit points associated with the offence, unless an application made under regulation 280 of the *Road Traffic Code 2000* exempts the officer from the breach;
5. to ensure that a Commission officer who has an assumed identity and who breaches a traffic law of this State does not use a driver's licence under that assumed identity in response to the offence in any circumstance other than compelling operational necessity, and
6. to ensure adequate oversight of the procedures introduced by the Commission to audit the receipt and recording of traffic infringement notices.

I said that, as Acting Commissioner Douglas did not describe any instance of an assumed identity ever having been compromised (that possibility being part of the Commission's justification for its officers holding multiple assumed identities), then I must conclude that no assumed identity had been compromised. That being the case, I expressed the view that the Commission's apprehension of compromise does not justify the increased risk of abuse inherent in a Commission officer possessing multiple assumed identities.

I also invited the Acting Commissioners' views on whether the number of assumed identities possessed by a Commission officer could be restricted to one in order to reduce the risk of recurrence of the abuses addressed, and asked that the Commission provide me, on a monthly basis, with a copy of the updated results recorded on the Infringement Notice Register, including the total number of demerit points accumulated by every Commission officer who holds a driver's licence under an assumed identity (whether incurred under that, or the officer's natural, driver's licence).

I asked Acting Commissioner Shanahan SC if the Commission's introduction of the new measures which he described in his letter was because of inadequate procedures being in place prior to January 2014.

On 8 January 2015 Acting Commissioner Shanahan SC replied, saying:

1. he was advised by the Directors of Operations and Legal Services that Commission officers historically had possessed at least two assumed identities – one being a numerical identifier (to facilitate continuity in the presentation of evidence in a Commission examination, or in a court), and the other being an assumed name (to facilitate operational activity);

2. seven Commission officers (two of whom had recently left their employment with the Commission) currently held multiple assumed identities;
3. he thought there was no practical reason why a single assumed identity approval under s 103(3) of the Act could not contain an assumed name whilst also designating the Commission officer with a numerical identifier;
4. further advice he received was that assumed identities had historically been used by Commission officers to covertly procure motor vehicles and to lease off-site premises for operational reasons;
5. emerging fiscal constraints and the Commission's efforts to adopt a more strategic approach to investigating alleged misconduct suggested the adoption of an operational approach similar to that used by the W.A. Police (where a single officer may have three assumed identities each of which was linked to a numerical identifier), and
6. the Commission's new procedures were introduced in order to increase the capacity of the Commission's executive management to control the use of, and the recording of demerit points against, driver's licences possessed under assumed identities.

Finally, Assistant Commissioner Shanahan SC provided the information I requested in connection with the Infringement Notice Register, and the Commission has provided the updated information from the Register on a monthly basis since January 2015.

In relation to the deficiencies identified concerning the Commission's management of its motor vehicle fleet, on 17 July 2015 Commissioner McKechnie QC wrote to me, saying that the Commission had undertaken and completed a comprehensive review of its policies governing the organisation's administrative fleet, and its surveillance fleet. The key changes introduced by the Commission included:

- leasing all Commission vehicles, including surveillance vehicles, through State Fleet;
- compliance with vehicle restrictions for safety and fuel efficiency as set out in the WA Government Fleet Policy and Guidelines (which requires the Commission to seek an exemption from those guidelines should it wish to deviate from them), and
- improved governance and accountability of surveillance fleet transactions, including independent oversight by the Commission's Corporate Services Directorate.

Commissioner McKechnie QC described the recent creation of a Policy Taskforce which is embedded in the Commission's Operations Directorate which will review and ensure that the appropriate governance and accountability measures to support the Commission's activities and operations are undertaken. The remit of the Taskforce is

primarily to strengthen the Commission's corporate governance and accountability systems.

It is unnecessary to recite here the 33 pages of new policies and procedures with which I was provided. However I have considered them in light of the varied nature of the deficiencies found to exist in the Commission's previous policies and procedures, and I am satisfied that they appropriately address those deficiencies. Their effectiveness will, of course, remain subject to my monitoring and evaluation, but it would be remiss of me not to acknowledge the preparedness of the Acting Commissioners and Commissioner McKechnie QC to deal with all my concerns, the occasional difference in opinion concerning what was authorised by the Act notwithstanding.

Conclusion

A close connection existed between the past abuses committed in relation to traffic infringement notices and the abuses highlighted in the previous Part of my Report in respect of the authorisation and use of assumed identities.

It was the possession by OSU officers of two or more driver's licences under assumed identities which facilitated the distribution of accumulated demerit points between them, and it was this distribution which camouflaged the totality of an officer's accumulated points – and therefore that officer's legal right to be driving a motor vehicle in this State. In four instances the Police investigation established the probability that a Commission officer continued to drive Commission motor vehicles when the officer's accumulated total of points exceeded the statutory number of 12 in any three year period.

The existence in the OSU of such practices, the defectiveness of managerial procedures designed to prevent such abuses, the ability of its officers to obtain additional assumed identities, and the culture of entitlement and elitism which existed in that Unit until recent times involved serious managerial failings at all levels within the executive management of the Commission.

Despite the debatable question of the scope of s 103 of the Act to empower the Commission to grant to its officers more than one assumed identity at any one time, and if, without resiling from my view, I consider the matter on the basis that an officer may hold more than one assumed identity, the dominant justification asserted by the Commission for this practice was that it was convenient for an officer to have the use of a second or third assumed identity should the first be compromised in operational circumstances.

As I said to the Commission, that apprehension is based on a hypothetical risk of compromise which has apparently not materialised in the Commission's 12 years of operation. This reflects the fact that the Commission is an anti-corruption body rather than a law-enforcement agency, and as the Commission's history shows, it is less likely to encounter the operational circumstances in which an assumed identity is compromised (particularly when covert surveillance is being conducted, as such officers are unlikely to be exposed and be required to provide a form of identification to a Police officer).

The secondary justification offered by the Commission – that an assumed identity authorised as a numerical character facilitates continuity in the presentation of evidence in a Commission examination, or to a court – if it is a useful feature of the approval of an assumed identity, may be linked as an alternative identifier to the assumed name.

It therefore remains my opinion that eliminating the means by which past abuses have occurred, if operationally possible, is a preferable response to retaining those means and monitoring the accumulation by Commission officers of demerit points.

In relation to the Commission's review of its fleet policies, and its creation of two new policies in this important area, I am satisfied that the improvements address the deficiencies of the past, and are therefore appropriate. Due to the nature of the activity to which the policies relate, I intend to monitor their operation during the next 12 to 24 months to assess their effectiveness.

Finally, in response to the Police informing me of the probability that Deputy Director McGowan did not possess a driver's licence issued in his own name in this State during his nine years of employment with the Commission, and as a consequence may not have driven a motor vehicle lawfully in this State during that period, I make it clear that such allegations have not been able now to be investigated to the point of prosecution and, in the circumstances I am satisfied that it would not now be in the public interest to pursue the matter.

5. APPOINTMENTS AS SPECIAL CONSTABLES

The statutory scheme

Section 35 of the *Police Act 1892 (WA)* allows the Commissioner of Police to appoint any person as a special constable for such period, and on such terms and conditions, as the Commissioner decides. The Commissioner must issue a special constable with a certificate of his or her appointment, and may cancel the appointment at any time.

Section 36 of the Act states, *inter alia*, that an appointment as a special constable gives the person all of the powers, duties and obligations that a Police officer has under any written law other than the *Police Act*, and any authorisation, exemption or exception in any written law other than the *Police Act* that applies to a Police officer applies to that person. The Commissioner of Police may limit the powers a special constable has, and determine when, where and how they may be exercised, and against which type of offence the special constable may act.

Section 37 of the Act states that a special constable is not a member of the W.A. Police for the purposes of the Act.

The letter from the Commissioner of Police

On 16 January 2014 the Commissioner of Police provided me with a copy of his letter to Commissioner Macknay QC which notified him of the following information:

- On 6 May 2013 he had received an application for special constable status from the Commission in respect of one of its officers. The application was signed by Deputy Director Craig McGowan on Commissioner Macknay QC's behalf.
- Deputy Director McGowan stated in the application that 'I confirm that a thorough integrity check has been performed on this officer and he has no previous criminal convictions and no finding against them (sic) of serious misconduct'.
- Based on that representation the Commissioner of Police signed the appointment documentation in favour of the Commission officer on 9 May 2013.
- The Commissioner of Police was subsequently informed that the Commission officer had been apprehended by the Police on 24 March 2013 at the Blues and Roots Festival in Fremantle, and was subsequently charged by summons with the offence of Possession of a Prohibited Drug under s 6(2) of the *Misuse of Drugs Act 1981 (WA)*, namely three tablets of dexamphetamine.
- The Commission officer did not disclose his place of employment to arresting Police, or later in his written plea of guilty to the Fremantle Magistrate's Court, at which time, in his absence, he was fined \$200 with costs of \$129.35 and was given a spent conviction. In his written plea the officer said that there 'is a real possibility my employment could be affected by this conviction and I have serious concerns for its effect on my family's financial position if this was the case'.
- An associate of the Commission officer was separately arrested at the same festival for possessing six tablets of dexamphetamine, was convicted of possessing the prohibited drug at the same court on the same day, and was fined the same amount as the Commission officer.
- Had Deputy Director McGowan conducted a basic check of the Police Incident Management System database at the time he submitted the special constable application on behalf of Commissioner Macknay QC, the drug charge against the Commission officer would have been seen, and
- He considered the absence of reference to the charge in the application for special constable status was a matter of serious concern. He concluded that there was either no 'thorough integrity check conducted' by the Commission, or that the offence was known and not disclosed to him.

My investigation

I commenced my investigation of the matter by writing to Commissioner Macknay QC on 11 February 2014, to tell him of my receipt of the letter to him from the Commissioner of Police.

I said that the Commission should have notified me of the matter pursuant to s 196(4) of the Act because it was an allegation made against a Commission officer. I asked that the notification be made, asked for an explanation as to how the Commission was going to deal with it, and asked whether the Commission had investigated whether other applications for special constable status had been properly made, including the carrying out of integrity checks on the applicants.

Commissioner Macknay QC replied on 27 February 2014. He said that it appeared Deputy Director McGowan had asked another Commission officer to conduct the probity check which the Deputy Director later represented to the Commissioner of Police had been carried out.⁷ He also said that the Deputy Director had not been interviewed about the matter, and that there was no notation on the Commission officer's security file which showed that the probity check had, in fact, been conducted.

Commissioner Macknay QC suggested that because the Commission officer was not convicted until 26 April 2013, a search of the Police Incident Management System database by the Commission on 16 April 2013 would not have revealed details of the matter (the officer's arrest having occurred on 24 March 2013).

Commissioner Macknay QC also said the Commission officer's contract of employment required the officer to 'report to the Commission any breach or dereliction of duty, impropriety, misconduct or other form of misbehaviour', and not to 'commit any act or omission, whether during or outside employment, which... undermines the Commission's ability to place trust and confidence in the employee'. Commissioner Macknay QC acknowledged that a criminal conviction would fall within the envisaged types of conduct.

Commissioner Macknay QC also said that all Commission officers were told that they 'are required to advise the Manager Security Branch of any significant changes to your personal circumstances, including changes of address, marital status, police record status, etc., as such changes may have a bearing on your security clearance.' He said that:

- the Commission officer did not inform the Commission of the officer's prohibited drug possession, arrest, charge, fine or that the officer was associating with other possessors, users or suppliers of prohibited drugs, and
- probity checks had been carried out on all Operations Directorate officers, including those who held special constable status, and that no applicant was identified as having any undisclosed convictions.

Commissioner Macknay QC gave no indication that any further investigation would be conducted by the Commission into the conduct of the Commission officer, or into the integrity of the Commission's systems and procedures which governed applications for special constable status generally.

⁷ In his representations to me under s 200 of the Act, Mr McGowan confirmed that he relied on other Commission officers to conduct the probity checks because, he says, he did not have the necessary IT access to do so.

Upon receipt of Commissioner Macknay QC's letter, my office made enquiries with the Police to identify the precise information which would have appeared on the Police Incident Management System database on 16 April 2013 had the Commission interrogated it as Deputy Director McGowan had represented to the Commissioner of Police on that day. The Police replied by providing the 'screen shots' that would have been seen on that date, and these shots provided all the information concerning the circumstances of the Commission officer's offence, arrest and bail date.

On 20 March 2014 I wrote to Commission Macknay QC and said that the 'thorough' probity check said to have been carried out was either not carried out, or the result was deliberately concealed from the Commissioner of Police, because the information which would have been observed by the Commission on the Police Incident Management System database on 16 April 2013, whilst obviously not then showing the conviction of the charge, provided all the information which should have prevented Deputy Director McGowan's representation to the Commissioner of Police from being made.

I said to Commissioner Macknay QC that the Commission's inability to establish the steps taken in the process to have the Commission officer appointed as a special constable also raised concerns about the adequacy of the Commission's recording processes in respect of such applications, and raised the following questions with him:

1. Did the Commission intend to investigate the Commission officer's failure to disclose to the Commission the fact of his arrest, and subsequently his conviction?
2. Did it intend to see if the Police Incident Management System had, in the past, recorded whether access was in fact made by the Commission officer who allegedly conducted integrity checks in processing special constable applications?, and
3. Did the Commission intend to change its procedures to reduce the chance of a similar problem arising in the future, and to make traceable the steps taken by the relevant Commission officer(s) during the process?

On 30 May 2014 Acting Commissioner Shanahan SC replied and said that:

- the Commission officer was dismissed in December 2013 because the officer was untruthful in his responses to Commission investigators;
- the Commission allowed Deputy Director McGowan's contract to lapse;
- the Commission officer who [allegedly] conducted the probity test at the behest of Deputy Director McGowan resigned from the Commission in December 2013;
- the Commission's procedures used for assuring Police that full and appropriate probity checks had been made in support for applications for special constable status have given rise to some 'ambiguity' as to what was required;

- the allegation made against the Commission officer had identified limitations in the Commission's access to the Police Incident Management System provided for in a memorandum of understanding between the two organisations, in that such access was confined to action which facilitated the Commission's 'investigative functions'. The terms of the MOU were being reviewed;
- the Commission officer who [allegedly] conducted the probity test at the behest of Deputy Director McGowan had access to the Police Incident Management System, but that Deputy Director McGowan's instructions 'directed his attentions to the Commission's security files and made no reference to IMS';
- the Commission had the capacity to audit its officers' access to the Police Incident Management System, and had confirmed that no search was conducted of it in respect of the Commission officer.

In response to the three questions asked in my letter dated 20 March 2014, he said:

- The Commission does not intend to investigate the Commission officer's failure to disclose the fact of his arrest and conviction because his employment had been terminated.
- No access was made to the Police Incident Management System in respect of the Commission officer's application for special constable status, and there was a widely-held view that access to the Police Incident Management System was limited to the Commission's misconduct function.

Further, while it was possible for the Commission to audit its database to ascertain if the Police Incident Management System had previously been accessed in support of applications for special constable status, there was little utility in doing so because it would require the identification of all previous applicants and a search to be made of their particulars, and the resources required to achieve this outcome would outweigh the benefit of any assurance derived – particularly as this audit power was only held by the Commission's Assistant Director Intelligence, and

- the Commission had changed its procedures for making applications for special constable status, in that it would specify the checks it conducted in support of them, leaving it to the Police to determine what further inquiries they wished to undertake to assist their consideration of the application.

On 10 June 2014 I replied to Acting Commissioner Shanahan SC, saying that Deputy Director McGowan's representation to the Commissioner of Police was that the Commission officer had no criminal convictions, and to have said so honestly necessarily required a check to have been made on the Police Incident Management System.

In addition, I said that now it was established that no such check of the Police Incident Management System had been made, the broader issue of whether or not the matter

indicated that a long-term, systemic failure existed within the Commission must be addressed. I recommended that an interrogation of the system be made to determine whether every Commission application for special constable status included checking the criminal record of the applicant.

Acting Commissioner Shanahan SC replied on 19 June 2014, saying:

- The Commission previously adopted the position that it did not have access to the Police Incident Management System for the purpose of vetting applicants for special constable status, and the Commission had never conducted a check of any applicant's criminal record.
- He was advised that the Commission had previously taken the view that the Police, being a party to the relevant memorandum of understanding, would have appreciated the Commission's lack of access to the Police Incident Management System, but he found 'such unarticulated reliance entirely unsatisfactory'.
- He accepted that there had been a breakdown in communication as to exactly what Deputy Director McGowan meant when he represented to the Commissioner of Police that the Commission officer 'had no criminal convictions', and that the Deputy Director may have made that assertion based on the officer's original security clearance, the Commission's review of that clearance in 2012, and the officer's failure to disclose any criminal convictions as he was obliged to do under his contract of employment.
- The Commission had now interrogated the Police Incident Management System in respect of all serving Commission officers with special constable status. The results of that interrogation were available if I wanted them, and
- he acknowledged the flaws in the Commission's past practices, however, given the remedial action taken by way of review of the MOU currently being conducted, he thought that we had moved past the need for any further investigation of the Police Incident Management System in respect of serving Commission officers.

On 24 June 2014 I replied to Acting Commissioner Shanahan SC, saying that I looked forward to the outcome of the two organisations' review of their memorandum of understanding, but I expressed the view that it would be desirable for the Commission to be able to make its enquiries of the Police Incident Management System so that it may be assured that there was no impediment, including particularly in the way of a criminal history, to the grant of an application for appointment as a special constable.

The Commission must have the assurance that the officers it proposed to advance as special constables qualified for that appointment, and the Police must be able to rely on the Commission's assertions made in support of such applications.

On the same day, I wrote to the Commissioner of Police and told him that I had been investigating the Commission's procedures. I summarised the correspondence which

had passed between me and the Commission. In addition, I asked the Commissioner for information concerning the following:

1. whether all applications for special constable status made by the Commission since the memorandum of understanding took effect in 2009 included the same, or a similar, representation that the nominated Commission officer 'has no previous criminal convictions';
2. whether the Police authorised applications for special constable status to the Commission before 2009 and, if it did, whether the process was the same as has been since 2009, and
3. if the Commission's access to the Police Incident Management System facilitated a check of the criminal history of serving Commission officers.

On 15 July 2014 the Commissioner of Police replied. He said that:

- all the Commission's applications for special constable status had the quoted endorsement on them in respect of the officer's lack of criminal convictions;
- the memorandum of understanding between the Police and the Commission was always intended to authorise the Commission to access not only the Police Incident Management System, but all Police databases (excluding covert operations) for the purpose of fulfilling the 'functions of the CCC' rather than restricting this purpose to its 'investigative functions' as suggested by Acting Commissioner Shanahan SC (the Commissioner of Police provided me with a copy of the memorandum of understanding);
- in a letter to him from Commissioner Macknay QC dated 19 April 2013 Commissioner Macknay QC provided a list of 22 Commission officers on whose behalf the Commission intended to soon make application for special constable status, listed the reasons why those officers required the status, and included the representation that the officers 'are not the subject of any criminal convictions or opinions of serious misconduct.' (he provided me with a copy of Commissioner Macknay QC's letter);
- he rejected as incorrect the advice provided to Acting Commissioner Shanahan SC that because the Police were party to the memorandum of understanding between the two organisations they would have known that the Commission interpreted the document to mean that it was excluded from using the Police Incident Management System for this purpose;
- he rejected Acting Commissioner Shanahan SC's description of the Commission's procedural failures as a 'breakdown in communication' between the two organisations;
- had he known of the Commission officer's conviction for possessing a prohibited drug, he would not have approved his application for special constable status;

- he would seek legal advice from the State Solicitor's Office in relation to his position in respect of the issue of special constable status to Commission officers under their assumed identities, and in relation to the impact of the secrecy provisions contained in s 152 of the Act when a Commission officer is granted such status;
- in April 2013 all authorisations of special constable status which had been granted to Commission officers were cancelled, primarily because a number of Commission applications were made under their assumed identity, rather than their natural names, without alerting him to this fact, and
- he had been advised that the Commission has not, since its inception, conducted a criminal history check of its officers who were making an application for special constable status.

On 29 July 2014 I wrote to Acting Commissioner Shanahan SC and asked:

1. about the status of the review of the two organisation's memorandum of understanding, and to be kept informed of its progress;
2. for a copy of every application the Commission has made for special constable status;
3. whether the name in each application is the Commission officer's natural or assumed identity name, and
4. in the case where an application is in an assumed name, I asked that I be provided with the Commission officer's natural name, the officer's date of birth, and whether the officer remains employed by the Commission.

On 21 October 2014 Acting Commissioner Shanahan SC replied with the following information:

- a working group had been formed to further refine the content of the memorandum of understanding, and to work through any issues as they arise;
- prior to May 2013 the Commissioner of Police did not require the Commission to make a formal application for special constable status;
- due to an administrative oversight, not all applications for special constable status in the Commission officer's natural name were captured in the Commission's search of its database, but those that were located were attached to his letter; and
- 11 applications were made under the natural name of the Commission officer, and 21 applications were made under assumed identities. All applications were signed by Deputy Director McGowan on behalf of Commissioner Macknay QC.

On 27 November 2014 I replied to Acting Commissioner Shanahan SC and asked:

1. for a description of how a Commission officer prior to May 2013 communicated a request to the Commissioner of Police to be appointed as a special constable, and a copy of any documentation used, or maintained, by the Commission for this purpose;
2. for a copy of any certificate or other document provided by the Commissioner of Police in response to the Commission's communications to him;
3. for an explanation why the Commission was unable to find its documentation in respect of one application made in the assumed identity of an officer, and in respect of seven applications made in the natural name of other officers (which appointments were made on the same day as those mentioned in the final dot point immediately above);
4. whether a central register is maintained by the Commission which records all applications for special constable status, whether the application was successful or not.

On the same day I wrote to the Commissioner of Police and invited him to comment on the information provided by Acting Commissioner Shanahan SC in his letter dated 21 October 2014. I requested a copy of any certificate his office may have issued granting special constable status to a Commission officer prior to June 2014. He replied on 17 December 2014 and said:

- Prior to May 2013 the Commission approached the Specialist Support Unit of the Police to facilitate the issuing of Western Australia Police Special Constable Certificates of Identity, and during this process the Commission supplied the Police with an email from the Manager of the OSU with the details of the Commission officers who sought the status.

The SSU was responsible for the preparation of a 'Special Constable Appointment' letter in accordance with s 35 of the *Police Act* and for presenting that documentation to the Commissioner of Police for approval. Upon approval a Police identification card was produced and a Police logon number provided.

The Commission made no representation concerning the existence or non-existence of criminal convictions on the part of its officers in this process;

- In October 2012 the Police became aware that the Commission had made applications for special constable status under assumed identities. The Commission did not make the Police aware of this fact;
- After May 2013 the Commission completed, and presented to the Commissioner of Police, written applications for special constable status for its officers with the following details:

- (a) whether the officer's name was a natural name or an assumed identity;

- (b) confirmation that the Commission had undertaken a thorough integrity check, and confirming that the officer had no criminal convictions;
 - (c) the reasons why the officer required special constable status, and
 - (d) a separate annexure which recorded the officer's natural identity in instances when the application was made under an assumed identity.
- The Commission's Director of Operations presented the application to the Commissioner of Police in person. Once the application was approved, the Director attended the SSU with the certificate of appointment. The SSU recorded the details in the Special Constable Register, and produced a Police identification card;
 - The applications for all active special constable authorities were signed by Deputy Director McGowan on behalf of his Commissioner and all stated that a thorough integrity check had been made in respect of the applicant Commission officer, that the officer did not have any criminal convictions, and that the officer would only exercise the special powers for the purpose of the Commission's operations;
 - All authorities are subject to the condition that the Commission officer may only exercise the special powers while employed by the Commission, and
 - The legal advice sought from the State Solicitor's Office had not been received.

On 13 March 2015 Acting Commissioner Shanahan SC wrote and said that he had been advised that to facilitate special constable applications a senior officer of the Commission's OSU (typically Deputy Director McGowan) would write to the Resource Management Information System Business Unit of the Police, and provide details of the Commission officers seeking the status.

A subsequent exchange of emails between the two organisations would then settle the administrative and technical aspects of the appointment process. The OSU officer would hand-deliver the paperwork to the Police and would then collect the relevant identification cards and certificates.

Acting Commissioner Shanahan SC provided me with copies of all available documents held by the Commission in respect of the application process prior to May 2013, adding that the Commission did not maintain throughout that period a central record of applications. He concluded by saying that the Commission could not locate the missing documentation in respect of the applications made for special constable status, but that there was evidence, which he produced, which established that they had, in fact, been made, and were granted by the Police.

Conclusion

Commissioner Macknay QC should have notified me of the letter dated 16 January 2014 from the Commissioner of Police, as he was obliged to do by s 196(4) of the Act. The issues associated with the Commission officer having been charged by the Police and fined for possessing a prohibited drug were serious, and without further investigation at that point should have raised the possibility in Commissioner Macknay QC's mind of the possible existence of a systemic problem inside the OSU, and perhaps within the Commission generally.

The procedural failures of the Commission concerning its internal recording and management of its applications made to the Commissioner of Police for special constable status during the period from the Commission's inception to May 2014 were systemic.

The representations made by the Commission to the Commissioner of Police that 'thorough integrity checks' had been conducted of its officers for whom the applications were being made were false and materially misled the Commissioner of Police.

The basis for the advice provided to Acting Commissioner Shanahan SC during my investigation that some Commission officers did not believe that the Commission had been granted the right by the Police under the two organisations' memorandum of understanding to access the Police Incident Management System in the fulfilment of the Commission's 'functions' is unknown. However, the clear and simply-worded memorandum provides no legitimate reason for the Commission's interpretation.

The Commission made no complaint to the Police, having regard to its asserted view that their right of access to the Police database did not permit it to be consulted in support of special constable applications, that such a restriction was unreasonable.

The point is not answered, as Acting Commissioner Shanahan SC was told, by saying that Commission officers assumed that the restriction was deliberate because the Police were the other party to the relevant MOU.

I am satisfied that the working party established by the Commission and the Police and the review of the process which has been undertaken will cure the deficiencies in the system used to process and support applications by the Commission for appointment of its officers as special constables. No specific recommendation is required of me in this connection.

However, I must say that I have no understanding why Commission officers may need the status as special constables, and I suggest that no such application should be made unless to confer that status can be demonstrated to be necessary for operational purposes, not generally, but in respect of particular operations.

Deputy Director McGowan expressly represented in the applications which he signed that thorough integrity checks had been made concerning the applicant officers, and that the officers did not have criminal convictions. Neither representation could have been made without accessing the Police Incident Management System.

I am driven to conclude that the representations were made either with knowledge of their falsity, or with reckless disregard for their truth. The process amounted to misconduct by deceiving the Commissioner of Police.

6. CONCLUSION AND RECOMMENDATIONS

It is evident that the past systemic abuses and procedural deficiencies in the three Commission activities to which my investigations extended were occasioned during the period of procedural and managerial failures within the OSU upon which I have previously reported.

It is also evident that the abuses and procedural deficiencies identified were facilitated by the abuse and manipulation of the Commission's power to issue, and its officers to use, assumed identities under Part 6, Division 2 of the Act.

The practice of the Commission to issue its officers with multiple assumed identities simultaneously has, in particular, increased the opportunity for the abuses and manipulations to occur, including the dilution of accountability for the accumulation of demerit points due to the commission of traffic offences.

The Commission has expressed the view that s 103 of the Act authorises the issuing of multiple assumed identities simultaneously to one officer.⁸ I hold the contrary view. The Commission's primary reason for its practice – to enable its officers to substitute the use of one assumed identity for the use of another in circumstances where that identity has been compromised – has not, in my view, been shown to be necessary.

The Commission's remaining three reasons for its practice are that it protects the Commission from being associated with the officer should the assumed identity be compromised, that an assumed identity provides for a continuous simple identifier of an officer's involvement in covert operations, and that an assumed identity protects the officer's true identity in court proceedings.

The first and third of these reasons provide the operational convenience for a Commission officer to hold a single assumed identity, but do not explain the necessity for the practice of the officer having one or more additional identities.

The second reason is, of course, merely a mechanism for officers who are performing covert duties to identify a colleague (for example, providing an officer with the assumed identity of 'SO 25' rather than with a longer given and surname). The same result – internal identification of an officer to another – can be achieved by the same means without resorting to the powers under Part 6, Division 2 of the Act.

⁸ In the Commission's representations made to me under s 200 of the Act, it maintains this view, but it agrees that there are risks associated with a Commission officer holding multiple assumed identities. However, it says that there are circumstances in which more than one assumed identity is required to 'support operational objectives' or to maintain the covert nature of its operations. It says that an officer should normally hold only one assumed identity, but more than one will be issued in exceptional circumstances of operational necessity.

It is my opinion that the elimination of the means by which the abuse and manipulation of the past may recur is preferable to leaving those means in place and hoping that history does not repeat itself. This is especially so when the Commission's justifications for those means have not withstood scrutiny.

While improvements to the Commission's procedures have been made to allow its executive management to record and monitor the number of demerit points accumulated by a Commission officer in the OSU who possesses an assumed identity (in either the officer's natural name, or under the officer's assumed identity) through the creation of an appropriate register, and reporting the results to me every month, the Commission's procedures, prior to my investigation, did not ensure that demerit points received under an officer's assumed identity were also recorded against the officer's driver's licence held in the officer's natural name.

My second recommendation seeks to correct this, at least for the preceding three years.⁹

Such an outcome is essential to properly determine if any particular officer at any particular time is lawfully entitled to drive a motor vehicle.

The apparent absence of resort to internal legal advice by OSU or Operations Directorate officers and executive management before performing their duties in the ways demonstrated in my Report allowed some officers to put the abuses into practice systemically over a long period of time.

The suggestion that some officers sought internal legal advice about certain issues, when no documentary evidence of either the advice sought, or given, could be found during my investigation, is unacceptable.

I am aware that the Commission has recently taken steps to ensure the effectiveness of its Legal Services Directorate. The Commission has recently received recommendations from an external, independent review of that Directorate. I was consulted by those who carried out that review and I am satisfied that I do not need to conduct any audit of this aspect of the Commission's processes.

For these reasons I make the following recommendations to the Commission:

RECOMMENDATION 1

A Commission officer should only hold one assumed identity at any one time, a recommendation made upon the supposition that for an officer to hold more than one assumed identity at once is legally possible.

⁹ In the Commission's representations made to me under s 200 of the Act, it said that to implement such a requirement would be difficult because the Commission envisages legal impediments to, and industrial implications arising from, adding demerit points to the driving records of those officers who were acting within what they believed to be lawful practice, and within the Commission's policy at the relevant time. However, the Commission undertakes to consult with the Department of Transport as to the requirement's feasibility before making a final decision about the matter.

RECOMMENDATION 2

The Department of Transport should be notified in writing of the number of demerit points accumulated during the three years prior to the date of my Report by each Commission officer who possessed, during that period, an assumed identity so that all accumulated demerit points can be recorded against the driver's licence held in the officer's natural name.

RECOMMENDATION 3

The Commission should notify the Department of Transport in writing within seven days of the payment of a fine imposed for any traffic offence committed by a Commission officer in the name of an assumed identity to enable the offence to be recorded against the driver's licence held in the officer's natural name.

As I have said, the result of the investigation into the conferral of special constable status is that the process of application has been put in order, perhaps for the first time. The justification for such applications for operational purposes within the Commission is a matter for the Commission to resolve. My oversight responsibility is concerned with the systemic problems which beset the process of application, and I am satisfied that they have been resolved.



**HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR**