



Joint Standing Committee on the Corruption and Crime Commission

Ensuring the timely appointment of a new Corruption and Crime Commissioner

**Report No. 15
August 2014**

Parliament of Western Australia

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Ensuring the timely appointment of a new Corruption and Crime Commissioner

Report No. 15

Presented by

Hon Nick Goiran, MLC and Mr Peter Watson, MLA

Laid on the Table of the Legislative Assembly and Legislative Council
on 14 August 2014

Chairman's Foreword

The former Commissioner of the Corruption and Crime Commission (CCC), Mr Roger Macknay QC, resigned from the position on 14 April 2014 after announcing his retirement on 4 November 2013.

Hon Chief Justice Wayne Martin AC QC, who chairs the statutory nominating committee tasked with finding a new Commissioner, told the Committee on 18 June 2014 that there had been no progress made on the appointment of a new Commissioner and the office remained vacant. The Premier, Hon Colin Barnett MLA, when interviewed on radio on 23 July 2014 confirmed this was still the case.

In the absence of a Commissioner, the agency is under the leadership of two part-time Acting Commissioners- Mr Neil Douglas and Mr Chris Shanahan SC- who undertake the role of Commissioner on a two weekly rotating basis.

In addition to Mr Macknay's departure, the Executive Director of the CCC, Mr Mike Silverstone, recently announced his resignation and will finish with the Commission in October. The current situation, where the Commission is led by two part-time Commissioners coupled with the imminent departure of the Executive Director, is concerning especially given Mr Macknay signalled his retirement nine months ago.

Having this State's chief integrity agency without full-time permanent leadership is a dire situation and the Committee calls upon the Government to take urgent action to ensure a new Commissioner is appointed expeditiously. The Committee has held closed hearings with both Mr Macknay and the Chief Justice and has made four recommendations to the Government that it believes will make the appointment process more timely. These include changes to the *Corruption and Crime Commission Act 2003* to:

1. allow for the appointment of senior lawyers with significant legal qualifications as Commissioner;
2. allow a Commissioner to retain their judicial pension, if they are receiving one, while being additionally remunerated at the rate of a Supreme Court judge;
3. allow for the appointment of a Deputy Commissioner to assist the Commissioner in the day to day work of the Commission and to ameliorate difficulties created by delays in the appointment of future Commissioners; and
4. remove the role of a nominating committee and allow the Government to propose one name of a suitable Commissioner to the Joint Standing Committee for its consideration.

This situation demands a priority bi-partisan approach to the expeditious passage of a Bill through the Parliament in the spring session of 2014.

I would like to acknowledge the work on this report by my Committee colleagues: the Deputy Chairman Mr Peter Watson MLA, the Member for Albany; Mr Nathan Morton MLA, the Member for Forrestfield; and the Member for the South West Region, Hon Adele Farina MLC. Finally, I wish to thank the Committee's Secretariat, Dr David Worth and Ms Jovita Hogan, for their efforts

A handwritten signature in blue ink, consisting of a vertical line with a horizontal stroke across it, and a long horizontal stroke extending to the right.

HON NICK GOIRAN, MLC
CHAIRMAN

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Ministerial Response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Committee directs that the Minister responsible for the Attorney General report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Findings and Recommendations

Finding 1

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The current situation, where the Corruption and Crime Commission is led by two part-time Acting Commissioners alternating on a fortnightly basis, coupled with the imminent departure of the long-standing Executive Director, hinders the Commission's effectiveness in carrying out its functions and is of concern to the Committee.

Finding 2

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The current remuneration for the position of Commissioner is significantly below what will attract a suitable candidate for the position.

Recommendation 1

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The Attorney General consider broadening section 10(1) of the *Corruption and Crime Commission Act 2003* to put beyond doubt the appropriateness of considering senior lawyers for appointment to the position of Commissioner of the Corruption and Crime Commission.

Finding 3

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While few Commissioners of integrity agencies in Australia serve out their five-year terms, the current length of appointment in Western Australia is suitable.

Recommendation 2

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The Attorney General introduce an urgent Bill to repeal schedule 2, section 3(5) and schedule 3, section 3(4) of the *Corruption and Crime Commission Act 2003* to allow the Commissioner of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission to retain any judicial pension applicable while additionally being remunerated at the rate of a Supreme Court judge.

Recommendation 3

Page 17

The Attorney General prepare an amendment to the *Corruption and Crime Commission Act 2003* to allow for the appointment of a Deputy Commissioner to assist the Commissioner in the day to day work of the Commission and to ameliorate difficulties created by delays in the appointment of future Commissioners.

Recommendation 4

Page 18

The Attorney General prepare an amendment to sections 9(3a)(a) and 9(3b) of the *Corruption and Crime Commission Act 2003* to remove the role of a nominating committee and allow the Government to propose one name of a suitable Commissioner to the Joint Standing Committee for its consideration.

Chapter 1

The delay in appointing a new CCC Commissioner

The Commission has two Acting Commissioners - who stand in, alternating on a fortnightly basis at this stage, but such arrangements, naturally enough, constrain the effort of the Commission... An advisor to Hon Dr Kim Hames MLA, the Minister representing the Attorney General.

The current situation

The former Commissioner of the Corruption and Crime Commission (CCC), Mr Roger Macknay QC, resigned from the position on 14 April 2014. Mr Macknay was appointed on 15 November 2011 and had served in the role for a period of 2 years and 5 months. Mr Macknay announced his retirement on 4 November 2013 and issued a media statement to that effect, citing family reasons for his early departure from the role.¹

The Committee was told by Hon Wayne Martin AC QC, Chief Justice, on 18 June 2014 that there had been no progress made on the appointment of a new Commissioner, and the office remained vacant:

*There is not any progress, I am afraid, and that is because we have taken every step that we feel is reasonably open to us to attract suitable candidates and we have not been successful.*²

Under section 9(3a)(a) of the *Corruption and Crime Commission Act 2003*³ (CCC Act), a nominating committee submits to the Premier a list of three people eligible for appointment as CCC Commissioner. The Chief Justice chairs the committee.

The Premier, Hon Colin Barnett, confirmed on 23 July 2014 that eight months after Mr Macknay's resignation, the position of Commissioner remained vacant.⁴

The Commissioner's tenure of office is five years, with the Commissioner eligible for reappointment once. Mr Macknay was preceded as Commissioner by Mr Kevin

1 Corruption and Crime Commission, *CCC Commissioner to step down*, 4 November 2013, Available at: www.ccc.wa.gov.au/Publications/MediaReleases/Media%20Releases%202013/CCC%20Commissioner%20to%20step%20down.pdf. Accessed on 25 July 2014.

2 Hon Wayne Martin AC QC, Chief Justice, Supreme Court of Western Australia, *Transcript of Evidence*, 18 June 2014.

3 AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s9.html. Accessed on 25 July 2014.

4 Hon Colin Barnett MLA, Premier, Radio Interview, 6RP, 23 July 2014.

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Hammond, AO (December 2003 — March 2007), the inaugural Commissioner, and then the Hon Len Roberts-Smith, RFD, QC (May 2007 — January 2011).

Since the CCC was established in early 2004 no Commissioner has yet fulfilled their full term. When Mr Macknay was appointed in November 2011, the CCC had been without a Commissioner for nearly 12 months following Hon Len Robert-Smith's departure.

In the absence of a Commissioner, the agency is currently under the leadership of two part-time Acting Commissioners- Mr Neil Douglas and Mr Christopher Shanahan, SC. Mr Douglas was appointed on the 24 July 2012. Following the resignation of former Acting Commissioner Mr Mark Herron on 24 June 2013, the CCC was without a second Acting Commissioner for nine months until Mr Shanahan was appointed on 7 April 2014.

Mr Shanahan previously served as an Acting Commissioner in two consecutive terms between 2005-2007 and 2007-2010. Each of the Acting Commissioners retain their fulltime private legal practices while fulfilling their roles at the CCC.⁵

The Acting Commissioners are called upon to act in the office of the Commissioner, as stipulated in section 14(1) of the CCC Act, in the following scenarios:

- a. during a vacancy in that office;*
- b. during any period or during all periods when the person holding the office of Commissioner, or a person appointed under this subsection, is unable to perform the functions of that office or is absent from the State; or*
- c. in relation to any matter in respect of which the person appointed under this subsection, has under section 13 declared himself or herself unable to act.⁶*

5 Corruption and Crime Commission, *Acting Commissioner*, 2014. Available at: www.ccc.wa.gov.au/AboutCCC/Pages/ActingCommissioners.aspx. Accessed on 25 July 2014.

6 AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s14.html. Accessed on 25 July 2014.

An advisor to Dr Kim Hames MLA, the Minister representing the Attorney General, told the Parliament during the 2014 Legislative Assembly Budget Estimates of how the Acting Commissioners were sharing the work of the Commissioner, and the impact on the Commission of this arrangement:

The Commission has two Acting Commissioners – one a barrister from the bar and one a partner in a legal firm – who stand in, alternating on a fortnightly basis at this stage, but such arrangements, naturally enough, constrain the effort of the Commission....⁷

The Executive Director of the CCC, Mr Mike Silverstone, has recently announced his resignation and will finish with the Commission in October 2014. Mr Silverstone has been the Executive Director of the CCC for ten years and has worked alongside all three Commissioners.⁸

Finding 1

The current situation, where the Corruption and Crime Commission is led by two part-time Acting Commissioners alternating on a fortnightly basis, coupled with the imminent departure of the long-standing Executive Director, hinders the Commission's effectiveness in carrying out its functions and is of concern to the Committee.

Closed hearings

In the week before he left the CCC, the Committee held a closed hearing on 9 April 2014 with the Commissioner, Mr Roger Macknay, QC. During this hearing, the Committee explored some of the factors that hinder the timely appointment of a Commissioner. The Committee subsequently held a closed hearing on 18 June 2014 with the Hon Wayne Martin, AC QC, Chief Justice of Western Australia, on the same topic. The details of these hearings are contained in Appendix One.

The barriers to the timely appointment of a new CCC Commissioner

The qualifications for appointment as Commissioner are outlined in section 10(1) of the CCC Act:

A person is qualified for appointment as the Commissioner if the person has served as, or is qualified for appointment as, a judge of the

7 Dr Kim Hames MLA, Minister representing the Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 May 2014, pE455.

8 Corruption and Crime Commission, *CCC Executive Director to retire*, 3 July 2014. Available at: www.ccc.wa.gov.au/Publications/MediaReleases/Media%20Releases%202014/CCC%20Executive%20Director%20to%20retire.pdf. Accessed on 25 July 2014.

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*Supreme Court of Western Australia or another State or Territory, the High Court of Australia or the Federal Court of Australia.*⁹

This level of qualification is similar to that required in the legislation of other Australian jurisdictions for Commissioners of their integrity agencies, such as Queensland's *Crime and Corruption Act 2001*¹⁰, Victoria's *Independent Broad-Based Anti-Corruption Commission Act 2011*¹¹ and NSW's *Police Integrity Commission Act 1996*.¹²

Pool of candidates

The pool of candidates for the role of CCC Commissioner includes both retired judges and those who qualify for appointment as a judge of the Supreme Court in other Australian jurisdictions. This qualification to be appointed as a judge is defined in section 8(1) of the *Supreme Court Act 1935* as being "a person who is a lawyer and has not had less than 8 years' legal experience."¹³

Other than eligible lawyers, there have been only nine District Court judges in WA (not including Mr Macknay) who have retired in the past five years and not been appointed to other judicial appointments.¹⁴ There have been only five ex-Supreme Court judges in WA (not including the current Parliamentary Inspector of the CCC and Hons Roberts-Smith and Steytler) who have retired in the same period.¹⁵ Judges from other Australian jurisdictions, including the Federal and Family Courts, would also meet this qualification. Then-Commissioner Macknay gave evidence to the Committee that the new Commissioner of the South Australian ICAC, Hon Bruce Lander QC, was a Federal Court judge before his appointment.¹⁶

Section 9(3b) of the CCC Act requires the nominating committee, chaired by the Chief Justice, to advertise throughout Australia for expressions of interest for the position of

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- 9 AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s10.html. Accessed on 25 July 2014.
- 10 AustLII, *Crime and Misconduct Act 2001*, nd. Available at: www.austlii.edu.au/au/legis/qld/consol_act/cama2001191/s224.html. Accessed on 25 July 2014.
- 11 AustLII, *Independent Broad-Based Anti-Corruption Commission Act 2011*, nd. Available at: www.austlii.edu.au/au/legis/vic/consol_act/ibaca2011479/s20.html. Accessed on 25 July 2014.
- 12 AustLII, *Police Integrity Commission Act 1996*, nd. Available at: www.austlii.edu.au/au/legis/nsw/consol_act/pica1996312/s4.html#special_legal_qualifications. Accessed on 25 July 2014.
- 13 AustLII, *Supreme Court Act 1935*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/sca1935183/s8.html. Accessed on 25 July 2014.
- 14 District Court of Western Australia, *Past District Court Judges*, 2 July 2014. Available at: www.districtcourt.wa.gov.au/P/past_district_court_judges.aspx?uid=2244-3502-7885-1286. Accessed on 25 July 2014.
- 15 Supreme Court of Western Australia, *Former Judges and Masters*, 1 May 2014. Available at: www.supremecourt.wa.gov.au/F/former_judges_and_masters.aspx?uid=8008-8600-1009-7904. Accessed on 25 July 2014.
- 16 See www.icac.sa.gov.au/content/about-commissioner. Mr Roger Macknay QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 April 2014.

Commissioner.¹⁷ Section 9(3a)(a) requires that the names of three eligible people be provided to the Premier by the nominating committee.¹⁸ The Premier then recommends to the Governor an appointment, after consulting with the Joint Standing Committee and obtaining, under section 9(3a)(b) of the CCC Act, “the support of the majority of the Standing Committee and bipartisan support.”¹⁹

The Chief Justice advised the Joint Standing Committee of the difficulties in submitting to the Premier the names of three people eligible for appointment to fill the current vacancy:

*I was involved in the processes relating to the appointment of two out of three of the Commissioners who have been appointed to date....On each of the two occasions in which I have been involved in the process, it has been an exceptionally difficult task. On each occasion we have advertised nationally. We have received expressions of interest and on each of those occasions the committee was of the view that none of the people who expressed interest was appropriate for nomination and so on each of those occasions it has been a question of me, and sometimes the Solicitor-General, going around and tapping people on the shoulder and asking them to express interest.*²⁰

The Chief Justice went on to outline what he believed were a number of contributing factors that created the dearth of applicants for the role of Commissioner. These include:

- the nature of the job, in that the duties of the position are very onerous with many statutory tasks unable to be delegated to Acting Commissioners or the Executive Director;
- the current remuneration for the position;
- the degree of isolation that necessarily goes with the position; and
- the degree of scrutiny, including media attention, the Commission is under.²¹

17 AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s9.html. Accessed on 25 July 2014.

18 Ibid.

19 Ibid.

20 Hon. Wayne Martin AC QC, Chief Justice, Supreme Court of Western Australia, *Transcript of Evidence*, 18 June 2014.

21 Ibid.

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The former Commissioner, Mr Macknay, also cited the loss of personal privacy as being one of the major disadvantages of the role:

I think the role is a demanding one in terms of the loss of personal privacy, if you like, that comes with it... observed last time that it really amounted to an involvement in politics, and I think there is an element of that. Most lawyers, particularly those who have been judges for a period of time, do not find that an appealing prospect.²²

Mr Macknay pointed out the contentious nature of the CCC's work and that this factor plays a part in the lack of attractiveness of the role of Commissioner:

Integrity agencies are never particularly liked by members of political parties; the police will never like an oversight agency, of course, and I suppose may public servants probably feel the same way. These are things which, to a greater or lesser extent, will always exist and will be impediments to finding suitable people.²³

The Chief Justice sees the role of Commissioner as much more difficult than a judge's position:

...you are running a substantial agency, you are moving into territory that is not well chartered in terms of, for example, the balance between private hearings and public hearings which has been the subject of great debate....As a judge, there is no issue there....The rules are well established for judicial inquiry, but this is quite a different role....It is different and I think in some respects more complex and more onerous.²⁴

The Premier, Hon Colin Barnett, commented during a recent media interview that the situation of having no Commissioner at the CCC was a problem for government and that the position of CCC Commissioner was a contentious one and difficult to fill.²⁵

Remuneration and conditions in relation to the Commissioner

Both the Chief Justice and former-Commissioner Macknay believe that a higher salary may make the job more appealing for those in the legal profession that would be giving up either their retirement or a highly remunerated position elsewhere in the legal system. It is accepted that the remuneration for the position works as a major

22 Mr Roger Macknay QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 April 2014.

23 Ibid.

24 Hon Wayne Martin AC QC, Chief Justice, Supreme Court of Western Australia, *Transcript of Evidence*, 18 June 2014, p6.

25 Hon Colin Barnett MLA, Premier, Radio Interview, 6RP, 23 July 2014.

disincentive in attracting eligible candidates. This issue was the topic in April 2014 for a newspaper article on the vacancy of Commissioner titled “Pay sticking point in search for CCC judge”.²⁶

Section 11 of the CCC Act says that Schedule 2 of the Act provide the terms and conditions of service for a Commissioner. Section 3 of this schedule provides:

(1) The Commissioner is entitled to be paid remuneration and to receive allowances or reimbursements at the same rate as a puisne judge of the Supreme Court.

(2) The Commissioner is entitled to the same conditions in respect of leave of absence as a judge of the Supreme Court.

(3) The provisions of the Judges’ Salaries and Pensions Act 1950 that relate to pensions apply, with such modifications as circumstances require, to and in relation to —

(a) the Commissioner; and

(b) after the Commissioner’s death, the Commissioner’s spouse or de facto partner and children,

... (5) If the Commissioner is receiving a non-contributory pension under the Judges’ Salaries and Pensions Act 1950 or any other Act, or under a law of the Commonwealth or of another State or Territory, the Commissioner is to be paid the difference between that pension and the remuneration payable under subclause (1), in lieu of the full amount of that remuneration.²⁷

The judicial pension is attractive as it provides a pension at a rate equal to 60% of the judge’s final salary.²⁸ As members of the judiciary are entitled to the full judicial pension at the age of 60 and after 10 years of service²⁹, the effect of schedule 2, section 3(5) of the CCC Act is that a retired judge, fitting these criteria, who takes on the role of Commissioner is effectively doing the job for 40% of the salary they would otherwise be entitled to under section 3(1) of the schedule.

26 Mr Daniel Emerson, ‘Pay sticking point in search for CCC judge’, *The West Australian*, 9 April 2014, p13.

27 AustLII, *Corruption and Crime Commission Act 2003- Schedule 2*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/sch2.html. Accessed on 25 July 2014.

28 Ibid.

29 AustLII, *Judges’ Salaries and Pensions Act 1950*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/jsapa1950276/s6.html. Accessed on 25 July 2014.

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Taking into account these provisions of the CCC Act, Chief Justice Martin gave evidence to the Committee that, of those eligible, a judge who has served between five and 10 years is a person to whom the appointment can be attractive as there would be no loss in their salary and they can be assured the appointment will take them past the 10 years of service needed to qualify for a judicial pension.³⁰

The Chief Justice told the Committee that the position of CCC Commissioner is unlikely to be attractive for senior lawyers or serving barristers, particularly partners in major law firms, due to the remuneration involved. He said that “judicial salaries are very significantly below the levels of remuneration available elsewhere in the profession.”³¹

Additionally, the need to have more than one term of appointment as Commissioner in order to qualify for a judicial pension may raise speculation that a Commissioner who had been a senior lawyer may be beholden to the government of the day for an extension of contract so they can serve the 10 years required.

Finding 2

The current remuneration for the position of Commissioner is significantly below what will attract a suitable candidate for the position.

The setting of judges’ salaries in Western Australia

The Salaries and Allowances Tribunal (S&AT) sets the salary rates for Western Australian judges, the Parliamentary Inspector of the CCC (PICCC) and the CCC Commissioner. Section 7 of the *Salaries and Allowances Act 1975* requires the S&AT, at intervals of not more than twelve months, to inquire into and report to the Attorney General on the question of whether any alterations are desirable in the remuneration to be paid or provided to Judges, District Court Judges, Masters of the Supreme Court, Magistrates and the PICCC. A copy of the report must be laid before each House of Parliament within five sitting days of that House after the Minister has received the report.³²

The Tribunal’s recommendation in 2012 was for a 2.6% increase with effect from 1 July 2013.³³ On 13 June 2013, the Commonwealth Remuneration Tribunal’s Review of

30 Hon Wayne Martin AC QC, Chief Justice, Supreme Court of Western Australia, *Transcript of Evidence*, 18 June 2014.

31 Ibid.

32 AustLII, *Salaries and Allowances Act 1975*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/saaa1975208/s7.html. Accessed on 25 July 2014.

33 Salaries and Allowances Tribunal, *Report with recommendations for Judges, Masters and Magistrates*, 23 November 2012. Available at: www.sat.wa.gov.au/JudgesMastersAndMagistrates/Pages/November2012.aspx. Accessed on 25 July 2014.

Remuneration for Public Office Holders Statement recommended a 2.4% increase in remuneration for the Federal judiciary.³⁴

For its latest review, the S&AT received submissions from the Chief Justice, the Chief Judge of the District Court, the Chief Magistrate, the Magistrates' Society of Western Australia, Registrar of the Supreme Court, Registrar of the District Court and the PICCC. All of these submissions sought to have the existing salary relativities maintained.

The Tribunal's most recent review of judges' salaries was tabled in Parliament on 27 November 2013 and recommended no change to the remuneration provided to Judges, District Court Judges, Masters of the Supreme Court, Magistrates and the PICCC.³⁵ Their current annual salaries, including leave loadings, are:

PICCC (part-time)	\$169,076
District Court Judge	\$380,421
CCC Commissioner/Supreme Court Judge	\$422,691 ³⁶

Proposed solutions

On each of the occasions that the three CCC Commissioners have retired from their position they have given four, five and sixth months' notice to the Government of their intentions.³⁷ This length of notice has proven to be inadequate to find a replacement Commissioner before the incumbent retired. The Committee believes there are a number of structural changes that are needed to the process of appointing a new CCC Commissioner so that appointments can be made in a more timely manner.

Qualifications

Currently the Commissioner must be qualified to serve as a judge, but if a judge, must resign before taking up their appointment at the CCC. The Chief Justice outlined to the Committee why it is good policy for a judge to retire before being appointed as Commissioner, and not a solution to the problem of a timely appointment of a new Commissioner:

34 Ibid.

35 Parliament of WA, *Tabled Paper 1220*, 27 November 2013. Available at: [www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3911220a169ccf4a49583bb548257c3000164f50/\\$file/1220.pdf](http://www.parliament.wa.gov.au/publications/taledpapers.nsf/displaypaper/3911220a169ccf4a49583bb548257c3000164f50/$file/1220.pdf), p5. Accessed on 25 July 2014.

36 As at October 2013, a NSW Supreme Court judge receives a salary of \$413,000 plus a conveyance allowance of \$22,000 per annum. This allowance was introduced in 1990 to equalise judges' salaries with Federal Court judges, who received a car allowance.

37 Mr Michael Silverstone, Executive Director, Corruption and Crime Commission, *Transcript of Evidence*, 9 April 2014, p10.

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The Commissioner is inherently likely to be exposed in political and other controversy from time to time and it is not good, I think, for the independent judicial branch of government to have its members exposed to that degree of controversy. But there is also, I think, a sound legal reason that arises from Chapter III of the Constitution of the Commonwealth, and of course, the High Court has consistently construed that Chapter as providing the judicial power of the Commonwealth must be exercised by an independent branch of government, which has meant that certainly for many years it has been established that federal judges must be independent of the executive branch, and therefore only perform a limited role in relation to the performance of executive functions.

... But the line between the legitimate roles of the judiciary and illegitimate roles is not entirely clear, so in that judgement the High Court said, "Well, judges can perform at least some royal commissions". In another decision they have said that it is fine for judges to serve as presidential members of the Australian Administrative Tribunal, which is an administrative body, and judges can legitimately issue warrants because the issuing of a warrant is an administrative function.

So there are some administrative things that judges can do, but some they cannot. And, of course, the jurisprudence that developed in relation to Federal judges has now spilled over in relation to State judges because the High Court has held that Chapter III contemplates that Commonwealth judicial power will be exercised by State courts. So therefore, the obligations that are imposed upon Federal judicial officers under the Constitution apply to State judicial officers...³⁸

Appointments for the role of CCC Acting Commissioner under section 14(1) of the CCC Act stipulates that:

The Governor may appoint a person who is eligible for appointment as Commissioner to act in the office of Commissioner...³⁹

All current and past appointments to the role of Acting Commissioner have included senior members of the legal profession but not one retired judge. The Committee considers that there should be consistency in the interpretation of both section 10(1)

38 Hon Wayne Martin AC QC, Chief Justice, Supreme Court of Western Australia, *Transcript of Evidence*, 18 June 2014.

39 AustLII, *Corruption and Crime Commission Act 2003*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/s14.html. Accessed on 25 July 2014.

on the appointment of a Commissioner and section 14(1) for the appointment of an Acting Commissioner.

The Chief Justice also considered that candidates for the role of Commissioner could come from senior lawyers, who are not judges, but they must have “significant legal qualifications”:

I would be hesitant to go beyond people’s legal experience though because there are some very important aspects of the role that require legal experience. It would be difficult to see how you could effectively conduct hearings of the kind that they have to conduct with Senior Counsel from all over Australia, engaged with putting arguments of law. A person without significant legal qualifications would, I think, be at a great disadvantage in that environment.

... legal questions about procedural fairness, about relevance in questioning and about the ambit of the inquiry will inevitably arise. The best analogy, I think, is that the Commission is a kind of standing Royal Commission. It produces reports of the same sort of character. If you look at the history of appointment of Royal Commissions in Australia in the last 20 or 30 years, it has almost always been senior experienced lawyers, usually judges or retired judges.⁴⁰

Recommendation 1

The Attorney General consider broadening section 10(1) of the *Corruption and Crime Commission Act 2003* to put beyond doubt the appropriateness of considering senior lawyers for appointment to the position of Commissioner of the Corruption and Crime Commission.

Length of contract

In terms of the appointment period, Mr Macknay told the Committee:

People have not felt the obligation to remain for five years, of course. But five years is quite a long time in the job. I do not think it has to be five years; I think three years would be an appropriate term really. That might make it seem more attractive. There is an argument that there ought be turnover in these sorts of agencies and it is one that

40 Hon Wayne Martin AC QC, Chief Justice, Supreme Court of Western Australia, *Transcript of Evidence*, 18 June 2014.

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*I do not necessarily disagree with, depending on the particular job and depending on the circumstances, of course.*⁴¹

Mr Silverstone told the Committee that in his time as Executive Director at the CCC he could think of only one Commissioner of integrity agencies in all of the Australian jurisdictions who had served five years in that position.⁴²

The Chief Justice suggested to the Committee that a 10-year period might be a suitable inducement for someone to express an interest in the job, but held its own problems:

One way you could overcome the pension problem is to appoint people for 10-year terms, but I think that would have problems as well. Ten years is a long time to be saddled with somebody who may, or may not, be appropriate.

*The other way would be to offer a pro-rata pension, so that you could say to somebody: "If you have done your five years, you will get half of the pension entitlement that you would get if you had done 10 years." I think the problem with that is that it creates a very real incentive for reappointment. During the first five-year term, the person would know that they can get all of the pension if they are reappointed, so there would at least be a perception that the person was avoiding direct conflict with government in order to secure reappointment, so that they could get the 10 years in order to get to their pension. I do not think that is a viable alternative either.*⁴³

Finding 3

While few Commissioners of integrity agencies in Australia serve out their five-year terms, the current length of appointment in Western Australia is suitable.

Level of remuneration

Given the evidence provided by both the Chief Justice and the former Commissioner that the remuneration of the position of Commissioner is significantly below what may be attractive for the position, the Committee notes that in New South Wales if the Commissioner of the Independent Commission Against Corruption is a retired judge, then they retain their judicial pension as well as being paid the equivalent of a judge's salary. The Chief Justice said that if the same conditions were adopted in Western

41 Mr Roger Macknay QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 April 2014.

42 Mr Michael Silverstone, Executive Director, Corruption and Crime Commission, *Transcript of Evidence*, 9 April 2014.

43 Hon Wayne Martin AC QC, Chief Justice, Supreme Court of Western Australia, *Transcript of Evidence*, 18 June 2014.

Australia, “it would significantly expand the range of people who would be interested.”⁴⁴

While such a level of remuneration might seem generous by the public, Mr Macknay said the main pool of candidates for the role would be retired or former judges rather than legal practitioners and compared the judicial pension to superannuation:

*...but to me the real sticking point is that the [CCC] Act— it is the same, as I have said, with retired judges returning— operates on the basis that the pension is entirely unearned, as though it is just a gift from the government to retired judges. That might have been the case in the nineteenth century or the early twentieth century, when these things were created, but it ignores the existence of compulsory superannuation. The fact of the matter is that if the judge did not have the benefit of a pension, governments of the day would have to pay, at the very least, 9% superannuation. It is really impossible to say that the pension does not belong, in part at least, to the judge.*⁴⁵

In comparing the salary of the Commissioner to a barrister, Mr Macknay told the Committee:

*In government terms, \$400,000 is a very high salary, but in the private sector I think it is not very appealing. The solicitors’ remuneration rate, which is fixed by committee under the Legal Practitioners Act, as I understand, is presently \$450 an hour. So, even if one says five billable hours a day, it is over \$2,000 a day or about \$11,000 a week. It has been many years since I have practised at the Bar, but I would imagine there would be many barristers at the Bar earning more than \$400,000 a year. Certainly, partners in the major firms would earn far more than that.*⁴⁶

Both Chief Justice Martin and then-CCC Commissioner Macknay recommended to the Committee that the easiest way forward would be to repeal schedule 2, section 3(5) of the *Corruption and Crime Commission Act 2003*:

(5) If the Commissioner is receiving a non-contributory pension under the Judges’ Salaries and Pensions Act 1950 or any other Act, or under a law of the Commonwealth or of another State or Territory, the Commissioner is to be paid the difference between that pension and

44 Ibid.

45 Mr Roger Macknay QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 April 2014.

46 Ibid.

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*the remuneration payable under subclause (1), in lieu of the full amount of that remuneration.*⁴⁷

The Chief Justice told the Committee that this amendment to the CCC Act would make the role of CCC Commissioner attractive to current judges who are about 60 or over and had completed 10 years' of service as a judge. The Chief Justice estimated the pool of possible interested judges in the State as:

*... there are 20 judges on the Supreme Court, 25 judges on the District Court, and four Western Australian resident judges of the Federal Court, so that would give you a potential pool. ... It is a potential pool of about 50, of whom probably between 10 and 20 would be in the 10 years' service, 60-plus group. So, I would hope within that group we would be able to attract somebody who would be willing to put their name forward.*⁴⁸

The Chief Justice noted that such an amendment to the CCC Act would also need to apply to the PICCC:

*...because of course if the amendment has the effect we would hope, you will be getting very probably a retired judge as a Commissioner, which is what we have had up until now. It would be desirable to have the same degree of attractiveness to the Parliamentary Inspector so that there is not, if you like, an imbalance; in other words, the Parliamentary Inspector ought to be of the same calibre as the Commissioner, so there should not be a pay disadvantage vis-a-vis the Parliamentary Inspector.*⁴⁹

This would require the repealing of schedule 3, section 3(4) of the CCC Act.

Recommendation 2

The Attorney General introduce an urgent Bill to repeal schedule 2, section 3(5) and schedule 3, section 3(4) of the *Corruption and Crime Commission Act 2003* to allow the Commissioner of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission to retain any judicial pension applicable while additionally being remunerated at the rate of a Supreme Court judge.

47 AustLII, *Corruption and Crime Commission Act 2003- Schedule 2*, nd. Available at: www.austlii.edu.au/au/legis/wa/consol_act/cacca2003338/sch2.html. Accessed on 25 July 2014.

48 Hon Wayne Martin AC QC, Chief Justice, Supreme Court of Western Australia, *Transcript of Evidence*, 18 June 2014.

49 Ibid.

Structure of the CCC

Mr Macknay also raised with the Committee the benefit of the CCC having a Deputy Commissioner to assist in the transition period between Commissioners. Such a change would assist the work of the CCC across a number of areas but particularly in ensuring the timely completion of CCC reports. Mr Macknay said that he would leave unfinished “probably four or five matters following on from investigations in which there would be either a draft report in hand or, in one instance, coming from counsel.”⁵⁰ Currently, Acting Commissioners are finalising reports where they had not been the participating commissioner in hearings for an investigation. He explained that:

I can say from my own experience that it can be extremely difficult to get across things, particularly when you are first starting. The last thing you want to do is to have to delve into some matter and try to get on top of it with a view to finalising a report. ... The Act says nothing about the need for the report to be completed by the individual who sat. The Commission has always operated on the basis that it is not necessary for the individual who sat to be there continuously throughout hearings. Reports, of course, are hybrid creatures. They are not based just on viva voce evidence coming from a hearing.

*They very often come from a variety of sources— statements taken from witnesses by investigators, documents, emails and so on, together with viva voce evidence. They do not have the status of a judgement, of course. They are merely an expression of opinion. I think the Commission, until otherwise directed, will continue to operate on the basis that it is not legally necessary for there to be continuity of an individual for that individual to sign the report.*⁵¹

The Chief Justice also told the Committee that if the CCC had a Deputy Commissioner it would assist in overcoming some of the disadvantages of the current structure:

... the duties of the [Commissioner] position are very onerous; there are a very large number of complaints each year; there is no capacity to delegate because although the Act provides for an Acting Commissioner, an Acting Commissioner can only serve when the Commissioner is, for some reason, unable to act. So there is no capacity to actually share the work with a Deputy Commissioner. So that means that some of the statutory tasks— obviously, the

50 Mr Roger Macknay QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 9 April 2014.

51 Ibid.

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*Commissioner does not need to consider every single complaint that comes before the Commission— but some of the statutory tasks, such as the authorisation of warrants have to be performed by the Commissioner himself or herself.*⁵²

The Archer Review of the CCC in 2008 recommended that the CCC Act be amended to incorporate a Deputy Commissioner and Assistant Commissioners with specific functions:

Recommendation 6

That the Act be amended to:

- (a) allow for the appointment of deputy commissioners to whom specific functions may be delegated by the Commissioner, and who are able to act as the Commissioner in the Commissioner's absence; and*
- (b) allow for the appointment of assistant commissioners to whom specific functions may be delegated by the Commissioner as the need arises, and who may be appointed on a full-time or part-time basis.*⁵³

Later in 2011, the Joint Standing Committee in the 38th Parliament recommended to the Government that the CCC Act be amended to allow for a position of Deputy Commissioner in its Report 21, *Parliamentary Inspector's Report Concerning Telecommunication Interceptions and Legal Professional Privilege*. The Committee's recommendation reflected recommendation 6 in the earlier Archer Review of the CCC Act:

*The Corruption and Crime Commission Act 2003 should be amended to allow for the appointment of deputy and/or assistant commissioners, to whom specific functions may be delegated by the Commissioner, and who are able to act as the Commissioner in the Commissioner's absence.*⁵⁴

The then-Attorney General, Hon Christian Porter MLA, responded to the Committee:

The relevance of this recommendation to the subject matter of the JSCCCC report appears to stem from the concerns the Parliamentary Inspector expressed in Chapter 4 of his report (which is annexed to the JSCCCC report) regarding the time the Corruption and Crime

52 Hon Wayne Martin AC QC, Chief Justice, Supreme Court of Western Australia, *Transcript of Evidence*, 18 June 2014.

53 Ms Gail Archer SC, *Review of the Corruption and Crime Commission Act 2003*, Perth, February 2008, p57.

54 Joint Standing Committee on the Corruption and Crime Commission, *Report 21- Parliamentary Inspector's Report Concerning Telecommunication Interceptions and Legal Professional Privilege*, Parliament of Western Australia, Perth, 24 November 2011, pxi.

Commission ("CCC") had taken to respond to his requests for information. It appears to be common ground between the Parliamentary Inspector and the CCC that this delay was contributed to by the staffing difficulties the CCC had been experiencing. As the JSCCCC is aware, the most fundamental of those staffing deficiencies has since been resolved with the appointment of the present Commissioner, however it is acknowledged that enhancements to the CCC's management structure of the nature mooted by this recommendation might conceivably ameliorate such difficulties in future.

In any event the JSCCCC is aware that the Government is presently drafting legislation which will implement various reforms to the Corruption and Crime Commission Act 2003. As noted in previous responses, these reforms are presently subject to Cabinet processes, however the JSCCCC recommendation is noted in the context of those ongoing reforms.⁵⁵

The *Corruption and Crime Commission Amendment Bill 2012* introduced to Parliament in June 2012 did not include an amendment reflecting the Committee's recommendation for a Deputy Commissioner position, but did propose an amendment for the establishment of one or more Assistant Commissioners. Debate on the Bill did not conclude before Parliament was prorogued for the 2013 State Election.⁵⁶

Recommendation 3

The Attorney General prepare an amendment to the *Corruption and Crime Commission Act 2003* to allow for the appointment of a Deputy Commissioner to assist the Commissioner in the day to day work of the Commission and to ameliorate difficulties created by delays in the appointment of future Commissioners.

Role of the nomination committee

In his evidence to the Committee, the Chief Justice raised another matter that might streamline the process for nominating a CCC Commissioner. This proposal was for sections 9(3a)(a) and 9(3b) of the CCC Act to be repealed to remove the role of the nominating committee. The Chief Justice suggested that instead the Government could make a recommendation of a suitable person to the Joint Standing Committee for its

55 Hon Christian Porter MLA, Attorney General, Letter, 21 March 2012.

56 Parliament of WA, *Corruption and Crime Commission Amendment Bill 2012*, 21 June 2012.

Available at:

[www.parliament.wa.gov.au/Parliament/Bills.nsf/5BE1B95B35BF034348257A240011530E/\\$File/B275B1.pdf](http://www.parliament.wa.gov.au/Parliament/Bills.nsf/5BE1B95B35BF034348257A240011530E/$File/B275B1.pdf), p14. Accessed on 28 July 2014.

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consideration. If the Committee was not able to provide bipartisan support for the suggestion, then the Government would be required to provide another name.⁵⁷

The *Corruption and Crime Commission Amendment Bill 2012* introduced to Parliament in June 2012 included amendments to section 9 of the CCC Act, reflecting the Chief Justice's proposal for the removal of the role of a nominating committee. Debate on the Bill did not conclude before Parliament was prorogued for the 2013 State Election.⁵⁸

Recommendation 4

The Attorney General prepare an amendment to sections 9(3a)(a) and 9(3b) of the *Corruption and Crime Commission Act 2003* to remove the role of a nominating committee and allow the Government to propose one name of a suitable Commissioner to the Joint Standing Committee for its consideration.

57 Hon Wayne Martin AC QC, Chief Justice, Supreme Court of Western Australia, *Transcript of Evidence*, 18 June 2014.

58 Parliament of WA, *Corruption and Crime Commission Amendment Bill 2012*, 21 June 2012.

Available at:

[www.parliament.wa.gov.au/Parliament/Bills.nsf/5BE1B95B35BF034348257A240011530E/\\$File/B275B1.pdf](http://www.parliament.wa.gov.au/Parliament/Bills.nsf/5BE1B95B35BF034348257A240011530E/$File/B275B1.pdf), pp14-15. Accessed on 28 July 2014.

Appendix One

Closed hearings

Date	Name	Position	
9 April 2014	Mr Roger Macknay, QC	Commissioner	Corruption and Crime Commission
	Mr Michael Silverstone	Executive Director	
	Ms Mia Powell	Manager Executive Services	
18 June 2014	Hon Wayne Martin, AC QC	Chief Justice of Western Australia	

Appendix Two

Committee's functions and powers

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

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

It is the function of the Joint Standing Committee to -

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

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