Joint Standing Committee on the Corruption and Crime Commission

The efficiency and timeliness of the current appointment process for Commissioners and Parliamentary Inspectors of the CCC

Report No. 31
November 2016
Committee Members

Chairman
Hon. Nick Goiran, BCom, LLB, MLC
Member for the South Metropolitan Region

Deputy Chairman
Mr Peter Watson, MLA
Member for Albany

Members
Hon. Adele Farina, BA, LLB, MLC
Member for the South West Region

Mr Nathan Morton, BSc, GradDipEd, MLA
Member for Forrestfield

Committee Staff

Principal Research Officer
Dr David Worth, DipAeroEng, MBA, PhD

Research Officer
Ms Jovita Hogan, BA (Hons)

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Joint Standing Committee on the Corruption and Crime Commission

The efficiency and timeliness of the current appointment process for Commissioners and Parliamentary Inspectors of the CCC

Report No. 31

Presented by
Hon Nick Goiran, MLC and Mr Peter Watson, MLA

Laid on the Table of the Legislative Assembly and Legislative Council on 15 November 2016
Chairman’s Foreword

The Joint Standing Committee commenced this Inquiry primarily in response to its concerns regarding the timeliness of the five appointment processes in which it has participated during the 39th Parliament. For example, during interviews for a recent appointment, the Committee was told by both people that they had had no contact with any agency since they had submitted their expressions of interest for the position more than nine months previously.

The Committee has an important role at the end of the appointment process for appointments to the positions of Commissioner of the Corruption and Crime Commission (CCC), Acting Commissioner, the Parliamentary Inspector of the Corruption and Crime Commission (PICCC) and Acting PICCC. Its role is provided for in sections 9, 14, 189 and 193 of the Corruption, Crime and Misconduct Act 2003 (CCM Act). For such appointments, the CCM Act requires the Premier to recommend to the Governor the appointment of a person who has a majority and bipartisan support from the Committee.

The Joint Standing Committee sought submissions to this Inquiry from:

- the Premier, Hon Colin Barnett, MLA;
- current and previous incumbents as Commissioners, Acting Commissioners, Parliamentary Inspectors and Acting Parliamentary Inspectors;
- anti-corruption agencies in all other Australian jurisdictions;
- inspectors of anti-corruption agencies in all other Australian jurisdictions; and
- the parliamentary committees that oversee the anti-corruption agencies in all other Australian jurisdictions.

The PICCC, Hon Michael Murray QC, and the CCC Commissioner, Hon John McKechnie QC, both of whom have had recent experience with the appointment process, provided important submissions to this Inquiry. Both do not support the current process that requires a nominating committee. The Committee found that Western Australia is the only Australian jurisdiction that utilises a nominating committee tasked with supplying a list of suitable candidates to the Executive on who should fill the key roles in or overseeing its anti-corruption agency.
The Committee has made two similar recommendations to those it has made in earlier reports. Specifically, it has recommended that:

i. The Attorney General prepare an amendment to the Corruption, Crime and Misconduct Act 2003 to allow for the appointment of a Deputy or Assistant Commissioner to assist the Commissioner in the day to day work of the Corruption and Crime Commission; and

ii. The Attorney General prepare an amendment to sections 9(3a)(a) and 9(3b) of the Corruption, Crime and Misconduct Act 2003 to:

1. remove the role of a nominating committee in the appointment process for Commissioners and Parliamentary Inspectors; and

2. in lieu thereof, mandate that the Premier propose one name from a list of three people to the Committee for its bipartisan and majority support.

The Committee has concluded this report with two new recommendations being that:

i. The Premier, with the assistance of the Director General of the Department of Premier and Cabinet, undertake a review of the internal Departmental processes for managing the appointments of Commissioners and Parliamentary Inspectors, with the aim of ensuring that they are more timely and efficient; and

ii. The review by the Premier include whether the function of recommending and managing the appointment of Commissioners and Parliamentary Inspectors should be transferred to the Attorney General.

I would like to thank the Chief Justice, Hon Wayne Martin AC, QC, for his detailed submission and supplementary submission which he provided at an early stage of the Inquiry. The Committee received a legal opinion from Mr Ken Pettit SC primarily on constitutional matters and their impact on the membership of the nominating committee within the current appointment process.

I also wish to acknowledge the assistance provided by agencies in other jurisdictions, eight of which in five jurisdictions provided submissions to the Committee’s Inquiry. The Committee also held six briefings with commissioners or inspectors in these jurisdictions.
This Inquiry was conducted during a very busy time for the Committee and so I would like to thank my fellow Committee Members for their input on this report: the Committee’s Deputy Chairman, the Member for Albany, Mr Peter Watson MLA; the Member for Forrestfield, Mr Nathan Morton MLA and the Member for the South West Region, Hon Adele Farina MLC. The Committee members were ably supported by the Committee’s Secretariat, Dr David Worth and Ms Jovita Hogan.

HON NICK GOIRAN, MLC
CHAIRMAN
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Ministerial Response

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

Finding 1
Of the 22 appointments to the roles of Commissioner, Acting Commissioner, Parliamentary Inspector and Acting Parliamentary Inspector during the past 12 years, just three appointees have been women.

Finding 2
The definition of ‘bipartisan support’ in the Corruption, Crime and Misconduct Act 2003 has not proved to be of concern to the current Committee.

Finding 3
It continues to be unnecessary to amend the Corruption, Crime and Misconduct Act 2003 to mandate a response from the Joint Standing Committee to any correspondence from the Premier in regard to proposed appointments.

Finding 4
Despite amendments in regard to remuneration for a Commissioner made to the then-Corruption and Crime Commission Act 2003, it is too early to judge whether this has increased the number of expressions of interest for the role of Commissioner.

Finding 5
The issue of the remuneration of ex-judges serving as the Commissioner has been resolved with the amendments included in the Corruption and Crime Commission Amendment (Misconduct) Act 2014.

Finding 6
None of the Commissioners have returned to judicial office since the Corruption and Crime Commission was established in January 2004.

Finding 7
None of the Parliamentary Inspectors have returned to judicial office since January 2004.

Finding 8
Sections 9(3b) and 14(2a) of the Corruption, Crime and Misconduct Act 2003 still require the position of Acting Commissioner to be nationally advertised when the current office holder is seeking to have their contract extended for another term.
Finding 9
There has not been a comprehensive full review of the Corruption, Crime and Misconduct Act 2003 since that of Ms Gail Archer SC in February 2008.

Finding 10
The Parliamentary Inspector (PICCC) recommends that the current process for appointing a PICCC or Acting PICCC be improved by removing the nominating committee and the requirement that it provide a list of three nominees to the Premier.

Finding 11
The Parliamentary Inspector prefers that the process for appointing a PICCC or Acting PICCC be that the Premier consult upon a proposed recommendation, including with the Chief Justice, before the recommendation is submitted to the Parliament via the Joint Standing Committee.

Finding 12
The creation of the role of a Deputy Commissioner is supported by the Commissioner, the Parliamentary Inspector, and multiple past Acting Commissioners, and would be consistent with the models used in the anti-corruption agencies in New South Wales, Victoria, Queensland and South Australia.

Recommendation 1
The Attorney General prepare an amendment to the Corruption, Crime and Misconduct Act 2003 to allow for the appointment of a Deputy or Assistant Commissioner to assist the Commissioner in the day to day work of the Corruption and Crime Commission.

Finding 13
In New South Wales, the Independent Commission Against Corruption (ICAC) Commissioner and Inspector of the ICAC are appointed by the Governor after a nominee is proposed by the Premier to the NSW Parliament’s Committee on the ICAC, which has the power to veto an appointment. The Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, however, does not have a role in the appointment of the Police Integrity Commissioner.

Finding 14
The appointment in Victoria of the Commissioner of the Independent Broad-based Anti-corruption Commission (IBAC) and the Inspector of the Victorian Inspectorate are Governor in Council appointments on the recommendation of a Minister. The recommendation is subject to a time-limited veto power by the Parliament of Victoria’s IBAC Committee.
Finding 15 Page 31
In Queensland, the Parliamentary Crime and Corruption Committee (PCCC) undertakes on behalf of the Speaker the selection process for the Parliamentary Crime and Corruption Commissioner. The Attorney-General appoints the senior positions at the Crime and Corruption Commission after the nominees are interviewed by the PCCC in order to obtain its bipartisan support.

Finding 16 Page 33
The appointment in South Australia of the Independent Commissioner Against Corruption is a Governor in Council appointment made on the recommendation of the Attorney-General subject to a time-limited approval process by the South Australian Parliament’s Statutory Officers Committee.

Finding 17 Page 35
The appointment in Tasmania of the Integrity Commissioner and the Parliamentary Standards Commissioner are Governor in Council appointments made on the recommendation of the Attorney-General after consultation with the Joint Standing Committee on Integrity.

Finding 18 Page 35
Western Australia is the only Australian jurisdiction that utilises a nominating committee tasked with supplying a list of suitable candidates to the Executive on who should fill the role of inspector and commissioner of its anti-corruption agency.

Finding 19 Page 38
The legislation establishing the previous State anti-corruption agencies have included, since 1988, a form of selection or nominating committee involving the Chief Justice and the Chief Judge.

Finding 20 Page 40
The Corruption and Crime Commission Bill 2003 proposed doing away with a nominating committee and intended to make the appointment of a Commissioner or Parliamentary Inspector an Executive decision, after consultation by the Attorney General with leaders of the other political parties represented in the Parliament.

Finding 21 Page 43
The Chief Justice and the Chief Judge do not support the inclusion of serving judicial officers in the appointment process for Commissioners and Parliamentary Inspectors, for reasons including the undesirability of involving judges in executive functions that are unrelated to the work of the courts.
Finding 22
There are no limits imposed by Chapter III of the Constitution of the Commonwealth that impact on section 3 of the Corruption, Crime and Misconduct Act 2003 that requires the Chief Justice and the Chief Judge of the District Court to participate in a nominating committee.

Finding 23
No legislative amendments to the Corruption, Crime and Misconduct Act 2003 are required in order to keep serving judges involved in the nominating committee process, however it would be prudent to include them in this process by ad hoc appointment in which case their consent would also be required, further minimizing any risk of offending the Kable principle.

Finding 24
The process in Western Australia for appointing a Royal Commissioner is uncomplicated and efficient. It does not include a nominating committee.

Recommendation 2
The Attorney General prepare an amendment to sections 9(3a)(a) and 9(3b) of the Corruption, Crime and Misconduct Act 2003 to:

1. remove the role of a nominating committee in the appointment process for Commissioners and Parliamentary Inspectors; and

Finding 25
The greatest delay in the current processes of appointing Commissioners and Parliamentary Inspectors is the time taken by the Premier’s office to process the recommendations received from the nominating committee to providing the information and preferred candidate to the Joint Standing Committee for its consideration.

Recommendation 3
The Premier undertake a review of the internal processes for managing the appointments of Commissioners and Parliamentary Inspectors, with the aim of ensuring that they are more timely and efficient.
Chapter 1

Background to this report

For the appointment of Commissioners and Parliamentary Inspectors, the CCM Act requires the Premier to recommend to the Governor the appointment of a person who has a majority and bipartisan support from the Joint Standing Committee after receiving three nominees from a nominating committee chaired by the Chief Justice.

Introduction

The Corruption, Crime and Misconduct Act 2003 (CCM Act) stipulates the process to be followed for appointments to the positions of Commissioner of the Corruption and Crime Commission (CCC) and the Parliamentary Inspector of the Corruption and Crime Commission (PICCC). The responsibilities of the Joint Standing Committee in relation to the appointments are set out in section 9 of the CCM Act, in relation to the appointment of the Commissioner, and section 189 in regard to the appointment of the PICCC. For both appointments, the CCM Act requires the Premier to recommend to the Governor the appointment of a person who has a majority and bipartisan support from the Joint Standing Committee on the Corruption and Crime Commission.

The Joint Standing Committee sought submissions to this Inquiry from:

- the Premier, Hon Colin Barnett, MLA;
- current and previous incumbents as Commissioners, Acting Commissioners, Parliamentary Inspectors and Acting Parliamentary Inspectors;
- anti-corruption agencies in all other Australian jurisdictions;
- inspectors of anti-corruption agencies in all other Australian jurisdictions; and
- the parliamentary committees that oversight the anti-corruption agencies in all other Australian jurisdictions.

The Committee commenced this Inquiry primarily in response to its concerns regarding the timeliness of appointments in which it has participated. For example, during interviews for a recent appointment, the Committee was told by both people that they

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2 For the appointment of the CCC Commissioner, see section 9(3a)(b) of the CCM Act.
had had no contact with any agency since they had submitted their expressions of interest for the position more than nine months previously.

**Terms of reference**

The Committee adopted the Inquiry’s terms of reference on 12 May 2016. They are that the Committee inquire into the efficiency and timeliness of the current appointment process for Commissioners and Parliamentary Inspectors of the CCC, including enquiring into:

a. the current operation of sections 9, 14, 189 and 193 of the *Corruption, Crime and Misconduct Act 2003*;

b. the role played by each of the agencies in discharging their responsibilities under sections 9, 14, 189 and 193 of the *Corruption, Crime and Misconduct Act 2003*; and

c. alternate models used for similar appointments in other jurisdictions.

**The Committee’s previous report on this matter**

The Committee has previously reported on a similar issue to that at the centre of this inquiry in its Report No. 15, *Ensuring the timely appointment of a new Corruption and Crime Commissioner*, which was tabled on 14 August 2014. That report focused primarily on the delays in the appointment of a new Commissioner to replace Mr Roger Macknay QC, and found that the Commissioner’s remuneration was a significant issue. The Government accepted and implemented the Committee’s recommendation to amend the then-*Corruption and Crime Commission Act 2003* (CCC Act) relating to the Commissioner’s remuneration.

In preparing its Report No. 15, the Committee gathered evidence from the Chief Justice, Hon Wayne Martin AC, QC, on issues in the operation of the then-CCC Act in relation to the role of the nominating committee. Justice Martin was appointed Chief Justice in May 2006 and has since been the Chair of the nominating committee required by the Act. He suggested to the Committee that removing the role of the

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4 The *Corruption and Crime Commission Act 2003* was amended in December 2014, after the Committee’s Report 15 had been tabled, and renamed as the *Corruption, Crime and Misconduct Act 2003*. 
nominating committee might streamline the appointment process. The Committee made such a recommendation in Report No. 15 and proposed instead the Government provide the name of a suitable Commissioner to the Joint Standing Committee for its majority and bipartisan support.

The Government did not act on this recommendation when amending the CCC Act in late 2014. Subsequent to the tabling of that report, the Committee has been involved in a further four appointments to fill vacancies in both the Corruption and Crime Commission and the Office of the PICCC, where issues of timeliness were again evident. The timings of the processes that the Committee has participated in are included in Chapter Five below.

The current model for appointments under the CCM Act

Section 9 of the Corruption, Crime and Misconduct Act 2003, as it applies to the process of the appointment of a Corruption and Crime Commissioner, provides the process to be followed:

(3) The Commissioner is to be appointed on the recommendation of the Premier by the Governor by commission under the Public Seal of the State.

(3a) Except in the case of the first appointment, the Premier is to recommend the appointment of a person —

(a) whose name is on a list of 3 persons eligible for appointment that is submitted to the Premier by the nominating committee; and

(b) who, if there is a Standing Committee, has the support of the majority of the Standing Committee and bipartisan support.

(3b) Before making nominations under subsection (3a) the nominating committee shall advertise throughout Australia for expressions of interest.
Chapter 1

(4) Except in the case of the first appointment, before an appointment is made under subsection (3), the Premier must consult with —

(a) the Standing Committee; or

(b) if there is no Standing Committee, the Leader of the Opposition, and the leader of any other political party with at least 5 members in either House.\(^7\)

The process for appointing Acting Commissioners is the same as that for Commissioners except section 14 of the CCM Act allows for the process to be completed prospectively:

(2a) The process for nomination and consultation with regard to the appointment of a person to act in the office of Commissioner shall be the same as that for the appointment of the Commissioner except that —

(a) the process may be carried out prospectively even though the necessity for an appointment has not arisen; and

(b) it may be carried out with respect to a number of persons each of whom is eligible to be appointed should the necessity arise; and

(c) any bipartisan support for a person lapses on the expiration of 12 months from the date of the resolution.\(^8\)

The Committee is not aware that a prospective process for Acting Commissioners has ever been undertaken by the nominating committee.

Section 189 of the CCM Act establishes the process for appointing a PICCC:

(1) The Parliamentary Inspector is to be appointed on the recommendation of the Premier by the Governor by commission under the Public Seal of the State.

(2) Except in the case of the first appointment, the Premier is to recommend the appointment of a person —

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(a) whose name is on a list of 3 persons eligible for appointment that is submitted to the Premier by the nominating committee; and

(b) who, if there is a Standing Committee, has the support of the majority of the Standing Committee and bipartisan support.9

Section 193(2a) of the CCM Act requires the process for the appointment of an Acting PICCC to be the same as that for the PICCC, with some additional elements:

(a) the process may be carried out prospectively even though the necessity for an appointment has not arisen; and

(b) it may be carried out with respect to a number of persons each of whom is eligible to be appointed should the necessity arise; and

(c) any bipartisan support for a person lapses on the expiration of 12 months from the date of the resolution.10

Appointments in relation to Acting Commissioners and Acting PICCCs are governed by section 14 and section 193 of the CCM Act with similar processes to that for the Commissioner and PICCC, except these positions are not nationally advertised.

As the Committee noted in its Report 15, a key element of the appointment process is section 9(3a)(a) of the CCM Act which requires the establishment of a nominating committee for all appointments to the position of Commissioner, Acting Commissioners, PICCC and Acting PICCCs. Section 3(1) of the CCM Act requires the nominating committee to consist of:

a) the Chief Justice;

b) the Chief Judge of the District Court; and

c) a person appointed by the Governor to represent the interests of the community.11

Another matter in regard to the current operation of appointment processes in the CCM Act

On 11 April 2016, in reporting on the outcome of the Committee’s review of a recommended candidate for Acting Commissioner, the Committee wrote to the

Chapter 1

Premier and noted its concern that, since the formation of the Commission in early 2004, it wasn’t aware of any female legal practitioners who had been recommended for appointment as Commissioner or Acting Commissioner by the previous nominating committees. The Premier had previously written to the Committee refusing to provide the list of the eight candidates the nominating committee had considered for appointment to the position of Acting Commissioner.

The Premier responded to the Committee’s concerns two months later:

> I am unable to comment on the recommendations of the Nominating Committee, some of which were made before my time as Premier. However, I understand that the CCC has had at least two female Acting Commissioners. Ms Gail Archer SC served as the Acting Commissioner of the CCC from 2008 to 2011, and Ms Michelle Hullett served as Acting Commissioner of the CCC in 2011.

Since its establishment in January 2004, the CCC has had four Commissioners and nine Acting Commissioners. In the same period there have been three PICCCs and six Acting PICCCs. Of these 22 appointments, three have been women (14%).

This ratio broadly reflects the situation in Western Australia for women barristers and judicial officers. For example, the Western Australian Bar Association (WABA) membership of 207 barristers includes 44 women (21%). There are two women listed as a Senior Counsel (SC) or Queen’s Counsel (QC) from the 35 WABA SCs and QCs (6%). In the District Court, six of the 28 judges are female (21%). In the Supreme Court, three of the 21 Judges are female (14%).

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12 For this appointment the Committee was chaired by the Deputy Chairman as the Chairman had recused himself from the appointment process.
14 Hon Colin Barnett MLA, Premier, Letter, 1 June 2016.
15 Mr Kevin Hammond AO (December 2003 - March 2007); Hon Len Roberts-Smith RFD QC (June 2007 - January 2011); Mr Roger Macknay QC (November 2011 - April 2014) and Hon John McKechnie QC (from April 2015).
16 Ms Moira Rayner (July 2004 - August 2005); Mr Christopher Shanahan SC (August 2005 - August 2010 and April 2014 – June 2016); Hon Neil McKerracher QC (December 2006 - October 2007); Hon John Dunford QC (April 2007 to October 2008); Ms Gail Archer SC (April 2008 – February 2011); Ms Michelle Hullett (January - August 2011); Mr Mark Herron (January 2011 - June 2013); Mr Neil Douglas (July 2012 – June 2015); and Mr Scott Ellis (from July 2016).
17 Mr Malcolm McCusker AO, CVO QC (January 2004 - December 2008); Hon Christopher Steytler AO, QC (February 2009 - June 2012) and Hon Michael Murray QC (from January 2013).
18 Hon Graeme Scott QC (December 2005 - 2008); Justice Ken Martin QC (April 2008 – February 2009); Mr Christopher Zelestis QC (December 2009 - December 2012); Mr Craig Colvin SC (from June 2012); Mr Robert Meadows QC (January 2013 – December 2015); and Mr Matthew Howard SC (from January 2016).
Chapter 1

Finding 1
Of the 22 appointments to the roles of Commissioner, Acting Commissioner, Parliamentary Inspector and Acting Parliamentary Inspector during the past 12 years, just three appointees have been women.

The Committee is of the view that the process of future appointments under the *Corruption, Crime and Misconduct Act 2003* should give greater consideration to the appointment of women.


Chapter 2

Reviews of the past experience of the appointment process

*The complexity of the current model is inefficient, cumbersome and may be costly in terms of public expenditure and public resources. Hon John McKechnie QC, CCC Commissioner.*

Archer statutory review of the CCC Act

In February 2008 Ms Gail Archer SC, published her statutory review of the *Corruption and Crime Commission Act 2003* (CCC Act). Chapter 8 of the review addressed issues around the appointment process for Commissioners and PICCCs. The review addressed:

- whether the eligibility for appointment to the position of Commissioner and PICCC should be relaxed;
- whether the Joint Standing Committee should have a power to veto the proposed appointment of a Commissioner or PICCC;
- the meaning of ‘bipartisan support’ in terms of the Joint Standing Committee considering recommendations for appointment from the Premier;
- whether the CCC Act should be amended to provide a time limit within which the Committee must consider nominations for appointment;
- whether there should not be a requirement to advertise for expressions of interest in the positions;
- the difficulty of the nominating committee in always being able to identify three suitable candidates for a vacancy and forwarding ‘make weights’ to comply with its statutory requirement;
- a suggestion that sitting judges should be exempt from security clearances when appointed as PICCC or Commissioner;

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Chapter 2

- the Commissioner’s remuneration level especially where the proposed appointee is, or had been, a judge of more than ten years standing.\(^2\)

Ms Archer made the following recommendations regarding the appointment process provided for at that time in the CCC Act:

- **Recommendation 14- The definition of ‘bipartisan support’**
  That the definition of bipartisan support be clarified.

- **Recommendation 15- Response to appointment nomination**
  That the Act be amended to require the JSCCCC to respond to a nomination for appointment within 14 days, or within a further 30 days if it notifies the Minister [Premier] within the first 14 day period that it requires more time.

- **Recommendation 16- Number of candidates for the position of CCC Commissioner**
  That section 9(3a) of the Act be amended to require the nominating committee to provide a list of \textit{up to} three persons eligible for appointment. (emphasis added)

- **Recommendation 17- Remuneration of ex-judges serving as the CCC Commissioner**
  Clause 3(1) of Schedule 2 of the Act be amended by adding the words ‘Subject to clause 4(1) at the beginning of clause 3(1)’.

- **Recommendation 18- Reappointment as a judge after serving as the CCC Commissioner**
  That clause 4 of Schedule 2 be amended so as to ensure that:
  (a) a person who was a judge immediately before being appointed Commissioner is entitled to be reappointed as a judge at the expiration of that person’s term of office as Commissioner, and
  (b) the person’s service as Commissioner does not affect the person’s rank, title, status or other rights or privileges as the holder of that judicial office.

- **Recommendation 19- Ex-judge serving as the Parliamentary Inspector**
  That clause 4 of Schedule 3 be amended so as to ensure that, where a person was a judge immediately before being appointed a PICCC, the person’s service as PICCC does not affect the person’s rank, title, status or other rights or privileges as the holder of that judicial office.

- **Recommendation 20- Locating candidates for the position of Acting CCC Commissioner**

\(^{2}\) Ibid.
That the Act be amended to permit the reappointment of Acting Commissioners and Assistant Commissioners without the need to advertise for expressions of interest.24

The outcome of the Archer Report recommendations

The JSCCCC in the 38th Parliament tabled its Report 13, *Analysis of Recommended Reforms to the Corruption and Crime Commission Act 2003*, in February 2011.25 This report was a summary of the responses of the Committee, the CCC and the Parliamentary Inspector to each of the 58 recommendations set out in Ms Archer’s report. It was prepared in consultation with the then-Commissioner and senior staff members of the CCC, the then-Parliamentary Inspector, and Ms Archer SC who, subsequent to the tabling of her report, had served as an Acting Commissioner of the CCC.26

**Recommendation 14- The definition of ‘bipartisan support’**

The JSCCCC of the 38th Parliament was opposed to this recommendation and believed that the existing definition of ‘bipartisan support’ was both appropriate and proper.27

**Finding 2**

The definition of ‘bipartisan support’ in the *Corruption, Crime and Misconduct Act 2003* has not proved to be of concern to the current Committee.

**Recommendation 15- Response to appointment nomination**

The JSCCCC of the 38th Parliament opposed this recommendation as it regarded it as unnecessary.28

During the 39th Parliament, the Committee has completed its part of the five appointment processes it has participated in within three weeks of receiving correspondence from the Premier.

**Finding 3**

It continues to be unnecessary to amend the *Corruption, Crime and Misconduct Act 2003* to mandate a response from the Joint Standing Committee to any correspondence from the Premier in regard to proposed appointments.

24 Ibid.
26 Ibid, pix.
Chapter 2

Recommendation 16- Number of candidates for the position of CCC Commissioner

The JSCCCC of the 38th Parliament made no comment regarding this recommendation.29

The issues giving rise to this recommendation remain a concern to the Committee despite the amendments made to the Act in regard to remuneration for a Commissioner. In material provided to the Premier recommending the appointment of Hon John McKechnie QC as Commissioner, the Chief Justice reported that he had received just two expressions of interest, one of which was from a legal practitioner who was not considered to be suitable for appointment to the position.30

Finding 4
Despite amendments in regard to remuneration for a Commissioner made to the then-Corruption and Crime Commission Act 2003, it is too early to judge whether this has increased the number of expressions of interest for the role of Commissioner.

This is an issue which will require ongoing review by the JSCCCC in the 40th Parliament.

Recommendation 17- Remuneration of ex-judges serving as the CCC Commissioner

The JSCCCC of the 38th Parliament supported this recommendation.31

Finding 5
The issue of the remuneration of ex-judges serving as the Commissioner has been resolved with the amendments included in the Corruption and Crime Commission Amendment (Misconduct) Act 2014.

Recommendation 18- Reappointment as a judge after serving as the CCC Commissioner

The JSCCCC of the 38th Parliament supported this recommendation, subject to an observation offered by the Parliamentary Inspector being catered for.32

None of the Commissioners have returned to judicial office since the CCC was established in January 2004. The current Committee has, therefore, had no experience of this issue and it is outside of the scope of this Inquiry. A future committee may wish to expressly inquire into this issue.

29 Ibid.
Finding 6
None of the Commissioners have returned to judicial office since the Corruption and Crime Commission was established in January 2004.

Recommendation 19- Ex-judge serving as the Parliamentary Inspector
As with Recommendation 18, the JSCCCC of the 38th Parliament supported this recommendation, subject to the Parliamentary Inspector’s caveat whether a Parliamentary Inspector would be entitled, at the expiration of his term, to be re-appointed as President of the Court of Appeal, which “could plainly not be appropriate.”

Similar to recommendation 18, none of the Parliamentary Inspectors have returned to judicial office since January 2004. The current Committee has, therefore, had no experience of this issue and it is outside of the scope of this Inquiry. A future committee may wish to expressly inquire into this issue.

Finding 7
None of the Parliamentary Inspectors have returned to judicial office since January 2004.

Recommendation 20- Locating candidates for the position of Acting Commissioner
The JSCCCC of the 38th Parliament supported this recommendation.

The CCC Act was not amended to reflect this recommendation. This matter has not proved to be of concern to the current Committee and does not seem to have been a factor in terms of the timeliness of recent appointment processes.

Finding 8
Sections 9(3b) and 14(2a) of the Corruption, Crime and Misconduct Act 2003 still require the position of Acting Commissioner to be nationally advertised when the current office holder is seeking to have their contract extended for another term.

Finding 9
There has not been a comprehensive full review of the Corruption, Crime and Misconduct Act 2003 since that of Ms Gail Archer SC in February 2008.

Submission from the CCC Commissioner
The submission provided by the CCC Commissioner, Hon John McKechnie QC, does not support the current appointment model used for Commissioners and Acting

33 Ibid, p22.
34 Ibid, p23.
Commissioners. The Commissioner submits that the complexity of the current model “is inefficient, cumbersome and may be costly in terms of public expenditure and public resources.”

The Commissioner, whose own appointment on 2 April 2015 was nearly one year after the resignation of the previous Commissioner, has recent personal experience of the appointment process. Mr McKechnie says that, in practice, the current requirements under the CCM Act for assembling a nominating committee, and then a review by the Premier; and consulting with the Joint Standing Committee have recently proven to prolong the appointment of a Commissioner at each stage of the process.

Mr McKechnie highlights a number of characteristics that are unique to Western Australia’s appointment process for the anti-corruption Commissioner compared to other jurisdictions:

a. the assembling of a nominating committee which includes current members of the judiciary to consider prospective appointees;

b. the inclusion of the Premier in the process; and

c. a requirement that there be a list of three prospective appointees.

The requirement for three prospective appointees

The requirement for the nominating committee to provide three prospective appointees to the Premier is of particular concern in terms of timeliness. All other jurisdictions require a single nomination only. This matter was considered in 2008 by Ms Gail Archer SC in her Review of the Corruption and Crime Commission Act 2003. It was submitted to that Review that it may not always be possible for the nominating committee to identify at that time three suitable candidates and, if that occurs, the nominating committee would be required to put forward ‘make weights’ to comply with its statutory requirement. The review found that “it is clearly unsatisfactory that the committee may be required to include names of persons who have no prospects of being the successful candidate” and made the recommendation that “the nominating committee provide a list of up to (emphasis added) three persons eligible.”

36 Ibid.
37 The exception being NSW, where the Premier is the responsible Minister under the Independent Commission Against Corruption Act 1988.
40 Ibid, pp71-72.
This practice was confirmed by the Chief Justice, Hon Wayne Martin AC, QC, when giving evidence to a previous Inquiry by the Committee. The Chief Justice said:

If I can be brutally frank, there have been occasions upon which we have rounded up the usual suspects to make up the three, confident in the expectation that one was significantly preferable to the others. We would never put forward a name if we could not live with that person being appointed, but, to be brutally frank, there have been names put forward from people who would not expect to be appointed who have agreed to go forward on that basis.41

The Joint Standing Committee made a recommendation on the matter of the nominating committee and the number of candidates proposed for appointment in Recommendation 4 of its Report No. 15, Ensuring the timely appointment of a new Corruption and Crime Commissioner:

The Attorney General prepare an amendment to sections 9(3a)(a) and 9(3b) of the Corruption and Crime Commission Act 2003 to remove the role of a nominating committee and allow the Government to propose one name of a suitable Commissioner to the Joint Standing Committee for its consideration.42

The Attorney General responded to the Committee’s recommendation by noting it and saying that consideration would be given to its inclusion in a future package of amendments to be put to Cabinet.43 However there were no such amendments included in the Corruption and Crime Commission Amendment (Misconduct) Bill 2014 or the subsequently amended Corruption, Crime and Misconduct Act 2003.

A discussion on the need for a nominating committee in the appointment process, including a submission from the Chief Justice and a separate legal opinion, is included in Chapter Four below. This discussion also notes the usefulness of the current practice of the Committee being provided with the list of three names given to the Premier by the nominating committee.

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41 Hon Wayne Martin AC, QC, Chief Justice, Supreme Court of Western Australia, Closed Hearing, Transcript of Evidence, 18 June 2014, p8.


Chapter 2

Commissioner’s support for a Deputy Commissioner position

The CCC Commissioner submits that a feature missing under the current requirements of the CCM Act are specific time limits for each stage of the appointment process; that a person may be proposed for appointment on more than one occasion; as well as an amendment to include the position of a Deputy Commissioner, “who may act both as Commissioner during any period of incapacity or vacancy and who may also perform functions under the CCM Act as directed by the Commissioner.”

The Committee also recommended the creation of the position of Deputy Commissioner in its Report 15. The Commissioner argues that this position would allow immediate assistance during any vacancy or incapacity. It would also provide a mechanism for succession planning for the end of the Commissioner’s tenure. The Commissioner points to the provisions of section 9(6) of the Independent Commissioner Against Corruption Act 2012 (SA) as an example of the form this position might take.

The Committee notes that the Corruption and Crime Commission Amendment Bill 2012 did provide for both the creation of a position of an Assistant Commissioner, as well as removing the role of the nominating committee, but the Bill lapsed at the prorogation of Parliament on 14 December 2012.

The Attorney General, Hon Michael Mischin MLC, recently wrote to the Committee in response to its Report 26, Public Hearing with the Police Commissioner on the CCC’s Report on an Incident at the East Perth Watch House. The first recommendation of that report again supported the creation of the position of Deputy Commissioner at the CCC. The Attorney said “the Government is supportive of the Joint Standing Committee’s recommendation to amend the Corruption and Crime Commission Act 2003 (CCM Act) to allow for the appointment of a Deputy (or Assistant) Commissioner.” He went on to say:

Whether the appointment of a person to that new office needs to occur immediately following the amendment can be considered separately once the impact on the CCC’s workload of the transfer of [minor misconduct] functions to the Public Sector Commissioner has been assessed and consideration has been given to whether the CCC’s

workload may increase with the conferral on it of other functions which are currently being considered.\textsuperscript{48}

The Committee maintains its previous support for the creation of the position of a Deputy or Assistant Commissioner in lieu of the more limited role currently undertaken by Acting Commissioners, although this issue is strictly outside of the terms of reference of this inquiry.

The Commissioner’s submission also provided the Committee with a summary of alternate models in other Australian jurisdictions for the appointment of Commissioners and Acting Commissioners. Similar information is further discussed in Chapter Three below.

\textbf{Submission from the Parliamentary Inspector}

\textbf{The Appointment Process}

The PICCC is deemed an officer of the Parliament and has the power to report directly to Parliament or to the Joint Standing Committee. It is an independent position and not an office of the Public Service. This independence forms a major part of the focus of the submission provided by the PICCC. When addressing the current processes, the PICCC says:

\textit{...the essential feature of the appointment...is that an appointment of a PI and Acting PI should have the bipartisan support of the Parliament as reflected in the decision of the JSC: ss189(3)(b), 193(2a). This requirement should be retained as it underlines the status of the appointee as an officer of the Parliament.}\textsuperscript{49}

The PICCC submits that the current process for appointments is an unnecessary and convoluted one:

\textit{When my predecessor, the Honourable Christopher Steytler QC, retired from the office there was a considerable delay in making a new appointment. It was occasioned by the need to establish a nominating committee...for the Committee to call for expressions of interest in the position, invite individuals to apply, or receive applications for appointment, for it to make a list of three persons and submit it to the Premier, and for the Premier to engage the JSC to perform its task,}

\textsuperscript{48} Ibid.

\textsuperscript{49} Submission No. 8 from Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, 21 June 2016, p2.
Chapter 2

before the Premier could make a recommendation to the Governor via the Executive Council.50

Although the appointment of Mr Steytler was not one the current Committee participated in, records indicate that Mr Murray was appointed as PICCC on 8 January 2013,51 some six months after Mr Steytler’s retirement on 30 June 2012.52 This demonstrates that there were delays in the appointment of the PICCC before this current Parliament.

The Parliamentary Inspector’s view is that sections 190 and 193(1) and Schedule 3 of the CCM Act in effect require, “the person is to be a serving or retired judge or a senior member of the legal profession.”53 For the PICCC, this makes it preferable for the Chief Justice to remain as part of the appointment process. The PICCC proposes that the current process could be improved by removing the nominating committee and the need for it to provide a list of three persons. He would prefer that the Premier consult upon a proposed recommendation, including with the Chief Justice, before the recommendation is submitted to Parliament via the Committee for its consideration of bipartisan support.54

The PICCC submits that a statutory precedent exists for a similar model under section 108(4) of the State Administrative Tribunal Act 2004 which involves the Chief Justice in the appointment of the President of the State Administrative Tribunal (SAT), and requires, “[b]efore recommending a person for appointment as the President, the Minister is to consult the Chief Justice of Western Australia.”55

The Chief Justice, Hon Wayne Martin AC, QC, disagrees with the PICCC’s proposal and argues that the role of the Chief Justice should “be restricted to the duties of judicial office and not intermingled with executive functions.”56 He counters the example provided by the PICCC of his involvement in the process of the appointment of the President of SAT as it “does not provide an appropriate analogy”:

50  Ibid.
54  Ibid.
56  Submission No. 1A from Hon Wayne Martin AC, QC, Chief Justice, Supreme Court of Western Australia, 5 July 2016, p7.
because the President of the State Administrative Tribunal is, and must be, a judge of the Supreme Court of Western Australia. Accordingly, section 108 of the SAT Act merely provides statutory recognition of the long-standing convention pursuant to which the Chief Justice is consulted before any member of the Court is requested to perform non-judicial duties such as, in that case, service as President of the State Administrative Tribunal.\textsuperscript{57}

Finding 10

The Parliamentary Inspector (PICCC) recommends that the current process for appointing a PICCC or Acting PICCC be improved by removing the nominating committee and the requirement that it provide a list of three nominees to the Premier.

Finding 11

The Parliamentary Inspector prefers that the process for appointing a PICCC or Acting PICCC be that the Premier consult upon a proposed recommendation, including with the Chief Justice, before the recommendation is submitted to the Parliament via the Joint Standing Committee.

The PICCC submitted to the Committee that, in respect to the appointment and performance of the offices of Commissioner and Acting Commissioners of the CCC, he can see no reason for the current process in the CCM Act being altered.\textsuperscript{58}

PICCC’s support for a Deputy Commissioner

The PICCC also supported in his submission that the CCM Act be amended to provide for the capacity for the Government to make an appointment of a Deputy Commissioner on a full or part-time basis, and says:

\begin{quote}
In the performance of my office during the period following the resignation of Commissioner Macknay QC and since the appointment of Commissioner J R McKechnie QC I have had the advantage of regular (weekly or fortnightly) consultation on the work and demands of the office of Commissioner, which do not appear to have diminished appreciably since the extensive amendments made to the Act with effect from 1 July 2015.\textsuperscript{59}
\end{quote}

As mentioned earlier, the Committee received a recent response to its recommendations made in its Report 26, \textit{Public Hearing with the Police Commissioner on the CCC’s Report on an Incident at the East Perth Watch House}, from the Attorney

\textsuperscript{57} Ibid, p8.
\textsuperscript{58} Submission No. 8 from Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, 21 June 2016, p3.
\textsuperscript{59} Ibid, p4.
Chapter 2

General, Hon Michael Mischin MLC, in which the Attorney supported the creation of a role of a Deputy, or Assistant, Commissioner. 60

Then-Acting Commissioner, Mr Chris Shanahan SC, made a submission to this inquiry and proposed that the CCM Act be amended to make provision for the appointment of up to two full-time Assistant Commissioners, and supported the continuing role of Acting Commissioners as examiners under Part 7 of the Act. 61

The submission of Federal Court Justice, the Hon Neil McKerracher QC (a former Acting Commissioner until October 2007), provides similar support to that of Mr Shanahan for the appointment of a full-time Assistant Commissioner:

...having two Acting Commissioners supporting the role of Commissioner, it may provide greater continuity for there to be an Assistant Commissioner or more if the need is there, working fulltime to support the Commissioner. Of course, that person would act in the Commissioner’s absence in the same way as an Acting Commissioner presently does. 62

The CCC provided in its submission a summary of legislation in other Australian jurisdictions that highlights that the legislation for ICAC in NSW, IBAC in Victoria, the CCC in Queensland and the ICAC in South Australia all provide for the appointment of a full-time Deputy, or Assistant, Commissioner. 63

Finding 12

The creation of the role of a Deputy Commissioner is supported by the Commissioner, the Parliamentary Inspector, and multiple past Acting Commissioners, and would be consistent with the models used in the anti-corruption agencies in New South Wales, Victoria, Queensland and South Australia.

Recommendation 1

The Attorney General prepare an amendment to the Corruption, Crime and Misconduct Act 2003 to allow for the appointment of a Deputy or Assistant Commissioner to assist the Commissioner in the day to day work of the Corruption and Crime Commission.

Other matters raised by the PICCC

The Inquiry is also examining the role played by each of the agencies in discharging their responsibilities in the CCM Act. In relation to this term of reference, the PICCC

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61  Submission No. 6 from Mr Chris Shanahan SC, 3 June 2016, p6.
62  Submission No. 2 from Hon Justice Neil McKerracher, 2 June 2016, p1.
63  Submission No. 12 from Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, 1 August 2016, Appendix 1, pp3-4.
seeks an amendment to section 193(1) which deals with the circumstances under which an Acting Parliamentary Inspector may be called upon. The PICCC submits that the current position is uncertain when taking periods of leave as its focus is on leave taken outside of the State, and the CCM Act is silent on other leave taken by the PICCC:

Further, in my view I should have the capacity, budgetary considerations allowing, to call upon an Acting PI to assist me to perform the functions of the office when the pressure of business requires, so that I may continue to act in a timely way.\(^{64}\)

The PICCC says that under the current arrangements he gives priority to matters which he considers to be of greater urgency at the expense of other matters. Also, the PICCC is appointed on a part time basis and if he were able to call upon one of both of the Acting PICCCs when necessary, it would allow the functions of the office to be more fully performed.\(^{65}\)

The Parliamentary Inspector proposes an amendment to section 193(1)(b) of the CCM Act as a way to provide certainty and better discharge of the functions of that Office. This proposal is outside of the intended scope of the Committee’s current inquiry and is best left to the ongoing review and possible inquiry by the Committee in the forthcoming 40\(^{th}\) Parliament.

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\(^{64}\) Submission No. 8 from Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, 21 June 2016, p3.  
\(^{65}\) Ibid.
Chapter 3

The process in other Australian jurisdictions

The system for the appointment of the [ICAC] Inspector at present in place in NSW operates in a way that one would expect it when it is fundamentally in the hands of the Executive Government. Hon David Levine AO, RFD QC, ICAC Inspector.

Introduction

This chapter summarises the current process used in other Australian jurisdictions for the appointment of anti-corruption commissioners and their oversight agencies. The Committee received submissions to this Inquiry from agencies in five other jurisdictions (see Appendix 2).

NSW

Independent Commission Against Commission

The Independent Commission Against Commission (ICAC) is one of Australia’s oldest anti-corruption agencies and was established in 1988. ICAC’s principal role is to investigate and expose corrupt conduct in the NSW public sector and its functions are set out in the Independent Commission Against Corruption Act 1988 (NSW).66

Section 5A of the ICAC Act allows for the appointment, or reappointment, of the ICAC Commissioner by the Governor after a nominee is proposed by a Minister to the NSW Parliament’s Committee on the Independent Commission Against Corruption (CICAC), which has the power to veto an appointment.67 The Committee was told by the ICAC Commissioner, Hon Megan Latham, that the NSW Premier manages this process.68

Police Integrity Commission

While ICAC oversees the NSW public sector, the Police Integrity Commission (PIC) was established in 1996 on the recommendation of the Royal Commission into the NSW Police Service to oversee the officers of the NSW Police Force and the NSW Crime

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68  Hon Megan Latham, Commissioner, Independent Commission Against Corruption, Briefing, 4 October 2016.
Chapter 3

Commission. 69 Section 7 of the **Police Integrity Commission Act 1996** (NSW) (PIC Act) allows the Governor to appoint the PIC’s Commissioner. 70 While sections 95 and 96 of the PIC Act provide the Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission a role to monitor and review the operations of the PIC, it doesn’t provide a role in reviewing the appointment of the PIC Commissioner. 71

**Inspector of the Police Integrity Commission and Inspector of the Independent Commission Against Corruption**

Section 57A of the ICAC Act allows for the appointment of an Inspector by the Governor after a nominee is proposed by the Premier to the CICAC72, which also has the power to veto this appointment. 73

Hon David Levine, AO RFD QC, is the Inspector of both ICAC and the Police Integrity Commission. Section 88B of the PIC Act allows for individuals to have this dual appointment. 74 In his submission, Inspector Levine said that “[t]he system for the appointment of the Inspector at present in place in New South Wales operates in a way that one would expect it when it is fundamentally in the hands of the Executive Government.” 75

Inspector Levine highlighted the fact that there had been a period in which the Office of Inspector was vacant for four months which meant there “was a form of the unconstitutional conduct of the Office by persons who had not been appointed by the Executive Government.” 76

**Committee on the Independent Commission Against Corruption**

The CICAC reviews the ICAC and ICAC Inspector’s performance and reports to Parliament on matters relating to their functions. It does not have the power to investigate particular conduct, or to reconsider the ICAC’s decisions, findings or

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75  Submission No. 9 from Hon David Levine, AO RFD QC, ICAC Inspector, 22 June 2016, p2.
76  Ibid.
recommendations about particular complaints or investigations. The Committee has 10 members from both Houses of Parliament, with five Government members, and is currently chaired by a Government member.\textsuperscript{77}

Part 7 of the ICAC Act requires the Minister to provide a proposed nominee as ICAC Commissioner or Inspector to the CICAC. Sect 64A allows the Committee 14 days after the proposed appointment is referred to it to veto the proposal, and a further 30 days (after the initial period) if it notifies the Minister that it requires more time to consider the matter.\textsuperscript{78}

The current Inspector of ICAC, Hon David Levine, AO RFD QC, submitted that he knew of no instance where the Committee’s veto had been exercised.\textsuperscript{79}

**Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission**

The Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission oversights and reviews the performance of these and five other agencies and reports to Parliament on matters relating to their functions.\textsuperscript{80} The PIC Act does not give the Committee a role in the appointment of the PIC Commissioner.

**Finding 13**

In New South Wales, the Independent Commission Against Corruption (ICAC) Commissioner and Inspector of the ICAC are appointed by the Governor after a nominee is proposed by the Premier to the NSW Parliament’s Committee on the ICAC, which has the power to veto an appointment. The Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, however, does not have a role in the appointment of the Police Integrity Commissioner.

**Victoria**

**Independent Broad-based Anti-corruption Commission**

As Victoria’s anti-corruption agency, the Independent Broad-based Anti-corruption Commission (IBAC) is similar to WA’s CCC in that it receives complaints and notifications of both public sector corruption and police misconduct, and investigates...
Chapter 3

IBAC’s Commissioner is appointed pursuant to section 20 of the Independent Broad-based Anti-corruption Commission Act 2011 (Vic) by the Governor in Council on the recommendation of the Minister. As outlined below, section 21 of the IBAC Act provides a parliamentary committee with veto powers in regard to appointment of the IBAC Commissioner.

**Victorian Inspectorate**

The Victorian Inspectorate role is to oversight the actions of IBAC and other integrity agencies, such as the Ombudsman. In terms of IBAC, section 11(2) of the Victorian Inspectorate Act 2011 (Vic) provides its role as:

- **(a)** to monitor the compliance of the IBAC and IBAC personnel with the Independent Broad-based Anti-corruption Commission Act 2011 and other laws;
- **(b)** to oversee the performance by the IBAC of its functions under the Protected Disclosure Act 2012;
- **(c)** to assess the effectiveness and appropriateness of the policies and procedures of the IBAC which relate to the legality and propriety of IBAC's activities;
- **(d)** to receive complaints in accordance with this Act about the conduct of the IBAC and IBAC personnel;
- **(e)** to investigate and assess the conduct of the IBAC and IBAC personnel in the performance or exercise or purported performance or purported exercise of their duties, functions and powers;
- **(f)** to monitor the interaction between the IBAC and other integrity bodies to ensure compliance with relevant laws;...

In his submission, Mr Robin Brett QC, the Inspector at the Victorian Inspectorate, told the Committee that, “[t]he appointment of the Commissioner of the …IBAC and the Inspector in Victoria … are simply Governor in Council appointments. Certain

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He said that these appointments are more or less a standard procedure similar to the Victorian process for appointments to numerous public offices such as judges, and that:

> It might be argued that the absence of a panel procedure like that used in Western Australia renders Victoria more likely to see appointments based on political considerations; but in practice all Governments have exercised these powers of appointment in a responsible, apolitical manner.\textsuperscript{85}

The appointment process for the Inspector is outlined in section 18 of the \textit{Victorian Inspectorate Act 2011} (Vic). The Inspector must be qualified for appointment as a judge of the Supreme Court of Victoria (or another State or a Territory), or the Federal or High Courts, and they must not have been a Commissioner or Deputy Commissioner of IBAC.\textsuperscript{86}

**Independent Broad-based Anti-corruption Commission Committee**

The Victorian Parliament's Independent Broad-based Anti-corruption Commission Committee was established in 2012, following the creation of IBAC and the Victorian Inspectorate. The Committee consists of seven members and is currently chaired by an Opposition member. The Government does not currently have a majority on this committee.\textsuperscript{87}

The current Chair of this Committee, Hon Kim Wells MP, submitted that the Committee’s function to "veto the proposed appointment of the heads of these agencies was also created at the same time. However, the appointment of the first Commissioner of the IBAC and first Inspector of the Victorian Inspectorate were exempted from this process of appointment."\textsuperscript{88}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{84} Submission No. 11 from Mr Robin Brett QC, Inspector, Victorian Inspectorate, 24 June 2016, p1.
\item \textsuperscript{85} Ibid.
\item \textsuperscript{88} Submission No. 3 from Hon Kim Wells MP, Chair, Independent Broad-based Anti-corruption Commission Committee, Parliament of Victoria, 7 June 2016, p1.
\end{itemize}
\end{footnotesize}
Chapter 3

He concluded, “[a]s a result of its recent establishment and the lack of any further appointments to these positions, the Committee has not [yet] been required to consider any proposed appointments to these positions.”89

Section 21 of the IBAC Act details the Committee’s veto powers in regard to the IBAC Commissioner:

**Veto of proposed Commissioner**

(1) Subject to subsection (4), the Minister must not make a recommendation under section 20 unless—

(a) the Minister has submitted details of the proposed recommendation to the IBAC Committee; and

(b) either—

(i) within the time specified in subsection (2) the IBAC Committee has informed the Minister that it has decided not to veto the recommendation; or

(ii) the time specified in subsection (2) has elapsed and the IBAC Committee has not vetoed the recommendation.

(2) The IBAC Committee must make a decision under this section within 30 days after the Minister has submitted details of the proposed recommendation to the IBAC Committee.

(3) The IBAC Committee—

(a) may decide to veto or not to veto the proposed recommendation;

(b) must notify the Minister in writing of its decision within the period specified in subsection (2).90

**Finding 14**

The appointment in Victoria of the Commissioner of the Independent Broad-based Anti-corruption Commission (IBAC) and the Inspector of the Victorian Inspectorate are Governor in Council appointments on the recommendation of a Minister. The

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89 Ibid.
recommendation is subject to a time-limited veto power by the Parliament of Victoria’s IBAC Committee.

Queensland

Crime and Corruption Commission

Sections 227 to 229 of the *Crime and Corruption Act 2001* (QLD) (CC Act)\(^91\) require the senior positions of Chairperson, Deputy Chairperson, Chief Executive Officer and Commissioners at Queensland’s Crime and Corruption Commission (CCC) to be appointed by the Attorney-General. Section 228 of the CC Act requires the Parliamentary Crime and Corruption Committee (PCCC) to be consulted and provide its bipartisan support for the nominee. For positions other than the Chairperson, the Minister must also consult the CCC’s Chairperson.\(^92\)

The then-Parliamentary Commissioner, Mr Paul Favell, in his submission to this Inquiry said that it is the Attorney-General who:

> ...places the advertisement and receives and considers the applications from applicants. The Attorney-General is responsible for the shortlisting and interviewing of prospective candidates and decides upon a nominee for the position. The nominee is then interviewed by the [Parliamentary] Committee in order to obtain its bipartisan support.\(^93\)

Mr Favell provided at least two occasions when it appeared that party political issues had impacted upon a prospective appointment to the position of CCC Chairperson. For the appointment of senior CCC officers he said “I can see some advantage in having persons outside the party political process involved in, at least, the nomination of a prospective appointee as is the case in Western Australia” in order to avoid possible perceptions of political bias.\(^94\)

Parliamentary Crime and Corruption Commissioner

The appointment process for Queensland’s Parliamentary Crime and Corruption Commissioner (an equivalent position to the Parliamentary Inspector of the Corruption and Crime Commission) is set out in section 306 of the CC Act. This provides for the Speaker of Parliament to advertise nationally for applications from suitably qualified

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\(^{92}\) Ibid.

\(^{93}\) Submission No. 10 from Mr Paul Favell, Parliamentary Crime and Corruption Commissioner, 24 June 2016, p1.

\(^{94}\) Ibid, p3.
people and the nominee must have the bipartisan support of the Parliamentary Crime
and Corruption Committee (PCCC). 95

The then-Commissioner submitted that, by arrangement with the Speaker, in practice
the selection process is actually conducted by the PCCC:

_The Committee places the advertisement and receives and considers the applications from applicants. The Committee then shortlists and interviews prospective candidates. Thereafter, upon reaching a bipartisan decision as to the preferred candidate, a recommendation is made from the Committee to the Speaker to appoint the nominated person as Parliamentary Commissioner. Pursuant to section 307 of the Crime and Corruption Act, the Parliamentary Commissioner must be appointed by the Speaker and within seven sitting days after the appointment, the Speaker must table a notice of the appointment in the Legislative Assembly._ 96

Mr Favell said that the Queensland process is quite streamlined because of the
involvement of the Parliamentary Committee from the earliest stages of this selection
process and the requirement for its bipartisan support for the candidate. He also
believes that the extensive involvement of the Committee in the selection process for
the Commissioner is desirable as section 10 of the CC Act requires the Commissioner to help “the Parliamentary Crime and Corruption Committee in the performance of its functions.” 97

**Parliamentary Crime and Corruption Committee**

The PCCC is an all-party committee consisting of seven members, with four members
nominated by the Government and three by the Leader of the Opposition. In its
submission, the PCCC said that:

_The Chair of the committee is nominated by the Leader of the House, however by convention and at various times since 2011, the committee has been chaired by a non-government or independent member. Currently the Chair of the committee is a non-government member._ 98

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95 Ibid, p1.
96 Ibid.
97 Ibid, p2.
98 Submission No. 13 from Mr Lawrence Springborg MP, Chair, Parliamentary Crime and Corruption Committee, 29 August 2016, p2.
The PCCC submitted that the CCC Act defines ‘bipartisan support’ as either “unanimous support, or the support of a majority of committee members other than a majority consisting wholly of members of the party or parties in government.”

The PCCC tabled on 30 June 2016 a report on its statutory review of the CCC. It considered a range of issues in relation to the governance of the Commission, including the current appointment processes. In its review, the PCCC noted that:

...that the Committee’s role in the appointment of Commissioners, in particular the Chairperson of the Commission, has been the subject of much debate and criticism in the previous and current Parliament.

The Committee acknowledges that delays in appointing persons to these roles, caused by either the Committee or the Minister, may impact on the Commission being able to perform its functions effectively.

Finding 15

In Queensland, the Parliamentary Crime and Corruption Committee (PCCC) undertakes on behalf of the Speaker the selection process for the Parliamentary Crime and Corruption Commissioner. The Attorney-General appoints the senior positions at the Crime and Corruption Commission after the nominees are interviewed by the PCCC in order to obtain its bipartisan support.

The Committee notes that, although there may well be merit in it administering the appointment process for the PICCC along the lines of the Queensland model, it would be unwise to adopt such an approach in Western Australia without first addressing the structural deficiency currently in place when the Committee membership is dissolved in the lead into, and during, a State election.

South Australia

Independent Commissioner Against Corruption

The Hon Bruce Lander QC submitted to the Committee that he was the first person to have been appointed the Independent Commissioner Against Corruption in South Australia (ICACSA). The position is unique to Australian jurisdictions as Mr Lander does not preside over a Commission as such, rather the ICACSA is the holder of the office in which the State’s statutory integrity functions are invested. The ICACSA may engage

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100 Ibid, p6.
Chapter 3

staff to assist in the discharge of those functions, and they and him are regarded as a ‘law enforcement body’.\textsuperscript{101}

Unlike in Western Australia, the ICACSA does not have a Parliamentary Inspector to review its work. Rather, he and the Office for Public Integrity (OPISA) are subject to an annual review conducted by a person appointed by the Attorney-General. To be eligible for appointment as the annual reviewer, the appointee must be a person who would be eligible for appointment as the ICACSA.\textsuperscript{102}

Both the ICACSA and the OPISA commenced operations in September 2013. The OPISA receives and assesses all complaints and reports about potential matters of corruption, misconduct and maladministration in public administration and provides recommendations to the ICACSA on how such matters might be dealt with.\textsuperscript{103} The operations of the ICACSA are governed by the \textit{Independent Commissioner Against Corruption Act 2012} (SA).\textsuperscript{104}

The ICACSA is appointed by the Governor but before an appointment can be made, the Attorney-General must ensure that the position is advertised in a newspaper circulating in each State or Territory. The Attorney-General must, upon identifying a suitable candidate, refer the proposed appointment to the Statutory Officers Committee, as required by section 15G of the \textit{Parliamentary Committees Act 1991} (SA).\textsuperscript{105}

The Statutory Officers Committee is a joint committee of the SA Parliament whose role is to consider and report on suitable people for appointment to offices such as ICACSA, the DPP and Electoral Commissioner, which are to be filled by appointment on the recommendation of both Houses.\textsuperscript{106}

In his submission Mr Lander said:

\begin{quote}
\textit{Having referred the proposed appointment to the Committee, the appointment cannot be made unless:}

1) \textit{the appointment has been approved by the Committee; or}
\end{quote}

\begin{flushleft}
\textsuperscript{101} Submission No. 5 from Hon Bruce Lander QC, Independent Commissioner Against Corruption, 2 June 2016, p1.
\textsuperscript{102} Ibid, p2.
\textsuperscript{105} Submission No. 5 from Hon Bruce Lander QC, Independent Commissioner Against Corruption, 2 June 2016, p1.
\end{flushleft}
2) the Committee has not, within 7 days of the referral, or such longer period as is allowed by the Attorney-General, notified the Attorney-General in writing that it does not approve the appointment.107

The SA Attorney-General confirmed in July 2016 that Mr Lander QC had been asked to lead and establish a NT ICAC while remaining employed as the ICACSA.108 On 11 August 2016, the SA Government also announced that Mr Lander, had been appointed the Judicial Conduct Commissioner to allow an independent avenue for the making of complaints in South Australia about the conduct of Judges and Magistrates.109

Finding 16

The appointment in South Australia of the Independent Commissioner Against Corruption is a Governor in Council appointment made on the recommendation of the Attorney-General subject to a time-limited approval process by the South Australian Parliament’s Statutory Officers Committee.

Tasmania

Integrity Commission

The Tasmanian Integrity Commission Act 2009 (Tas)110 (IC Act) provides the framework for the operation of the Integrity Commission and the Parliamentary Standards Commissioner. The Integrity Commission was established on 1 October 2010 and its role is similar to that of other Australian anti-corruption agencies. It develops standards and codes of conduct to guide public officers in their conduct; educates public officers and the public about integrity issues; and maintains codes of conduct and registration systems to regulate the contact between lobbyists and public officers. It also receives and assesses complaints relating to allegations of misconduct by public officers. The Integrity Commission does not prosecute itself but refers potential breaches of the law to the Commissioner of Police and the DPP.111

The Integrity Commission is independent of the Tasmanian State Government and is not subject to the direction or control of a minister. It is not part of, or subject to, any other Tasmanian department or agency. The Integrity Commissioner is appointed by

Chapter 3

the Governor on the advice of the Attorney-General after they have consulted the Joint Standing Committee on Integrity.112

Parliamentary Standards Commissioner

In his submission to the Committee, Reverend Michael Tate AO, the inaugural Parliamentary Standards Commissioner for the Tasmanian Parliament, said he was appointed under the IC Act after he “was approached by the then Premier who had had some discussion with the then Leader of the Opposition.”113 Mr Tate said that a review was presently being conducted by the Hon William Cox into the operation of the IC Act.

The Parliamentary Standards Commissioner is a position unique to the Tasmanian Parliament. The Commissioner’s main task is to provide advice to Members of Parliament and the Integrity Commission about the “conduct, propriety and ethics and the interpretation of any relevant codes of conduct and guidelines relating to the conduct of Members of Parliament” and in particular, to the operation of the Parliamentary disclosure of interests register and declarations of conflicts of interest register. Section 27 of the IC Act outlines the appointment process for the Parliamentary Standards Commissioner.114

Section 29 of the IC Act restricts the Parliamentary Standards Commissioner from assessing or investigating a complaint made under the IC Act if they have provided advice about a matter that relates to that complaint.115

Joint Standing Committee on Integrity

The Tasmanian Parliament’s Joint Standing Committee on Integrity consists of six Members of Parliament of whom three are to be Members of the Legislative Council and three are Members of the House of Assembly. The Committee reports to both Houses and its role is to monitor and review the performance of the functions of the following integrity agencies:

(a) the Integrity Commission;

(b) the Ombudsman;

(c) the Auditor-General;

113 Submission No. 7 from Reverend Michael Tate AO, Parliamentary Standards Commissioner, Parliament of Tasmania, 20 June 2016, p1.
(d) the State Service Commissioner in performing his or her functions in relation to misconduct.\textsuperscript{116}

The Committee is consulted about the appointment of both the Parliamentary Standards Commissioner and the Integrity Commissioner. Its Chair, Hon Ivan Dean MLC, submitted that:

\begin{quote}
Whilst the legislation requires that the Minister consults with the Joint Standing Committee on Integrity prior to the appointment of a Chief Commissioner, it does not prescribe the requirement that approval is provided by the Committee for the appointment to be made.
\end{quote}

\begin{quote}
In relation to fulfilling the requirement of consulting with the Committee, the current practice is that the Attorney-General writes to the Joint Standing Committee on Integrity to announce the intended appointee to the position and seeks a response from the Committee.\textsuperscript{117}
\end{quote}

\textbf{Finding 17}

The appointment in Tasmania of the Integrity Commissioner and the Parliamentary Standards Commissioner are Governor in Council appointments made on the recommendation of the Attorney-General after consultation with the Joint Standing Committee on Integrity.

\textbf{Conclusion}

Each of the other Australian jurisdictions have a similar process whereby the appointment of the Commissioner of the anti-corruption agency and the Inspector of that agency are made by the Executive after a conferral with a parliamentary committee. The only exception to this arrangement is in Queensland where the selection process for the Parliamentary Crime and Corruption Commissioner is managed by the Parliamentary Crime and Corruption Committee on behalf of the Speaker.

\textbf{Finding 18}

Western Australia is the only Australian jurisdiction that utilises a nominating committee tasked with supplying a list of suitable candidates to the Executive on who should fill the role of inspector and commissioner of its anti-corruption agency.

\textsuperscript{117} Submission No. 4 from Hon Ivan Dean MLC, Chair, Joint Standing Committee on Integrity, Tasmanian Parliament, 9 June 2016, pp2-3.
Chapter 4

The requirement for a nominating committee

…the Government makes appointments to very important offices, including my office, without having the need for an independent nominating committee... Hon. Wayne Martin AC, QC, Chief Justice.

Introduction

The use in Western Australian anti-corruption legislation of a selection, or nominating, committee, consisting in total or part, of senior judicial officers has a history of almost 30 years. This chapter summarises the agencies that used such a process before considering the submission to this Inquiry by the Chief Justice, Hon Wayne Martin AC, QC, who chairs the nominating committee required by the CCM Act for the appointment of Commissioners and PICCCs. The chapter discusses a legal opinion obtained by the Committee from Mr Ken Pettit SC on the constitutionality of the composition of the current nominating committee. It concludes with a comment by the Committee on the usefulness of elements of the nominating committee process.

Past use of selection committees involving the Chief Justice

Appointment of OCC Commissioners

The Official Corruption Commission (OCC) was established under the Official Corruption Commission Act of 1988 (OCC Act). It was conferred with limited functions and powers to consider allegations of corruption made against public officers. Section 5(3) of the OCC Act described a selection committee, to determine the three OCC Commissioners, consisting of the Chief Justice, the Chief Judge of the District Court and the Commissioner of Police. \(^\text{118}\) Subsequently, extensive legislative amendments were made in 1996 and the title of the Act was changed to the Anti-Corruption Commission Act 1988 (ACC Act). \(^\text{119}\)

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Chapter 4

Appointment of ACC Commissioners

The Anti-Corruption Commission (ACC) was established in 1996 under the ACC Act.\textsuperscript{120} The ACC Act extended the powers of the OCC to allow investigation of police corruption and allowed the ACC to carry out its own investigations.\textsuperscript{121} The three ACC commissioners consisted of one who had been a judge, or was eligible for appointment as a judge, and two who were not public officers. The ACC had a similar nomination process for its three commissioners as that now used in the CCM Act for the CCC Commissioner. A selection committee was required to advertise for expressions of interest and the Commissioners were appointed by the Governor. Section 5(5) of the ACC Act described a selection committee consisting of the Chief Justice; the Chief Judge of the District Court; and the Solicitor General.\textsuperscript{122}

Recommendations from the ‘WA Inc’ Royal Commission\textsuperscript{123}

Appendix 2 of the WA Inc Royal Commission’s Final Report contained detailed proposals concerning the establishment of the Office of the Commissioner for the Investigation of Corrupt and Improper Conduct. It recommended that the first Commissioner should be appointed by the Governor on the recommendation of a committee comprising the Chief Justice, the Chief Judge of the District Court and the Commissioner of Police. Thereafter, a proposed Joint Parliamentary Committee should manage the process and receive advice from the Auditor General, the Ombudsman and the Director of Public Prosecutions before submitting a short list of suitable applicants to the Premier. From this list, the Premier was to make a recommendation to the Governor in Council.\textsuperscript{124}

Finding 19

The legislation establishing the previous State anti-corruption agencies have included, since 1988, a form of selection or nominating committee involving the Chief Justice and the Chief Judge.

\textsuperscript{120} Ibid.
\textsuperscript{121} Joint Standing Committee on the Anti-Corruption Commission, Amending the Anti-Corruption Commission Act 1988, Parliament of Western Australia, Perth, 22 December 1998, pvii.
\textsuperscript{123} The full title of this Commission was Royal Commission to inquire to inquire whether there has been (a) corruption; (b) illegal conduct; or (c) improper conduct, by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations. Available at: www.slp.wa.gov.au/publications/publications.nsf/inquiries+and+commissions?openpage. Accessed on 8 September 2016.
Original Bill to establish the CCC

The Corruption and Crime Commission Amendment and Repeal Bill 2003\(^{125}\) brought to Parliament by then-Attorney General Jim McGinty proposed a different appointment process than the one that was finally passed by Parliament in the CCC Act in December 2003. In the Bill’s consideration in detail phase in the Legislative Assembly Mr McGinty said that there was no requirement in the legislation to advertise for nominations for the position of CCC Commissioner. He said:

> *It is intended that it will be a judicial position. At present, the Government advertises for magistrates but not for Supreme Court or District Court judges. Those judges are subject to a consultative process, not in a political sense, but in a professional sense.*\(^{126}\)

Mr McGinty said that the appointment process followed a procedure modelled on the State’s Electoral Act 1907 and would involve consultation with the leaders of all political parties. Section 5B(2) of the Electoral Act 1907 provides for the appointment of an Electoral Commissioner and Deputy Electoral Commissioner by the Premier and section 5B(3) requires the Premier “[b]efore making a recommendation under subsection (2) the Premier shall consult with the parliamentary leader of each party in the Parliament.”\(^{127}\)

Mr McGinty said that before a person was recommended formally as Commissioner to the Governor, “the process I would adopt would be to confer with the leaders of the political parties and advise them of the recommendation having taken into account their views and the views of others.”\(^{128}\) A similar process was retained in the section 9(4a) of the CCC Act for the appointment of the first CCC Commissioner, where the Premier was to consult with the then-Leader of the Opposition.

The Government later accepted a proposed amendment to the Bill to ensure that no serving judges were appointed as a Commissioner after an inquiry by the Legislative Council’s Standing Committee on Legislation. That Committee’s Report 21 in relation to the Corruption and Crime Commission Act 2003 and the Corruption and Crime Commission Amendment Bill 2003, investigated the issues around the ‘separation of


\(^{126}\) Hon Jim McGinty, Attorney General, Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 5 June 2003, p8296.


\(^{128}\) Hon Jim McGinty, Attorney General, Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 5 June 2003, p8296.
Chapter 4

powers' doctrine and the impact of the *Kable* decision. The CCC Act, as then agreed to, now requires a serving judge to retire before taking up the position of Commissioner.

**Finding 20**

The *Corruption and Crime Commission Bill 2003* proposed doing away with a nominating committee and intended to make the appointment of a Commissioner or Parliamentary Inspector an Executive decision, after consultation by the Attorney General with leaders of the other political parties represented in the Parliament.

**The Chief Justice’s submissions**

The Chief Justice, Hon Wayne Martin AC, QC, was invited by the Joint Standing Committee to provide a submission to the Inquiry. He was also later requested to comment on the submission provided by the Parliamentary Inspector, Hon Michael Murray QC, and subsequently provided a supplementary submission to the Inquiry.

The first submission received from the Chief Justice focused on his role, and that of the Chief Judge, as the nominating committee for the positions of Commissioner and PICCC, and it is contained in Appendix 3. The Chief Justice submits that there are at least three reasons why the inclusion of serving judges on the nominating committee is “both inappropriate and undesirable”:

<a>) the constitutional prohibition upon the engagement of judges in non-judicial work that is inconsistent with their judicial office;</a>

b) the undesirability of involving judges in executive functions that are unrelated to the work of the courts; and

c) the practical consequences of requiring heads of jurisdiction to perform other roles.130

When arguing these constitutional limitations, the Chief Justice explains the connection between Chapter III of the Commonwealth Constitution and the integrated national judicature, where each State Parliament (and therefore State Court) is limited by the implicit requirements of the Commonwealth Constitution:

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130 Submission No. 1 from Hon Wayne Martin AC, QC, Chief Justice, Supreme Court of Western Australia, 26 May 2016, p2.
Chapter 4

The High Court has repeatedly held that Chapter III of the Constitution of the Commonwealth contemplates an integrated national judicature in which the judicial power of the Commonwealth is exercised by courts created by both State and Commonwealth Parliaments. It follows that the courts created by State Parliaments, as potential repositories of the judicial power of the Commonwealth, must comply with the requirements of Chapter III of the Constitution of the Commonwealth and the legislative power of each State Parliament is limited by that implicit requirement of the Constitution.131

Chief Justice Martin says that one of the requirements which the High Court has recognised as an essential characteristic of a court meeting the requirements of Chapter III is the requirement that judges of that court be independent of the Executive. His view is that the executive nature of the role and function of the nominating committee make it inconsistent with the requirements of judicial office, leaving the actions of the Chief Justice open to a possible finding of inconsistency.132

The Chief Justice further submits that the context for the provision of a nominating committee in the original CCC Act can be understood given the High Court principles impacting on the use of judicial officers have developed only in the last decade or so, and have:

...resulted in various State legislatures adopting the practice of imposing executive functions upon persons who might (or might not) hold judicial office, not by virtue of their appointment as a judge, but rather by virtue of their appointment to another office (that is, as persona designata133).

Because these principles had not been fully developed when the Act was passed in 2003, that approach was not taken, and the powers and responsibilities which attend membership of the nominating committee are imposed by the Act upon the Chief Judge and me by virtue of our judicial office.134

Given the submission by the Parliamentary Inspector that the Chief Justice remain involved in appointments to that Office, the Committee sought the Chief Justice’s supplementary submission on the issue. This is attached as Appendix 4.

131 Ibid.
133 The legal term persona designata has its origin in the doctrine of the separation of powers and refers to person being considered as an individual, rather than for their official position or as a member of a class. See for example, http://definitions.uslegal.com/p/persona-designata/.
134 Ibid, p3.
Chapter 4

In his supplementary submission, the Chief Justice refers to the undesirable involvement of judicial officers in administrative actions, such as participating in the CCM Act’s nominating committee, and points to potential consequences. These pressures are evident when there has been difficulty in soliciting expressions of interest from appropriately qualified candidates resulting in the nominating committee identifying, and then approaching, potential candidates. This could create issues where the Supreme Court may be required to review the legality of actions taken by persons later appointed as a Commissioner or PICCC.135

When commenting on the submission by the PICCC and his suggestion that the Chief Justice retain some involvement in appointments to the PICCC position, Chief Justice Martin reiterates his concern regarding the undesirability of “an inappropriate fusion between judicial and executive functions” and says that recent decisions of the “High Court are replete with observations regarding the undesirability of fusing those responsibilities.”136 In earlier evidence to the Committee, the Chief Justice said that his current role as Chair of the nominating committee could be undertaken by another non-judicial officer such as the Solicitor-General, as:

…the Government makes appointment to very important offices, including my office, without having the need for an independent nominating committee, and obviously the process of consultation with this Committee could be maintained, … I suspect when the [CCC] Act was passed they thought, “Well, we will create independence”; in other words, there will be an independent process of selection by giving the role to judges, but I think there are other ways you can do that.137

The Chief Justice acknowledged in his submission that there are some long-standing exceptions by which judicial officers can, and have been, involved in the performance of executive functions, and notes his role of Lieutenant Governor, and acting as Deputy to the Governor when the Governor is unavailable to serve, as being the most obvious example. He submitted to the Committee an example of his previous experience of proposing to a previous Government to remove himself from another such executive role was when he:

…recommended to the government of the day that the Electoral Act be amended to remove the Chief Justice from the role of chair of the

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135 Submission No. 1 from Hon Wayne Martin AC, QC, Chief Justice, Supreme Court of Western Australia, 26 May 2016, p4.
136 Submission No. 1A from Hon Wayne Martin AC, QC, Chief Justice, Supreme Court of Western Australia, 5 July 2016, p7.
137 Hon Wayne Martin AC, QC, Chief Justice, Supreme Court of Western Australia, Closed Hearing, Transcript of Evidence, 18 June 2014, p4.
Chapter 4

Electoral Distribution Commission, and the Act was amended to provide the capacity for a retired judge to perform that role (which has in fact been performed by a retired judge since those amendments).\textsuperscript{138}

The Chief Justice advised that the Chief Judge of the District Court, Judge Sleight, who is also required to participate in the nominating committee “has authorised me to advise that he agrees entirely with the views expressed in this submission.”\textsuperscript{139}

Finding 21
The Chief Justice and the Chief Judge do not support the inclusion of serving judicial officers in the appointment process for Commissioners and Parliamentary Inspectors, for reasons including the undesirability of involving judges in executive functions that are unrelated to the work of the courts.

Legal opinion from Mr Ken Pettit SC
After considering the submission from the Chief Justice, the Committee resolved to obtain a legal opinion on the Constitutional validity of provisions of the CCM Act under which two members of the State’s judiciary have a statutory role in the nomination of candidates for appointment under the CCM Act. Specifically, counsel’s view was sought from Mr Ken Pettit SC on:

1. Is it the case that there are limits imposed by Chapter III of the Constitution of the Commonwealth that impact on section 3 of the Corruption, Crime and Misconduct Act 2003 that require the Chief Justice and the Chief Judge of the District Court to participate in a nominating committee?

2. If yes to 1, are any legislative amendments to the CCM Act possible in order to keep serving judges involved in the process (ie persona designate)?

3. If yes to 2, what legislative amendments to the CCM Act are necessary to keep serving judges involved in the process (ie persona designate)?

In light of the Queensland model for appointing its Parliamentary Inspector (as discussed in Chapter Three), the Committee considered it prudent to also ask Mr Pettit SC:

4. Are any limits imposed by the Constitution of the Commonwealth or the documents that constitute the Constitution of Western Australia that would preclude the Joint Standing Committee from undertaking the role currently

\textsuperscript{138} Submission No. 1 from Hon Wayne Martin AC, QC, Chief Justice, Supreme Court of Western Australia, 26 May 2016, p4.
\textsuperscript{139} Ibid, p5.
Chapter 4

undertaken by the nominating committee in section 3 of the Corruption, Crime and Misconduct Act 2003?

Mr Pettit provided his opinion to the Committee on 30 August 2016 and it is attached in Appendix 5. He describes ‘the separation of powers’ doctrine flowing from Chapter III of the Commonwealth Constitution as:

*The doctrine has two related limbs. It prevents the Commonwealth vesting non-judicial powers in a Federal court, and it prevents the Commonwealth vesting judicial powers in a body that is not a constitutionally appropriate court.*

In terms of the ‘separation of powers’ between the judiciary and the Parliament in the case of the nominating committee provided for in the CCM Act, Mr Pettit says:

*Those provisions are of course in the form of legislative commands to members of the judiciary from the legislature, but they do not allow the executive to influence or impose its will on the judiciary. On the contrary, the object of the provisions is to require the nominating committee to impose its will on the executive to the extent of confining the field of candidates available to the Premier for recommendation in Executive Council.*

Mr Pettit advises that Chapter III of the Constitution in regard to the ‘separation of powers’ doctrine, does not directly apply to the State Government. He agrees with the Chief Justice, that in a series of cases beginning with *Kable*, the High Court has held that the fact that the Commonwealth Parliament has vested federal judicial power in some State courts means that State courts exercising federal judicial power must also have certain ‘minimum qualities’, and “[a]s a result, certain laws of a State may be invalid to the extent that they deprive a State Court of such minimal standards.”

Mr Pettit continues that “the High Court has discerned in the Commonwealth Constitution an implicit requirement that State courts, as recipients of federal judicial power, must be, in a sense, worthy recipients or Constitutionally appropriate recipients.” He argues, however, that the “criteria applicable to State courts is not yet clear from the decided High Court cases” and that the legal implications of the High Court’s decision in the *Kable* remain in flux.

140 Mr Ken Pettit SC, Legal Opinion, 30 August 2016, p2.
141 Ibid.
142 *Kable v Director of Public Prosecutions NSW* (1996) 189 CLR 51.
143 Mr Ken Pettit SC, Legal Opinion, 30 August 2016, p3.
144 Ibid.
In terms of the CCM Act appointment processes, Mr Pettit argues that the relevant provisions of the CCM Act could not impair the institutional integrity of the Supreme and District Courts. Rather for Mr Pettit, the CCM Act reflects Parliament’s great respect for the judgment of members of the Judiciary and this is why they have turned to them for their judgment on executive appointments to the CCC and the OPICCC. 145

Mr Pettit addresses the argument that the Chief Justice could potentially be embarrassed should he later be faced with a case in which a Commissioner or PICCC was a party. He says:

...that argument is itself demonstrative of scant faith in the judiciary’s ability to act in a detached manner, and flies in the face of the multiple interactions that members of the judiciary have had, and continue to have, with the executive government in various ways. The Chief Justice, for example, is the Lieutenant Governor, in which role the Chief Justice is obliged by convention to accept the advice of Executive Council. 146

In his opinion, Mr Pettit is unable to see how even the appearance of independence and impartiality could be at risk as the CCM Act does not touch upon the manner in which the Chief Justice and the Chief Judge go about the administration of justice in their respective courts. 147

While Mr Pettit sees no need to amend the CCM Act to address the concerns raised by the Chief Justice “given that the High Court does not yet appear to have fully expounded upon the Kable principle” he says that “the risk of offending the Kable principle is reduced by not including serving judicial officers in any such executive function.” If the Chief Justice and Chief Judge are to retain their roles on the nominating committee, then Mr Pettit says that “it would be safer to include them in the nominating committee by ad hoc appointment by the Premier or the Joint Standing Committee or some other body, rather than by the CCM Act, in which case their consent would also be required, further minimizing the risk.” 148

Mr Pettit concludes that:


146 Ibid.
147 Ibid, p7.
Chapter 4

2. No legislative amendments to the CCM Act are required in order to keep serving judges involved in the process.

3. The CCM Act could be further insulated from risk of invalidation by imposing an intermediate step in the process by which the nominating committee is constituted.

4. There are no legal or Constitutional limits that would preclude the Joint Standing Committee from undertaking the role currently undertaken by the nominating committee in section 3 of the Corruption, Crime and Misconduct Act 2003, but there may be governance objections.\(^\text{149}\)

Finding 22
There are no limits imposed by Chapter III of the Constitution of the Commonwealth that impact on section 3 of the Corruption, Crime and Misconduct Act 2003 that requires the Chief Justice and the Chief Judge of the District Court to participate in a nominating committee.

Finding 23
No legislative amendments to the Corruption, Crime and Misconduct Act 2003 are required in order to keep serving judges involved in the nominating committee process, however it would be prudent to include them in this process by \textit{ad hoc} appointment in which case their consent would also be required, further minimizing any risk of offending the \textit{Kable} principle.

Arrangements for appointing a Royal Commissioner

The CCC was established in 2004 following the release of the interim findings of the Royal Commission into whether there has been corrupt or criminal conduct by any Western Australian Police Officer in December 2002. The CCC’s web site describes the Commission “as a permanent investigative commission with the same powers as a Royal Commission.”\(^\text{150}\)

While the CCM Act describe a complex process for appointing Commissioners and PICCCs that involves the Premier; a nominating committee involving the Chief Justice and the Chief Judge; and the Joint Standing Committee, the process for appointing a commissioner for a Royal Commission in WA is more straight forward.

Section 5 of the \textit{Royal Commissions Act 1968} gives the State Government wide discretion in appointing people as Royal Commissioners compared to the specific regime for appointing a CCC Commissioner that involves a nominating committee:

\(^{149}\) Ibid, p9.
Without in any way prejudicing, limiting, or derogating from the power of the Governor to make or authorise any inquiry, or to issue any Commission to make any inquiry, the Governor may, under the Public Seal of the State, appoint any person or persons to be a Royal Commission, generally or upon such terms of appointment as the Governor thinks fit, to inquire into and report upon, and, where so required or authorised by terms of appointment, to make recommendations in respect of any matter specified in the appointment.\textsuperscript{151}

**Finding 24**

The process in Western Australia for appointing a Royal Commissioner is uncomplicated and efficient. It does not include a nominating committee.

**Submission from Mr Chris Shanahan SC**

Then-Acting Commissioner Shanahan SC drew on his long experience of working at the Commission when supporting the continuing use of a nominating committee, in particular the positive role of the Chief Justice, as:

...the role of the Chief Justice as the head of the nominating committee is likely to attract more candidates from amongst senior members of the Bar and the profession generally than would otherwise be the case, it ensures the propriety and importance of the appointments.\textsuperscript{152}

Retaining the role of the Joint Standing Committee in the appointment process, and the need to ensure its bipartisan support for a candidate, are also supported by Mr Shanahan.\textsuperscript{153}

**Present position of the Attorney General**

The Attorney General, Hon Michael Mischin MLC, responded to the Committee’s recommendations in its Report 26 in April 2016 and supported amending the CCM Act to remove the role of the nominating committee in the process for the appointment of new Commissioners “so that the Premier may propose one name of a suitable Commissioner to the Joint Standing Committee for its consideration.” Further, the Attorney said the Government was considering an “equivalent amendment should be


\textsuperscript{152} Submission No. 6 from Mr Chris Shanahan SC, 3 June 2016, p6.

\textsuperscript{153} Ibid.
made to the CCM Act to remove the role of the nominating committee in the process for the appointment of new Parliamentary Inspectors.”  

Mr Mischin concluded by saying that the Government will “move to make these amendments as part of a package of amendments to the CCM Act which is presently being considered.”

It has been the practice in this Parliament for the Premier to attach the Chief Justice’s report from the nominating committee when he writes to the Committee with his recommendation for the appointment of a Commissioner or PICCC. The Committee has found this useful and on occasion has interviewed more than one nominee. In one case, it recommended to the Premier that he appoint a person other than the proposed candidate due to a specific operational reason for the Commission.

**Recommendation 2**
The Attorney General prepare an amendment to sections 9(3a)(a) and 9(3b) of the *Corruption, Crime and Misconduct Act 2003* to:

1. remove the role of a nominating committee in the appointment process for Commissioners and Parliamentary Inspectors; and
2. in lieu thereof, mandate that the Premier propose one name from a list of three people to the Committee for its bipartisan and majority support.

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155 Ibid.
Chapter 5

The Committee’s experience of the current process

The greatest delays have related to appointing a Commissioner: a total of 9 weeks to appoint Mr Len Roberts-Smith RFD, QC in 2007; a total of 38 weeks to appoint Mr Macknay QC in 2011; and a total of 54 weeks to appoint Hon John McKechnie QC in 2015.

Introduction

The Joint Standing Committee has participated in the appointment process five times during the 39th Parliament - three times for appointments to the Corruption and Crime Commission and twice to the Office of the Parliamentary Inspector. This chapter provides the timing for each of these appointments. The timings for these appointment processes have also been confirmed by comparing them with the data that the Chief Justice has provided in his supplementary submission (see Appendix 4).

Timing of recent appointments

Table 5.1- Appointment of Acting Corruption and Crime Commissioner, Mr Christopher Shanahan SC

<table>
<thead>
<tr>
<th>Milestone</th>
<th>Date</th>
<th>No. of weeks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resignation of previous incumbent</td>
<td>24 June 2013</td>
<td>N/a</td>
</tr>
<tr>
<td>Nominating committee recommendations to the Premier</td>
<td>17 September 2013</td>
<td>12</td>
</tr>
<tr>
<td>Premier notifies the JSCCCC of his recommendation</td>
<td>12 March 2014</td>
<td>25</td>
</tr>
<tr>
<td>JSCCCC meets with nominee</td>
<td>31 March 2014</td>
<td>3</td>
</tr>
<tr>
<td>JSCCCC responds to Premier with a recommendation</td>
<td>31 March 2014</td>
<td>0</td>
</tr>
<tr>
<td>Recommended nominee appointed</td>
<td>7 April 2014</td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTAL WEEKS FROM NOMINATION COMMITTEE REPORT TO APPOINTMENT</strong></td>
<td></td>
<td><strong>29</strong></td>
</tr>
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</table>
## Chapter 5

### Table 5.2 - Appointment of Corruption and Crime Commissioner, Hon John McKechnie QC

<table>
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<th>Milestone</th>
<th>Date</th>
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<tr>
<td>Resignation of previous incumbent</td>
<td>14 April 2014</td>
<td>N/a</td>
</tr>
<tr>
<td>Nominating committee recommendations to the Premier</td>
<td>24 February 2015</td>
<td>45</td>
</tr>
<tr>
<td>Premier notifies the JSCCCC of his recommendation</td>
<td>11 March 2015</td>
<td>2</td>
</tr>
<tr>
<td>JSCCCC meets with nominee</td>
<td>18 March 2015</td>
<td>1</td>
</tr>
<tr>
<td>JSCCCC responds to Premier with a recommendation</td>
<td>18 March 2015</td>
<td>0</td>
</tr>
<tr>
<td>Recommended nominee appointed</td>
<td>2 April 2015</td>
<td>2</td>
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</tbody>
</table>

**TOTAL WEEKS FROM NOMINATION COMMITTEE REPORT TO APPOINTMENT:** 5

### Table 5.3 - Appointment of Acting Parliamentary Inspector, Mr Matthew Howard SC

<table>
<thead>
<tr>
<th>Milestone</th>
<th>Date</th>
<th>No. of weeks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resignation of previous incumbent</td>
<td>#</td>
<td>N/a</td>
</tr>
<tr>
<td>Nominating committee recommendations to the Premier</td>
<td>3 September 2015</td>
<td>N/a</td>
</tr>
<tr>
<td>Premier notifies the JSCCCC of his recommendation</td>
<td>9 November 2015</td>
<td>9.5</td>
</tr>
<tr>
<td>JSCCCC meets with nominee</td>
<td>25 November 2015</td>
<td>2</td>
</tr>
<tr>
<td>JSCCCC responds to Premier with a recommendation</td>
<td>26 November 2015</td>
<td>0</td>
</tr>
<tr>
<td>Recommended nominee appointed</td>
<td>1 January 2016</td>
<td>5</td>
</tr>
</tbody>
</table>

**TOTAL WEEKS FROM NOMINATION COMMITTEE REPORT TO APPOINTMENT:** 16.5

* The previous incumbent gave notice not to renew his term due to illness.

### Table 5.4 - Appointment of Acting Parliamentary Inspector, Mr Craig Colvin SC

<table>
<thead>
<tr>
<th>Milestone</th>
<th>Date</th>
<th>No. of weeks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expiration of previous term</td>
<td>August 2015</td>
<td>N/a</td>
</tr>
<tr>
<td>Nominating committee recommendations to the Premier</td>
<td>3 September 2015</td>
<td>N/a</td>
</tr>
<tr>
<td>Premier notifies the JSCCCC of his recommendation</td>
<td>9 November 2015</td>
<td>9.5</td>
</tr>
<tr>
<td>JSCCCC meets with nominee</td>
<td>#</td>
<td>N/a</td>
</tr>
<tr>
<td>JSCCCC responds to Premier with a recommendation</td>
<td>18 November 2015</td>
<td>1</td>
</tr>
<tr>
<td>Recommended nominee appointed</td>
<td>9 December 2015</td>
<td>3</td>
</tr>
</tbody>
</table>

**TOTAL WEEKS FROM NOMINATION COMMITTEE REPORT TO APPOINTMENT:** 13.5

* Mr Colvin extended his previous term as an Acting PICCC and the Committee agreed that it did not need to meet with him.
Table 5.5- Acting Corruption and Crime Commissioner, Mr Scott Ellis

<table>
<thead>
<tr>
<th>Milestone</th>
<th>Date</th>
<th>No. of weeks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Expiration of previous term</td>
<td>27 July 2015</td>
<td>N/a</td>
</tr>
<tr>
<td>Nominating committee recommendations to the Premier</td>
<td>3 September 2015</td>
<td>5.5</td>
</tr>
<tr>
<td>Premier notifies the JSCCCC of his recommendation</td>
<td>12 November 2015</td>
<td>10</td>
</tr>
<tr>
<td>JSCCCC meets with nominee</td>
<td>4 April 2016</td>
<td>21&lt;sup&gt;a&lt;/sup&gt; (6)</td>
</tr>
<tr>
<td>JSCCCC responds to Premier with a recommendation</td>
<td>4 April 2016</td>
<td>0</td>
</tr>
<tr>
<td>Recommended nominee commences</td>
<td>1 July 2016</td>
<td>12.5</td>
</tr>
<tr>
<td><strong>TOTAL WEEKS FROM NOMINATION COMMITTEE REPORT TO APPOINTMENT</strong></td>
<td></td>
<td>49</td>
</tr>
</tbody>
</table>

<sup>a</sup> The original correspondence from the Premier to JSCCCC was not received by the Committee.

Submission from Mr Chris Shanahan SC

Then-Acting Commissioner Shanahan SC provided the Committee with a detailed submission. He was first appointed as an Acting Commissioner on 16 August 2005, about 18 months after the CCC had commenced operations. Mr Shanahan served two contiguous terms until 22 August 2010. He was reappointed an Acting Commissioner on 14 April 2014, and resigned as from 30 June 2016. Between 14 April 2014 and 28 April 2015, Mr Shanahan shared with Acting Commissioner Douglas the role of acting Commissioner after the retirement of Mr Roger Macknay QC and until Hon John McKechnie QC was appointed. In his time at the Commission he has served with all of the Commissioners, other than Mr Macknay.<sup>156</sup>

Mr Shanahan’s submission highlights the greater delays being experienced in appointing a Commissioner: a total of nine weeks to appoint Commissioner Len Roberts-Smith RFD, QC in 2007; a total of 38 weeks to appoint Mr Roger Macknay QC in 2011; and a total of 54 weeks to appoint Hon John McKechnie QC in 2015.<sup>157</sup>

Mr Shanahan submitted to the Committee on both the Inquiry’s terms of reference as well as other matters, such as how the statutory powers of the substantive Commissioner are to be exercised by an Acting Commissioner during a vacancy in that office. He proposes that the CCM Act be amended to require three months’ notice of resignation or retirement from a sitting substantive Commissioner to allow the appointment process to get under way whilst they remained in the role. He notes that this proposal would not have ensured the more speedy replacement in the case of Mr Macknay, who gave over 6 months public notice of his intention to retire, as there were other factors that impeded that process.

---

<sup>156</sup> Submission No. 6 from Mr Chris Shanahan SC, 3 June 2016, pp2-3.
<sup>157</sup> Ibid, p6.
Chapter 5

Mr Shanahan also proposes that administrative arrangements should be put in place between the nominating committee, the Department of the Attorney General and the Joint Standing Committee to set milestones for the completion of each stage of the appointment process.158

Other proposals made by Mr Shanahan include the need to address the remuneration offered to Acting Commissioners as there has been no change to them since the amendments in 2014 to the conditions of appointment for substantive Commissioners, and the use of section 14(2a) of the CCM Act to allow the prospective appointment of Acting Commissioners in anticipation of vacancies.159

Conclusion

The five appointments that the Committee has participated in have averaged about 22.5 weeks from when the nominating committee provided its three recommended names to the Premier, to when the successful applicant was appointed or commenced in their new position. As the Committee reported in August 2014 in its Report 15, *Ensuring the timely appointment of a new Corruption and Crime Commissioner*, the appointment of CCC Commissioner McKechnie was delayed by the inability of the nominating committee to recommend three suitable candidates to the Premier.160

A major factor in the resolution of this hiatus was the agreement of the State Government to amend the *Corruption and Crime Commission Act 2003* to allow the CCC Commissioner to be paid their judicial pension while also receiving the Commissioner’s salary.

The submission made to the Committee by the Chief Justice states that his communications in relation to vacancies and the subsequent advertising is generally conducted through the Solicitor General, and that this part of the process has not been the cause of any significant delay in the nominating committee making its recommendations to the Premier.161

For these five appointments the Committee was able to complete its part of the process in one to three weeks. The greatest delay appears to be from the time the Premier’s office receives the nominating committee’s recommendations to the point at which the JSCCCC is notified of the preferred candidate. This has averaged about

159 Ibid, p7.
161 Submission No. 1A from Hon Wayne Martin AC, QC, Chief Justice, Supreme Court of Western Australia, 5 July 2016, p1.
10 weeks, with the notification of the recommendation in regard to Acting Commissioner Shanahan taking 25 weeks.

The final administrative activity required by the Premier’s office to appoint successful candidates was generally completed in less than a month. In the case of Acting Commissioner Ellis, however, the total of 13 weeks for his appointment was based on the CCC Commissioner not wanting him to commence until after the Commissioner had returned from leave.

Finding 25
The greatest delay in the current processes of appointing Commissioners and Parliamentary Inspectors is the time taken by the Premier’s office to process the recommendations received from the nominating committee to providing the information and preferred candidate to the Joint Standing Committee for its consideration.

The Committee wrote to the Premier, Hon Colin Barnett MLA, seeking his response to the data the Committee had prepared on the timelines of the past five appointment processes. The Committee’s letter of 8 September 2016 was mislaid within the Premier’s office.\(^{162}\) The Premier replied on 19 October (see Appendix 7).\(^{163}\) The Premier confirmed information provided by the Chief Justice that “the Solicitor General currently plays an informal role in assisting the nominating committee to perform its responsibilities.” He said the Government:

\[
\ldots \text{is currently giving consideration to a range of amendments proposed in the 2012 Bill [Corruption and Crime Commission Amendment Bill 2012] that have not so far subsequently been implemented, as well as a range of other amendments proposed by the Corruption and Crime Commission, the JSC and others. The amendments currently being considered include the amendments to remove the requirement for the Premier to recommend a person to be Commissioner or Parliamentary Inspector from a list of 3 names submitted by the nominating committee.}^{164}\]

The Premier did not concede that his office contributed to any delay in the recent appointments of Commissioners and Acting Commissioners, and noted:

\[
\text{After my office receives the list of 3 names from the nominating Committee, it consults with the Attorney General’s office. There may}
\]

\(^{162}\) Ms Julie Harding, Executive Assistant, Office of the Premier of Western Australia, Email, 10 October 2016.

\(^{163}\) Hon Colin Barnett MLA, Premier, Letter, 19 October 2016, p2.

\(^{164}\) Ibid.
Chapter 5

also be a need for further consultations with the Solicitor General. Further, my preferred nominee is put to Cabinet before it is submitted to the JSC for approval.\footnote{165}

The Premier concluded his letter to the Committee by confirming “that my office is committed to ensuring appointments are made in a timely fashion” and offering:

In light of the concerns expressed in your letter, I will ask my office to examine what, if any, measures can be taken to reduce the time taken in the selection of a preferred candidate for referral to the JSC in the future.\footnote{166}

Recommendation 3
The Premier undertake a review of the internal processes for managing the appointments of Commissioners and Parliamentary Inspectors, with the aim of ensuring that they are more timely and efficient.

HON NICK GOIRAN, MLC
CHAIRMAN

\footnote{165} Ibid, p3.
\footnote{166} Ibid, p4.
Appendix One

Inquiry Terms of Reference

That the Committee inquire into the efficiency and timeliness of the current appointment process for Commissioners and Parliamentary Inspectors of the CCC, including enquiring into:

a. the current operation of sections 9, 14, 189 and 193 of the Corruption, Crime and Misconduct Act 2003;

b. the role played by each of the agencies in discharging their responsibilities under sections 9, 14, 189 and 193 of the Corruption, Crime and Misconduct Act 2003; and

c. alternate models used for similar appointments in other jurisdictions.
## Appendix Two

### Submissions received

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Organisation</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Hon Wayne Martin AC, QC</td>
<td>Chief Justice</td>
<td>Supreme Court of Western Australia</td>
</tr>
<tr>
<td>Hon Justice Neil McKerracher, QC</td>
<td></td>
<td>Federal Court of Australia</td>
</tr>
<tr>
<td>Hon Kim Wells, MP</td>
<td>Chair</td>
<td>Independent Broad-based Anti-corruption Commission Committee, Parliament of Victoria</td>
</tr>
<tr>
<td>Hon Ivan Dean, MLC</td>
<td>Chair</td>
<td>Joint Standing Committee on Integrity, House of Assembly, Tasmania</td>
</tr>
<tr>
<td>Hon Bruce Lander QC</td>
<td>Independent Commissioner Against Corruption, SA</td>
<td></td>
</tr>
<tr>
<td>Mr Chris Shanahan SC</td>
<td>Acting Commissioner</td>
<td>Corruption and Crime Commission</td>
</tr>
<tr>
<td>Rev Prof Michael Tate AO</td>
<td>Parliamentary Standards Commissioner, Tasmania</td>
<td></td>
</tr>
<tr>
<td>Hon Michael Murray AM, QC</td>
<td>Parliamentary Inspector of the Corruption and Crime Commission, WA</td>
<td></td>
</tr>
<tr>
<td>Hon David Levine AO, RFD QC</td>
<td>Inspector of the Independent Commission Against Corruption, NSW</td>
<td></td>
</tr>
<tr>
<td>Mr Paul Favell</td>
<td>Parliamentary Crime and Corruption Commissioner, QLD</td>
<td></td>
</tr>
<tr>
<td>Mr Robin Brett QC</td>
<td>Inspector</td>
<td>Victorian Inspectorate</td>
</tr>
<tr>
<td>Hon John McKechnie QC</td>
<td>Commissioner</td>
<td>Corruption and Crime Commission</td>
</tr>
<tr>
<td>Mr Lawrence Springborg, MP</td>
<td>Chair</td>
<td>Parliamentary Crime and Corruption Committee, Queensland</td>
</tr>
<tr>
<td>Hon Colin Barnett, MLA</td>
<td>Premier</td>
<td></td>
</tr>
</tbody>
</table>
Appendix Three

Submission from the Chief Justice, Hon Wayne Martin AC, QC

CHIEF JUSTICE OF WESTERN AUSTRALIA
Chief Justice's Chambers, Supreme Court of Western Australia,
Stirling Gardens, Barrack Street
Perth Western Australia 6000
Telephone: +618 9421 5237 Fax: +618 9221 3023
Email: chief.justice.chambers@justice.wa.gov.au

Our ref: CCC01001

26 May 2016

Hon Nick Goiran MLC
Chairman
Joint Standing Committee on the Corruption and Crime Commission
Parliament House
PERTH WA 6000

Dear Chairman

Thank you for your letter of 23 May 2016 inviting my submission into the inquiry to which your letter refers.

The Nominating Committee

The only aspect of the processes of appointment to the position of Commissioner and Parliamentary Inspector, and to positions involving acting in each of those roles, concerns the role of the Nominating Committee.

As I am sure you are aware, the Nominating Committee to which reference is made in each of those sections is constituted by the definition of that expression found in section 3 of the Corruption, Crime and Misconduct Act 2003 (WA) (the Act). Pursuant to that definition, I and the Chief Judge of the District Court are, by virtue of our offices, members of that Committee, together with a person appointed by the Governor to represent the interests of the community. Pursuant to the sections identified in the Committee's terms of reference, the functions of the Nominating Committee are to submit to the Premier a list containing the names of three persons eligible for appointment to the relevant position, and from which an appointment can be made.
In my respectful submission, there are at least three reasons why the inclusion of serving judges on the Committee required to make nominations to the Premier is both inappropriate and undesirable. They are:

(a) the constitutional prohibition upon the engagement of judges in non-judicial work that is inconsistent with their judicial office;

(b) the undesirability of involving judges in executive functions that are unrelated to the work of the courts; and

(c) the practical consequences of requiring heads of jurisdiction to perform other roles.

I will deal with each of these matters in turn.

**Constitutional Limitations**

For various reasons it is obviously inappropriate for me to provide the Committee with legal advice, and nothing in this letter should be construed as an attempt to do so. Rather, the purpose of my letter is to bring to the attention of the Committee the possibility that the provisions of the Act to which I have referred might give rise to a legal issue which is best avoided. A brief description of that issue follows.

The High Court has repeatedly held that Chapter III of the Constitution of the Commonwealth contemplates an integrated national judicature in which the judicial power of the Commonwealth is exercised by courts created by both State and Commonwealth Parliaments. It follows that the courts created by State Parliaments, as potential repositories of the judicial power of the Commonwealth, must comply with the requirements of Chapter III of the Constitution of the Commonwealth, and the legislative power of each State Parliament is limited by that implicit requirement of the Constitution.

One of the requirements which the High Court has recognised as an essential characteristic of a court meeting the requirements of Chapter III of the Constitution of the Commonwealth is the requirement that the judges of that court be independent of the executive. That
requirement can be infringed if judges are, by virtue of their office, required to perform executive functions which are inconsistent with the duties of their judicial office. It is difficult to predict in advance of determination by the High Court precisely which executive functions might be considered to be inconsistent with judicial office. Generally speaking, the greater the connection with functions traditionally performed by the executive, and the less the connection with functions traditionally performed by the judiciary, the greater the risk of a finding of inconsistency.

The development of these principles over the last decade or so has resulted in various State legislatures adopting the practice of imposing executive functions upon persons who might (or might not) hold judicial office, not by virtue of their appointment as a judge, but rather by virtue of their appointment to another office (that is, as persona designata). Because these principles had not been fully developed when the Act was passed in 2003, that approach was not taken, and the powers and responsibilities which attend membership of the Nominating Committee are imposed by the Act upon the Chief Judge and me by virtue of our judicial office. As I can see no relevant connection between the judicial offices which we hold, and the functions which we are required to perform as members of the Nominating Committee, which functions are entirely executive in character, this structure must at least raise a question with respect to the constitutional validity of these provisions. In my respectful view, it would be desirable if that question were avoided by the removal of the Chief Judge and the occupant of my office from the process of appointment.

Undesirable Involvement in Administration

Although there are some long-standing exceptions by which judicial officers can be involved in the performance of executive functions (the role of Lieutenant Governor being perhaps the most obvious example - a position venerated by time since the early days of the colony), contemporary evaluations of the importance of the independence of the judiciary are such that it is undesirable, as a matter of policy, to require judges to perform purely executive functions unconnected with their judicial office. Those reasons of policy are strong indeed when the executive functions have potential political consequences. That is why I
recommended to the government of the day that the Electoral Act be amended to remove the Chief Justice from the role of chair of the Electoral Distribution Commission, and the Act was amended to provide the capacity for a retired judge to perform that role (which has in fact been performed by a retired judge since those amendments).

Over the 10 years upon which I have served on the Nominating Committee, its role has not been entirely non-contentious. As the Committee will be aware, there have been times at which it has been extremely difficult to solicit expressions of interest from appropriately qualified candidates for appointment to the relevant vacant position.

Sometimes this has required the Committee to identify prospective candidates who might be approached. On another occasion, as chair of the Committee I made a recommendation to the Premier for amendment to the Act to improve the terms and conditions available to retired judges who were otherwise entitled to a judicial pension. These various actions, which are characteristic of those involved in the recruitment process, are not, with respect, duties of a kind which should be required of serving judges, given the potential risk of contention.

I should also note that the Supreme Court is regularly required to review the legality of actions taken by persons appointed to the offices created by the Act. Under current arrangements, the holders of those offices are, by definition, appointed from a list of names provided to the Premier by the Chief Justice as chair of the Nominating Committee. In those circumstances, the potential for conflict of interest is obvious.

**Practical Consequences**

The Chief Judge and I carry significant responsibilities relating to the administration of our respective courts, over and above the normal duties of judicial office. Those obligations are particularly onerous at times, such as these, when increasing case loads have not been matched by increasing judicial resources. The difficulties to which I have referred under the previous heading have required successive Chief Judges and I to devote significant amounts of time to the discharge of the functions imposed upon us by the Act. To be perfectly frank, those functions are,
with respect, an unnecessary and inappropriate distraction from the discharge of the burdens of our judicial offices.

Summary

For these various reasons, in my respectful submission, the Committee should recommend the amendment of the Act to remove the Chief Judge and the Chief Justice from the Nominating Committee. As the Committee may be aware, when the views expressed in this letter were put to the then Attorney General during the life of the previous Parliament, the government accepted the recommendation, and the Bill to amend the Act which lapsed with the dissolution of that Parliament contained clauses within it which would have had that effect.

Whether or not the removal of judicial officeholders from the appointment process should be matched by some other safeguards is not a matter upon which I wish to comment, as it is, with respect, none of my concern.

Chief Judge Sleight has authorised me to advise that he agrees entirely with the views expressed in this submission.

Yours sincerely

[Signature]

The Hon Wayne Martin AC
Chief Justice of Western Australia
Appendix Four

Supplementary submission from the Chief Justice, Hon Wayne Martin AC, QC

5 July 2016

Hon Nick Goiran MLC
Chairman
Joint Standing Committee on the Corruption and Crime Commission
Parliament House
PERTH WA 6000

Dear Chairman

Thank you for your letter of 1 July 2016. I will firstly deal with your request for further information in relation to appointments made under the Corruption, Crime and Misconduct Act at a general level, and then provide more specific information in relation to each appointment with which I have been involved.

My communications with executive government in relation to the occurrence of vacancies and in relation to such matters as the placement of advertisements calling for expressions of interest and such like has generally been conducted through the Solicitor General. When Mr Meadows QC served as Solicitor General, he generally advised me of the need for an appointment by letter, with the result that I am able to identify the date upon which I received such advice from the file maintained in my office on this topic. However, during the term of Mr Donaldson SC as Solicitor General, it was more common for him to notify me of the need for an appointment by telephone, with the consequence that I have no record of the date upon which that advice was received.

Once such advice was received, it was my practice to request the Solicitor General to make appropriate arrangements for the placement of advertisements calling for expressions of interest. Although there was one occasion upon which this process took rather longer than I might have expected, generally speaking, the need to place advertisements calling for expressions of interest has not been the cause of significant
delay in the Nominating Committee making its recommendations to the Premier.

On occasions on which there has been a significant delay in making a recommendation to the Premier, the source of that delay has been the lack of expressions of interest from three people appropriately nominated for appointment. On those occasions I would discuss the situation with the Solicitor General, and we would discuss prospective candidates who might be specifically approached with a view to soliciting an expression of interest from them. On occasions it took quite some time for this process to secure expressions of interest from three persons appropriately nominated to the Premier. As the process was conducted by the Solicitor General at my request, the timing of that process was largely outside my control.

The final step in the process is the meeting of the Nominating Committee to consider its recommendations to the Premier. As far as I can recall, that step in the process has never been a cause of significant delay, and the members of the Nominating Committee have been able to conduct communication with each other efficiently through email and other means.

I turn now to provide more specific information with respect to the 15 appointments in which I have been involved.

**Position of Acting Commissioner**

I was advised of the need to appoint an Acting Commissioner by letter from the Solicitor General dated 15 May 2006. However, there were difficulties in securing the nomination of three persons appropriately qualified for appointment, with the result that my advice to the Premier was not provided until 13 November 2006.

**Position of Commissioner**

I was advised of the need to appoint a Commissioner by letter from the Solicitor General dated 16 November 2006. The advertisement calling for expressions of interest required the expressions to be provided by 15 December 2006. During January I advised the Solicitor General, on
behalf of the Nominating Committee, that we were unable to recommend three names to the Premier from those who had expressed interest. Steps were taken by the Solicitor General to rectify the situation and I provided my advice to the Premier by letter dated 1 March 2007.

Position of Acting Commissioner for the Mallard Inquiry

I was advised of the need to appoint an Acting Commissioner in order to conduct an inquiry into the Mallard matter by letter from the Solicitor General dated 11 February 2007. The advice of the Nominating Committee was provided to the Premier by letter dated 20 March 2007.

Position of Acting Commissioner

I was advised of the need to appoint an Acting Commissioner by letter from the Solicitor General dated 20 June 2007. The advice of the Nominating Committee was provided to the Premier by letter dated 7 August 2007.

Positions of Acting Commissioner and Acting Parliamentary Inspector

I was advised of the need to appoint persons to the office of Acting Commissioner and Acting Parliamentary Inspector by email from the Solicitor General's office dated 2 October 2007. An advertisement calling for expressions of interest was placed immediately, but the Nominating Committee considered that the expressions of interest received in response to that advertisement did not provide three persons appropriately nominated for appointment to each position. Accordingly, further action was taken by the Solicitor General and the advice of the Nominating Committee was ultimately provided to the Premier by letter dated 14 February 2008.

Position of Parliamentary Inspector

My records do not reveal when I was advised of the need to nominate a person to the position of Parliamentary Inspector, although I suspect it would have been shortly prior to an email which I sent to members of
the Nominating Committee on that topic on 19 November 2008. The advice of the Nominating Committee was provided to the Premier by letter dated 17 December 2008.

**Position of Acting Parliamentary Inspector**

I was advised of the need to appoint an Acting Parliamentary Inspector by letter from the Premier dated 21 May 2009. Once again the Nominating Committee did not consider that the expressions of interest received in response to the advertisement placed were sufficient to enable three names to be provided to the Premier. Accordingly, remedial action was taken by the Solicitor General and the advice of the Nominating Committee was ultimately provided to the Premier by letter dated 9 October 2009.

**Position of Acting Commissioner**

I was advised of the need to appoint an Acting Commissioner by letter from the Solicitor General dated 27 April 2010. This is another one of those occasions upon which the Committee did not consider that expressions of interest received in response to the advertisement placed were sufficient to enable three names to be provided to the Premier. Remedial action was taken by the Solicitor General and the advice of the Nominating Committee was ultimately provided by letter to the Premier on 7 October 2010.

**Position of Commissioner**

I was advised of the need to appoint a Commissioner by a telephone call from the Solicitor General on 8 October 2010. Although advertisements were placed shortly thereafter, in the view of the Nominating Committee, no expressions of interest were received from persons appropriately nominated for appointment. The Solicitor General was requested to solicit expressions of interest from appropriate persons. That took a long time, and in the result, the advice of the Nominating Committee was provided to the Premier by letter dated 14 September 2011.
Position of Acting Commissioner

My records do not reveal when I was advised of the need to appoint an Acting Commissioner, although as advertisements were placed calling for expressions of interest in late August 2011, I expect that I would have received such advice shortly before those advertisements were placed. The advice of the Nominating Committee was provided to the Premier by letter dated 21 October 2011.

Position of Acting Parliamentary Inspector

Again my records do not reveal the time at which I was advised of the need to appoint an Acting Parliamentary Inspector. However, as advertisements calling for expressions of interest for appointment to that position were placed in January 2012, I believe that I would have been advised of the need for an appointment shortly before Christmas 2011. The advice of the Nominating Committee was provided to the Premier by letter dated 23 February 2012.

Position of Parliamentary Inspector

Again my records do not reveal the precise date upon which I was advised of the need to appoint a Parliamentary Inspector. However, I suspect that advice would have been received shortly before an advertisement calling for expressions of interest was placed in early April 2012. This was another one of those occasions upon which the expressions of interest received in response to the advertisement were not thought to provide sufficient names for recommendation to the Premier and the Solicitor General was requested to take remedial action. The advice of the Nominating Committee was provided to the Premier by letter dated 16 August 2012.

Position of Acting Commissioner

Again my records do not reveal precisely when I was advised of the need for an appointment to the position of Acting Commissioner, although I suspect it would have been in the latter part of July 2013, shortly before advertisements calling for expressions of interest were
placed. The advice of the Nominating Committee was provided to the Premier by letter dated 17 September 2013.

**Position of Commissioner**

My records do not reveal precisely when I was advised of the need to appoint a Commissioner, although I suspect that such advice would have been received during November 2013, shortly before advertisements calling for expressions of interest were placed. By letter dated 5 February 2014, I advised the Premier of the difficulties which had been encountered in attempting to solicit expressions of interest from persons appropriately qualified for appointment and made recommendations with respect to alterations to the terms of remuneration provided to appointees otherwise eligible to receive a judicial pension. There was further correspondence with the Premier on that subject during 2014. After changes were made to the legislation, another advertisement calling for expressions of interest was placed in January 2015 and the advice of the Nominating Committee was provided by letter to the Premier dated 24 February 2015.

**Positions of Acting Parliamentary Inspectors**

I was advised of the need to make appointments to two positions of Acting Parliamentary Inspector by letters from the Premier dated 4 & 13 March 2015. However, this was an occasion upon which there appears to have been some delay in the placement of advertisements calling for expressions of interest, which did not occur until June 2015. As the Nominating Committee did not consider the expressions of interest received in response to the advertisements to provide three persons appropriately nominated for appointment, the Solicitor General was requested to contact suitably qualified persons to solicit expressions of interest. That occurred and the advice of the Nominating Committee was provided by letter to the Premier dated 3 September 2015.

I trust this information is sufficient for your purposes and would, of course, be pleased to expand upon it further on request.
I turn now to your request for my view in relation to the submission received from the Parliamentary Inspector advocating a new process for appointment to that position, and for appointment to the position of Acting Parliamentary Inspector.

Although, of course, I have the greatest of respect for the Parliamentary Inspector, who was a valued colleague on the Court for many years, I do not support that part of his submission relating to the process for appointment to the position of Parliamentary Inspector and Acting Parliamentary Inspector. My objection to the process he proposes is identical to my objection to the current process. The office of Chief Justice is the senior judicial office in the State. The duties of the Chief Justice should, generally speaking, be restricted to the duties of judicial office and not intermingled with executive functions such as the appointment of persons to offices which are not judicial in character. Put bluntly, the Chief Justice should not be involved in what is fundamentally a recruitment process which, as you will see from the terms of this letter, has engaged a considerable amount of my time over the last 10 years.

However, my concern is not limited to the inevitable distraction from the fundamental duties of my office which this responsibility causes. My primary concern relates to the undesirability of an inappropriate fusion between judicial and executive functions. More recent decisions of the High Court are replete with observations with respect to the undesirability of fusing those responsibilities. Engagement in what is a fundamentally administrative process relating to the appointment of officials to administrative positions is, in my respectful view, a paradigm example of blurring the judicial function with the executive function.

No doubt members of your committee will be aware that I also serve as Lieutenant Governor, and act as Deputy of the Governor when the Governor is unavailable to serve. However, that exception to the general principles to which I have referred is venerated by time and history, and gives rise to no practical difficulties, given the very limited executive role performed by the Monarch's representative in this State.
With respect to the Parliamentary Inspector, section 108 of the State Administrative Tribunal Act does not provide an appropriate analogy. That is because the President of the State Administrative Tribunal is, and must be, a judge of the Supreme Court of Western Australia. Accordingly, section 108 of the SAT Act merely provides statutory recognition of the long-standing convention pursuant to which the Chief Justice is consulted before any member of the Court is requested to perform non-judicial duties such as, in that case, service as President of the State Administrative Tribunal.

Thank you for the opportunity to provide a further submission with respect to the matters under current consideration by your Committee.

Yours sincerely

[Signature]

The Hon Wayne Martin AC
Chief Justice of Western Australia
Appendix Five

Legal opinion- Mr Ken Pettit SC

K M PETTIT SC
Prosecutor General
Level 23 Allenvale Square
77 St Georges Terrace, Perth
Western Australia 6000
Telephone: (08) 9220 9366

30 August 2016

Ms Kirsten Robinson
Clerk of the Legislative Assembly
Parliament House
Perth WA 6000

Dear Ms Robinson

Legal Opinion for the Joint Standing Committee on the Corruption and Crime Commission

Instructions

I have been asked to provide my opinion on the Constitutional validity of provisions of the Corruption, Crime and Misconduct Act 2003 (the CCM Act) under which two members of the State’s judiciary have a statutory role in the nomination of candidates for appointment under the CCM Act.

The particular questions asked of me are:

1. Is it the case that there are limits imposed by Chapter III of the Constitution of the Commonwealth that impact on section 3 of the Corruption, Crime and Misconduct Act 2003 that requires the Chief Justice and the Chief Judge of the District Court to participate in a Nominating Committee?
2. If yes to 1, are any legislative amendments to the CCM Act possible in order to keep serving judges involved in the process (ie persona designata)?
3. If yes to 2, what legislative amendments to the CCM Act are necessary to keep serving judges involved in the process (ie persona designata)?
4. Are any limits imposed by the Constitution of the Commonwealth or the document that constitute the Constitution of Western Australia that would preclude the Joint Standing Committee from undertaking the role currently undertaken by the Nominating Committee in section 3 of the Corruption, Crime and Misconduct Act 2003?

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The CCM Act

By s 9(3a) of the CCM Act, the Premier is to recommend to the Governor the appointment of a Commissioner from a list of three candidates. The list of three candidates is to be submitted to the Premier by a nominating committee comprising the Chief Justice of the Supreme Court, the Chief Judge of the District Court and another. By s 14(2a), similar provision is made for Acting Commissioners.

Under ss 189(2)(a) and 191(2a), similar provisions are made for the nominating committee to provide a list of three candidates for appointments as the Parliamentary Inspector and an Acting Parliamentary Inspector.

Those provisions are of course in the form of legislative commands to members of the judiciary from the legislature, but they do not allow the executive to influence or impose its will on the judiciary. On the contrary, the object of the provisions is to require the nominating committee to impose its will on the executive to the extent of confining the field of candidates available to the Premier for recommendation in Executive Council.

Also, s 9(3b) requires the nominating committee to advertise throughout Australia for expressions of interest in the position of Commissioner. (No similar provision is made for the nomination of the other officers.) Again, this does not allow the executive to influence the judiciary. It too merely comprises a legislative command from the Parliament to certain members of the judiciary.

Chapter III Commonwealth Constitution

The issues for my opinion arise from Chapter III ("The Judiciary") of the Commonwealth Constitution, not from any provision of the Constitution Act 1889 (WA) or the Constitution Acts Amendment Act 1899 (WA).

Chapter III of the Commonwealth Constitution has two relevant operations. First, it imposes certain standards for the composition and operation of federal courts. Some of those standards arise by implication as discerned by the High Court, rather than expressly.

Second, Chapter III, read with Chapters I and II, separates federal judicial power from federal legislative and executive powers. This second operation is referred to as "the separation of powers" doctrine. The doctrine has two related limbs. It prevents the Commonwealth vesting non-judicial powers in a Federal court, and it prevents the Commonwealth vesting judicial powers in a body that is not a constitutionally appropriate court.

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1 R v Kirby, Ex p Entertainers Society of Australia (1956) 94 CLR 254.
Chapter III of the Constitution, both as to its standards and as to the separation of powers doctrine, does not directly apply to the State. However, in a series of cases beginning with Kable, the High Court has held that the fact that the Constitution allows vesting, and the Commonwealth Parliament has vested, federal judicial power in some State courts, has the consequence that State courts exercising federal judicial power must also have certain minimum qualifications. As a result, certain laws of a State may be invalid to the extent that they deprive a State Court of such minimal standards.

However, this result is not simply because State courts are mentioned in s 71 of Chapter III along with Federal Courts. State courts are not treated in the same way as Federal Courts. Rather, it is because the High Court has discerned in the Commonwealth Constitution an implicit requirement that State courts, as recipients of federal judicial power, must be, in a sense, worthy recipients or Constitutionally appropriate recipients.

The exposition of the criteria applicable to State courts is not yet clear from the decided High Court cases, as follows.

High Court authorities

Because the implications of Kable remain in flux, it is preferable to examine recent High Court discussion of Kable, rather than to begin with an examination of Kable itself. In joint reasons from six justices in Attorney General (NT) v Emmerson, the principle from Kable was articulated in this way:

40. The principle for which Kable stands is that because the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Court, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction, is constitutionally invalid.

41. In Mihalas v United States, the fundamental nature of judicial independence and the relationship between institutional integrity and impartiality were identified by the Supreme Court of the United States:

"The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action."

Ultimately the inquiry in respect of a function or process bestowed upon, or required of, a court was "whether [it] undermines the integrity of the Judicial Branch."

42. The ad hoc interim legislation in Kable (the stated object of which was "to protect the community") authorised the Supreme Court of New South Wales to order preventive detention without any breach of the law being alleged or any adjudication of guilt. A.

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3 See for example: Nicholas v Western Australia [1972] WAR 168.
4 Kable v Director of Public Prosecutions, NSW [1996] 189 CLR 51.
5 French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.
6 [2014] HCA 13
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majority of this Court found that task incompatible with the institutional integrity of the Supreme Court because the legislation drew the Court into implementing what was essentially a political decision or government policy that Mr Kable should be detained, without the benefit of ordinary judicial process. This Court has subsequently confirmed that Kable applies beyond its extraordinary circumstances to the Supreme Courts of the Territories and to all State and Territory courts as Ch II courts. Some mention should be made of the authorities in this Court, after Kable, which were relied upon in argument in this appeal.

44. By comparison with Kable, in Fardon v Attorney-General (Qld)\(^1\), legislation of general application authorising the continued detention or supervised release of prisoners who were "a serious danger to the community" was upheld as valid. This was because the adjudicative process required of the State Supreme Court in that case supported the maintenance of the institutional integrity of the Court\(^2\) and the adjudicative process required could be performed "independently of any instruction, advice or wish of the legislative or executive branches of government."\(^3\)

45. Since Kable, it has been stated often that a court must satisfy minimum requirements of independence and impartiality\(^4\), even though it is not possible to make a single statement embracing all of the defining characteristics of a court\(^5\). In the context of the arguments advanced in this appeal, it is worth repeating the well-established proposition that independence and institutional impartiality mark a court apart from other decision-making bodies\(^6\). A legislature which imposes a judicial function on an adjudicative process on a court, whereby it is essentially directed or required to implement a political decision or a government policy without following ordinary judicial processes, deprives that court of its defining independence and institutional impartiality.

46. This was exemplified in International Finance Trust Co Ltd v New South Wales Crime Commission\(^7\), Section 10 of the Criminal Assets Recovery Act 1999 (NSW) required the Supreme Court of New South Wales to hear and determine an application, made ex parte, for a restraining order in respect of property, if a law enforcement officer suspected that

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\(^1\) [2004] HCA 46; (2004) 223 CLR 575
\(^3\) [2004] HCA 46; (2004) 223 CLR 575 at 821 [116] per Gummow J. See also at 598 [33], 600-602 [41]-[44] per McHugh J.
\(^7\) (2009) 240 CLR 319
the owner of the property had committed one of a range of crimes or that the property in question derived from criminal activity. Members of the majority in this Court found that a 10 committal the Supreme Court into a process incompatible with, and repugnant in a fundamental degree to, the judicial function of the Court and ordinary judicial processes. That conclusion embraced a proposition established in *Gypsys Jokers Motorcycle Club Inc v Commissioner of Police* that legislation which purports to direct the courts as to the manner and outcome of any exercise of jurisdiction is apt to impair, impermissibly, the character of courts as independent and impartial tribunals.

47. In *South Australia v Totani*, the legislation under consideration was directed to the making of control orders. Section 14(1) of the *Serious and Organised Crime (Control) Act 2000* (SA) provided that, on application by a member of the Executive (the Commissioner of Police), the Magistrates Court of South Australia was required to make a "control order" against a defendant if satisfied the defendant was a member of a "declared organisation", without the need to determine, by ordinary judicial processes, whether the defendant engaged in, or had engaged in, serious criminal activity. A "declared organisation" was an organisation that was subject to an anterior declaration by another member of the Executive (the Attorney-General). By majority, s 14(1) was held invalid on the ground that it authorised the "enlistment" or "recruitment" of the Magistrates Court to implement the decisions of the Executive in a manner incompatible with the proper discharge of its federal judicial responsibilities and its institutional integrity.

The High Court examined the issue again in *Duncan v Independent Commission Against Corruption* and reaffirmed what had been said in *Emmerson*. The majority also pointed out that, if any Commonwealth law affecting the Federal courts is valid despite Chapter III, then any similar State law affecting State Courts must also be valid.

The key concepts were summarized by the Chief Justice in *Totani* at [69]. Although said in 2010, and I have not found express endorsement since then, these principles have held good in my opinion. The Chief Justice said (references omitted):

69. The text and structure of Ch III of the Constitution postulate an integrated Australian court system for the exercise of the judicial power of the Commonwealth with this Court at its apex. There is no distinction, so far as concerns the judicial power of the Commonwealth, between State courts and Federal courts created by Parliament. The consequences of the constitutional placement of State courts in the integrated system include the following:

1. A State legislature cannot confer upon a court of a State a function which substantially impairs its institutional integrity and which is therefore incompatible with its role as a repository of federal jurisdiction.
2. State legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.

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18 [(2015)] HCA 32 at [15]-[20].
3. The institutional integrity of a court requires both the reality and appearance of independence and impartiality.

4. The principles underlying the majority judgments in *Kable* and further expounded in the decisions of this Court which have followed after *Kable* do not constitute a codification of the limits of State legislative power with respect to State courts. Each case in which the *Kable* doctrine is invoked will require consideration of the impugned legislation because:

"the critical notions of repugnancy and incompatibility are incapable of further definition in terms which necessarily dictate future outcomes".

For legislators this may require a prudential approach to the enactment of laws directing courts on how judicial power is to be exercised, particularly in areas central to the judicial function such as the provision of procedural fairness and the conduct of proceedings in open court. It may also require a prudential approach to the enactment of laws authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings.

5. The risk of a finding that a law is inconsistent with the limitations imposed by Ch III, protective of the institutional integrity of the courts, is particularly significant where the law impairs the reality or appearance of the decisional independence of the court.

The relevant provisions of the CCM Act could not "substantially impair the institutional integrity" of the Supreme and District Courts. Invalidation of State and Territory legislative provisions on this ground has been by:

(a) "conscripting" a court into an executive policy in order to clothe the executive policy with the appearance of judicial authority, or "rendering [a court] an instrument of the Executive"; or

(b) denying the Court power to implement some form of judicial hearing (right to be heard or exemption from giving reasons).

However, these are all cases in which the impugned effect is upon the administration of justice. The CCM Act could not be characterized as "repugnant to or incompatible with the exercise of the judicial power of the Commonwealth" etc. in that sense, because the Act does not touch upon the administration of justice.

On the contrary, as mentioned above, the CCM Act reflects Parliament's greater respect for the judgment of those members of the Judiciary thereafter the judgment of the executive in appointments to the Commission. While an argument might be mounted that the Chief Justice could potentially be embarrassed should the Court later be faced with a case in which an appointed Commissioner was a party, that argument is itself demonstrative of scant faith in the judiciary's ability to act in a detached manner, and flies in the face of the multiple interactions that members of the judiciary have had, and continue to have, with the executive government in various ways. The Chief Justice, for example, is the Lieutenant Governor, in which role the Chief Justice is obliged by convention to accept the advice of Executive Council.

The CCM Act does not "dictate the process or outcome of judicial proceedings". It does not "impair the reality or appearance of the decisional independence of the court".
Nor am I able to see how even the appearance of independence and impartiality could be at risk. The CCM Act does not touch upon the manner in which the Chief Justice and the Chief Judge go about the administration of justice in their respective courts.

In the result, in my opinion the CCM Act does not offend the Kable principle.

**Persona Designata principle**

The Kable principle is connected with the doctrine of the separation of powers, but is not coincidental. As mentioned, the basic, irrefutable, character of State courts as recipients of Federal judicial power is more to do with the independence and integrity of State courts than it is to do with separation of powers.

Most of the case law on the persona designata principle arose in the context of challenges to a Commonwealth law which conferred powers on a Federal judge, which challenges rested principally on the doctrine of separation of power, not on any Commonwealth equivalent of the Kable principle. Nevertheless, there obviously exists a Commonwealth equivalent (see below).

Commonwealth to confer non-judicial functions on a Federal court or upon a Federal Judge acting as such, a person who happens The persona designata principle, in this context, is that, although it is generally invalid for the to be a Federal judge may be appointed to perform non-judicial functions provided the appointment is directed, not at the court or the office of the judge, but at the individual person (notwithstanding that the judge is chosen because she/he is a judge).

For example, the appointment of a Federal Court judge as a member of the Administrative Appeals Tribunal was held valid in *Drake v Minister for Immigration and Ethnic Affairs*\(^{20}\); the powers conferred on Federal Court judges to authorise telephone tapping was upheld in *Hilton v Wells*\(^{21}\) and affirmed in *Grollo v Palmer*\(^{22}\).

Because of that context, two criteria were expressed for application of this persona designata principle. First, the function must not be incompatible with the judge’s judicial role. This appears to be a reference to the Commonwealth equivalent of the Kable principle. Second, the appointment must be by the judge’s consent: *Grollo v Palmer*\(^{22}\). Because of the latter requirement, the Commonwealth’s Telecommunications (Interception) Act 1979 now requires the consent of each “eligible Judge”\(^{24}\)

On its face, the CCM Act would not comply with the second criterion because the composition of the “nominating committee” is set by the CCM Act, regardless of consent from the Chief Justice and Chief Judge. However, that is of little moment because, in this

\(^{20}\) (1979) 66 FLR 409, a decision of the Federal Court itself.

\(^{21}\) (1983) 157 CLR 57.

\(^{22}\) (1995) 184 CLR 348.

\(^{23}\) R 356, per Brennan CJ, Deane, Dawson and Toohey JJ.

matter, the question is not whether the CCM Act would comply with the separation of powers doctrine, but with the *Kable* principle. The State’s courts are not bound by the separation of powers doctrine, save for so much of it as is reflected in the *Kable* principle, namely to the extent that the separation of powers doctrine must be facilitated by ensuring the independence and instructional integrity of courts that exercise federal jurisdiction.

In the context of the *Kable* principle, it is not a central consideration whether the Act allows the judges’ consents – either the CCM Act offends the Constitutional principle or it does not, and the Chief Justice and Chief Judge have little capacity to mitigate by their consents any breach of the Constitution.

Rather, the consent of the Chief Justice and Chief Judge are but one factor in the overall analysis of the CCM Act for compliance with the *Kable* principle. Because the CCM Act does not touch upon the administration of justice, and because the CCM Act does not otherwise appear to discredit the offices of those Judges or their Courts, I consider the persons designate principle to be of marginal significance.

**Prudential amendment of the CCM Act**

In accordance with my opinion above, I see no need to amend the CCM Act. Nevertheless, given that the High Court does not yet appear to have fully expounded upon the *Kable* principle, and in the interests of prudence, some observations follow.

At a general level, the risk of offending the *Kable* principle is reduced by not including serving judicial officers in any such executive function.

Second, if the Chief Justice and Chief Judge are to retain their CCM Act roles, then it would be safer to include them in the nominating committee by *ad hoc* appointment by the Premier or the Joint Standing Committee or some other body, rather than by the CCM Act, in which case their consent would also be required, further minimizing the risk.

**Use of Joint Standing Committee**

The last question for my opinion is whether the definition of “nominating committee” in the CCM Act could be lawfully amended to comprise members of the Joint Standing Committee. I see no legal or constitutional impediment to that course. In any event, the Constitution Act 1889 (WA) and the Constitution Acts Amendment Act 1899 (WA) take effect as more statutes of the Parliament, capable of amendment by a subsequent Act. That power is subject to any entrenchment provision under which special rules apply to the amendment process, but none is applicable here.

Section 34 of the Constitution Acts Amendment Act 1899 provides that a person is disqualified from membership of the Legislature if the person holds an office listed in Part 1 of Schedule V. The list in Part 1 of Schedule V does not include every executive role, and the implication is that, otherwise, executive roles are not disqualifying.
However, there may well be an argument against the suggested role on grounds of governance. To the extent that the Commissioner and others are appointed from a very short list compiled by the Joint Standing Committee, the reality and perception of impartial Committee oversight of the Commissioner and others could be in question.

Conclusions

2. No legislative amendments to the CCM Act are required in order to keep serving judges involved in the process.
3. The CCM Act could be further insulated from risk of invalidation by imposing an intermediate step in the process by which the nominating committee is constituted.
4. There are no legal or Constitutional limits that would preclude the Joint Standing Committee from undertaking the role currently undertaken by the nominating committee in section 3 of the Corruption, Crime and Misconduct Act 2003, but there may be governance objections.

Yours faithfully,

KM Pettit SC
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Submission from the CCC Commissioner, Hon John McKechnie QC

Background

[1] On 23 May 2016 the Commission received a written invitation from the Joint Standing Committee (JSCCCC) to make a submission in relation to an inquiry into the efficiency and timeliness of the current appointment process for Commissioners and Parliamentary Inspectors of the CCC.

[2] The Inquiry’s terms of reference include the following:

a) The current operation of sections 9, 14, 28 and 193 of the Corruption, Crime and Misconduct Act 2003 (CCM Act);

b) The role played by each of the agencies in discharging their responsibilities under sections 9, 14, 28 and 193 of the CCM Act; and

c) Any alternate models used for similar appointments in other jurisdictions.

WA model for Commissioner appointments under the CCM Act

[3] The current WA model for appointment of the CCC Commissioner (‘Commissioner’) is set out in section 9 of the CCM Act.

[4] In brief, the current appointment process for the Commissioner is as follows:

a) a nominating committee must be formed consisting of the Chief Justice, the Chief Judge of the District Court and a person appointed by the Governor to represent the interests of the community;¹

b) the nominating committee must advertise the role nationally and call for expressions of interest;²

b) the nominating committee must submit a list of three names of eligible persons to the Premier;³

d) the Premier must consult the JSCCCC to ensure that the appointee recommended also:

i. has the support of a majority of the JSCCCC;⁴ and

ii. has ‘bipartisan support’;⁵

¹ Required by section 3 CCM Act definition of ‘nominating committee’.
² Section 9(3b) CCM Act.
³ Section 9(3a)(a) CCM Act.
⁴ Section 9(c)(a) CCM Act.
⁵ Section 9(3a)(b) CCM Act.

⁶ Section 9(3a)(b) CCM Act. ‘Bipartisan support’ is defined in section 3 and means the support of members of the Standing Committee who are members of both of the parties supported by the Premier and the Leader of the Opposition.
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- the Premier recommends an appointee with the support of the JSCCC to the Governor; and
- the Commissioner is appointed by the Governor on the recommendation of the Premier.

[5] The term of appointment for the Commissioner is an initial period of 5 years on a full time basis with eligibility to be reappointed once. The Commission supports the terms and conditions of service as currently provided for in Schedule 2 clause 1 and 2 of the CCM Act.

[6] Recent amendments to the remuneration or salary and judicial pension schemes in 2014 continue to be supported by the Commission as a means to ensure that it attracts the most qualified prospective appointees with experience in judicial office who may consider appointment as an attractive, beneficial and valuable opportunity.

[7] The Governor may temporarily suspend the Commissioner from office at any time, if the grounds under section 12(2) CCM Act are satisfied. The statement of grounds for suspension must be laid before each House of Parliament within 7 days and within 30 days after that the Commissioner may only be removed from office on addresses from both Houses of Parliament.

[8] The CCM Act does not currently prescribe any timelines at any stage of the appointment of the Commissioner.

Role played by each agency at each stage of the process

[9] The appointment of the Commissioner is intended to be a-political and for this reason the requirements under the CCM Act mandate the involvement of the following:

- the State’s most senior judicial officer bearers (Chief Justice and Chief Judge of the District Court) as nominating committee members;

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1 Section 9(3) CCM Act.
2 Section 9(3) CCM Act. Since the Australia Acts were passed in 1981 by the Commonwealth Parliament and the Parliament of the United Kingdom at the request of all State Parliaments, the Governor acts on the advice of the Premier, Ministers and Executive Council. The Governor’s powers and functions are set out in the Letters Patent, under which the Governor is appointed, and the Constitution Act 1850: http://www.govhouse.wa.gov.au/governors-role-link/the-governor.html.
3 Section 11 and Schedule 2 CCM Act.
4 Section 32 of the Corruption and Crime Commission Amendment (Disqualification) Act 2014 ensures that a Commissioner who is entitled to a judicial pension does not forfait that entitlement on appointment to the office of Commissioner.
5 Section 12(1)-(3) set out the procedures and criteria for suspension and removal from office.
6 There is a provision regarding the expiry of resolutions concerning eligible Acting Commissioners after 12 months at section 14(2a)(c).
b) an independent member of the public (recommended by the Governor) as a nominating committee member;

c) both JSCCCC support and bipartisan support; and

d) appointment by the Governor (on the recommendation of the Premier).

[10] In practice, the CCM Act requirements for assembling a nominating committee and consultation with the JSCCCC and Premier have proven most recently to prolong the appointment of a Commissioner at each stage of the process.

[11] The complexity of the WA Model espoused in the CCM Act is inefficient, cumbersome and may be costly in terms of public expenditure and public resources.

[12] The current requirement to have a member of the public and judicial officers assist in the selection process is not replicated in any jurisdiction in Australia. The inclusion of persons not associated with any political party in the recruitment process may avoid perceptions of political bias in the appointment of the Commissioner although this particular process is not adopted by any other State.

[13] In Victoria, it is the Attorney-General who submits a proposed appointment to the IBAC Committee. Similarly in Queensland, and in South Australia, it is the Attorney-General who makes a referral to a parliamentary committee. In New South Wales and in Tasmania, it is the relevant Minister who makes a recommendation in consultation with their respective bipartisan parliamentary committees.

[14] In each of the above states, the Minister cannot make a recommendation for appointment by the Governor without the nominee being approved by a bipartisan parliamentary Committee.

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Section 21 Independent Broad-based Anti-corruption Commission Act 2011 (IBAC Act). The relevant Minister is the Attorney-General, Hon. Martin Pakula MP. The IBAC Committee is established by the Parliamentary Committees Act 2003 (Vic) and is comprised of 3 Australian Labor Party members, 2 Liberal Party members, 1 The Nationals party member and 1 Victorian Green party member.

Section 32(6)(g) Crimes and Corruption Act 2001 (Qld) (CC Act). The relevant Minister is the Attorney-General, Hon. Yvette D’Ath (Redcliffe). The Parliamentary Crime and Corruption Committee is comprised of 3 Liberal National Party and 4 Australian Labor Party members.

Section 5 Independent Commission Against Corruption Act 2012 (NSW) (ICAC Act (NSW)). The relevant Minister is the Premier of New South Wales, Hon. Mike Baird MP. The Committee on the Independent Commission Against Corruption is currently comprised of 3 Liberal Party members, 3 National Party members, 1 Christian Democratic Party member and 4 Australian Labor Party members.

Section 15(2)(3) Integrity Commission Act 2009 (Tas) (IC Act).
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[15] The Commission considers that the following measures are sufficient to alleviate perceptions of political bias:

a) retention of the requirements for consultation and majority support of the prospective appointee by the JSCCCC, and

b) retention of appointment by the Governor.

Key differences between WA and interstate appointment models

[16] There are a number of alternate models for the appointment of Commissioner and Assistant or Acting Commissioner in integrity agencies across Australia. A full comparative table is annexed at Appendix 1.

New South Wales

[17] In NSW, the relevant Minister (Premier) must refer a proposed nominee to the Committee on the Independent Commission Against Corruption for consideration. This Committee has 14 days (or up to a maximum of 44 days 16) to consider whether to veto the proposal or not.17 The Governor appoints the Commissioner.

[18] In contrast to the appointment of a Commissioner, the Governor appoints one or more ‘Assistant Commissioners’ with the concurrence of the Commissioner.18 The Assistant Commissioner has all the functions of the Commissioner and shall be taken to be the Commissioner.21

Victoria

[19] In Victoria, the relevant Minister (Attorney-General) must submit a proposed nominee to the IBAC Committee, who then have a 30 day statutory timeframe within which to veto the proposal or otherwise. Once this has been supported by the committee, the Minister must make a recommendation to the Governor22 and the Governor makes the appointment.

[20] Victoria has a model which allows for the appointment of an Acting Commissioner23 as well as appointment of a Deputy Commissioner24 with a tenure of 5 years with reappointment available.

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16 Section 64A ICAC Act (NSW): The Joint Committee has 14 days after the proposed appointment is referred to it to veto the proposal and has a further 30 days (after the initial 14 days) to veto the proposal if it notifies the Minister within that 14 days that it requires more time to consider the matter.

17 Section 64A ICAC Act (NSW).

18 Section 103 and Schedule 1, clause 2(1) ICAC Act (NSW).

19 Section 103 and Schedule 1, clause 2 ICAC Act (NSW).

20 Section 21 IBAC Act.

21 Section 30 IBAC Act.

22 Section 23 and 24 IBAC Act.
An Acting Commissioner appointment is limited to performing functions in the absence of the Commissioner or Deputy Commissioner and to a term of 6 months. A person does not necessarily need to meet the eligibility requirements for Commissioner (under section 20 Independent Broad-based Anti-corruption Commission Act 2011 (Vic) (‘IBAC Act’)) but who has experience in a similar role in a body with investigative functions may be appointed. The Governor in Council appoints an Acting Commissioner on recommendation of the Minister, to act during any vacancy, absence or incapacity of the Commissioner.

A Deputy Commissioner is appointed by the Governor in Council on the nomination of the Minister and must have the concurrence of the Commissioner. More than one person may be appointed to the role and the person, if previously a judicial officer, is not required to retire but must ‘cease’ to hold the judicial office.

South Australia

In South Australia, the Attorney-General must ensure that the Commissioner position is advertised in each State and Territory. The Attorney-General refers the proposed appointee to the Statutory Officers Committee who will either approve the appointment within a 7 day period (or as extended by the Attorney-General) or provide written notice to the AG that it does not approve the appointment. The Governor makes the appointment.

The South Australian model provides for the appointment of a Deputy Commissioner by the Governor. The person is responsible for assisting the Commissioner as directed by the Commissioner. The Deputy Commissioner may act as the Commissioner during any period for which:

a) no person is for the time being appointed as the Commissioner; or

b) the Commissioner is absent from, or unable to discharge, official duties.

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25 Section 30(4)(c) IBAC Act or 12 months if they fit prescribed criteria in section 30(3)(c) IBAC Act.
26 Governor in Council is a body that comprises the Governor as Chair and members of the Executive Council. Broadly, the latter comprises the Premier and his or her Ministers who have been sworn in by the Governor as Executive councillors, usually at the same time as they are sworn as Ministers. In Victoria, this consists of the Premier and his or her Ministers. At meetings of the Governor in Council the Governor, on the recommendation of a Minister and with the advice of the Executive Council, deals with a wide range of matters that Parliament has specified be handled in that way rather than by a Minister acting alone, http://governor.vic.gov.au/victorians-governor/government-in-australia
27 Section 30(1) IBAC Act.
28 Section 23 IBAC Act.
29 Section 5 ICAC Act (SA).
30 Section 9(1) ICAC Act (SA).
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[25] In addition, when not in an ‘acting’ role, the Deputy Commissioner performs functions or exercises powers at the direction of the Commissioner.31

Queensland

[26] In Queensland the relevant Minister (Attorney-General) must advertise nationally for applications from suitably qualified persons to be considered for selection as the Chairperson (Commissioner).32 Advertisement is not required for a reappointment.33 The Minister must consult with the Parliamentary Crime and Corruption Committee as the Minister may only nominate an appointee to the Governor with bipartisan support of the parliamentary committee.34 In practice, this means that the selection process for the appointment is undertaken by the parliamentary committee, who then proffer a recommendation of the preferred candidate to the Minister. The Governor makes the appointment.

[27] For the appointment of the Deputy Chairperson and Chief Executive Officer, the process is similar35 except that it is the Minister who undertakes the selection process and the nominee is interviewed by the parliamentary committee to obtain bipartisan support. The Chairperson is consulted in the appointment of his / her deputy pursuant to section 228(a)(ii) Crime and Corruption Act 2001 (Qld) (CC Act).

[28] In addition to the appointment of a Deputy Chairperson, Queensland have introduced a model which allows for the transfer of functions and powers under the Act to Senior Executive Officers, who are appointed from within the Commission and not by the Governor. The Chairperson may delegate the chairperson’s powers under the CC Act or another Act (other than under section 674 Police Powers and Responsibilities Act 2000) to an appropriately qualified commission officer.36

Other jurisdictions in Australia

[29] As yet, there is no integrity commission established in the Northern Territory although in 2015 the Legislative Assembly resolved to establish an Anti-Corruption Integrity and Misconduct Commission.37

31 Section 9(6) ICAC Act (SA).
32 The Chairperson is defined as the Commissioner under the CC Act.
33 Section 227(3) CC Act.
34 Section 227-228 CC Act.
35 The process is set out in sections 227 - 229 CC Act.
36 Section 270 GDA (Qld).
37 On 26 August 2015, the Legislative Assembly of the Northern Territory resolved to establish an Anti-Corruption Integrity and Misconduct Commission. The Commissioner Martin AO QC tabled a final report on 27 June 2016 which can be accessed via https://acimc问询nt.nt.gov.au/?a=292252.
[30] As the Tasmanian Integrity Commission performs a substantially different function, Tasmanian provisions are not analysed for the purpose of this submission.

[31] Unique to the process of appointment of Commissioner in WA are the following characteristics embedded in the CCM Act:

a) the assembling of a nominating committee comprised of current members of the judiciary to consider prospective appointees;

b) a Premier with a role in the process of appointment; and

c) a requirement that there be a list of three prospective appointees.

[32] Missing from the WA model of appointment are the following desirable characteristics for appointment of a Commissioner and Deputy Commissioner:

a) Time limits for the nomination and recommendation stages;

b) Nomination of one person;

c) A person may be proposed for appointment on more than one occasion; and

d) Appointment of a Deputy Commissioner, who may act both as Commissioner during any period of incapacity or vacancy and who may also perform functions under the CCM Act as directed by the Commissioner.

Efforts towards statutory reform

The Archer Review

[33] The Archer Review of the Corruption and Crime Commission Act 2003 made a number of relevant recommendations which are yet to be addressed by amendments to the Act.

a) Recommendation 6 - Assistant Commissioners

That the Act be amended to:

- allow for the appointment of deputy commissioners to whom specific functions may be delegated by the Commissioner, and

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41 Although the Premier is the responsible Minister or relevant Minister under the NSW ICAC Act, WA is the only State that nomimates the Premier himself/herself in the CCM Act, rather than a reference to the relevant or responsible Minister.

42 This replicates the position in section 5A(2) ICAC Act 1988 (NSW).

43 This is the position in South Australia pursuant to section 9(1) Independent Commissioner Against Corruption Act 2012.

44 Note the Act has been retitled with effect from 1 July 2016 to Corruption, Crime and Misconduct Act 2003.
who are able to act as the Commissioner in the Commissioner’s absence; and

- allow for the appointment of assistant commissioners to whom specific functions may be delegated by the Commissioner as the need arises, and who may be appointed on a full-time or part-time basis.\(^5\)

b) **Recommendation 14** - the definition of ‘bipartisan support’ be clarified.\(^6\)

c) **Recommendation 15** - Time limit for review by the JSCCC

That the Act be amended to require the JSCCC to respond to a nomination for appointment within 14 days, or within a further 30 days if it notifies the Minister within the first 14 day period that it requires more time.\(^7\)

d) **Recommendation 16** - Discretion in number of candidates

That section 9(3a) of the Act be amended to require the nominating committee to provide a list of up to three persons eligible for appointment.\(^8\)

e) **Recommendation 20** - Reappointment of acting and assistant commissioners

That the Act be amended to permit the reappointment of acting commissioners and assistant commissioners without the need to advertise for expressions of interest.\(^9\)

**Parliamentary reports and support**

[34] The introduction of a Deputy Commissioner and/or Assistant Commissioners (Recommendation 6 above) was supported at the time by the Commission, the Parliamentary Inspector and the JSCCC, and restated in two subsequent parliamentary reports.\(^10\)

[35] Each of the other recommendations outlined above (Recommendations 14, 15, 16 and 20 above) were supported by the JSCCC and by the CCC and subsequently included in the 2011 JSCCC report Report 21


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Parliamentary Inspector’s Report Concerning Telecommunication Interceptions and Legal Professional Privilege. The removal of the nominating committee was also supported by the Chief Justice.

[36] Subsequent proposed legislative amendment by the Corruption and Crime Commission Amendment Bill 2012 did include provision for an Assistant Commissioner and removal of the role of nominating committee but lapsed at prorogation of Parliament in 2013.

[37] The most recent JSCCCC report Ensuring the timely appointment of a new Corruption and Crime Commissioner (2014) reignited the recommendations for appointment of a Deputy Commissioner and removal of the role of nominating committee with the result that the Attorney General’s office agreed to give these consideration.

Recommendations

[38] The Commission’s recommendations for appointments to the office of the Commissioner and proposal for Deputy Commissioner follow.

Acting, Assistant or Deputy Commissioner?

[39] The Commission recommends the introduction of the office of Deputy Commissioner in lieu of the office of Acting Commissioner to provide support and assistance to the Commissioner as required in the exercise of functions and powers under the CCM Act as well as to provide immediate assistance during any vacancy or incapacity.

[40] A Deputy Commissioner will provide a mechanism for succession planning when the tenure of a Commissioner ceases as well as maintaining a dual role of acting as and when required.

[41] The Commission recommends a provision be inserted in the CCM Act that, before making a recommendation of appointment of a Deputy Commissioner to the Governor, the Minister must obtain the concurrence of the Commissioner. This aligns with provisions in other States and recognises the working relationship that will exist between the Deputy and the Commissioner in the performance of functions concurrently under the CCM Act.

[42] The Commission also recommends amendment to provide for provisions similar to those at section 9(6) Independent Commissioner Against Corruption Act 2012 (SA) (‘ICAC Act (SA)’), which states that the Deputy Commissioner may -

(a) act as the Commissioner during any period for which—

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46 As provided for in section 23(3) IBAC Act and section 103 and Schedule 1, clause 2(1) ICAC Act (NSW).
Appendix Six

(i) no person is for the time being appointed as the Commissioner; or

(ii) the Commissioner is absent from, or unable to discharge, official duties; and

(b) when not so acting, perform functions or exercise powers at the direction of the Commissioner.

[43] Acting Commissioner arrangements at section 14 CCM Act are limited to appointment by the Governor when the Commissioner is unavailable. The provisions relating to appointment of an Acting Commissioner do not extend to providing support or assistance to the Commissioner when operational needs may require it.

[44] Further, an Acting Commissioner cannot act concurrently with the Commissioner unless they are appointed under terms in section 14(1)(c) CCM Act, that is, when the Commissioner has declared an inability to act pursuant to section 13.

[45] Two significant limitations are the requirement that, under section 14(2a), each prospective Acting Commissioner must undergo the same recruitment and selection process as the Commissioner, and any bipartisan support (from the JSCECC) for a person lapses on the expiration of 12 months from the date of the resolution. Thus, if a person is not already appointed during the term of a Commissioner as an Acting Commissioner, or a 'Commissioner in waiting', there is a real prospect that if the Commissioner is unable to act for any reason the office will be vacant for a lengthy period whilst the onerous requirements for appointment under the CCM Act are met.

[46] Section 14(2a) and (b) CCM Act make provision for the appointment of multiple Acting Commissioners on a prospective basis. In effect this creates a 'pool' of eligible Acting Commissioners, who may be appointed by the Governor as and when required to fill a vacancy or absence or during a period of illness or incapacity of the Commissioner. Such a mechanism could also be used for Deputy Commissioners.

[47] The term of appointment of an Acting Commissioner is currently at the discretion of the Governor. The Commission recommends that the term of a Deputy Commissioner is equivalent to the Commissioner.

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[55] Section 14(1) provides for appointment only when there is a 'vacancy' (as defined in Schedule 2, clause 7) in the office, during a period of absence or when the Commissioner is unable to act. Further the Governor may limit the functions and powers of the Acting Commissioner under sections 14(2)(a) and (b) and sections 14(3) and (d) CCM Act.

[55] Section 13 defines the circumstances where the Commissioner is unable to act, and includes a conflict of interest or where the Commissioner is having to perform other functions under the CCM Act.


[55] Sections (4)(a) - (e) and Section 13 CCM Act - declaration of inability to act.

[55] Section 14(3) CCM Act.
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Eligibility

[48] The Commission supports the existing requirements for legal qualifications and eligibility of prospective appointees and considers the same be applied to both Commissioner and Deputy Commissioner roles.

[49] As currently provided for in sections 10(1) and (2) CCM Act persons who qualify for appointment as a judge of the Supreme Court of Western Australia, or another State or Territory, the High Court of Australia or the Federal Court of Australia should be eligible for appointment.

[50] Section 8 Supreme Court Act 1935 states that 'a person is eligible for appointment (to a Judge of the Supreme Court) if that person is a (Australian) lawyer and has had not less than 8 years' legal experience'. Section 10(2) District Court of Western Australia Act 1969 provides that the person must be an 'Australian lawyer' with not less than 8 years' legal experience.

Reduction of list of three to one nominee

[51] The Commission recommends that the CCM Act be amended to remove the requirement for a list of three eligible persons to be considered by the JSCCCC and recommends that the Premier undertake the process of vetting and shortlisting prospective applicants to ascertain the name of one suitable nominee.

Shortlisting process and removal of nominating committee

[52] The Commission recommends that the Premier hold primary responsibility for the shortlisting of prospective appointees. If the requirement to assemble a nominating committee is removed this would create a significantly more streamlined and efficient process to ensure a timely appointment.

[53] The Premier already holds the statutory responsibility for coordinating the process of nomination and recommendation for appointment under the current provisions.

JSCCCC power of veto over proposed nominee

[54] The Commission recommends that the JSCCCC be given the power of veto regarding the appointment of a Commissioner, and that the passing of a resolution of appointment require a majority support of the JSCCCC.

[55] The Commission recommends consideration of provisions similar to those set out in subsections 21(1) - (3) IBAC Act.

[56] As a joint standing committee of Parliament, the JSCCCC is representative of both houses of Parliament and must be comprised of two members of the Legislative Assembly and two members of the Legislative Council. At present, the JSCCCC is comprised of four members with each major political party (Liberal and Australian Labor Party) represented in equal numbers. The current Legislative Assembly Standing Orders and
membership of the JSCCCC already ensure that no one political party may dominate consideration of a resolution to support an appointment of a Commissioner under the CCM Act. 55

[57] A requirement that the JSCCCC hold the power of veto by majority resolution in relation to a recommended nominee will ensure that the requirement for bipartisan support is maintained.

Statutory time limits for appointment procedures

[58] The Commission recommends the introduction of statutory time limits to expedite the process of appointment to the office of Commissioner and Deputy Commissioner.

[59] The Commission does not support a position, such as that in Victoria, where it is prescribed that there cannot be a vacancy in the role of Commissioner for more than 12 months. 56 Instead, the Commission considers that any vacancy in the role of Commissioner may be immediately filled by a Deputy Commissioner.

[60] The Commission recommends the following -

a) A statutory time limit within which the Premier is required to consider prospective appointments which begins from the date expressions of interest (or applications) close to the date the Premier makes a recommendation to the JSCCCC; and

b) A statutory timeframe within which the JSCCCC is to deliberate and pass a resolution on a recommendation from the Premier which is to commence at the date the JSCCCC receives the recommendation.

[61] Any recommendation to, and appointment by, the Governor should not be time limited.

[62] The recommendations of the Archer report continue to be supported by the Commission and compare favourably with interstate agencies -

a) the Queensland CCC and Tasmanian Integrity Commission do not have any prescribed time limits;

b) in New South Wales the Parliamentary Joint Committee are given a period of 14 days (up to a maximum of 44 days if extended by the Minister) to consider an appointee after it is referred to them by the Minister;

c) in Victoria, after the Minister submits details of the proposed recommendation to the IBAC Committee, that Committee has 30 days to decide whether to veto the recommendation, and

55 Legislative Assembly Standing Order 259(1) states that a quorum of three is sufficient to deliberate and pass resolutions.

56 Section 30(3) IBAC Act.
d) in South Australia, the Statutory Officers Committee considering appointment of a Commissioner has only 7 days to decide after the referral is made by the Attorney-General (although this can be extended with Attorney-General approval).

Judicial officer resignation requirement

[63] The Commission recommends that the current requirement for a Commissioner to resign under section 10(4) CCM Act be amended to enable a former judge, who takes office as the Commissioner, to be able to return to the judiciary upon conclusion of their service as Commissioner.

[64] A provision similar to the IBAC Act section 23, which requires only that the judicial officer “cease” to act in a judicial role during the term of appointment as Commissioner.

[85] The requirement to resign from judicial office may have the effect of limiting the potential pool of eligible but currently serving judicial officers, who may have sufficient experience to be appointed but may wait to apply until they are nearing retirement.

Parliamentary Inspector appointments under the CCM Act

[66] The Commission does not comment on the appointment of the Parliamentary Inspector or Acting Parliamentary Inspector.

[67] The functions of their office are accountable to the Parliament, which places the JSIII in the best position to determine the suitability of the appointment requirements under the CCM Act.

John McKechnie, QC
COMMISSIONER
Appendix Seven

Submission from the Premier, Hon Colin Barnett MLA

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

Dear Chairman,

I refer to your letter dated 8 September 2016.

Thank you for inviting me to make a submission to the Joint Standing Committee on the Corruption and Crime Commission (JSC) in relation to the appointment process for the Corruption and Crime Commissioner (Commissioner) and the Parliamentary Inspector of the Corruption and Crime Commission (Parliamentary Inspector).

I apologise for the delay in providing this submission, which was due to your original letter to me being misplaced.

You have advised that the JSC is currently undertaking an inquiry into the efficiency and timeliness of the current appointment process provided for in the Corruption, Crime and Misconduct Act 2003 (CCM Act). I understand that the JSC is generally concerned about delays that have occurred in respect of previous appointments.

In particular, you have provided me with data collated by the JSC on relevant appointment processes conducted since 2013, which, in the JSC’s assessment, indicates that the greatest delays in each appointment process have been associated with processes that are the responsibility of my office. You have invited my comments on this data and asked whether I would support an amendment to the CCM Act that would transfer the responsibility for appointments from my office to the Department of the Attorney General.

With respect to these matters, I make the following observations.

Current appointment process and proposed amendments to the CCM Act

Currently, the CCM Act provides for the Commissioner and the Parliamentary Inspector to be appointed by the Governor on the recommendation of the Premier. For each position, the Premier must recommend a person from a list of 3 names submitted to him or her by a nominating committee comprising of the Chief Justice, the Chief Judge of the District Court and a person appointed by the Governor to represent the interests of the community. The recommended candidate must also have the support of the JSC.
Before making the list of candidates for the position of Commissioner, the nominating committee must advertise throughout Australia for expressions of interest. As the Chief Justice has advised you in his submission, the Solicitor General currently plays an informal role in assisting the nominating committee to perform its responsibilities.

The qualifications for appointment as Commissioner and Parliamentary Inspector are set out in sections 10 and 190 of the CCM Act respectively. The Commissioner must be a person who has served as a judge or who is qualified for appointment as a judge of the Supreme Court of WA or another State or Territory, the High Court or the Federal Court. The Parliamentary Inspector must be a lawyer with not less than 8 years' legal experience.

As the attachment to your letter notes, and the Chief Justice's submission to the Committee confirms, delays have occurred in respect of previous appointments due to difficulties associated with attracting 3 suitable candidates to be included on the list submitted to me by the nominating committee.

Amendments were made to the CCM Act in 2014 relating to the remuneration of the Commissioner in order to help deal with these difficulties.

Other amendments to the process for the appointment of the Commissioner and Parliamentary Inspector were proposed by the Corruption and Crime Commission Amendment Bill 2012 (2012 Bill). These amendments proposed to remove the requirement for the Premier to recommend a person for each of the positions from a list of 3 names submitted by the nominating committee.

The effect of the amendments would be to abolish the nominating committee and require the Commissioner and Parliamentary Inspector to be a person appointed by the Governor on the recommendation of the Premier who had the support of the JSC. It is expected that the informal role played by the Solicitor General in identifying, communicating with, and recommending suitable candidates would continue. However, the Solicitor General's assistance would be provided to the Premier's office rather than to the nominating Committee. The amendments would mean that the Solicitor General need not recommend more than a single suitable candidate for the Premier's consideration (although the option for recommending a list of suitable candidates would remain).

The 2012 Bill lapsed as a result of the proroguing of Parliament for the 2013 election on 14 December 2012. The Government is currently giving consideration to a range of amendments proposed in the 2012 Bill that have not so far subsequently been implemented, as well as a range of other amendments proposed by the Corruption and Crime Commission, the JSC and others. The amendments currently being considered include the amendments to remove the requirement for the Premier to recommend a person to be Commissioner or Parliamentary Inspector from a list of 3 names submitted by the nominating committee.
I understand that the Chief Justice has specifically requested that these amendments be made. The Government has previously confirmed that it is supportive of these amendments (see the Government Response to the JSC’s Report No. 26 dated 18 April 2016).

It can reasonably be expected that these amendments would assist in reducing the time taken to make appointments. Not only would the amendments help to avoid the delays previously associated with attracting 3 suitable candidates, they would help to reduce the time needed by the Premier to select a preferred candidate to recommend to the JSC.

**Data on appointment processes conducted since 2013**

With respect to the data regarding previous appointments attached to your letter, I note the following matters:

(a) Prior to Mr Christopher Shanahan being recommended for appointment as Acting Commissioner in 2014, the JSC refused to support my recommendation of a different nominee. It appears that the 25 week period recorded in table 1 as being the period elapsing between the nominating Committee providing me with its recommendations and my notification to the JSC of Mr Shanahan as my preferred candidate may include time involved in repeating part of the process due to the JSC’s rejection of my initial nominee.

(b) The 3 appointments referred to in Tables 3, 4 and 5 all had to be processed and considered concurrently during the same 10 week period. That is, the 10 week average referred to in your letter relates to the time taken to process 3 appointments, rather than a single appointment.

(c) After my office receives the list of 3 names from the nominating Committee, it consults with the Attorney General’s office. There may also be a need for further consultations with the Solicitor General. Further, my preferred nominee is put to Cabinet before it is submitted to the JSC for approval.

**Transfer of responsibility to the Attorney General**

The Attorney General is the Minister with formal responsibility for the administration of the CCM Act (see the Administration of Departments, Authorities, Statutes and Votes published in Government Gazette No. 57 on 5 April 2016).

I do not support sections 9 and 189 of the CCM Act being amended to transfer responsibility for the appointment of the Commissioner and the Parliamentary Inspector to the Attorney General. I am strongly of the view that such appointments are appropriately matters for the Premier of the day.

I would make the point that nothing in the data attached to your letter suggests that a transfer would necessarily, of itself, lead to a significant reduction in the time taken to make relevant appointments. Nevertheless, the Government will give consideration to any recommendations for legislative reform made by the JSC as a result of its current inquiry.
I confirm that my office is committed to ensuring appointments are made in a timely fashion, within the constraints that exist by virtue of the statutorily prescribed procedure for appointments and the high level of the appointments being made. In light of the concerns expressed in your letter, I will ask my office to examine what, if any, measures can be taken to reduce the time taken in the selection of a preferred candidate for referral to the JSC in the future.

Yours sincerely

[Signature]

Colin Barnett MLA
PREMIER
19 OCT 2016
Appendix Eight

Committee’s functions and powers

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

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

It is the function of the Joint Standing Committee to -


b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and

c) carry out any other functions conferred on the Committee under the Corruption, Crime and Misconduct Act 2003.

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