



**Joint Standing Committee on the
Anti-Corruption Commission**

**INTEGRITY WITHIN THE
PUBLIC SECTOR**

**Review of the Anti-Corruption
Commission**

**Report No. 2
In the Thirty-Sixth Parliament**

2002



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Report No 2

IN THE THIRTY-SIXTH PARLIAMENT

Presented by:

HON. DERRICK TOMLINSON, MLC

MR JOHN HYDE, MLA

Laid on the Table of the Legislative Council and Legislative Assembly
on Thursday, 19 December 2002

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COMMITTEE STAFF

**Principal Research Officer
Research Officer**

Melina Newnan, BA, LLB
Amanda Millsom-May, Dip Teach

CONSULTANT

Bill Thomas

COMMITTEE ADDRESS

Joint Standing Committee on the
Anti-Corruption Commission
Legislative Assembly
Parliament House
Harvest Terrace
PERTH WA 6000

Tel: 9222 7494
Fax: 9222 7804
Email: jscacc@parliament.wa.gov.au
Website: www.parliament.wa.gov.au

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COMMITTEE'S FUNCTIONS AND POWERS

The functions of the Committee are:

On 28 June 2001 the Legislative Assembly and the Legislative Council agreed to establish the Joint Standing Committee on the Anti-Corruption Commission. The Joint Standing Committee's functions and powers are set out as follows under Legislative Assembly Standing Orders 289, 290 and 264:

- (a) to monitor and review the performance of the functions of the Anti-Corruption Commission established under the *Anti-Corruption Commission Act 1988*;
- (b) to consider and report to Parliament on issues affecting the prevention and detection of "corrupt conduct", "criminal conduct", "criminal involvement" and "serious improper conduct" as defined in section 3 of the *Anti-Corruption Commission Act 1988*. Conduct of any of these kinds is referred to in this Standing Order as "official corruption";
- (c) to monitor the effectiveness or otherwise of official corruption prevention programs;
- (d) to examine such annual and other reports as the Joint Standing Committee thinks fit of the Anti-Corruption Commission and all public sector offices, agencies and authorities for any matter which appears in, or arises out of, any such report and is relevant to the other functions of the Joint Standing Committee;
- (e) in connection with the activities of the Anti-Corruption Commission and the official corruption prevention programs of all public sector offices, agencies and authorities, to consider and report to Parliament on means by which duplication of effort may be avoided and mutually beneficial co-operation between the Anti-Corruption Commission and those agencies and authorities may be encouraged;
- (f) to assess the framework for public sector accountability from time to time in order to make recommendations to Parliament for the improvement of that framework for the purpose of reducing the likelihood of official corruption; and
- (g) to report to Parliament as to whether any changes should be made to relevant legislation.

The Joint Standing Committee will not:

- (a) investigate a matter relating to particular information received by the Anti-Corruption Commission or particular conduct or involvement considered by the Anti-Corruption Commission;
- (b) reconsider a decision made or action taken by the Anti-Corruption Commission in the performance of its functions in relation to particular information received or particular conduct or involvement considered by the Anti-Corruption Commission; or
- (c) have access to detailed operational information or become involved in operational matters.

The Legislative Council has agreed to a resolution, which has the same functions and powers as set out in the above Standing Orders of the Legislative Assembly.

The general provisions for standing and select committees (Standing Orders 248-281) also apply to the Joint Standing Committee.

CHAIRMAN'S FOREWORD

The Anti-Corruption Commission (ACC) was established by legislation in 1996. Its predecessor, the Official Corruption Commission (OCC), had functioned for eight years previously, but with significantly less authority, and with considerably less public controversy. In the first five years of its operation, the ACC failed to win the confidence of many serving police officers, has been in conflict with the Police Union, has been the subject of adverse media comment, and has had its authority challenged successfully in the Supreme Court. All of these things have detracted from the important role the ACC has played in pursuing improper conduct within the public sector, and in particular, within the Police Service.

The *Anti-Corruption Commission Act 1988 (ACC Act)*, under which the ACC operates is flawed. The Joint Standing Committee on the Anti-Corruption Commission (JSCACC) in eight of its eleven reports to the previous Parliament recommended amendments to the ACC Act. They related to accountability, confidentiality and the coercive powers of the ACC. None were acted upon.

It was the intention of the current JSCACC to reconsider those recommendations as part of its own review of the ACC Act. However, events overtook that intention. In October 2002, shortly after the JSCACC advertised for public submissions, the Royal Commission into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers (the Royal Commission) brought another dimension to the JSCACC's deliberations. A Discussion Paper released by the Royal Commission, sought public comment upon external oversight of the Western Australian Police Service. The matters raised in the Discussion Paper reflected earlier recommendations of the JSCACC.

In anticipation that the Royal Commission might consider recommendations for an overhaul of the ACC, or perhaps even a new body for the external oversight of the Police Service, the JSCACC prepared this report to indicate, in the light of its knowledge and experience, how the ACC might be renewed. Firstly, the JSCACC decided to reconsider whether the ACC should be a standing Royal Commission like the Parliamentary Commissioner for Administrative Investigations (the Ombudsman) in this State, or the Police Integrity Commission (PIC) and the Independent Commission Against Corruption (ICAC) in New South Wales, or the Crime and Misconduct Commission (CMC) in Queensland.

Secondly, the JSCACC considered whether the ACC should continue to have general oversight of the public sector, or whether there should be separate bodies to oversight the Police and the Public Sector. The JSCACC also considered whether a Crimes Commission to investigate serious and organised crime in Western Australia might be justified. The JSCACC has subsequently recommended against this last proposition. The JSCACC found no evidence that the Western Australian Police Service is incapable of combating serious crime.

The JSCACC recommends that powers of the ACC to compel information at successive stages of preliminary inquiry and investigation be revised, and that consideration be given to extending the powers of a Special Investigator to allow public hearings. However, the JSCACC considers that the checks and balances against the unjust use of that authority contained within the existing ACC Act should be retained. The JSCACC is of the view that the public sector integrity

authority should not be a standing Royal Commission. Rather the powers of a Royal Commission, including the discretion to hold public hearings, should be exercised only by a Special Investigator appointed for the purpose and only on the independent decision of the Commissioners.

Finally, I thank my fellow Committee Members for their contributions to this report. I also wish to thank Mr Bill Thomas, a former member of the JSCACC in the Thirty-Fifth Parliament who was engaged as a consultant to assist the Committee in the preparation and drafting of this Report. I also acknowledge and thank the Committee staff who provided advice and assistance in the final presentation of this report.

I commend this Report to the Parliament.

HON DERRICK TOMLINSON, MLC
CHAIRMAN

ABBREVIATIONS AND ACRONYMS

“ACC”	Anti-Corruption Commission
“ACC Act”	<i>Anti-Corruption Commission Act 1988</i>
“AG”	Auditor General
“ALP”	Australian Labor Party
“CIB”	Criminal Investigation Bureau
“CICIC”	Commissioner for the Investigation of Corrupt and Improper Conduct
“CIEPIC”	Commission for the Investigation Exposure and Prevention of Improper Conduct
“COG”	Commission on Government
“CJC”	Criminal Justice Commission (Qld)
“CMC”	Crime and Misconduct Commission (Qld)
“DPP”	Director of Public Prosecutions
“FBI”	Federal Bureau of Investigations (USA)
“ICAC”	Independent Commission Against Corruption (NSW)
“JSCACC”	Joint Standing Committee on the Anti-Corruption Commission
“OCC”	Official Corruption Commission
“PACC”	Police Anti-Corruption Commission
“PCICAC”	Parliamentary Committee on the Independent Commission Against Corruption (NSW)
“PCMC”	Parliamentary Crime and Misconduct Committee (Qld)
“PCOPIC”	Parliamentary Committee on the Ombudsman and the Police Integrity Commission (NSW)
“PIC”	Police Integrity Commission (NSW)
“PSSC”	Public Sector Standards Commission

“TAFE”	Technical and Further Education
“WAPS”	Western Australian Police Service

GLOSSARY

“Ombudsman”	means the Parliamentary Commissioner for Administrative Investigations.
“Royal Commission”	means the Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers.
“Wood Royal Commission”	means the Royal Commission into the New South Wales Police Service.
“Fitzgerald Inquiry”	means the Commission Inquiry Into Possible Illegal Activities and Associated Police Misconduct (Qld)

RECOMMENDATIONS

The Committee recommends:

Recommendation 1.

That the definition of criminal conduct be expanded to include all sections of the Criminal Code.

The Committee recommends:

Recommendation 2.

That the ACC be reconstituted as a public sector integrity authority and renamed, with responsibility for investigating all criminal conduct as well as corruption and serious improper conduct as currently defined in the *Anti-Corruption Commission Act 1988*.

The Committee recommends:

Recommendation 3.

That the public sector integrity authority have the power to act on its own motion, both reactively and proactively in the light of its own experience and knowledge.

The Committee recommends:

Recommendation 4.

That the public sector integrity authority play an active role in the ethics and integrity education of public officers including police. This should include design of courses as well as participation in their delivery. The public sector integrity authority should seek to be involved in relevant courses offered by TAFE and universities.

The Committee recommends:

Recommendation 5.

That the public sector integrity authority's jurisdiction should not be expanded to include investigation of organised crime.

The Committee recommends:

Recommendation 6.

That the hierarchy of investigations contained in the *Anti-Corruption Commission Act 1988* be retained.

The Committee recommends:

Recommendation 7.

That the right of a complainant to seek a review of a decision not to take a matter any further be retained subject to the request being able to be refused if the application is frivolous, vexatious or not made in good faith. A refusal on the foregoing grounds should be able to be made the subject of a complaint to the Parliamentary Inspector proposed at Recommendation 17.

The Committee recommends:

Recommendation 8.

That the Special Investigator be able to conduct public hearings. This power should be exercised only with the written non-delegable authority of the Commissioners.

The Committee recommends:

Recommendation 9.

That the legislation provide a presumption that special investigation hearings be conducted in private.

The Committee recommends:

Recommendation 10.

That the full provisions of the *Royal Commission Act 1968* which protect the rights of those against whom allegations are made should be applied to public hearings conducted by a Special Investigator.

The Committee recommends:

Recommendation 11.

- (a) That the powers currently possessed by the ACC to compel evidence from any person for preliminary inquiries should be acquired for investigations by the public sector integrity authority.
- (b) The powers of the public sector integrity authority to compel evidence at preliminary inquiries be restricted to requiring public officers to provide information or documents.
- (c) That any public officers or persons giving information to a public sector integrity authority investigator have the right to be accompanied by a legal practitioner.

The Committee recommends:

Recommendation 12.

That the public sector integrity authority be comprised of a full-time Commissioner who shall be Chairman and two part-time Commissioners. One Commissioner should be a former judge or eligible for appointment as a judge and one Commissioner should have a background or experience in civil liberties or human rights.

The Committee recommends:

Recommendation 13.

That the functions of the Commissioners of the public sector integrity authority should not include conducting investigations.

The Committee recommends:

Recommendation 14.

1. That the public sector integrity authority be comprised of two divisions of investigation:
 - (a) a police integrity investigations division with responsibility for investigating allegations against police officers;
 - (b) a division with responsibility for investigating allegations against other public officers.
2. That each division be headed by a director which should be a statutory position answering directly to the Chairman of the Commission.

The Committee recommends:

Recommendation 15.

That the public sector integrity authority operate a witness protection scheme which will service the police force and other law enforcement bodies as well as its own requirements.

The Committee recommends:

Recommendation 16.

That the legislation constituting the public sector integrity authority should not diminish parliamentary privilege.

The Committee recommends:

Recommendation 17.

That a position of Parliamentary Inspector of the public sector integrity authority be created to provide operational accountability. The Parliamentary Inspector will have access to operations and operational information and report to the Parliament through a standing committee.

The Committee recommends:

Recommendation 18.

That prohibition on publication of the fact that a matter is being considered by the ACC in section 54 of the *Anti-Corruption Commission Act 1988* be repealed.

MINISTERIAL RESPONSE

Standing Order 277(1) of the Standing Orders of the Legislative Assembly states that:

A report may include a direction that a Minister in the Assembly is required within not more than three months, or at the earliest opportunity after that time if the Assembly is adjourned or in recess, to report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Accordingly, the Joint Standing Committee on the Anti-Corruption Commission therefore directs that the Premier respond to the recommendations.

CHAPTER 1 INTRODUCTION

1.1 PURPOSE OF THIS REPORT

In August 2002, the JSCACC resolved to consider the issue of Integrity within the Public Sector and prepare a series of Discussion Papers to be tabled in the Parliament of Western Australia. The Discussion Papers would deal with the following topics:

- Review of the *Anti-Corruption Commission Act 1988*;
- Review of Regulatory Agencies;
- Ethics Education in the Public Sector;
- Integration of Oversight Agencies; and the
- Role of the Parliamentary Committee.

1.2 CONDUCT OF THE INQUIRY

The JSCACC advertised the inquiries and called for public submissions.¹ To date, eleven submissions have been received from individuals and governments agencies and other groups. These submissions address the issues in one or more of the Discussion Paper topics.

It has not been possible to fully develop all of the many issues raised within the submissions which are broader than covered in this report. However, the JSCACC has read all of the submissions and will attempt to address issues that impact on the Discussion Paper topics.

In October 2002, the JSCACC attended a conference in Brisbane entitled *Reconstructing 'The Public Interest' in a Globalising World; Business, the Professions and the Public Sector*. The JSCACC also took the opportunity to hold briefings with the Crime and Misconduct Commission (CMC) and the Parliamentary Crime and Misconduct Committee (PCMC) whilst in Brisbane. Following the Conference, the JSCACC travelled to Sydney and held further briefings with the following oversight bodies and parliamentary committees (both Members and staff):

- Police Integrity Commission (PIC);
- NSW Parliamentary Committee on the Independent Commission Against Corruption;
- NSW Parliamentary Committee on the Ombudsman and the Police Integrity Commission; and the
- Independent Commission Against Corruption (ICAC).

¹ Advertisement calling for submissions appeared in the *West Australian* newspaper on Saturday 28 September 2002 and in the *Weekend Australian* on 28-29 September 2002.

The discussions proved to be invaluable in not only giving the JSCACC an overview of the operation of these bodies and committees but an opportunity to discuss issues that the JSCACC was examining in its series of Discussion Papers.

1.3 ROYAL COMMISSION INQUIRY

The Royal Commission released a Discussion Paper in October 2002 that called for submissions on the issue of external oversight of the Western Australian police service. It was intended that the submissions would be received and discussed within a number of group consultation meetings (Round Table Conferences). The first Round Table Conference conducted sessions under the topic headings jurisdiction, structure, powers and oversight and gave attention to the following matters:

- An examination of the legislative framework of the ACC and the Ombudsman;
- The relationship of the ACC and Ombudsman with the Internal Affairs Unit of the Western Australian Police Service (WAPS), the Professional Standards Portfolio, and WAPS itself;
- The current mechanisms for external oversight by the ACC and the Ombudsman and their adequacy; and
- The potential for a new model for corruption investigation in WA.

The JSCACC understands that the Royal Commission intends to conduct an additional three Round Table Conferences during 2003.

1.4 CURRENT INQUIRY

It was originally intended that the JSCACC's first Discussion Paper would review ACC Act. The JSCACC was of the view, that this paper would generate comment and consideration of the provisions of the Act with a view to examining the provisions in some detail and considering improvements.

Due the circumstance of the Royal Commission inquiry considering some of the issues that would be the subject of the JSCACC Discussion Papers, the JSCACC considered that it would be timely and appropriate for the JSCACC to consider a wider range of issues in its first Report to ensure that it was both topical and relevant.

This current Report now considers a number of issues and makes considered recommendations.

1.5 INQUIRY PARAMETERS

This Report examines issues including:

- the background to the Anti-Corruption Commission and external oversight of the police;

- the jurisdiction of the proposed public sector integrity authority and the Criminal Code;
- powers including public hearings and the power to compel evidence;
- the structure of an integrity authority; and
- the accountability of an integrity authority.

CHAPTER 2 BACKGROUND

2.1 THE ANTI-CORRUPTION COMMISSION AND EXTERNAL OVERSIGHT OF THE POLICE

The ACC is one of two bodies with responsibility for external operational oversight of police in Western Australia. The other is the Ombudsman.

The creation of the ACC in 1996 as an organisation whose mission included an explicit reference to the external oversight of police was the outcome of the convergence of two distinct schools of thought, that:

- there should be a body external to the police force to deal with complaints about the behaviour of police; and
- there should be a powerful body with overarching responsibility for detecting and investigating corruption across the public sector.

The jurisdiction of the ACC is to investigate and report on corruption, criminal conduct or serious improper conduct among 140 000 State and local government employees, local government councillors, statutory office holders and members of the Parliament of Western Australia. This includes 5 000 police officers.

The argument for external oversight of police is based on the need for public confidence in the process of dealing with complaints by ensuring that there can be no suggestion that police can go easy on their own. Externality was traditionally resisted by police commissioners and police unions who saw it as a slight on the professional integrity of their organisation. When the ombudsman legislation was first introduced in 1971 the newly elected Tonkin Labor government envisaged that the Ombudsman would be able to investigate complaints against police. However, the Minister for Police in the Tonkin government, Hon. Jerry Dolan, MLC, at the behest of the Commissioner of Police, crossed the floor in the Legislative Council to support a successful opposition amendment to his own government's bill, to exclude police conduct from the jurisdiction of the Ombudsman.² The Minister was censured by the ALP but the exclusion endured.

In 1984, a qualified form of externality in the consideration of complaints about police conduct was introduced when the *Parliamentary Commissioner Act 1971* was amended to introduce a degree of oversight of investigations by the police about police. The general function of the Ombudsman is to investigate matters of administration across the public sector but the 1984 amending Act introduced section 14(1a) which provides:³

14(1a) Subject to this Act...the Commissioner (viz. the Ombudsman) shall investigate any action taken by a member of the Police Force or Police Department, whether or not that

² Hansard, Vol 192, 3 December 1971, p 823. The Minister's vote did not affect the outcome because the government did not have a majority in the House. The amendment was carried 15 votes to 10. The police union had lobbied the opposition to propose the amendment.

³ *Parliamentary Commissioner Act 1971*, section 14(1).

action relates to a matter of administration, where that action was, or purported to be, done in the exercise of, or in connection with or incidental to the exercise of, that members powers, duties or functions as a member of the Police Force or Police Department.

Provided that the Parliamentary Commissioner (viz. the Ombudsman) shall not investigate such action until the Commissioner has had a reasonable opportunity to conduct his own investigation into such action.

The external oversight of police created by this device is grafted onto the Ombudsman's primary role, viz. investigating matters of administration and is qualified by the fact that, although complaints can be received by either the police or the Ombudsman, the police have the first opportunity to investigate it.

In 1996, the Legislative Council Select Committee on the Western Australian Police Service reported that the system of external oversight by the Ombudsman should be replaced by a Police Anti-Corruption Commission (PACC) which would have the powers of a Royal Commission.⁴ The Select Committee's recommendation was published on the same day that the bill to create the ACC was introduced into the Parliament.

The bill to establish the ACC was designed to create a powerful body with responsibility for detecting, investigating and reporting on corruption, criminal conduct and serious improper misconduct across the public sector.⁵ Perceptions of corruption and misconduct among politicians and senior officials in the eighties and, particularly after the stock market crash of 1987, imprudent use of public funds culminated in the appointment of the Royal Commission into the Commercial Activities of Government and Other Matters. That Royal Commission's recommendations included the creation of a Commissioner for the Investigation of Corrupt and Improper Conduct (CICIC) which would have been a continuing body to deal with official corruption and misconduct with powers similar to a Royal Commission to compel evidence and conduct public hearings.⁶ That proposal would have included police in the jurisdiction but police conduct formed virtually no part in the deliberations that led to the recommendation.

The Court government was chary about a standing Royal Commission. It included the issue of an anti-corruption body in the terms of reference of the Commission on Government (COG) and deferred further consideration of it to consideration of the COG Report. COG reported in December 1995 and recommended the establishment of a Commission for the Investigation, Exposure and Prevention of Improper Conduct (CIEPIC).⁷ COG had given more attention to police matters than the Royal Commission into the Commercial Activities of Government and Other Matters and this was reflected in the detail of the recommendation for CIEPIC. Police were included in its jurisdiction and a full-time Deputy Commissioner was proposed who would be responsible for oversight of investigation of complaints against police. Like the CICIC the organisation proposed by COG was essentially a standing Royal Commission.

⁴ Legislative Council, Report of the Select Committee on the WA Police Service, Terms of Reference 3, June 1996, pp 107-111.

⁵ *Official Corruption Commission Amendment Act 1996.*

⁶ Royal Commission into the Commercial Activities of Government and Other Matters, 1992, pp 4-23-4-26 and Appendix 2 1-6.

⁷ Commission on Government, Report No 2, pp 80-103 and 246-252.

When the government did legislate in 1996 it introduced amendments to the *Official Corruption Commission Act* that were so substantial that a new body, the ACC, was created and the Act itself was renamed as the *Anti-Corruption Commission Act 1988*.

Although the deliberations that led to the creation of the ACC had been more concerned with political corruption than police corruption, by the time the bill emerged in the Parliament the publication of the Legislative Council report had raised the profile of the issue of investigation of allegations against police. The government was at pains to emphasise that the jurisdiction of the ACC included police. The opposition moved amendments to create a division within the ACC with responsibility for matters concerning police. The government sought to put the question of police falling within the scope of the ACC beyond doubt by sponsoring an amendment to redraft the long title of the Act into its current form:

An ACT to provide for an Anti-Corruption Commission to receive or initiate allegations of corruption, or of criminal or improper conduct of certain kinds, against police officers and other public officers and certain other people, to provide for the way in which such allegations are to be inquired into, investigated or otherwise dealt with, and for related purposes.

The bill certainly achieved that aim. Police matters have been a major part of the ACC's concerns from its inception. The three special investigations that have been appointed were into the conduct of police officers. Moreover, although only about half the matters that come before the ACC concern the police⁸ the public controversy and litigation that the ACC and its special investigators have become involved in has invariably concerned police matters.

The ACC Act falls a long way short of establishing a standing Royal Commission. That was the government's intention. By the time the bill was debated there were three proposals for anti-corruption bodies that would have included police within their scope, and have the capacity to compel evidence and conduct public hearings. They were the Royal Commission's proposal for a CICIC, COG's more detailed proposal for a CIEPIC and most recently the Legislative Council's PACC. In his second reading speech the then Premier dismissed these proposals *with respect*. He cited the Royal Commission into the New South Wales Police Service (Wood Royal Commission) which recommended that the continuing body with responsibility for operational oversight of police should have the principal function of assembling admissible evidence to secure prosecutions rather than being *of the genus of a standing Royal Commission*.⁹

The JSCACC concurs with the then Premier on this question.

The ACC Act does give the ACC power to appoint special investigators who have the authority of a Royal Commission to compel evidence, but not that to conduct public hearings. Special investigations are not conducted by the ACC Commissioners, but by senior lawyers with specific terms of reference and a finite life. The ACC also has the power to recommend the establishment of a Royal Commission and its Terms of Reference.

The essential nature of the ACC is often misrepresented or misunderstood. It is conceived of as an investigatory body which will investigate an allegation and send its conclusions to the Director of Public Prosecutions if it believes criminal prosecution is warranted and/or to a public sector disciplinary authority such as the Commissioner of Police if it believes the investigation has

⁸ ACC, Annual Report 2001-200, p. 21.

⁹ Hansard, Vol 333, Legislative Assembly, 19 June 1996, p 2867.

disclosed misconduct. The ACC has expressed frustration to the JSCACC because investigations have provided evidence on what they believe to be criminal conduct but which cannot satisfy the criminal onus of proof. They have sought power to conduct public hearings so that the public may be informed *of the things that are occurring*.¹⁰

The power to expose which the ACC has sought is also a power to punish and the JSCACC's recommendations on this proposed power are reported at Chapter Four.

¹⁰ O'Connor, Terry, Evidence, 5 May 2000, JSCACC, 10th Report, p 44.

CHAPTER 3 THE JURISDICTION OF THE PUBLIC SECTOR INTEGRITY AUTHORITY & THE CRIMINAL CODE

Corruption is essentially an economic offence. The statutory definition of the jurisdiction of the ACC extends it to criminal conduct, which is a number of offences from the Criminal Code enumerated in a Schedule to the ACC Act.¹¹ They can be characterised as crimes against property. They do not include crimes against the person. For example, assault, which might be a complaint against police (or another public officer such as a prison officer) in an allegation of excessive use of force, is not within the jurisdiction of the ACC.

Conduct by a police officer, which precipitates complaints of ‘non-scheduled’ criminal offences, may well also constitute serious improper conduct and hence fall within the jurisdiction of the ACC under that head. But the complainant in the matter of a non-scheduled offence will still be at disadvantage relative to a complainant in a scheduled matter because the ACC is able to investigate a scheduled offence with a view to reporting to the DPP and securing a criminal prosecution. The disadvantage of a complainant in an allegation of conduct, which constitutes a non-scheduled criminal offence, is ameliorated by the existence of the Ombudsman’s specific, but qualified, jurisdiction to investigate any action taken by a member of the Police Force.¹² This creates an overlap of jurisdiction because any action taken by a member of the Police Force will include any breach of the ACC’s scheduled offences by a police officer. A protocol between the ACC and the Ombudsman provides a practical line of demarcation and a means of managing the overlapping jurisdiction.

The Ombudsman retains exclusive jurisdiction for external oversight in relation to the residual non-scheduled offences. An investigation by the Ombudsman into, *inter alia*, an allegation of a non-scheduled offence has the powers of a Royal Commission including that to compel evidence, which an ACC investigator does not possess, but can investigate a police matter only after the Commissioner of Police has been given a prescribed time to investigate it. This protection of the Commissioner of Police’s autonomy is weakened for scheduled offences that are investigated by the Ombudsman. The Ombudsman can investigate an allegation, which has been referred to her by the ACC.

*whether or not the Commissioner of Police has had a reasonable opportunity to investigate the matter to which the allegation relates.*¹³

The JSCACC can see no reason why the powers available to investigate breaches of the Criminal Code enumerated in the schedule of the ACC Act should be any different from those available to deal with non-scheduled offences.

The Committee recommends:

Recommendation 1.

That the definition of criminal conduct be expanded to include all sections of the Criminal Code.

¹¹ *Anti-Corruption Commission Act 1988*, sections 3(1), 13(1)(a)(iii), Sch.1.

¹² *Parliamentary Commissioner Act 1971*, section 14 (1a). See also pages 3-4 herein.

¹³ *Anti-Corruption Commission Act 1988*, section 28(3).

3.1 THE ALLOCATION OF RESPONSIBILITY FOR INVESTIGATING CORRUPTION AND CRIMINAL AND SERIOUS IMPROPER CONDUCT IN THE POLICE AND OTHER PORTIONS OF THE PUBLIC SECTOR

About half the work of the Ombudsman is police matters and has been discharged with conspicuously less controversy and litigation than the ACC's conduct of its police responsibilities notwithstanding the qualifications on the Ombudsman's powers to investigate police. The JSCACC has considered that the skills and culture appropriate for dealing with the type of complaints that the ACC deals with may be so different to those best suited to dealing with the matters that go to the Ombudsman that the two organisations should be left to develop separately, each with a non-police and police component. However it has concluded that the police components of the ACC and Ombudsman's organisations, whose current tasks differ primarily on which sections of the Criminal Code their jurisdiction and practice is derived from, would benefit by being in the same organisation.

The JSCACC has concluded that due to:

- the desirability of a commonality of powers for investigators exercising external oversight of police irrespective of which section of the Criminal Code they might be concerned with; and
- the desirability of one organisation having responsibility for exercise of external oversight of police in respect of all sections of the Criminal Code.

The police oversight functions currently exercised by the ACC and the Ombudsman should be combined in one organisation.

If it is accepted that the police oversight functions currently exercised by the ACC and the Ombudsman should reside in one organisation there are two models for reorganising the allocation of responsibilities for investigating corruption, criminal conduct and serious improper conduct in the police and other portions of the public sector.

MODEL 1

Split the ACC into police and non-police focussed organisations leaving the Ombudsman's organisation as it is now, minus the police oversight functions which are assigned along with the ACC's police functions to a new police oversight body.

This option creates three organisations where now there are two. Moreover, as well as the ACC and the Ombudsman there are the Auditor General and the Commissioner for Public Sector Standards who exercise forms of external oversight of the public sector and are independent agencies under the ACC Act.

The Chairman of the ACC has given evidence to the JSCACC that corruption and criminal conduct is no more or less prevalent in the public sector, apart from sections of the police force, than it is in the wider community. He said:

...the Commission (viz. the ACC) does not believe that endemic or systemic corruption exists

*within the public sector. However, the situation is different within the police service. The Commission believes significant problems exist in the police service, mainly centred on the self appointed elite, the detective cohort, or what used to be called the CIB. By and large, the great majority of uniformed officers are hard working and honest people*¹⁴

The extent of corruption, criminal conduct and serious improper conduct in the Western Australian public sector does not warrant a proliferation of oversight bodies. In particular there is no need for a separate organisation based solely on the non-police jurisdiction of the ACC.

The JSCACC believes that Western Australia can be proud of the honesty and integrity of its public sector. Historically, for example, since responsible government in 1890 billions of dollars worth of mining tenements have been issued in Western Australia, which is the largest mining province in the world, in accordance with laws and procedures in a public sector answerable to the Parliament of Western Australia. In the same period vast sums of wealth have been created by land-use planning decisions made by public officers. In each of these fields there is virtually no serious suggestion of corruption.

The ACC reported 78 allegations of corrupt or criminal conduct in State government departments, apart from police, in 2001-2002.¹⁵ There is no reason why most of these should not be able to be dealt with by the Police Public Sector Investigation Unit, subject to ACC supervision, because the problem of externality does not arise. The investigation of the conduct of a Health Department officer who misuses a departmental credit card should be able to be undertaken by the police without problems of integrity or public confidence in the investigation arising, as readily as it would if the allegation related to an employee of a private hospital.

MODEL 2

Widen the definition of criminal conduct to include all sections of the Criminal Code and assign the residual police oversight functions now undertaken by the Ombudsman to the ACC, or its successor, leaving the Ombudsman's organisation as it is now, minus the police oversight functions.

The JSCACC favours this model. It provides an opportunity to reconstitute the ACC as a public sector integrity authority with responsibility for all operational oversight of police and responsibility for corruption and all criminal and serious improper conduct in the wider public sector.

The recommendations for the powers of the reconstituted public sector integrity authority are set out in Chapter Four and the recommendations for the structure at Chapter Five.

The Committee recommends:

Recommendation 2.

That the ACC be reconstituted as a public sector integrity authority and renamed, with responsibility for investigating all criminal conduct as well as corruption and serious improper conduct as currently defined in the *Anti-Corruption Commission Act 1988*.

¹⁴ O'Connor, Terry, Evidence, 5 May 2000, JSCACC, 10th Report, pp 41-42.

¹⁵ ACC, Annual Report 2001-2002, p 24.

3.2 OWN MOTION INVESTIGATIONS

The public sector integrity authority should be able to act on its own motion. ie to be pro-active. The long title of the ACC Act includes the initiation of allegations against police officers and other public officers among the purposes of the Act. Section 13(1)(d) gives effect to this by providing that the ACC can consider, in the light of its own experience and knowledge, whether or not they ought initiate an allegation and if they do so they can investigate it as they would an allegation received from a person (including a public officer).¹⁶

The weakness of section 13(1)(d) is that it refers to offences that have occurred and does not envisage corruption, criminal conduct or serious improper conduct which is likely to occur. The legislation should permit the public sector integrity authority to act of its own motion on apprehended offences.¹⁷

The ACC Act empowers the ACC to act on its own motion in light of their experience and knowledge. The JSCACC interprets the qualification as requiring the ACC to have some reason for formulating an allegation with the effect that they should not act capriciously or go on “fishing expeditions”. That is a reasonable qualification which should apply to reactive and proactive own motion investigations.

The Committee recommends:

Recommendation 3.

That the public sector integrity authority have the power to act on its own motion, both reactively and proactively in the light of its own experience and knowledge.

3.3 EDUCATION

The promotion of standards of probity within the public sector should be one of the functions of the public sector integrity authority. Accordingly, they should play an active role in the education of public officers. ICAC in New South Wales and CMC in Queensland perform this function. In the public sector at large the number and array of organisations makes it difficult to generalise how this might be done. However, the ongoing ethics education undertaken by the CMC impressed the JSCACC.

In addition to being available for in-house training and education the public sector integrity authority should seek representation on course advisory committees, and like bodies, at universities and TAFE for courses which train both public officers and people likely to have professional dealings with public officers. Moreover commissioners and staff should be available to make presentations in such courses. This should include business schools and law schools.

The police education system is the most structured in the public sector. They have their own educational institution, the new Police Academy at the Joondalup campus of Edith Cowan University and induction, promotional, in-service and continuous education programs. The

¹⁶ *Anti-Corruption Commission Act 1988*, section 13 (1).

¹⁷ JSCACC, *Amending the Anti-Corruption Commission Act 1988*, 5th Report in the 35th Parliament, p 21.

public sector integrity authority should have a substantial role in the design of programs and make direct presentations to them, including participation of commissioners.

The JSCACC in the 35th Parliament visited the New York Police Department, the FBI, the Los Angeles Police Department and the Hong Kong Police. In each jurisdiction the place of ethics in the training of police officers and the role of formal training in the formation of a 'police culture' was one of the matters on which the JSCACC sought briefings.

The JSCACC reported on this in its Annual Report for 1997-8.¹⁸ It is difficult to apply those observations directly to Western Australia because the organisational arrangements in those jurisdictions vary greatly. In particular in the US the large number of police forces there, the fact that the notion of external oversight of police is not established as it is in Australia and the scale of the organisations raise issues that do not occur here. However, in each jurisdiction it was agreed that it was important that there should be an ethics component in the induction programs and that this should be reinforced in courses which officers take later in their careers and continuous education programs.

The JSCACC acknowledges that existing bodies such as the Ombudsman and Public Sector Standards Commissioner are offering integrity training to public officers.

The Committee recommends:

Recommendation 4.

That the public sector integrity authority play an active role in the ethics and integrity education of public officers including police. This should include design of courses as well as participation in their delivery. The public sector integrity authority should seek to be involved in relevant courses offered by TAFE and universities.

3.4 ORGANISED CRIME

The JSCACC has not received any submissions or evidence that would support a proposition that the body that is responsible for investigating police corruption and criminal conduct should have a responsibility for organised crime. In Queensland the Crime and Misconduct Commission, and before that the Criminal Justice Commission, has responsibility for organised crime as well as public sector criminal conduct. This dates to the Fitzgerald inquiry in the late eighties that reported on high level police and political involvement with organised crime notably prostitution and illegal gambling.¹⁹

There has been no evidence of similar situations in Western Australia placed before this JSCACC. Any linkages between organised crime and police or other public officers that can be conceived of as even remotely likely would be caught within the existing terms of reference of the ACC through involvement with public officers.

In its submission to the JSACC the Western Australian Police Union of Workers stated:

The Union takes the view there is no need for the establishment of a separate body devoted to

¹⁸ JSCACC 7th Report, 35th Parliament, Annual Report 1997-1998, May 1999.

¹⁹ Crime and Misconduct Commission, Briefing of JSCACC, 8 October 2002.

*inquiries into organised crime. No evidence has been provided to the Union that the WA Police Service's efforts to investigate, detect and prosecute those involved in organised criminal activity are deficient.*²⁰

The Western Australian Police Service in its submission to JSCACC stated:

*...the most appropriate vehicle for addressing the links between everyday crime and organised crime remains with the WA Police Service.*²¹

If there is a need for police to have extra-ordinary powers to investigate organised crime that is a separate question and beyond the scope of this report.

The Committee recommends:

Recommendation 5.

That the public sector integrity authority's jurisdiction should not be expanded to include investigation of organised crime.

²⁰ Submission of the Western Australia Police Union of Workers, p 6.

²¹ Submission of the Western Australia Police Service, p 21.

CHAPTER 4 POWERS

4.1 INTRODUCTION

Two key issues that arise in relation to legislation to constitute a public sector integrity authority concern the powers it should possess. In particular:

- should there be the power for public hearings to be conducted under the aegis of a public sector integrity authority; and
- should, and under what circumstances, the public sector integrity authority have the power to compel evidence? These extraordinary powers which exceed those normally available to police are traditionally reserved to Royal Commissions.

Organisations with responsibility for investigating police and public sector corruption, criminal conduct or serious improper conduct in other jurisdictions, notably NSW and Qld, possess extraordinary powers. The Independent Commission Against Corruption (ICAC) in NSW was modelled on the organisation of the same name in Hong Kong and was established to expose perceived high level and endemic official corruption in that State. When the Wood Royal Commission found widespread police corruption, which had gone undetected by ICAC, notwithstanding its extraordinary powers, the Police Integrity Commission (PIC) was established. It too possesses extraordinary powers. In Queensland the Criminal Justice Commission was established after the Fitzgerald Inquiry with extensive powers to investigate police and other public sector misconduct, and organised crime. The Crime and Misconduct Commission (CMC) which superseded the CJC has similar powers.

The models of ICAC, PIC, and CMC are all standing Royal Commissions of one form or other in that they have a continuing existence and extraordinary powers. In this respect they differ from the ACC which, as noted earlier, was deliberately conceived as an organisation which would not be *of the genus of a standing royal commission*.^{*} Whether Western Australia should continue to eschew the model of a standing Royal Commission is the underlying issue in considering any changes to anti-corruption legislation in this State.

4.2 HIERARCHY OF INVESTIGATIONS

The JSCACC believes that the hierarchy of investigations under the ACC Act should be retained: preliminary inquiry, investigation and special investigation. This legislative device makes it possible to grade the powers available to investigators in accordance with the seriousness of the matter being investigated and, presumably, the seniority and experience of the officer exercising those powers.

Moreover, the concept of a preliminary inquiry provides a convenient point at which complainants can be notified of the decision as to whether a matter should be taken further. The ACC Act provides that, at this stage, the complainant can seek a review of a decision that further

^{*} See page 7.

action is not warranted.²² The ACC has drawn the JSCACC's attention to the resources the review process takes up but it is important for public confidence in the process and should be retained in future legislation subject to a provision a request for a review can be refused where it is made on frivolous or vexatious grounds, is not made in good faith or is otherwise without substance.²³ A refusal to review a decision on these grounds could be the subject of a complaint to the Parliamentary Inspector under the accountability measures proposed at Chapter Six.

The Committee recommends:

Recommendation 6.

That the hierarchy of investigations contained in the *Anti-Corruption Commission Act 1988* be retained.

The Committee recommends:

Recommendation 7.

That the right of a complainant to seek a review of a decision not to take a matter any further be retained subject to the request being able to be refused if the application is frivolous, vexatious or not made in good faith. A refusal on the foregoing grounds should be able to be made the subject of a complaint to the Parliamentary Inspector proposed at Recommendation 17.

4.3 PUBLIC HEARINGS

In its submission to the JSACC the Western Australian Police Union of Workers stated that if public hearings are introduced:

Acceptable accountability measures need to be put in place to ensure they are conducted only in the pursuit of justice and in the interests of truth. Further, in the context of public hearings, an individual called to give evidence must; have the right to counsel, be adequately informed prior to the hearing of the nature of the inquiry and have the right to cross-examine (either personally or by counsel) other witnesses and call his/her own witnesses.

Under the union's model of private hearings to further an existing investigation, a person required to attend must; have the right to representation by counsel, be adequately informed prior to the hearing of the nature of the inquiry and only be asked questions specific to the investigation ie a hearing should not be a mere "fishing expedition".²⁴

If the Chairman or Commissioners or staff of the public sector integrity authority had the power to conduct public hearings it would acquire characteristics of a standing Royal Commission. Arguments in support of public hearings can be based on the public's right to be informed about a matter of legitimate public interest – the probity of government. This is a form of 'freedom of information'. The exemplary value of public hearings and their efficacy in exposing systemic

²² *Anti-Corruption Commission Act 1988*, section 20.

²³ JSCACC 5th Report, 35th Parliament, Amending the *Anti-Corruption Commission Act 1988*, 1998, pp xvi, 28.

²⁴ Submission of the Western Australian Police Union of Workers, p 14.

corruption within an organisation are most often cited in support of public hearings as instruments of law enforcement. The Chairman of the ACC made this point to the JSCACC, when seeking the power to conduct public hearings.²⁵ He elaborated:

*I would not ever envisage that we would have a public hearing in respect of one allegation against one individual. I could not conceive of it. I could conceive of it only where there was systemic corruption involving a number of matters, and often, but not always involving a number of individuals*²⁶

The ACC continues to press for the power to conduct public hearings.²⁷

The consequences of corruption, criminal conduct or serious improper conduct envisaged by the ACC Act are prosecution and disciplinary proceedings. If the State's anti-corruption authority(s) were to acquire the power to hold public hearings a third penalty, public shaming, would be introduced which could be applied against police officers and public officers who investigators believe have engaged in corruption, criminal conduct or serious improper conduct.

The JSCACC has, from its inception opposed proposals for public hearings under the aegis of the ACC citing the doctrine that investigations should lead to either prosecution or disciplinary proceedings.²⁸ The ACC held to the same view for a time. The only way in which public hearings are contemplated within the scheme of the ACC Act are the powers, which have never been exercised, of the ACC to make a public report to the Parliament or recommend the establishment of a Royal Commission and its terms of reference.²⁹

The JSCACC has come to accept that there may be matters that warrant public exposure, which are not sufficiently wide in scope to warrant a Royal Commission.

The Western Australian Police Service in its submission to JSCACC stated:

It is agreed that public hearings will ensure transparency and openness of proceedings of the oversight body. One of the deterrents to corrupt activities is the implied threat that people who are subject to investigation may be required to attend a public hearing.

*The determinant of whether a hearing should be conducted in public or private should be the test of whether it is in the 'Public Interest', that is, if the subject matter is of significant public interest then an open hearing should be held. However, safeguards need to be included to protect the identity of informants, covert and ongoing police operations, secrecy provisions and recognition of caveats from other jurisdictions.*³⁰

²⁵ JSCACC 10th Report, 35th Parliament, Report on the public hearings held by the Joint Standing Committee on the Anti-Corruption Commission in the Legislative Council chamber, 5 May 2000, p 44.

²⁶ JSCACC 10th Report, 35th Parliament, Report on the public hearings held by the Joint Standing Committee on the Anti-Corruption Commission in the Legislative Council chamber, 5 May 2000, p 47.

²⁷ ACC, Annual Report 2001-2002, pp 1, 3.

²⁸ JSCACC 4th Report, 35th Parliament, Report on the Operational Accountability of the Anti-Corruption Commission and the Protection of Rights under the *Anti-Corruption Commission Act 1988*, 1998, pp 19-20.

²⁹ *Anti-Corruption Commission Act 1988*, section 30(4)(a).

³⁰ Submission of the Western Australia Police Service, p 5.

The JSCACC recommends that special investigators should be able to conduct public hearings and that this should require non-delegable consent of the commissioners. Special investigations under the ACC Act are conducted by senior lawyers in a curial setting. This should continue to be the case in any new legislation constituting the public sector integrity authority. Counsel assisting and counsel representing the witnesses would be able to argue the merits of making a request to the commissioners for a public hearing. In order to prevent this power leading to a standing royal commission, commissioners or staff of the public sector integrity authority should not be special investigators.

It is envisaged that the commissioners, being detached from the conduct of investigations, are more likely to make balanced judgements on whether public hearings are warranted which would have regard for the witnesses rights and the prospects for achieving a successful prosecution or a disciplinary outcome. A decision to conduct public hearings should not be taken lightly. The JSCACC draws attention to the published evidence of Judge Paul Urquhart, Commissioner of the New South Wales Police Integrity Commission to the JSCACC, on the criteria he uses in determining if a public hearing should be held under their legislation which gives him a discretion. *There is no presumption in NSW that a hearing in the PIC must be held in public or private.*³¹

Sections 32 and 33 of the *Police Integrity Commission Act 1996* provide that the PIC for the purposes of an investigation may conduct hearings and that the decision whether they be held in private or public or partly in private or public is made by the Commission. Factors such as public interest and the potential risk to the safety and well being of the witness are usually taken into consideration when determining whether a hearing will be held in public or private.

The parliamentary committee responsible for NSW ICAC has questioned the propensity of that organisation to hold public hearings. They recommended that:

*ICAC wherever possible should conduct all initial investigations, including hearings, in private, followed by an expositive-type [sic] public hearing of fully investigated material if there is sufficient evidence which may justify the making of an adverse finding.*³²

This JSCACC takes a more stringent attitude to the criteria for holding public hearings. There has been no equivalent in WA legislation of ICAC making an adverse finding. With the ACC as an investigatory body it has been up to the courts and disciplinary authorities to make findings in their respective jurisdictions. The role of public hearings should be to expose systemic corruption, criminal conduct or serious improper conduct not substitute the penalty of public exposure where the investigating authority cannot satisfy the burden of proof of the courts or a disciplinary authority. In Queensland the legislation imposes a presumption of a closed hearing on CMC hearings³³ that is more stringent than the practice of the PIC (NSW). The JSCACC recommends a similar provision in Western Australian legislation should special investigators have the power to conduct public hearings.

The ACC Act applies a number of sections of the *Royal Commissions Act 1968* to the conduct of special investigations, which are always conducted in private. These include the right of a

³¹ JSCACC 10th Report, 35th Parliament, Report on the public hearings held by the Joint Standing Committee on the Anti-Corruption Commission in the Legislative Council chamber, 5 May 2000, pp 32-34.

³² Parliamentary Committee on the Independent Commission Against Corruption, Report No 8, 52nd Parliament, Parliament of NSW, June 2002.

³³ *Crime and Misconduct Act 2001* (Qld), section 177.

witness to know the allegations against him or her and to be accompanied by counsel. But they do not include the right to know of the testimony of other witnesses or to cross-examine them, which is normal practice at a Royal Commission. The JSCACC recommends that the full provisions of the *Royal Commissions Act 1968*, which protect the rights of those against whom allegations are made, should be applied if and when special investigators of the public sector integrity authority are empowered to conduct public hearings.

The Committee recommends:

Recommendation 8.

That the Special Investigator be able to conduct public hearings. This power should be exercised only with the written non-delegable authority of the Commissioners.

The Committee recommends:

Recommendation 9.

That the legislation provide a presumption that special investigation hearings be conducted in private.

The Committee recommends:

Recommendation 10.

That the full provisions of the *Royal Commission Act 1968* which protect the rights of those against whom allegations are made should be applied to public hearings conducted by Special Investigator.

4.4 THE POWER TO COMPEL EVIDENCE

The ACC has had powers to compel evidence in an anomalous manner since its inception. There are powers to compel people other than public officers at the stage of a preliminary inquiry which do not exist at the subsequent, and presumably more serious, investigations. The powers of a Royal Commission to require witnesses to answer questions and produce documents are vested only in a Special Investigator appointed by the Commission. This lack of correlation between the seriousness of an investigation and the powers that are able to be exercised dates to a provision for the OCC which did not possess any powers of investigation beyond the preliminary inquiry.

The JSCACC recommends that the power of the ACC to compel evidence from persons who are not public officers in preliminary inquiries should be removed.

As with the issue of public hearings the JSCACC and its predecessor in the 35th Parliament have received representations from the ACC that its capacity to compel evidence should be extended, specifically to give investigators on investigations the same powers as those on preliminary inquiries.³⁴ Those representations were resisted until the eleventh report of the JSCACC in August 2000.

³⁴ JSCACC 10th Report, 35th Parliament, Report on the hearings held by the Joint Standing Committee on the Anti-Corruption Commission in the Legislative Council chamber, 5 May 2000, p 43 and ACC, Annual Report 2001-2002, p 1.

The JSCACC received representations from the ACC that there were serious matters under investigation, which they would be able to bring to a satisfactory conclusion if they had the power to compel. Some of these matters are now being examined by the Royal Commission. The JSCACC reported to the Parliament that the powers to compel evidence possessed by the ACC for preliminary inquiries should be acquired for investigations (and removed from preliminary inquiries). This report, which was not acted upon, made the recommendation for additional extraordinary powers of investigation conditional upon four concurrent recommendations:

- that the JSCACC's recommendation for the creation of a Parliamentary Inspector of the ACC be accepted;
- that use of the additional powers would require the concurrence of the commissioners in a manner similar to that proposed here for the use of public hearings by a special investigator;
- that the witness compelled to give or provide evidence would enjoy the same rights of notice of questions and allegations and representation as witnesses before a special investigation; and
- evidence obtained under the additional powers should not be able to be used in criminal or civil proceedings.³⁵

These recommendations should be incorporated in the legislation to constitute the public sector integrity authority. In particular the extension of the powers beyond those currently enjoyed by the ACC, which is proposed here would make the case for the JSACC's recommendations on accountability unassailable.

The Committee recommends:

Recommendation 11.

- (a) That the powers currently possessed by the ACC to compel evidence from any person for preliminary inquiries should be acquired for investigations by the public sector integrity authority.
- (b) The powers of the public sector integrity authority to compel evidence at preliminary inquiries be restricted to requiring public officers to provide information or documents.
- (c) That any public officers or persons giving information to a public sector integrity authority investigator have the right to be accompanied by a legal practitioner.

³⁵ JSCACC 11th Report, 35th Parliament, The Investigative Powers and Operational Accountability of the Anti-Corruption Commission, 2000, pp 7, 10, 11.

CHAPTER 5 STRUCTURE

5.1 THE COMMISSIONERS

The appointment of Commissioners of the ACC under the ACC Act is by recommendation of a committee consisting of the Chief Justice, the Chief Judge of the District Court and the Solicitor General.³⁶ The purpose of that mechanism is to make process independent of the executive and hence separate from those who might be most likely to be the subject of allegations. The countervailing consideration is that the process of appointing commissioners is not accountable. An alternative would be to have the appointment made by the Premier in consultation with the Leader of the Opposition. This is the mode of appointment to the CMC in Queensland.³⁷ If an appointment was made that was inappropriate the Premier could be held to account in the Parliament – and ultimately by the electorate. The JSCACC has not been able to resolve the competing considerations of independence and accountability and foreshadows that this will be an issue for the Parliament to determine when legislation is being considered.

In this Report the JSCACC is recommending a wider jurisdiction for the public sector integrity authority than section 12 of the ACC Act to include, all criminal conduct and an increase in the extraordinary powers beyond those currently available to the ACC. It is also proposed that the Commissioners' non delegable consent would be required for the exercise of the additional extraordinary powers recommended in this report, viz that of investigators to compel evidence and special investigators to conduct public hearings.

This represents a significant increase in the responsibilities of the Commissioners. In these circumstances the JSCACC recommends that the position of Chairman should be full-time. The other two Commissioners remain part-time appointments. The position of Chairman of the ACC has turned out to be full-time in practice and the added responsibilities proposed here would only add to the workload. Retaining multiple Commissioners permits a wider range of perspectives to be brought to the Commission's deliberations.

The requirement that one Commissioner, the Chairman, should be a former judge or eligible for appointment as a judge is appropriate. One Commissioner, and there is no reason why it could not be the one who is a former judge or eligible for appointment as a judge, should have a background or experience in civil liberties or human rights.

Other backgrounds like extensive experience in public administration could provide suitable credentials for appointment as a Commissioner. No one person will be able to bring to the table the range of talents that it is desirable to have on the Commission.

The JSCACC has considered whether a person should be disqualified for life from being a Commissioner because he or she has at some time been a member of the WA Police Force as is the case with the ACC Act.³⁸ On the face of it, it is discriminatory and unfair. Some police officer's careers span jurisdictions. The last two Commissioners of Police in WA have been external appointments. It might be that a person with recent experience in senior management of

³⁶ *Anti-Corruption Commission Act 1988*, sections 5(5), (6) and (7).

³⁷ *Crime and Misconduct Act 2001 (Qld)*, section 228.

³⁸ *Anti-Corruption Commission Act 1988*, section 5(4).

police in another jurisdiction could be available and suitable for appointment but for the fact that he or she had had served in the WA police force, possibly thirty years ago. Similarly, modern career paths often lead to different callings. A person experienced in the law or public administration may well have been a WA Police Officer at some time in his or her career and would thereby be disqualified.

The intent of section 5(4) of the ACC Act is to preclude appointment of recently serving senior police officers who could be expected to know some of the officers and possibly even know of some of the matters that would come before the ACC. The appointment of former Commissioner of Police John Porter to the OCC made that body vulnerable to criticism if it were to consider police matters that arose from his time as Commissioner.³⁹ We interpolate to add that there was no suggestion of impropriety or misconduct by Mr Porter. However, the net of ineligibility is cast so wide that it precludes people, albeit probably not many, who might otherwise make suitable appointments.

In the current circumstances where there is a Royal Commission into police on foot and about half the allegations made to the ACC concern police a strong case might be made for erring on the side of caution notwithstanding that it discriminates against many West Australians. The JSCACC has not been able to resolve the issue and defers to the Parliament in considering the legislation.

The Committee recommends:

Recommendation 12.

That the public sector integrity authority be comprised of a full-time Commissioner who shall be Chairman and two part-time Commissioners. One Commissioner should be a former judge or eligible for appointment as a judge and one Commissioner should have a background or experience in civil liberties or human rights.

5.2 FUNCTIONS OF COMMISSIONERS

The functions of the Commissioners should be to:

- formally constitute the corporate entity;
- receive and initiate allegations;
- employ the directors of police integrity investigations and (other) public sector integrity investigations, their staff, and other staff and commission special investigations and external investigations;
- receive reports from investigators, special investigators and the inquiries of external organisations;
- decide if a matter will be subject to further investigation, referred to the DPP for prosecution or to the Commissioner of Police, or elsewhere in the case of other public officers, for discipline or the file closed; and

³⁹ Hansard, Vol 333, Legislative Assembly, 25 June 1996, p 3217.

- decide if a matter will be the subject of a report to the Parliament or a minister that could include a recommendation that a Royal Commission be established.

The JSCACC is recommending that additional powers to compel evidence be extended to investigators, and the power to conduct public hearings to special investigators, and that the exercise of these extraordinary powers should require the non-delegable consent of the Commissioners. If those recommendations are accepted the functions of the Commissioners will also include:

- considering requests from investigators for the power to compel evidence from a witness who is not a public officer; and
- consider proposals from special investigators to hold public hearings.

The JSCACC considers it most important that the Commissioners of the public sector integrity authority should not conduct investigations. In considering reports from investigations and, in particular, in considering requests for the exercise of extraordinary powers the Commissioners should be detached from the actual conduct of the investigations. Balanced judgements are more likely if they are not at the ‘coal-face’ of an investigation.

The Committee recommends:

Recommendation 13.

That the functions of the Commissioners of the public sector integrity authority should not include conducting investigations.

5.3 ORGANISATION

The JSCACC believes that the scope of the public sector integrity authority’s jurisdiction warrants separate specialist divisions of investigators to investigate allegations against police and allegations against other public sector officers. The JSCACC is not proposing names for the divisions. For convenience the divisions that would handle the police and the balance of the public sector components of the public sector integrity authority’s jurisdiction are denoted as the police integrity division and the public sector integrity division respectively.

It is proposed that each division of the public sector integrity authority will be headed by a director, which will be a statutory office, answering directly to the Commissioners who will be responsible for the management of investigations into allegations within their respective areas of responsibility. There is no distinction proposed between the divisions in terms of the conduct that will fall within the jurisdiction of the public sector integrity commission. The definitions of corruption, criminal conduct and serious improper conduct will apply equally to police and other public officers. Similarly, the powers to investigate allegations will apply equally to police and other public officers. It would be wrong of the community to expect high standards of conduct from police officers, and put in place particular mechanisms to investigate police conduct with a view to enforcing those standards, and not impose similar expectations on other public officers – including Members of Parliament.

Separate divisions within the public sector integrity authority are proposed because the task of enforcing the law in respect of the two groups is quite different. Police possess powers that other

public officers do not and they are exposed to criminality and opportunities for misconduct to a greater extent than other public officers. Moreover, because of the nature of their profession police officers can be expected to be more skilled than other public officers at concealing corruption, criminal conduct and serious improper conduct from detection. In addition because of their work police officers are more likely to make enemies among people they deal with and those people may be less likely to have reservations about breaking the law to make false allegations against police to settle scores or get themselves out of trouble.

The statistics reported by the ACC confirm that the number of accusations of corruption, criminal conduct or serious improper conduct against police officers is markedly different to that of other public officers. There were 240 new cases reported which involved the police service in 2001-2002 and 259 for other government departments, local government and other public administration.⁴⁰ In broad terms that is one 'new case' per twenty one police officers and one per 452 'other' public officers. We hasten to add that a case reported is not a matter proved and many of those cases may prove to be groundless, but it does indicate that there is a twenty one fold greater likelihood that a police officer will be involved in an allegation than other public officers. In view of this difference and the discrete nature of the police service a dedicated police integrity investigations division within the public sector integrity authority is warranted.

The director of police integrity investigations will be a person chosen for skills and experience that suit him or her for the specialist responsibility of investigating complaints against police. The director of police integrity investigations and the director of public sector investigations will report directly to the full-time Chairman of the Commission rather than through an executive officer.

The JSACC does not believe that all the cases undertaken need to be investigated 'in-house' ie by investigators employed by the public sector integrity authority. In 2001-2002 only 90 of the 884 matters under active consideration were subject of investigation by the ACC itself.⁴¹ If all matters were to be dealt with by public sector integrity authority salaried and commissioned investigations it would involve a huge increase in the 65 staff currently employed by the ACC and a substantial transfer of staff from the police service. So long as the public sector integrity authority is able to determine whether a police matter is investigated by their own investigators or the police, including taking over an investigation in progress or commencing a new one without informing the police, it is most desirable that police rigorously to deal with allegations against police and so promote the reputation and corporate self esteem of their organisation.

A very substantial proportion of the allegations of corruption and criminal conduct cases involving public officers apart from police, ie in the public sector integrity investigations division, should be able to be dealt with by the police because the issue of externality does not arise. An area of the jurisdiction that cannot be allocated to the police is serious improper conduct that does not constitute a criminal offence. In the serious improper conduct jurisdiction an in-house investigatory capacity must be maintained. Problems of externality similar to the archetypal complaint about police investigating police can arise if allegations are left to internal disciplinary authorities without active involvement of the public sector integrity authority's investigators.

⁴⁰ ACC, Annual Report 2001-2002, p 24.

⁴¹ ACC, Annual Report 2001-2002, p 6.

The Committee recommends:

Recommendation 14.

1. That the public sector integrity authority be comprised of two divisions of investigation:
 - (a) a police integrity investigations division with responsibility for investigating allegations against police officers;
 - (b) a division with responsibility for investigating allegations against other public officers.
2. That each division be headed by a director which should be a statutory position answering directly to the chairman of the commission.

It is not envisaged that the two investigation divisions would comprise the totality of the office of the public sector integrity authority. Some administrative functions would be able to be performed by a 'corporate services' section of the organisation able to service both divisions. The extent to which such economies of scale are able to be availed of will depend upon the security requirements of the divisions which will be a matter to be arranged between the Chairman and the directors of the divisions.

Witness protection is a function which the JSCACC believes could be undertaken by the public sector integrity authority outside the two investigation divisions. This would be a function to service the police force and other law enforcement agencies as well as the public sector integrity authority. A major consideration in witness protection schemes is security and the JSCACC believes that locating the service within a small discrete organisation such as the public sector integrity authority would facilitate this. The JSCACC has been briefed on the operation of the CMC's Witness Protection Unit in Queensland by the CMC. The authority for this is the *Witness Protection Act 2000* which is separate from the Act which constitutes the CMC. The JSCACC believes that a similar scheme should be established in WA.

The Committee recommends:

Recommendation 15.

That the public sector integrity authority operate a witness protection scheme which will service the police force and other law enforcement bodies as well as its own requirements.

CHAPTER 6 ACCOUNTABILITY

The lack of operational accountability of the ACC has been the major defect of the ACC Act.

6.1 THE JOINT STANDING COMMITTEE ON THE ANTI-CORRUPTION COMMISSION

This JSACC has been the principal organ of accountability of the ACC under the existing Act. It is appropriate that the Parliament of Western Australia should devote the considerable resources and time involved in a standing committee to oversight of an organisation whose mission is standards of probity in the administration of a public sector of 140 000 people for which the Parliament is responsible and which can affect the rights of citizens. The same committee should also have responsibility for oversight of the Ombudsman and the Commissioner for Public Sector Standards who are independent agencies under the ACC Act.

The JSCACC intends as part of the series of Discussion Papers to address the issues concerning the role of a parliamentary committee in detail in that Discussion Paper to be tabled in 2003.

Given the statutory secrecy provisions in the ACC Act, the Clerk of the Legislative Assembly sought, on behalf of JSCACC, advice from the Crown Solicitor's Office on a number of issues including JSCACC's ability to hear evidence from employees and former employees of the ACC.

The JSACC is disturbed to have received an opinion prepared by the Deputy Crown Solicitor for the Clerk of the Legislative Assembly, which considers the affect of Section 52(1) of the ACC Act on the disclosure of information to the Parliament. In essence, the Deputy Crown Solicitor advises that the express discretion of Commissioners to provide information to the Joint Standing Committee within the general prohibition on the disclosure of information should be read as implying that the general provisions preclude officers or former officers of the ACC from giving evidence to the Committee.⁴² The opinion avers that by passing the Act the Parliament has diminished the effect of the *Parliamentary Privileges Act 1891*.

The JSCACC suggests that the legislation should make it quite clear that parliamentary privilege is not diminished. The JSCACC has no desire to have access to detailed or sensitive operational information but feels that such limitations should be prescribed by the Standing Orders, which constitute the JSCACC, rather than the Act, which creates the integrity authority.

The Committee recommends:

Recommendation 16.

That the legislation constituting the public sector integrity authority should not diminish parliamentary privilege.

⁴² Opinion of Deputy Crown Solicitor, 24 September 2002.

6.2 THE PARLIAMENTARY INSPECTOR OF THE PUBLIC SECTOR INTEGRITY AUTHORITY

The proposal for a Parliamentary Inspector of the ACC was formulated by the previous JSCACC because it was not able to provide operational accountability on the ACC.⁴³ Under the Standing Orders of the Legislative Assembly the JSCACC is precluded from obtaining access to detailed operational information, reconsidering particular matters or involving itself in operational matters. The only experience the JSCACC has had of investigating an operational complaint involved access to sensitive information that the ACC chose to make available. The JSCACC agrees it should not be involved in operational matters, nor should it have access to sensitive information relating to investigations. However, it is not satisfactory for the organisation, which is being held to account to have the discretion to withhold information that is necessary to investigate operational complaints.

The notion of the Parliamentary Inspector is an office independent of the public sector integrity authority and answerable to the Parliament through the parliamentary committee and will have unfettered access to operational information and so be in a position to investigate complaints about the operations of the ACC, make inquiries of his or her own motion or on the initiative of the parliamentary committee and report to the Parliament through the parliamentary committee without disclosing sensitive information. The proposal has come to be accepted by the ACC and was endorsed by the Police Union and the Special Inquiry into allegations concerning the Anti-Corruption Commission conducted by Mr Trevor Boucher.⁴⁴

The JSCACC also recommends that, with respect to the enhanced extraordinary powers for the public sector integrity authority which are recommended in Chapter Four the Parliamentary Inspector should be provided with:

- copies of all written notices authorising special investigators to conduct public hearings and the reasons for the notice; and
- copies of all written notices authorising investigators to exercise additional powers to compel evidence and the reasons for the notice.

The parliamentary oversight committee of the public sector integrity authority should take an interest in the grounds on which the Commissioners exercise discretion to permit investigators and special investigators to exercise extraordinary powers. The committee would expect to be notified by the Parliamentary Inspector in the event that a notice was issued contrary to the Act or outside accepted practice.

⁴³ JSCACC 4th Report, 35th Parliament, Report on the Operational Accountability of the Anti-Corruption Commission and the Protection of Rights under the *Anti-Corruption Commission Act 1988*, 1998, pp x-xii.

⁴⁴ Report of the Special Inquiry into Allegations concerning the Anti-Corruption Commission, Nov 1998, p 34.

The Committee recommends:

Recommendation 17.

That a position of Parliamentary Inspector of the public sector integrity authority be created to provide operational accountability. The Parliamentary Inspector will have access to operations and operational information and report to the Parliament through a standing committee.

6.3 RESTRICTION ON PUBLICATION OF INFORMATION

The JSCACC recommends that the restrictions on publication of the fact that an allegation has been made to the ACC should be discontinued. The provision dates to a recommendation by the Legislative Assembly Select Committee into the Official Corruption Commission in 1991. It arose because nuisance allegations were made to the OCC about public figures, including both the then Premier and Leader of the Opposition which the OCC was then obliged to investigate. It was then leaked to the press that the person concerned was ‘under investigation by the OCC’ which was politically damaging even if it subsequently turned out to be without basis. The practice had been quite common in New South Wales where the number of complaints about local government figures correlated with the election cycle.

The provision has turned out to have had unintended consequences. There has been the comical situation of the Commissioner of Police having to speak in code about a matter he was concerned with being investigated by an external organisation.

The JSCACC is pleased to have learned that in Queensland a similar practice of vexatious allegations followed by leaks died out because it was discredited and thereby lost any political utility.⁴⁵

The Committee recommends:

Recommendation 18.

That prohibition on publication of the fact that a matter is being considered by the ACC in section 54 of the *Anti-Corruption Commission Act 1988* be repealed.

⁴⁵ O’Gorman, Terry, Evidence, 5 May 2002, JSCACC, 10th Report, pp 66, 69.

APPENDIX ONE

LEGISLATION & REGULATIONS

Legislation	State (or Country)
Anti-Corruption Commission Act 1988	Western Australia
Financial Administration and Audit Act 1985	Western Australia
Criminal Justice Act 1989	Queensland
Criminal Justice Legislation Amendment Act 1997	Queensland
Independent Commission Against Corruption Act 1988	New South Wales
Official Corruption Commission Act 1988	Western Australia
Police Integrity Commission Act 1996	New South Wales
Police Act 1892	Western Australia
Royal Commissions Act 1968	Western Australia
Administrative Decisions (Judicial Review) Act 1977	Commonwealth
Australian Federal Police Act 1979	Commonwealth
Complaints (Australian Federal Police) Act 1981	Commonwealth
Crime & Misconduct Act 2001	Queensland
Parliamentary Commissioner Act 1971	Western Australia
Criminal Code	Western Australia

APPENDIX TWO

SUBMISSIONS RECEIVED

No.	Date	Name	Position	Organisation
1	21 Oct 2002	Carol Roe	Citizen	
2	07 Nov 2002	Peter Evans	Citizen	
3	18 Nov 2002	MJ Dean	General President	W.A. Police Union of Workers
4	21 Nov 2002	Julie Fry	Citizen	
5	21 Nov 2002	Malcolm Mummery	Citizen	
6	22 Nov 2002	Gavin Waugh	Citizen	
7	25 Nov 2002	Gary McGrath	Citizen	
8	26 Nov 2002	B E Matthews	Commissioner of Police	W.A. Police Service
9	26 Nov 2002	Kerry O'Neil	Acting Auditor General	Office of the Auditor General
10	29 Nov 2002	Deirdre O'Donnell	Ombudsman	Parliamentary Commissioner for Administrative Investigations
11	12 Dec 2002	Maxine Murray	Commissioner	Office of the Public Sector Standards Commissioner

APPENDIX THREE

LIST OF JSCACC REPORTS & PAPERS IN THE 35TH PARLIAMENT

Document	Date	Title
Discussion Document	7 Apr 1998	Secrecy under the Anti-Corruption Commission Act
Report 1	23 Oct 1997	Confidentiality and Accountability: Parliamentary Supervision of Anti-Corruption and/or Law Enforcement Agencies in Australia
Report 2	28 May 1998	The Working Group of Parliamentary Committees with a Role to Oversee Criminal Justice and Law Enforcement Bodies
Report 3	18 Jun 1998	Complaints made by Detective Sergeant Peter Coombs Against the Anti-Corruption Commission, Special Investigator Geoffrey Miller QC and Others
Report 4	29 Oct 1998	The Operational Accountability of the Anti-Corruption Commission and the Protection of Rights Under the Anti-Corruption Commission Act 1988
Report 5	23 Dec 1998	Amending the Anti-Corruption Commission Act 1998
Report 6	23 Dec 1998	The Second Working Group Meeting of Parliamentary Committees with a Role to Oversee Criminal Justice and Law Enforcement Bodies
Report 7	13 May 1999	Annual Report
Report 8	3 June 1999	Ministerial Response to the Committee's Recommendations
Report 9	9 Dec 1999	A Report on the Special Investigation Conducted By Mr Geoffrey Miller QC: The Allegations, The Evidence, The Outcomes and Their Relevance to Anti-Corruption Procedures Within The Western Australian Police Service
Report 10	22 Jun 2000	The Hearings Held by the Joint Standing Committee on the Anti-Corruption Commission in the Legislative Council Chamber Parliament House, Perth on Friday, 5 May 2000
Report 11	10 Aug 2000	The Investigative Powers and Operational Accountability of the Anti-Corruption Commission

LIST OF JSCACC REPORTS & PAPERS IN THE 36TH PARLIAMENT

Document	Date	Title
Report 1	22 Sept 2002	Annual Report 2001-2002

APPENDIX FOUR

INTERSTATE MEETINGS HELD

Date	Name	Organisation	Place
7 October 2002	Mr Brendan Butler, SC Chairman	Crime and Misconduct Commission	Brisbane, Qld
7 October 2002	Mr Ray Rinaldo, Commissioner (part-time)	Crime and Misconduct Commission	Brisbane, Qld
7 October 2002	Mr John Callanan, Assistant Commissioner - Crime	Crime and Misconduct Commission	Brisbane, Qld
7 October 2002	Mr Stephen Lambrides, Assistant Commissioner - Misconduct	Crime and Misconduct Commission	Brisbane, Qld
7 October 2002	Mr Geoff Wilson, MP, Chairman	Parliamentary Crime and Misconduct Committee	Brisbane, Qld
7 October 2002	Ms Desley Boyle, MP, Member	Parliamentary Crime and Misconduct Committee	Brisbane, Qld
7 October 2002	Mr Andrew McNamara, MP, Member	Parliamentary Crime and Misconduct Committee	Brisbane, Qld
7 October 2002	Mr Stephen Finnimore, Research Director	Parliamentary Crime and Misconduct Committee	Brisbane, Qld
7 October 2002	Mr Luke Passfield, Research Officer	Parliamentary Crime and Misconduct Committee	Brisbane, Qld
8 October 2002	Mr Terry Griffin, Commissioner	Police Integrity Commission	Sydney, NSW
8 October 2002	Mr Peter Barnett, Manager- Assessment and Reports Team	Police Integrity Commission	Sydney, NSW
8 October 2002	Mr James Slater, Executive Officer	Police Integrity Commission	Sydney, NSW
8 October 2002	Mr Stephen Lambrides, Assistant Commissioner - Misconduct	Police Integrity Commission	Sydney, NSW
8 October 2002	Mr Kerry Hickey, MP, Member	Joint Committee on the Independent Commission Against Corruption	Sydney, NSW
8 October 2002	Ms Helen Minnican, Committee Director	Joint Committee on the Independent Commission Against Corruption	Sydney, NSW
8 October 2002	Ms Prue Sheaves, Project Officer	Joint Committee on the Independent Commission Against Corruption	Sydney, NSW
8 October 2002	Mr Kieran Pehm, Deputy Commissioner	Independent Commission Against Corruption	Sydney, NSW

Date	Name	Organisation	Place
8 October 2002	Mr Mal Brammer, Executive Director – Strategic Operations Division	Independent Commission Against Corruption	Sydney, NSW
8 October 2002	Mr Grant Poulton, Executive Director – Corruption Prevention, Education and Research	Independent Commission Against Corruption	Sydney, NSW
8 October 2002	Mr John Pritchard – Commission Solicitor	Independent Commission Against Corruption	Sydney, NSW
8 October 2002	Ms Linda Waugh, Executive Officer to the Commissioner	Independent Commission Against Corruption	Sydney, NSW