Joint Standing Committee on the Corruption and Crime Commission

Parliamentary Inspector's Report on Allegations of Misconduct Made Against Officers in the Corruption and Crime Commission's Electronic Collection Unit

Report No. 25
November 2015

Parliament of Western Australia

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)

Legislative Assembly
Parliament House
Harvest Terrace
PERTH WA 6000

Tel: (08) 9222 7469
Fax: (08) 9222 7804
Email: jscccc@parliament.wa.gov.au
Website: www.parliament.wa.gov.au/jscccc

Published by the Parliament of Western Australia, Perth.
November 2015.
ISBN: 978-1-925116-26-7

(Series: Western Australia. Parliament. Legislative Assembly. Committees. Joint Standing Committee on the Corruption and Crime Commission. Report 25)

328.365

Joint Standing Committee on the Corruption and Crime Commission

Parliamentary Inspector's Report on Allegations of Misconduct Made Against Officers in the Corruption and Crime Commission's Electronic Collection Unit

Report No. 25

Presented by

Hon Nick Goiran, MLC and Mr Peter Watson, MLA

Laid on the Table of the Legislative Assembly and Legislative Council
on 26 November 2015

Chairman's Foreword

The Parliamentary Inspector of the Corruption and Crime Commission (PICCC), Hon Michael Murray QC, provided a report on allegations made against three officers of the Corruption and Crime Commission's Electronic Collections Unit (ECU) to the Joint Standing Committee on 8 October 2015.

The allegations were bought to the attention of the Parliamentary Inspector by Acting Commissioner Mr Christopher Shanahan, SC, on 29 July 2014. The most significant allegation the PICCC investigated was that one officer of the Commission possessed and was using in his workplace a substance prohibited by the *Misuse of Drugs Act 1981* (WA), namely, 1,3-DIMETHYLAMYLAMINE (DMAA). The officer was said to be consuming a product known as *Jack3d*, which is associated with body-building. It was also alleged that other Commission staff knew about this practise for some time but did not report it to their superiors. The PICCC's report also analyses the effectiveness and appropriateness of the procedures used by the Commission to notify him of, and to conduct an investigation into, the allegations.

In addition to reporting on the investigation into the allegations, the PICCC's report, and the associated correspondence provided in the appendices of the Committee's report, highlight two significant differences between the PICCC and the CCC Commissioner, Hon John McKechnie QC, in the interpretation of some of the powers contained in sections of the *Corruption, Crime and Misconduct Act 2003* (CCM Act).

The first difference was whether the three Commission staff should have been named in the PICCC's report. The second difference was whether the PICCC had the power to investigate allegations made about two of the un-named officers who worked in the ECU, as the allegations were claimed by Commissioner McKechnie QC to be industrial matters as defined in the *Industrial Relations Act 1979* (WA). The differing interpretations placed on these two matters are explored further within the correspondence attached as appendices to the Committee's report.

The CCC's two Acting Commissioners, Mr Neil Douglas and Mr Christopher Shanahan SC, had been Acting as the CCC Commissioner during the period covered by the PICCC's report following the resignation in early 2014 of the then-Commissioner, Mr Roger Macknay QC. Acting Commissioner Douglas provided on 26 August 2014 the first update to the PICCC of the Commission's preliminary investigation into the allegations. When the PICCC provided the CCC Commissioner with his draft report on this matter Mr Douglas was no longer an Acting Commissioner. The Commissioner advised the PICCC that Mr Douglas was overseas and was unable to consider or respond to the draft report.

Subsequently, the Joint Standing Committee provided a copy of the PICCC's final report to Mr Douglas to allow him to specifically address some critical comments that the PICCC had made about his actions during the Commission's investigations. Mr Douglas' response was then provided to the PICCC for his comment. Both of these responses are included in appendices to the Committee's report.

The Parliamentary Inspector is also critical of the manner in which the Commission outsourced aspects of the investigation to Gregor & Binet Pty Ltd. This company was contracted by the Commission on 29 August 2014 but did not report until late March 2015. While acknowledging that section 182 of the CCM Act allows the Commission to outsource such investigations to an external service provider, the PICCC notes that in this case the outsourcing led to a lengthy delay in the Commission's own investigations.

The Parliamentary Inspector's report on the allegations against three Commission officers is a thorough one. The Joint Standing Committee supports all three recommendations he has made to the Commission following his investigations.

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

Contents

Findings and Recommendations

Committee and the Parliamentary Inspector of the effectiveness of the changes made to its procedures.

Recommendation 5 **Page 14**

The Crime and Corruption Commission not contract to a service provider an allegation of misconduct made against a Commission officer in cases where the Parliamentary Inspector leaves the allegation with the Commission under section 196(4) of the *Corruption, Crime and Misconduct Act 2003*, without first consulting with the Parliamentary Inspector.

Chapter 1

Committee's consideration of the PICCC's report

…among the most worrying allegations I have encountered in the short time I have been in office … **Hon Michael Murray QC, Parliamentary Inspector of the CCC.**

Introduction

The Parliamentary Inspector of the Corruption and Crime Commission (PICCC), Hon Michael Murray QC, provided his report on allegations made against three officers of the Corruption and Crime Commission's Electronic Collections Unit (ECU) to the Joint Standing Committee on 8 October 2015. The PICCC's report is provided in Appendix 1.

The PICCC was first made aware of the allegations by Acting Commissioner Mr Christopher Shanahan SC on 29 July 2014. The PICCC provided this report to the Committee under sections 199 and 201 of the *Corruption, Crime and Misconduct Act 2003* (CCM Act) and requested that the Committee table it in Parliament.

The most significant allegation the PICCC investigated was that one officer possessed and was using in his workplace a substance prohibited by the *Misuse of Drugs Act 1981* (WA), namely, 1,3-DIMETHYLAMYLAMINE (DMAA). The officer was said to be consuming a product known as *Jack3d*, which is associated with body-building. It was also alleged that other Commission staff knew about this practise for some time but did not report it to their superiors. The PICCC's report also analyses the effectiveness and appropriateness of the procedures used by the Commission to notify him of, and to conduct an investigation into, these allegations.

The Corruption and Crime Commissioner, Hon John McKechnie QC, wrote to the Committee on 9 October 2015 and provided copies of his correspondence with the PICCC about these allegations and his view that the PICCC was precluded by section 205 of the CCM Act from naming the three officers concerned in the allegations in his report. Copies of the Commissioner's correspondence are contained in Appendices 2, 3 and 4. The PICCC's response to the Commissioner's concerns is addressed in his report in Appendix 1.

Section 2 of the PICCC's report provides a chronology of the investigations undertaken into the allegations by his office, the CCC and WA Police. The PICCC provided to Commissioner McKechnie QC both a copy of the draft and final version of his report. The Commissioner received the draft PICCC report on 13 August 2015 and he provided a copy of it to all the CCC staff who were named in it for their response. The

Commissioner provided two separate responses to the draft report to the PICCC on 15 September 2015 (see Appendices 3 and 4).

The CCC's two Acting Commissioners, Mr Neil Douglas and Mr Christopher Shanahan SC, had been Acting as the CCC Commissioner during the period covered by the PICCC's report following the resignation in early 2014 of the then-Commissioner, Mr Roger Macknay QC. Acting Commissioner Douglas provided the Commission's first update of its preliminary investigation into the allegations to the PICCC on 26 August 2014. On the date that the PICCC provided the CCC Commissioner with his draft report on this matter, Mr Douglas was no longer an Acting Commissioner.[1] Commissioner McKechnie QC advised the PICCC that Mr Douglas was overseas and was unable to consider or respond to the draft report.[2]

Response from Mr Douglas

The Joint Standing Committee resolved to provide a copy of the PICCC's final report to Mr Douglas to allow him to specifically address some critical comments that the PICCC had made about his involvement during the investigation. These included noting that then-Acting Commissioner Douglas had written to the PICCC on 26 August 2014 with an update of the Commission's investigation of the allegations and had reported that the Commission had forwarded material about the allegations to WA Police for criminal investigation. Later enquiries by the PICCC found that this had not occurred.

On 20 November 2014 Acting Commissioner Shanahan SC wrote to the PICCC acknowledging that the Commission had not referred any allegation made against either officers X or Y to WA Police for investigation. He also said that Acting Commissioner Douglas' letter to the PICCC dated 26 August 2014 was based on incorrect information provided to Mr Douglas by senior Commission officers, and it appeared that due to a period of leave in August 2014 by both the primary investigator involved in the Commission's investigation, and the Director of Legal Services, the Commission's decision to refer the allegations to WA Police was not implemented.

The PICCC also reports on another letter to him from then-Acting Commissioner Douglas on 26 February 2015. In a personal meeting with Acting Commissioner Shanahan SC to discuss various issues on 5 March 2015 the PICCC enquired about Acting Commissioner Douglas' letter. Mr Shanahan told the PICCC that some of the information in Acting Commissioner Douglas' letter did not accord with his recollection of events.

1 Mr Douglas was appointed for a period of three years to his position as Acting Commissioner by the Governor on 24 July 2012. His appointment automatically lapsed on 25 July 2015.

2 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter to the PICCC, 15 September 2015.

The PICCC reports that Acting Commissioner Shanahan SC wrote to him on 9 March 2015 saying that he had "immediately after our meeting on 5 March 2015, asked the Director of Legal Services to prepare a memorandum of his understanding of the relevant sequence of events described by Acting Commissioner Douglas in his letter dated 26 February 2015." This memorandum provided a different sequence of events to that provided by Acting Commissioner Douglas. Mr Shanahan also said:

> *…in respect of point 5(h) in Acting Commissioner Douglas' letter dated 26 February 2015, it was incorrect in two important respects: first, the draft letter prepared by the Commission investigator to the Commissioner of Police was never produced, referred to, or discussed with him* [Acting Commissioner Shanahan SC], *and secondly, he did not make a decision in September 2014 not to refer the allegation to the Police.*[3]

In his report the PICCC is also critical of the Commission's advice to the Attorney General dated 30 January 2015 to alert him that a Commission officer was due to appear in the Perth Magistrates Court on 4 February 2015 after being charged by the Police with two counts of possessing a 'prohibited substance'. This advice was signed by Acting Commissioner Douglas and, according to the PICCC, one of its purposes appears to be to downplay the seriousness of the offences for which officer X had been summonsed.

The PICCC also refers to Acting Commissioner Douglas' letter to him dated 20 April 2015 in relation to the outcome of the proceedings against X in the Perth Magistrates Court on 15 April 2015 which, Mr Douglas had said, was consistent with the Commission's views as expressed in his letter to the PICCC dated 26 February 2015. In this letter in February, Mr Douglas had said that a suppression order was in force in relation to Mr X's name. The PICCC notes in his report that "there was not, nor ever had been, a suppression order in force."[4]

The PICCC's report was provided to Mr Douglas by the Committee on 16 October 2015 and he was invited to provide a response, if he wished, by 30 October. The Committee approved Mr Douglas' request for an extension to this deadline and his response was received on 9 November 2015. It is provided in Appendix 6.

In his response to the Committee, Mr Douglas restricts his comments to the issue of the briefing note to the Attorney General authored by the CCC's Acting Chief Executive of the Commission and signed by him on 30 January 2015 (see Annexure A to the

3 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Report on Allegations of Misconduct Against Corruption and Crime Commission Officers in the Electronic Collection Unit & Associated Matters*, Perth, 8 October 2015.

4 Ibid.

PICCC's Report) and the media release of 3 February 2015 about the court case involving officer X (see Annexure C to the PICCC's Report).

In terms of his view as to the seriousness of the allegations, Mr Douglas says:

> *As set out in the ECU Report, it later became known that the allegations had not been referred to WA Police at that time. However, this had no bearing on my view, at the time and subsequently, that the nature of the allegations were serious and that they warranted all the serious actions that were taken by the Commission, as well as the referral of the allegations to WA Police.*[5]

Mr Douglas outlined in his response the measures that the Commission took in relation to the allegations about X that reflected its view that they were serious allegations:

> *(1) the Commission reported the allegations promptly to the Parliamentary Inspector on 29 July 2014;*
>
> *(2) the allegations were the subject of timely and thorough preliminary investigations by the Commission;*
>
> *(3) on 1 August 2014 the Commission obtained and executed a search warrant under the Misuse of Drugs Act;*
>
> *(4) later in the afternoon and evening of 1 August 2014, an investigation team of 3 Commission officers conducted a search of X's home and office;*
>
> *(5) the 3 Commission investigators also conducted a video recorded interview of X;*
>
> *(6) the Commission initiated formal disciplinary proceedings against X; and*
>
> *(7) the Commission appointed an independent investigator to investigate and report on the disciplinary and other issues related to the allegations.*[6]

Mr Douglas' response was provided to the PICCC on 9 November 2015 for his comment.

Parliamentary Inspector Murray QC responded on 12 November to Mr Douglas' comments to his report on the ECU staff. It is contained in Appendix 7. He concludes his

5 Mr Neil Douglas, Letter, p7, 9 November 2015.
6 Ibid.

letter that he remains "of the view that the conclusions to which I came were well supported by the evidence before me and, having carefully reviewed the available material, I adhere to them."[7]

Investigation of the allegations by an external company

The allegations made against its officers by another Commission officer were investigated by an external service provider, Gregor & Binet Pty Ltd, which was contracted by the Commission on 29 August 2014. This company promotes itself as 'workplace specialists.'[8] The inquiry was undertaken by Ms Melanie Binet.

On 10 November 2014 Acting Commissioner Shanahan SC wrote to the PICCC and said that an investigator had been appointed by the Commission to conduct the disciplinary investigation of X and Y and she had completed her interviews with relevant Commission officers. On 15 December 2014 Mr Shanahan wrote again and said that he had been advised that Ms Binet had completed all her interviews with Commission officers, and hoped to have her investigation report with the Commission prior to the Christmas break. Due to illness, the PICCC did not receive Ms Binet's report from the Commission until 24 April 2015.

In his report, the PICCC states that it was not until 5 January 2015 that he was first told that the Commission's disciplinary investigation of officers X and Y was not being conducted by Commission officers but by an external service provider. In previous correspondence to him the Commission had referred to Ms Binet as the 'investigator', or as 'Ms Binet' or 'Ms Melanie Binet'. This delay in acknowledging the use of an external contractor impacted the PICCC's own investigations as:

> *The effect of the use of this terminology on my oversight of the Commission's disciplinary investigation between 29 August 2014 and 5 January 2015 was that I could not consider making a recommendation to the Commission for X's allegation, and the related allegation made against Y, to either be:*
>
> *1) excised from her broader investigation and finalised by her as a matter of priority, or*

7 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, Letter, 12 November 2015.

8 Gregor & Binet, *Welcome to our website*, 2008. Available at: http://gregorandbinet.com/. Accessed on 6 November 2015.

> *2) excised from her broader investigation and determined directly by the Commission, based on the evidence obtained on, and shortly after, 1 August 2014 by Commission investigators.*[9]

The PICCC acknowledges that section 182 of the CCM Act allows the Commission to outsource the investigation of serious allegations of misconduct to an external service provider. In this case, however, the outsourcing led to a lengthy delay in the Commission's own disciplinary investigation. The PICCC notes, "It was not as if the proper investigation of the matters at issue was beyond the expertise possessed by Commission officers."[10]

The PICCC's third recommendation to the Commission is that:

> *The Commission does not contract to a service provider an allegation of misconduct made against a Commission officer in cases where the Parliamentary Inspector leaves the allegation with the Commission under s 196(4) of the* [CCM] *Act without first consulting with the Parliamentary Inspector.*[11]

The difficulties raised by what agency should investigate misconduct allegations being made against Commission officers was also addressed by the Committee in its Report No. 18, *Improving the working relationship between the Corruption and Crime Commission and Western Australia Police*, tabled in March 2015. This report noted the lack of suitable staff resources for the PICCC to undertake such investigations. The Committee noted the public perception difficulty with WA Police investigating claims made against officers of the agency which oversees WA Police conduct. It offered an alternate model based on MOUs used between police forces and oversight bodies in the United Kingdom to bring in external staff to investigate such allegations.

The Committee recommended in its Report that the Commission should enter into dialogue with similar interstate oversight agencies to ascertain the viability of entering into an agreement to second their staff when an internal investigation of CCC staff is required.[12]

In a closed hearing with the Committee in August 2015, Commissioner McKechnie acknowledged that a meeting of Australian anti-corruption Commissioners in May 2015 in Sydney had discussed such a proposal and agreed in-principle to develop a MOU. In

---

9 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Report on Allegations of Misconduct Against Corruption and Crime Commission Officers in the Electronic Collection Unit & Associated Matters*, Perth, 8 October 2015.

10 Ibid.

11 Ibid.

12 Joint Standing Committee on the Corruption and Crime Commission, *Improving the working relationship between the Corruption and Crime Commission and Western Australia Police*, Parliament of WA, Perth, 26 March 2015, p8.

his view, however, he told the Committee "if it is an allegation of crime, it is an allegation of crime, and that is the Police's job [to investigate]."[13]

Finding 1

The Corruption and Crime Commission has an in-principle agreement with interstate agencies to develop a Memorandum of Understanding in accordance with the recommendation of the Joint Standing Committee's Report No. 18.

Recommendation 1

The Corruption and Crime Commission provide an update by 30 June 2016 to the Joint Standing Committee and the Parliamentary Inspector as to the progress it has made in developing a Memorandum of Understanding with interstate agencies in accordance with the recommendation of the Joint Standing Committee's Report No. 18.

Differences in interpretation of the CCM Act between the PICCC and the Commissioner

The PICCC's report, and the associated correspondence provided in the appendices of the Committee's report, highlight two significant differences between the PICCC and the CCC Commissioner in their interpretation of sections of the CCM Act.

Whether to name the Commission officers in the report

The first difference is whether the three Commission staff should have been named in the report. The PICCC's initial approach was to name the staff. As he says in his report:

> *I have been asked by the Commission not to name X because they advance concerns about his mental health. Solicitors for Y and Z have made the same request on grounds expressed more generally. I am not persuaded to accede to the requests made on the grounds of the likelihood of harm personally to any of the three officers, including damage to their professional reputations.*[14]

In his final report, however, the PICCC was persuaded to redact the names "solely because no relevant purpose would be served by [naming them] in the context of this Report." He provides his reasoning that:

> *…the action recommended in respect of X is to be performed by the Commission internally and the Commission has taken appropriate*

13 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 19 August 2015.

14 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Report on Allegations of Misconduct Against Corruption and Crime Commission Officers in the Electronic Collection Unit & Associated Matters*, Perth, 8 October 2015.

> *disciplinary action against Y and Z. So far as matters relevant to this Report are concerned, their names are not necessary, once it is understood what their positions and responsibilities in the ECU were.*[15]

In his report the PICCC goes into further detail in exploring the submissions from the Commission and the solicitors for Y and Z that he was precluded by section 205 of the *Corruption, Crime and Misconduct Act 2003* from naming the officers. The PICCC counters that sections 151(5), 207 and 208 would allow him to name the officers concerned, but he chose not to do so "because the appropriate degree of accountability for their conduct does not require it."[16]

In a public hearing with Commissioner McKechnie on 21 October 2015 in relation to the Commission's 2014-15 Annual Report, the Committee noted the Commission's recent naming of WA Police and other public figures in its reports, while wishing to redact the names of its own staff in the PICCC's report. For example, in its report published on 20 August 2015 titled *Report on the Investigation of an Incident at the East Perth Watch House on 7 April 2013*, the Commission named the 12 public officers who were either police officers, police auxiliary officers or custody officers when Ms Joanne Martin was strip searched at the East Perth Watch House. The Commission made opinions of serious misconduct within the meaning of section 4(c) of the CCC Act against three of the public officers, and reviewable police action against two others. It did not make opinions against the other seven officers who were named in its report.[17]

In responding to questions about whether to name people in Commission reports, the Commissioner said:

> *…I have discussed the issue—not the particular issue, just the* [Parliamentary Inspector] *and I had a discussion because it is an important point. In relation to some people, including some people in the Commission, they are before the courts and I think there is quite a difference in matters before the courts where you do not want to do anything to prejudice the fair trial, and matters afterwards where the matter is resolved. I think that is an important point.*
>
> *I am currently considering a report that we hope to produce shortly where certain people may not be named in order not to prejudice disciplinary or possible court proceedings. But you are right, it can create—I was thinking about it last week. It is a little bit like sexual*

15 Ibid.

16 Ibid.

17 Corruption and Crime Commission, *Report on the Investigation of an Incident at the East Perth Watch House on 7 April 2013*, 20 August 2015, pp33-35. Available at: www.ccc.wa.gov.au/sites/default/files/East%20Perth%20Watch%20House%20Incident%20on%207%20April%202013.pdf. Accessed on 10 November 2015.

> *offences because, very properly, the law protects victims. A sexual offender who is known to the victim—a father or somebody of the same name—gets as it were an unintended benefit of not being named, whereas were it a stranger they would be named. It is a little bit the same way in relation to matters before the courts. All I can say is we are very acutely aware of it, we have had discussions about it and will continue to try to have a consistent and fair approach.*[18]

The Committee's report No. 19, *Parliamentary Inspector's report on misconduct and related issues in the Corruption and Crime Commission*, was tabled on 17 June 2015 and provided the PICCC's investigation into allegations of misconduct of Commission officers of its Operation Support Unit (OSU). There was substantial media reporting, at the time of the report being tabled in Parliament, about the nature of the allegations and the PICCC's findings. The Committee is concerned that since this time the public would be unaware of the subsequent legal action against ex-Commission officers and the sanctions made against them.

In this current case, officer X is not named in the PICCC's report and his charges, as outlined by the PICCC, were discontinued in court. In a recent, different, action against a Commission officer caught up by the investigations into the OSU allegations, the officer was charged and sentenced but a suppression order was made by the Magistrate. The Committee enquired about this matter with Commissioner McKechnie and was told that the Commission was not party to the action and did not seek the order. Further, Commissioner McKechnie said the:

> *…suppression order was issued at 4:05 p.m. on 25 September 2014 before Magistrate Woods and continues, as no application has been made to "lift" it. The terms of the suppression order are:*
>
> > *Not publish name or worked formerly at CCC. Not to photograph. Not to publish any identifying details.*[19]

Finding 2

There has been limited public reporting of the outcome of investigations into, and prosecution of, Corruption and Crime Commission officers in its Electronic Collection Unit and the Operation Support Unit who have been alleged to have acted criminally.

18 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 21 October 2015, pp6-7.

19 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter, 13 November 2015.

Recommendation 2

The Corruption and Crime Commission provide to the Joint Standing Committee and the Parliamentary Inspector a summary of the outcomes of the disciplinary and criminal investigations since July 2013 into officers of the Commission's Electronic Collection Unit and the Operational Support Unit.

Whether the PICCC had the power to investigate the allegations about Y and Z

On the 2 June 2015, the Commissioner wrote to the PICCC saying that he regarded the matters involving officers Y and Z as industrial matters as defined in the *Industrial Relations Act 1979* (WA). The Commissioner based this submission on section 196(9) of the CCM Act, which says:

> *The Parliamentary Inspector must not undertake a review of a matter that arises from, or can be dealt with under, a jurisdiction created by, or that is subject to, the* Industrial Relations Act 1979.[20]

In his report, the PICCC said the Commissioner's view was one "with which I respectfully disagree." He continues:

> *In my view s 196(9) of the* [CCM] *Act does not operate so as to qualify, retrospectively, so to speak, the exercise of my functions under s 195 and powers conferred by s 196, which may result in recommendations to the Commission as to the manner in which a particular matter should, in my view, be dealt with by the Commission.*[21]

The Commissioner wrote to the PICCC on 15 September 2015 providing a detailed further submission about his views on this matter. His letter is contained in Appendix 2. He specifically requested in his first response to the PICCC's draft report of 15 September 2015 that the PICCC in his final report not detail the allegations made against officers Y and Z. This letter is contained in Appendix 4.

Closed hearing with PICCC

The Committee held a closed hearing with the PICCC on 14 October 2015 in regard to his latest annual report. As part of those discussions, the PICCC provided his views on the operations of sections 196(9) and 205 of the CCM Act and his difference of opinion with the CCC Commissioner on his powers to investigate allegations made against Commission staff. The following day he provided to the Committee a substantial

20 AustLII, *Corruption, Crime and Misconduct Act 2003*, nd. Available at: www5.austlii.edu.au/au/legis/wa/consol_act/ccama2003330/. Accessed on 5 November 2015.

21 Hon Michael Murray QC, Parliamentary Inspector of the Corruption and Crime Commission, *Report on Allegations of Misconduct Against Corruption and Crime Commission Officers in the Electronic Collection Unit & Associated Matters*, Perth, 8 October 2015.

submission on his views as to the operation of these sections of the CCM Act. This is included in Appendix 5.

Outcome of the investigations

The allegations against officer X resulted in him being stood down from his position by the Commission, but he was then reinstated within a short period. Acting Commissioner Douglas wrote to the PICCC on 26 August 2015 saying that the matters involving X and Y had been referred to WAPOL for investigation. A subsequent enquiry from the PICCC to the Commission uncovered that the Commission's Legal Services Branch had not actually referred the matter to WAPOL as directed by the Director of Operations. The matter was finally referred to WAPOL by the PICCC on 7 January 2015.

Officer X resigned from the Commission with effect from 30 January 2015 and was charged by WAPOL with two counts of possessing a prohibited drug on 3 February 2015 (see PICCC report's Annexure B). He was summonsed to appear in the Perth Magistrates Court on 3 February 2015. At a hearing on 15 April 2015 the charges against him were withdrawn on the grounds that, having regard to his personal circumstances and otherwise good character, it was not in the public interest to seek his conviction of the offences with which he had been charged. The court transcript of this hearing is attached at Annexure E of the PICCC's report.

The four allegations made against officer Y were that she had knowledge of X's use of a prohibited drug and failed to report it; that she engaged in inappropriate behaviour in the workplace in breach of the Commission's Code of Conduct; that she acted outside her duties to provide feedback to a job applicant; and that she had a close relationship with Mr Z, the Assistant Director, ECU, which contributed to low morale amongst its staff. WA Police determined that insufficient evidence existed to proceed against officer Y for any criminal offence.

The allegations against officers Y and Z were dealt with through the Commission's internal performance management process after an investigation and report to the Commission by Gregor & Binet. Annexure D in the PICCC's report contains redacted copies of the letters provided to officers Y and Z by the Commission's Acting Chief Executive after the Commission had received the George & Binet report. They outline the allegations made against each staff member and the need for an improvement in their future performance.

In his response to the PICCC's draft report, the Commissioner outlined the remediation strategies the Commission had made to ensure that the matters raised in the Gregor & Binet report had been appropriately addressed. These included:

- *A drug and alcohol awareness training has been developed and will be delivered to the ECU in September* [2015] *and then subsequently rolled out to the entire Commission.*

- *New systems have been introduced to monitor quality control and reduce errors within the ECU. Positive reports from the State and Commonwealth Ombudsman indicate that those systems are effective.*

- *Restructuring of the ECU is to be considered as part of the Commission's broader organisational change project.*

- *The CCC's Selection Panel Report template has been amended to include a more detailed conflict of interest register aimed at enhancing transparency in the decision making process around selection.*

- *Consultants used for selection processes across the Commission are appropriately rotated to ensure independence on recruitment panels.*

- *Centralised reporting of IWDP completion rates has now been implemented to monitor performance management compliance across the Commission. All IWDP's will be completed for Commission officers by 30 September 2015.*

- *The Commission has standard investigation protocols in place for all investigations including properly cautioning witnesses before they are interviewed, and ensuring searches are within scope.*

- *A Fitness for Work Policy has been endorsed and implemented which enables the Commission to assess for impairment, be it physical, mental or drug/alcohol related.*

- *People Services have put processes in place to ensure regular welfare checks are conducted with staff on personal leave by their Manager and by a HR representative.*

- *Corporate Services reviewed the CCC's existing employee voice mechanisms and the Acting Chief Executive re-communicated these to staff. These will be communicated again in six month intervals and were last communicated on 5 August 2015.*

- *The Commission's Code of Conduct has been amended to include "We will promote and enhance the interests, welfare and functions of the Commission and its reputation and standing in the community".*[22]

Conclusion

The Parliamentary Inspector's report on the allegations against three Commission officers is a thorough one. The correspondence between he and the current CCC Commissioner provide a thorough exploration of their different views of sections of the CCM Act that have yet to be tested in court, particularly the ambit of the powers of the PICCC to investigate allegations against Commission staff, and then report their names to Parliament.

Finding 3

The Parliamentary Inspector of the Corruption and Crime Commission (PICCC) has investigated allegations of misconduct made against three Corruption and Crime Commission staff. His report on this matter clearly outlines the differences he has with the Commissioner on the interpretation of some sections of the *Corruption, Crime and Misconduct Act 2003* in regard to the powers of the PICCC.

The Committee agrees with the PICCC's conclusion in respect of the actions that need to be taken by the Commission to deal with the issues he identified in the Electronic Control Unit, and supports his three recommendations in regard to future actions the Commission needs to implement.

Recommendation 3

The Corruption and Crime Commission not exercise its power to refer to the Police, or other law enforcement agency, a suspicion about a Commission officer having committed an offence without first consulting the Parliamentary Inspector.

Recommendation 4

The Corruption and Crime Commission continue to implement the recommendations made by Gregor and Binet on pages 86-88 of their report in respect of the systemic issues identified, and, after appropriate monitoring, inform the Joint Standing Committee and the Parliamentary Inspector of the effectiveness of the changes made to its procedures.

22 Hon John McKechnie QC, Commissioner, Corruption and Crime Commission, Letter to the PICCC, 15 September 2015.

Recommendation 5

The Crime and Corruption Commission not contract to a service provider an allegation of misconduct made against a Commission officer in cases where the Parliamentary Inspector leaves the allegation with the Commission under section 196(4) of the *Corruption, Crime and Misconduct Act 2003*, without first consulting with the Parliamentary Inspector.

Appendix One

Parliamentary Inspector's Report

REPORT ON ALLEGATIONS OF MISCONDUCT AGAINST CORRUPTION AND CRIME COMMISSION OFFICERS IN THE ELECTRONIC COLLECTION UNIT & ASSOCIATED MATTERS

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

8 October 2015

1. PRELIMINARY MATTERS

The purpose of my Report is to inform the Joint Standing Committee for the Corruption and Crime Commission of Western Australia (JSC) of my investigation into allegations of misconduct made against three persons, to whom I shall refer as X, Y and Z, who at the time of the allegations were officers of the Corruption and Crime Commission employed in its Electronic Collection Unit (ECU), and into the effectiveness and appropriateness of the procedures used by the Commission to notify me of, and to conduct an investigation into, those allegations, and of associated matters concerning my investigation.

I will deal at the outset with my decision not to name the officers concerned. I have been asked by the Commission not to name X because they advance concerns about his mental health. Solicitors for Y and Z have made the same request on grounds expressed more generally. I am not persuaded to accede to the requests made on the grounds of the likelihood of harm personally to any of the three officers, including damage to their professional reputations.

I am persuaded not to name them solely because no relevant purpose would be served by doing so in the context of this Report. As will be seen, the action recommended in respect of X is to be performed by the Commission internally and the Commission has taken appropriate disciplinary action against Y and Z. So far as matters relevant to this Report are concerned, their names are not necessary, once it is understood what their positions and responsibilities in the ECU were.

It is convenient to refer now to the submission made by the Commission and the solicitors for Y and Z that I am precluded by s 205 of the *Corruption, Crime and Misconduct Act 2003 (WA)* (Act) from naming the people concerned in the allegations upon which I now report to the Parliament via the JSC.

So far as is material, s 205 of the Act provides:

Without limiting section 208, a report by the Parliamentary Inspector under this Division must not include –

a) *information that may reveal the identity of a person who has been… investigated by the Commission…; or*

b) *information that may indicate that a particular investigation has been… undertaken by the Commission; or*

c) *information that may reveal the identity of a person who has been investigated by the Police Force…; or*

d) *information that may indicate that a particular investigation has been… undertaken by the Police Force.*

This a general provision designed to preserved the anonymity of persons involved in the ways described in the section, in the work of the Parliamentary Inspector, unless disclosure is required in the discharge of the functions of my office. The important qualification to the provision is the preservation of the full effect of s 208 of the Act, and under that provision, the general secrecy provision applicable to my office, official information acquired in the performance of my functions (for example, to deal with matters which may or may not amount to misconduct by Commission officers, upon the notification to me of allegations concerning them) may be disclosed by me in the manner and for the purposes enumerated in s 208(4).

Of course, such disclosure may be made to the Parliament and to the JSC and, in the limited circumstances set out in s 208(5) of the Act, may include operational information. It is noteworthy also that under sub-section (6) the details of a matter notified to me (as in this case) may be disclosed. The point I draw from all this is that s 208 provides a code in relation to disclosure by me: see also ss 207 and 151(5) in relation to official information. In this Report I could disclose the names of the officers concerned but I choose not to do so because the appropriate degree of accountability for their conduct does not require it.

In parting from this point I note that the sections of the Act which deal with my reporting powers are written consistently with the view set out above. The general power is contained in s 199 of the Act. Section 200 requires me, before reporting adversely upon a person, to give them the opportunity to make representations to me. The section assumes that the person may be identified in the Report. The Parliament and the JSC have absolute power in that regard under s 202.

2. A FACTUAL CHRONOLOGY

On 29 July 2014 Acting Commissioner Shanahan SC notified me under s 196(4) of the Act of allegations of misconduct made by a Commission officer against X, Manager of Systems, and Y, Manager of Operations, in the ECU of the Commission and of wider behavioural and systemic matters of concern within that unit.

The allegation against X was that he possessed and used, in the workplace during his work hours, a substance prohibited by the *Misuse of Drugs Act 1981 (WA)*, namely, 1,3-DIMETHYLAMYLAMINE (DMAA), by consuming a product known as 'Jack3d', a product associated with body-building.

The possession or use of a prohibited drug contrary to s 6(2) of the *Misuse of Drugs Act 1981 (WA)*, is a simple offence which, when dealt with summarily by a Court, carries a penalty of up to $2,000, or two years imprisonment, or both. The commission of such an offence by a public officer, established upon conviction, while the officer acts or purports to act in their official capacity, constitutes serious misconduct under s 4(c) of the *Corruption, Crime and Misconduct Act 2003 (WA)* (the Act).

The four allegations made against Y were that she had knowledge of X's conduct and failed to report it; that she engaged in inappropriate behaviour in the workplace in breach of the Commission's Code of Conduct; that she acted outside her duties to provide feedback to a job applicant, and that a close relationship she had with Mr Z, the Assistant Director, Electronic Collection Unit, led to low morale amongst its staff.

On 5 August 2014 I consented to the Commission conducting a preliminary investigation into the allegations, and requested regular updates of its progress.

On 26 August 2014 Acting Commissioner Douglas wrote to me and provided the Commission's first update of its preliminary investigation of the allegation concerning X. He said:

1) X had admitted ownership and possession of the product known as 'Jack3d'.

2) The ChemCentre analysis dated 12 August 2014 confirmed that the product contained a 'prohibited substance'.

3) X purchased the product eight days before its prohibition by the Misuse of Drugs Act 1981 (WA) (the date of prohibition being 31 August 2012), but that his possession of it after that date was nevertheless a criminal offence.

4) X was interviewed by Commission officers before commencing a previously approved seven week period of leave to undertake overseas travel.

5) The Commission had forwarded relevant documents and other material to the Police to allow them to determine if they wanted to investigate the matter.

6) The Commission considered it appropriate to initiate formal disciplinary proceedings against X and, to that end, intended to appoint an independent investigator to undertake the investigation in accordance with the Commission's disciplinary policy, a task that would commence in earnest upon X's return from leave.

7) The Commission would keep me advised of developments as they occurred.

On 28 August 2014 I wrote to Acting Commissioner Douglas and said that I was content, at that point, not to remove the allegations from the Commission pursuant to s 196(5) of the Act on the basis that the allegation against X that he committed the offence of possession of a prohibited drug, and the allegation made against Y (that she aided the commission of the offence by X, because she knew of, tolerated and failed to report X's alleged conduct) had been referred to the Police for criminal investigation, and that the remaining three allegations made against her would be investigated internally by the Commission. I requested ongoing updates of the Commission's investigation.

Later, by letter dated 11 September 2014, in respect of an unrelated matter, I took up with the Commission what appeared to be a process whereby the Commission would undertake a preliminary assessment of an allegation and unilaterally refer matters to the Police for investigation where there appeared to be grounds requiring that to be done, contemporaneously with notification of the allegation to me.

It seemed to me that the advice that allegations of the involvement of X and Y in criminal activity had been referred to the Police to investigate the possession and use of a prohibited drug was another instance of the Commission's evolving practice in this regard.

In my letter to Acting Commissioner Douglas dated 11 September 2014, I pointed out that the practice adopted during the investigations into allegations of criminal conduct by Commission officers during the OSU investigations was that the Commission would provide me with a report of its preliminary investigation before it took any further action, so that I might consider any potential use of my powers under s 196(5) and (7).

I proposed the following procedure in all matters where the Commission completed its preliminary investigation and determined that the allegation should be referred to the Police, or other investigative agency, for criminal investigation and prosecution:

a) the Commission should provide me with its final investigation report, and notify me of its determination, so that I may finalise my assessment of the allegation under s 196(4) of the Act, and

b) the Commission should take no further action until I concluded my assessment.

However, I had been told that the allegation of original conduct concerning X and Y had been referred to the Police, and so, after my letter dated 28 August 2014 to Acting Commissioner Douglas, I waited for updates of the Commission's internal disciplinary action against Y, and for any report the Commission received from the Police in respect of the criminal investigation.

On 5 November 2014 I received correspondence from the Police that was at odds with Acting Commissioner Douglas' statement in his letter to me dated 26 August 2014 that the allegation in relation to the possession of an illicit drug had been referred to them for criminal investigation. Enquiries were conducted by my office to determine from the Police whether the Commission had, in fact, referred the allegation. The Police said that they had no record of the Commission having done so.

On 10 November 2014 Acting Commissioner Shanahan SC wrote to me and said that an investigator had been appointed by the Commission to conduct the disciplinary investigation of X and Y. She had completed her interviews with relevant Commission officers, including X and Y, and he was awaiting her report.

On 13 November 2014 I wrote to both Acting Commissioners and:

1. said that I anticipated receipt of the investigator's report, including her recommendations, the Commission's assessment of the conduct of X and Y, and proposals for further action in relation to them, and any other officers within the ECU who may have been implicated in the allegations made;

2. requested that the information in point 1 be kept from X and Y until I had the opportunity of reviewing the matter;

3. repeated the advice I had received from Acting Commissioner Douglas in his letter dated 26 August 2014, and repeated my position, as expressed in my letter to him dated 28 August 2014, that I had decided not to remove any of the allegations against X and Y under s 196(5) of the Act on the basis that the allegations of criminal conduct had been referred to the Police by the Commission;

4. provided a copy of the correspondence from the Police dated 5 November 2014, and explained that their database did not show the allegation made against X had been referred to the Police;

5. requested an explanation of Acting Commissioner Douglas' statement that the allegation made against X, and the possible implication of Y, had been referred to the Police, and to be immediately provided with all the materials in the possession of the Commission so that I could consider the matter pursuant to s 196(5) of the Act; and

6. asked that nothing be said to X, or to Y, about the matter.

On 20 November 2014 Acting Commission Shanahan SC wrote to me and said that:

1. despite the advice he had received from Commission officers upon which his letter to me dated 10 November 2014 was based, Ms Binet (of Gregor & Binet Pty Ltd, the external service provider contracted by the Commission on 29 August 2014 to investigate the allegations) recently said that further interviews of Commission officers were required, and that her report would now likely be available in December 2014;

2. he had made extensive enquiries and discovered that the Commission had not referred any allegation made against X, or Y, to the Police for criminal investigation;

3. Acting Commissioner Douglas' letter to me dated 26 August 2014 was based on incorrect information provided to him by Commission officers, and it appeared that due to a period of leave by both the primary Commission investigator involved in the Commission's investigation, and the Director of Legal Services in August 2014, the Commission's decision to refer the allegations to the Police (a decision made on or about 19 August 2014) was not implemented;

4. on receipt of my letter dated 11 September 2014 the Acting Chief Executive Officer spoke with the Director Legal Services and when it was established that the criminal allegations concerning X and Y had not in fact been referred to the Police, it was decided that that should not be done (on the basis that I had given a binding direction about the procedure to be adopted). The investigation file concerning X was to be forwarded to me when a final report was completed, and Ms Binet's report would also be provided to me when it was available;

5. he was advised that it was always intended that both documents mentioned in point 4 would be provided to me together to give me a thorough overview of the relevant conduct;

6. a final investigation report was being prepared and Ms Binet's report would be available in December 2014; and

7. he apologised on behalf of the Commission for its officers' failure to refer the allegations concerning the possession of a prohibited drug and involvement in it to the Police and for the failure to tell me that it had not been done, as I had been advised.

On 15 December 2014 Acting Commissioner Shanahan SC wrote to me and said that he had been advised that Ms Binet had completed all her interviews with Commission officers, and hoped to have her investigation report with the Commission prior to the Christmas break.

On 5 January 2015 Acting Commissioner Shanahan SC wrote to me and said, *inter alia*:

1. X would cease his employment with the Commission on 30 January 2015, and intended to leave Western Australia for New South Wales where his wife was offered employment;

2. the finalisation of Ms Binet's report was now scheduled for mid-January 2015 and, in recognition that this would leave me little time to conclude my consideration of the matter before X left Western Australia, invited me to make any observations I may have regarding a referral of the matter to the Police for criminal investigation;

3. X had indicated his willingness to cooperate with a Police investigation regardless of his relocation to New South Wales, and

4. he was happy to refer the Commission's investigation file to me immediately, without Ms Binet's report.

On 7 January 2015 I removed the allegations of criminal conduct made against X and Y from the Commission under s 196(5) of the Act, and referred those allegations to the Police for criminal investigation under s 196(3)(f).

The Police later summonsed X to the Perth Magistrates Court in respect of two offences of possession of a prohibited drug (DMAA) contrary to s 6(2) of the *Misuse of Drugs Act 1981 (WA)*, allegedly committed on 1 August 2014. One offence concerned his possession of DMAA upon Commission premises, and the other offence concerned his possession of DMAA at his home, discovered when Commission officers executed a search warrant.

The Police action was based almost entirely on the evidence gathered by the Commission during its investigation of the allegations.

On 14 January 2015 Acting Commissioner Shanahan SC wrote to me and said that X had offered no explanation for his cessation of employment with the Commission, other than that which related to his wife's offer of employment in New South Wales. He added that Ms Binet's report would be provided to me once she had concluded her enquiries.

On 20 January 2015 the Police provided me with a report concerning their criminal investigation of the allegations made against X and Y. The relevant points, which have not already been referred to above, were:

1. the Therapeutic Goods Administration banned DMAA on 8 August 2012, and on 31 August 2012 it became a prohibited substance under Schedule 9 of the *Poisons Act 1964 (WA)*. Since that date the possession of DMAA has been an offence under s 6(2) of the *Misuse of Drugs Act 1981 (WA)*;

2. on 1 August 2014 Commission investigators, in response to the complaint made in respect of X and Y, searched the ECU in the company of Y and discovered a quantity of the product 'Jack3d' in the freezer of a fridge. Y was interviewed by the investigators about her knowledge of the presence of the product, and its nature, not under criminal caution, but under her employment obligations;

3. Commission investigators on the same day attended X's residence and executed a search warrant. More of the product 'Jack3d' was found in X's fridge. He was cautioned and questioned by the investigators, and admitted purchasing, possessing and controlling the product, later emailing to the investigators his online credit card receipt of his purchase in July 2012;

4. the Police investigation focussed on X's possible commission of an offence under s 6(2) of the *Misuse of Drugs Act 1981 (WA)*, and Y's possible commission of an offence as an occupier of premises by knowingly permitting the premises to be used for the possession of a prohibited drug, contrary to s 5(1)(ii) of the Act;

5. a witness claimed that, at about 9am on a day in late November, or early December, 2012, he entered the ECU and saw X and Y standing at the sink of a breakout area. X was drinking a chocolate-coloured liquid from a shaker. The

witness heard an exchange between the two about the liquid, and Y said, 'Isn't that banned?' X smiled and made a reply that was inaudible to the witness;[23]

6. the witness claimed that at the time Y was attending a gym and appeared knowledgeable about performance-enhancing products. X drank the same drink every morning at the ECU prior to attending the gym at 10am, and once described the product as 'giving him a rush' and making him 'aggro' which had to be burnt off at the gym;

7. the witness claimed that other ECU officers were aware of X's consumption of the product, and that it was a performance-enhancing substance. In early 2013 one officer told the witness that the substance was called 'Jack3d', and the witness researched the product and satisfied himself that it was a prohibited drug;

8. the ChemCentre examined the substance seized by Commission investigators from both locations and provided a certificate of analysis (dated 12 August 2014) confirming a component as DMAA, and that the total weight of the substance was 445 grams;

9. during his interview with Commission investigators, X said:

    a) the product is a pre-workout supplement made by USPlabs;

    b) he purchased the product found in the ECU freezer about two years before, but had stopped going to the gym in early 2013 when he became sick;

    c) in the last month he started taking the product again before going to the gym, and did so in the ECU, the last occasion being about two weeks ago;

    d) he was aware that the product went off the market, and had heard rumours through online forums that it was banned;

    e) he showed the Commission investigators the product he held in his private freezer, and explained that he kept it there to reduce the chance of it clumping from moisture;

    f) any of his colleagues in the ECU could have known his product was stored in the freezer in the unit;

    g) about two to three weeks before, he had a conversation with Y near the sink in the ECU breakout room. Y asked if the product in the freezer was

[23] Both X and Y deny this occurred and comment adversely on their view of the witness' mental health and credibility.

his, and he replied that it was. He believed that Y had seen the product in the freezer prior to their conversation; and

h) two containers that had been discovered in his ECU office were branched-chain amino acids, and other supplements located in his residence were GHBlast, Optifast, Ultra Muscleze and magnesium, some of which he said he had purchased 'across the road from the Commission'.

10. On 9 January 2015 the Police asked X to participate in an electronic record of interview, but he declined. The Police said, however, that under caution he spoke freely and said:

a) he possessed the product having ordered it online, and was aware through online forums that the product was banned;[24]

b) he arranged delivery to his personal post box on St George's Terrace; and

c) he did not know if Y knew of his storage of the substance in the ECU and he did not recall what he had told the Commission investigators about her knowledge.

11. On 1 August 2014 Y was approached by Commission investigators and was told that they were acting on information that a prohibited drug was being stored in the Unit, that X was alleged to be using it, and that it was in the form of a supplement. When the investigators attempted to pronounce its name, she replied, 'Jack3d' and said, 'I know what you're talking about'. She showed the investigators through the ECU and was present when the product was found in the freezer. She was interviewed by Commission investigators under her employment obligations, but was not given a criminal caution, and said:

a) to the Commission investigators, when they searched X's office and found certain items, 'That's not what you're looking for' because she knew exactly what the investigators were looking for, as she had heard of the product before;

b) she knew the substance was a powder, that it would be in a tub and sealed, and that some people refrigerated it;

c) she had previously seen the container in the ECU freezer, and when it was seized by the Commission investigators it was facing the other way, so she did not know what it was. She said it was not hers;

[24] X denies saying this to the Police.

d) she had just returned from three weeks leave, but had seen the container in the freezer prior to commencing leave. She does not normally store items in the freezer, but she had seen the container from a back angle and assumed it was a workout supplement of some sort. If she had touched the container, it would have been to move it out of the way to put something in the fridge;

e) she has an understanding of workouts and those sorts of things, and that the product was a pre-workout supplement, almost like an energy drink, and that it contains caffeine that gives you energy prior to, and during, a workout;

f) some people consume the product as they usually train in the afternoon when they get tired, and she was aware that the product was a banned substance as of last year. She said that it was widely known that the substance was banned. She remembered the lead-up period to it becoming banned, and there was a date from which it would be banned;

g) a number of supplement stores were trying to sell the product before the date of prohibition;

h) X likely possessed the product because he goes to the gym. She had a lot of conversations with him about training and going to the gym, and he had a lot of knowledge of these types of things. She was therefore not surprised that training supplements were found in X's office;

i) X began going to the gym again just prior to her starting her leave on 5 July 2014. He would go during his lunch break;

j) the product could have been in the ECU freezer for a long time, but she couldn't say for how long;

k) she attends a gym, but no other ECU officer does so, and that she has taken 'that sort of stuff' before, such as a 'girlie' supplement called D-Fine8 because she is not a coffee drinker. She knows that there is a new product called 'Jacked';

l) she was not aware of any discussions within the ECU querying the container in the ECU's freezer, but that X in the past had offered her the use of any of his training supplements. She may have discussed supplements with X in the past, but cannot remember if they talked about 'Jack3d' specifically;

m) during her employment by the Commission she and X would talk about 'this stuff' quite a lot, however for the past year, due to his health issues, they had not had many discussions, until he started his training program again;

n) no ECU officer had raised any concern with her about any substances seen in the unit, and she couldn't remember any conversations with X about the product being banned, as it was banned quite some time ago. It was possible they may have discussed it, but she couldn't be certain; and

o) she assumed the product was banned, as the ingredient was no longer above-board. She had never seen X consume the product, and if she was aware that he had consumed it she would question it.

12. On 19 August 2014 Y provided a written response to the Commission in relation to its disciplinary investigation into her conduct. She said:

a) she was not aware of X's consumption of the product;

b) she did not recall discussing the product with him;

c) she did not recall seeing him consume the product;

d) the complaint made against her was a complete fabrication;

e) she maintains a high level of fitness and has a general interest in fitness training methods, but she has limited knowledge of the product;

f) she provided the Commission investigators with information, and vaguely recalls previously seeing a container in the ECU freezer, but assumed it was some form of food stuff; and

g) she would not condone the use of a banned substance, particularly in the workplace, and had she been aware of any potential issue, including an issue of this nature, she would have reported it to her manager.

13. On 9 January 2015 Y declined to participate in an electronically recorded interview with the Police, but under caution she denied using, taking possession of, or exercising any control over, the product in the ECU freezer.

14. In effect she also denied knowing that X was in possession of a prohibited substance, permitting that possession to continue, or, even by doing nothing to prevent it, aiding X to continue in possession of a prohibited drug.

15. The Police determined that sufficient evidence existed to proceed against X for the two offences under s 6(2) of the *Misuse of Drugs Act 1981 (WA)*, and he

was summonsed. The Police determined that insufficient evidence existed to proceed against Y for any criminal offence.

On 30 January 2015 the Commission provided a briefing note to the Hon Attorney General, under the hand of Acting Commissioner Douglas. The author of the note, however, was said to be the Acting Chief Executive of the Commission. I attach it as Annexure A and will refer to it in a little more detail later.

On 3 February 2015 the Police media section issued a news release, describing the charges laid against X, in advance of his appearance in the Perth Magistrates Court on 4 February 2015. I attach it as Annexure B. The document said that the two charges which had been laid were:

1) The possession of 204 grams of 'a product containing the prohibited drug' DMAA seized during a search of an area in the office of the Commission on 1 August 2014; and

2) The possession of a further 241 grams 'of the product which contained DMAA' found during a later search of X's home (without naming him), making up the total of 445 grams. The media release added that 'DMAA is a prohibited drug used as a supplement in weight training'.

Also on 3 February 2015, but following the Police release, the Commission published a Media Statement titled *Former Commission Officer to Appear in the Perth Magistrates Court*. I attach it as Annexure C. I will comment more about the Commission's statement later. For now it is sufficient to note that it builds upon the statement made in bold in the briefing note that the 'Jack3d' contained 'less than 1% DMAA' by adding that the 445 grams of 'Jack3d' was estimated to contain a quantity of 1.6 grams of DMAA.

On 12 February 2015 I wrote to Acting Commissioner Shanahan SC and said, *inter alia*, that despite the Police decision not to proceed against Y at that point in time, I considered that the Commission's internal disciplinary investigation of her conduct, and of the culture and associated issues within the ECU, should continue and, in that regard, I wished to receive Ms Binet's report when it was finalised.

I also raised my serious concerns about the Commission's letter to me on 26 August 2014 in which Acting Commissioner Douglas said, in unambiguous terms, that X's allegation had been referred to the Police, when in fact it had not. I suggested that Acting Commissioner Douglas must have been misinformed as to what had occurred, or had misunderstood something he was told, for him to have written to me in those terms.

I referred to the explanation given by the Commission for the error: that 'due to a period of leave by both the primary investigator and the Director of Legal Services in August 2014 the Commission's decision to refer these matters to the W.A. Police (on or about 19 August 2014) was not actioned', and suggested that such inaction over a matter of such grave importance as the referral of two Commission officers to the Police for criminal investigation for serious criminal offences was extraordinary.

I suggested that the conduct of the Commission investigator and the Director of Legal Services might, on investigation, constitute an act of grave misconduct.

I also pointed out that the Commission's failure to refer X's allegation to the Police had nothing to do with the correspondence which passed between us at that time in relation to the unrelated matter discussed in my letter dated 11 September 2014.

On 26 February 2015 Acting Commissioner Douglas responded to my letter, and said, *inter alia*:

1) The two offences alleged against X were of a relatively minor nature because the amount of 445 grams of DMAA which the Police alleged in their summons to have been in his possession was in fact the total amount of the product 'Jack3d' found to be in his possession, and that the actual amount of DMAA in his possession was, to Acting Commissioner Douglas' understanding, 1.6 grams.[25]

2) The Commission was yet to receive Ms Binet's report because she had been unwell.

3) In response to the proposed procedure described in my letter dated 11 September 2014,[26] the Commission itself may determine whether an allegation made against a Commission officer should be referred to the Police for investigation, and despite the possibility of conflict arising between the Commission and me should we both exercise that power, but make different decisions in respect of it, there may be other factors that the Commission may want to take into account as to whether or not it considered that any particular allegation should be referred to the Police for investigation. Despite his position, Acting Commissioner Douglas thought it appropriate to give more detailed consideration to my proposal, and thought that should be done in the broader context of our negotiations about the scope and intended effect of s 196(4) of the Act.

[25] Acting Commissioner Douglas' understanding of the law in this respect will be discussed later in my report.
[26] Set out on page 3 of my Report.

4) In relation to his letter to me dated 26 August 2014 in which he said that the allegation made against X had been referred to the Police for criminal investigation, he was provided with a draft of the letter on or about that date and signed it without reason to question its accuracy.

5) He explained the sequence of events which led to him signing his letter, namely that:

   a) on 19 August 2014 some Commission officers (including Mr Silverstone, the then Executive Director, the Director of Legal Services and the Director of Operations) decided to recommend to the Acting Commissioner that the allegation made against X be referred to the Police for criminal investigation;

   b) on 20 August 2014 the Director of Operations instructed a Commission investigator (the same investigator who had conducted the Commission's preliminary investigation of the allegation) to cease investigating the allegation and create a disclosure package for delivery to the Police;

   c) on 25 August 2014 the Commission investigator prepared the draft letter;

   d) for reasons that cannot now be determined, the draft letter was never shown to, or discussed with, either of the Acting Commissioners;

   e) on 26 August 2014 the Director of Legal Services, apparently assuming that the letter had been signed and sent to the Police, provided him (Acting Commissioner Douglas) with a letter addressed to me saying that the allegation made against X had been referred to the Police;

   f) on 10 September 2014 it was discovered that the allegation had not been referred to the Police, and the Commission investigator prepared a letter to the Commissioner of Police, in terms similar to those described in point (c) above, for Acting Commissioner Shanahan SC's signature;

   g) before Acting Commissioner Shanahan SC signed the letter, the Director of Legal Services brought to his attention my letter dated 11 September 2014 concerning the unrelated allegation; and

   h) as a result of seeing that letter, Acting Commissioner Shanahan SC did not sign the draft letter prepared for him.

6) He said that had the Commission not received my letter dated 11 September 2014 concerning the unrelated matter, it is likely that the Commission would have referred the allegation made against X to the Police on that day. This

would have constituted a delay of 16 days from the date on which the Commission originally intended to refer the allegation to the Police, and

7) He would not describe as 'grave misconduct' the actions of the two Commission officers that resulted in the failure to refer the allegation made against X to the Police and, even though those actions plainly fall short of the standards expected of senior Commission officers, he is satisfied that they were 'inadvertent, if not unprecedented, administrative failings of that kind by those officers'.

On 5 March 2015 I attended the Commission and met with Acting Commissioner Shanahan SC to discuss various issues, including the allegation made against X. In this last respect I asked him about points 5(f)-(h) of Acting Commissioner Douglas' letter to me, set out above. He explained that the letter was not drawn to his attention before it was sent, and that the information in points 5(f)-(h) did not accord with his recollection of events.

On 9 March 2015 Acting Commissioner Shanahan SC wrote to me and said, *inter alia* that:

1) the information in Acting Commissioner Douglas' letter was incorrect and required clarification;

2) he had, immediately after our meeting on 5 March 2015, asked the Director of Legal Services to prepare a memorandum of his understanding of the relevant sequence of events described by Acting Commissioner Douglas in his letter dated 26 February 2015. The Director did so on 6 March 2015 and said, *inter alia* that:

    a) he had not seen a copy, or draft, of Acting Commissioner Douglas' letter before Acting Commissioner Shanahan SC showed him a copy of it on 5 March 2015;

    b) as recorded in his memorandum to Acting Commissioner Shanahan SC dated 14 November 2014, he returned from a period of annual leave on 18 August 2014, that his journal showed that he had met with the Executive Director and the Director of Operations on that, and on the following, day and they agreed that the allegation made against X should be referred to the Police;

    c) he assumed that the referral would be made by the Commission investigator who conducted the Commission's preliminary investigation;

d) on 26 August 2014 he prepared a draft letter to me under Acting Commissioner Douglas' hand, saying that the allegation had been referred to the Police, and he met with Acting Commissioner Douglas that day and advised him that the allegation had been referred (based on his assumption described immediately above);

e) on about 10 September 2014 he asked the Commission investigator for a copy of the investigator's letter to the Commissioner of Police referring the allegation, and was told that the allegation had not been referred. The Commission investigator referred him to an email from the Director of Operations dated 26 August 2014 to the investigator, into which he had been copied, which suggested that he [the Director of Legal Services] would undertake the referral. He replied to the investigator that he had not appreciated from the email that he had been asked to do the referral;

f) on 11 September 2014 he drafted a letter of referral to the Police, together with a covering memorandum to the Acting Commissioner. However, the Acting Executive Director determined that it was no longer appropriate to refer the matter to the Police in light of my letter dated the same day in respect of the unrelated allegation;[27] and

g) he considered taking action so that the Commission corrected the record with me about the non-referral of the allegation made against X, but did not do so, 'possibly because' of his continuing assessment of the low level of criminality involved in X's alleged conduct, and the likely lack of interest he thought the Police would have in it had it been so referred.

3) he did not become aware of the confusion over the supposed referral of the allegation made against X to the Police until he received my letter dated 13 November 2014;

4) in respect of point 5(h) in Acting Commissioner Douglas' letter dated 26 February 2015, it was incorrect in two important respects: first, the draft letter prepared by the Commission investigator to the Commissioner of Police was never produced, referred to, or discussed with him [Acting Commissioner Shanahan SC], and secondly, he did not make a decision in September 2014 not to refer the allegation to the Police;

5) the Acting Chief Executive had been employed in that position for less than two weeks before 11 September 2014 with no handover from the former Executive Director in relation to matters concerning the Parliamentary Inspector. The Acting Chief Executive interpreted my letter of that date

[27] Identified on page 3 of my report.

concerning the unrelated allegation as binding the Commission in respect of its referral to the Police of the allegation made against X; and

6) he agreed with Acting Commissioner Douglas' remarks in his letter dated 26 February 2015 that the unfortunate series of events was entirely inadvertent, and that a contributing factor was the governance arrangements in place at that time which attempted to manage the Commission's continuity of business when two Acting Commissioners and an Acting Executive Director were providing leadership to the Commission.

On 20 April 2015 Acting Commissioner Douglas wrote to me and said:

1) Commission officers had attended the Perth Magistrates Court on 15 April 2015 when X's criminal proceedings were mentioned;

2) a suppression order 'is or was in place' in respect of X;

3) the prosecution applied for the proceedings to be discontinued on the basis that there was no public interest in continuing the prosecution, adding that:

    a) the drug known as DMAA is used as a supplement in weight training;

    b) the drug has been prohibited since August 2012;

    c) the accused purchased the drug before August 2012 when the drug was legally available;

    d) it is not a common illicit drug, and

    e) X is otherwise of impeccable character and lost his employment as a result of the matter; and

4) the outcome of the proceedings was consistent with the Commission's views on the matter as expressed in his letter to me dated 26 February 2015.

On 23 April 2015 I wrote to Acting Commissioners Shanahan SC and Douglas and said, *inter alia*:

1) there was reason to believe that, to some extent, the information provided to the Magistrate's Court on 15 April 2015, as reported by the Commission officers who were present, was incorrect, and that I was making further enquiries in that regard;

2) a number of aspects of the allegations made against X and Y remained of interest to me, including:

a) the alleged criminal conduct and misconduct of X and Y;

b) the failure to refer the criminal allegations to the Police and the conduct of those responsible for that omission to implement the instruction of the Commission;

c) whether there were systemic problems in the ECU and, if so, how they were to be resolved, and

d) the explanations offered by the Commission to me concerning the process of referral; and

3) I disagreed with Acting Commissioner Douglas' view that the conduct under investigation was of a 'relatively minor' nature.

On 24 April 2015 I was provided with a copy of Ms Binet's report,[28] which was dated March 2015. In addition to her investigation, assessment and recommendations concerning the allegations made against X and Y, Ms Binet's report included the following key findings:

1) a number of ECU officers had reason to suspect that misconduct in the form of possession of a banned substance was occurring in the unit, but failed to report their suspicion at the earliest opportunity;

2) the close personal relationship between Y and Mr Z, the Assistant Director of the ECU, combined with Z's management style and practices, created an undesirable workplace culture that had negatively impacted on morale in the unit; and

3) various systemic issues existed, which were adversely impacting on productivity and morale in the ECU, and which exposed the Commission to avoidable high levels of risk.

The recommendations made by Ms Binet to the Commission which are relevant to my Report included:

1) Z should undergo performance management in relation to his management style and practices;

2) Y should receive a disciplinary warning and undergo performance management in relation to her workplace behaviour;

[28] Ms Binet's report is 88 pages long and demonstrates that her investigation canvassed many interpersonal and organisational issues within the ECU other than the allegations concerning X and Y, and Y's grievance against the Commission officer who made those allegations.

3) Y and four other ECU officers should undergo accountability training and drug and alcohol awareness training;

4) a quality control system should be implemented to check that lines are correctly provisioned and that errors are recorded and analysed to enable systems of work to be modified to reduce error rates;

5) the ECU work group should participate in appropriately tailored team-building activities;

6) an effective, regular, documented and monitored performance management system be implemented;

7) standard investigation protocols should be observed for internal investigations, including properly cautioning witnesses before they are interviewed, and ensuring searches are within scope;

8) a fitness for work education campaign focussing on the effect and legality of over the counter drugs, supplements and health foods should be implemented to support a comprehensive fitness for work, drug and alcohol policy, and

9) the Commission's Code of Conduct be amended to include an obligation to maintain the Commission's reputation and standing in the community.

Ms Binet's report discussed the information provided by X and Y to the Commission investigators, including the provision by X of a copy of an email invoice showing that he purchased four tubs of the product 'Jack3d' on 31 July 2012, paying the amount of $199.80 for them. She also reported that:

1) X said to the Commission investigators that it was quite widely known in gym circles that the product was going to be banned because a lot of stores were selling their stock at discounted prices to get it off their shelves. He read online forums in mid-2013 that indicated that the product was being taken off the market because there was something not legal in it.

2) Z called a meeting of the ECU staff on 14 August 2014 and told them that he was disgusted that they were gossiping about X, and that he intended to set them straight. He informed them of the allegations made against X, but that he (Z) had 100% faith in X's integrity, and that he wanted X to return to work, after having been stood-down, as soon as possible;

3) Z called another meeting of the ECU staff on 20 August 2014 and told them that X had been reinstated, that he would return to work, that the allegation made against him had been investigated, and that the matter was now closed. Z also indicated that it was his view that the investigation should never have

occurred in the first place, and that when X returned to work he intended to treat him as if nothing had happened.
The investigation, in fact, was not concluded or closed. Z's action had a detrimental effect on staff yet to be interviewed by the Commission investigators, who assumed that Z had told them the truth, but were subsequently startled to be approached by the investigators in respect of the allegations. One ECU staff member expressed the opinion that Z's behaviour was not consistent with extensive integrity and accountability training that ECU staff had undertaken;

4) DMAA, and products containing the prohibited drug, were banned by the Therapeutic Goods Administration from import, supply and private use in Australia on 8 August 2012. The reasons for banning DMAA given by the Administration included:

    a) it had no current accepted therapeutic use;

    b) it had a stimulant or psychoactive effect;

    c) risks associated with its use included high blood pressure, psychiatric disorders, bleeding to the brain and stroke;

    d) its long-term safety had not been demonstrated; and

    e) the potential for its misuse was high; and

5) the dangers of DMAA were heavily publicised prior to, and following, the drug's prohibition in Australia. In April 2011 a FIFO worker died after mixing the drug with his beer. In May 2012 the dangers of the drug were highlighted on a nationally broadcast episode of *A Current Affair*. On 18 June 2012 Food Standards Australia and New Zealand issued a warning about supplementary sports foods containing DMAA, and on 2 August 2012 the State Coroner, Mr Alistair Hope, investigating the death of the FIFO worker referred to above, noted that the worker was naïve and should have been alert to the dangers of the drug.

On 29 April 2015 I wrote to Commissioner McKechnie QC and requested a copy of the Commission's advice to the Attorney General, and, in light of the content of Ms Binet's report, asked if the Commission had determined what, if any, action it intended to take in respect of Y, in respect of the other Commission officers named by Ms Binet in her findings, and in response to Ms Binet's findings concerning the systemic issues within the ECU.

On 8 May 2015 Commissioner McKechnie QC replied and provided a copy of the Commission's advice to the Attorney General, dated 30 January 2015: Annexure A. He also said that the Commission was considering options to manage the officers the subject of Ms Binet's recommendations, and to address the organisational issues within the ECU which were identified by Ms Binet.

On 19 May 2015 I wrote to Commissioner McKechnie QC and asked for further information, including who had made the decision to allow X to return to work after having been stood down on 1 August 2014, when and why the decision was made, and when X returned to work.

On 20 May Commissioner McKechnie QC replied and said that the decision to permit X to return to work was made at a meeting on 18 August 2014 of the Chief Executive, the Director of Corporate Services, the Director of Operations and the Director of Legal Services. The Commissioner said that, relevant to the decision made by these officers was the fact that X had purchased the product 'Jack3d' before it was banned, that the matter was to be referred to the Police for investigation, and that the disciplinary investigation into his conduct would continue.

Finally, on 2 June 2015, Commissioner McKechnie QC wrote to me enclosing a report by the Acting Assistant Director, People Services of the Commission, which was accepted by and acted upon by the Acting Chief Executive. It is apparent from the terms of his letter that the Commissioner agreed with the action taken by the officers to deal with the allegations concerning Y and Z.

The report reserved to be separately dealt with, the systemic issues raised in the Binet report. I am assured that they are in the course of being remedied and I merely express the view that Ms Binet's recommendations in that respect appear to me to be sound. I therefore recommend their continued implementation.

As to the conduct of Y and Z, letters dated 27 May 2015 have been sent to them and other counselling and remedial action is being taken, albeit in the context, as I am informed by their solicitor, of challenges to the process which are truly industrial matters and therefore no my concern: s 196(a) of the Act.

As to the content of the Acting Executive Director's letter to Y, there is one matter of potential difficulty upon which I should comment in due course when finalising my review of the matter. I refer to the finding made on page 2 that:

> *There is evidence that it is possible that you were aware that X possessed or was consuming a substance in the workplace which you knew or should have known was prohibited and failed to report this, however there is insufficient evidence to establish this on the balance*

of probabilities. For this reason no disciplinary action will be taken against you in relation to the matter.

The allegation that Y aided X's possession of the prohibited drug DMAA on Commission premises by encouraging or assisting that possession to continue because she knew of it, to his knowledge, but did nothing to end that possession by reporting it or taking other action, was removed by me from the Commission on 7 January 2015 so that, with the allegation concerning X, it could be referred to the Police for investigation and possible prosecution.

Upon my removal of an allegation under s 196(5) of the Act, the power of the Commission to deal with it is at an end and the question which arises is whether that situation was infringed in this case. As I have said, I will return to this potential problem in the course of finalising my review of the allegations, but I am satisfied that the question is one of technical interest only because I do not disagree with the position finally reached upon this particular aspect of the matter and,, in relation to the Commission's disciplinary procedure I have no recommendation to make beyond expressing my concurrence with the recommendations made by Ms Binet. I attach the letters dated 27 May 2015 as Annexure D.

3. REVIEW AND ASSESSMENT

My jurisdiction

In his letter dated 2 June 2015, the Commissioner said that he regarded the matters involving the two officers, Y and Z, as industrial matters as defined in the *Industrial Relations Act 1979 (WA)* (IR Act). He said they were dealt with accordingly. The term 'industrial matter' is defined in s 7(1) of the IR Act.

To understand the significance of the Commissioner's observation it is necessary to have regard to the provisions of the Act. Upon notification to me of an allegation under s 196(4) of the Act I may 'review' the Commission's acts and proceedings with respect to the matter.

Under s 196(5) - (8) I may 'remove' the matter to my control and exercise certain powers. I did that with respect to the allegations of criminal conduct by X and Y, but not otherwise in respect of the allegations made.

If I do not take that course, as in the case of the allegations of misconduct otherwise made against Y, in which Z came to be implicated, I must exercise my ordinary function to deal with matters of misconduct on the part of Commission officers by my oversight of the acts and processes of the Commission in the exercise of powers which it retains in full in respect of the misconduct that the matters in question may be said to involve.

In the course of the exercise of that function I may make recommendations to the Commission and/or to the Parliament (as I prefer, through the Joint Standing Committee), including, but not limited to, recommendations based on my assessment of the effectiveness and appropriateness of the Commission's procedures.

As overriding the power of removal and, perhaps, the exercise otherwise of the functions and powers described above, the Commissioner relies upon s 196(9) of the Act, which provides:

> *The Parliamentary Inspector must not undertake a review of a matter that arises from, or can be dealt with under, a jurisdiction created by, or that is subject to, the Industrial Relations Act 1979.*

That jurisdiction is concerned with industrial actions done or occurring in respect of industrial matters.

By referring to industrial matters, the Commissioner is telling me that in his view I have no power to review or make recommendations with respect to the non-criminal conduct of Y and Z. It is a view with which I respectfully disagree.

It is sufficient that I explain my view by noting that, according to the long title of the Act, the IR Act sets out 'the law relating to the prevention and resolution of conflict in respect of industrial matters, the mutual rights and duties of employers and employees, the rights and duties of organisations of employers and employees and for related purposes'. These allegations have nothing to do with those matters: see also s 6, setting out the objects of the Act.

Section 7(1) defines an 'industrial matter' as 'any matter affecting or relating to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein'. Examples are given - questions concerning wages, salaries and allowances, hours of work, leave, refusal to employ particular classes of people, the relationship of employees and employers, the rights and duties of industrial associations, compulsion to join them, preference in employment, etc. The allegations concerning the officers mentioned have nothing to do with any of these matters.

In my view s 196(9) of the Act does not operate so as to qualify, retrospectively, so to speak, the exercise of my functions under s 195 and powers conferred by s 196, which may result in recommendations to the Commission as to the manner in which a particular matter should, in my view, be dealt with by the Commission.

If that outcome results in disciplinary or performance management procedures being undertaken with the Commission (as has already occurred in respect of matters affecting Y and Z in this case) then, any disputation which arises (again, it appears from what I am told), as is the case here, then that will be an industrial matter and s 196(9)

of the Act makes it clear that I may not be involved by way of a further review of the Commission's procedures.

The resolution of any questions arising in that context will be an industrial matter as between employer and employee, if necessary with the assistance of the Western Australia Industrial Relations Commission. I cannot be involved to review the matter, by complaint, report, referral or otherwise. My powers will have been exercised.

The Commission's attitude to the seriousness of the allegations

During my investigation of this matter I observed an attitude within the Commission that the allegation made against X, and the associated allegations made against Y were no more than relatively minor matters. The Commission's attitude was reflected by the following actions:

1) its failure, in its botched attempt in August 2014 to refer its investigation of the allegation made against X to the Police for criminal investigation, to also refer its investigation of the allegation made against Y, which potentially implicated her as an aider, by the encouragement her inaction provided to his possession and use of a prohibited drug on Commission premises.
   Further, the Commission made no attempt to refer those allegations to the Police after I said on 28 August 2014 that I would, for the purposes of my ongoing review of the allegations under s 196(4) of the Act, proceed upon the basis that the allegations of the possible commission of criminal offences had been referred to the Police.

2) its failure to immediately notify me once it realised that the criminal allegations had not been referred to the Police, and the reason given later by the (then) Director of Legal Services to Acting Commissioner Shanahan SC (but not to me) as to why he did not think it was necessary to immediately notify me of the failure (namely, because of his assessment of the low level of criminality involved in X's alleged conduct, and the likely lack of interest he thought the Police would have in it had it been so referred);

3) its reinstatement of X on 20 August 2014 after he was stood down from his duties, on full pay, on 1 August 2014, despite his admission of possessing and using the product 'Jack3d' on the ECU premises during his work hours, and despite the chemical analysis conducted on 12 August 2014 which confirmed that the product contained the prohibited drug DMAA;

4) the nature and content of its advice to the Attorney General on 30 January 2015 informing him of the imminent appearance in the Magistrates Court of a Commission officer (Annexure A);

5) the nature, content, and the fact of, its media statement dated 3 February 2015 when the Police media statement (Annexure B) was, in contrast, properly objective and unobjectionable, and in itself achieved the purpose for which the Commission purportedly issued its own statement, Annexure C; and

6) its misunderstanding of the criminal law concerning admixtures in respect of a prohibited drug, expressed in the two documents which are Annexures A and C in such a way as to attempt to minimise the seriousness of the two charges laid against X.
The Commission's publication of Annexure C served no useful purpose following the Police News Release, was defensive in tone and failed to adequately recognise the seriousness of the offences of the possession and use of a substance known to contain a prohibited drug, by an officer of the Commission.

The Commission's referral of the allegations to me under s 196(4)

The notification by Assistant Commissioner Shanahan SC under s 196(4) of the Act of the allegations made against X and Y to me on 29 July 2014 was timely, having regard to the date upon which the Commission received those allegations; 16 July 2014.

The referral was also in accordance with the terms of an arrangement between the Commission and me which regulated the time period in which the Commission was to fulfil its obligations under s 196(4) of the Act, an arrangement which remained in place until modified by the joint report dated 9 June 2015 by Commissioner McKechnie QC and me, establishing the Protocol for notifications under s 196(4).

On 5 August 2014 I agreed to the Commission conducting a preliminary investigation into the allegations because the Commission appeared to appreciate that the allegation made against X, and the related allegation made against Y, involving the possibility of criminality by them, should be referred to the Police.

My consent was also consistent with a practice which had been established between me and the Commission during the investigation of allegations of criminal conduct made against Commission officers employed in its Operations Support Unit. Most, if not all, of the allegations of criminal conduct made against OSU officers originated within the Commission itself, and I was notified of them pursuant to the Commission's obligation to do so under s 196(4) of the Act. The effect of my removal of the allegations from the Commission and their referral to the Police during the OSU investigations was that the Commission ceased its criminal investigation of the allegations, but continued with its disciplinary investigation of the officers involved, again, under my supervision.

In his letter to me dated 26 August 2014, Acting Commissioner Douglas did not explain why the Commission decided, in X's case, to depart, without notice, from the practice established between the Commission and me during the OSU investigations (which were continuing at that time).

In the end, of course, the allegations concerning X and Y, that in one way or another they had committed an offence of the possession of a prohibited drug, were removed by me under s 196(5). As I have said, that gave me the capacity to exercise my powers to make a determination as to how to deal with the matter and terminated the Commission's capacity to act further in relation to those allegations.

So far as allegations concerning Y remained in the hands of the Commission, the question, to which I have adverted above, is whether those matters could include Y's conduct in respect of X's possession of the DMAA admixture, Jack3d, and I have quoted the passage in the Acting Executive Director's letter to Y in which she formulates the issue and finds insufficient evidence to sustain an adverse finding.

It was arguably open to the Commission to have regard to the question whether Y was guilty of misconduct within the meaning of s 4 of the Act because she knew that X had in his possession and consumed Jack3d on Commission premises, knowing that the 'energy drink' contained a prohibited drug, and did nothing about it, without considering the further question whether the circumstances were such that she was fixed with criminal liability as an aider of the commission of an offence by X because, by her conduct, she encouraged the continuation of X's knowing possession of the drug.

If that is wrong, then, as I have noted, it seems that no harm has been caused to the investigation because the Commission found there was insufficient evidence to sustain an adverse finding against Y in this regard. I have also noted the advice received from the Police that in their view there is insufficient evidence to warrant Y being charged with a criminal offence. I do not dissent from either conclusion, but I shall return to the allegations of misconduct against Y and make my final determination a little later.

The circumstances of this case demonstrate why, upon notification to me of an allegation concerning, or which may concern, a Commission officer, in accordance with the relevant Protocol, 'as soon as reasonably practicable' after its receipt by the Commission, the question of a possible referral to the Police, the AFP, another investigative agency and/or the State or Commonwealth DPP, should be discussed by the Commission and me.

I consider it is inappropriate for the Commission to refer an allegation of suspected criminal conduct by one of its officers without my prior knowledge and consent. There

are a number of reasons for this, the first of which is the impact it may have on my ability to exercise my powers under s 196(5) and (7) of the Act.

For example, if, as in this case, there are other allegations of misconduct related to the allegation of the commission of a criminal offence, it may be desirable to hold any investigation of other matters until the criminal investigation is complete and, where relevant, any criminal proceedings have concluded, to avoid any unwitting interference with the criminal investigation by a prior investigation and interviews conducted by Commission investigators.

Incidentally, there is nothing to suggest that the Commission's failure to make its referral of allegations to the Police, as I was told it had done, in August 2014, or its failure to tell me of the change of mind until I learned of it in November 2014, had a negative impact upon the Police investigation ultimately conducted upon my referral on 7 January 2015.

It seemed rather pointless to take that action in November 2014 because I was informed that Ms Binet's inquiry was well advanced and that her report was imminently expected, although it was not in fact received by me (dated March 2015) until 24 April 2015.

All that can be said is that discussion by the Commission and me and early action of referral to the Police of the allegations of criminal conduct, accompanied by suspension, at least in respect of those allegations, of the investigations by the Commission investigators would have ensured that the most serious of the allegations received prompt attention by the Police as the first investigators on the ground, rather than the relatively 'cold case' process which in fact occurred.

Also, my consideration of the issue of a possible referral to the Police and of the materials to be provided by the Commission to the Police, ensures that the decision is warranted, thereby eliminating the risk of the suspected officer being the target of unfairness or victimisation, and ensuring that the Police are fully and properly informed of the scope of the suspected wrongdoing.

This leads me to make the recommendation that the decision as to referral for criminal investigation of a Commission officer should only be made upon discussion by the Commissioner and me. Certainly the decision whether or not to make such a referral should not be made by fellow Commission officers, no matter how senior, as apparently occurred in this case.

The Commission's contracting of Gregor & Binet

The Commission contracted Gregor & Binet Pty Ltd on 29 August 2014 to conduct an investigation into the allegations made against X, Y and other ECU officers, and into

systemic issues within the unit, to determine if any breach of discipline had occurred. Gregor & Binet was instructed by the Commission to prepare a written report of its findings, and to provide recommendations to the Chief Executive of the Commission.

After Gregor & Binet was contracted, Y lodged a formal grievance against the Commission officer who made the allegations against her and X, and the Commission subsequently included the investigation of this grievance in its contract with Gregor & Binet.

I was not told on 29 August 2014 of the Commission's contracting of Gregor & Binet.

The Commission may, under s 182 of the Act, engage suitably qualified persons to provide it with services, information or advice. There is no suggestion that Gregor & Binet did not fall within the class of qualified persons described in s 182 of the Act.

It was not until 5 January 2015 that I was first told that the Commission's disciplinary investigation of X and Y (an investigation which, by that time, had been undertaken for about four months) was being conducted, not by Commission officers, but by an external service provider.

In previous correspondence the Commission had referred to Ms Binet as the 'investigator', or as 'Ms Binet' or 'Ms Melanie Binet'. Such references were not sufficient for me to understand that Ms Binet was not a Commission officer, but an external service provider.

The effect of the use of this terminology on my oversight of the Commission's disciplinary investigation between 29 August 2014 and 5 January 2015 was that I could not consider making a recommendation to the Commission for X's allegation, and the related allegation made against Y, to either be:

1) excised from her broader investigation and finalised by her as a matter of priority, or

2) excised from her broader investigation and determined directly by the Commission, based on the evidence obtained on, and shortly after, 1 August 2014 by Commission investigators.

As seen in my correspondence with the Commission, I considered the allegations concerning the possession and use of a prohibited drug by X, and Y's knowledge of it, as the most serious of the allegations made.

The Police informed my office that their summonsing of X after my referral of his allegation to them on 7 January 2015 was almost entirely based on the evidence and information obtained by the Commission investigators on 1 August 2014.

The Commission's failure during this period to determine the disciplinary issues concerning both officers was, in part, because of Gregor & Binet's uncompleted investigation. This investigation, in turn, was delayed because of unforeseen circumstances within that firm. However, the genesis of all this was the Commission's decision to outsource the investigation of serious allegations of misconduct to an external service provider under s 182 of the Act.

This matter demonstrates how the Commission's control over the timeliness of a disciplinary investigation can be lost when the investigation is contracted out to an external service provider. Particularly because the allegations raised, or came to involve, not only potentially serious misconduct or misconduct generally, but also systemic issues within the ECU, in my view it was desirable that, so far as the matters at issue were not removed by me, their conduct remained in the hands and under the control of the Commission.

It was not as if the proper investigation of the matters at issue was beyond the expertise possessed by Commission officers.

The Commission's advice to the Attorney General dated 30 January 2015

The Commission's advice to the Hon Attorney General was signed by Acting Commissioner Douglas, and appears to have had two purposes.

The first purpose was to alert the Attorney General to the fact that a Commission officer was due to appear in the Perth Magistrates Court on 4 February 2015 after being charged by the Police with two counts of possessing a 'prohibited substance' pursuant to s 6 of the *Misuse of Drugs Act 1981 (WA).* This was a legitimate purpose.

The second purpose was to downplay the seriousness of the offences for which X had been summonsed. I have commented upon this aspect, but I would add some further observations:

1) The product 'Jack3d' was described as a 'sports drink', popular with some body-builders, and able to be purchased on line. None of that would appear to have anything to do with the long period of possession by X. Further, to write 'less than 1% DMAA' in bold was also an attempt to downplay the amount of prohibited drug which the Commission concluded, based on the product's packaging, was in the product 'Jack3d'.

2) Then, to say that the total quantity of the product possessed and used by X, 445 grams, might have contained 1.6 grams of DMAA potentially exposed the Hon Attorney General to criticism because the law is clear that it is the quantity of an admixture (that is, a prohibited drug mixed with another

substance which is not a prohibited drug) which is the relevant quantity for the purposes of the Act.[29]

3) It was an error to say that [X] was unaware that the product had been banned until after the matter had been reported to the Commission in August 2014. This was not the case. X admitted being aware from online discussions before the allegation was received by the Commission that the product had been banned.

4) To say that X chose to resign from the Commission of his own volition prior to being charged by the Police was misleading because, while he was subject to the Commission's disciplinary investigation from August 2014 he did not resign, although he had possessed and used the substance since it was banned in August 2012, He knew, in the relevant legal sense that he was aware that there was likely to be a prohibited drug in the Jack3d, well before the investigation commenced, that he was in possession of, or had under his control, a prohibited drug.

5) I am far from satisfied that X resigned in early January 2015 due to a moral sense of wrongdoing, as the advice implies, for he could have done so at any time after 1 August 2014.

I have commented above on the Commission's unnecessary Media Statement, Annexure C. It is largely open to the same criticisms as those I have made in respect of the Briefing Note, Annexure A.

The withdrawal of the charges against X

I have referred to Acting Commissioner Douglas' letter to me dated 20 April 2015 in relation to the outcome of the proceedings against X in the Perth Magistrates Court on 15 April 2015 which, he said, was consistent with the Commission's views on the matter as expressed in his letter to me dated 26 February 2015.

The most convenient way to see what occurred is for me to attach the transcript of the prosecution application made to her Honour Deputy Chief Magistrate Woods: Annexure E. I note that there was not, nor ever had been, a suppression order in force.

Further, as I have said, one might take issue with the proposition that X had lost his position with the Commission by way of punishment for his possession of the DMAA drug. X resigned with effect from 30 January 2015. He was not dismissed. He had been stood down and was soon reinstated.

[29] See *Paul v Collins Jnr* [2003] WASCA 238 and *Reid v DPP (WA)* [2012] WASCA 190.

Neither Acting Commissioner ever said to me that X was to be, or was, dismissed, or even encouraged to resign. Acting Commissioner Shanahan SC told me, by his letter dated 5 January 2015, that X was to resign, with effect from 30 January 2015, and that he planned to go with his wife to NSW, where she had been offered employment.

I make no comment upon the question whether it was right for the prosecution to seek the dismissal of the charges against X, not upon the ground that the case was weak, but upon the ground that having regard to his personal circumstances and otherwise good character it was not in the public interest to seek his conviction of the offences with which he had been charged. The view of the prosecutor and the decision of the Court do not relieve me of the duty to consider the question of misconduct.

The allegation of misconduct made against X

Pursuant to s 196(5) of the Act, I turn to the exercise of my function under s 195(1)(b) of the Act to determine the allegation of misconduct made against X. The allegation is that he possessed and used a prohibited drug on the Commission's premises. Had he been convicted of the offence of possessing a prohibited drug in contravention of s 6(2) of the *Misuse of Drugs Act 1981 (WA)*, his conduct would have constituted serious misconduct under s 4(c) of the *Corruption and Crime Commission Act 2003 (WA)*, and the allegation would have been so determined by me.

The Director of Public Prosecutions withdrew both charges on 15 April 2015.Therefore there is no basis upon which a determination of serious misconduct under s 4(c) of the Act can be made against X. But the question remains whether his conduct, as I find it, fell within the definition of misconduct under s 4.

In this respect, s 4(d)(iii) is the only relevant part of the definition which properly applies to his conduct, and it requires me to be satisfied that his conduct 'constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer'.

If I am so satisfied, then in order to determine that X's conduct was misconduct I must determine if it constitutes, or could constitute, a disciplinary offence which provides reasonable grounds for the termination of his employment as a public service officer under the *Public Sector Management Act 1994*, as required by s 4(d)(vi) of the Act.

As X's physical possession or control, and use, of the product 'Jack3d' occurred while he executed his duties as a Commissioner officer on the ECU's premises, and that the product contained the prohibited drug DMAA, are not facts in doubt, the issue central to my determination is whether X, in all the circumstances, was or should have been aware that he ought not to have possessed the product, or used it, on the Commission's premises, or at all, given that it contained a dangerous prohibited drug.

I have summarised the statements made by him, by Y and by other witnesses working in the ECU to Commission investigators, Ms Binet and to the Police. To my mind the evidence is clear. X purchased the Jack3d sports supplement, which gave him a rush and made him feel 'aggro', before it was declared to be a prohibited drug as a mixture containing the drug DMAA.

He soon heard rumours that it had been banned and went on line to make some inquiries, as, later, did other witnesses from within the ECU. He learned that the product did indeed contain a prohibited drug and was removed from sale, although it could, apparently, still be purchased via the internet. He admitted to the Police, in effect, that he knew that the substance was illegal, at least in the accepted legal sense that he was aware that the product was likely to contain a prohibited drug, not necessarily that he was aware that the drug was DMAA.

And yet, for a considerable period he continued to store the Jack3d on Commission premises and at his home, and he continued to consume it regularly, in circumstances where he was observed by other Commission officers to do so. He made no attempt to cease this use and to get rid of the substance.

This behaviour was inimical to the proper conduct of an officer of the State's peak integrity agency, performing an important role in dealing with corruption and misconduct in public office. Regardless of the concentration of DMAA within the product, (which was apparently quite sufficient to have the desired effect on the consumer) this was, in my view, misconduct which constituted a disciplinary offence of sufficient seriousness to require the termination of X's employment.

It therefore fell within s 4(d) of the Act, particularly because X's position in the ECU was Manager of Systems, a position of seniority and responsibility.

The ECU's activities include the monitoring, capture and dissemination of intercepted telecommunications pursuant to warrants issued to the Commission under the *Telecommunications (Interception and Access) Act 1979 (Com)*, and the monitoring of information obtained through the use of surveillance devices, the authority for the use of which is gained by virtue of a warrant issued under the *Surveillance Devices Act 1998 (WA)*.

The powers possessed and used by the Commission under these two Acts are the most intrusive possessed by the Commission, and must be exercised with the highest standards of professionalism by officers above suspicion that they are themselves committing criminal offences.

I therefore make a determination under s 195(1)(b) of the Act that X's possession and use of the prohibited drug DMAA, in the ECU in the circumstances described, constitutes misconduct under s 4 and recommend that the Commission records that

determination against X in its records for future reference. Given his resignation, nothing more would appear to be required.

The allegations of misconduct made against Y

In respect of my function under s 195(1)(b) of the Act to determine the allegation of misconduct made against Y relating to her knowledge and tolerance of X's possession and use of a prohibited drug on the Commission's premises, the matter may now be dealt with relatively shortly.

The Commission officer who made the allegation against Y said on 15 July 2014 that in late November or early December 2012 the officer entered the ECU breakout area and stood at the ECU's refrigerator, Y was in the vicinity and X was standing at the sink nearby, drinking what seemed to be a chocolate coloured milkshake from a shaker.

The officer alleges that he heard Y ask X what he was drinking, to which X replied, saying something the officer did not understand. Y immediately asked 'Isn't that banned?' X looked at the officer with a wry smile and said something. The officer thought that X acknowledged that the product was banned, although he could not hear what was said.

At the time of making his complaint, the officer had witnessed X frequently drinking this, or a similar, product, at 10am each morning prior to going to the gym for an hour. The officer said that X had described to him the effect of the product as giving him a rush, that it made him aggro, and that he had to burn this effect off at the gym.

Another Commission officer told the complaining officer in 2013 that the product X was consuming was called 'Jack3d'. Their subsequent research identified that the product contained the prohibited drug DMAA, which it was illegal to possess or use in Western Australia.

My function under s 195(1)(b) of the Act is, as I have said, to determine whether Y's conduct, as I find it, fell within the definition of misconduct under s 4. In this respect, the conduct identified in s 4(d)(iii) is, again, the relevant part of the definition which might be properly applied to her conduct, and it requires me to be satisfied that it 'constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer'.

If I am so satisfied, then, as in the case of X, in order to determine that Y's conduct was misconduct I must determine if her conduct constitutes, or could constitute, a disciplinary offence which might provide reasonable grounds for the termination of her employment as a public service officer under the *Public Sector Management Act 1994*, as required by s 4(d)(vi) of the Act.

Again, I have summarised the statements made by Y, by X and the other witnesses, to the Commission investigators, to Ms Binet and to the Police.

As to the question whether Y was guilty of misconduct in relation to her tolerance of X's possession and use of a prohibited drug on Commission premises, the issue resolves itself into the question whether there is sufficient evidence to warrant the conclusion that she knew and tolerated, as the Manager of Operations of the ECU, that he had in the refrigerator and used, not merely a 'sports drink' but a product containing a prohibited drug.

The strongest evidence against her is that of the exchange between X and her at the refrigerator in the ECU given by the witness who was the original complainant, but, although it might be an implied admission by her that X told her he was consuming a substance which she knew to be banned, there is no direct evidence as to what X said, or that she acknowledged that she knew he was talking about a prohibited drug.

X's statements to the investigators and the Police about what he told Y are equivocal and contradictory, and she made no admissions under caution, or without being cautioned. In fact, her self-serving statements of denial would be admissible in a criminal court.

It is for those reasons that I agree with the Police decision not to charge Y and with the Acting Executive Director's decision that the evidence in this respect is insufficient to support disciplinary action against Y. The outcome of the Commission's investigation of the allegations otherwise concerning Y is, as I have already said, in my view, appropriate, and I make no comment on the conclusions to which they have come in respect of the conduct of Z. Annexures D are the appropriate responses to the findings made by the Commission.

Finally, as I have already said, in my view Ms Binet's recommendations in respect of action to be taken to deal with the systemic issues in the ECU, exposed by the investigation she made, are appropriate and support my recommendation for their continuing implementation by the Commission to put an end to this sorry affair and provide the necessary assurance that the ECU is in a state which enables those officers employed in the Unit to perform their important functions effectively.

4. RECOMMENDATIONS

Recommendation 1

The Commission does not exercise its power to refer to the Police, or other law enforcement agency, a suspicion about a Commission officer having committed an offence without first consulting the Parliamentary Inspector.

Recommendation 2

The Commission continues to implement the recommendations made by Gregor & Binet on pages 86-88 in Ms Binet's report in respect of the systemic issues identified, and, after appropriate monitoring, informs the Parliamentary Inspector of the effectiveness of the changes made to its procedures.

Recommendation 3

The Commission does not contract to a service provider an allegation of misconduct made against a Commission officer in cases where the Parliamentary Inspector leaves the allegation with the Commission under s 196(4) of the Act without first consulting with the Parliamentary Inspector.

HON MICHAEL MURRAY AM QC

PARLIAMENTARY INSPECTOR

Annexure A

COPY

CORRUPTION AND CRIME COMMISSION

ATTORNEY GENERAL BRIEFING NOTE
CORRUPTION AND CRIME COMMISSION

1. ISSUE

A Corruption and Crime Commission ("the Commission") officer is due to appear in the Perth Magistrates Court on 4 February 2015 after being charged by Western Australia Police ("WA Police") with two counts of possession of a prohibited substance pursuant to section 6 of the *Misuse of Drugs Act 1981* (WA).

2. BACKGROUND

1,3-Dimethylamylamine (DMAA) was gazetted as a schedule 9 prohibited substance under section 22A of the *Poisons Act 1964* (WA) on 31 August 2012.

The two charges of possession of DMAA relate to two containers of a sports drink supplement called *Jack3d*. Based upon an analysis of packaging of the *Jack3d* product, *Jack3d* contains **less than 1% DMAA.**

Jack3d is a caffeine-based sports drink mix that can be purchased online and is popular with some body-builders due to its stimulant effects which reportedly make them feel as if they have more energy or an adrenaline-like high.

The Commission understands *Jack3d* can still be purchased online despite being banned in Australia by the Therapeutic Goods Administration in August 2012. DMAA can be purchased lawfully outside Australia.

The Commission officer is alleged to have purchased two containers of *Jack3d*, one kept at home and the other at his workplace at the Commission. The officer has consistently maintained that he purchased the *Jack3d* prior to DMAA being banned in Western Australia on 31 August 2012 and that he did not know of the ban until August 2014 after the matter was reported to the Commission.

ChemCentre, which analysed the mixture, advised that the total weight of the drink supplement, as opposed to the banned substance, was 204g in one container and 241g in the other, representing a total amount of 445g. Based on the analysis of packaging referred to above the 445g would have contained 1.6g of DMAA.

3. CURRENT SITUATION

When the Commission became aware that a container of *Jack3d* kept in a kitchen at its offices reportedly contained a banned ingredient, it conducted an investigation.

CORRUPTION AND CRIME COMMISSION
186 St Georges Terrace
PERTH WA 6000
PO Box 7667, Cloisters Square
PERTH WA 6850
Telephone: +61 8 9215 4888
toll Free: 1800 809 000
Fax: +61 8 9215 4884
info@ccc.wa.gov.au
www.ccc.wa.gov.au

The Parliamentary Inspector of the Corruption and Crime Commission, the Hon. Michael Murray, QC, was informed of the outcome and later referred the matter to WA Police.

Prior to being charged by WA Police, the officer chose to resign from the Commission of his own volition. His employment ends today.

There is likely to be some media attention surrounding this matter.

The Commission and WA Police have both prepared a media release in anticipation that this will be the case.

4. RECOMMENDATION

That the Attorney General note the contents of this brief.

I would, of course, be available to provide a further briefing on this matter.

Neil Douglas
ACTING COMMISSIONER

30 January 2015

Author: [redacted] Acting Chief Executive (9215 4892).

Annexure B-

News Release

Phone: (08) 9222 1011
Fax: (08) 9222 1060
Email: police.media@police.wa.gov.au

frontline 2020

CRIME STOPPERS .com.au 1800 333 000

CORRUPTION AND CRIME COMMISSION EMPLOYEE CHARGED

A 37 year old former employee of the Corruption and Crime Commission (CCC) has been charged by WA Police with possessing a prohibited drug.

It will be alleged that on Friday 1 August 2014, the CCC seized 204 grams of a product containing the prohibited drug, 1,3-Dimethylamylamine (DMAA) during a search of a communal area at its office situated at 186 St Georges Terrace, Perth.

DMAA is a prohibited drug used as a supplement in weight training.

A subsequent search by the CCC of the employee's home allegedly located a further 241 grams of the product which contained DMAA.

The matter was referred to the WA Police for investigation and the man was charged by summons with two counts of Possessing a Prohibited Drug. He is due to appear in the Perth Magistrate's Court tomorrow, Wednesday 4 February 2015.

Ends release.

Samuel DINNISON
Police Media
3 February 2015

Annexure C-

CORRUPTION AND CRIME COMMISSION

MEDIA STATEMENT

Former Commission Officer to Appear in the Perth Magistrates Court

3 February 2015

A former Corruption and Crime Commission officer is due to appear in the Perth Magistrates Court on Wednesday 4 February 2015.

The 37-year old has been charged by Western Australia Police ("WA Police") with two counts of possession of a prohibited substance pursuant to section 6 of the *Misuse of Drugs Act 1981* (WA).

The charges relate to two containers of a sports drink supplement called "Jack3d" – a caffeine-based product which can be purchased online and is popular with some body builders due to its stimulant effects which reportedly make the user feel he or she has more energy.

The former Commission officer is alleged to have purchased two containers of "Jack3d", one of which was kept at his home while the other was kept at his workplace – the Commission.

"Jack3d" contains 1,3-Dimethylamylamine ("DMMA") which was gazetted as a Schedule 9 prohibited substance under section 22A of the *Poisons Act 1964* (WA) on 31 August 2012. The Commission understands there was an estimated total amount of 1.6gm of DMMA in the two containers (with a total of around 445gm of "Jack3d"), which are the subject of the two charges.

The Commission understands that "Jack3d" can still be purchased online in Australia, despite having been banned by the Therapeutic Goods Administration in August 2012.

The officer has consistently maintained that he purchased the product prior to DMMA being banned in Western Australia and that he was unaware of the ban until after the matter was reported to the Commission in August 2014. The Commission immediately notified the Parliamentary Inspector of these matters following that report.

The Parliamentary Inspector subsequently referred the matter to Police.

The Commission was very disappointed that one of its former officers has allegedly been found in possession of such a banned substance. It has taken steps to ensure that staff are aware of their obligations in this regard and that these circumstances do not recur.

CORRUPTION AND CRIME COMMISSION

188 St Georges Terrace
PERTH WA 6000
PO Box 7667, Cloisters Square
PERTH WA 6850

Telephone: +61 8 9215 4888
Toll Free: 1800 809 000
Fax: +61 8 9215 4884
info@ccc.wa.gov.au
www.ccc.wa.gov.au

It also appreciates Commission staff are under significant pressure to adhere to the high standards of conduct demanded of them, and the Commission takes an uncompromising approach to maintaining those standards.

Please note: This statement is in addition to the statement issued by WA Police in relation to this matter.

Media Contact: Marie Mills: 9421 3600 or 0418 918 202.

Annexure D-

CORRUPTION AND CRIME COMMISSION

Your Ref:
Our Ref: *03534/2014*

27 May 2015

[redacted]
C/- Corruption and Crime Commission

Dear [redacted]

OUTCOME OF INVESTIGATION: ELECTRONIC COLLECTIONS UNIT (ECU)

I write with regard to the allegations of inappropriate behaviour in relation to your employment, outlined in a letter to you dated 23 October 2014. Those allegations were:

1. That your involvement in the appointment of [redacted] was not appropriate.
2. That [redacted] was not the best candidate for the position of Manager Operations.
3. That you treat [redacted] in a preferential manner.
4. That your language in the workplace is not appropriate.
5. That your treatment of some staff in the ECU has been unfair and/or unreasonable.
6. That your management of the suspension of [redacted] was not appropriate.

The investigation into these, and other, matters has been completed and the Commission is now in receipt of a final report into the matters.

In relation to these allegations, the Investigator's report finds:

- There was insufficient evidence to conclude that you improperly influenced the selection process or that [redacted] was not the best candidate for the position, however a perception of bias was created which will be addressed by changes to the protocols for selection processes.

- The relationship between you and [redacted] combined with the management style and practices observed by you, created an undesirable workplace culture that has negatively impacted on morale in the ECU. Your treatment of [redacted] (such as your tolerance of [redacted] use of profanities, public disparagement of other staff and inappropriate comments) has created a perception that she enjoys a privileged and

CORRUPTION AND CRIME COMMISSION
186 St Georges Terrace
PERTH WA 6000
PO Box 7667, Cloisters Square
PERTH WA 6850
Telephone: +61 8 9215 4888
Toll Free: 1800 809 000
Fax: +61 8 9215 4884
info@ccc.wa.gov.au
www.ccc.wa.gov.au

protected existence in the ECU. This inequitable treatment has generated jealously and ill will impacting significantly on morale and productivity. More importantly, despite the significant efforts of the Commission to improve accountability within the organisation, staff feel unable to report concerns about [redacted] conduct to you and therefore conduct which ought to be addressed is not brought to your attention.

- There was insufficient evidence to conclude that your language in the workplace was not appropriate, however it was found that you failed in the exercise of your supervisory responsibilities to address [redacted] use of profanities.

- You appear to have negative perceptions of a number of the monitoring staff which you were unable to substantiate. For example, you removed tasks from [redacted] and now adversely view her skill set without providing the framework of a formal IWDP or PIP, contrary to the principles of procedural fairness.

- The exercise of your supervisory responsibilities with respect to [redacted] was deficient. Given the operational and compliance significance of [redacted] role, and his history of illness and absence from work, you should have ensured that you were better informed about the work [redacted] was or was not performing and the state of his health. To the extent that you did endeavour to performance manage [redacted] the lack of formal process meant that [redacted] was not sufficiently put on formal notice in a timely manner that his performance was considered to be substandard. This significantly compromises the ability of the Commission to now take steps to terminate [redacted] employment on the grounds of poor performance.

- Your handling of [redacted] suspension has positively discouraged staff from complying with the Commission Code of Conduct and with the accountability training which they have completed. Your comments were counterproductive to the investment the Commission has made in changing the culture in the organisation so that issues are reported at the first available opportunity.

The report also found that:

- ECU staff perceive you as being isolated from the coalface and unwilling to entertain reasonable criticism of yourself or those closest to you.

I have accepted these findings in full.

Subject to any written submissions you make to the contrary I believe that these findings are most appropriately addressed through the Commission's performance management process (IWDP). Any written submissions in relation to an alternative course of action in light of these findings should be forwarded to me on or before seven calendar days of you receiving this letter.

If the IWDP proceeds and your performance does not improve as a result of the IWDP process, the matter will be progressed to sub-standard performance management (PIP).

The IWDP process will be conducted by the A/Director Operations. Behavioural and leadership expectations will be clearly communicated to you and monitored regularly. The Commission will also organise the provision of one-on-one leadership coaching, to assist you in meeting the objectives outlined in the IWDP. In addition, this coaching will assist you in focussing the ECU work unit into the future, and rebuilding morale and productivity within the team.

The Commission requires a high standard of professionalism from all staff, including behaviour which demonstrates mutual respect and support. As a senior officer of the Commission this expectation is heightened.

Should you require it, counselling support continues to be available to Commission officers under our Employee Assistance Program. Please contact Davidson Trahaire Corpsych on 1300 360 364 at any time to access these services.

Finally, I remind you that victimisation of anyone involved in this investigation constitutes a breach of discipline and may result in disciplinary action, up to and including termination of employment.

For any enquiries about this matter, please contact the A/Director Operations in the first instance.

Yours faithfully

ACTING CHIEF EXECUTIVE

CORRUPTION AND CRIME COMMISSION

Your Ref:
Our Ref: *03534/2014*

27 May 2015

[redacted]
C/- Corruption and Crime Commission

[redacted]

OUTCOME OF INVESTIGATION: ELECTRONIC COLLECTIONS UNIT (ECU)

I write with regard to the allegations of inappropriate behaviour in relation to your employment, outlined in a letter to you dated 28 October 2014. Those allegations were:

1. That your language and behaviour in the workplace is not appropriate.
2. That you have absented yourself from the workplace during normal working hours for non-work related reasons.
3. That you were aware that [redacted] possessed or was consuming a substance in the workplace which you knew or should have known was prohibited and failed to report this.
4. That your treatment of staff members from within and outside the ECU has been unfair and/or unreasonable.
5. That your work performance is unsatisfactory and you have failed to fully and properly perform all your duties.

The investigation into these, and other, matters has been completed and the Commission is now in receipt of a final report into the matter.

In relation to these allegations, the Investigator's report finds:

- You commonly used profanities in the workplace in the presence of other officers, publicly disparaged other staff and routinely told stories which are offensive, vulgar and/or explicit.

- Your participation in a variety of offsite activities (such as conferences and courses), combined with your heavy access to paid leave, have resulted in low visibility in the workplace. Your decision not to provide explanations for your authorised absences to your staff has created a perception that you are performing less than your contractual minimum hours of work. However, when these standard and discretionary absences are taken into account

CORRUPTION AND CRIME COMMISSION
186 St Georges Terrace
PERTH WA 6000
PO Box 7667, Cloisters Square
PERTH WA 6850
Telephone: +61 8 9215 4888
Toll Free: 1800 809 000
Fax: +61 8 9215 4884
info@ccc.wa.gov.au
www.ccc.wa.gov.au

you have just met the contractually obliged minimum of 37.5 hours per week.

- There is evidence that it is possible that you were aware that [redacted] possessed or was consuming a substance in the workplace which you knew or should have known was prohibited and failed to report this, however there is insufficient evidence to establish this, on the balance of probabilities. For this reason no disciplinary action will be taken against you in relation to the matter. However, it is recommended that you attend accountability training (with specific focus on reporting obligations) and drug and alcohol awareness training (with specific focus on over the counter pharmaceuticals, their variable legality and potential side effects).

- That you manage based on personal friendships rather than performance. For example, monitoring staff with whom you are friends get allocated work in preference to competent monitors whom you do not like.

- That you spend a significant amount of your time in the workplace in an unproductive way, including socialising and taking personal calls, rather than working. You have delegated many of your duties back to the Senior Monitors on an ad-hoc or permanent basis or have not performed them at all. For example, you have failed to conduct regular performance reviews.

The report findings highlight that it is questionable as to whether the structure and roles within ECU (particular the Senior Monitors, Manager Operations and Manager Evidence and Compliance) are appropriately classified. These roles will be reviewed in future, at a time yet to be determined, in accordance with the Commission's Organisational Change Policy, to ensure the appropriate number, classification and duties for these positions.

The Commission Code of Conduct provides that:

> *"We treat members of the public and fellow Commission officers with respect, courtesy, honesty and fairness and with proper regard for their rights, obligations, cultural differences, safety, health and welfare. We are not to participate in or tolerate bullying, harassment, sexual or otherwise or discrimination in the workplace or via social media."*

The Commission requires a high standard of professionalism from all staff, including behaviour which demonstrates mutual respect and support. As a senior officer of the Commission this expectation is heightened.

I have accepted the findings of the report in full. Subject to any written submissions you make to the contrary, I have decided that these findings are most appropriately addressed through the Commission's performance management process (IWDP). Any written submissions in relation to an alternative course of action in light of these findings should be forwarded to me within seven days of receiving this letter.

If the IWDP proceeds and your performance does not improve as a result of the IWDP process, the matter will be progressed to sub-standard performance management (PIP).

The IWDP process will be conducted by the Assistant Director ECU, with oversight by the A/Director Operations. Behavioural and leadership expectations will be clearly communicated to you and monitored regularly.

Should you require it, counselling support continues to be available to Commission officers under our Employee Assistance Program. Please contact Davidson Trahaire Corpsych on 1300 360 364 at any time to access these services.

Finally, I remind you that victimisation of anyone involved in this investigation constitutes a breach of discipline and may result in disciplinary action, up to and including termination of employment.

For any enquiries about this matter, please contact the A/Director Operations in the first instance.

Yours faithfully

ACTING CHIEF EXECUTIVE

Annexure E-

THE MAGISTRATES COURT OF

WESTERN AUSTRALIA

CRIMINAL

[redacted]

WESTERN AUSTRALIA POLICE

and

[redacted]

DEPUTY CHIEF MAGISTRATE E. WOODS

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON WEDNESDAY, 15 APRIL 2015, AT 10.58 AM

MR B. MEERTENS appeared for the prosecution.

MS R. LEE appeared for the accused.

JSO: [redacted]

R. LEE, MS: Your Honour, I appear for [redacted] He was excused from attending today and the prosecution have an application.

HER HONOUR: Thank you. Mr Meertens?

B. MEERTENS, MR: Yes, your Honour. Meertens for the prosecution today. This is a matter where I've considered the case and it has been decided that it's in the public interest - it's not in the public interest to proceed with the charge - charges and accordingly I apply under section 25 of the Criminal Procedure Act to discontinue the charges. I think it's appropriate, your Honour, that in this - on the facts of this case, that it's appropriate that I give some short reasons.

The prohibited drug, the subject of the two charges, is known as DMAA which is a drug which has only been prohibited since August 2012. It is commonly used in weight training supplements to boost performance. The facts in the evidence known to the police are that the accused purchased this drug before August 2012 and simply had some of it remaining in his possession and at his office after that date. So I think the facts are that he purchase it about two years prior to the police finding it in his possession.

Accordingly, he has purchased at a time when it was legal, even though it may be legal - illegal now. It is not one of your common illicit addictive drugs. He has basically lost him employment as a result of this incident and police finding it at his work place and at his home and he is otherwise of impeccable character. So, in all the circumstances, it's not in the public interest to proceed with the prosecution and I apply to discontinue the charges.

HER HONOUR: And the drugs should be destroyed?

MEERTENS, MR: Yes.

HER HONOUR: Thank you. Yes. Is there any other application?

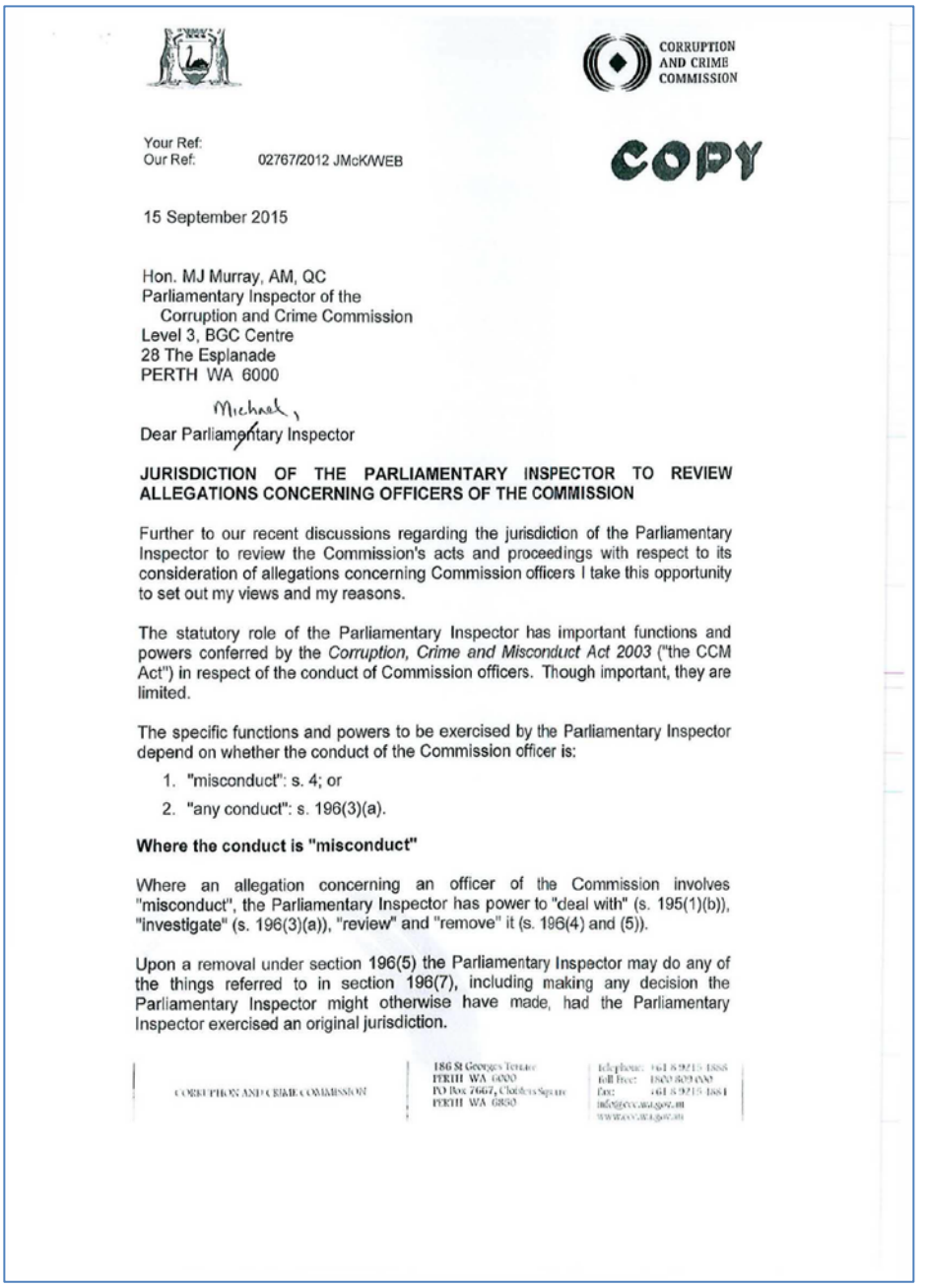
LEE, MS: No, your Honour.

HER HONOUR: So charges 1561 and 1562 of 2015 will be dismissed under section 25. There will be a formal order for destruction of the drugs. Thank you.

MEERTENS, MR: Thank you, your Honour.

Appendix Two

Commissioner McKecknie's letter to PICCC- 15 September 2015



CORRUPTION AND CRIME COMMISSION

Your Ref:
Our Ref: 02767/2012 JMcK/WEB

COPY

15 September 2015

Hon. MJ Murray, AM, QC
Parliamentary Inspector of the
Corruption and Crime Commission
Level 3, BGC Centre
28 The Esplanade
PERTH WA 6000

Dear Parliamentary Inspector

JURISDICTION OF THE PARLIAMENTARY INSPECTOR TO REVIEW ALLEGATIONS CONCERNING OFFICERS OF THE COMMISSION

Further to our recent discussions regarding the jurisdiction of the Parliamentary Inspector to review the Commission's acts and proceedings with respect to its consideration of allegations concerning Commission officers I take this opportunity to set out my views and my reasons.

The statutory role of the Parliamentary Inspector has important functions and powers conferred by the *Corruption, Crime and Misconduct Act 2003* ("the CCM Act") in respect of the conduct of Commission officers. Though important, they are limited.

The specific functions and powers to be exercised by the Parliamentary Inspector depend on whether the conduct of the Commission officer is:

1. "misconduct": s. 4; or
2. "any conduct": s. 196(3)(a).

Where the conduct is "misconduct"

Where an allegation concerning an officer of the Commission involves "misconduct", the Parliamentary Inspector has power to "deal with" (s. 195(1)(b)), "investigate" (s. 196(3)(a)), "review" and "remove" it (s. 196(4) and (5)).

Upon a removal under section 196(5) the Parliamentary Inspector may do any of the things referred to in section 196(7), including making any decision the Parliamentary Inspector might otherwise have made, had the Parliamentary Inspector exercised an original jurisdiction.

CORRUPTION AND CRIME COMMISSION | 186 St Georges Terrace PERTH WA 6000 PO Box 7667, Cloisters Square PERTH WA 6850 | Telephone: +61 8 9215 4888 Toll free: 1800 809 000 Fax: +61 8 9215 4884 info@ccc.wa.gov.au www.ccc.wa.gov.au

The Parliamentary Inspector may also make recommendations to the Commission, independent agencies and/or an appropriate authority with respect to misconduct (s. 195(1)(d)). For example, the Parliamentary Inspector may recommend the conduct be referred to the WA Police or be the subject of a disciplinary investigation by the Commission.

The Parliamentary Inspector may at any time prepare a report for either House of the Parliament or the Standing Committee with respect to a matter "affecting the Commission" (s. 199(1)(a)). Of course, any report must comply with s. 205 and not include information revealing the identities and information in relation to investigations specified.

For the sake of completeness I note that as of 1 July 2015 the Parliamentary Inspector is the only body able to deal with "minor misconduct" of Commission officers. From that date the Commission's jurisdiction is limited to dealing with "serious misconduct" (s. 18) and the Public Sector Commissioner is specifically excluded from receiving allegations about Commission officers (s. 45G).

I do not believe there is any disagreement between us in this respect.

Where the conduct is not "misconduct", but is other conduct

Where it appears there is disagreement is from the point where the Parliamentary Inspector recommends to the Commission that misconduct be the subject of a disciplinary investigation or performance management process. In those cases, for the reasons outlined below, the jurisdiction of the Parliamentary Inspector to further review the matter ends and passes to the WAIRC.

Where the Parliamentary Inspector receives a complaint about a Commission officer's conduct, the Parliamentary Inspector can investigate it and make recommendations to others: s. 196(3)(a)-(g).

Absent an opinion of "misconduct" the Parliamentary Inspector cannot deal with other conduct. The function to "deal with" is limited to misconduct: s. 195(1)(b).

At any time after notification, s.196(4), the Parliamentary Inspector may review the Commission's acts and proceedings with respect to the Commission's consideration of the allegation.

Upon removal the Parliamentary Inspector may do any of the things listed in subsection 196(7). If the Parliamentary Inspector stands in the shoes of the Commission and exercises disciplinary powers that are "industrial matters" then the Parliamentary Inspector's decision may itself be subject to review by the WAIRC.

The Parliamentary Inspector's power to conduct such a review of the Commission's acts and proceedings is limited. It is qualified by section 196(9), which is expressed in mandatory terms: "The Parliamentary Inspector must not undertake a review of a matter that arises from, or can be dealt with under, a

jurisdiction created by, or that is subject to, the *Industrial Relations Act 1979*" ("the IR Act").

The IR Act confers jurisdiction on the WAIRC, amongst others. The jurisdiction of the WAIRC is expressed widely: "the Commission has cognizance of and authority to enquire into and deal with any industrial matter" (s. 23 IR Act).

"Industrial matter" is also defined widely (s. 7(1) IR Act):

> *any matter affecting or relating or pertaining to the work, privileges, rights or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to -*
>
> *(a) the wages, salaries, allowances, or other remuneration of employees ...;*
>
> *(b) the hours of employment ... mode, terms, and conditions of employment ...;*
>
> *...*
>
> *(ca) the relationship between employers and employees;*
>
> *...*
>
> *and also includes any matter of an industrial nature the subject of an industrial dispute or the subject of a situation that may give rise to an industrial dispute ...*

The breadth of the jurisdiction of the WAIRC is reflected in the authorities.

For example, and relevantly to recent matters the subject of discussion between us, an employer's inquiry into allegations concerning the conduct of an employee is a matter relating "in a fundamental way" to the employee's work and, therefore, an industrial matter as defined in s7(1) of the IR Act.[1]

Other examples of the exercise of the jurisdiction in the disciplinary and, therefore, industrial context show the WAIRC:

a) assessing that an employer, in investigating allegations against an employee, failed to comply with its policies and related procedures, which constituted unfair action against an employee "in an industrial sense";[2]

b) finding that an employer denied an employee procedural fairness in disciplinary procedures that led to the employer imposing penalties for

---

[1] *State School Teachers' Union of WA (Inc) v Minister for Education* (1995) WAIG 2631. The Applicant union claimed procedures employed by the employer in the course of an investigation were unfair, and a denial of natural justice and procedural fairness. The respondent claimed there was no industrial matter before the Commission and the application should be dismissed. Commissioner Beech held the matter before the Commission was an industrial matter as defined.
[2] *Western Australian Prison Officers' Union of Workers v Minister for Corrective Services* (2014) WAIRC 00313 per Commissioner Kenner at [108].

breaches of discipline,[3] suspending an employee without pay,[4] and transferring an employee;[5]

c) stopping baseless disciplinary proceedings;[6] and

d) considering whether the legal right of the employer to impose a disciplinary penalty had been exercised so harshly or oppressively against the employee as to amount to an abuse of that right.[7]

The WAIRC is the body vested with jurisdiction to enquire into and deal with industrial matters and those matters clearly include any matter involving a suspected breach of discipline on the part of an employee.

The *Corruption and Crime Commission Industrial Agreement 2013* ("the Industrial Agreement") is also relevant. It applies to all but a very small number of officers employed by the Commission.

The Industrial Agreement was registered under Part II Division 2B of the IR Act and sets out the remuneration and other terms and conditions of employment of Commission officers.

Clause 62 of the Industrial Agreement specifies the dispute settlement procedure for "any questions, difficulties or disputes arising under this Agreement". Clause 62.5 provides for disputes in relation to any such matters, which cannot be resolved within the Commission in accordance with the clause, to be referred to the WAIRC.

Clause 10.15 specifies the disciplinary procedures applying to suspected breaches of discipline. Clause 57.6 specifies the procedure to apply where performance management issues are identified.

The Industrial Agreement therefore vests jurisdiction in the WAIRC to deal with "any questions, difficulties or disputes arising under this Agreement", including any issues arising with respect to the Commission's acts and proceedings in dealing with disciplinary and performance management matters.

Therefore, whilst the Parliamentary Inspector is empowered to review the Commission's acts and proceedings with respect to its consideration of allegations concerning Commission officers generally (s. 196(4)), the Parliamentary Inspector must not undertake such a review where the matter can be dealt with under a jurisdiction created by or subject to the IR Act, which clearly includes the WAIRC (s. 196(9)).

---

[3] *Department of Education and Training v Weygers* (2009) WAIRC 00041.
[4] *Health Services Union of Western Australia v Director General of Health* (2008) WAIRC 00215.
[5] *Western Australian Prison Officers' Union of Workers v Minister for Corrective Services* (2014) WAIRC 00313.
[6] *Civil Service Association of Western Australia Inc v Director General of Department for Community Development* [2002] WASCA 241 per Anderson J at [20].
[7] *Australian Rail Tram and Bus Industry Union of Employees West Australian Branch v Public Transport Authority* (2005) WAIRC 01276 per Commissioner Smith at [69].

The Parliamentary Inspector's jurisdiction to review the Commission's acts and proceedings in respect of allegations of conduct by Commission officers that is disciplinary in nature or performance based, is excluded because those matters are industrial matters subject to the jurisdiction of the WAIRC. Parliament must have intended that such matters be the subject of review by the WAIRC alone.

The exception is limited to the Parliamentary Inspector's power to review certain matters. It does not prevent the Parliamentary Inspector from reporting and making recommendations to either House of Parliament and/or the Standing Committee in relation to those matters, if they are "matters affecting the Commission" (s. 199(1)(a)).

My tentative view remains that the Parliamentary Inspector can:

(1) investigate conduct and make recommendations;

(2) deal with misconduct;

(3) subject to s. 196(9) review the Commission's consideration and report on that under s. 199(1)(a); and

(4) unless the Parliamentary Inspector has formed an opinion of misconduct, may not either review an industrial matter or publish a report about an individual officer's conduct that falls short of misconduct.

I ask you to consider this letter both generally in the exercise of your role and specifically in relation to your proposed report where 2 officers have not been the subject of a misconduct opinion.

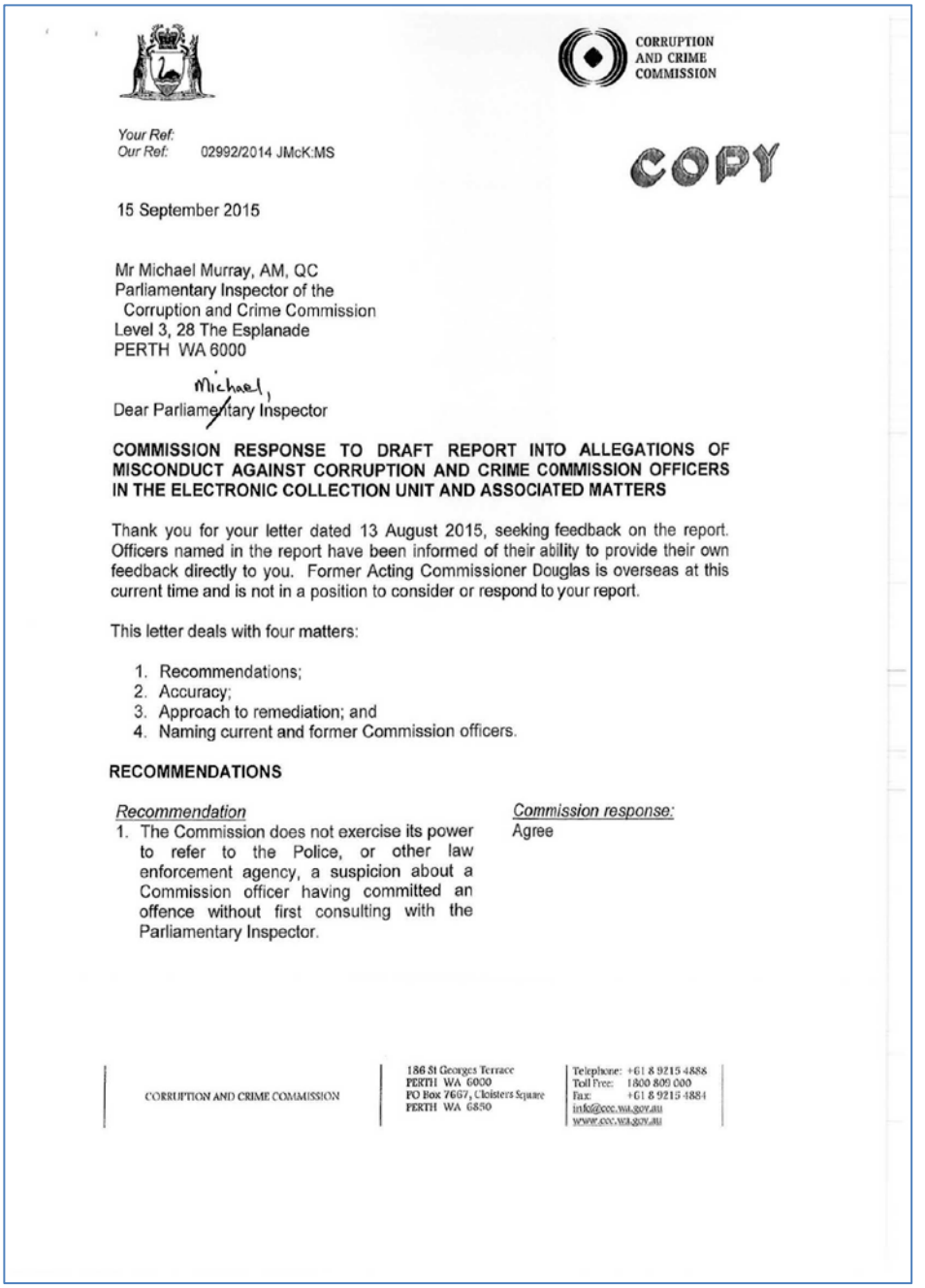
I welcome further discussion at your convenience.

Yours sincerely

John McKechnie, QC
COMMISSIONER

Appendix Three

CCC's first response to draft PICCC report



CORRUPTION AND CRIME COMMISSION

Your Ref:
Our Ref: 02992/2014 JMcK:MS

COPY

15 September 2015

Mr Michael Murray, AM, QC
Parliamentary Inspector of the
Corruption and Crime Commission
Level 3, 28 The Esplanade
PERTH WA 6000

Dear Michael,
Parliamentary Inspector

COMMISSION RESPONSE TO DRAFT REPORT INTO ALLEGATIONS OF MISCONDUCT AGAINST CORRUPTION AND CRIME COMMISSION OFFICERS IN THE ELECTRONIC COLLECTION UNIT AND ASSOCIATED MATTERS

Thank you for your letter dated 13 August 2015, seeking feedback on the report. Officers named in the report have been informed of their ability to provide their own feedback directly to you. Former Acting Commissioner Douglas is overseas at this current time and is not in a position to consider or respond to your report.

This letter deals with four matters:

1. Recommendations;
2. Accuracy;
3. Approach to remediation; and
4. Naming current and former Commission officers.

RECOMMENDATIONS

Recommendation	*Commission response:*
1. The Commission does not exercise its power to refer to the Police, or other law enforcement agency, a suspicion about a Commission officer having committed an offence without first consulting with the Parliamentary Inspector.	Agree

CORRUPTION AND CRIME COMMISSION

186 St Georges Terrace
PERTH WA 6000
PO Box 7667, Cloisters Square
PERTH WA 6850

Telephone: +61 8 9215 4888
Toll Free: 1800 809 000
Fax: +61 8 9215 4884
info@ccc.wa.gov.au
www.ccc.wa.gov.au

2. The Commission considers adopting and implementing the recommendations made by Gregor & Binet on pages 86-88 in Ms Binet's report in respect of the systemic issues identified, noting that the appropriate disciplinary action has been taken against Y and Z.	Agree The details of the associated action in response to the recommendations are outlined in the section below entitled "Remediation".
3. The Commission does not contract to a service provider an allegation of misconduct made against a Commission officer in cases where the Parliamentary Inspector leaves the allegation with the Commission under s. 196(4) of the Act.	The Commission may not always have the necessary capacity to undertake every investigation, particularly as it relates to industrial matters. Moreover, it may wish to have an independent person conduct an investigation. However, should the Commission wish to contract such a service provider in future, it will consult with you before doing so.

ACCURACY

Page 5, paragraph 4 states:

> *On receipt of my letter dated 11 September 2014 the Acting Chief Executive Officer spoke with the Director Legal Services and when it was established that the criminal allegations concerning* X and Y *had not in fact been referred to the Police, decided that should not be done, but the* X *investigation file should be forwarded to me when a final report was completed, and Ms Binet's report would also be provided to me when it was available.*

Ms C the Commission's Director Corporate Services and former acting Chief Executive took action in direct response to your letter (dated 11 September 2014) which states in part:

> *I am concerned that the Commission's new practice of unilaterally referring to the Police allegations which were notified to me under the s 196(4), but whose initial investigation I was content to leave with the Commission.*
>
> *While I applaud the Commission's proactive response in this respect, the practice precludes me from exercising my continuing review power under s 196(4), and my broader powers under s 196(5) and (7) should it be necessary for me to exercise them.*
>
> *In this respect, I note that on 26 August 2014 the Commission informed me that it had already referred the allegation concerning* X *(Commission reference 02992/2014 PO/vcw) to the Police for investigation. This matter was, of course, an allegation referred to me under s 196(4).*

The origin of the Commission's new practice may simply be a misunderstanding of my initial decision made under s 196(4) when I first receive a notification under that section.

In circumstances where I leave an allegation to the Commission to investigate, my review power under s 196(4) continues to be exercised until the Commission completes its investigation. In minor matters, I customarily ask for the result of the Commission's investigation when I respond to the Commission's notification, and any action taken to address the issue.

However, in more serious matters, such as in the OSU matters, the Commission has usually provided me with its investigation report before taking any further action. This has been for the purpose of me considering my potential use of s 196(5) and (7) to finally deal with the matter.

To address any misunderstanding we may have, I propose the following. In respect of allegations referred to me by the Commission under s 196(4), but which I leave in the hands of the Commission to initially investigate, we adopt the following procedure:

> *If the Commission completes its investigation and determines that the matter should be referred to the Police or other investigative agency for criminal investigation and prosecution:*
>
> *(a) the Commission provides me with its final investigation report, and notifies me of its determination so that I may finalise my assessment of the allegation under s 196(4), and*
>
> *(b) the Commission take no further action until I conclude my assessment.*

Upon receiving this letter, Ms C interpreted it as a binding direction in respect to the X matter and implemented action accordingly. This interpretation was explained in a letter to you on 9 March 2015 by Acting Commissioner Shanahan.

Ms C's action occurred at a time when the Commission was subject to difficult circumstances, namely:

- the Commission being in midst of Operation Gap;
- having two Acting Commissioners on a rotating basis;
- Ms C only having been in the role for a number of days;
- a lack of handover on matters concerning yourself;
- a lack of a shared understanding between the CCC and yourself regarding an agreed protocol for dealing with allegations against Commission officers; and
- the Operations Directorate not functioning well as a result of allegations of serious misconduct made by senior officers against the Director Operations.

In regard to the final point, the senior officers who made those allegations were also holders of the information around X and Operation Gap. At the time, those officers were taking long periods of personal leave following the making of those allegations against the Director Operations.

I ask that the statement on page 5, paragraph 4 and any other reference to this matter, be amended to reflect the contextual factors that impacted upon the action taken by Ms C.

APPROACH TO REMEDIATION

Based on the findings and subsequent recommendations in Ms Binet's report, the following actions were taken:

1. Z is subject to an Individual Work and Development Plan (IWDP) which includes the requirement for ECU to undertake facilitated team building and to ensure that officers within the unit are aware of their responsibilities under the Commission's Code of Conduct.

2. Y is also subject to IWDP which includes reference to her responsibilities under the Code of Conduct.

3. A drug and alcohol awareness training has been developed and will be delivered to the ECU in September and then subsequently rolled out to the entire Commission.

4. New systems have been introduced to monitor quality control and reduce errors within the ECU. Positive reports from the State and Commonwealth Ombudsman indicate that those systems are effective.

5. Restructuring of the ECU is to be considered as part of the Commission's broader organisational change project.

6. The CCC's Selection Panel Report template has been amended to include a more detailed conflict of interest register aimed at enhancing transparency in the decision making process around selection.

7. Consultants used for selection processes across the Commission are appropriately rotated to ensure independence on recruitment panels.

8. Centralised reporting of IWDP completion rates has now been implemented to monitor performance management compliance across the Commission. All IWDP's will be completed for Commission officers by 30 September 2015.

9. The Commission has standard investigation protocols in place for all investigations including properly cautioning witnesses before they are interviewed, and ensuring searches are within scope.

10. A Fitness for Work Policy has been endorsed and implemented which enables the Commission to assess for impairment, be it physical, mental or drug/alcohol related.

11. People Services have put processes in place to ensure regular welfare checks are conducted with staff on personal leave by their Manager and by a HR representative.

12. Corporate Services reviewed the CCC's existing employee voice mechanisms and the Acting Chief Executive re-communicated these to staff. These will be communicated again in six month intervals and were last communicated on 5 August 2015.

13. The Commission's Code of Conduct has been amended to include "We will promote and enhance the interests, welfare and functions of the Commission and its reputation and standing in the community".

The Commission has put in place considerable remediation strategies to ensure that the matters raised in Ms Binet's report have been appropriately addressed.

NAMING CURRENT AND FORMER COMMISSION OFFICERS

I ask, as respectfully but as strongly as I can that officers are not identified in the report. Naming the officers both current and former will significantly set the Commission back in its efforts to rebuild the workforce and reputation in the wake of this and Operation Gap.

There are also questions of fairness and reasonableness. The officers have already been dealt with through the Commission's internal industrial mechanisms. To then publicly air these matters, potentially jeopardising their future careers, seems excessive and beyond what would be fair in a normal workplace industrial matter.

I refer to other officers named in your report, but still referred to as having a role in this process, being [Ms C] and [Mr L]. In the case of [Ms C], especially having regard to the matters mentioned earlier, if there is to be any mention of her conduct, it should be of commendation, not condemnation. [Mr L's] lack of action was significant but, in in my respectful view, having regard to the pressures at the time, does not justify being identified by reference to him personally.

In relation to the non-criminal conduct of [Y] and the conduct of [Z] referred to in the report, I refer to my letter dated 15 September 2015 regarding the jurisdiction of the Parliamentary Inspector to review and report on allegations concerning officers of the Commission. In my opinion s. 196(9) applies to prevent a review and for the reasons set out in my second letter dated 15 September 2015 specifically in relation to [X, Y and Z], ask that they not be identified.

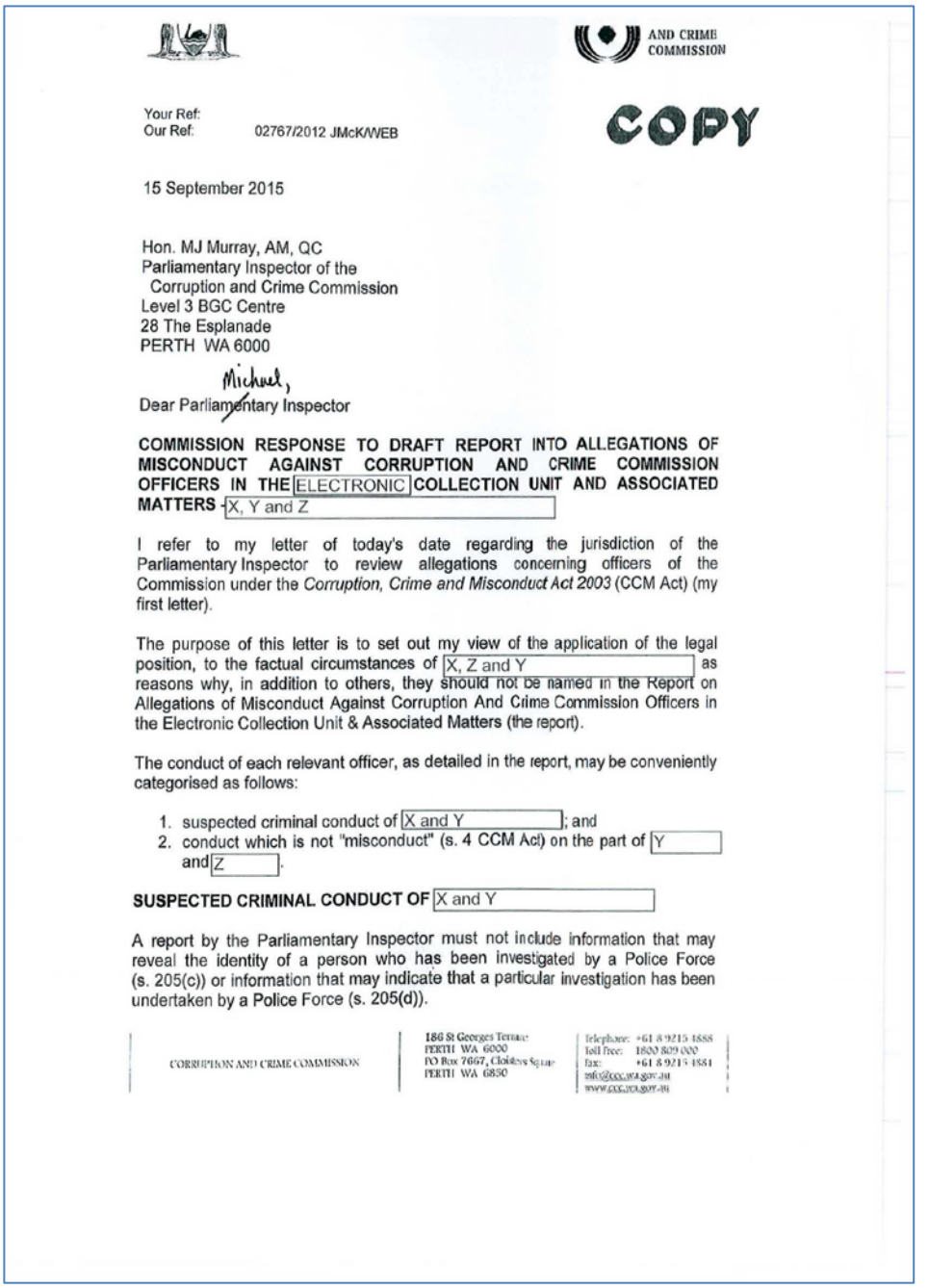
in relation to investigations carried out by the Commission and the Police into alleged criminal acts by X and Y, I respectfully draw your attention s. 205(a) and (c).

Yours sincerely

John McKechnie, QC
COMMISSIONER

Appendix Four

CCC's second response to draft PICCC report



AND CRIME COMMISSION

COPY

Your Ref:
Our Ref: 02767/2012 JMcK/WEB

15 September 2015

Hon. MJ Murray, AM, QC
Parliamentary Inspector of the
Corruption and Crime Commission
Level 3 BGC Centre
28 The Esplanade
PERTH WA 6000

Michael,
Dear Parliamentary Inspector

COMMISSION RESPONSE TO DRAFT REPORT INTO ALLEGATIONS OF MISCONDUCT AGAINST CORRUPTION AND CRIME COMMISSION OFFICERS IN THE ELECTRONIC COLLECTION UNIT AND ASSOCIATED MATTERS - X, Y and Z

I refer to my letter of today's date regarding the jurisdiction of the Parliamentary Inspector to review allegations concerning officers of the Commission under the *Corruption, Crime and Misconduct Act 2003* (CCM Act) (my first letter).

The purpose of this letter is to set out my view of the application of the legal position, to the factual circumstances of X, Z and Y as reasons why, in addition to others, they should not be named in the Report on Allegations of Misconduct Against Corruption And Crime Commission Officers in the Electronic Collection Unit & Associated Matters (the report).

The conduct of each relevant officer, as detailed in the report, may be conveniently categorised as follows:

1. suspected criminal conduct of X and Y; and
2. conduct which is not "misconduct" (s. 4 CCM Act) on the part of Y and Z.

SUSPECTED CRIMINAL CONDUCT OF X and Y

A report by the Parliamentary Inspector must not include information that may reveal the identity of a person who has been investigated by a Police Force (s. 205(c)) or information that may indicate that a particular investigation has been undertaken by a Police Force (s. 205(d)).

CORRUPTION AND CRIME COMMISSION
186 St Georges Terrace
PERTH WA 6000
PO Box 7667, Cloisters Square
PERTH WA 6850
Telephone: +61 8 9215 4888
Toll free: 1800 809 000
Fax: +61 8 9215 4884
info@ccc.wa.gov.au
www.ccc.wa.gov.au

As you are aware, X and Y have been investigated by the WA Police with respect to the suspected criminal conduct detailed in the report, and the WA Police have undertaken an investigation in relation to those matters.

Any and all information capable of identifying X and/or Y and the police investigation must therefore be removed from the report by reason of the express prohibition contained in s. 205.

CONDUCT WHICH IS NOT "MISCONDUCT" ON THE PART OF Y and Z

The report sets out considerable detail of other conduct by Y and Z the subject of the Commission's disciplinary investigation, in addition to the acts and proceedings undertaken by the Commission with respect to its consideration of that conduct.

You express no opinion as to the conduct of Y and Z being 'misconduct' as defined (s. 4). It clearly wasn't.

The report states the outcome and conclusions reached as a result of the Commission's investigation of the conduct was appropriate and ultimately recommended the Commission adopt and implement the recommendations made in respect of systemic issues identified (Recommendation 2). I have agreed with your recommendation. In the same recommendation you note "the appropriate disciplinary action has been taken against Y and Z".

I do not dispute the Parliamentary Inspector has the power to investigate "any conduct of officers" (s. 196(3)(a)) that is not "misconduct", if it is necessary for the purposes of performing functions of the Parliamentary Inspector, such as making recommendations to the Commission, an independent agency or an appropriate authority (s. 195(1)(d)).

However, for the reasons set out in my second letter, where there is no "misconduct" for you to deal with and the matter is to be dealt with by the Commission in accordance with its disciplinary procedures, as here, the jurisdiction of the Parliamentary Inspector ends and any further review is within the sole jurisdiction of the WAIRC.

In this case, you were notified of the allegations and were content for the Commission to deal with them through its proposed internal disciplinary investigation.

In those circumstances, subsection 196(9) prohibits any further review of the matters.

They should not therefore be the subject of a report.

Further, they are not "matters affecting the Commission" (s. 199(1)(a)) and for that reason also should not be included in the report.

Even if this is wrong, to include details of the conduct of Commission officers that is significantly adverse to them, and information capable of identifying them in circumstances where there is no "misconduct" and appropriate disciplinary action has been taken, is unwarranted, wholly disproportionate and unfair.

For all of these reasons I ask that you consider not reporting on the conduct of Y and Z at all, or at least in a manner which has no risk at all of identifying either of them.

Yours sincerely

John McKechnie

John McKechnie, QC
COMMISSIONER

Appendix Five

PICCC's letter to Committee on sections 196(9) and 205 of the CCM Act

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

15 October 2015

The Hon Nick Goiran MLC
Chairman
Joint Standing Committee of the
Corruption and Crime Commission

Dear Chairman

S 196(9) & S 205 OF THE ACT

I refer to my evidence yesterday which touched upon the fact that Commissioner McKechnie QC and I have recently had cause to discuss the scope of my misconduct function, and of ss 196(9) and 205 of the Act.

The Commissioner gave me a copy of his letter to you dated 9 October 2015 which, I understand, included copies of his four letters to me dated 15 September 2015.

I write this letter to you because it may be beneficial for the Committee to have a greater understanding of the nature of the issues raised by the Commissioner, and of my general views of them.

It may ultimately be necessary to place the issues before the Committee by way of report, containing detailed arguments in support of our respective opinions, but at the moment I take the view that we should be able to reach a common understanding about the matters of law involved, both of which may affect the performance of my duties, including to report to the Parliament and to the Committee.

As to that I repeat the point to which I alluded before the Committee that it is my responsibility to decide how I must proceed in the discharge of my statutory functions, although, of course, I will always be grateful to have the input and views of both the Committee and the Commissioner.

S 205 of the Act

The Commissioner says that, as a matter of law, I am precluded from disclosing the identity of any Commission officer in my reports to Parliament.

As briefly discussed yesterday during my appearance before the Committee, the Commissioner relies on the prohibition in s 205 of the Act for his view. If the

PO Box 5817, Perth, St George's Terrace, PERTH WA 6831
Telephone: (08) 9264 9570
Email: piccc@piccc.wa.gov.au

Commissioner is correct, his view would have application, not just in respect of Commission officers, but to all other classes of persons mentioned in the section.

I respectfully disagree with the Commissioner because the operation of s 205 of the Act cannot limit the operation of s 208.

I may disclose official information under s 208(4) of the Act, including to either House of Parliament, or to the Committee. I may also disclose operational information under s 208(5). By virtue of s 151(5), I may also disclose restricted matter as defined in s 151, when such matter is also official information, as defined in s 152 or s 208.

The kinds of information described in s 205 can, of course, constitute restricted matter, or official information, or both. Whether the information constitutes official information is determined by whether I have acquired it by reason of, or in the course of, the performance of my functions under the Act.

If the information is official information, I may disclose it by virtue of s 208(4) of the Act, despite the information also being of the kind defined in s 205.

As I said in my Report dated 8 October 2015, made in respect of matters concerned with the Electronic Collection Unit of the Commission and certain officers of that Unit, I think that my interpretation of the sections discussed above is supported by the statutory context, particularly that contained in the sections of the Act which relate to the process of reporting to the Committee and to the Parliament, who have absolute power of disclosure under s 202.

My remit under s 199(1)(a) is to report on any matters affecting the Commission, including questions of misconduct by its officers, and including matters of operational effectiveness and the requirements of the Commission, including those concerned with the effectiveness and appropriateness of its procedures.

Before I do so, s 200 requires, if I propose to report 'any matters adverse to a person or body', I must give them the opportunity to make representations to me concerning those matters. The section clearly gives that opportunity to those who I propose to identify by name or in some other way, and the Commission has the same opportunity in the same circumstances.

My decision to disclose such information is discretionary, and I have alluded in my Report dated 8 October 2015 to the considerations to which I had regard in that case. To put the matter shortly, and without attempting to set out an exhaustive list of relevant considerations, I am guided in my decision by the need for identification to permit me to properly perform the functions of my office, bearing in mind that the thrust of the provisions discussed above is that derogation from anonymity, generally preserved by the Act, is justified, indeed required, where necessary to serve the purposes of public accountability and oversight by my office.

My misconduct function and s 196(9) of the Act

The Commissioner raises two issues concerning my misconduct function:

1. I may not report to Parliament any conduct of a Commission officer which is not misconduct, and

2. s 196(9) of the Act precludes me from examining the conduct of a Commission officer which is not found to be misconduct, but which may become the subject of internal disciplinary action (and is therefore 'industrial' in nature).

I respectfully disagree with the Commissioner's first point.

The performance of my functions and powers are matters which may be reported to the Parliament because they will inevitably be matters which affect the Commission (a prerequisite of my reporting power under s 199 of the Act). My misconduct function – which is to 'deal with' matters of misconduct on the part of the Commission or a Commission officer – is not fulfilled only in instances when I assess such conduct as constituting misconduct; the function is equally performed when I assess an allegation as not constituting misconduct.

Further, the fulfilment of my misconduct function invariably involves the simultaneous fulfilment of other functions, such as the assessment of the effectiveness and appropriateness of the Commission's procedures, and the making of recommendations to the Commission, or to the Parliament. The fulfilment of, and reporting upon, my non-misconduct functions always relate to some factual setting within, or relating to, the Commission, and that setting provides the context which makes a report comprehensible, able to be considered on its merits, and able to be properly responded to by the Parliament, the Commission and other interested persons.

In relation to the Commissioner's second point, my view is that the substantive conduct of a Commission officer, when it is the subject of an allegation, falls within my jurisdiction by virtue of my misconduct function. My jurisdiction is the performance of a function under s 195, using the very broadly expressed powers conferred in s 196 in particular.

The requirement for the Commission to notify me arises where there is an 'allegation that concerns, or may concern' a Commission officer, not merely in respect of established misconduct, before I have had the opportunity to review the Commission's proceedings. I may then exercise my ordinary powers of investigation, remove the matter from the Commission and deal with it in accordance with my general powers and having regard to s 196(7). I will make an assessment of the matter and possibly make recommendations to the Commission.

For the purposes of s 196(9) of the Act, any disciplinary or other remedial action taken by the Commission to which the officer is subjected in response to my assessment or otherwise (whether the assessment is one of misconduct or not) may be or become the 'industrial matter' to which the sub-section refers. I will have dealt with the matter with which I was concerned under the Act and the performance of my functions is at an end.

If further disputation arises that is to be regarded solely as an industrial matter between employer and employee, both of whom retain their rights and duties under the *Industrial*

Relations Act 1979 (WA), and the effect of s 196(9) is to make it clear that I am *functus officio*. If the sub-section was to be interpreted as proposed by the Commissioner it would have the effect of removing retrospectively the jurisdiction and powers conferred upon me otherwise by the Act.

Again, this is a matter adverted to in the Report dated 8 October 2015 at 22-24.

I trust that this information is of assistance to you.

I have provided a copy of this letter to the Commissioner.

Yours sincerely,

HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR

Appendix Six

Mr Douglas' response to PICCC's report

Neil Douglas
21 Browne Street
SUBIACO WA 6008

9 November 2015

Hon. Nick Goiran, MLC
Chairman
Joint Standing Committee
on the Corruption and Crime Commission
Parliament House
Level 1, 11 Harvest Terrace
WEST PERTH WA 6005

Dear Mr Goiran

Provision of Parliamentary Inspector's report for comment

Thank you for your letter of 16 October 2015 and for the opportunity to respond to the report from the Parliamentary Inspector of the CCC, Hon Michael Murray QC (**Parliamentary Inspector**), titled *Report on Allegations of Misconduct Against Corruption and Crime Commission Officers in the Electronic Collection Unit & Associated Matters* (**ECU Report**).

1. Overview

The ECU Report is critical of a briefing note to the Attorney General that was authored by the Acting Chief Executive of the Commission and signed by me on 30 January 2015 (**Briefing Note**). A copy of the Briefing Note is in Annexure A to the ECU Report. The main criticisms are that -

(1) the Briefing Note is based on what the Parliamentary Inspector believes to be my 'misunderstanding of the current law concerning admixtures in respect of a prohibited drug'; and

(2) the purpose of the Briefing Note was to 'downplay the seriousness of the offences for which X had been summonsed'.

Similar criticisms are made in relation to a Commission media statement on 3 February 2015, a copy of which is in Annexure C to the ECU Report (**Media Statement**).

1

2. Law concerning admixtures

2.1 The context

X was charged with 2 counts of possession of a prohibited drug (being 1, 3-Dimethylamylamine (**DMAA**)), contrary to section 6 of the *Misuse of Drugs Act 1981*. The charges related to 2 containers – one of 204 grams and the other of 241 grams – of a sports drink supplement product, *Jack3d*. The Commission's understanding (which has not been questioned) was that the total of 445 grams contained about 1.6 grams, or less than 1%, of the prohibited drug, DMAA.

2.2 ECU Report

The ECU Report expressed the view that one of the things that 'reflected' the Commission's 'attitude to the seriousness of the allegations' against X and others was –

> 'its misunderstanding of the criminal law concerning admixtures in respect of a prohibited drug, expressed in the two documents which are Annexures A and C in such a way as to attempt to minimise the seriousness of the two charges laid against X' (page 25).

This is explained later in the ECU Report (at page 29), in relation to the content of the Briefing Note, as follows –

> '1. The product "Jack3d" was described as a "sports drink", popular with some body-builders, and able to be purchased on line. None of that would appear to have anything to do with the long period of possession by X. Further, to write "less than 1% of DMAA" in bold was also an attempt to downplay the amount of prohibited drug which the Commission concluded, based on the product's packaging, was in the product "Jack3d".
>
> 2. Then, to say that the total quantity of the product possessed and used by X, 445 grams, might have contained 1.6 grams of DMAA potentially exposed the Hon Attorney General to criticism because the law is clear that it is the quantity of an admixture (that is, a prohibited drug mixed with another substance which is not a prohibited drug) which is the relevant quantity for the purposes of the Act'.

With respect to the views expressed by the Parliamentary Inspector –

(1) there was no 'misunderstanding of the criminal law';

(2) if, as appears to be the case, the information given to the Attorney General was accurate and relevant, it is not apparent how the Attorney General could be 'potentially exposed … to criticism'; and

(3) informing the Attorney General, in a briefing note, of the actual amount of the prohibited drug involved is not fairly described as 'an attempt to downplay' that amount.

2.3 Relevant legal principles

There are 2 relevant legal principles. One, cited in the ECU Report, relates to the quantity of an admixture for the purpose of determining the charge for an offence under the *Misuse of Drugs Act*. The other – not referred to in the ECU Report – is that the amount or percentage of a prohibited drug in an admixture may be a significant factor in determining the seriousness of an offence (and, therefore, the culpability of an offender) - see *RIF v the State of Western Australia* [2013] WASCA 88 [21] and *Maric v Western Australia* [2015] WASCA 190[18].

2.4 Application of principles

The charge against X related to his possession of a total of 445 grams of a product that contained the prohibited drug DMAA. As far as I am aware, there has never been any question, in any Commission document or communication, that the total of 445 grams of the product that contained the prohibited drug DMAA was, as the ECU Report states, the 'relevant quantity for the purposes of the Act' – insofar as those purposes related to the terms of the charge for an offence under the Act. Both the Briefing Note and the Media Statement refer to the total amount of 445 grams in the 2 containers which was the subject of the 2 charges.

The Briefing Note went on to inform the Attorney General how much of the prohibited drug DMAA was contained in the amount of the product in the possession of X for which he was charged. Based on an analysis of packaging, the product contained 1.6 grams of DMAA, or less than 1%.

The ECU Report says that this was an attempt to 'downplay the amount of prohibited drug'. I am not aware of any suggestion, in the ECU Report or elsewhere, that the Commission's description of 'less than 1% DMAA' or '1.6 g of DMAA' was inaccurate. On that basis, it is not apparent why informing the Attorney General of the actual amount of the prohibited drug should be considered to be 'downplay[ing] the amount of the prohibited drug'.

The more serious criticisms in the ECU Report are the assertions that informing the Attorney General, in the Briefing Note, of these matters –

(1) was a 'misunderstanding of the criminal law concerning admixtures in respect of a prohibited drug'; and

(2) potentially exposed the Attorney General to criticism because the law is clear that it is the quantity of an admixture (that is, a prohibited drug mixed with another substance which is not a prohibited drug) which is the relevant quantity for the purposes of the Act'.

There are 3 responses to these criticisms.

First, the information given to the Attorney General was consistent with the law relating to determining the relevant quantity of an admixture for the purpose of an offence under the *Misuse of Drugs Act*. There was never any question about the terms of the charges against X which related to the total quantity of 445 grams of the product.

Second, it was appropriate to inform the Attorney General, by way of a briefing note, of matters that were relevant to the seriousness of the charges. The amount or percentage of the prohibited drug (DMAA) was a relevant factor – if not a significant factor – in assessing the seriousness of the charges and the potential culpability of X. Plainly, the charges against X would have been more serious if they had related to possession of 445 grams of pure DMAA than 445 grams of a product that contained less than 1% DMAA.

Third, I had (and continue to have) no reason to doubt that, as an experienced lawyer and former Senior State Prosecutor with the DPP, the Attorney General would have had no difficulty distinguishing between the law relating to the quantity of an admixture for the purposes of an offence under the Act, and the relevance of the amount or percentage of the prohibited drug in an admixture for assessing the seriousness of the offence to which the charges related. Specifically, I have no doubt that the Attorney General, having read the Briefing Note, would have understood that X was charged with possessing a total quantity of 445 grams of a product that, on an analysis of the packaging, contained 1.6 grams of DMAA, or less than 1% DMAA.

3. Other criticisms of the Briefing Note

3.1 Overview

The ECU Report lists 3 other 'observations' that are critical of the content of the Briefing Note.

3.2 When was X aware that the product was banned?

The relevant sentence from the Briefing Note states –

> 'The officer has consistently maintained that he purchased the *Jack3d* prior to DMAA being banned in Western Australia on 31 August 2012 and that he did not know of the ban until August 2014 after the matter was reported to the Commission'.

This was based on X's recorded statement in his interview with Commission investigating officers that –

> 'I knew that it went off the market and … I heard rumours that it might have been banned, but rumours through … online forums … but I never actually saw anything that said it is illegal, or anything like that' (at pages 4, 17).

The ECU Report states –

> '3. It was an error to say that [X] was unaware that the product had been banned until after the matter had been reported to the Commission in August 2014. This was not the case. X admitted being aware from online discussions before the allegation was received by the Commission that the product had been banned' (page 29).

These observations in the ECU Report appear to be based on a Police report that was apparently given to the Parliamentary Inspector on 20 January 2015 and which recorded that X told the Police that –

> 'he possessed the product having ordered it online, and was aware through online forums that the product was banned' (ECU Report, page 9).

However, at the time when the Briefing Note was prepared, I had not seen the Police report; nor was I aware of the statement alleged to have been made by X to the Police. Indeed, I have recently been informed by the Commission that, at that time, neither the Parliamentary Inspector nor WA Police had given a copy of the Police report to the Commission.

In any event, the ECU Report includes the footnote, in respect of X's alleged statement to the Police, that 'he denies saying this to the Police'. The ECU Report does not express a view, or even consider, whether this aspect of the Police report or X's denial should be preferred. Despite this, later parts of the ECU Report appear to overlook X's denial. For example in assessing whether the actions of X constituted misconduct, the ECU Report states –

> 'He soon heard rumours that it had been banned and went on line to make some inquiries, as, later, did other witnesses from within the ECU. He **learned that the product did indeed contain a prohibited drug** and was removed from sale, although it could, apparently, still be purchased via the internet. **He admitted to the Police**, in effect, that he knew that the substance was illegal, at least in the accepted legal sense that he was aware that the product was likely to contain a prohibited drug, not necessarily that he was aware that the drug was DMAA' (page 31, emphasis added).

Whatever else may be said about these views, they do not fairly represent the evidence available to the Commission when the Briefing Note was given to the Attorney General.

3.3 Resignation before charges

The relevant sentence from the Briefing Note states –

> 'Prior to being charged by WA Police, the officer chose to resign from the Commission of his own volition. His employment ends today'.

This was intended to be a fair representation of the facts that -

(1) X was charged on 9 January 2015 (and proceeded with by summons to appear in the Magistrates Court on 4 February 2015); and

(2) X submitted his resignation to the Commission ('of his own volition' and '[p]rior to being charged') on 12 December 2014 and it took effect on 30 January 2015.

The ECU Report states –

> '4. To say that X chose to resign from the Commission of his own volition prior to being charged by the Police was misleading because, while he was subject to the Commission's disciplinary investigation from August 2014 he did not resign, although he had possessed and used the substance since it was banned in August 2012, [sic] He knew, in the relevant legal sense that he was aware that there was likely to be a prohibited drug in the Jack3d, well before the investigation commenced, that he was in possession of, or had under his control, a prohibited drug' (ECU Report, pages 29-30).

It is not apparent why the factually correct statement (that X chose to resign prior to being charged) is said to be misleading. The suggestion appears to be that it is misleading because it does not add that X did not resign closer to the time when the Commission began its investigation in September 2014, or closer to the time when the product was banned in August 2012. However, this overlooks that the Briefing Note informed the Attorney General that –

(1) X purchased the product prior to it being banned on 31 August 2012; and

(2) the matter was reported to the Commission in August 2014.

From the information given to the Attorney General, it is clear that X could have resigned, but did not resign, at an earlier time (whether by reference to the events that occurred on 31 August 2012 or August 2014, or otherwise).

3.4 Implication of 'moral sense of wrongdoing'

The ECU Report states –

> 'I am far from satisfied that X resigned in early January 2015 due to a moral sense of wrongdoing, as the advice implies, for he could have done so at any time after 1 August 2014'.

I am not aware of any suggestion (by the Commission, by X or by anyone else) that X's resignation, or its timing, was 'due to a moral sense of wrongdoing'. Instead, I expect that there would have been a variety of reasons for his resignation and its timing.

In reviewing the draft Briefing Note before signing it in February 2015, it did not occur to me that someone may read it as containing an implication that X resigned 'due to a moral sense of wrongdoing'. Nor, on reflection, am I aware of the basis for that suggested implication. (Incidentally, the reference in the ECU Report to X resigning 'in early January 2015' is incorrect. He submitted his resignation to the Commission on 12 December 2014 – almost a month before he was charged – and the resignation took effect on 31 January 2015.)

The information given to the Attorney General was intended to do no more than provide the facts of X's resignation and its timing.

4. Seriousness of the allegations against X

4.1 Commission's view of the level of seriousness

It is apparent, from the terms of the ECU Report, that the Parliamentary Inspector and I had somewhat different views about the level of the seriousness of the allegations against X. Despite the focus in the ECU Report on the differences, it is important not to lose sight of the shared understanding that the allegations, particularly concerning a Commission officer, were serious matters that warranted serious attention.

In this context, it should not be overlooked that –

(1) the Commission reported the allegations promptly to the Parliamentary Inspector on 29 July 2014;

(2) the allegations were the subject of timely and thorough preliminary investigations by the Commission;

(3) on 1 August 2014 the Commission obtained and executed a search warrant under the *Misuse of Drugs Act*;

(4) later in the afternoon and evening of 1 August 2014, an investigation team of 3 Commission officers conducted a search of X's home and office;

(5) the 3 Commission investigators also conducted a video recorded interview of X;

(6) the Commission initiated formal disciplinary proceedings against X; and

(7) the Commission appointed an independent investigator to investigate and report on the disciplinary and other issues related to the allegations.

On 26 August 2014, by way of an update, I informed the Parliamentary Inspector of several of these actions. I had also been informed, and relayed to the Parliamentary Inspector, that the Commission had forwarded relevant documents and other material to WA Police to allow them to determine if they wanted to investigate the matter (for the purpose of determining whether X should be charged).

As set out in the ECU Report, it later became known that the allegations had not been referred to WA Police at that time. However, this had no bearing on my view, at the time and subsequently, that the nature of the allegations were serious and that they warranted all the serious actions that were taken by the Commission, as well as the referral of the allegations to WA Police.

4.2 Parliamentary Inspector's view of the level of seriousness

In his letter to the Commission dated 12 February 2015, the Parliamentary Inspector expressed the view that the charges against X were 'serious criminal offences'.

It seemed to me that this was overstating the position somewhat.

In the growing spirit of cooperation and frankness between our offices at that time, I shared my views about this in my letter to the Parliamentary Inspector on 26 February 2015. I observed –

> 'Based on these details [that is, the details set out earlier in that letter and in the Briefing Note], it seems to me that the offences are of a relatively minor nature. It would be reasonable to expect, for example, that if the offences were to be proved, a Magistrate would readily entertain a spent conviction application'.

In the end, my view about the likelihood of a spent conviction order was not tested because the DPP decided that it was not in the public interest to proceed with a prosecution, and the Magistrates Court dismissed the charges against X. These decisions and actions may be seen as supporting a more benign view of the level of seriousness of the allegations against X.

Among the relevant factors in deciding whether it was in the public interest to proceed with the prosecution, it was open to the DPP to consider the seriousness of the alleged offences and degree of culpability of the alleged offender (see the DPP's *Statement of Prosecution Policy and Guidelines 2005*). Plainly, it would have been relevant for the DPP to take into account the amount (and percentage) of DMAA in the product in respect of which the charges against X were based.

To avoid any misunderstanding, I should add that I am not aware whether in this case the DPP took these factors into account and, if so, the weight that was attributed to them. The 'short reasons' given by the prosecutor to the Magistrate, as recorded in the transcript that is in Annexure E to the ECU Report, do not appear to have been intended to cover all the factors that were taken into account by the DPP.

Yours faithfully

Neil Douglas

Appendix Seven

PICCC's concluding remarks on response from Mr Douglas

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

12 November 2015

The Hon Nick Goiran MLC
Chairman
Joint Standing Committee of the
Corruption and Crime Commission

Dear Chairman

RE: MR NEIL DOUGLAS – ECU REPORT

Thank you for your letter dated 9 November 2015, and for the copy of Mr Douglas' letter to you.

Before I briefly comment on those aspects of Mr Douglas' letter which relate to matters of law, I should explain that the Commission was provided with a copy of my draft Report under s 200 of the Act so that it, and its officers who were adversely commented upon, could make submissions to me. This is the normal process followed when there are a number of persons in the Commission who are affected.

In respect of X, the former officer who was the subject of proposed adverse comment, I separately sent him a copy of my draft Report under s 200. I received his comments and included some of them in the Report – again, standard procedure.

Had I been informed by the Commission, or by Mr Douglas himself, either before, or at the time I wrote to the Commission, that his term as Acting Commissioner had expired, I would have written to him separately from the outset.

It is unfortunate that the Committee has been unnecessarily burdened by a process of representations which should have formed part of the s 200 process.

As to the law in relation to the quantity of an admixture of a prohibited drug in some other substance, it is as I explained in the Report at p29. The quantity of the admixture is that which relevantly determines the seriousness of the alleged offence for the purposes of laying a charge and determining the court of trial. For obvious reasons it is the amount of the substance possessed by the alleged offender which determines the seriousness of the offence when a charge is laid.

The focus of my Report was on the Commission's demonstrable disregard for the seriousness of the offences, which seems to have contributed to the ineffectiveness of the Commission's processes.

PO Box 5817, Perth, St George's Terrace, PERTH WA 6831
Telephone: (08) 9264 9570
Email: piccc@piccc.wa.gov.au

In this regard, the Briefing Note was provided to the Hon Attorney-General very shortly after the Commission officer had been charged by the Police, and the only source of law which properly categorised the seriousness of the offences charged was that to which I referred.

As to the second 'legal principle' referred to by Mr Douglas in para 2.3 of his letter, it is not a principle at all, but a reference to the weight to be given to various relevant matters when sentencing for drug trafficking offences, commonly charged as possession of a drug of addiction with intent to sell or supply, and therefore irrelevant to the circumstances of X in this case.

The authorities to which Mr Douglas refers are, respectively, a judgment of Buss JA given in 2013 and applied by Hall J in the case of *Maric v W A [2015] WASCA 190* at *[18]*. In the 2013 case Buss JA repeated what he said in *W A v Atherton [2009] WASCA 148 [125]*, which, omitting citations, was:

> The major sentencing considerations for offences of dealing or trafficking in dangerous drugs of addiction are general and personal deterrence. The weight of the drugs in question (ie:- I add, the admixture) is a matter of importance but is not, generally, the chief factor to be taken into account. Other matters to be taken into account include the nature and level of the offender's participation in drug dealing and whether the offence was committed solely for commercial gain. The degree of purity is often regarded as significant. Matters personal to an offender will almost always be of very limited significance, though they are not completely irrelevant.

These matters were not mentioned in the report because they were irrelevant to this case. Simply put, I took the view that, in the circumstances of this case as they applied to X, and as described in my report in the last three paragraphs on p 31 and at the top of p 32, the possession and use of the prohibited drug by X was a matter of considerable gravity. To my surprise the Commission apparently took a different view, as expressed in the matters summarised in points 1 – 7 on pp 24 -25 of the Report.

I have no further comment to make in respect of the matters dealt with in Parts 2 and 4 of Mr Douglas's letter and, as to the criticisms of my conclusions set out in Part 3 of the letter, I remain of the view that the conclusions to which I came were well supported by the evidence before me and, having carefully reviewed the available material, I adhere to them.

Yours sincerely,

HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR

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 -

a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;

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

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

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