



ROYAL COMMISSION
INTO WHETHER THERE HAS BEEN ANY
CORRUPT OR CRIMINAL CONDUCT BY
WESTERN AUSTRALIAN POLICE OFFICERS

INTERIM REPORT

DECEMBER 2002



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CRIMINAL CONDUCT BY WESTERN AUSTRALIAN
POLICE OFFICERS

Our ref: 3368
Your ref:

20 December 2002

His Excellency Lieutenant General John Sanderson AC
Governor of the State of Western Australia
Government House
PERTH WA 6000

Your Excellency

Pursuant to the Commission issued to me on 12 December 2001, I now have the honour to present to you an Interim Report which relates to my inquiry into the third and fourth terms of reference.

Yours sincerely

G.A. Kennedy AO QC
COMMISSIONER

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ABBREVIATIONS USED IN THIS INTERIM REPORT

ACC	The Anti-Corruption Commission
CJC	The Criminal Justice Commission (Qld)
CMC	The Crime and Misconduct Commission (Qld)
DPP	Director of Public Prosecutions
IAU	The Internal Affairs Unit of the Western Australia Police Service
ICAC	The Independent Commission Against Corruption (NSW)
JSC	Joint Standing Committee on the Anti-Corruption Commission
NSWCC	New South Wales Crime Commission
NYPD	New York City Police Department
OCC	Official Corruption Commission
OMBUDSMAN	The Parliamentary Commissioner for Administrative Investigations
PIC	The Police Integrity Commission (NSW)
PCMC	Parliamentary Crime and Misconduct Committee
QC	Queen's Counsel
QCC	The Queensland Crime Commission
THE UNION	Western Australian Police Union of Workers
WAPS	The Western Australia Police Service

CHAPTER 1

INTRODUCTION

- 1.1 Pursuant to the provisions of s5 of the *Royal Commissions Act 1968*, by a commission dated 12 December 2001, I was appointed a Royal Commission (“the Commission”) to inquire into and report on whether, since 1 January 1985, there has been corrupt conduct or criminal conduct by any Western Australian police officer. The expressions “corrupt conduct” and “criminal conduct” are defined in the commission to include, but are not limited to, the meanings given to them by s3 of the *Anti-Corruption Commission Act 1988*. The commission also requires me to inquire into, and to report on, the effectiveness of existing procedures and statutory provisions in investigating and dealing with corrupt and criminal conduct by police officers, and to inquire into, and to report on, whether changes in the laws of the State or in investigative or administrative procedures are necessary or desirable for the purpose of investigating or dealing with, preventing or exposing, corrupt or criminal conduct by police officers. I am required to report by 31 August 2003 on the foregoing matters which are considered significant, to the extent practicable in the time available to the Commission.
- 1.2 Following the initial formal sitting of the Commission on 28 March 2002, public hearings commenced on 1 July 2002. A number of matters have since been investigated in public hearings, in the course of which evidence has been given alleging corrupt and criminal conduct by certain Western Australian police officers. Some of these matters had been the subject of earlier investigation by the Anti-Corruption Commission (“ACC”), and they have therefore provided an opportunity for assessing the benefits to be derived from the powers granted to the Commission under the *Royal Commission (Police) Act*

2002 as contrasted with the more limited powers granted to the ACC under its Act.

- 1.3 It became apparent in the course of the early hearings of the Commission that, if Western Australia is to have an external oversight agency that meets contemporary standards and is fully effective, it would probably be necessary to create a new body, with additional powers, in the place of the ACC. Having regard to this conclusion, the Commission conducted a Round Table Conference on 14 and 15 November 2002, chaired by Mr P Hastings QC, Senior Counsel Assisting the Commission, to enable interested parties to discuss areas of concern with respect to the oversight arrangements that are capable of being exercised by the ACC under its present legislation. Major concerns related to the requirements of secrecy imposed upon it and to the lack of appropriate levels of transparency and accountability.
- 1.4 On the invitation of the Commission, senior representatives of the New South Wales Police Integrity Commission ("PIC"), the New South Wales Independent Commission Against Corruption ("ICAC"), and the Queensland Crime and Misconduct Commission ("CMC") attended the conference. It was also attended by representatives of the relevant stakeholders, including the Western Australia Police Service ("WAPS"), the Western Australian Police Union of Workers ("the Union"), the ACC and the Parliamentary Commissioner for Administrative Investigations ("the Ombudsman"), all of whom had the opportunity to address the various issues which were raised. Prior to the conference, written submissions had been sought and received from members of the public. At the end of each day of the conference, a summary of the proceedings of the conference was placed on the Commission's web site.

- 1.5 The contributions of those attending the Round Table Conference were extremely useful. In particular, the contributions of the representatives of the PIC, the ICAC and the CMC were especially valuable, having regard to the legislative changes which have been made in New South Wales and in Queensland that have resulted in what may be described as the creation of second generation external oversight agencies.
- 1.6 In the circumstances, it has been possible at this stage of the work of the Commission to conclude that the identifiable flaws in the structure and powers of the ACC have brought about such a lack of public confidence in the current processes for the investigation of corrupt and criminal conduct that the establishment of a new permanent body is necessary. That body should be armed with the additional powers which have been shown to be required by the PIC, the ICAC and the CMC to enable them adequately to perform their statutory functions. Its establishment should result in the avoidance of the existing duplication of responsibilities between the various State agencies that are presently concerned with the investigation of corruption and other serious misconduct on the part of public officers. Having firmly reached this conclusion, it was considered to be desirable that the Commission's views should be the subject of an Interim Report.
- 1.7 If the recommendations of this Interim Report are accepted, it will be extremely important for there to be a smooth transition from this Commission and the ACC to the new permanent external oversight agency. In this regard, it should be borne in mind that this Commission has acquired valuable resources, which include its hearing room facilities, sophisticated technical services and intelligence information. It would be most unfortunate if the opportunity were not to be taken, at the conclusion of the

Commission's work, to retain, to the maximum extent possible, its facilities and resources by absorbing them into the new agency in which the ongoing responsibility for investigating and preventing the corrupt and criminal conduct of public officers will be vested.

CHAPTER 2

BACKGROUND TO THE ROYAL COMMISSION

- 2.1 Royal Commissions have a long history. LA Hallett, *Royal Commissions and Boards of Inquiry* (1982), at 16-17, observed that they extend as far back as the Domesday Book of 1086, which was the result of an inquiry appointed by William the Conqueror for the purpose of establishing the ownership of land holdings in England, and for valuing them for taxation. Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (2001), at 5, suggested that they were used in the United Kingdom to investigate crime at least as early as the Inquest of Sheriffs in 1176.
- 2.2 The essential function of a Royal Commission is to inform Governments, whether it be for the purpose of formulating policy or of ascertaining the facts of a particular matter. One of its principal features is the power to acquire information by coercive means. The task of this Commission is to inquire as to the facts, to report, and to make recommendations. This Commission will not be deciding issues in a binding manner as between individuals, nor will it be making decisions which directly affect the rights or status of individuals.
- 2.3 In *McGuinness v Attorney General (Vic)* (1940) 63 CLR 72, at 102, Dixon J said, in relation to a Royal Commission presided over by Gavan Duffy J to inquire into the suggested bribery of members of the Victorian Parliament:

For while the principle that the Crown cannot grant special commissions, outside the ancient and established instruments of judicial authority, for the taking of inquests, civil or criminal, extends to inquisitions into matters of right and into supposed offences, the principle does not affect commissions of mere inquiry and report involving no compulsion, except under the

authority of statute, no determination carrying legal consequences and no exercise of authority of a judicial nature *in invitos*.

2.4 The calls for the appointment of a Royal Commission to investigate whether there has been corrupt or criminal conduct on the part of police officers in Western Australia, and to review the functions and operations of the oversight provided by the ACC, are not new. There has for some time been disquiet within the community regarding a number of high profile matters, the investigations into which have not been satisfactorily concluded by the WAPS. Some of them, including such matters as the Argyle Diamond investigation, the death of Shirley Finn, and Stephen Wardle's death in custody, go back over substantial periods of time.

2.5 There have also been concerns expressed about the lack of transparency and accountability in relation to the work of the ACC, which have resulted in large measure from the secrecy provisions imposed upon it under its Act. The inability of the ACC to conduct hearings in public and other legislative limitations, although initially imposed for understandable reasons having regard to the restricted functions which it was designed to serve at its inception (when it was named the Official Corruption Commission) have been found to have worked against it in the performance of its present role. The inability of the ACC to bring to the attention of the public its successes has been very much to its disadvantage. As a consequence, it has been unable effectively to respond to criticisms which have been directed at it, many of them being unfounded.

2.6 So far as this Commission is concerned, there are some who have argued against the need for it to investigate corruption. Their arguments have largely been based on the "rotten apple" theory that, if there are indeed corrupt police officers, they are in the minority,

and it has been suggested that they are opportunistic in their misconduct and that no systemic or entrenched corruption exists in the WAPS. Furthermore, some have argued that any corrupt practices in the past, and the potential for future corrupt practices, have been addressed by the innovations introduced through the Delta reform program of the WAPS. These welcome reforms, commencing in the mid 1990s, were heralded as providing a fundamental change as to how the WAPS would go about the business of policing; but they cannot, on their own, provide the solution to corrupt and criminal conduct on the part of police officers.

2.7 The Hon Justice JRT Wood, in his final report on the New South Wales Police Service in 1987 (“the Wood Royal Commission”), said at 26-27, paragraphs 2.6 and 2.7:

“2.6 The ‘rotten apple’ theory of police deviance by which corruption has been understood in terms of individual moral failure has been long discounted. The narrow perspective of corruption offered by the rotten apple theory has been criticised as a defensive approach which denies the social determinants of corruption and the reality that organisations can be corrupt:

Consequently it would seem that acceptance by police managers and political elites, of a rotten apple concept of police corruption, is a defensive, face-saving exercise. The solution is simply seen as removing ‘bent’ officers without a need to evaluate organisational procedures. It is, in essence, a means of ‘papering over the cracks’ without admitting that there is a fundamental problem of major significance (K Bryett & A Harrison, Policing in the Community, Butterworths, Sydney, 1993, p 74).

2.7 The Knapp Commission, reporting on police corruption in New York in 1972, concluded that the New York City Police Department’s (NYPD) reliance on the rotten apple theory had functioned as an obstacle to meaningful reform:

According to this theory, which bordered on official Department doctrine, any policeman found to be corrupt must promptly be denounced as a rotten apple in an otherwise clean barrel. It must never be admitted that his individual corruption may be symptomatic of underlying disease... A high command unwilling to acknowledge that the problem of corruption is extensive cannot very well argue that drastic changes are necessary to deal with the problem.

- 2.8 The two most recent Commissions into police misconduct in Australia exposed very significant levels of police corruption. They were the Queensland Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct within the Queensland Police Force, conducted by Mr GE Fitzgerald QC (1989) and the Wood Royal Commission.
- 2.9 The Fitzgerald Commission of Inquiry was a landmark inquiry, not simply by reason of the corrupt police conduct that it uncovered, but in the range of measures recommended to prevent or minimise opportunities for future corruption. Principal amongst these recommendations was the establishment of the Criminal Justice Commission ("CJC"), which was given the task of restoring public confidence in the Queensland public sector. In addition to its role in investigating corruption within the public sector, the CJC assisted police in investigating organised and major crime until this function was transferred to the newly created Queensland Crime Commission ("QCC") in 1997.
- 2.10 The decision was made in 2001 to combine the functions of the CJC and the QCC to form a single crime and misconduct agency, the CMC. It was established under the *Crime and Misconduct Act 2001* (Qld). The CMC, being a second generation crime fighting body was given increased powers. It is significantly more sophisticated in its operations than its predecessor.

- 2.11 In New South Wales, the first generation efforts to combat corruption underwent significant changes that flowed from the recommendations of the Wood Royal Commission. The ICAC, which had been established in 1988, but which was found to be ill equipped to deal with police corruption, had this function excised and passed to the newly formed PIC in 1996. The ICAC continued, however, to have responsibility for public sector corruption and, in addition, its role was expanded into the important areas of research, prevention and education.
- 2.12 What has occurred in both Queensland and New South Wales can be seen in a developmental model as an evolution of the agencies tasked with corruption and crime prevention. The paths chosen by Queensland and New South Wales differ, but they reflect the particular needs in each jurisdiction. Queensland has chosen a comprehensive approach, with crime and corruption being vested in the one organisation. New South Wales, on the other hand, has taken the course of creating separate agencies to deal with crime (New South Wales Crime Commission), public sector corruption (ICAC) and police corruption (PIC). In each case, the initial model has changed in response to the experience gained from that model.
- 2.13 It is clearly too early, at this stage of the Commission's investigations, to come to a firm conclusion as to the level of any corruption in the WAPS. That is a matter which will be further examined in my Final Report.

CHAPTER 3

THE ANTI-CORRUPTION COMMISSION

BACKGROUND

- 3.1 Community expectations with respect to the conduct and integrity of the WAPS are, understandably, very high. Given the extensive powers that the WAPS is entrusted to exercise, and the impact that these powers can have on individuals if misapplied, it is necessary to ensure that a robust external system of accountability exists to maintain public confidence in the WAPS. To date, these accountability measures have largely been a shared responsibility between the Parliamentary Joint Standing Committee on the ACC (“JSC”), the ACC itself and the Ombudsman. It is to the latter two agencies that people generally turn when they wish to make a complaint regarding their dissatisfaction with the WAPS or with an individual officer. The WAPS itself, through its Internal Affairs Unit (“IAU”), receives many complaints directly.
- 3.2 There are a number of other accountability agencies that also have a role to play in the oversight of police operations. They include:
- (a) the Commissioner for Equal Opportunity;
 - (b) the Information Commissioner;
 - (c) the Auditor General; and
 - (d) the Commissioner for Public Sector Standards.
- 3.3 Whilst these agencies have specific responsibilities for particular aspects of police service oversight, it is the ACC that is most closely associated in people’s minds with the external oversight of the WAPS.

HISTORY OF THE ANTI-CORRUPTION COMMISSION

- 3.4 The Official Corruption Commission (“OCC”) was the forerunner of the ACC. It was established by the *Official Corruption Commission Act 1988*, the long title of which was “an Act to provide for the appointment of an Official Corruption Commission for receiving and considering allegations of corruption made against public officers and for incidental purposes”. The Act was uncomplicated, consisting of only 14 sections, the last of which required the Minister to carry out a review of the operation and effectiveness of the Act as soon as was practicable after the expiry of two years from its commencement. It further required the Minister to consider and to have regard to the effectiveness of the OCC and the need for the continuation of its functions.
- 3.5 The OCC consisted of three members, one of whom was required to be a person who had held office as a Judge, District Court Judge, Magistrate or commissioned officer of the police force. All that was provided with respect to the other two members was that they should not be public officers. The appointment of members of the OCC was to be made by a committee consisting of the Chief Justice of Western Australia, the Chief Judge of the District Court and the Commissioner of Police. The Chairman was appointed by the Governor. The office of Commissioner was and remains a part-time appointment only.
- 3.6 The initial functions of the OCC were described as being to receive information furnished to it by any person who alleged that a public officer had corruptly acted, or corruptly failed to act, in the performance or discharge of the functions of his office or employment, or had corruptly taken advantage of his position to obtain any benefit for himself, or any other person, or had committed any other offence under specified sections of the *Criminal Code* and Chapter XII of the Code. The OCC was then to consider whether, in

its opinion, the matter should be referred to a person or body who, or which, was empowered by law to investigate and to take action in relation to allegations of the kind made, and further to consider every report furnished to the OCC by that person or body.

- 3.7 In referring a matter on to a person or body, the OCC was required to forward a report and any recommendation it wished to make. Where a matter had been referred to a person or body under s7 of the *Official Corruption Commission Act*, that person or body was required, as soon as possible after discharging its functions in respect of that matter, to forward a report to the OCC as to the action taken concerning the matter. No provision was made for the enforcement of this obligation.
- 3.8 Except for the right to seek further information from the person who had furnished the initial information, the OCC had no power to compel any person to do anything.
- 3.9 In 1991, s7 of the Act was amended to enable the OCC, at its discretion, to report to each House of Parliament in respect of any findings of illegality. In making its report, the OCC was empowered to report facts only, and it was directed not to express ethical or other judgments.
- 3.10 A number of amendments were made to the *Official Corruption Commission Act* in 1994. The long title was extended, as were the OCC's functions. It was now empowered to make such preliminary inquiry, if and as it considered necessary, to enable it to form an opinion that there were reasonable grounds for an allegation to be referred to a person or body empowered by law to investigate or take action, or both, in relation to allegations of conduct or involvement of a kind described in s7(1)(a) or (aa).

- 3.11 In 1994, the OCC was also empowered to request, orally or in writing, any person or body to supply to it such information as was specified in the request, in such manner, and within such period, as was so specified. Failure without reasonable excuse to comply with a request in writing constituted an offence rendering the person to whom the request was made liable to a penalty of \$2,000. The OCC was given a similar power to require the production of a document or other thing as specified in the request, with a failure to comply with the requirement carrying a similar penalty.
- 3.12 In 1996, further extensive amendments were made to the *Official Corruption Commission Act*. A new long title of the Act was substituted, and the name of the Act was changed to the *Anti-Corruption Commission Act 1988*. The ACC now consisted of three persons, one of whom was to be a person who had held office as a Judge or District Court Judge or was eligible for appointment as a Judge, while the other two were to be persons who were not public officers otherwise than by reason of being appointed as members. A person who was a judicial officer or who was or has been a member of the Police Force was now no longer eligible to be a member. The Solicitor General replaced the Commissioner of Police on the selection committee.
- 3.13 The desirable course at this time would have been to pass an entirely new Act rather than making substantial amendments to the original *Official Corruption Commission Act* which had created a Commission with very limited functions, in contrast to the functions then being conferred on the ACC.

STRUCTURE OF THE ANTI-CORRUPTION COMMISSION

- 3.14 The ACC is an independent body, responsible for ensuring that allegations of corrupt, criminal or serious misconduct made against

Western Australian public officers (a term which includes police officers) are appropriately investigated or otherwise resolved.

- 3.15 The ACC is comprised of three members, each of whom is appointed by the Governor on the recommendation of a committee made up of the Chief Justice of Western Australia, the Chief Judge of the District Court and the Solicitor General. This method of appointment is used to ensure the independence of the ACC from the Government of the day.
- 3.16 A further example of the independence of the ACC can be seen in that it is not subject to the directions of the Government. Rather, it is accountable to the Parliament through the JSC.
- 3.17 The ACC is assisted in undertaking its responsibilities by a Chief Executive Officer, a Principal Investigator, two investigation teams and a complaints, review and audit team. Additionally there are Units servicing the specialist areas of electronic surveillance, intelligence and special projects. Support is further provided in the general corporate services areas associated with a government agency.
- 3.18 As with other non-judicial bodies, the ACC has an investigative and a reporting function only, and is unable to determine the guilt of any person. Furthermore, it does not have the power to direct that disciplinary action be taken against a public officer, or to initiate criminal prosecutions. Rather, it is limited to receiving allegations, carrying out investigations, or referring them to another agency for investigation, and furnishing reports of such investigations. The results of investigations may be referred to the Director of Public Prosecutions or the WAPS for prosecution, or to a public officer's department for possible disciplinary action.

PARLIAMENTARY JOINT STANDING COMMITTEE ON THE ANTI-CORRUPTION COMMISSION

3.19 As previously indicated, the ACC functions as an agency independent from the executive arm of the Western Australian Government. In June 1997 it was decided that a Joint Standing Committee of the Legislative Assembly and the Legislative Council of Parliament should be established to oversee the ACC in the performance of its functions. The JSC was established by resolution of both Houses of Parliament, with terms of reference that require it to monitor and review the performance of the ACC and to report to Parliament on issues affecting the prevention and detection of corruption in the public sector of Western Australia. The JSC is comprised of eight members drawn from both Houses, and includes representatives from the Government, the Opposition and Independent Members.

3.20 Under Legislative Assembly Standing Order 290, the functions of the JSC are as follows:

- (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 cooperation 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.

3.21 The Standing Order also lists certain activities in which the JSC should not involve itself. It provides:

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.

3.22 Some difficulty is created for the JSC in carrying out its obligation to monitor the performance of the ACC and to report to Parliament, what might be described as its positive terms of reference being severely limited by the constraints invoked by the negative terms of reference. As a consequence, the body responsible for overseeing anti-corruption investigations is unable to gain a full understanding of all the matters which it is overseeing. These difficulties are exacerbated by the non-disclosure provisions of the *Anti-Corruption Commission*

Act, such that only the ACC may decide what it might disclose.

OPERATIONAL ACCOUNTABILITY

3.23 The absence of an independent complaints body to receive complaints and investigate the ACC has been the subject of criticism from a variety of sources, including the JSC. In its *Report on the Operational Accountability of the Anti-Corruption Commission and the Protection of Rights under the Anti-Corruption Act 1988* (Report No.4, October 1998), the JSC made the following point:

The lack of independent scrutiny creates a significant gap in accountability. If a mechanism is not established through which the operations of the ACC can be fully and independently scrutinised, the ACC will remain vulnerable to criticisms that it functions as a 'Star Chamber' and that complaints about the fairness of its procedures or the conduct of its officers cannot be answered.

3.24 It is clear from the material before the Commission to date, that the absence of an independent review or statutory mechanisms for ensuring that the ACC is operating in accordance with the powers conferred upon it and exercising them lawfully, remains a substantial issue. In other Australian jurisdictions where specialist anti-corruption bodies have been established, it has been accepted that there is a requirement for full accountability, including the scrutiny of operational material. The issue then becomes one of establishing an arrangement that provides the necessary level of accountability and scrutiny without interfering with or compromising the operational integrity and independence of the anti-corruption agency.

3.25 It should, however, be noted that a number of key operational activities relating to the use of intrusive powers are subject to close and strict controls. Electronic surveillance, telephone intercepts and the execution of search warrants all require justification to, and the

prior authorisation of, a Supreme Court or Federal Court Judge.

RECOMMENDATIONS OF THE JOINT STANDING COMMITTEE

3.26 The JSC has made a number of significant recommendations regarding the ACC, including the following:

- (a) Report 4 of 29 October 1998 – That an Office of Parliamentary Inspector of the ACC be established with extensive powers to:
 - (i) audit the operations of the ACC;
 - (ii) investigate complaints against the ACC or its officers;
and
 - (iii) evaluate the effectiveness of the ACC's procedures.
- (b) Report 4 of 29 October 1998 – That the terms of reference of the Committee be amended so that its functions extend to monitoring and reviewing the performance of the functions of the Inspector.
- (c) Report 5 of 22 December 1998 – That the ACC's powers in respect of serious improper conduct should allow the ACC to evaluate evidence for the purpose of advising an appropriate authority whether or not it warrants consideration of further action.
- (d) Report 5 of 22 December 1998 – That the distinction between the powers available to the ACC when conducting a preliminary inquiry and the powers available to the ACC when conducting an investigation be removed from the *Anti-Corruption Commission Act*.
- (e) Report 5 of 22 December 1998 – That the ACC have the power to initiate investigations into criminal conduct, corrupt conduct or criminal involvement which may have occurred, may be occurring or may be likely to occur.

3.27 The last mentioned recommendation relates to the inability of the ACC to commence an investigation without an allegation having been made.

3.28 In addition, the JSC in its Discussion Paper of April 1998, has commented unfavourably on, or expressed concerns about, a range of matters. including:

- (a) the general issue of secrecy with respect to the work of the ACC;
- (b) the protection offered individuals subject to investigation by the ACC;
- (c) the extent to which the ACC can make public, and should make public, the results of its investigations; and
- (d) the accountability of the ACC.

3.29 It is likely that a number of these issues that have been identified by the JSC and are the subject of specific recommendations, would be addressed and included in the Anti-Corruption Commission Bill that has been drafted, but is being withheld awaiting the outcome of this Commission.

CHAPTER 4

THE PRESENT ROLE OF THE OMBUDSMAN

4.1 This Chapter has drawn heavily upon a most useful background paper provided by the Ombudsman for the Round Table Conference.

4.2 Since 1985, the Ombudsman has played a role in the external oversight of the WAPS by independently investigating allegations relating to improper conduct by police officers and, since 1994, by independently reviewing the adequacy of police internal investigations. The Ombudsman accepts that, although her role includes investigating and reviewing internal police investigations into process corruption, the Ombudsman is neither a corruption fighter nor an investigator of criminality. The expression “process corruption” had been adopted by Wood J in his report into the New South Wales Police Service as referring to the kind of corruption whereby unnecessary physical force is applied by police, police powers are abused, evidence is fabricated or tampered with, and confessions are obtained by improper means. Accepting the description of her counterpart in New South Wales, the Ombudsman sees her own role in overseeing the WAPS as involving:

- (a) overseeing investigations into alleged or suspected police misconduct;
- (b) helping the WAPS improve the manner in which it investigates misconduct;
- (c) keeping the complaints system under scrutiny;
- (d) directly investigating issues of significance and/or public interest; and

- (e) working with the WAPS to utilise its complaint handling system to improve organisational performance.

4.3 The responsibilities of the Ombudsman with respect to the external oversight of police in this State have evolved from a system under which the Ombudsman had been given no power to investigate police conduct, to a system under which the Ombudsman now reviews the adequacy of all police internal investigation files and investigates any significant issues which may emerge from them.

EVOLUTION OF THE OMBUDSMAN'S ROLE IN THE OVERSIGHT OF THE WESTERN AUSTRALIA POLICE SERVICE

4.4 The main features in the evolution of the Ombudsman's role were claimed to include:

- (a) the movement from a system driven by complainant satisfaction/dissatisfaction to a system driven by investigative rigour;
- (b) a substantial growth in the number of allegations made in relation to police conduct; and
- (c) a fundamental change in the commitment of the WAPS to thorough internal investigations.

The Ombudsman's role evolved in four distinct phases.

THE FIRST PHASE – PRIOR TO 1985

4.5 Prior to 1971 there was no external oversight of the WAPS. The management and discipline of police officers was the sole responsibility of the Commissioner of Police.

4.6 With the enactment of the *Parliamentary Commissioner Act 1971*, the

WAPS became subject to external scrutiny, although only to a limited extent. The Act conferred on the Ombudsman jurisdiction over the “Police Department”, but not over the “Police Force”. Accordingly, the Ombudsman could investigate complaints concerning the administration of the Police Department, but could not investigate complaints concerning the conduct of individual officers. From 1972 until 1983, the Ombudsman received 304 written complaints regarding the Police Department. Of these complaints, 61 were rejected in the absence of any jurisdiction to investigate the conduct of individual officers.

4.7 Discussions that took place between the Ombudsman and the Commissioner of Police concerning the limited extent of the Ombudsman’s jurisdiction reflected growing community concern about the appropriateness of the complaints system being controlled by the police, with the exception only of a small number of complaints. There was no systematic external review or scrutiny of the conduct of police officers.

4.8 In response to the community concern, the *Complaints Against Police Bill 1984* was introduced into the Legislative Assembly of the Western Australian Parliament in October 1984. The Bill detailed procedures for the receipt, investigation and handling of complaints by the Commissioner of Police in relation to the conduct of police officers, and for the audit of such investigations by the Ombudsman. This Bill, if passed, would have empowered the Ombudsman to monitor and to comment upon internal investigations carried out by the police and would have enabled the Ombudsman to call for Interim Reports, to interview the complainants and other witnesses, and to access documents. The Ombudsman, or the Commissioner of Police, would have been given the power to appoint a Special Investigator if it would not have been appropriate for an allegation to be internally

investigated by the police themselves. On the completion of an internal investigation, the Ombudsman would have been able to review the investigation and, if not satisfied, either to call for a re-investigation or to conduct his or her own investigation. The Bill passed through the Legislative Assembly; but it was not proceeded with in the Legislative Council. The Government of the day proposed instead that the jurisdiction to investigate complaints about the misconduct of police officers should be conferred upon the Ombudsman by way of an amendment to the *Parliamentary Commissioner Act*.

THE SECOND PHASE – 1985 TO 1993

4.9 The *Parliamentary Commissioner Amendment Act 1984* was assented to in December 1984 and proclaimed on 1 July 1985. The amending Act empowered the Ombudsman to investigate complaints against individual police officers, but only after the Commissioner of Police had been provided with a “reasonable opportunity” first to conduct his own investigation. A reasonable opportunity was defined in the Act as being 42 days from the receipt of the complaint by the Commissioner of Police, or such longer period as might be agreed to by the Ombudsman – see s14(1b) of the Act.

4.10 The amending Act conferred jurisdiction on the Ombudsman with respect to matters that had been internally investigated by the police, but the outcome of which had not satisfied the complainant. Furthermore, this Act empowered the Ombudsman to conduct an investigation either on receipt of a complaint or on his or her own motion. The amendments did not, however, oblige the Commissioner of Police to notify the Ombudsman of complaints concerning police internal investigations. Nor did it apply to any action taken by a member of the Police Force or of the Police Department before the amendment came into operation.

- 4.11 The omission of any obligation on the part of the Commissioner of Police to notify the Ombudsman of complaints was overcome by an administrative arrangement between the Ombudsman and the Commissioner of Police by which notice of complaints made directly to the Commissioner of Police were to be sent to the Ombudsman, whilst complaints made directly to the Ombudsman were to be referred to the Commissioner of Police for investigation.
- 4.12 It is to be observed that the *Official Corruption Commission Act*, the title of which was subsequently changed in 1996 to the *Anti-Corruption Commission Act 1988* was proclaimed to come into operation on 11 August 1989 during the second phase.

THE THIRD PHASE – 1993 TO 1997

- 4.13 This was described as a transitional phase, which involved a move away from complainant dissatisfaction to investigative rigour as the motivation for the Ombudsman's involvement in the oversight of police internal investigations.
- 4.14 The most significant distinction between this phase and the previous phase was said to be that this phase did not require the complainant to express dissatisfaction with the outcome of a police internal investigation as a prerequisite to the involvement of the Ombudsman. The merits of a number of selected police internal investigations were now being tested against objective investigation standards. The new arrangement did not, however, apply to the majority of police internal investigations. The matters selected were based upon agreed criteria, which included those matters involving serious allegations, such as allegations of assault or of using excessive force, of making serious threats or of intimidation. This change was not supported by any amendment to the *Parliamentary Commissioner Act*.

4.15 During this phase, further reforms were proposed by the Ombudsman, including:

- (a) the Ombudsman having the oversight of current police investigations into the more serious complaints, involving, if appropriate, the direct supervision of police internal investigations; and
- (b) the Ombudsman having the power, on public interest grounds, of carrying out direct primary investigations of complaints, without the need for the Commissioner of Police having first to carry out an investigation.

4.16 The jurisdiction of the former OCC had been expanded in 1994, and it was still further expanded in 1996. This resulted in a change in the Ombudsman's role with respect to police oversight, insofar as the Ombudsman was required to report to the ACC any complaint about a member of the WAPS which involved corrupt or serious improper conduct.

4.17 The *Parliamentary Commissioner Amendment Act 1996* impacted on the existing system of dealing with complaints with respect to the police. The changes relevant to the Ombudsman's police complaints jurisdiction were as follows:

- (a) provision was made for the Ombudsman to carry out informal investigations when a matter could be investigated and resolved expeditiously;
- (b) the ability of the Ombudsman to consult with, and to disclose information to, the ACC and the Director of Public Prosecutions was extended;
- (c) protection from civil proceedings was provided for any person acting in good faith who made a complaint or

- provided any information to the Ombudsman; and
- (d) further protection was given to complainants or persons who provided information to the Ombudsman by making it an offence for a person to victimise another person because that other person had made, or intended to make, a complaint or to provide information to the Ombudsman.

THE FOURTH PHASE – 1997 TO THE PRESENT

4.18 This phase saw the completion of the evolution from a system based on complainant satisfaction to a system based on investigative rigour. In 1997, the Ombudsman and the Commissioner of Police reached a further agreement whereby all internal investigation files were to be sent to the Ombudsman for review. It was described as the “oversight stage”. As with the earlier administrative arrangements, this arrangement was not supported by legislation.

4.19 At the present time, the role of the Ombudsman in the system of external oversight of police investigations is reflected in the following features:

- (a) all police internal investigations are reviewed for their adequacy against objective investigative criteria; and
- (b) complainant dissatisfaction is not a prerequisite to the Ombudsman’s involvement.

4.20 The first full year of the new review system was the 1998/1999 financial year. In that year, the Ombudsman reviewed 1,112 allegations. Seventy one allegations (approximately 6.4%) were returned to the WAPS for further investigation. In 2001-2002 the Ombudsman reviewed internal investigations into 2,208 allegations and tabled two investigation reports in the State Parliament.

4.21 As a consequence of the Ombudsman's assumption of the role of reviewing all police investigations, it became necessary to recruit four additional staff members.

OMBUDSMAN'S REVIEW OF POLICE INVESTIGATIONS

4.22 In all cases, on receipt of the police internal investigation files, complainants are contacted and asked for their views on both the investigation process and the decision made on the complaint. If the review determines that the police internal investigation was adequate, the file is returned to the police, and the complainant is given a letter setting out the reasons for the determination. If the internal investigation is determined to have been inadequate, the Ombudsman may either request the WAPS to carry out more work or, alternatively, the Ombudsman may carry out his or her own investigation. If a file is returned to the WAPS for further work, a second review is conducted by the Ombudsman after that work has been completed.

PROGRAMS

4.23 The Ombudsman has developed three programs in order to facilitate the Ombudsman's oversight of police internal investigations. They comprise a review program, an investigation program and an outreach program.

4.24 The review program aims at ensuring that complaints about police officers are internally investigated in a timely, competent and transparent way. This is sought to be achieved by reviewing the quality of the investigations undertaken by the WAPS and by conducting inquiries into issues which require clarification, or which have not been adequately addressed in the course of the police internal investigation. Before arriving at decisions on the merits of internal investigations, the opinions of the complainants are sought,

and they may be interviewed as necessary. The Ombudsman accordingly seeks to ensure that her proposed solutions take into account the interests and views of the complainants. At the conclusion of the review, the Ombudsman may make recommendations to, and negotiate with, police internal investigators and their managers in order to rectify an inadequate investigation.

4.25 The investigation program aims to add value to the accountability and transparency goals of the review program by identifying and closely examining significant issues. The investigation utilises traditional investigative methods, audit based methods, research based methods, narrative methods and methods based on the powers of the Ombudsman. The decision to conduct an investigation is based upon whether any of the following factors exist:

- (a) significant public interest in the matter;
- (b) a reasonable prospect of proving an allegation or group of allegations;
- (c) the matter relates to important systemic policy, with procedural or legislative issues being involved;
- (d) the matter involves a significant conflict of interest for police;
- (e) the allegations are about misconduct by senior executives in the police service; and
- (f) reasonable expectations with respect to accountability and transparency are unlikely to be met through a police internal investigation;

4.26 There is no express legislative basis for the reviewing program, which relies upon a Memorandum of Understanding between the Commissioner of Police and the Ombudsman. This evolved from the administrative arrangements already in operation.

4.27 The investigation program provides information in a strategic and timely manner to stakeholders in order to educate police as to the Ombudsman's expectations of them, advising them how they are performing against agreed criteria and suggesting appropriate studies to minimise misconduct. The outreach program supports and enhances the reviewing of complaints and aims at enhancing the Ombudsman's accessibility to complainants and community groups.

THE OMBUDSMAN AND THE ANTI-CORRUPTION COMMISSION

4.28 The Ombudsman is required to notify the ACC when he or she receives allegations reasonably suspected of being concerned with corrupt or criminal conduct, criminal involvement or serious improper conduct.

4.29 Having received such a notification from the Ombudsman, the ACC assesses whether the matter falls within its jurisdiction. If further action is needed in relation to the allegations, the ACC will determine who is to undertake that action. Although it might decide that the allegation falls within its jurisdiction, the ACC may nevertheless refer it back to the Ombudsman for review or investigation.

4.30 In the case of complaints received by the ACC, it may, after consultation with the Ombudsman, refer them to the Ombudsman for investigation. There is no obligation on the Ombudsman, in these circumstances, to provide the Commissioner of Police with a reasonable opportunity first to investigate the matter.

4.31 Under the present system, a significant part of the functions of an external agency overseeing the Police Service is being carried out by the Ombudsman.

CHAPTER 5

THE COMPLAINTS PROCESS

COMPLAINTS PROCESS IN WESTERN AUSTRALIA

5.1 The current procedures for making complaints with respect to misconduct on the part of Western Australian police officers are unnecessarily complex. Complainants, whether members of the public or police officers, are able to select to which of three agencies they may direct their complaints. Those agencies are the ACC, the Ombudsman and the IAU of the WAPS.

COMPLAINTS RECEIVED BY THE ACC

5.2 Section 13(1) of the *Anti-Corruption Commission Act 1988* provides that the ACC shall receive information furnished to it by any person who alleges that a public officer (a term which includes a police officer) has corruptly acted or corruptly failed to act in the performance of the functions of his or her office or employment or has corruptly taken advantage of his or her office or employment, as a public officer to obtain any benefit for himself or herself or for another person, or committed one of the offences specified in s13(1)(a)(iii), (iv), (v) and (vi). Section 13(1)(b) requires the ACC to receive information furnished to it by any person who alleges that another person has been involved in criminal conduct engaged in by a public officer in such a manner that the other person could be regarded under Chapter II of the *Criminal Code* as having taken part in committing an offence, or as having committed an offence or as being an accessory after the fact to an offence. Section 13(1)(c) requires the ACC to receive information furnished to it by any person who alleges that a public officer has engaged in conduct, other than corrupt conduct or criminal conduct, of a nature specified in para (c)(i) to (iv) and which constitutes, or could constitute an offence against the *Statutory*

Corporations (Liability of Directors) Act 1996 or any other written law, or a disciplinary breach providing reasonable grounds for the termination of a person's office or employment as a public service officer under the *Public Sector Management Act 1994*.

5.3 By s13(1)(d), the ACC is required to consider, in the light of its own experience and knowledge, and independently of any allegation from a member of the public, whether or not the ACC itself ought to allege that a public officer has engaged in corrupt conduct, criminal conduct or serious improper conduct or that another person has been involved with criminal conduct engaged in by a public officer in a manner described in s13(1)(b) of the Act.

5.4 Section 14 requires the Ombudsman, the Inspector of Custodial Services, the Principal Officer of a notifying authority or an officer who constitutes a notifying authority to report to the ACC any matter which that person suspects on reasonable grounds concerns or may concern corrupt conduct, criminal conduct, criminal involvement or serious improper conduct. The expression "notifying authority" is defined in s14(8) of the Act. The Director of Public Prosecutions is expressly excluded from the requirements of s14. Section 16 empowers any person, including a public officer, to report to the ACC any matter which that person suspects on reasonable grounds concerns or may concern corrupt conduct, criminal conduct, criminal involvement or serious improper conduct.

5.5 The ACC is required by s17(1) of the Act to examine each allegation received and decide whether or not, in its opinion, investigatory or other action, or both, for the purposes of the Act in relation to the allegation is warranted on reasonable grounds.

- 5.6 When the ACC is deciding whether further action in relation to an allegation is warranted, the matters to which it may have regard include the following:
- (a) the seriousness of the conduct or involvement to which the allegation relates;
 - (b) whether or not, in the case of an allegation under s13(1)(a), (b) or (c), the allegation is frivolous or vexatious or is made in good faith;
 - (c) whether or not the conduct or involvement to which the allegation relates is or has been the subject of appropriate investigatory or other action otherwise than for the purposes of the Act; and
 - (d) whether or not, in all circumstances, the carrying out of further action for the purposes of the Act in relation to the allegation is justified or is in the public interest.
- 5.7 If the ACC decides that further action for the purposes of the Act in relation to an allegation is warranted on reasonable grounds, it is required to decide whether further action should be carried out by the ACC itself or whether the allegations should be referred to an independent agency or appropriate authority for further action. The WAPS is an appropriate authority.
- 5.8 In deciding whether further action in relation to an allegation should be carried out by the ACC, or referred to an independent agency or appropriate authority for further action, the matters to which the ACC is required to have regard include:
- (a) the seniority of any public officer to whom the allegation relates;
 - (b) the seriousness of the conduct or involvement to which the

allegation relates; and

- (c) the need for there to be an independent investigation rather than an investigation by a public authority with which any public officer to whom the allegation relates is connected by membership or employment or in any other respect.

5.9 The term “independent agency” is defined to mean the Ombudsman, the Director of Public Prosecutions, the Auditor General, the Inspector of Custodial Services or the Commissioner for Public Sector Standards. The term “appropriate authority” is defined to mean a person, body or organisation who or which is empowered by a law of this State to take investigatory or other action, or both, in relation to corrupt conduct, criminal conduct, criminal involvement or serious improper conduct, but does not include an independent agency.

5.10 If the ACC determines that it should itself carry out further action in relation to an allegation, that action may be carried out by a Special Investigator appointed under Part IV of the Act or, if the investigation is carried out by officers of the ACC, then ss 44-47 of the Act operate. By s21(4), the ACC may, at any time, whether or not the carrying out of further action by it has been completed, decide to refer the allegation to an independent agency or appropriate authority for further action.

5.11 Despite having referred an allegation to an independent agency or appropriate authority under s22(1), the ACC may at any time decide itself to carry out further action in relation to the allegation. It may not, however, do so where an allegation has been referred to the Ombudsman, unless the carrying out of further action by the ACC has been requested or agreed to by the Ombudsman.

- 5.12 The ACC is not permitted to refer an allegation to the Ombudsman or to the Auditor General without having first consulted the Ombudsman or the Auditor General, as the case may be.
- 5.13 When an allegation is referred to the Ombudsman under s22(1), the reference is to be treated by the Ombudsman as if it were a complaint duly made under s17 of the *Parliamentary Commissioner Act 1971* and that Act applies. When an allegation about a member of the Police Force or Police Department is referred to the Ombudsman, the Ombudsman is entitled to proceed to investigate that allegation whether or not the Commissioner of Police has had a reasonable opportunity to investigate the matter to which the allegation relates.

ALLEGATIONS RECEIVED BY THE OMBUDSMAN

- 5.14 Section 14(1a) of the *Parliamentary Commissioner Act* confers upon Ombudsman the jurisdiction to investigate any action taken by a member of the Police Force or Police Department, whether or not that action relates to a matter of administration, where that action was done, or purported to be done, in the exercise of, or in connection with, or incidental to the exercise of, that member's powers, duties or functions as a member of the Police Force or Police Department. A proviso to the subsection prevents the Ombudsman from investigating any such action until the Commissioner of Police has had a reasonable opportunity to conduct his own investigation into it. A reasonable opportunity is specified in the subsection as a period of 42 days or such longer period as is agreed to by the Commissioner of Police and the Ombudsman.
- 5.15 The consequence of these provisions is that all complaints received by the Ombudsman in relation to police officers are referred in the first instance to the WAPS for its attention. If a complainant is not satisfied with the response received from the WAPS, the Ombudsman may

become involved and carry out a review of the internal investigation conducted by the WAPS. The Ombudsman may also review the outcome of an internal investigation by the WAPS of its own motion, although in practice such a step will only be taken in relation to the more serious allegations, such as assault, the excessive use of force, intimidation and the like.

- 5.16 By s14 of the Act, if a complaint to the Ombudsman relates to an allegation of corrupt or criminal conduct, the Ombudsman is required to notify the ACC of that complaint. It will then be open to the ACC either to investigate the matter itself, or to refer it back to the Ombudsman or to the WAPS, as the case may be, for investigation. If the ACC elects to refer the allegation to the Ombudsman, there is no requirement that the Commissioner of Police should first be given a reasonable opportunity to investigate the allegation.

COMPLAINTS RECEIVED BY WESTERN AUSTRALIA POLICE SERVICE

- 5.17 Complaints to the WAPS are dealt with by the IAU, which has the responsibility of receiving complaints or information from police officers, public sector employees and members of the general public in relation to allegations of corruption, criminality or serious improper conduct. A complaint may be made orally or in writing, or electronically by e-mail. From these complaints any allegations are detailed in an "Information Report" which is prepared within the IAU.
- 5.18 A co-ordinating group within the IAU considers each Information Report to determine whether the matter will be investigated by the IAU or whether it should be investigated at local or district level or whether it should simply be filed.

- 5.19 This process effectively divides complaints into two categories, Local Complaint Resolutions, which are dealt with at local or district level and Non-Local Complaint Resolutions, which are investigated by IAU. The focus on investigating Local Complaint Resolution, which are minor or less serious matters, is on evidence -gathering and proof.
- 5.20 As previously indicated, should an originating complaint concern corrupt or criminal conduct, the ACC must be notified. If the complaint refers to matters other than corrupt or criminal conduct, the Ombudsman must be notified in accordance with the agreement entered into between the Commissioner of Police and the Ombudsman.
- 5.21 The WAPS commences the resolution or investigatory process unless it is notified by the ACC that the ACC intends to take the matter over. The ACC, however, reviews all investigations conducted by the IAU and will from time to time conduct a full review of the investigation file.

MEMORANDA OF UNDERSTANDING BETWEEN AGENCIES

- 5.22 In order to clarify points of possible dispute, tripartite arrangements involving exchanges of memoranda of understanding, have been entered into between the ACC, the Ombudsman and the WAPS. These memoranda outline the respective responsibilities of the agencies in respect of reporting, oversight and the exchange of information. Generally, it appears that the memoranda have been useful in overcoming deficiencies in the applicable legislation and in inter-agency relationships. It is not, however, an ideal situation to endeavour to fill in the gaps in legislation with memoranda which have no statutory base.

OUTCOME OF INVESTIGATION REPORTS

5.23 The ACC and the Ombudsman have an investigative and reporting function only. They are not able to make findings of fact, let alone determinations of guilt. They are limited to receiving or initiating complaints or allegations, carrying out investigations, and furnishing reports. Recommendations may be made for further action to be taken. Whilst the results of their investigations may be conveyed to the Director of Public Prosecutions for consideration to be given to launching prosecutions, the ultimate decision will be that of the Director of Public Prosecutions. Similarly, in cases where disciplinary action is recommended, it will be for the individual authority to determine what should occur.

CHAPTER 6

ROYAL COMMISSION HEARINGS TO DATE

- 6.1 The public hearings of the Commission commenced on 1 July 2002 with a segment relating to the conduct of a number of WAPS officers who were or had been stationed at Kalgoorlie, or were associated with them. Evidence was given in relation to the conduct of several of those officers and other officers stationed at Brentwood Police Station and later Murdoch Police Station. Witnesses gave evidence of criminal conduct and corrupt conduct by those officers primarily in relation to stealing and supplying prohibited drugs. In relation to some of the allegations, the officers denied any improper conduct. In relation to other evidence, the officers declined the opportunity to respond. In the final report of this Commission the evidence will be dealt with in detail and findings will be made concerning the effect of that evidence. Prior to the hearing, of the six officers most affected by the evidence, two had resigned and two had been dismissed following action taken against them by the Commissioner of Police under s8 of the *Police Act 1892*. At the conclusion of the hearing, two further officers resigned from the police service.
- 6.2 A majority of the evidence led during the hearing had been gathered by investigations of the ACC, mostly during an operation known as "Operation Norway". There had been some previous public exposure of some of the evidence as a result of proceedings commenced in the Industrial Relations Commission by officers affected by the action taken by the Commissioner of Police under s8. Similarly, the majority of the evidence relating to allegations of misconduct by officers stationed at the Brentwood and Murdoch Police Stations had been gathered during a previous investigation of the ACC, but had not been the subject of any public exposure. Investigations by the

Commission have added to the evidence previously gathered by the ACC.

- 6.3 The second segment of hearings of the Commission involved evidence of allegations of corrupt conduct by members of the Armed Robbery Squad of the WAPS who had investigated a robbery at a Swan View supermarket on 28 April 1997. The evidence will also be canvassed in detail and findings made in the final report of the Commission. The evidence was also largely the product of an earlier operation by the ACC, known as "Operation Latvia". The Royal Commission investigations supplemented that evidence. The matter had not been the subject of any significant earlier publicity.
- 6.4 The Commission then heard evidence in relation to an investigation into allegations of sexual assault by a well known sportsman, who was referred to as Q2. It was alleged that senior officers of the WAPS had interfered with the investigation of the allegations in order to protect Q2. This matter had also been the subject of an investigation previously by the ACC, and there had been some publicity concerning the matter as a result of leaks to the media. Additional evidence was led before the Commission, and each of the officers who were involved in allegations of misconduct were called before the Commission and cross-examined.
- 6.5 The Commission also heard evidence during the segment relating to unauthorised access to the WAPS computer system. Evidence was led of specific examples of circumstances of improper access, the explanation given, the outcome of investigations and of issues relating to the improvement of the system in order to prevent improper access. A number of the examples had been the subject of investigation by the ACC. The ACC was also able to provide evidence of other instances of improper access which had come to its attention.

The ACC was concerned about the frequency of improper access and about the manner in which cases of access were dealt with within the WAPS. The Commission led further evidence of other examples of unlawful access, and of the issues concerning possible means of improving the computer system to better monitor inappropriate access. By leading evidence of a number of examples, the Commission endeavoured to draw attention to the extent of the problem, and to issues associated with improvement of the system. Again, those issues will be the subject of more detailed analysis in the final report.

- 6.6 The segments referred to above, in which there have been previous investigations by the ACC, were selected, partly because there was already in existence significant evidence relating to possible corrupt conduct or criminal conduct by the WAPS officers, and partly to assess whether the ventilation of the evidence in public was in the public interest. The evidence was not led for the purposes of examining investigations of the ACC.
- 6.7 Regardless of the findings which may be made in relation to these matters, it is considered that subjecting the issues to the hearing process of the Commission and to public exposure has been in the interest of the community. There has been a refinement of the issues, and a creation of public awareness of the actions which have been taken by the ACC to deal with possible corruption in the WAPS.

CHAPTER 7

ROUND TABLE CONFERENCE - EXTERNAL OVERSIGHT AGENCIES

INTRODUCTION

- 7.1 At the formal opening of the hearings of the Commission on 28 March 2002, it was announced that, in order to deal with the third and fourth terms of reference, it was intended to invite written submissions from the public in relation to the issues involved, and to adopt the course followed by the Wood Royal Commission in inviting representatives of the major interested parties to participate in Round Table Conferences to discuss whether there is a need for reforming the laws of the State regarding the present investigative or administrative procedures for investigating corrupt or criminal conduct. In anticipation of this Interim Report, a Round Table Conference was held on 14 and 15 November 2002 in relation to those issues concerned with the current legislation relating to the existence, functions and powers of the ACC. A discussion paper was prepared and disseminated prior to the Conference, identifying the apparent issues and outlining the structures operating in similar bodies in other States of Australia. Advertisements were placed in newspapers, inviting the public to make submissions and a number of submissions were received. Arrangements were made for the Assistant Commissioner of the PIC in New South Wales, the Deputy Commissioner of the ICAC in New South Wales and the Chairperson of the CMC in Queensland to attend the Conference, and to discuss the various issues by reference to their own experience with the institutions and systems in operation in their respective States.
- 7.2 Conference participants represented many of the major Government stakeholder agencies concerned with the Conference agenda, together with senior academics from the University of Western Australia and

Edith Cowan University. Organisations or persons represented at this Conference were as follows:

The Anti-Corruption Commission

The Commissioner of Public Sector Standards

The Department of Premier and Cabinet

The Director of Public Prosecutions

Edith Cowan University

The Parliamentary Joint Standing Committee on the Anti-Corruption Commission

The Minister for Police

The Parliamentary Commissioner for Administrative Investigations
(The Ombudsman)

The Western Australia Police Service

The Western Australian Police Union of Workers

The University of Western Australia

POLICE CORRUPTION

7.3 There was no dispute as to the need for an external civilian agency to oversight the police service, and indeed the WAPS expressed the belief that such oversight is essential to its operation. The Union was firmly of the view that any external oversight body must have a clearly defined role and charter. Its requests were for a clearer definition of the expression "corruption" and for a clearer distinction to be made between corruption on the one hand and misconduct and general disciplinary issues on the other.

7.4 The retention of the requirement for the Commissioner of Police to have confidence in his officers, and for the officers to retain the confidence of the Commissioner, was generally accepted as being an integral part of the process. So too was the proposition that the Commissioner of Police should retain the primary responsibility for

the discipline of the Police Service.

PUBLIC SECTOR CORRUPTION

7.5 The different models of the CMC, the ICAC and the PIC with respect to police and public sector corruption raised the issue of the sharing and integration of facilities and functions. The Conference heard how this issue is addressed by the PIC and the ICAC in relation to corruption within the public service, the New South Wales Parliament, local government and other institutions.

7.6 The issue of public sector corruption generated significant discussion due to the variety of alternative models which could be conceptualised. As is the case with police corruption, this area of corruption is currently included within the provinces of the Ombudsman, the ACC and the WAPS, and, to some extent, the Public Sector Standards Commissioner. The potential for a “one stop shop” for complaints and investigations appealed to some, although the benefit of having multiple avenues for complaints was also recognised.

ORGANISED CRIME

7.7 The conference was informed of the successful operations carried out interstate into police corruption made possible by virtue of the results of the existing crime commissions’ long-term operations. It was explained that investigations by crime commissions have revealed corrupt connections between organised crime and the police, as well as other areas of the public sector. The requirement for close cooperation between the external oversight agency and the police service was stressed, as were the benefits of joint taskforces. Whether an external oversight agency should also have an organised crime investigatory capacity, as is the case with the CMC in Queensland,

produced the following arguments:

(a) *For the Proposition*

- (i) An external oversight agency can assist police investigations by the use of its Royal Commission type powers, which are not available to the police, such as the ability to compel witnesses to give evidence and to produce documents. These additional measures were considered to be of vital importance in fighting organised crime and its corrupting influence on police.
- (ii) There is a demonstrated link between organised crime and corrupt police officers that enables criminal activities to proceed unhindered.
- (iii) Cost savings should be achievable by co-locating these areas of crime investigation with Royal Commission type powers in the one agency.

(b) *Against the Proposition*

- (i) The police service is the principal law enforcement agency, and there is no argument to suggest that it has been deficient in the detection, investigation and prosecution of organised crime.
- (ii) Placing a crime function within the external oversight agency might lead to an erosion in the confidence placed in the police.
- (iii) Having the same agency exercise responsibilities for corruption and for organised crime may lead to a loss of focus within the agency.

- (iv) The increased potential for the infiltration of corruption into a body that exercises both oversight and crime functions.
- (v) The possibility of duplication of effort in the intelligence function

7.8 The Conference heard, however, of a two stage process in which crimes that have been shown to be resistant to traditional policing methods can be referred to a crime commission where the additional coercive powers may prove to be of assistance in achieving a successful outcome. Several high profile cases in New South Wales were cited as evidencing the success that can be achieved by this process, even many years after the event.

RESEARCH, EDUCATION AND PREVENTION

7.9 The Conference gave strong support for the external oversight agency having a significant role in research, education and corruption prevention. This view is consistent with the ACC's submission, which also expressed its preference for having an enhanced research capacity to conduct research and to report, including publicly, on trends in serious allegations of misconduct. The CMC and the ICAC provided examples of the proactive and preventative role which oversight agencies can perform through research, education and prevention activities.

7.10 A principal benefit was seen in the capacity of research and education being used in creating corruption resistant organisations, not only in the WAPS but also throughout the public sector, through developing and implementing policies and procedures that minimise serious misconduct.

INSPECTOR GENERAL

7.11 The benefits of having an accountability mechanism such as an Inspector General, Parliamentary Inspector or a similar officer, was seen to arise from the need to ensure the accountability of the external oversight agency and to provide for persons aggrieved with the oversight agency or its officers, an authority to whom to direct their complaints. Although in Western Australia the JSC has partially fulfilled this role, it was pointed out that its terms of reference do not provide for its involvement in operational matters or in the investigation of misconduct, or for its having access to detailed operational information. This demonstrates the need for an Inspector General.

7.12 The Conference heard of the role of the Inspector General in other jurisdictions and of the unfettered access that such an officer has to inquire into and report on the operations of the oversight agency. The Conference was told that the ICAC, which is overseen by a Parliamentary Committee, has recommended the appointment of an Inspector, with functions similar to those of the PIC Inspector, in order to enhance the accountability of the agency and public confidence in it.

7.13 The ACC strongly advocated that such a position be established as it saw it as being of significant benefit to the ACC in dealing with complaints and criticisms levelled against it. The Union was also favourably disposed to the introduction of an Inspector General.

PARLIAMENTARY STANDING COMMITTEE

7.14 Conference participants generally expressed satisfaction with the role of the JSC. There was no argument advanced for the JSC to be discontinued or changed in any material way. The JSC was seen as

providing broad parliamentary oversight and was regarded as an important part of an efficient and effective system of checks and balances.

- 7.15 The equivalent of the JSC in Queensland, the Parliamentary Crime and Misconduct Committee, was seen as a fundamental accountability requirement for that agency and, indeed, as having significant benefits in maintaining public confidence in the agency and, at times, defending it from public criticism. The Parliamentary Commissioner in Queensland, it was noted, also has an audit function in respect of operational activities.

OMBUDSMAN

- 7.16 Notice was taken of the changes recommended by the WA Machinery of Government Report and the activities of the Functional Review Committee. The work of these committees gave cause to consider whether the Ombudsman should continue to investigate matters relating to police misconduct, given the existence of an external oversight agency charged with this purpose. The issue of the future role of the Ombudsman was also raised in the written submission of the Union, which recognised that nearly 50 per cent of the Ombudsman's work related to police and might more appropriately be undertaken by a new agency.
- 7.17 The Ombudsman spoke of the primary role of her office in Western Australia, and of the roles of her counterparts in other jurisdictions as giving confidence to the public in the decision making of government and ensuring the accountability of government agencies. The different strategic focus that the Ombudsman can bring to an issue, as against that of a criminal investigator, was considered to be an important attribute.

A BROADER ROLE FOR A NEW EXTERNAL OVERSIGHT AGENCY?

7.18 There was discussion of the possibility for the external oversight agency having jurisdiction to conduct public hearings into allegations of misconduct across the broader public sector, including local government.

7.19 The Deputy Commissioner of the ICAC outlined a number of corrupt activities investigated by that agency that involved local government councils within New South Wales. It was pointed out that the Public Sector Investigation Unit of WAPS also investigated local government crime. The ICAC was given as an example of an agency that had the capacity to use its resources to carry out public inquiries into local government misconduct, with the considerable advantages of established expertise and facilities.

HEARINGS – PUBLIC VERSUS PRIVATE

7.20 There was substantial agreement on the requirement for the external oversight agency to have the ability to hold both public and private hearings, depending on the issues being investigated. A point of debate arose out of the Union view that the proper place for the exposure and testing of allegations of criminal conduct was a court of law, and that inquisitorial hearings should be limited.

7.21 This led to a discussion on the need to ensure greater safeguards and due process for those required to give evidence, including legal representation and notice of matters being investigated. It was pointed out by the Assistant Commissioner of PIC that, before leading evidence of corruption in public, the credibility of witnesses was assessed by a private hearing. It was also indicated that operational reasons often meant that no notice could be given, but that procedural fairness could be preserved by other means.

- 7.22 The Assistant Commissioner of the PIC provided examples of public hearings that had led to other witnesses coming forward. In determining whether to conduct a public or a private hearing, it was suggested that a “public interest test” be applied.
- 7.23 The inability of the ACC, due to its legislation, to conduct hearings in public was seen by it as being distinctly disadvantageous to its operations. The benefit of public hearings was seen as demonstrating to the public that the external oversight agency was doing its job, which is of importance in retaining the confidence of the public.

REACTIVE AND PROACTIVE INVESTIGATIONS

- 7.24 The Assistant Commissioner of the PIC also spoke of the value of proactive investigations in New South Wales. It was accepted that an external oversight agency needs to have both reactive and proactive capabilities, particularly in view of the increasing sophistication of corrupt practices. The existing legislation in relation to the ACC is restrictive in this regard, as it generally requires an allegation to be raised before the ACC can commence an inquiry/investigation. The ACC can, however, initiate its “own motion” investigation after making an allegation itself. Its ability to carry out intelligence gathering on proactive investigations was seen as unduly restricted under the terms of its Act.
- 7.25 Proactive investigations were acknowledged as being resource and time intensive, but there was no disagreement that an intelligence driven investigative model, based on intelligence and research, was appropriate.
- 7.26 The different investigative profiles of the PIC and the CMC were described to the Conference. Whereas the PIC conducts a small

number of very intensive investigations each year, the CMC, with its broader jurisdiction over the public sector, has a more extensive investigatory profile, undertaking several hundred investigations each year. The use of joint investigations in Queensland involving the CMC and other agencies was explained, and the rationale for adopting this approach and the benefits that inter-agency cooperation has brought were outlined.

INTEGRITY TESTING

- 7.27 The CMC was described as having adequate powers available to it in respect of controlled operations, assumed identities and integrity testing in relation to the investigation of official misconduct. In answer to criticism that random testing is unfair and expensive, it was pointed out that integrity tests are not conducted on a random or non-targeted basis. The experience in Queensland has been that the use of integrity tests is an expensive and difficult undertaking and that it would not be sensible to use these powers other than for identified subjects of concern. The safeguards and procedures required to make use of these powers were explained to the Conference.
- 7.28 The impact of integrity tests was broadly accepted as being valuable as a general deterrent.
- 7.29 The Union reinforced the need for any use of these powers to be covered by legislation, together with appropriate internal processes to approve these operations. Reservations were expressed about the use of *agents provocateur* to induce officers to commit an offence. Although the Union could see virtue in integrity testing, it also pointed out that it is a power that would need to be well controlled.

CONTROLLED OPERATIONS

7.30 It was noted that, in Western Australia, although a Bill has been drafted to provide lawful authority for controlled operations in which acts of investigators would otherwise be unlawful, it has not been introduced into Parliament. However, such legislation has been enacted by the Commonwealth and New South Wales Governments. In New South Wales, the power to authorise controlled operations is vested in the Commissioner and Deputy Commissioner of the Police Service. This was considered to be appropriate by the Deputy Commissioner of the ICAC, due to the need at times to exercise this power in an expeditious manner.

7.31 The ACC advised of its belief that controlled operations should be supervised by an agency other than that conducting the operation. The Chairperson of the CMC, however, identified concerns about an Inspector General carrying out this function, by reason of the impingement upon independent oversight if the Inspector General were subsequently required to deal with complaints in relation to an operation he or she may have approved.

COMPULSION – WITNESSES AND DOCUMENTS

7.32 The Conference was informed that, in Queensland and New South Wales, evidence given to an external oversight agency as a result of the use of coercive powers cannot be used against the witnesses concerned in criminal or civil matters. This creates a difficulty when it is revealed that an officer is corrupt, but the evidence cannot be used in a civil or criminal proceeding, and the officer is still serving.

7.33 The position during the Wood Royal Commission in New South Wales was clarified by legislation to enable evidence from the Royal Commission to be used as a basis for the exercise of the power of the

Commissioner of Police to terminate the employment of an officer due to loss of confidence. There was also an issue raised concerning the admissibility of the evidence of corrupt conduct of an officer at the hearing of an appeal by the Industrial Relations Commission. It was ultimately held that the Royal Commission evidence that had been relied upon by the Commissioner of Police to come to a decision to terminate could be used in the proceedings.

GENERALLY AGREED PROPOSITIONS FROM THE ROUND TABLE CONFERENCE

7.34 Throughout the Conference there were a number of propositions that had unanimous support and others that were clearly favoured by the majority. The most important propositions, in relation to which there was little disagreement, were:

- (a) there is a need for an external civilian agency to oversight the operations and functions of the Western Australia Police Service;
- (b) the oversight agency should also be responsible for public sector corruption;
- (c) there was strong support from the interstate agencies for an organised crime function for the oversight agency;
- (d) it was emphasised that there was a need for an Inspector General or a similar officer to oversight the operations and functions of the external oversight agency;
- (e) there needs to be the capacity for the oversight agency to conduct both public and private hearings, depending upon the circumstances and the public interest;
- (f) there is a requirement for there to be a well-resourced research, education and prevention component within the oversight agency;

- (g) there continues to be a requirement for a Parliamentary Standing Committee;
- (h) local government is an area of the public sector that may require closer attention;
- (i) the Commissioner of Police should retain the primary responsibility for discipline within the Police Service;
- (j) the oversight agency requires the capacity to undertake both reactive and proactive investigations;
- (k) the oversight agency, in order to be effective, requires the full range of powers of a Royal Commission; and
- (l) there should be legislative provision for the authorisation of integrity tests, controlled operations and the use of assumed identities.

7.35 The Round Table Conference was successful in conveying the wide experience of the representatives of the agencies in New South Wales and Queensland, highlighting the deficiencies in the *Anti-Corruption Commission Act 1988* and the difficulties under which the ACC has been forced to operate. Their contribution emphasised the need to legislate in this State to bring it into line with contemporary standards operating elsewhere in Australia. The representatives also gave assurances that the additional powers vested in their organisations, that are not currently available to the ACC, are being exercised with responsibility and restraint, and with effective accountability processes in place. The Conference was noteworthy for the lack of any substantial disagreement between the stakeholders concerning the need to follow the example set by the New South Wales and Queensland agencies.

CHAPTER 8

OTHER AUSTRALIAN MODELS

NEW SOUTH WALES

- 8.1 In New South Wales, the *Independent Commission Against Corruption Act 1988* created the Independent Commission Against Corruption (ICAC). This Act provided the ICAC with powers and discretion to:
- (a) expose corruption through investigations, which can include public hearings;
 - (b) prevent corruption by giving advice and developing resistance to corrupt practices in public sector organisations; and
 - (c) educate the public sector and the community about corruption and the role of the ICAC.
- 8.2 The ICAC is a public authority, but it is independent of the Government of the day. It has an accountability relationship with the New South Wales Parliament. Given the evidence gathered during the Wood Royal Commission, it would appear evident that the ICAC was not fully effective in carrying out its functions in relation to police corruption.
- 8.3 The Police Integrity Commission (PIC) was established in 1996 upon the recommendation of the Wood Royal Commission and took over responsibility for dealing with police corruption which had previously been held by the ICAC.
- 8.4 The PIC is also an independent body, coming within the portfolio of the Minister for Police and being monitored by a Parliamentary Joint

Committee, as in the case of the ACC. It was established by the *Police Integrity Commission Act 1996*, and its functions are to detect, investigate and prevent police corruption and other serious police misconduct and to manage or oversee other agencies doing the same. Oversight of police corruption is shared, in that the New South Wales Ombudsman also plays a role with respect to medium-level misconduct.

8.5 Members of the public or police officers who are dissatisfied with the actions or inaction of the PIC can complain to the Inspector of the PIC. This Inspector is an independent officer who reports directly to the New South Wales Parliament and has the power to investigate and assess complaints.

8.6 In addition to these bodies that deal with issues of police and public sector corruption, New South Wales also has the New South Wales Crime Commission (NSWCC) which deals with the issues relating to organised crime and drug trafficking. These investigations often overlap with investigations into police corruption.

QUEENSLAND

8.7 In January 2002, the Criminal Justice Commission (CJC) and the Queensland Crime Commission (QCC) merged to form the Crime and Misconduct Commission (CMC). The CJC had been established by the *Criminal Justice Act 1989* following the Fitzgerald Commission. The QCC had been established by the *Crime Commission Act 1997*.

8.8 The CMC was established by the *Crime and Misconduct Act 2001* and serves two basic functions. The first relates to the investigation of major and organised crime. The second relates to complaints of misconduct by public sector employees, including those from the

police service. The CMC also has a research function and a prevention function.

- 8.9 The CMC is accountable through the Parliamentary Crime and Misconduct Committee (PCMC), an all-party committee that monitors and reviews the activities of the CMC and receives complaints in relation to it. The Parliamentary Crime and Misconduct Commissioner assists the PCMC in this role.

SOUTH AUSTRALIA

- 8.10 There are two agencies involved in dealing with complaints against public sector officials in South Australia. These are the State Ombudsman of South Australia and the Police Complaints Authority. The office of Ombudsman was created by the *Ombudsman Act 1972*. The Ombudsman has jurisdiction to investigate complaints against government administration, but the South Australian police department is expressly excluded.
- 8.11 Complaints against police in South Australia are referred to the Police Complaints Authority, which was established by s5 of the *Police (Complaints and Disciplinary Proceedings) Act 1985*. The Act also directs the Commissioner of Police in South Australia to constitute within the Police Force a separate branch, the Internal Investigation Branch, to carry out investigations in relation to the conduct of members of the Police Force. This branch investigates most complaints under the supervision of the Police Complaints Authority, which can also investigate matters on its own initiative.

VICTORIA

- 8.12 In Victoria, the office of Ombudsman was created by the *Ombudsman Act 1973*. It is the external agency that deals with complaints against

police and other public sector employees. The Ombudsman investigates some complaints against police, but most complaints are referred to the Police Service for investigation. The Ombudsman is then responsible for independently reviewing the police investigation. Although the Ombudsman has investigative powers, they are limited in comparison with the wide range of investigative powers available to other external oversight agencies, such as Queensland's CMC.

CRIME COMMISSIONS

8.13 For some years, New South Wales and Queensland have operated Crime Commissions to investigate serious and/or organised crime. For that purpose these Commissions have been given coercive powers to enable evidence to be taken under compulsion.

8.14 The NSWCC is a statutory corporation established by s5(1) of the *New South Wales Crime Commission Act 1985*. The NSWCC was initially created in 1986 as the State Drug Crime Commission. The principal objective of the NSWCC is to reduce the incidence of illegal drug trafficking while its secondary objective is to reduce the incidence of organised and other crime. Its principal functions include the investigation of matters relating to relevant criminal activity referred to the NSWCC by a management committee, the review of police enquiries into matters relating to criminal activity, and furnishing reports relating to illegal drug activity and organised and other crime which include, where appropriate, recommendations for changes in the laws of the State. By s24(1) of the *New South Wales Crime Commission Act* there is constituted a New South Wales Crime Commission Management Committee, comprising four members, being the Minister for Police and Emergency Services, the Commissioner of Police, the Chairman or another member of the National Crime Authority and the Commissioner of the NSWCC. The

principal functions of the Management Committee are to refer matters to the NSWCC for investigation or review, to review and monitor the work of the NSWCC and to give approvals to the NSWCC to disseminate intelligence and information to such bodies as the NSWCC thinks appropriate. The NSWCC has its own staff, but investigations are primarily carried out by taskforces of the New South Wales Police who have been posted to the NSWCC, and are under the command of the senior officer of the taskforce.

- 8.15 The QCC was established by the *Crime Commission Act 1997* as a permanent body to investigate the criminal activity referred to in the Act and, in particular, criminal paedophilia and major and organised crime. “Major crime” is defined as criminal activity that involves an indictable offence, punishable on conviction by a term of imprisonment for not less than 14 years. “Organised crime” is defined as criminal activity that involves indictable offences, punishable by a term of imprisonment for not less than seven years, and involving two or more persons, and substantial planning and organisation or systematic and continuing activity, with the purpose of obtaining profit, gain, power or influence. The Act provided in s38 for the establishment of a management committee, the members of which comprise the Crime Commissioner as Chairperson, the Police Commissioner, the Chairperson of the CJC, the Chairperson of the National Crime Authority, the Chairperson of the Parliamentary Committee, the Deputy Chairperson of the Parliamentary Committee, the Commissioner for Children and Young People and two community representatives. The major function of the management committee was to refer relevant criminal activity and major crimes to the QCC for investigation and to review and monitor generally the work of the QCC.

- 8.16 Section 4(3) of the *Crime Commission Act* recognised that the investigation of official misconduct should be undertaken independently of general law enforcement, and that the need for cooperation between law enforcement agencies may be subordinate to the need for the independent investigation of official misconduct. However, with the enactment of the *Crime and Misconduct Act* the CJC and the QCC were merged into a single body corporate under the name “Crime and Misconduct Commission” (CMC). The Crime Reference Committee has responsibility for referring major crime to the CMC for investigation and has a coordinating role for investigations into major crime conducted by the CMC in cooperation with any other law enforcement agency. The Crime Reference Committee consists of the Assistant Commissioner (Crime), the Chairperson of the CMC, the Commissioner of Police, the Commissioner for Children and Young People, the Chairperson of the National Crime Authority and two community representatives.
- 8.17 The QCC was staffed by officers of the Queensland Police Service, who continue to assist the CMC. The officers are under the command of an Assistant Commissioner of Police who is also attached to the CMC. The cost of the police contingent attached to the CMC is included in the budget of the CMC.
- 8.18 The CMC functions are seen as an adjunct to, and not as a substitution for, the role of police services in the investigation of major crime. A typical reference to the CMC is a murder investigation in which the police service has exhausted its inquiry. The CMC can then utilise its coercive powers to take the investigation further than the conventional powers of the police services permit.

8.19 Crime Commissions have had a number of successes in obtaining evidence that led to convictions in cases of murder in which conventional investigative powers had not been able to gather sufficient evidence for a prosecution.

CHAPTER 9

COMPARISON OF THE ANTI-CORRUPTION COMMISSION WITH NEW SOUTH WALES AND QUEENSLAND AGENCIES

INTRODUCTION

- 9.1 The ACC has been the subject of unfavourable publicity concerning its operations and there is a perception that it is not fulfilling its charter of investigating and preventing police corruption. The advantages of conducting public hearings by this Commission with regard to investigations previously carried out by the ACC have highlighted the disadvantages under which the ACC has suffered. In addition, a comparison with the similar agencies in New South Wales and Queensland readily identifies the handicaps under which the ACC has been forced to operate. The agencies in New South Wales and Queensland, whilst not free from criticism have acquired general public acceptance for their expertise and capabilities, and provide worthy benchmarks for assessment of the needs of an external oversight agency in this State.
- 9.2 The ACC and its officers have used their best endeavours to render the operations of the ACC effective, and have achieved significant success with the powers and procedures available to them, but their efforts have been limited by the significant deficiencies in its functions and powers which include:
- (a) the appointment of part time Commissioners;
 - (b) lack of involvement in the investigation of serious and organised crime;
 - (c) requirement for the appointment of a Special Investigator in order to exercise the full range of powers available;
 - (d) requirement for the existence of an allegation, albeit self-initiated, for an investigation;

- (e) inability to conduct hearings in public;
- (f) inability to make findings or recommendations;
- (g) lack of legal protection for covert operational activities; and
- (h) lack of oversight, such as that provided by an Inspector.

9.3 These deficiencies have not only inhibited the operational capacity of the ACC, but importantly have engendered in the perceptions of the public a lack of confidence in the ACC and its role in the investigation and prevention of police and public sector corruption. It is proposed to refer to each of these issues and to specify the functions, powers and procedures which are available elsewhere and which need to be incorporated into an external oversight agency in Western Australia.

FUNCTIONS

9.4 In undertaking the task of defining the functions of an external oversight agency, it is appropriate to consider the fundamental issue of responsibility for the management of misconduct, first, in the police service, and secondly in the public sector. The issues need to be considered separately as different considerations apply.

POLICE SERVICE

9.5 With regard to the police service, it is generally accepted that Commissioners of Police should bear the primary responsibility for the maintenance of discipline within their police services. That responsibility carries with it the primary obligation to investigate misconduct. Appropriately, police services investigate complaints about police conduct and conduct investigations for the purposes of identifying and profiling high risk areas and officers. Consistent with that approach, the role of an external oversight agency is the oversight of those operations within the police service. Such oversight involves scrutiny of the processes adopted by the police service in general, and individual investigations in particular. It also involves the external

agency carrying out its own investigations into particular areas or officers. To enable such a system to operate, it is necessary to have a process whereby the Commissioner of Police advises the external agency of its internal operations, the complaints received and the progress and the outcome of its investigations into them. The external agency could then discharge its function by identifying the conduct it wishes to investigate and by otherwise maintaining supervision of the investigations carried out by the police service. Such a system would preserve the primary responsibility of the Commissioner of Police to maintain discipline in the police service, but also puts in place a mechanism whereby the external agency can ensure that this responsibility is being properly discharged.

PUBLIC SECTOR

9.6 The same approach is not applicable to public sector departments and authorities. The police service is a monolithic organisation in which systems are established and in which powers are vested to permit a substantial degree of self-regulation. Public sector authorities are many and varied in their size and resources. In many instances they lack the expertise to investigate misconduct. Such a position is appropriate in the public sector, as the problems of misconduct are significantly less than for the police service, and the need for each department or authority to establish and maintain internal investigation units does not exist. In these circumstances the external oversight agency is an appropriate entity to entrust with the responsibility of the regulation of misconduct throughout the public sector. The primary function of the Commissioner for Public Sector Standards is the oversight of human resource practices in the public sector, including processes for discipline. However the Commissioner does not have the resources or powers to conduct investigations, and the responsibility for that function should appropriately lie with the external oversight agency. The agency may choose to direct or assist

the public sector authorities to conduct its own investigation, but on the premise that overall responsibility is vested in the external agency.

ANTI-CORRUPTION COMMISSION ACT

9.7 Section 12 of the *Anti-Corruption Commission Act* specifies the functions of the ACC. The section does not distinguish between allegations concerning police officers and other public officers. Nor does the Act make any provision for the allocation of primary responsibility for dealing with complaints about misconduct. Section 12 limits the functions of the ACC to involvement with allegations of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct. It provides for a general function for the ACC to consider whether further action is needed in relation to an allegation and, if so, by whom that further action should be carried out.

PARLIAMENTARY COMMISSIONER ACT

9.8 Section 14(1a) of the *Parliamentary Commissioner Act* provides that the Ombudsman shall investigate any action taken by a member of the police force or police department in the exercise of that member's powers, provided that the Ombudsman shall not investigate such actions until the Commissioner of Police has had a reasonable opportunity to conduct his own investigation into such action. Pursuant to s14(1b), a period of 42 days is deemed to provide a reasonable opportunity for the Commissioner of Police to conduct his own investigation. Pursuant to the administrative arrangements incorporated in the Memorandum of Understanding between the Ombudsman and the Commissioner of Police, the Ombudsman is informed of all complaints, and is also advised of the progress and outcome of investigations into those complaints. The Ombudsman exercises oversight of those investigations. Upon completion of the review of the investigations, in accordance with s25(2) the

Ombudsman may recommend that further action be taken.

CRIME AND MISCONDUCT ACT (QLD)

- 9.9 In the light of the appropriate attribution of responsibility or the investigation of misconduct in the police service and in the public sector referred to above, there is much to commend the provisions of the *Crime and Misconduct Act*. Section 41 provides that the Commissioner of Police has primary responsibility for dealing with complaints about, or information or matter the Commissioner of Police reasonably suspects involves, police misconduct. Section 42(2) provides that the Commissioner of Police must deal with a complaint about police misconduct in the way the Commissioner of Police considers most appropriate, subject to the monitoring role of the CMC.
- 9.10 Section 45 provides that the CMC has primary responsibility for dealing with complaints about, or information or matter involving, official misconduct, although s44(2) provides that a public official must deal with a complaint about official misconduct in the way that the public official considers most appropriate, subject once again to the CMC's monitoring role.
- 9.11 It is recommended that similar provisions be incorporated in legislation that identifies the source of primary responsibility for police and public sector misconduct. It is also recommended that the role of the Ombudsman in the oversight of investigations by the Commissioner of Police into police misconduct be absorbed into the functions of the external oversight agency, which will have the statutory responsibility for that function.

STRUCTURES

- 9.12 The arrangements in New South Wales and Queensland for the external oversight and investigation of police and public sector misconduct are conceptually similar. In New South Wales, police misconduct is investigated by the PIC, and public sector misconduct is investigated by the ICAC and the Ombudsman. Serious and organised crime is monitored by the NSWCC. In Queensland, investigations of police and public sector misconduct and serious and organised crime are carried out by separate divisions of the CMC, again with the involvement of the Ombudsman.
- 9.13 There are greater advantages in the New South Wales arrangements through the existence of separate agencies dedicated to the investigation of police corruption, public sector misconduct and serious and organised crime respectively. Such an arrangement is superior because of the benefits of resources and security through dedicated agencies. However, for budgetary reasons it is unlikely that the New South Wales situation of separate agencies for each function is achievable. On that basis, the Queensland model is more appropriate. Even the Queensland model operates on a scale beyond the needs and fiscal capacity of this State. It operates with a staff of 285 full-time employees and a budget of close to \$30,000,000. However, as will be discussed later, it is possible to modify the Queensland model into a form suitable for Western Australia and it is recommended that the modified form of the CMC, later described, be implemented in Western Australia.
- 9.14 As has been mentioned earlier, the experience in New South Wales and Queensland is that there is a connection between the investigation of organised crime and of police corruption. On recommending an agency similar to the CMC in Queensland, it is intended that there be included the function of investigating serious

or organised crime. When investigating corrupt conduct by police officers, it is desirable for reasons of security, that serving or ex-police officers be excluded from the process. A disadvantage of incorporating that function within the body which investigates police corruption is that it brings police officers physically into the premises of the agency and renders the maintenance of an appropriate level of security more difficult. However, there are measures that would mitigate that risk. They are:

- (a) with the passage of time and as the benefit of reforms within the WAPS take effect, it is to be anticipated that an improved culture will significantly reduce the risk involved;
- (b) it is possible to quarantine that part of the premises and the facilities and system upon which the investigation of serious or organised crime takes place, from the operation involving the investigation of corrupt police; and
- (c) the agency over time gains a familiarity with officers of the police service and is able to identify and screen out suspect officers from the taskforces which participate in the investigation of serious or organised crime within the agency.

9.15 In any event, the risks involved from the participation of police officers in the agency's activities are not so great as to preclude inclusion of the function of investigating organised crime in its charter. The benefits of the ability to coordinate investigations, and the gathering of intelligence, and the use of the powers and facilities available, outweigh the disadvantage in the threat to security of the agency's operations.

TERRORISM

9.16 The utility of the creation of such a function in the new agency would specifically arise in the fight against terrorism. Recent terrorist activity

overseas has heightened awareness in Australia for the need for the maintenance of a specialist counter-terrorist operational capacity, and it has recently been announced that there will be created in the WAPS a specialist investigative and intelligence gathering unit to combat terrorism in Western Australia. Unlawful acts forming part of terrorist activities would undoubtedly constitute serious crime which would qualify for referral to the crime commission division of the agency. The agency would then be in a position to exercise its extensive powers in a manner commensurate with the degree of threat which terrorism constitutes to this country.

JURISDICTION

9.17 Pursuant to s12 of the *Anti-Corruption Commission Act* the function of the ACC is to deal with allegations of “corrupt conduct, criminal conduct, criminal involvement or serious improper conduct” about police officers and other public officers. The term “public officer” has the same meaning as in the *Criminal Code*, which includes a wide range of public officials including Ministers of the Crown, members of either House of Parliament, public service officers or employees within the meaning of the *Public Sector Management Act* and members or employees of any authority, board, commission, local government, council of a local government or similar body established under a written law.

9.18 The jurisdiction of the Ombudsman overlaps that of the ACC. Under s14(1) of the *Parliamentary Commissioner Act*, the Ombudsman is to investigate any decision or recommendation made, or any act done or omitted, that relates to a matter of administration. Pursuant to s14(1a), which was inserted in 1985, the Ombudsman is to investigate any action taken by a member of the police force or police department, whether or not that action relates to a matter of administration.

9.19 The ACC and the Ombudsman entered into a Memorandum of Understanding relating to arrangements regarding the respective oversight responsibilities of WAPS, Western Australian Government Railway special constables and public sector investigations by each agency, and the lawful exchange of information between them on matters of mutual interest. The arrangement is that when an allegation is received by the Ombudsman which is reasonably suspected to concern serious and improper conduct, criminal conduct, or criminal involvement, notification of the allegation will be forwarded to the ACC in writing in accordance with s14 of the *Anti-Corruption Commission Act*. Upon receipt of the notification, the ACC will assess whether the matter falls within its jurisdiction as defined by s13 of the Act and determine whether further action is needed and if so, by whom. The Ombudsman is to continue to exercise responsibility with respect to the allegation until written advice is received from the ACC stating that it will assume responsibility to assess or investigate the allegation. Where an allegation is received by the ACC, it may refer the matter to the Ombudsman for further action, after first consulting with the Ombudsman. The Memorandum of Understanding was executed on 10 October 2001.

9.20 The Ombudsman has also entered into a Memorandum of Understanding with the Commissioner of Police. Pursuant to the Memorandum, the Commissioner of Police will notify the Ombudsman in writing whenever a police complaint is received. The Commissioner has a reasonable opportunity in which to investigate the matter and the Ombudsman is to monitor the timeliness of police internal investigations. On completion of the police investigations the police file is sent to the Ombudsman for review, which is expected to be completed within 30 working days from receipt of the file. The Ombudsman is to review the file to determine whether all relevant issues have been considered, relevant evidence gathered and analysed

and reasonable conclusions reached. The Ombudsman has advised that the office does not investigate police complaints, but confines itself to the overview role, unless there are issues of significance and/or public interest which may warrant an investigation.

- 9.21 The Report of the State Taskforce established to review the Machinery of Government, published in June 2001, noted that there are a number of agencies which have been established to ensure the operating standards and the appropriate conduct of public sector agencies and their offices. The Taskforce noted the concerns that members of the public who wish to query or complain about actions of a public sector agency do not have a single point to access the complaints system, and recommended the establishment of a single entry point for the public. The Taskforce did not examine the role of the ACC, and its remarks were directed to the Auditor General, the Ombudsman and the Commissioner for Public Sector Standards. If the ACC is added to that list, the comments have further force. Even though the Taskforce was not referring to the ACC, the following views expressed by it are worthy of note, and apply equally to the ACC:

Creation of accountability bodies appears to have occurred as ad hoc responses to issues of the day, rather than as a carefully considered, inter-related, accountability and administrative review package. But the shared objective of ensuring the appropriate conduct of the public sector and accountability to citizens for administrative actions that affect them means that similarities exist in the outcomes sought by each of these statutory offices.

- 9.22 The Taskforce was advised that at present the accountability agencies cooperate informally to manage cases that may transcend more than one agency's jurisdiction, or where a complaint has been misdirected to an agency that does not have jurisdiction in relation to a particular matter.

- 9.23 Submissions to the Taskforce have suggested that the possible amalgamation, or, at the least, co-location, of these agencies has the potential to facilitate a number of benefits to both the public and the Government by ensuring the efficient use of resources and access to processes of administrative review. Moreover, the Chief Executive Officers' Consultative Group highlighted the added workload on agencies arising from multiple and inconsistent reporting requirements under each accountability agency's respective legislation.
- 9.24 The Government has announced its intention to establish another accountability agency, an independent appeals body able to review administrative decisions, giving Western Australians the right to be informed of the reasons behind administrative decisions that affect them.
- 9.25 Legislative Assembly Standing Order 290 identifies the functions of the JSC and includes:
- (1)(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 cooperation between the Anti-Corruption Commission and those agencies and authorities may be encouraged.
- 9.26 The Annual Report of the JSC for 2001-2002 records that it had received a number of informal briefings from selected key agencies responsible for ensuring the conduct and accountability of public sector agencies. The agencies were the ACC, the Auditor General, the Office of the Public Sector Standards Commissioner and the Ombudsman. The JSC reported that the briefings focused on the

interaction of the ACC and the other public sector agencies, including consideration of the effectiveness of these interactions. The report also included in its work-in-progress the preparation of a series of reports which included a review of the roles and responsibilities of other key agencies responsible for ensuring the conduct and accountability of public sector agencies.

- 9.27 The concerns expressed or implied by the Taskforce and the JSC are valid and do not require further justification. It is recommended that the opportunity be taken to eliminate the duplication of the jurisdiction of the ACC and the Ombudsman by legislative amendments which will have the effect of incorporating the functions of the Ombudsman in relation to the investigation of police or public sector misconduct into the proposed external oversight agency.

Scheduled Offences

- 9.28 The ACC has drawn attention to the fact that, pursuant to s13(1)(a) of the *Anti-Corruption Commission Act*, it has jurisdiction in respect of allegations that a public officer has:

- (a) acted corruptly;
- (b) corruptly obtained a benefit; or
- (c) committed a scheduled offence whilst acting or purporting to act in his or her official capacity.

A “scheduled offence” means an offence specified in the Schedule to the Act, which designates specific offences in the *Criminal Code*. It is the view of the ACC that the current limitation of its jurisdiction to a “scheduled offence” is an unnecessary limitation and that it should have jurisdiction in respect of all criminal offences carrying a penalty of, say, two years’ imprisonment or more. This suggestion seems valid and the opportunity should be taken to include in the legislation

for the new agency a provision which extends its jurisdiction accordingly.

Breaches of Discipline

9.29 The Ombudsman has drawn attention to the fact that, under s13(1)(c) of the *Anti-Corruption Commission Act*, the jurisdiction of the ACC in relation to allegations that a public officer has engaged in conduct, other than corrupt or criminal conduct, that constitutes misconduct, is limited to disciplinary breaches which provide reasonable grounds for the termination of the person's office or employment. The Ombudsman has pointed out that in Queensland, as a result of the combined effect of the provisions of the *Crime and Misconduct Act* and the *Ombudsman Act* there is no independent oversight of mere "breaches of discipline", whereas currently in Western Australia the Ombudsman assesses the investigation of all complaints concerning police, including "breaches of discipline". As acknowledged above, there is clearly a need for continuing supervision of the investigation by WAPS of complaints about police misconduct, including those that would not require dismissal. If that function is to be attributed to the new agency for the reasons given earlier, the limitation in s13(1)(c)(vi) of the *Anti-Corruption Commission Act* should be removed. The consequence will be that the new agency would then have jurisdiction with respect to all allegations of misconduct by police. It is not contemplated that the agency would investigate all such matters, but would continue the process currently undertaken by the Ombudsman of overseeing investigations into breaches of discipline with a view not only to ensuring that the investigations are conducted in a proper manner, but also to enable the identification of strategic issues which may warrant closer attention.

Sanctions

9.30 To complement the role of the agency in monitoring not only police

internal investigations, but also other public sector investigations into allegations of misconduct where the agency is dissatisfied with an outcome, either as to findings, or penalty, it is recommended that the agency should be given powers similar to those provided to the CMC by s48 of the *Crime and Misconduct Act*. That section provides for the CMC to review or audit the way a public official has dealt with official misconduct and to require a public official to report to the CMC about an investigation in the way and at the time the CMC directs, or to undertake the further investigation of the misconduct that the CMC directs. If the agency remains dissatisfied as a result of that process, it could report that dissatisfaction to Parliament. Any further action would be the responsibility of the Government.

INTERNAL ORGANISATION

Leadership

9.31 Pursuant to s5 of the *Anti-Corruption Commission Act*, the ACC is to consist of three members, one who has been a Judge or is eligible for appointment as a Judge, who is to be the Chairman, and two who are persons who are not public officers “otherwise than by reason of being appointed as members”. It is also provided that a person who is a judicial officer, or who is or has been a member of the WAPS is not eligible to be a member of the ACC. Appointments are to be made in accordance with the recommendation of a Committee consisting of the Chief Justice of Western Australia, the Chief Judge of the District Court and the Solicitor General. The opportunity should be taken to consider whether this structure is capable of providing the style of leadership which is vital to the success of an external oversight agency.

9.32 All Commissioners appointed to the ACC have been part-time. There is certainly no criticism intended of the Chairman or of the Commissioners of the ACC in considering the appropriate form of

leadership. All indications to this Commission have been that the Commissioners have used their very best endeavours to make the ACC an effective organisation, notwithstanding what appear to be significant deficiencies in its statutory functions and powers.

9.33 In New South Wales, similar agencies tend to be structured on the basis of the primary responsibility for leadership being vested in a Commissioner. Under s7 of the *Police Integrity Commission Act* the Governor may appoint a Commissioner for the PIC, and by virtue of s6(3) the functions of the PCC are exercisable by the Commissioner. This Act also provides that the staff of the PIC may include one or more Assistant Commissioners, who may exercise any function of the Commissioner, as directed by the Commissioner.

9.34 The ICAC is established by legislation in similar form. Section 5 of the *Independent Commission Against Corruption Act* empowers the Governor to appoint a Commissioner for the ICAC, and, pursuant to s4(3), the functions of the ICAC are exercisable by the Commissioner. Under this Act the Governor may, with the concurrence of the Commissioner, appoint one or more Assistant Commissioners who shall assist the Commissioner, as the Commissioner requires. The NSWCC is to consist of one or more members being the Commissioner, and if any Assistant Commissioners are appointed, the Assistant Commissioners. In accordance with s5B(3) of the New South Wales *Crime Commission Act*, the Assistant Commissioner is to assist the Commissioner, as the Commissioner requires.

9.35 In Queensland, the CMC is based upon leadership by the Commission, which, by virtue of s223 of the *Crime and Misconduct Act* is to consist of five Commissioners, including a full-time Commissioner who is the Chairperson and four part-time Commissioners who are community representatives. By s225 a person

is qualified for appointment as a part-time Commissioner if the person is in practice as a lawyer and has a demonstrated interest in civil liberty or has one or more qualifications or expertise in public sector management, criminology, sociology or research related to crime or crime prevention, or community service experience relating to public sector officials.

9.36 The appointment of part-time Commissioners to participate in the management of an agency has advantages in providing for the input of community representatives with a diversity of skills and experience. However, government by a commission of the nature of that in Queensland is likely to be inefficient. Decisions generally have to await the next meeting of the commission, and the process absorbs time and resources in meeting the formalities required for decisions to be made in that manner. The leadership of external oversight agencies has become a specialised occupation, with the primary requirement being knowledge of the criminal justice system and law enforcement techniques. The different qualifications of members of the CMC do not necessarily contribute the expertise necessary for the leadership of such an agency. The format adopted in the New South Wales agencies is preferable, and it is recommended that provision be made for the functions of the external oversight agency to be exercised by a Commissioner, with provision for an Assistant Commissioner capable of exercising the Commissioner's functions, and who will also have a direct role in the management of the organisation.

9.37 Section 5(4) of the *Anti-Corruption Commission Act* currently prohibits a person who is a judicial officer from appointment to the ACC. The exclusion of the judiciary limits the range of suitable applicants for the appointment of Commissioner, particularly if the agency is to have the capacity to conduct public hearings, where the skills of judicial office would be appropriate. The inaugural Commissioner of the PIC

was a Judge of the District Court of New South Wales, and it is recommended that the opportunity be provided for the selection of a suitable Commissioner who currently occupies judicial office. That would be particularly valuable for the first term of the office, when the agency will need to establish public credibility and acceptance. It is likely that the community will feel a greater sense of comfort, particularly when public hearings and other powers will be new, if the organisation is headed by a person who has public confidence as a member of the judiciary.

Multi-disciplinary teams

9.38 The New South Wales and Queensland agencies all operate on the premise of multi-disciplinary teams, comprising investigators, analysts and lawyers. The ACC currently employs one lawyer. The addition of a capacity to conduct more hearings, particularly public hearings, will necessarily involve a greater participation of lawyers, not only at the hearing phase, but also in the planning and preparatory stages. In any event, it is recommended that greater use be made of lawyers within the investigative unit in order to take advantage of the combination of skills which multi-disciplinary teams can offer.

Special Investigator

9.39 In accordance with s8(1) of the *Anti-Corruption Commission Act* the ACC may appoint a duly qualified lawyer to be a Special Investigator to investigate and report to the ACC on allegations specified in the instrument of appointment. Where an investigation is carried out by a Special Investigator, Part IV of the Act applies, with the consequence that the Special Investigator has extensive powers of compulsion, including the powers of a Royal Commission. Section 42 of the Act provides that any evidence taken shall be taken in private. In *Parker v Miller* [1998] WASCA 124, the Full Court of the Supreme Court held

that the powers of a Special Investigator did not extend to the publication of findings or recommendations that police officers be dismissed. Following this decision, the ACC has made limited use of its power to appoint Special Investigators, and has only appointed Special Investigators on four occasions.

- 9.40 Similar agencies in New South Wales and Queensland are effectively standing Royal Commissions, with the Commissioner having the ability to conduct hearings, without the need for the appointment of a Special Investigator. Even if the functions and powers of the ACC were extended to overcome the decision in *Parker v Miller*, the requirement for the appointment of a Special Investigator to conduct hearings is unsatisfactory. The capacity of the Commissioner or Chairperson of the agency to conduct hearings has advantages of establishing expertise and experience in the individual concerned, together with the flexibility and convenience of an official permanently available to conduct hearings.

Investigations

- 9.41 It is now beyond argument that a successful external oversight agency must have the capacity to conduct proactive investigations. The pursuit of corrupt police officers (and public sector employees) is a challenging and sophisticated task. Ideally, it involves extensive preparatory inquiries to identify areas of high risk and officers whose profile indicate possible corrupt or criminal conduct. An agency which is limited to the reactive function of responding to complaints is limited in its capacity to take the initiative to endeavour to eliminate corruption from the police service or public sector. Police have been shown to involve themselves in corrupt conduct with criminals, especially drug dealers, who do not complain when money or drugs are stolen from them. To identify such behaviour requires the agency to be proactive in examining the activities of officers and

criminals alike, in order to reveal the existence of corrupt conduct. Under s23 of the *Police Integrity Commission Act*, the PIC may conduct an investigation on its own initiative, on a police complaint made or referred to it, or on a police complaint of which it has become aware, or on a report made to it. It is recommended that a similar provision be made for the external oversight agency.

- 9.42 The ACC has limited capacity to act in a proactive manner. Section 17 of the *Anti-Corruption Commission Act* provides that the ACC shall examine each allegation and decide whether or not further action is warranted. That and other provisions clearly indicate that the capacity of the ACC to exercise its powers is dependent upon the existence of an allegation. Section 13 of the Act provides that the ACC shall receive information furnished by any person who alleges that public officers have engaged in corrupt conduct, criminal conduct, criminal involvement or serious improper conduct, and s13(1)(d) enables the ACC to consider, in the light of its own experience and knowledge, whether or not it ought to make an allegation of the same type. The capacity of the ACC to initiate its own allegations provides some scope for proactive inquiries, but it is desirable that an external oversight agency should have unfettered capacity to carry out proactive investigations.

PUBLIC OR PRIVATE HEARINGS

- 9.43 Unlike the PIC, the ICAC and the CMC, the ACC has no power to conduct public hearings. As mentioned above, when the ACC decides to carry out further action in relation to an allegation, if the investigation is carried out by a Special Investigator, the powers of a Royal Commission are available, except that s42 provides that any evidence taken shall be taken in private. Under s33 of the *Police Integrity Commission Act* a hearing may be held in public or in private, or partly in public and partly in private, as decided by the

Commissioner. The PIC may decide to hear closing submissions in private. In reaching these decisions the PIC is obliged to have regard to any matters that it considers to be related to the public interest. The ICAC has similar provisions in its legislation. The position with the CMC is slightly different. Section 177 of the *Crime and Misconduct Act* provides that, generally, a hearing is not open to the public. However, it is also provided that, for a hearing for a crime investigation, the CMC may open the hearing to the public if it considers that opening the hearing will make the investigation more effective and would not be unfair to a person or contrary to the public interest. For a hearing other than for a crime investigation, the CMC may open the hearing to the public if it considers that closing the hearing to the public would be unfair to a person or contrary to the public interest. Only the Chairperson of the CMC may conduct a public hearing.

- 9.44 There is no doubt that the inability of the ACC to conduct public hearings has been a substantial impediment to its operations, and that the external oversight agency should have that capacity. The conduct of inquiries into corruption in public has been the subject of judicial approval of the High Court (*Victoria v Australian Building Employees' and Builders Labourers' Federation* (1982) 152 CLR 25) and the New South Wales Supreme Court (*Bayeh v Attorney General for NSW & Anor* (1995) 87 A Crim R 270). A decision to conduct a public hearing by the ICAC was also considered and approved by the New South Wales Court of Appeal in *Independent Commission Against Corruption v Chaffey & Ors* (1992) 30 NSWLR 21. Gleeson CJ stated (at 30):

Considerations of public interest which support an open hearing, and which were taken into account by the Commissioner, include the need for public confidence in the operations of the Commissioner...

and (at 31):

What is of particular interest for present purposes is that the process of reasoning set out above involves a conscious weighing the public interest in openness of proceedings against the harm to reputation that can result...

Mahoney JA stated (at 53):

The scrutiny of impugned conduct in public has a disinfectant effect: reference has often been made to the 'the disinfectant effect of sunlight'. And scrutiny in public rather than behind closed doors is a traditional check upon abuse of both administrative and judicial power...

- 9.45 The provisions of the New South Wales legislation provide a wider discretion to conduct public hearings, which experience demonstrates, can be exercised responsibly and effectively, and similar powers should be made available to the external oversight agency to enable it to conduct public hearings on the same basis.

PRIVILEGE AGAINST SELF INCRIMINATION

- 9.46 It is a common feature of the legislation which regulates Royal Commissions, the PIC, the ICAC and the CMC that a statement made by a witness in answer to any questions shall not be admissible in evidence against him or her in any civil or criminal proceedings, except in relation to proceedings for contempt or false swearing. The preservation of that privilege is appropriate having regard to the use of the power of compulsion to answer questions. However, it would be an unacceptable outcome if an officer were to admit to corrupt conduct in evidence, but be able to remain in the Police Service because the evidence could not be used against him. An exception should be made to the privilege to ensure that any evidence given is available for use in procedures, including any review or appeal, under s8 of the *Police Act* to terminate the officer's employment. Whilst the officer would not be subject to criminal proceedings based upon any admissions made, he or she should not be immune from

termination if he or she has admitted conduct that demonstrates a lack of the necessary integrity required of a police officer.

FINDINGS

9.47 As mentioned above, the Full Court of the Supreme Court held in *Parker v Miller* that a Special Investigator appointed by the ACC did not have the power to publish findings that a person was unfit to hold office as an officer in the WAPS or to recommend the removal of an officer. Malcolm CJ, after noting the provisions of s30(2) of the *Anti-Corruption Commission Act* described the function of the ACC in the following terms:

The prohibition of the inclusion of such a recommendation is entirely consistent with the view that the ACC has no power to make a finding that a person is guilty of a criminal offence or express an opinion that the evidence is sufficient to warrant a prosecution or otherwise recommend a prosecution.

A special investigator appointed by the ACC cannot be given greater powers than the ACC, itself, has. It follows that the special investigator appointed under s8(1) of the ACC Act to investigate and report on specified allegations has no power to include in the report findings or conclusions that any person is guilty of "criminal conduct", "criminal involvement", "serious improper conduct" or "improper conduct". Consistently with the limitation of the power to the conduct of an investigation, evidence may be assembled which, if the Commission considers it would warrant further action by the Director of Public Prosecutions, may be referred to him for further action. Alternatively, or additionally, the matter may be referred to the Commissioner of Police to take further action including disciplinary proceedings.

9.48 Restricting the ACC to the role of collecting evidence severely limits its utility. To be effective, an external oversight agency should have the capacity to make findings on the evidence presented to it and to make recommendations to the Commissioner of Police or other public authority executives for the discipline and management of officers or

employees found to be engaging in misconduct.

9.49 The PIC has the power to make assessments and form opinions as to whether misconduct has or may have occurred and may make recommendations whether consideration should be given to the institution of prosecution proceedings or other disciplinary action. Section 16 of the *Police Integrity Commission Act* also provides that the PIC may not make any finding or express any opinion that a person is guilty or has committed an offence or make a recommendation that the person should be prosecuted for a specified offence. The section also stipulates that any opinion that a person has engaged in police misconduct is not a finding that the person is guilty of a criminal or disciplinary offence. The ICAC has similar powers under its legislation. The CMC is enabled by s49 of its Act to report an investigation to the Director of Public Prosecutions for the purposes of any prosecution proceedings the Director considers warranted or to a Chief Executive Officer of a relevant department for disciplinary action.

9.50 It is recommended that the external oversight agency have the power to make assessments and form opinions and make recommendations similar to the provisions in s16 of the *Police Integrity Commission Act*, which provides:

16(1) The Commission may:

- (a) make assessments and form opinions, on the basis of its investigations or those of the Police Royal Commission or of agencies of which it has management or oversight under this Act, as to whether police misconduct or other misconduct:
- has or may have occurred, or
 - is or may be occurring, or
 - is or may be about to occur, or

- is likely to occur, and
 - (b) make recommendations as to whether consideration should or should not be given to the prosecution of or the taking of action under Part 9 of the *Police Act 1990* or other disciplinary action against particular persons, and
 - (c) make recommendations for the taking of other action that the Commission considers should be taken in relation to the subject matter of its assessments or opinions or the results of any such investigations.
- (2) However, the Commission may not:
- (a) make a finding or form an opinion that a specified person is guilty of or has committed, is committing or is about to commit a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence), or
 - (b) make a recommendation that a specified person be, or an opinion that a specified person should be, prosecuted for a criminal offence or disciplinary offence (whether or not a specified criminal offence or disciplinary offence).
- (3) An opinion that a person has engaged, is engaging or is about to engage:
- (a) in police misconduct (whether or not specified conduct), or
 - (b) in specified conduct (being conduct that constitutes or involves or could constitute or involve police misconduct), is not a finding or opinion that the person is guilty of or has committed, or is committing or is about to commit a criminal offence or disciplinary offence.
- (4) Nothing in this section prevents or affects the exercise of any function by the Commissioner that it considers appropriate for the purposes of or in the context of Division 2 of Part 9 of the *Police Act 1990*.

COMPULSORY POWERS

9.51 The present provisions of the *Anti-Corruption Commission Act* appear inconsistent in the availability to the ACC of compulsory powers during its processes. Section 37(1) of the Act provides that in making

a preliminary inquiry, the ACC may request “any person or body” to supply such information as is specified. However, once an investigation has commenced, the power to obtain information is limited to requesting “a public authority or public officer to produce a statement of information” – s44. It is not clear why the power to obtain information during an investigation should be confined to public authorities and public officers, when any person may be the subject of a request during the preliminary inquiry. There is no logical reason why the powers of an agency should vary during the different phases of its operations. If the agency is charged with the responsibility of investigating misconduct, it is more appropriate that its full range of powers be available to it throughout its entire process.

9.52 This Commission has been granted powers in s5 and s6 of the *Royal Commission (Police) Act* to obtain information and documents. The power to require the production of a statement of information in s5 is directed only to a public authority or public officer, but the power in s6 to obtain documents pursuant to a written notice is applicable to any person. Similar powers should be available to the external oversight agency.

9.53 In addition, this Commission has been granted powers to use assumed identities and to conduct controlled operations and integrity testing programs in Parts 6 and 7 of the *Royal Commission (Police) Act*. The necessity for such powers may be traced back to the decision of the High Court in *Ridgeway v The Queen* (1995) 184 CLR 19, in which the High Court set aside a conviction by reason of the illegal conduct of investigators in facilitating the commission of the offence for which the conviction was recorded. The effect of the decision was to put in issue any successful prosecution in which police had broken the law in the course of assisting an accused to commit an offence. This was in addition to the well known difficulties encountered by investigators

who breached the law in the course of investigating offences, following the previous decision of the High Court in *Bunning v Cross* (1978) 141 CLR 54. The Commonwealth and New South Wales Governments, shortly after the judgment in *Ridgeway v The Queen*, enacted statutory provisions to declare lawful any actions of law enforcement officers which would otherwise be unlawful, provided they were carried out in the course of an approved controlled operation or integrity test. Similar provisions for the approval of controlled operations and integrity testing programs have been incorporated in Part 7 of the *Royal Commission (Police) Act*. Any permanent agency involved in the task of investigating corruption and/or organised crime should have the benefit of similar protection in order to avoid the risk of extensive investigations ultimately failing.

9.54 Similarly, it is now accepted practice in the investigation of corruption and organised crime to arrange for surveillance and other covert operatives to have the benefit of assumed identities in the performance of their duties. In arranging the *indicia* of an assumed identity, for example, in submitting applications for passports or opening bank accounts in assumed names, on occasion laws are broken. Notwithstanding the legitimate objectives of the use of such devices, to have law enforcement officers breaking the law is unacceptable. Accordingly, legislation has now been passed to permit such activities in appropriate cases. The Commonwealth Government has enacted the *Measures to Combat Serious and Organised Crime Act 2001*, which permits participating agencies, which include the PIC, the NSWCC and the CMC to arrange for the issue of assumed identity documentation through Commonwealth instrumentalities in a lawful manner. Complementary provisions were included in the *Royal Commission (Police) Act* to enable officers of this Commission to obtain documentation in an assumed identity from agencies of the Western Australian Government. It is essential that any external oversight

agency should have the same powers and it is recommended that the provisions of Parts 6 and 7 of the *Royal Commission (Police) Act* be applied to the external oversight agency.

ACCOUNTABILITY

- 9.55 In view of the nature of the compulsory powers given to an external oversight agency, it is essential that there should be appropriate accountability mechanisms to ensure that those powers are not abused. There is no provision in the *Anti-Corruption Commission Act* for the supervision of the activities of the ACC or its officers. The principal function of the JSC is to monitor and review the performance of the functions of the ACC. However, the JSC, as previously noted, is prohibited from investigating a matter relating to particular information received by the ACC, or particular conduct or involvement considered by the ACC. It will not reconsider a decision made or action taken by the ACC in the performance of its functions, and it will not have access to detailed operational information, or become involved in operational matters.
- 9.56 The terms of the Standing Order would appear to have been taken from s94 of the *Police Integrity Commission Act*, which provides for a Joint Committee (called the Committee on the Office of the Ombudsman and the Police Integrity Commission). However, an important difference is that in New South Wales the *Police Integrity Commission Act* also provides for the office of Inspector of the PIC, whose principal functions are to audit the operations of the PIC, to deal with complaints of abuse of power, impropriety and other forms of misconduct on the part of the PIC or officers of the PIC, and to assess the effectiveness and appropriateness of the procedures of the PIC. Pursuant to s90 of the Act the Inspector may investigate any aspect of the PIC's operations or any conduct of officers of the PIC and is entitled to full access to records of the PIC and may require

officers of the PIC to supply information or produce documents. The Inspector may also require officers of the PIC to attend before him or her to answer questions or produce documents and may investigate and assess complaints about the PIC or officers of the PIC.

9.57 The absence of similar provisions in the *Anti-Corruption Commission Act* is a serious deficiency. The ACC is exempt from the scrutiny of the Ombudsman as a result of its inclusion in Schedule 1 of the *Parliamentary Commissioner Act* as an entity to which the Act does not apply. The Public Sector Standards Commissioner is not equipped to carry out investigations and currently there is a lack of a formal mechanism by which complaints against the ACC and its officers are to be investigated. In addition, the appointment of an Inspector, to audit and monitor the compliance of an agency with its statutory obligations is an essential part of the principle of accountability, which must accompany the grant to such an agency of extensive compulsory powers. It is recommended that the new agency be subject to supervision by an Inspector with similar powers to those granted to the Inspector of the PIC.

CHAPTER 10

STANDING COMMISSION

10.1 Although the terms of reference of this Commission require me to report upon whether changes in the laws of the State are necessary for the purpose of investigating or dealing with corrupt conduct or criminal conduct by police officers, the opportunity is taken to draw attention to the advantages of establishing a body, with the powers and facilities recommended, as a form of Standing Commission available as a forum for the hearing of inquiries which are currently conducted on an *ad hoc* basis. Several examples in recent years come to mind, such as inquiries into possible misconduct within the public health system or in local government.

10.2 Local government inquiries particularly seem to have the potential to benefit from access to the powers and expertise of the proposed new agency. The ACC currently has jurisdiction with respect to allegations of corrupt conduct, criminal conduct or serious improper conduct by members, officers, or employees of any local government or council of a local government by virtue of the definition of “public officer” in the *Criminal Code*, which has been adopted by the *Anti-Corruption Commission Act 1988*. The ACC carries out investigations into serious allegations of misconduct at the local government level, and it shares responsibility with the Public Sector Investigation Unit of the WAPS for those investigations. The Department of Local Government and Regional Development also carries out investigations into possible offences against the *Local Government Act 1995*. Under the current provisions of Part VIII of that Act, inquiries into any aspect of a local government or its operations or affairs may be conducted by the Executive Director or another authorised person, or by an Inquiry

Panel appointed by the Minister. An Inquiry Panel has the powers of a Royal Commission, but at present there is no existing facility to accommodate such inquiries and, on each occasion, a process of appointing panel members, acquiring staff and accommodation and equipping a hearing room has to occur before the inquiry can proceed. There have been a number of such inquiries in recent years, including the inquiry into the City of South Perth and the inquiry into the Margaret River Council. There has also been a Royal Commission into the Wanneroo Council.

10.3 In the report of the inquiry into the City of South Perth, Mr Gregory McIntyre, who constituted the Inquiry Panel, noted that inquiry processes of that kind were expensive, both economically and in the impact they could have on individuals in the community, and he recommended that a study be undertaken to focus on the issue of the most appropriate manner to deal with matters of that kind. Mr McIntyre found that there had been various acts of unlawful conduct and he recommended the dismissal of the Council. The Panel of Inquiry into the Margaret River Council resulted in criminal charges being laid against the Executive Officer. These were matters which would be appropriate for an inquiry by an anti-corruption agency. In New South Wales the ICAC conducts public inquiries into similar matters, as does the CMC in Queensland.

10.4 The use of a standing body with appropriate hearing facilities and resources, and the expertise to conduct such inquiries, has much to commend it and, if the recommendations of this Interim Report are adopted, and a new permanent oversight body is established with the capacity to conduct public hearings, there will be an opportunity to utilise that capacity and reduce the cost and inefficiency of *ad hoc* bodies conducting inquiries into public sector misconduct.

CHAPTER 11

RESOURCES

11.1 A key to the success of any external oversight agency is the provision of adequate resources to enable it to carry out its designated function. The enactment of appropriate laws for the creation and operation of such a body is part of achieving effectiveness, but equally important is the task of ensuring that the agency is provided with the resources which are necessary to render it fully effective across the range of functions and powers with which it is provided.

11.2 Dr Colleen Lewis in her book *Complaints Against Police – The Politics of Reform* (1999), at 180, points out that there are substantial risks involved in under-resourcing civilian oversight agencies:

Even when governments grant civilian oversight agencies the core reactive powers they need to effectively discharge their responsibilities they usually fail to adequately resource them. As a result, they are unable to operationalise what powers they do have. Inadequate reactive powers and resources places civilian oversight bodies in a subordinate position to those they are overseeing and compromises their effectiveness as accountability institutions.

11.3 The allocation of resources within external oversight agencies in other jurisdictions in Australia provides an appropriate framework for assessing the potential allocation of financial and human resources to a Western Australian specific external oversight model.

11.4 The ICAC in New South Wales is divided into an executive and four separate divisions. The divisions comprise:

- (a) Strategic Operations, including the Strategic Risk Assessment Unit;

- (b) Corruption Prevention, Education and Research;
 - (c) Legal Services; and
 - (d) Corporate Services.
- 11.5 The ICAC employed a full time equivalent of 112 staff during the 2001-2002 financial year, with a budget of approximately \$16,000,000. Extensive recruitment is currently under way for over 20 positions in the Strategic Operations and Corruption Prevention, Education and Research divisions.
- 11.6 The PIC in New South Wales has a total staff component of 94.7. This figure is made up of statutory appointments, executive appointments, operational staff and support staff. The PIC operates on an annual budget of approximately \$16,000,000.
- 11.7 The CMC in Queensland has an establishment of 285 staff and an annual budget of approximately \$30,000,000. The population of Queensland is approximately double that of Western Australia, and it is not suggested that an external oversight agency in this State should have the same resources, but if the CMC model is followed, it is clear that an increase in budget and resources will be necessary.
- 11.8 The budget for the ACC for 2001-2002 was \$11,702,000 with positions for 78 full time equivalents. The allocation for 2002-2003 is \$10,312,000 with an approved establishment of 85 full time equivalents.
- 11.9 Dr Lewis (1991) at 181, emphasises the importance of a holistic approach to external oversight. This includes both a reactive capacity and a proactive capacity: *By integrating reactive and proactive policies an holistic approach to police misconduct and associated issues becomes possible. Until this happens, civilian oversight can not be a truly effective method of*

police accountability. The proactive component of an external oversight agency necessarily incorporates research, education and prevention functions aimed at curbing corrupt practices before they become entrenched within the system. These are functions that have been embraced by and incorporated into the external oversight agencies in New South Wales and Queensland and warrant the provision of substantial resources in Western Australia.

- 11.10 Limiting capital and human resources of the agency will have the likely result that the resources available will be allocated in a manner in which the perceived high risk areas of police and public sector corruption and serious and organised crime will receive priority, and less urgent but equally important areas such as research, education and supervision of police internal investigations will be neglected.
- 11.11 The successive inquiries throughout Australia into police corruption have been positive in exposing problems within the respective police services and in leading to significant reform, much of which has been adopted in the WAPS. However, it is not to be assumed that the reform process will eliminate police corruption, and the downside of the inquiries has been that corrupt officers have become familiar with the investigative techniques of these inquiries which have been successful in the past, and adjust their conduct accordingly. It is essential, therefore, if the corruption problem is to be kept under control, that the external oversight agency be resourced in a manner which provides it with resources of the necessary capacity and sophistication to enable it to establish and maintain an acceptable level of control that meets the expectations of the community.
- 11.12 It is not convenient to endeavour to assist in identifying the appropriate organisation and numbers and levels of staff in this

Interim Report, and it is intended to provide a separate recommendation concerning the appropriate resources for an effective Western Australian external oversight agency.

CHAPTER 12

RESEARCH, EDUCATION AND THE PREVENTION OF CORRUPTION

- 12.1 The system of investigation and prevention of corruption in Australia has clearly undergone a process of evolution and development over a period commencing with the Fitzgerald Inquiry in 1987. That process has taken place in a desultory and arbitrary manner, usually based upon the most recent unpleasant exposure of police corruption. The process is obviously continuing. To ensure that it continues in a proper manner, it needs to be steered by a structured program of research and education, accompanied by the development and adoption of appropriate corruption prevention strategies. The ACC has little ability to carry out such a role as its activities are mainly tied to allegations. The Ombudsman has filled the gap to some extent by conducting investigations into matters of strategic importance and the JSC has also had a role in research into the functions of the ACC. However, there is clearly a need for the resources of the external oversight agency to be significantly expanded to enable it to have a central role in the planning and coordination of a program of research and education if it is properly to fulfil its role as an external oversight agency.
- 12.2 The pioneer of anti-corruption agencies was the Hong Kong Independent Commission Against Corruption, which was established in 1974 in response to widespread public concern with corruption in both the public and private sectors of Hong Kong. The Hong Kong Commission employs a three-pronged approach of investigation, prevention and education to fight corruption. The stated aims of the agency are to:

- (a) pursue the corrupt through effective detection, investigation and prosecution;
- (b) eliminate opportunities for corruption by introducing corruption resistant practices; and
- (c) educate the public on the evils of corruption and foster their support in fighting corruption.

This three-pronged approach is reflected in the organisational structure of the agency, which has three departments - Operations, Corruption Prevention and Community Relations.

- 12.3 It is also interesting to examine the manner in which both Queensland and New South Wales have incorporated research and education in the corruption prevention functions of their respective external oversight agencies.

QUEENSLAND

- 12.4 The *Crime and Misconduct Act 2001* espouses its purposes in s4 as being:

- (a) to combat and reduce the incidence of major crime; and
- (b) to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector.

- 12.5 In outlining how these purposes are to be achieved, it states in s5(3) *... the commission is to help units of public administration to deal effectively, and appropriately, with misconduct by increasing their capacity to do so* This effectively prescribes for the CMC to take a proactive role in developing the capacity of public sector agencies to undertake preventative activities to guard against crime and misconduct within their jurisdictions.

12.6 This preventative function of the CMC is elaborated on in s24 where it indicates that its activities should include:

- (a) analysing the intelligence it gathers in support of its investigations into major crime and misconduct; and
- (b) analysing the results of its investigations and the information it gathers in performing its functions; and
- (c) analysing systems used within units of public administration to prevent misconduct; and
- (d) using information it gathers from any source in support of its prevention function; and
- (e) providing information to, consulting with, and making recommendations to, units of public administration; and
- (f) providing information relevant to its prevention function to the general community; and
- (g) ensuring that in performing all of its functions it has regard to its prevention function; and
- (h) generally increasing the capacity of units of public administration to prevent misconduct by providing advice and training to the units and, if asked, to other entities; and
- (i) reporting on ways to prevent major crime and misconduct.

12.7 To accommodate these requirements, the CMC has its own research and prevention capability, with 12 Research Officers and 10 Prevention Officers. The CMC Annual Report for 2001-2002 identifies a number of streams of activities undertaken by this directorate, three of which would have application to the Western Australian situation:

Stream	Primary Responsibilities
Policing Research	<ul style="list-style-type: none"> • monitor and report on significant developments in the Queensland Police Service. • promote improvements in police methods of operation by conducting pilot projects and disseminating research.

	<ul style="list-style-type: none"> • conduct research on trends in, the causes of and the prevention of misconduct by police. • monitor implementation of significant CMC reports relating to Queensland Police Service.
Capacity Development	<ul style="list-style-type: none"> • monitor and report on significant developments within the jurisdiction of the CMC with respect to the capacity of external agencies to identify, deal with, and prevent instances of misconduct. • undertake (where required) detailed analyses of organisational exposure to risks of misconduct. • provide ‘targeted’ advice and assistance to external agencies aimed at enhancing their capacity to deal with misconduct. • provide ‘general audience’ advice and assistance about the rights and obligations of employers and employees with respect to actual or potential instances of misconduct.
Crime Prevention	<ul style="list-style-type: none"> • undertake research projects that can provide policy makers and/or law enforcement authorities with policy-relevant information – particularly with respect to the issues of paedophilia and drugs. • monitor “what works, what doesn’t work, what looks promising”, in terms of crime prevention strategies in Queensland. • collaborate wherever possible with the CMC’s crime function in order that research data and/or prevention advice are integrated with operational activities efficiently and effectively.

NEW SOUTH WALES

12.8 The ICAC also has research, education and prevention as important functions in its efforts against corruption in the public sector. Section

13 of the *Independent Commission Against Corruption Act 1988* sets out the principal functions of that agency and includes the following provisions that describe its functions of research, education and prevention:

- (d) to examine the laws governing, and the practices and procedures of, public authorities and public officials, in order to facilitate the discovery of corrupt conduct and to secure the revision of methods of work or procedures which, in the opinion of the Commission, may be conducive to corrupt conduct,
- (e) to instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways in which corrupt conduct may be eliminated,
- (f) to advise public authorities or public officials of changes in practices or procedures compatible with the effective exercise of their functions which the Commission thinks necessary to reduce the likelihood of the occurrence of corrupt conduct,
- (g) to co-operate with public authorities and public officials in reviewing laws, practices and procedures with a view to reducing the likelihood of the occurrence of corrupt conduct,
- (h) to educate and advise public authorities, public officials and the community on strategies to combat corrupt conduct,
- (i) to educate and disseminate information to the public on the detrimental effects of corrupt conduct and on the importance of maintaining the integrity of public administration,
- (j) to enlist and foster public support in combating corrupt conduct,
- (k) to develop, arrange, supervise, participate in or conduct such educational or advisory programs as may be described in a reference made to the Commission by both Houses of Parliament.

12.9 Of the authorised total staff of the ICAC, 24.5 are deployed on research and education. According to its Annual Report for 2001-2002, officers of the ICAC gave over 30 speeches and presentations to various organisations on its role and functions, and various projects.

In that regard, it is to be noted that the Hong Kong ICAC and the CMC issue regular electronic bulletins regarding their projects and operations.

12.10 The *Police Integrity Commission Act 1996* also prescribes a role for the PIC in education and prevention functions in ss14 (c) and 14 (d):

- (c) to make recommendations concerning police corruption education programs, police corruption prevention programs, and similar programs conducted within NSW Police or by the Ombudsman or the Independent Commission Against Corruption for NSW Police,
- (d) to advise police and other authorities on ways in which police misconduct may be eliminated.

CONCLUSION

12.11 Whilst there is no doubt that the WAPS has primary responsibility for the maintenance of its discipline, including the formulation and implementation of anti-corruption strategies, it is also clearly necessary for the external oversight agency to supervise and enhance that process. The agency will also be concerned with corruption across the public sector. The involvement of the agency in both areas will overlap, and its experience with and knowledge of integrity issues within the police service will assist in dealing with similar issues in the public sector, and *vice versa*. The agency should also adopt a role in relation to public education on corruption issues which will not only lift the level of awareness of the public of the existence of potential problems, but will also give the agency a profile which will lead to greater confidence that it is carrying out its functions of corruption investigation and prevention.

CHAPTER 13

RECOMMENDATIONS

- 13.1 In the light of the foregoing, I make the following recommendations.
- (a) the ACC be replaced by a new external oversight agency to be known as the Corruption and Crime Commission;
 - (b) the structure of the new agency be based upon that of the CMC in Queensland;
 - (c) the functions of the agency should include the investigation of serious and organised crime;
 - (d) the primary responsibility for dealing with complaints about police conduct and investigating suspected police misconduct continue to lie with the Commissioner of Police, with the new agency exercising a monitoring role, including the ability to investigate;
 - (e) primary responsibility for the investigation of official misconduct by officers of the public sector to lie with the new agency;
 - (f) the role of the Ombudsman in the oversight of investigations by the Commissioner of Police into police misconduct be carried out by the new agency;
 - (g) the new agency be constituted by a Commissioner, with provision for the appointment of an Assistant Commissioner;
 - (h) persons occupying judicial office not be excluded from appointment as Commissioner of the new agency;
 - (i) a Joint Parliamentary Committee continue to oversee the activities of the new agency;

- (j) there be appointed an Inspector, with similar powers to the Inspector of the PIC in New South Wales, to supervise the activities of the agency;
- (k) the new agency have the power to conduct hearings in public, on the same basis as the PIC in New South Wales;
- (l) the new agency have the power to make assessments and form opinions and make recommendations similar to the powers of the PIC in New South Wales;
- (m) the new agency have the capacity to conduct proactive investigations;
- (n) the new agency have the full range of powers to obtain information and documentation as are available under ss 5 and 6 of the *Royal Commission (Police) Act*;
- (o) the new agency have powers to conduct integrity tests and controlled operations, and to use assumed identity, as are available to this Commission pursuant to the *Royal Commission (Police) Act*;
- (p) the new agency to have the power to direct the Commissioner of Police and public officials to carry out investigations in a manner and at a time that the new agency directs, with the capacity for the agency to report its dissatisfaction with that process to Parliament;
- (q) the new agency be fully resourced to carry out the important functions of research and education;
- (r) the resources of the new agency be sufficient to enable it to fully discharge the functions entrusted to it.

13.2 The foregoing are the major recommendations. It is intended at a later time to present a draft of an Act to establish the new agency. This will contain full details of the proposal.

APPENDIX 1

TERMS OF REFERENCE

Commission

appointing

The Honourable Geoffrey Alexander Kennedy AO QC

to be a Royal Commission

Western Australia


Governor

*By His Excellency Lieutenant General
John Murray Sanderson, Companion of the
Order of Australia, Governor of the State
of Western Australia.*



To: **The Honourable Geoffrey Alexander Kennedy AO QC:**

By this commission under the Public Seal of the State, I, the Governor, acting with the advice and consent of the Executive Council —

1. appoint you to be a Royal Commission to inquire into and report on whether since 1 January 1985 there has been —
 - (a) corrupt conduct; or
 - (b) criminal conduct,by any Western Australian police officer;
2. declare that the phrases in clause 1(a) and (b) include, but are not limited to, the meanings given to them by section 3 of the *Anti-Corruption Commission Act 1988*;
3. require you to inquire into and report on the effectiveness of existing procedures and statutory provisions in investigating and dealing with conduct of the kind referred to in clause 1 by police officers;
4. require you to inquire into and report on whether changes in the laws of the State or in investigative or administrative procedures are necessary or desirable for the purpose of investigating or dealing with, preventing or exposing, conduct of the kind referred to in clause 1 by police officers;
5. declare that you are to inquire into and report on those matters which you consider significant to the extent practicable in the time available to the Royal Commission;
6. declare that you are to report by 31 August 2003;

7. declare that, by virtue of this commission, you may in the execution of this commission do all the acts, matters and things and exercise all the powers that a Royal Commission may lawfully do and exercise, whether under the *Royal Commissions Act 1968* or otherwise;
8. declare that section 18 of the *Royal Commissions Act 1968* applies to the Royal Commission;
9. declare that in conducting the inquiry you may —
 - (a) do anything that you consider appropriate in order to avoid prejudice to pending or prospective criminal proceedings, including taking evidence or otherwise proceeding in private, precluding the publication of evidence or deferring the taking of evidence; and
 - (b) during the course of the inquiry refer any matter to an appropriate authority, where you consider that delaying that action until the completion of your report would be undesirable;
10. declare that in your report you may make any recommendations you consider appropriate.

GIVEN under my hand and the Public Seal of the State
at Perth on **12 December** 2001.

By command of the Governor,



Premier.

GOD SAVE THE QUEEN!

APPENDIX 2

LEGISLATION REFERRED TO IN THIS REPORT

Anti-Corruption Commission Act 1988

Crime and Misconduct Act 2001 (Qld)

Criminal Code

Crime Commission Act 1997 (Qld)

Criminal Justice Act 1989 (Qld)

Complaints Against Police Bill 1984

Independent Commission Against Corruption Act 1988 (NSW)

Local Government Act 1995

Measures to Combat Serious and Organised Crime Act 2001 (Cth)

New South Wales Crime Commission Act 1985 (NSW)

Official Corruption Commission Act 1988

Ombudsman Act 2001 (Qld)

Parliamentary Commissioner Act 1971

Parliamentary Commissioner Amendment Act 1984

Parliamentary Commissioner Amendment Act 1996

Police Act 1892

Police Act 1990 (NSW)

Police (Complaints and Disciplinary Proceedings) Act 1985 (SA)

Police Integrity Commission Act 1996 (NSW)

Public Sector Management Act 1994

Royal Commissions Act 1968

Royal Commission (Police) Act 2002

Statutory Corporations (Liability of Directors) Act 1996

APPENDIX 3

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APPENDIX 4

INDIVIDUALS OR ORGANISATIONS WHICH MADE A SUBMISSION TO THE ROUND TABLE CONFERENCE

The Anti- Corruption Commission

Ms Jennifer Cranny, member of the public

Mr Chris Cull, Australasian Intelligence and Investigation Services

Mr Robert Falconer, former Commissioner of Police for Western Australia

Ms Julie Fry, member of the public

Dr Colleen Lewis, Head, Criminal Justice and Criminology, Monash University, Victoria

Parliamentary Commissioner for Administrative Investigations, Western Australia

Mr Tim Prenzler, School of Criminology and Criminal Justice, Griffith University, Queensland

Mr Shayne Sherman, member of the public

Mrs S Smith, Acting Chief Executive Officer, Shire of Busselton

Western Australia Police Service

WA Police Union of Workers

APPENDIX 5

LIST OF PARTICIPANTS IN ROUND TABLE CONFERENCE

Inspector Louise Ball, Royal Commission Unit, WAPS

Mr Emi Barzotto, Chief of Staff, Office of the Minister for Police

Mr Brendan Butler SC, Chairperson, Crime and Misconduct Commission, Queensland

Mr Matthew Byrne, Director Operations/General Counsel, Police Royal Commission

Mr Peter Byrne, Principal Policy Officer, Office of the Director General, Department of Premier and Cabinet

Mr Graeme Charlwood, Chief Executive Officer, Anti-Corruption Commission

Mr Michael Dean, General President, WA Police Union of Workers

Mr Donald Doig, Commissioner, Anti-Corruption Commission

Associate Professor Irene Froyland, Sellenger Centre for Police Research, Edith Cowan University

Mr Bob George, Commissioner, Anti-Corruption Commission

Mr Peter Hastings QC (Chairman), Senior Counsel Assisting, Police Royal Commission

Mr Neil Hunter, Executive Director, Office of the Public Sector Standards Commissioner

Mr Richard Hooker, Barrister, Wickham Chambers, representing WAPS

Mr Graeme Lienert, Assistant Commissioner, Professional Standards, WAPS

Ms Fiona Low, Director of Legal Services, Office of the Director of Public Prosecutions

Mr Frank Morgan, Director, Crime Research Centre, University of Western Australia

Dr Neil Morgan, Director of Studies, Crime Research Centre, University of Western Australia

Ms Lauren Netto, Research Officer, Research, Policy and Reform Unit, Police Royal Commission

Mr Terence O'Connor QC, Chairman, Anti-Corruption Commission

Ms Deirdre O'Donnell, Parliamentary Commissioner for Administrative Investigations, Western Australia

Mr Kieran Pehm, Deputy Commissioner, Independent Commission Against Corruption, NSW

Hon Kevin Prince, Barrister, representing WA Police Union of Workers

Hon Michelle Roberts MLA, Minister for Police

Mr Glenn Ross, Manager, Research, Policy and Reform Unit, Police Royal Commission

Mr Timothy Sage, Assistant Commissioner, Police Integrity Commission, NSW

Mr Wayne Snell, Co-ordinator, Justice and Police Studies, Edith Cowan University

Hon Derrick Tomlinson MLC, Chairman of the Joint Standing Committee on the Anti-Corruption Commission

Mr Roger Watson, Assistant Parliamentary Commissioner for Administrative Investigations, Western Australia

Mr Eric Wood, Policy Officer, Office of the Minister for Police