LEGISLATIVE ASSEMBLY OF QUEENSLAND

PARLIAMENTARY CRIMINAL JUSTICE COMMITTEE

A report of a review of the activities of the Criminal Justice Commission pursuant to s.118(1)(f) of the *Criminal Justice Act 1989*.

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Report No. 26
6 February 1995

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PREVIOUS REPORTS OF THE PARLIAMENTARY CRIMINAL JUSTICE COMMITTEE

	REPORT	DATE TABLED
1.	Progress Report of the Committee being the Minutes of Evidence taken on 16 and 17 July 1990 at a public hearing in relation to the Report of the Criminal Justice Commission entitled "Report on Gaming Machines Concerns and Regulations".	21 August 1990
2.	The Committee's Report No. 1 Relating to the Report of the Criminal Justice Commission entitled "Report on Gaming Machine Concerns and Regulations".	4 September 1990
3.	Progress Report of the Committee being the Minutes of Evidence taken on 6 and 7 August 1990 at a public hearing in relation to the Report of the Criminal Justice Commission entitled "Reforms in Laws Relating to Homosexuality - An Information Paper".	4 September 1990
4.	The Committee's Report No. 2 into the Report of the Criminal Justice Commission entitled "Reforms in Laws Relating to Homosexuality - An Information Paper".	2 October 1990
5.	Report Into Allegations made in the South Australian Legislative Council on 10 October 1990 by Mr Ian Gilfillan, Leader of the Australian Democrats against the Criminal Justice Commission's Director of Operations, Commander Carl Mengler.	4 December 1990
6.	Report Into the issue of legal representation of witnesses at public hearings of the Parliamentary Criminal Justice Committee.	6 December 1990
7.	Minutes of Evidence taken on 15 April 1991 at a public hearing between the Parliamentary Criminal Justice Committee and the Criminal Justice Commission and other material provided by the Commission to the Committee in relation to the roles and functions of the Committee and the Commission.	22 May 1991
8.	Minutes of Evidence taken on Friday 24 May 1991 in relation to the Committee's review of its monitoring and reviewing functions and related matters.	17 June 1991
9.	Review of the Committee's operations and the operations of the Criminal Justice Commission Part A, Submissions, Volume 1 - Public Submissions, Volume 2 - CJC Submissions and Minutes of Evidence taken on 6 and 13 June 1991; 2(a) and 2(b).	16 July 1991.
10.	Report of the independent investigation into the allegations made by Robert David Butler and Channel 7 regarding former Inspector John William Huey and the Queensland Criminal Justice Commission.	16 July 1991
11.	The Term of Sir Max Bingham QC, Chairman of the Criminal Justice Commission.	2 August 1991
12.	Report on Prostitution.	12 November 1991
13.	Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission.	3 December 1991
14.	Report of the names of the Members of the 1986-1989 Queensland Legislative Assembly referred to in the Criminal Justice Commission's *Report on an investigation into possible misuse of Parliamentary travel entitlements by Members of the 1986-1989*	7 February 1992

	REPORT	DATE TABLED
	Queensland Legislative Assembly (December 1991)	
15.	Review of the recommendations arising out of the Criminal Justice Commission's *Report on an Investigation into Possible Misuse of Parliamentary Travel Entitlements by Members of the 1986-1989 Queensland Legislative Assembly*.	13 April 1992
16.	Report on the public hearing held on 25 June 1992 into allegations made by Mr Richard Chesterman QC (past member of the Misconduct Tribunals), on 23 June 1992 in *The Courier-Mail* and *The Australian* newspapers.	13 July 1992
17.	The Committee's recommendations on changes to the method of appointment and conditions of service of members of the Misconduct Tribunals.	28 July 1992
18.	Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission. Part C - A report pursuant to section 4.8(I)(f) of the *Criminal Justice Act 1989-1992*.	10 November 1992
19.	Review of the Criminal Justice Commission's *Report on S.P. Bookmaking and Related Criminal Activities in Queensland (August 1991)*.	23 September 1993
20.	Review of the Criminal Justice Commission's use of its powers under section 3.1 of the *Criminal Justice Act 1989*. Part A - Submissions and Minutes of Evidence taken on 30 April 1993.	12 May 1993
20.	Report of a Review of the CJC's use of its power under section 3.1 of the *Criminal Justice Act 1989*. Part B - Report, Conclusions and Recommendations	23 September 1993
21.	Report into allegations made by Robert David Butler and Christopher Charles Adams regarding former Superintendent John William Huey and the Criminal Justice Commission.	9 November 1993
22.	A review of the past twelve months operation of the Parliamentary Criminal Justice Committee of the 47th Parliament.	10 December 1993
23.	Review of the Criminal Justice Commission's *Report on a Review of Police Powers in Queensland* Volumes I-III. Part A - Minutes of Evidence taken on 16 and 17 December 1994.	17 February 1994
	Part B - Comment, Analysis and Recommendations	2 August 1994
24.	Report of the unauthorised release and publication of a Committee document	16 February 1994
25.	Report on the Inquiry into the CJC's failure to account for two copies of the November 1993 monthly report to the PCJC and related matters.	5 August 1994

PARLIAMENTARY CRIMINAL JUSTICE COMMITTEE

47TH PARLIAMENT

CHAIRMAN:	Mr K H Davies MLA, Member for Mundingburra
DEPUTY CHAIRMAN:	Hon N J Turner MLA, Member for Nicklin
MEMBERS:	Mr T A Barton MLA, Member for Waterford
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RESEARCH DIRECTOR:	Mr N J Laurie
SENIOR RESEARCH OFFICER:	Mrs M A Rosengren

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CHAIRMAN'S FOREWORD

Section 118(1)(f) of the *Criminal Justice Act 1989* (the Act) provides that it is a function of the Parliamentary Criminal Justice Committee (PCJC or the "Parliamentary Committee"):

> *at a time appropriate to allow tabling of its report under this paragraph in the Legislative Assembly by which it was appointed, being a time near to the expiry of 3 years from its appointment-*
>
> *(i) to review the activities of the Commission during such 3 years; and*
>
> *(ii) to report to the Legislative Assembly and to the Minister as to further action that should be taken in relation to this Act or the functions, powers and operations of the Commission.*

The review process is outlined in the next section "Background to this Report". It included:

- the calling for and receipt of public submissions
- the receipt of a submission from the Criminal Justice Commission (CJC or the Commission)
- public hearings on 22 and 23 August 1994
- the receipt of a supplementary submission from the Commission following the public hearings and the tabling of public submissions
- a visit to Wellington, Auckland, Adelaide and Sydney to examine how the functions of the Commission are performed in those jurisdictions.

This Report No. 26 is a culmination of that process.

The format of this Report is as follows:

Chapter 1 "The Structure of the CJC" outlines the present and proposed structure of the CJC.

Chapter 2 analyses "The Role and Operation of the PCJC". The chapter includes recommendations for amendment of the *Criminal Justice Act 1989* to fully implement the recommendations of the Fitzgerald Report, as well as details of the operations of the Committee in respect of its two primary roles - to monitor and review the activities of the CJC and reporting to Parliament.

Chapters 3, 5, 6, 7, 8, 10 and 11 contain reviews of the Office of General Counsel and the six operating Divisions of the Commission:

- Official Misconduct Division
- Research and Co-ordination Division
- Intelligence Division
- Witness Protection Division
- Corruption Prevention Division and
- Corporate Services Division.

The future of the Misconduct Tribunals is further considered in Chapter 4.

Chapter 9 is devoted to Whistleblowers.

Issues relating to the accountability of the CJC are addressed in Chapter 12.

The role of the Chairman and Commissioners is discussed in Chapter 13.

Finally, Chapter 14 is devoted to the investigation of Elected Officials.

Throughout the Report, various Conclusions and Recommendations are made. For ease of reference these are found in the Summary of Conclusions and the Summary of Recommendations at the end of the Report.

This Report discharges both the Committee's statutory obligation to review the CJC as outlined above and the recommendation of the first Parliamentary Committee in Report No. 18:

> *It is still too early to make major recommendations about possible changes to CJC structure and operations. That is properly a review that should be carried out towards the end of 1994 or the beginning of 1995. By then, the Commission and the Parliamentary Committee should be in a position to adequately assess the full operation and workability of the current Criminal Justice Commission's structure and be in a better position to recommend changes, if necessary.* (1992:4)

The Report contains recommendations for a proposed new structure of the CJC, which the Committee believes will improve the organisation, reduce duplication of effort and therefore economise resources. It also takes account of the significant changes implemented by the Executive in relation to the Fitzgerald Reform Agenda.

On behalf of the Committee, I wish to acknowledge the work of the Committee's research staff, Mr Neil Laurie (Barrister-at-Law) Research Director, Mrs Michele Rosengren, Senior Research Officer, Mr Daniel O'Connor (Barrister-at-Law) former Research Director and Ms Sandy Rowse of the Committee Secretariat. The Committee is indebted to Mr Peter Forster of the Consultancy Bureau for that organisation's independent and expert research and advice in relation to the implementations of the Fitzgerald recommendations.

Ken Davies MLA
Chairman
6 February 1995

BACKGROUND TO THIS REPORT

Section 118(1)(f) of the *Criminal Justice Act 1989* (the Act) provides that it is a function of the Parliamentary Criminal Justice Committee:

> *at a time appropriate to allow tabling of its report under this paragraph in the Legislative Assembly by which it was appointed, being a time near to the expiry of 3 years from its appointment-*
>
> *(i) to review the activities of the Commission during such 3 years; and*
>
> *(ii) to report to the Legislative Assembly and to the Minister as to further action that should be taken in relation to this Act or the functions, powers and operations of the Commission.*

This section is in accordance with the recommendations of the Fitzgerald report.

The current Parliamentary Criminal Justice Committee was appointed in November 1992. This Committee is the second Committee established to monitor and review the Criminal Justice Commission (the Commission).

The first Parliamentary Committee tabled three reports in relation to the discharge of its responsibilities under s.118(1)(f) (then s.4.8(1)(f)). They are as follows:

- Report No. 9 tabled on 16 July 1991 entitled *Review of the Committee's operations and the operations of the Criminal Justice Commission Part A, Submissions, Volume 1 - Public Submissions, Volume 2 - CJC Submissions and Minutes of Evidence taken on 6 and 13 June 1991; 2(a) and 2(b)*

- Report No. 13 tabled on 3 December 1991 entitled *Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission*

- Report No. 18 tabled on 10 November 1992 entitled *Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission. Part C - A report pursuant to section 4.8(I)(f) of the Criminal Justice Act 1989-1992*

In the last mentioned report the previous Parliamentary Committee noted that Report No. 13 was the major review undertaken by the Committee and that Report No. 18 was a supplement to the two earlier reports.

In Report No. 18 the Parliamentary Committee also noted:

> *It is still too early to make major recommendations about possible changes to CJC structure and operations. That is properly a review that should be carried out towards the end of 1994 or the beginning of 1995. By then, the Commission and the Parliamentary Committee should be in a position to adequately assess the full operation and workability of the current Criminal Justice Commission's structure and be in a better position to recommend changes, if necessary.*

The Review Process

Section 118(1)(f) of the Act obliges the Parliamentary Committee to conduct a review of the activities of the Commission during the three years of operation from when the Committee was appointed.

The Act does not state how the Committee is to conduct this review. However, the Committee has been assisted by the work of the previous Committee in this regard. The previous Committee, apart from providing three reports which laid a basis for the current Committee through the recommendations contained therein, established a precedent for the mechanism of review. The current Committee has followed a similar process.

The Committee has undertaken the following actions in order to facilitate this important review:

- The Committee called for public submissions in relation to this review. The closing date for submissions was set as 17 June 1994. A copy of the advertisement is Appendix 1 of this report. The Committee, by resolution pursuant to the Parliamentary Papers Act, made the submissions available to the public on 12 August 1994. Most of the submissions received were tabled in the Legislative Assembly on 30 August 1994. The Committee felt that it was not appropriate to table all of the submissions it received.

- The Criminal Justice Commission was provided with significant notice of the intention of the Committee to commence the review. The Commission was invited to make a submission on all aspects of the operations of the Commission. The Committee refrained from limiting or defining the scope of the Commission's submission. The Commission supplied a comprehensive submission to the Committee which was tabled in the Legislative Assembly on 30 August 1994.

- On 22 and 23 August 1994 the Committee held public hearings in relation to the review. At these hearings 22 witnesses attended and gave evidence, including 11 witnesses representing eight community and professional organisations, the Commissioner of the Police Service, and 11 officers and Commissioners of the CJC.

  The witnesses appearing were as follows:

  Mr Rob O'Regan QC, Assistant Commissioner John McDonnell, Mr Mark Le Grand, Mr Robert Hailstone, Mr Graham Brighton, Mr Marshall Irwin, Mr Paul Roger, Dr David Brereton, Mr Barry Ffrench, Mr Lew Wyvill QC, Professor Ross Homel, Commissioner Jim O'Sullivan, Mr Peter MacDonald, Ms Margaret Harvey, Ms Cyrell Jan, Mr Eric Thorne, Mr Robert McDonald, Mr John Robertson, Mr John O'Gorman, Mr Terry O'Gorman, Mr Michael Quinn and Mr Shane Herbert.

  Prior to the hearings the Committee received requests from various individuals who wished to give evidence at the hearings. These included persons who had provided submissions to the Committee and those who had not made submissions.

  The Committee decided to take evidence only from representatives of various community and professional organisations and from the officers of the Commission.

  The Committee made this determination in view of two major factors. First, if individual members of the community had been permitted to make representation, the hearings could have proceeded for an indeterminable period. If the Committee had permitted some individuals to give evidence, then it would have been difficult to refuse others. The Committee wished to avoid a situation where it was perceived to be favouring particular

individuals and disapproving others.

Secondly, the review concerned the general operation of the Commission in the last four years and its role and function in the future. The Committee did not wish the review or the hearings to become distracted by concentrating upon individual complaints against the Commission. Individuals are always able to make submissions to the Committee concerning individual complaints against the Commission.

However, the Committee emphasises that the views expressed by individuals in submissions to the Committee have been taken into account. Submissions from individuals have been given the same weight as submissions tendered by community organisations, as long as they were submissions rather than isolated complaints.

- The Committee's public hearings commenced by calling officers of the Commission on a Division by Division basis. The Commissioners of the CJC were then examined. The representatives of the various community groups and professional organisations were then given the opportunity to give evidence. Finally, the Commission was given a right of reply.

- The Criminal Justice Commission was allowed to supply a supplementary submission to the Committee in order to respond in full to concerns raised in submissions received and evidence given at the public hearing. That supplementary submission was tabled in the Legislative Assembly on 27 October 1994.

- From 9-17 October 1994 the Committee visited Wellington, Auckland, Adelaide and Sydney. This visit was undertaken, in part, for the purposes of the Committee's review of the CJC.

  The Committee met with the following groups, organisations and individuals in relation to issues raised in this report:

  - Police Complaints Authority - Meeting with Sir John Jefferies (Chairman) and Mr Euan Robertson (Deputy Chairman).

  - New Zealand Police Service - Meeting with Deputy Commissioner Ian Bird, Assistant Commissioner Allan Galbraith (Crime and Operations), Mr David Kerr (Chief Legal Adviser) and Mr Les McCarthy (Officer in Charge: Internal Affairs).

  - New Zealand Police Association Incorporated - Meeting with Mr Steve Hinds (President), Mr Graham Harding (Secretary) and the Board of Directors.

  - The Honourable Wayne Matthew MLA, Minister for Emergency Services, South Australia.

  - South Australian Police Service - Meeting with South Australian Commissioner of Police, Mr D A Hunt and senior officers.

  - South Australian Police Complaints Authority - Meeting with Mr Peter Boyce (Director).

  - Australian Transaction Reports and Analysis Centre (AUSTRAC) - Meeting with Mr Bill Coad (Director), Mr Ric Power (Special Projects Manager), Ms Kyley Rezek (Financial Analyst) and Mr Graham Jordi (IT Consultant).

- National Crime Authority - Meeting with Mr Tom Sherman (Chairman) and Mr John Adams (Officer-in-Charge of the Brisbane Office of the NCA).

- New South Wales Crime Commission - Meeting with Mr Philip Bradley (Chairman).

- Independent Commission Against Corruption (ICAC) - Meeting with Mr Kevin Holland QC (Acting Commissioner), Mr Paul Seshold (Executive Director), and Mr Tim Robinson (Director of Operational Services).

The Parliamentary Committee believes that its review process has facilitated public discussion, provided constructive criticism and assisted the Committee to gather the information necessary for the compilation of this report.

The Committee thanks all the organisations and individuals who participated in the review process. The Committee has been continually impressed with the level of information and assistance during the review process.

This report recommends a number of changes to the structure and operation of the Commission. Any review process is prone to cause anxiety and concern to those that may be effected by the process. The accountability process itself is not painless.

As Fitzgerald QC observed, the balancing of accountability with independence is difficult.

1. THE STRUCTURE OF THE CJC

1.1 The Present Structure and Organisation of the Criminal Justice Commission

The Criminal Justice Commission was established by the *Criminal Justice Act 1989* on the recommendation of the Commission of Inquiry chaired by Mr G E Fitzgerald QC. The Commission is charged with monitoring, reviewing, co-ordinating and initiating reform of the administration of criminal justice and fulfilling those criminal justice functions not appropriately or effectively carried out by the Queensland Police Service (QPS) or other agencies (s.21(1)).

The Act gives the Commission a structure consistent with the recommendations of the Fitzgerald Report. This structure creates a Commission comprising a full time Chairperson and four part-time Commissioners. It creates an Executive Director to co-ordinate the activities of the Commission through Divisions, each headed by an appropriate Director. Section 19(1) of the Act provides that initially there shall be established within the Commission the following Divisions and Tribunals:

- the Official Misconduct Division
- the Misconduct Tribunals
- the Witness Protection Division
- the Research and Co-ordination Division
- the Intelligence Division.

The Official Misconduct Division investigates allegations of misconduct against members of the QPS and of official misconduct against officers of other units of public administration.

The Misconduct Tribunals were established by the Act to investigate and determine disciplinary charges of official misconduct and to review decisions on disciplinary charges of misconduct against police and other `prescribed' persons who are made subject to its jurisdiction by Order-in-Council. The Tribunals work independently from the Commission.

The Witness Protection Division provides a witness protection service to persons assisting the Commission or other law enforcement agencies of the State.

The Research and Co-ordination Division's functions include recommending reforms of criminal law and criminal justice administration and research into matters affecting the administration of criminal justice and the enforcement of criminal law in Queensland. Further, the Division reviews and monitors the programs and methods of the QPS. It is also a function of the Division to co-ordinate and develop strategies for co-ordinating the activities of the Commission and other criminal justice agencies in the state.

The Intelligence Division functions as a specialist criminal intelligence service through an integrated approach to organised and major crime and other criminal activities that exceed the bounds of normal police investigations. The Division maintains a database of intelligence on criminal activities.

Further, section 19 of the Act provides capacity for the Commission to establish new organisational

units or terminate existing units. The following functions of the Commission have been formalised in its structure since initial establishment:

- The Office of General Counsel, to provide strategic and legal research and policy advice to the Commission, represent the Commission before Courts and Tribunals, preside over Commission hearings and assume administrative responsibility for misconduct tribunals.

- A Corporate Services Division to integrate the activities of the Executive Director and all functions associated with administrative services within the Commission. This Division operates as do other Corporate Services Divisions in the Public Sector, but with the Executive Director retaining special secretarial and co-ordination functions for the Commission as provided in the *Criminal Justice Act 1989*. It is noted that this structure retains the Fitzgerald Report intention that specialist Directors of the Commission's Divisions have a direct line of accountability to the Chairperson and Commissioners.

- The Commission also established a Corruption Prevention function to perform an education and liaison role with other agencies, departments, private institutions and auditors in relation to preventing and detecting official misconduct.

In the Commission's 1993/94 Annual Report a diagram was included as a representation of the current reporting structure and organisation of the Commission. Figure 1 is a reproduction of that diagram.

1.2 The Proposed Changes to the Structure and Organisation of the Commission

In this report the Committee has reviewed the operation of the Criminal Justice Commission since it was established in 1989, with particular emphasis on the period of this Committee's existence.

In summary, the Committee has recommended that the following functions of the Commission should remain relatively unchanged:

- the Intelligence Division

- the Corporate Services Division

- the Witness Protection Division

- the Office of General Counsel.

However, the Committee has recommended the following changes to the present structure of the Commission:

- the establishment of an Organised and Major Crime Division

- the retention of the Official Misconduct Division however, the organised and major crime function should be transferred to a proposed Organised and Major Crime Division

- the Research and Co-ordination Division should not have a co-ordination role and should be referred to as the Research Division. The Research Division should continue as a unit of the Commission until that division has completed the Research Agenda left for it by the Fitzgerald Report. Priority is to be given by the Division to the Fitzgerald Report.

- the Corruption Prevention Division, apart from the Whistleblower Support Program,

should not be part of the Commission structure. The responsibilities currently undertaken by this Division should be transferred to the Public Sector Management Commission, the Office of Public Sector Ethics and the Queensland Audit Office.

· the Whistleblower Support Program should be referred to as the Whistleblower Support Unit and should be accountable directly to the Chairman.

· the Misconduct Tribunals should not be associated with the Commission's structure. The Tribunals should exist as a separate entity and should not be transferred to the District Court.

The Committee' proposed structure is represented by Figure 2.

FIGURE 1

FIGURE 2

2. THE ROLE AND OPERATION OF THE PCJC

Introduction

This Chapter will examine the role and operation of the Parliamentary Criminal Justice Committee (PCJC), the Parliamentary Committee recommended by the Fitzgerald Report and established by the *Criminal Justice Act* and the Legislative Assembly to act as a watchdog of the Commission.

This chapter addresses the role of the Committee as recommended by the Fitzgerald Report. This Chapter then focuses upon what recommendations of the Fitzgerald Report pertaining to the Committee have been adopted and what recommendations have not been implemented.

Finally, this chapter discusses the operation of the current Committee since its establishment in November 1992.

2.1 The Fitzgerald Report

As will be discussed in more detail in Chapter 12, Fitzgerald QC, when recommending the creation of the CJC, emphasised the need for such a body to be both independent and accountable. Fitzgerald QC warned against the creation of an autonomous body such as an Independent Commission Against Corruption (ICAC). (1989:300-303)

Autonomy is defined as the *right of self government; personal freedom; freedom of the will.* (The Australian Concise Oxford Dictionary:63)

Conversely independent is defined *as not depending on authority or control; self governing; not depending on others for one's opinion or conduct; that is an independent in politics etc; unwilling to be under obligation to others*. (The Australian Concise Oxford Dictionary:544)

The difference between the terms is subtle but important. Fitzgerald QC said that the difference was that an independent body was accountable, but that an autonomous body was not.

Fitzgerald QC recommended the creation of a Criminal Justice Committee, to which the Criminal Justice Commission was to be accountable.

Fitzgerald QC (1989:308-309) proposed that the Committee would have the following features:

(i) It was to be a standing committee not charged with any other responsibility;

(ii) The membership of the committee was to reflect the balance of power in the Legislative Assembly;

(iii) The Committee was to have the power to formulate policies and guidelines to be obeyed by the CJC;

(iv) The Committee was to have power to direct the CJC to initiate and pursue investigations;

(v) The Committee was to have power to direct the CJC to report to the Parliament;

(vi) The Committee was to be entitled to be informed of the basis on which any investigation was being undertaken;

(vii) The Committee was not to have the power to prevent or hinder any investigation by the CJC;

(viii) The CJC was to report to the Committee;

(ix) The CJC was to be able to report to the Committee on a confidential basis;

(x) The Committee's members were to be subject to specific obligations of confidentiality;

(xi) The Committee was to have the power to conduct hearings in camera;

(xii) The Committee was to have power to decide what matters were reported to and tabled in Parliament and when that was to be done.

2.2 The *Criminal Justice Act 1989*, the Standing Rules and Orders and Resolutions of the Legislative Assembly

The constitution, responsibilities and powers of the Committee are sourced from:

· the *Criminal Justice Act 1989*;

· the Standing Rules and Orders;

· Resolutions of the Legislative Assembly.

The Committee has the following features:

(i) The Committee is a standing statutory Committee with the responsibility of acting as watchdog of the Commission.

Section 118(1) of the Act provides that the functions of the Parliamentary Committee are:

> *(a) to monitor and review the discharge of the functions of the Commission as a whole and of the Official Misconduct Division in particular;*
>
> *(b) to report to the Legislative Assembly, with such comments as it thinks fit, on any matters pertinent to the Commission, the discharge of the Commission's functions or the exercise of the powers of the Commission, a Commissioner, or of officers of the Commission, to which the attention of the Assembly should, in the committee's opinion, be directed;*
>
> *(c) to examine the annual report and other reports of the Commission and report to the Legislative Assembly on any matter appearing in or arising out of any such report;*
>
> *(d) to report on any matter pertinent to its functions that is referred to it by the Legislative Assembly;*

(e) to participate in the constitution of the Commission and the removal from office of a Commissioner as prescribed;

(f) at a time appropriate to allow tabling of its report under this paragraph in the Legislative Assembly by which it was appointed, being a time near to the expiry of three years from its appointment -

(i) to review the activities of the Commission during such three years;

and

(ii) to report to the Legislative Assembly and to the Minister as to further action that should be taken in relation to this Act or the functions, powers and operations of the Commission.

The recommendations of the Electoral and Administrative and Review Commission (EARC) that this Committee also have the responsibility of being a constitutional and legal committee were in direct conflict with the Fitzgerald Report recommendations and were rejected by the Parliamentary Committee on EARC. (Report,1993:53)

In rejecting the EARC's recommendations the EARC Committee stated:

> *Supervision of the CJC is a matter which, at least at this point in time, is of such significance and involves such a workload that this function would clearly dominate any committee which also had other functions. Whilst supervision of the CJC is important, so too is the maintenance of parliamentary oversight of legal, constitutional and electoral reform, and the Committee considers that these functions can only be performed satisfactorily by separate committees.*

(ii) In accordance with the Fitzgerald Report recommendations s.112 provides for the membership of the Committee to reflect the balance of power in the Legislative Assembly.

(iii) In accordance with the Fitzgerald Report recommendations s.21(3) provides that the Commission is to report to the Committee on a regular basis, when instructed by the Committee and when the Commission considers it appropriate to report. Although there is no specific provision within the Act, it has been held that the CJC may report to the Committee on a confidential basis (CJC v News Ltd and Madonna King Appeal No 21 of 1994 - 8 September 1994).

(iv) Section 118(2) of the Act provides that the Committee has such powers as:

(a) are necessary to enable or assist the committee in the proper discharge of its functions prescribed by subsection (1);

(b) are conferred on it by the Legislative Assembly with a view to the proper discharge by the committee of its functions prescribed by subsection (1).

The Legislative Assembly has empowered the Parliamentary Committee to:

- send for persons, papers and records;
- examine witnesses on oath or affirmation;
- sit during the sitting of the House;
- meet and adjourn from place to place;

· appoint a Chairman and Deputy Chairman.

However, the Committee does not have the power to prevent or hinder a CJC investigation, or do more than require the CJC to review a decision to carry out any investigation.

(vii) In accordance with the Fitzgerald Report recommendations s.132(3) provides that it is an offence for a Member of the Committee to disclose information gained as a result of that person's membership of the Committee.

(viii) Pursuant to the Standing Rules and Orders, the Committee may conduct hearings in camera.

(ix) The Committee may table reports in the Parliament. The Committee has the power to determine what matters are contained within those reports and when they are presented.

2.3 The Non-Implementation of the Fitzgerald Report Recommendations

There are two important recommendations of the Fitzgerald Report concerning the Committee which have not been implemented:

1. The Fitzgerald Report clearly indicated that the Committee was to have the power to formulate policies and guidelines to be obeyed by the CJC. The Committee has never been given this power. Of course, the Committee has always been at liberty to formulate policies and guidelines. However, the Commission is not bound to adhere to those polices and guidelines.

   An example of a guideline that has been formally set by the Committee, but not followed by the Commission, was identified in the Committee's Report No. 25 (PCJC,1994).

   In a previous report, No. 20B, the Committee had instructed that:

   The CJC should inform this Committee, in detail, every time it is necessary to institute an internal investigation. (PCJC 1993:68)

   Despite this direction, the Committee later found that the Commission had undertaken an internal investigation without informing the Committee. By not informing the Committee the Commission was later found to have not been acting in accordance with the spirit of accountability envisioned by the Fitzgerald Report and the Act. However, in a strict legal sense, the Commission was not required to inform the Committee. That is, the Commission was not acting unlawfully by not adhering to the Committee's previous direction.

   From time to time it may be necessary and desirable for the Committee to develop policies and set guidelines for the Commission.

   For example, the Committee, in consultation with the Commission and associations such as the Bar Association, the Law Society and the Queensland Police Employees Union, may develop policies or protocols for the Commission in relation to matters such as the information to be provided to witnesses called before investigative hearings. The advantage of the Committee being involved is obvious: it is an objective arbitrator.

Such guidelines should not be a complete substitute for legislation. However, guidelines that have the force of law would suffice on an interim basis until legislation could be considered or enacted.

In addition, guidelines could be developed in relation to matters that are not appropriate for legislation. For example, guidelines could be developed by the Committee concerning the priority to be given by Divisions to projects, particularly with regard to the Research Division.

The issue of policies and guidelines was raised by the Chairman with Mr R O'Regan QC during the course of the public hearings:

The CHAIRMAN: *Mr O'Regan, I would just like to get a comment from you. I might be asking you something that you have not had time to think about, but I will ask it anyhow. The Fitzgerald report at page 309 said—and this did not find its way into the legislation and I do not know the reason for that; nevertheless it did not find its way into the legislation—*

> *"The Criminal Justice Committee should have the power to formulate policies and guidelines to be obeyed by the CJC, and to direct the CJC to initiate and pursue investigations or to report to the Parliament. Whilst the Criminal Justice Committee should be entitled to be informed of the basis on which any investigation or category of investigation is being undertaken, it should not have the power to prevent or hinder any investigation by the CJC, (or any of its organs or officers), or do more than require the CJC to review a decision to carry out any investigation."*

The second part of that statement, I think, reflects the current situation but it is particularly that first comment—

> *"The Criminal Justice Committee should have the power to formulate policies and guidelines to be obeyed by the CJC, and to direct the CJC to initiate and pursue investigations or to report to the Parliament."*

I was just wondering what you, off the top of your head, think about that?

Mr O'Regan: *It depends upon the specificity of the guidelines. I would have thought that it would be difficult for the Committee to formulate guidelines which were specific enough to be helpful, considering the extraordinary diversity in the range of the investigations of the Commission. But I am not opposed to the notion that the Commission should take into account informed advice from other sources including, of course, the parliamentary committee.*

The CHAIRMAN: *From my reading, I think the idea there was that the Committee, being an all-party parliamentary committee, should have a policy role. Obviously, the CJC itself has a broad range of functions and responsibilities that it has to carry out under the Act but it just seems to me that that was intended to be a reserve power for the Committee so that if it particularly wanted a certain piece of policy to be developed by the CJC, then it would be able to require that to be done. Now that is not the case. In terms of the consultation, monitoring and review process, it is probably arguable that we achieve it anyhow. Nevertheless, we have not actually got the power to direct whereas that was recommended by Fitzgerald to be a specific power which did not find its way into the legislation, and I do not know why.*

Mr O'Regan: *As you were talking, Mr Chairman, it occurred to me that is the sort of thing which might be considered in relation to the various research responsibilities of the Research and Coordination Division. As Dr Brereton has indicated, those responsibilities are numerous and it is not possible to discharge them all to the same extent at the same time. That is the difficulty which has been created for the Commission by reason of the decision in the Boe case. There are various ways in which that problem might be solved. One is to remove a number of those things from the research agenda of the Commission. Another, which really is relevant to what you were saying, is to give the Committee itself a role in suggesting the priority*

which might be accorded to individual projects within that extensive range. These remarks began when you asked me a question and asked me to respond off the top of my head, and there is not much there, so it is a bit difficult to give you a more specific response. But I do not reject the notion that the Commission should be involved in that sort of monitoring activity. As you rightly observed, the Committee performing its regular supervisory or monitoring role perhaps does much the same thing.

Conclusion

The Committee believes that it is desirable, and in accordance with the recommendations of the Fitzgerald Report, that the Parliamentary Criminal Justice Committee be able to formulate policies and issue general guidelines to the Commission that must be adhered to by the Commission.

Recommendation

In accordance with the recommendations of the Fitzgerald Report, the Committee recommends that the *Criminal Justice Act* be amended to enable the Parliamentary Criminal Justice Committee to formulate policies and issue general guidelines to the Commission that must be adhered to by the Commission.

The Committee further recommends that any such guidelines issued by the Committee to the Commission be tabled in the Legislative Assembly by the Chairman of the Committee within 14 sitting days of those guidelines being issued to the Commission.

2. At page 3 of the Criminal Justice Commission's 1993/94 Annual Report the following statement regarding the Parliamentary Criminal Justice Committee appears:

> *the Committee can direct the CJC to investigate matters that fall within its jurisdiction under the act.*

This statement could be interpreted as meaning that the PCJC has the power to direct the Commission to undertake a particular investigation and that the CJC must comply with that direction.

This statement clearly reflects the Fitzgerald Report recommendations. However, the recommendations of Fitzgerald QC in this respect were not incorporated within the *Criminal Justice Act*.

The Committee, from time to time, has made representations to the Commission that particular matters be investigated. However, it has accepted the advice previously forwarded by the Commission to the Committee to the effect that whilst the Committee may request the Commission to investigate a matter, the Committee does not have the power to direct the Commission to undertake an investigation.

That advice, from Mr Russell Hanson QC, detailed the restrictions on the power of the Committee. The advice makes it clear that the Committee does not have the power to require the CJC to conduct an investigation. The Committee has always operated in

accordance with this advice, which appears to be in conflict with the statement made in the Commission's Annual Report.

Conclusion

In order to maintain the Commission's independence and integrity it is essential that the Committee should not be able to prevent or hinder an investigation by the Commission. However, it is difficult to justify the proposition that the Committee should not have the power to require the Commission to conduct an investigation. To the contrary, it is arguable enabling the Committee to request the Commission to undertake an investigation is an important safeguard.

Recommendation

The Committee recommends that the *Criminal Justice Act* be amended, in accordance with the recommendations contained within the Fitzgerald Report, to specifically provide that the Committee has the power to direct the Commission to undertake or pursue an investigation.

2.4 The Operation of the Current Parliamentary Committee

The Parliamentary Criminal Justice Committee of the 47th Parliament was appointed on 10 November 1992.

The primary role of the Committee has two aspects:

- to monitor and review the activities of the Commission to ensure its accountability; and
- to report to Parliament on reports prepared by the Commission and on any other matters upon which the Committee considers desirable to report.

It is necessary to explain how the Committee fulfils both of these primary roles.

2.4.1 Monitor and Review

The term "monitor and review" is not defined in the Act. However, the Committee has developed a system which it considers enables effective monitoring and reviewing of the CJC. This system includes, amongst other things:

- receiving monthly reports from the Commission in relation to its activities and the discharge of its functions;
- holding regular monthly in-camera meetings (private hearings);
- receiving complaints against the CJC;
- conducting audits of various registers, sections and divisions of the CJC;
- conducting particular inquiries into the actions of the CJC as those matters arise;
- seeking independent advice of Queens Counsel, academics and persons with particular

skills and expertise.

2.4.2 Monthly Reports

Prior to each monthly joint meeting between the Parliamentary Committee and the Commission, the Commission provides the Committee with a report which summarises the activities of the Commission for the previous month.

The reports are structured in such a way as to allow reference back to previous reports. This allows for the Committee to continually monitor the progress of investigations, projects or initiatives of the Commission.

The Parliamentary Committee has previously described the monthly report as follows:

> *The purpose of the monthly reports is to brief the Parliamentary Committee as to the activities of the Commission for the previous month and is therefore, a summary of the Commission's activities for each of the Divisions. The reports contain confidential and sensitive material relating to operational matters and future legal proceedings.*
>
> *The monthly reports are divided into sections which deal with the activities of each division. Whilst the information contained therein is in summarised form the material, depending on which division and what operation, may still be of a sensitive and of an operational nature.*
>
> *The monthly report have been described by a senior officer of the Commission as going to the heart of accountability to the Parliamentary Criminal Justice Committee. The reports and monthly meetings between the Parliamentary Committee and the Commission are integral to the Parliamentary Committee's role to monitor and review the Commission's activities.*

2.4.3 Monthly Meetings

Each month the Parliamentary Committee and the Commission meet to discuss the Commission's activities. Whilst these meetings are characterised as "joint meetings" they are in fact meetings of the Committee to which members and officers of the Commission are invited.

The agenda for each meeting is set by the Chairman of the Parliamentary Committee. The agenda always includes a section which enables Committee Members to ask questions arising from the monthly report. On occasions the Committee notifies the Commission that it requires verbal reports to be made in relation to particular issues. On other occasions the Committee requires verbal reports in relation to complaints about the Commission which have been forwarded to the Committee.

The joint meeting is attended by:

- The Commissioners;
- The Directors; and
- when required, individual Commission Officers to provide information to the Committee.

The monthly meeting between the Parliamentary Committee and the Commission is vital to the accountability process. The meetings provide an opportunity for Committee Members to be

informed of the Commission's activities on a regular basis. The meetings also enable the Committee Members to ask questions and scrutinise the actions of Commission Officers who are responsible for particular matters. This procedure enforces the accountability process.

These meetings also promote the frank interchange of opinions between the Committee and the Commission.

On occasions, discussion at these meetings is robust. However, the Committee believes that the discussions are invariably constructive.

2.4.4 Complaints

The Parliamentary Committee has resolved to accept and consider complaints from members of the public.

The Parliamentary Committee has no statutory function for conducting original investigations. The powers with which it is invested are limited to those necessary to enable or assist it to discharge its functions of monitoring, reviewing and reporting.

It may only consider complaints about organisations or individuals to the extent that the receipt of those complaints is relevant to the Committee's function to monitor and review the discharge of the functions of the Commission, or relevant to its function of reporting to the Legislative Assembly on matters pertinent to the Commission, the discharge of the Commission's functions or the exercise of the powers of the Commission, a Commissioner or Officers of the Commission.

Many of the complaints received by the Committee do not come within the jurisdiction of the CJC. A significant percentage of these complaints are from persons who are dissatisfied with the legal and justice systems and approach the Committee as a last resort. The Committee has no power to act on these complaints.

Some of the complaints are from persons in the Public Service or the Police Service but many are from members of the public at large. The complaints often express dissatisfaction concerning actions or investigations of the CJC while others are complaints against the Police, Units of Public Administration, Prisons Service etc. A significant percentage of complaints concern matters outside the jurisdiction of the CJC and therefore are also beyond the powers of the Criminal Justice Committee.

When a complaint is received, it is immediately forwarded to the CJC and a report is requested in relation to the matter before making a decision on it.

When the CJC's report is received, the complaint is assessed as follows:

- If the complaint is unfounded, such as being outside the jurisdiction of the CJC, or if it is within the CJC's jurisdiction, is dismissed for some other reason within the responsibility of the CJC, the complainant is advised in writing that the Committee concurs with the CJC's decision.

- When the matter is disputable, that is, the Committee is not satisfied with the advice of the CJC, the matter is discussed and the Committee's decision is communicated to the CJC and the complainant, requiring either further action by the Commission or that the Committee concurs with the Commission's decision.

The Parliamentary Committee most often finds no reason to dispute the CJC decisions on

complaints. However, in a small percentage of cases, the Committee may request that the Commission reconsider its decision or consider a different aspect of a complaint.

The Parliamentary Committee has succeeded in gaining apologies from the Commission in matters where the Committee has considered the CJC had acted inappropriately.

The complaints mechanism put into place by the Parliamentary Committee is a valuable tool for monitoring and reviewing the operation of the CJC.

2.4.5 Audits

The Commission maintains a number of registers and files which are subject to both internal audit and audit by the Parliamentary Committee.

Registers maintained in relation to the Official Misconduct Division include:

- The Search Warrants Register;
- The Arrests Register;
- The Listening Device Register;
- The Notice to Produce Register;
- The Summons to Witness Register;
- The Authority to Enter Public Premises Register;
- The Notice to Furnish Information Register;
- The Direction to Produce Prisoner Register.

In addition, when the Commission's compulsory powers are utilised or if an officer attached to the Commission exercises a power under legislation other than the *Criminal Justice Act*, for example the *Criminal Code*, specified documents relating to the exercise of that power are required to be filed with the Commission's Records Supervisor. These files are also available for audit by the Committee.

Registers are also maintained by the Intelligence Division which record the access to and dissemination of material from the data base.

Audits by the Parliamentary Committee in relation to the CJC's exercise of powers focus upon:

- whether all required documentation is on the file and correctly noted on the relevant register;

- whether all required documentation, such as statements in support of a notice to produce, provide sufficient particularity to support the use of the power;

- whether the requisite authorisation for the exercise of a power has been obtained;

- whether the matter under investigation is appropriate for investigation by the CJC or should be the responsibility of another law enforcement body.

Audits by the Parliamentary Committee in relation to the dissemination of intelligence material focus upon:

- whether all required documentation or information is apparent on the file;

- whether all required documentation or information has provided sufficient particularity;

- whether internal audit procedures appear to be adequate;

- whether the dissemination of material appears to be lawful and in compliance with the provisions of the *Criminal Justice Act*.

Recent audits of registers with the Intelligence Division have revealed a high standard of internal audit procedures.

Recent audits undertaken of the powers registers and files were generally satisfactory. However, there were instances where some required documentation appeared to lack sufficient particularity or was absent from the relevant file.

The Parliamentary Committee is communicating with the Commission about the isolated deficiencies uncovered by its recent audits. Should the matters in question not be satisfactorily resolved, the Committee undertakes to inform the Parliament in more detail.

2.4.6 Particular Inquiries

From time to time the Parliamentary Committee has conducted particular inquiries into the activities of the Commission. In a number of instances the Committee has conducted these inquiries as a result of issues raised by persons in the media. On other occasions the Committee has conducted inquiries in response to complaints made by individuals.

The manner in which the Parliamentary Committee has conducted these inquiries has depended upon the nature of the subject matter.

The following are some inquiries that have been conducted by the Parliamentary Committee during its term:

- On 11 and 17 February 1993 the CJC served notices to produce documents on staff of the Courier-Mail newspaper. This action was taken as a result of the unauthorised release of a confidential CJC intelligence report on organised crime to the newspaper. The exercise of this power under the then section 3.1 of the Act caused considerable controversy. The Committee determined that it was in the public interest to discover the facts surrounding the incident and to report thereon to Parliament. On Tuesday 23 February 1993 the Committee resolved to conduct a review of the power of the Criminal Justice Commission to require the production of records or things pursuant to section 3.1 of the Act and to report to Parliament thereon.

  The Committee sought submissions from interested parties, including the CJC and the Courier-Mail, and conducted public hearings in relation to the matter. The submissions received and the Hansard of evidence taken at the public hearings were reported to Parliament in the Committee's report No. 20 part A entitled *Report of a Review of the CJC's use of its power under section 3.1 of the Criminal Justice Act 1989*. The Committee's report, conclusions and recommendations contained in part B of that report was tabled in September 1993.

  In summary, the Committee concluded that:

  - the Courier-Mail had been irresponsible in its publishing of material from the organised crime report;

- in the circumstances, the use of the section 3.1 power against the Courier-Mail was appropriate;

- the Committee's inquiry had revealed that the Commission had serious internal security deficiencies that required immediate rectification; and

The Committee recommended:

- amendments to the *Criminal Justice Act 1989* designed to make the coercive powers contained within that Act consistent;

- that a review of the Commission's security be undertaken by either the NCA or ASIO;

- that shield laws for journalists not be introduced.

- On 14 December 1992 a Member of the Committee received a complaint from Mr Chris Adams of Channel 7 Brisbane and Mr Bob Butler. In essence, this complaint alleged that previous complaints made against former Queensland Police Inspector John William Huey had not been properly investigated. In particular, the complaint alleged that an investigation undertaken by NSW police investigators on behalf of the previous Committee was flawed. The complainants also provided additional material which it was submitted demonstrated:

> *that the Commissioner of Police, his Deputy, and the Criminal Justice Commission abrogated their statutory responsibility by allowing John Huey to retire and give clearances for him to do so when complaints of official misconduct were alive against him.*

The Parliamentary Committee resolved to investigate this complaint in detail. The Committee engaged the services of Mr John Jerrard QC to provide advice in respect of many of the matters contained within the complaint. The conclusion reached by the majority of the Committee was as follows:

> *The Committee has undertaken a detailed and considered examination of the complaints raised by Messrs Adams and Butler in their letter of 14 December 1992 and further correspondence of 11 March 1993. In addition the Committee has been assisted in its deliberations by a senior member of the Criminal Bar.*
>
> *The Committee is of the firm view that none of the complaints raised by Messrs Adams and Butler can be substantiated or sustained.*
>
> *The Committee believes that the report of the New South Wales investigators was thorough, independent and professional.*
>
> *Finally, the Committee believes that this report will bring this matter to an end.*

A full report on this matter was made to the Legislative Assembly on 9 November 1993.

- Between 24 December 1993 and 4 January 1994 a series of articles appeared in The Australian newspaper which, upon later examination, were found to be based upon the CJC's November 1993 monthly report to the Committee. On 15 February 1994 Mr

O'Regan QC advised the Chairman of the Committee that, despite numerous searches, two CJC copies of the November 1993 monthly report could not be located. On 22 February 1994 the Committee resolved to request the CJC to undertake closed investigative hearings in relation to the missing reports and report to the Committee thereon in detail. The CJC advised the Committee that it would not undertake investigative hearings into the matter. On 11 March 1994, at a joint PCJC/CJC meeting, the CJC was requested by the Committee to again undertake an inquiry into the two "unaccounted for" reports. That night the Committee resolved to conduct an inquiry into the CJC's failure to account for two copies of the November 1993 monthly report to the PCJC and related matters, if the Commission failed to conduct a closed investigative hearing. On 17 March 1994 the Commission advised the Committee that it did not intend to conduct an investigative hearing into the matter. On 18 March 1994 the Committee announced that a public inquiry would be held in respect of the matter.

During the course of the inquiry the Parliamentary Committee sought and received submissions from the CJC and individual officers of the CJC. In addition, the Committee undertook four days of public hearings into the matter.

On 5 August 1994 the Parliamentary Committee tabled Report No. 25 entitled *Report on the Inquiry into the CJC's failure to account for two copies of the November 1993 monthly report to the PCJC and related matters* in the Legislative Assembly.

The Committee concluded that:

- the Commission had inappropriately used its power pursuant to section 3.1 of the Act;

- the Commission was negligent by not informing the Committee that copies of the November 1993 monthly report could not be located until some six weeks after the Commission became aware of the fact. The Committee regarded the failure of the Commission to inform the Committee as a serious breach of the Commission's duty to be accountable to the Parliament through the all-party Committee.

- the Commission should have informed Counsel representing the Commission in a Supreme Court action that copies of the report could not be accounted for by the Commission. The Committee could not rule out that Commission officers deliberately withheld this information in order to improve the Commission's prospects of securing injunctive relief.

- the Commission had embarked on an internal investigation without informing the Committee. This action was contrary to a previous recommendation of the Committee that the CJC inform the Committee, in detail, *every time it was necessary to institute an internal investigation*.

- appalling security had been given to the November 1993 monthly report by the Commission generally, and by particular staff, which enabled the situation to develop whereby once an unauthorised release of the document occurred it became almost impossible to determine the source of that release.

- The Sunday Mail of 29 August 1993 ran an article under the headline *"SECRET GAG ON COPS"*. The Sunday Mail report alleged that *"A secret deal was done by the Queensland Police Union and the Criminal Justice Commission to buy the silence of two controversial*

detectives ..."

The next day, 30 August 1993, the Parliamentary Committee wrote to the Commission Chairman, Mr O'Regan QC seeking a complete and detailed report from the Commission outlining the facts, matters and circumstances surrounding the alleged *"deal"*.

In particular, the Parliamentary Committee requested the CJC to address whether:

(i) *"An extraordinary deal was hammered out by the Police Union with the Criminal Justice Commission to grant two former detectives early retirement from the police service in return for their silence.";*

and

(ii) *On 2 June 1993 were Messrs Harris and Reynolds "... offered a CJC clearance for early retirement if Harris withdraws his court action against the CJC."*

On 30 August 1993 the Chairman of the Commission, Mr O'Regan QC, responded in the following terms:

> *I am unable to furnish you with a "complete and detailed report from the Commission outlining the facts, matters and circumstances surrounding the alleged "deal" referred to in the Sunday Mail article because no "deal" was done. An approach by the President and Secretary of the Police Union was made to me seeking settlement of the Supreme Court action with each party bearing his or its own costs and this was rejected. In the event, as the Court record shows, the applicant withdrew his application unconditionally and was ordered to pay the Commission's costs. Furthermore, there is no substance in the suggestion in the article that Harris and Reynolds were "offered a CJC clearance for early retirement if Harris withdraws his court action against the CJC".*
>
> *In short, the Sunday Mail report is incorrect and mischievous.*

The Committee resolved at a meeting on Tuesday 31 August 1993 that it was in the public interest to place the matter on the agenda for the joint meeting of the PCJC/CJC on Friday 10 September 1993.

At the meeting on 10 September 1993 the Commission provided the Committee with a complete transcript of a meeting held at the Queensland Police Union of Employees Offices on June 2 1993. The Commission also provided a copy of a transcript of the article produced in the Sunday Mail of 29 August 1993.

The majority of the transcript had not appeared in the Sunday Mail article.

It was evident that the transcript published in the Sunday Mail was incomplete and contrived. The published transcript had been heavily edited in order to give it a certain flavour and to suggest, contrary to fact, that some deal had been worked out involving the CJC pertaining to Messrs Harris and Reynolds.

On 14 September 1993 the Chairman of the Committee tabled the complete transcript in the Legislative Assembly and informed the House as to the facts of the matter.

> On 26 September 1993 *The Sunday Mail* apologised to the Criminal Justice Commission and individual officers of the Commission, in relation to statements made in its previous articles.

The above four instances demonstrate that the Parliamentary Committee carefully scrutinises the CJC's activities and when necessary criticise any shortcomings. On the other hand, when the Commission has had unjustifiable and unwarranted attacks made upon it, the Committee has uncovered the correct facts and reported thereon.

The underlying philosophy of the Parliamentary Committee is to find where the truth lays in any given matter.

When the Commission is found by the Committee to be in the wrong, the Committee has no hesitation in so stating. Almost invariably these matters are reported to the Legislative Assembly, although on some occasions the matter is dealt with between the Committee and the Commission.

When the Commission has been unfairly treated the Parliamentary Committee has demonstrated that it is not hesitant in correcting the public record. It is important that when necessary the Committee should attempt to "set the record straight".

In the past the Committee has stated:

> *In public and in private, respected people will voice opposition to the CJC. Constructive criticism is to be encouraged. Criticism which ignores the lessons of the Fitzgerald Inquiry or which denigrates appropriate and legitimate processes, such as that which condemns the time taken to investigate complex issues, or the delays which inevitably occur with public consultation and debate, or the time taken with the processes of accountability, also condemns this society to repeat the errors of the past.*

The Committee also noted that support for the Commission against unjustified criticism has not meant that the Committee gets too close to the Commission to be objective. The Committee remains confident that this remains the case.

2.4.7 Advice

From time to time the Parliamentary Committee has sought and received expert advice in relation to matters under consideration.

Advice sought and received has included advice from:

- Mr Gerard Carney, Associate Professor of Law, Bond University in relation to the Commission's use of its power under s.3.1 of the Act;
- Mr Bruce Grundy, Head of the Department of Journalism, University of Queensland in relation to the Commission's use of its power under s.3.1 of the Act;
- Mr Russell Hanson QC in relation to the Commission's use of its power under s.3.1 of the Act;
- Mr John Jerrard QC in relation to complaints made by Messrs Adams and Butler against Mr John Huey and the CJC;

- Mr John Logan, Barrister-at-Law, in relation to the unauthorised release of the CJC's November monthly report to the PCJC;

- Mr Peter Forster of the Consultancy Bureau in relation to the implementation of the Fitzgerald reports recommendations regarding the CJC;

- Mr Cedric Hampson QC in relation to matters of privilege regarding the CJC's November 1993 monthly report to the PCJC; and

- Mr John McGill SC in relation to inquiries being undertaken by the Senate Select Committee on Whistleblowers.

The Parliamentary Committee has also, on occasions, requested and been provided with advice that has been provided to the Commission by independent persons.

In addition, the Parliamentary Committee regularly requests and receives advice from its Research Staff on matters. The Committee is staffed by a Research Director and a Senior Research Officer. The Committee also shares a secretary with another Parliamentary Committee.

None of the Members of the current Committee are lawyers. However, the Committee has only employed persons qualified as solicitors or barristers to the positions of Research Director and Senior Research Officer. As a result of the availability of advice on legal matters when required, the Committee has not found the absence of lawyers on the Committee to be an impediment.

2.4.8 Reporting

Section 118(1)(c) of the Act provides that it is a function of the Parliamentary Committee:

> *to examine the annual report and other reports of the Commission and report to the Legislative Assembly on any matter appearing in or arising out of any such report;*

The Commission employs 262 permanent personnel and has a budget of almost $21 million. In contrast, the Committee comprises 7 members of Parliament and has a staff of three.

Since November 1992 the Commission has publicly released 30 reports. It is neither possible nor desirable for the Committee to report on all reports released by the Commission. It is also not intended by the Act, which gives the Committee a discretion.

As a matter of practice the Committee does not report on investigative reports produced by the Official Misconduct Division as that would require a re-investigation of the matters involved. Such action would be incredibly duplicitous and undesirable.

Rather than reporting on all reports from the Research and Co-ordination Division, the Committee selectively reviews reports of that Division. The major work of the Committee in this regard is the almost completed and comprehensive review of the Commission's *Report on Police Powers in Queensland Volumes I-V*.

Generally the Committee reviews Commission reports which relate to law reform issues.

However, in one instance the Committee reported to Parliament in respect of errors contained within a Commission report. In November 1992 the Commission report entitled *Report on S.P. Bookmaking and Related Criminal Activity in Queensland (August 1991)* was tabled in the Legislative Assembly. One section of that report entitled *Money Laundering via the Casinos*

received critical attention. In February 1993, as a result of mediation by the Committee between the Commission and Jupiters Casino the Chairman of the Commission, Mr O'Regan QC, apologised to Jupiters Casino, on behalf of the Commission, for the Commission's failure to consult with the Casino prior to the release of the report.

The Commission also made a re-commitment to the Committee to the principles of natural justice and the implementation of better procedures to edit all Commission reports before publication.

The Parliamentary Committee reported to the Parliament in April 1993 in respect of the actions taken by the Committee and the negotiations between the Commission and Jupiters Casino in its report entitled *Review of the Criminal Justice Commission's Report on S.P. Bookmaking and Related activities in Queensland (August 1991).*

In reviewing the Commission's reports the usual procedure adopted by the Parliamentary Committee is to:

- publicly call for submissions on the issues raised in the report;
- write to and invite submission's from particular groups and individuals with special expertise or interest in the issues raised; and
- hold public hearings on the issues, calling evidence from persons with diverse interests.

In addition, the Parliamentary Committee has travelled and met with persons with expertise on the issues raised in other jurisdictions. On other occasions the Committee has seen fit to meet privately with groups to gather information.

Finally, the Parliamentary Committee reports it's findings to the Legislative Assembly. Copies of the Committee's reports are widely distributed. In particular, the Committee ensures that a copy of each report is sent to all public libraries in the State.

Since the constitution of the current Parliamentary Committee the following reports have been made by it to the Legislative Assembly:

No.	**Title**	**Date Tabled**
18.	Review of the operations of the Parliamentary Criminal Justice Committee and the Criminal Justice Commission. Part C - A report pursuant to section 4.8(I)(f) of the *Criminal Justice Act 1989-1992*.	10 November 1992
19.	Review of the Criminal Justice Commission's *Report on S.P. Bookmaking and Related Criminal Activities in Queensland (August 1991)*.	23 September 1993
20.	Review of the Criminal Justice Commission's use of its powers under section 3.1 of the *Criminal Justice Act 1989*. Part A - Submissions and Minutes of Evidence taken on 30 April 1993.	12 May 1993
20.	Report of a Review of the CJC's use of its power under section 3.1 of the *Criminal Justice Act 1989*. Part B - Report, Conclusions and Recommendations	23 September 1993
21.	Report into allegations made by Robert David Butler and Christopher Charles Adams regarding former Superintendent	9 November 1993

No.	Title	Date Tabled
	John William Huey and the Criminal Justice Commission.	
22.	A review of the past twelve months operation of the Parliamentary Criminal Justice Committee of the 47th Parliament.	10 December 1993
23.	Review of the Criminal Justice Commission's *Report on a Review of Police Powers in Queensland* Volumes I-III. Part A - Minutes of Evidence taken on 16 and 17 December 1994.	17 February 1994
24.	Report of the unauthorised release and publication of a Committee document.	16 February 1994
25.	Report on the Inquiry into the CJC's failure to account for two copies of the November 1993 monthly report to the PCJC and related matters.	5 August 1994

The Committee is currently reviewing the following Commission Reports:

· *Report on Police Powers in Queensland - Volume IV;*

· *Report on Police Powers in Queensland - Volume V; and*

· *Report on Cannabis and the Law in Queensland.*

Discharge of Responsibilities

The Parliamentary Criminal Justice Committee's responsibilities under the Act require the Committee to:

· meet on a regular basis. When Parliament is sitting the Committee meets every Tuesday night. In addition, the Committee meets before every joint PCJC/CJC meeting to discuss matters that have arisen in the previous month. The Committee also meets at other times when particular matters arise or for the purposes of considering draft reports. The Committee has held 110 formal meetings since its inception.

· meet with the CJC on a monthly basis. Since the Committee's inception the Committee has held 23 in camera joint meetings with the Commission. In addition, the Committee has held one joint meeting in public.

· hold public and private hearings. The Committee holds public hearings for two purposes: to facilitate public debate and gather information in relation to reviews being undertaken by the Committee; and as an adjunct to particular inquiries being undertaken by the Committee. The Committee has held 14 days of private and public hearings. The following public and private hearings have been held by the Committee:

30 April 1993	- Inquiry into the CJC's use of its power under section 3.1 of the *Criminal Justice Act 1989*
25 November 1993	- private hearing regarding the CJC's Report on Police Powers Vol's I-III
26 November 1993	- private hearing regarding the CJC's Report on Police Powers Vol's I-III

16 December 1993	- CJC's Report on Police Powers Vol's I-III
17 December 1993	- CJC's Report on Police Powers Vol's I-III
19 April 1994	- Inquiry into the CJC's failure to account for two copies of the November 1993 monthly report to the PCJC and related matters
20 April 1994	- Inquiry into the CJC's failure to account for two copies of the November 1993 monthly report to the PCJC and related matters
21 April 1994	- Inquiry into the CJC's failure to account for two copies of the November 1993 monthly report to the PCJC and related matters
22 April 1994	- Inquiry into the CJC's failure to account for two copies of the November 1993 monthly report to the PCJC and related matters
26 April 1994	- private hearing regarding the inquiry into the CJC's failure to account for two copies of the November 1993 monthly report to the PCJC and related matters
22 August 1994	- Three Yearly Review of the CJC
23 August 1994	- Three Yearly Review of the CJC
5 October 1994	- CJC's report on Police Powers Vol IV
12 December 1994	- CJC's report on Police Powers Vol V

· travel and have inspection tours or meet with individuals and groups with particular expertise. The details of travel and inspections are listed below:

19-21 April 1993	- Conference - Juvenile Justice, Canberra
5 May 1993	- Toowoomba Community Beat Program
7 May 1993	- Inala Shop Front Community Policing Project
10 May 1993	- Counter Terrorist Section of the Queensland Police Service
11-19 August 1993	- Wellington, Auckland and Perth, Police Powers Vol's I-III
25-29 October 1993	- Melbourne, Hobart and Sydney, Police Powers Vol's I-III
9-17 October 1994	- Wellington, Auckland, Adelaide and Sydney, Police Powers Vol's IV-V; Three Year Review of the CJC; and the CJC's Report on Cannabis

3. OFFICIAL MISCONDUCT DIVISION

Introduction

This chapter will examine in detail the Official Misconduct Division of the Commission. The chapter commences by outlining the recommendations of the Fitzgerald Report as they relate to the Official Misconduct Division. The Chapter then focuses upon the implementation of those recommendations through the provisions of the *Criminal Justice Act*.

This chapter also summarises the structure and resourcing of the Division.

Later in the chapter the following issues are examined in detail:

- the role of the Commission in the investigation of organised and major crime;
- the use of the investigative hearings power;
- the use of the Commission's other coercive powers;
- the handling of complaints of official misconduct by the Division.

3.1 Objective Structure and Performance

3.1.1 The Fitzgerald Report

The Fitzgerald Report noted that the trust by society in democratic institutions is often compromised by controversies relating to impropriety in matters of public administration, particularly in regard to the administration of criminal justice.

The Report also noted that particularly insidious crime such as corruption and organised crime are extremely difficult to detect.

Fitzgerald QC advocated that problems relating to official misconduct should be addressed by laws which:

> - *provide for an independent body to investigate official misconduct;*
> - *oblige public officials to report all official misconduct or any reasonable basis of suspicion of misconduct by any person;*
> - *forbid any action by any person to disadvantage any other person because he disclosed official misconduct or reasonable suspicion of misconduct;*
> - *require public officials to provide all reasonable help in investigations of misconduct;*
> - *forbid the exercise of any official authority, discretion or use of public resources in relation to the investigation of any conduct by any complainant or potential witness in relation to the investigation of any suspected official misconduct (other than in respect of an investigation of such person which had previously been commenced) except with the written authority of a designated officer in charge of such investigation into suspected official misconduct.* (1989:300)

Fitzgerald QC recommended that the CJC should contain within it an Official Misconduct Division. The role of the Division was described as follows:

> *The proposed Official Misconduct Division will provide the means by which the investigative work of this Commission can be continued and the benefits passed on to the CJC.*
>
> *Continuity of this Commission on an interim basis will facilitate a smooth handover of staff, data, and functions to the new body.*
>
> *The Division will be responsible for independent investigations of any suspected official misconduct. It may investigate individual cases or conduct broader based inquiries into the incidence of official misconduct. Its Director will have to be legally qualified.*
>
> *The Division's activities will not be open to examination by the Police Force or any other Government agency, save the Director of Prosecutions. Access to these activities will be limited to necessary liaison about prosecutions that are needed to facilitate the Misconduct Tribunal's operations.*
>
> *Reports made by the Division as a result of complaints referred to it or as a result of matters initiated by it, can be directed to:*
>
> · *The Director of Prosecutions for consideration of prosecution;*
>
> *and/or*
>
> · *The Misconduct Tribunal to determine whether official misconduct has occurred which should be dealt with administratively apart from any prosecution;*
>
> *or*
>
> · *The chief executives of various Government departments, agencies or statutory bodies, including the Police Commissioner if disciplinary action is thought necessary.* (1989:311)

Fitzgerald QC stated that the Official Misconduct Division would require some special powers. The following powers were likely to be required:

> · *compel the production of documents and things and to attend and give evidence;*
>
> · *cause interception of or intercept telecommunications and post;*
>
> · *monitor other communications (including by electronic means);*
>
> · *carry out surveillance (if otherwise illegal);*
>
> · *search and seize in respect of suspected criminal offences and to seize evidence of other serious offences, not the subject of the search warrant, but which evidence is found while executing a search warrant;*
>
> · *detain persons for specified times and purposes, and under specified conditions;*

- *take samples or specimens of all sorts and anything from the person of anyone detained or arrested;*

- *cause arrested or detained persons to undergo examinations and tests;*

- *take possession of passports and other travel documents and financial documents including instruments of title or securities;*

- *photographs, fingerprint, palmprint, footprint or voice print or take samples of handwriting from any person detained or arrested.*

The Official Misconduct Division should be able to:

- *instigate hearings ... The powers exercisable in such hearings will have to be considered by the CJC. The powers necessary for that process may approximate those of a commission of inquiry including the power to over-ride claim of privilege against self-incrimination with appropriate protections in respect of subsequent use of testimony obtained that way;*

- *obtain declarations on oath of property, financial transactions, movements of money and assets by an person in public office or any person associated with any person in public office;*

- *conduct secret investigations (which may not be reported to the subject of the investigations or any other person) including by access to bank records, financial details, public records and fiscal records and to copy any of those.* (1989:313)

However, Fitzgerald QC also noted that these special powers should be subject to strict judicial controls to be established by legislation.

The Division was not to be merely reactive, that is, merely responding to complaints. Rather, it was envisaged that the Division would be able to institute investigations on its own initiative.

Within the Division, Fitzgerald QC recommended the creation of a complaints branch. This branch was to be able to receive complaints of official misconduct.

The complaints branch was to be able to dismiss frivolous or vexatious complaints or refer trivial or purely disciplinary matters to the Commissioner of Police or the Chief Executives of Departments.

3.1.2 The Criminal Justice Act 1989

The recommendations made by Fitzgerald QC have largely been catered for by the *Criminal Justice Act 1989*:

- s.29 provides for the creation of the Official Misconduct Division. The functions of the Division as set out by the Act in s.29(3) largely mirror the recommendations of Fitzgerald

- ss.31 and 32 together define official misconduct

- s.69 provides for power to issue a notice to discover information from any person

- s.70 enables an authorised Commission officer to enter and search premises used by a unit of public administration and inspect, copy, seize and remove

- s.71 enables a warrant to be obtained from a Supreme Court Judge to enter, search and seize

- s.74 enables the Commission to summons persons to attend before the Commission

- ss.76 and 78 abrogates the right to silence before the Commission

- s.82 enables the Commission to use listening devices.

There are divergences between the Act and the recommendations of Fitzgerald QC. Most notably, as will be discussed in more detail later, judicial control over the powers exercisable by the division is not as stringent as Fitzgerald QC envisaged.

3.1.3 Structure and Resourcing

The Commission has reported that as of July 1994 the Official Misconduct Division comprised 132 staff and was allocated approximately 50% of the resources of the Commission.

The staff in July 1994 included:

- *seconded police investigators - 48*

- *contract investigators - 12*

- *seconded police surveillance officers - 16*

- *police and civilian technical officers - 3*

- *lawyers - 19*

- *accountants (financial analysts and assistants) - 8*

- *complaints officers - 6*

- *registry and support personnel - 20*

The Commission further reported that the Division is split approximately 50/50 between the complaints section and the multi-disciplinary teams.

The estimated cost of the Division for 1994/95 is $8,418,465.00. However, this amount does not include substantial costs incurred by the Corporate Services Division on behalf of the Official Misconduct Division.

The costs can be broken down as follows:

	Salaries & Wages	Administrative Costs	Consulting	Plant & Equipment	Total
Directorate	819,169	623,647	22,000		1,464,816
Complaints	2,573,107	40,000			2,613,107
Multi-Disciplinary & Proceeds of Crime	2,887,187	195,000			3,082,187
Financial Analysts	170,351	3,500	10,000		183,851
Surveillance	697,155	149,048			846,203
Technical	143,146	45,155		40,000	228,301

3.1.4 Performance

The Committee believes that the achievements of the Division in the past five years of its operation have been considerable.

The following objective matters are available to demonstrate the Division's effectiveness:

- A significant reduction in the incidence of complaints of police verballing (fabrication of evidence);
- An increase in police reporting the incidence of misconduct by other police, thereby indicating a breakdown of the "police culture" identified by Fitzgerald QC;
- A significant reduction in the incidence of complaints of serious assault by police; and
- Significant criminal charges arising from investigations involving the Official Misconduct Division.

3.2 Organised and Major Crime

3.2.1 The Fitzgerald Report

Fitzgerald QC defined organised crime as follows:

> *"Organized crime", is a term frequently used but rarely defined. It embraces serious crime committed in a systematic way involving a number of people and substantial planning and organization, sophisticated methods and techniques.*
>
> *Offences commonly associated with organized crime include theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, getting money from vice activities engaged in by others, extortion, violence, corruption of or by officials, bankruptcy and company violations, harbouring of criminals, forging of passports, armament dealings or illegal trafficking of fauna into or out of Australia.*
>
> *In modern organized crime, theft and fraud have included systematic robbery, organized shoplifting, wharf and cargo theft, motor car theft and credit card theft, arson/insurance fraud, bankruptcy/insolvency fraud and public fiscal fraud, for example, fraud of health insurance and social security and tax evasion.*
>
> *An exhaustive definition of organized crime is both impossible and unnecessary. A working definition might focus on the destination of the proceeds of crime. If they stay with and are used on "legitimate" expenses by the people directly engaged in misconduct, then the crime is usually local. If a "cut" goes to others, remote from the misconduct, then the crime is clearly "organized".* (1989:161-162)

Fitzgerald QC noted that organised crime was particularly insidious, difficult to control and likened it to a "Hydra":

> *Organized crime involves large scale illegal conduct which is planned, complex and uses sophisticated techniques and skills. It exploits weaknesses in human nature and vulnerabilities in public and major private institutions.*
>
> *Organized crime is self-perpetuating. The organization persists in criminal activities*

> *for a long period, in fact for years or decades. It is intended to endure indefinitely. The nature of and emphasis given to particular criminal activities changes over time, but the organization is the same.*
>
> *The organization is like a Hydra, and the removal of some of its heads will not kill it. Its executives continue to wield influence from prisons. Others may be promoted to take their place in the operation. So long as it holds on to its wealth, and a share of it can be given to the participants, organized crime will survive.* (1989:162)

Importantly, Fitzgerald QC was of the view that organised crime and official misconduct were inseparably linked:

> *Organized crime cannot get its massive power, or the opportunity to use its illicit wealth in `legitimate' undertakings, without corrupt officials who aid and shield its activities, and corrupt or unethical professional advisers to guide it.*
>
> *The greater the spread of organized crime and the more obvious its disproportionate wealth, the greater the pressure on honest people to help it or take part in it. Organized crime is subversive. Its erodes the ethical standards of those on the periphery and encourages disrespect for the law.*
>
> *The corruption of law enforcement officers, officials in criminal justice administration, other administrators and politicians and judges is a basic stratagem of organized crime. If such corruption is successful and frequent, the criminal justice system is crippled.*
>
> *Dishonest agents tell criminals how much law enforcement agencies know about them, and from where the information came. Honest agents cannot trust each other or the system.*
>
> *Corrupt people in authority misdirect resources and deflect attention from the proper targets of investigation. Bad management becomes deliberate. Evidence is "lost", and bureaucrats "bungle".*
>
> *...*
>
> *Organised crime is a special threat, since it leads to the perversion and corruption of the basic institutions of our society. Its sophistication, adaptability and wealth make it extraordinarily difficult to combat.* (1989:163)

Fitzgerald recognised that special powers were required to combat organised crime and that the problem could not be tackled in a piecemeal manner, as this had never been successful anywhere in the world. Rather, he thought that the problem had to be tackled in an integrated and comprehensive manner.

Fitzgerald recommended that the permanent role of the CJC should include:

- *providing Parliament with regular reports on the effectiveness of criminal justice administration, with particular reference to the incidence and prevention of crime with special emphasis on organized crime, and the efficiency of law enforcement by the Police Force;*
- *undertaking essential criminal justice functions which are not appropriately carried out by police or other agencies. Apart from research and co-ordination of criminal law reform processes, these would include witness protection and investigation of official misconduct in public institutions;*

> · *overseeing criminal intelligence matters and managing criminal intelligence with specific significance to major crime, organized crime and official misconduct.* (1989:305)

The Fitzgerald Report did not mention the investigation of organised crime when discussing the role of the Official Misconduct Division. However, it is implicit that Fitzgerald QC believed that the CJC should have a role in the combating of organised crime.

The Fitzgerald Report did not provide a definition of `major' crime. Obviously, when the Fitzgerald Report referred to major crime it meant crime which was more than serious. The Committee believes `major' crime has a reference to crime that was serious, of significance to the community and required special investigative expertise or powers.

3.2.2 The Criminal Justice Act 1989

The objects of the *Criminal Justice Act 1989* are set out in s.3, which provides *inter alia* that:

> *3. The objects of this Act are -*
>
> *(a) to provide for the establishment and maintenance of a permanent body -*
>
> *(iii) to investigate the incidence of organised or major crime;*
>
> *(iv) to take measures to combat organised or major crime for an interim period;*

Section 21(1)(b) of the Act provides that the Commission shall:

> *(b) Discharge such functions in the administration of criminal justice as, in the Commission's opinion, are not appropriate to be discharged, or cannot be effectively discharged, by the Police Service or other agencies of the State.*

This section clearly indicates that the Commission is able to perform law enforcement functions other than the investigation of official misconduct.

The responsibilities of the Commission are set out in s.23 of the Act. These responsibilities include:

> *(d) overseeing criminal intelligence matters and managing criminal intelligence with specific significance to major crime, organised crime and official misconduct;*
>
> *(e) in discharge of such functions in the administration of criminal justice as, in the Commission's opinion, are not appropriate to be discharged, or cannot be effectively discharged, by the Police Service or other agencies of the State, undertaking-*
>
> *(iv) investigation of organised and major crime*

However, while Division 7 of the Act specifically addresses organised and major crime in the context of the activities of the Intelligence Division, there is no such provision which specifically includes the investigation of organised and major crime within the role and functions of the Official Misconduct Division. As will be discussed further below, for effectiveness and management

reasons, the Organised Crime Task Forces are located with other multi-disciplinary teams under the control of the Director, Official Misconduct Division. These investigatory activities are undertaken by this Division as a consequence of the direction of the Chairperson pursuant to s.29(3)(h) of the Act which provides:

> *It is the function of the division to perform such duties on behalf of the Commission as the chairperson directs.*

In September 1991, the Criminal Justice Commission submitted that this role be included in the roles and responsibilities of the Official Misconduct Division within the Act. The previous Parliamentary Committee supported this proposal. The legislative amendment has yet to be made.

3.2.3 How the Commission Discharges the Function

3.2.3.1 Resourcing and Structure

The Commission reports that 15% of the Official Misconduct Division's budget (or, 7.5% of the Commission's budget) is committed to the investigation of organised crime. Initially, the Commission submitted that the amount was approximately 20% of the Official Misconduct Division's budget, but that was found to have been an over estimation.

3.2.3.2 Multi-Disciplinary Teams

The CJC utilises multi-disciplinary teams for this investigatory process including police. The Parliamentary Committee is convinced that the use of multi-disciplinary teams results in a broader, more strategic and effective approach to investigation than that adopted by traditional police methods. This approach is also in line with Fitzgerald QC's vision for tackling the problem.

The Official Misconduct Division allocates additional multi-disciplinary teams to the investigation of organised and major crime of different types and categories.

In addition, the Division has also established a Proceeds of Crime Team which works closely with the Multi-disciplinary Teams and the Joint Organised Crime Task Force.

3.2.3.3 The Joint Organised Crime Task Force

A Joint Organised Crime Task Force (JOCTF) has been established between the CJC and the Queensland Police Service since December 1992 and appears to the Committee to be performing well. Its direct benefit is effective integrated operations.

The Commission commits full-time resources of one multi-disciplinary team to the JOCTF. This team consists of ten investigators, four intelligence analysts, two financial analysts, one lawyer and support staff with surveillance and technical unit support.

The Commission's submission to the Parliamentary Committee sets out concisely the history and operation of the JOCTF:

> *After some preliminary discussions the Commission formally raised the formation of a JOCTF with the (then) Commissioner of the QPS on 11 December 1990. The proposal was confirmed in writing on 17 December 1990. The matter was raised again on 4 April 1991. Much to the Commission's regret the QPS rejected the Commission's approach. The Commission pursued the idea again on 12 June 1991 and again on 12 September 1991. The Commission was left with no choice but to*

> *undertake its own investigation of organised crime groups by means of an in-house task force composed of personnel from the Intelligence and Official Misconduct Divisions.*
>
> *It was not until the current Commissioner of the QPS was appointed in November 1992 that the proposal to establish the JOCTF was finally implemented. The Task Force was formally established on 1 December 1992, two years after the original proposal.*

The Parliamentary Committee is of the view that one of the benefits of the JOCTF is that officers of the Police Service can gain experience working in multi-disciplinary teams using varied investigative methods. The culture of policing and the traditional tactical focus on investigative activities in a Police Service environment are considered, by many in the area, to not be conducive to police and other civilian disciplines operating efficiently and effectively against organised and major crime. The immediate emphasis on "clearing up" visible crimes discourages determination of longer term patterns which may reveal the presence of major or organised crime.

The JOCTF has been successful in targeting organised and major crime. Information provided by the CJC Intelligence Division will be increasingly important in providing the stimulus for these activities and in collecting strategic intelligence essential to planning suitable investigations.

Further, the JOCTF meets regularly with representatives of other law enforcement agencies and Commonwealth agencies with interests in organised and major crime.

3.2.3.4 Multi-Agency Approach

In 1991, the Chairperson of the Commission expressed concern that uncertainty as to the status of the CJC as a law enforcement agency may limit its interaction with other agencies, especially in relation to information interchange. Confidential discussions with those agencies has convinced the Committee that the CJC has developed a sound relationship with them.

Since its establishment the Criminal Justice Commission has adopted a policy that wherever possible investigations of organised or major crime should be conducted in conjunction with other agencies including the Queensland Police Service and the National Crime Authority.

Co-ordination and liaison with other law enforcement agencies such as the NCA has effectively targeted organised and major criminal activities at both the State and national level.

The CJC reports that it has entered formalised relationships, through Memoranda of Understanding, with the following agencies:

- Queensland Police Service
- Australian Federal Police
- Victoria Police
- New South Wales Crime Commission
- Australian Securities Commission
- Australian Transaction Reports and Analysis Centre

- Australian Bureau of Criminal Intelligence
- Independent Commission Against Corruption
- Office of the Prosecuting Attorney, Honolulu, Hawaii.

The joint operations and interchange of officers between the CJC and the Police Service, and the close liaison and working relationship with other agencies, have a number of advantages, including the fact that this co-operation will minimise any potential for duplicated effort.

Conclusion

The fight against organised crime has started to be conducted successfully by the operation of multi-disciplinary teams within the Commission. The location of these functions at the CJC permits the development of Joint Organised Crime Task Forces, target organised and major crime.

The involvement of Joint Organised Crime Task Forces in the investigation of major and organised crime is a positive development which has the potential to assist the efforts of the Police Service towards greater involvement of multi-disciplinary teams in the long term.

3.2.4 The Location of the Organised and Major Crime Function at the Criminal Justice Commission

One of the major issues which arose during the Parliamentary Committee's review of the Commission was whether the Commission should be involved in the investigation of organised and major crime. The major arguments are discussed below.

3.2.4.1 Interference with other functions

One argument is that by the establishment of the Joint Organised Crime Task Force (JOCTF) to investigate "organised or major crime" the Commission has developed to close a working relationship with the Queensland Police Service (QPS) to properly fulfil its obligations in relation to the investigation of misconduct within the QPS.

The submission from the Queensland Council for Civil Liberties, which is concerned that the CJC has become a "super police force", stated:

> *As a further aspect of our concern as to the super police force role that the CJC has developed in recent times, we note the observation that there is a very real risk that the CJC will lose credibility in relation to its complaints process in respect of the Queensland Police Service if it continues down the super police force track involving, as it does, increased and quite numerous joint operations between the CJC and the Queensland Police Service.*
>
> *The Police Complaints Tribunal predecessor of the CJC in relation to complaints against police had no credibility partly because of the perception that it was far too close to and not in any way independent from the police.*
>
> *This observation is made notwithstanding the very high calibre of most of the Chairpersons of the Police Complaints Tribunal.*
>
> *The same credibility problem is looming for the CJC. The more that it gets close to*

> *the Queensland Police Service the less it can credibly command public respect as an independent and vigorous investigator and supervisor of complaints against the police.*

The Queensland Law Society made the following submission:

> *It seems that there are a number of factors which may combine to reduce public confidence in the work of the Commission. It is apparent from matters touched upon earlier in this submission that the Society believes that the rotation of serving police officers through the CJC is blurring the respective roles of the CJC and the police service and, to an extent, the seeming preoccupation of the CJC with serious criminal investigation exacerbates that trend.*
>
> *If the public perception is one of difficulty in distinguishing between the roles of the CJC and the police force, then public confidence in the primary role of the CJC, that of detecting and investigating public misconduct and corruption, will be eroded.*

The Committee appreciates the concerns raised by many commentators that the role of the CJC in investigating major and organised crime raises the issue of possible contamination, or perceived contamination, of the Commission's core function of investigating official misconduct. The Committee notes that the roles appear to be incongruous, at least if they are allocated within one Division.

However, as Fitzgerald QC noted, organised crime and official misconduct are almost inseparably linked. Therefore it is difficult to understand how a body that investigates official misconduct can avoid being involved in the investigation of organised crime.

3.2.4.2 It was never intended that the CJC would be responsible for the investigation of organised or major crime

Section 3(a)(iv) of the Act refers to the Commission taking measures *to combat organised or major crime for an interim period*. The use of the words "for an interim period" is curious and at first glance might suggest that at the time of passing the legislation it was not intended for the CJC to perform this role permanently.

Indeed, some submissions have suggested that the CJC has clearly exceeded the jurisdiction in relation to organised crime envisaged by the Act. The Council for Civil Liberties stated:

> *We contend that there is a significant difference between the objects outlined in section 3 to investigate the incidence of organised or major crime on the one hand and to take measures to combat organised or major crime for an interim period on the other.*
>
> *The fact that section 3 enjoins the Commission to combat organised or major crime for an interim period envisaged that any law enforcement/police role by the Commission (refer to the term "to take measures to combat") would be time-limited. There can be no other reason for the phrase "for an interim period" in the object "to take measures to combat organised or major crime for an interim period".*
>
> *We contend that the objects of the Act specifically drew a distinction between investigating the incidence of organised crime on the one hand from taking measures to combat organised crime on the other.*
>
> *The intention of the Act was to give to the Criminal Justice Commission a brief to investigate the extent of organised or major crime through its Intelligence Division*

role. It was intended that it actually involve itself in law enforcement measures only for an interim period.

However, what has occurred is that, with the establishment of the Joint Organised Crime Task Force (hereinafter referred to as JOCTF), the Criminal Justice Commission has arrogated to itself a permanent role in super policing, quite contrary to the interim combating organised or major crime role which is specifically outlined in section 3 of the Act.

One can search in vain in the debates in the House or Committee stage for any understanding by parliamentarians from both sides of politics at the time of the introduction of the Criminal Justice Act as to this distinction.

It is trite to observe that the Objects clause of an important Act such as the Criminal Justice Act represents the very fundamentals of how the Act and the Commission which it established is to be interpreted and viewed.

On the basis of the object of the Act referring to combating organised or major crime for an interim period, we contend that it is sufficient on that basis alone to demand that the Criminal Justice Commission wind back its quiet but inexorable self-arrogated super police force role.

As will be discussed in more detail later, the Parliamentary Committee believes that the Commission has made significant inroads in the fight against organised crime. Further, the Committee believes that the Criminal Justice Commission, particularly through the establishment of the JOCTF, has assisted the Police Service to adapt to new methods of fighting organised and major crime. The Committee is not convinced that the CJC has exceeded its role as intended either by the Fitzgerald Report or the *Criminal Justice Act*. Nor is the Committee convinced that it is presently appropriate for the Criminal Justice Commission to withdraw from the area of investigating organised and major crime.

3.2.4.3 The function duplicates that of other agencies

A number of oral and written submissions to the Parliamentary Committee argued that there was no need for the Commission to investigate organised and major crime as that function could be undertaken, or was being undertaken, by other agencies.

The submission from the Council for Civil Liberties stated:

It should not be forgotten that, in a country of approximately 18 million people, there is a veritable plethora of law enforcement agencies including a national super police force in the form of the NCA.

The plethora of law enforcement agencies are set out below:

- *Each State or territory has its own police force.*
- *The Australian Federal Police is a national policing body.*
- *The National Crime Authority is a super police force which has been dogged by continuing controversy since it was established in the mid 1980s.*
- *The Australian Securities Commission is a national super police force with particular emphasis on corporate criminal activity.*

- *The Australian Bureau of Criminal Intelligence is a national super police force criminal intelligence data-gathering agency. The ABCI is highly secretive. It is based in Canberra and talks principally only to law enforcement agencies.*

- *In New South Wales, the above police agencies which also operate there are complemented by the State Drug and Crime Commission as well as the Independent Commission Against Corruption.*

- *The Australian Police Ministers' Council (APMC) and the Standing Commission of Attorneys-General (SCAG) are also national groupings of law enforcers which are secretive. The QCCL has been trying for in excess of 2 years to have both the APMC and SCAG indicate on a meeting by meeting basis what their agenda is and what their resolutions are but we have been blocked and ignored in this regard. It is pertinent, however, to observe that the individual State members of both of these groupings are quite happy, when it suits them to issue press releases as to law enforcement matters which are decided at the regular meetings of both of these groupings but will refuse requests for specific information when it suits them.*

With such an array of agencies competing on a very restricted law enforcement turf, it is no wonder that each agency seeks to outdo the other in terms of publicity and attention-seeking, when it suits them.

The Committee points out that a number of the above agencies do not have jurisdiction to investigate organised crime matters effecting Queensland.

The Australian Securities Commission, is an agency with a limited focus on Company Code related issues.

The ABCI, is a co-ordinating body only, and does not have direct investigative functions.

The Australian Federal Police only has jurisdiction in relation to Commonwealth or intrastate matters.

Some in depth discussion in relation to whether the QPS and the National Crime Authority (NCA) could undertake this function is required.

The CJC's organised and major crime intelligence investigation and surveillance capability was developed because of the total absence of this capacity in Queensland identified by the Fitzgerald Report in 1989. The Queensland Police Force lacked the capacity to undertake such activities and the level of trust and co-operation with federal agencies was such that little effective work was possible.

The resources provided to the CJC to combat organised and major crime are limited by both Australian and international standards. The emerging picture regarding the impact of organised criminal activity in Australia confirms that we are not isolated from the most serious international crime problems. The capacity established at the CJC, despite the many criticisms, is at a point of consolidation where useful results have manifested and many more are reasonably predicted.

There is no discernible evidence available to the Committee that to suggest that this function could be conducted any more effectively by the Queensland Police Service or the NCA.

The Committee is of the view that there are sound reasons why the function should remain with the

CJC.

The CJC has been established; it has enabling legislation; there is a basic level and skill mix of staffing; it has suitable investigative methods and a growing base of intelligence needed to enable success in combating major and organised crime.

While there is an understandable debate that the Police Service should be responsible for the investigation of major and organised crime, the Committee is of the opinion that Police Service priorities should continue to be focused on crime prevention and detection activity involving the frequent, often severe and high priority crimes against persons and property, where there is an enormous challenge to achieve the results the community is expecting. Most of the Police Service intelligence, task force and operational effort should be directed to this end.

Experience in Australia and overseas has shown that it is almost impossible to create the right environment for effective, lasting, multi-disciplinary, organised crime teams to operate in a command based Police Service, where the prime obligation is community based local and Regional crime detection and prevention activity.

The Commission of Inquiry concluded that there would always be matters of serious criminal concern that were inappropriate for a Police Service to investigate. Experience worldwide confirms that the establishment of special bodies with special powers is necessary to conduct these investigations. Even with these measures, success rates are low.

Issues such as police corruption and allegations about duplication of resources, are issues of less importance in this debate and should not obscure the basic effectiveness question. That is, what powers, composition, structure and level of resourcing is necessary to effectively combat organised crime?

The effective management of multi-disciplinary teams of professionals in a Police Service hierarchy would require significant culture change, progressive civilianisation and leadership or command by people who may not be Police officers. This change is unlikely to be achieved except over a long period of time.

A good indication of this cultural change would be the degree of civilian recruitment and civilian leadership and command positions firmly established and operating in traditional police positions such as the CIB, Forensic Services, and Intelligence functions. Equally compelling indicators would be the demonstrated successful use of a variety of different crime prevention and investigative techniques including organisation targeting strategies as distinct from individual investigative strategies and operations.

However, even with this change, a Government or community is unlikely to grant the necessary special investigative powers to a Police Service to successfully combat organised crime including the conduct of investigative hearings in private or public.

Fitzgerald QC recognised that:

> *Special powers are required to combat corruption and organised crime*

and that:

> *responsibility and authority for law enforcement should not be totally vested in the Police Force or in any other self-regulatory and self-assessing body.*

Fitzgerald QC clearly intended that the Official Misconduct Division of the CJC would have these types of powers. The Fitzgerald Report stated:

> *The Official Misconduct Division powers likely to be required include:*
>
> · *compel the production of documents and things and to attend and give evidence;*
>
> · *cause interception of or intercept telecommunications and post;*
>
> · *monitor other communications (including by electronic means);*
>
> · *carry out surveillance (if otherwise illegal);*
>
> · *search and seize in respect of suspected criminal offences and to seize evidence of other serious offences, not the subject of the search warrant, but which evidence is found while executing a search warrant;*
>
> · *detain persons for specified times and purposes, and under specified conditions;*
>
> · *take samples or specimens of all sorts and anything from the person of anyone detained or arrested;*
>
> · *cause arrested or detained persons to undergo examinations and tests;*
>
> · *take possession of passports and other travel documents and financial documents including instrument of title or securities;*
>
> · *photograph, fingerprint, palmprint, footprint or voice print or take samples of handwriting from any person detained or arrested.* (1989:313)

Is the community prepared to grant these types of powers to the Police Service?

The Committee believes that it would not be prudent, nor in the public interest, to confer these additional powers upon a Police Service, where there are no effective checks and balances available to monitor their use. If such powers were to be given to the Police Service they would need to be strictly quarantined. It is to be noted that the Police Commissioner, Mr J O'Sullivan, supports the present arrangement.

The view has also been expressed is that the National Crime Authority (NCA), which recently established a Brisbane office, should be left to tackle the problem of organised crime.

The NCA focuses its operations on national priorities under reference from all State Ministers and Commonwealth Ministers. The NCA's Secretariat does not have national references in relation to:

· various ethnic groups and races known to be involved in major criminal activities in Queensland, Australia and overseas;

· outlaw motorcycle gangs;

· major crime of concern on a State basis where insufficient intelligence has been

gathered to confirm its interstate operations.

In other words, NCA references are given sparingly even when considerable work by State agencies has confirmed the definite existence of a national problem.

The NCA's stated primary role is to work in co-operation with State agencies and Police Services and to co-ordinate activities such as the collection and holding of strategic intelligence. State resources are seconded to the NCA for periods of time.

The NCA contributes to joint operations through its own staff providing financial and intelligence analysis, legal services, computer services and electronic surveillance, and intercept capacity. The NCA has special powers. However, the NCA relies on the contribution of policing and other resources from the relevant State agencies to investigate and take action against people involved in major organised criminal activities.

The operational resources used by the NCA in Queensland are those of the JOCTF established between the CJC and the Police Service. As a result of these activities, charges have been laid relating to murder and drug trafficking offences, the evidence of which had previously been out of reach of any one State organisation or Police Service.

The Chairperson of the NCA, Mr Tom Sherman, has endorsed the positive results being achieved by current arrangements.

Queensland's capacity to gather intelligence and investigate organised and major crime, which is now established at the CJC could best be described as effective though basic. However, it has developed to a stage where beneficial results are emerging.

The NCA was not considered a sufficient answer in terms of Queensland's particular problems. Despite dealing with the problem of organised crime in some depth, and noting the insufficiencies in the co-operation with state and federal law enforcement agencies, the Fitzgerald report did not recommend that Queensland's fight against organised crime be transferred to the NCA.

The National Crime Authority has indicated support for the CJC's involvement in organised crime, and has indicated that such a role is complementary to the role of the NCA and is not duplicative. The NCA's submission to the Committee stated:

> *The NCA sees the role of the CJC concerning the abovementioned responsibilities as being complementary to the NCA's role. Whilst the CJC and the NCA both investigate organised crime, the CJC focuses on such crime within Queensland and the NCA principally focuses on co-ordinating national criminal investigations. Both the NCA and the CJC co-operate and communicate closely to ensure that there is effective exchange of criminal information and that there is no duplication of investigations and use of resources.*
>
> *The CJC may investigate State organised crime which does not directly relate to an NCA (national or multi State) investigation. The NCA will have no involvement in the matter if the criminal activity under investigation falls outside the NCA's charter. However the information collected may link into and assist other NCA investigations. Likewise information obtained by the NCA may assist the CJC's independent investigations.*
>
> *The CJC may also participate with the NCA and other Australian law enforcement agencies in an NCA nationally co-ordinated investigation. In such cases, the CJC would participate with the NCA as a task force member conducting investigations*

relevant to the reference given to the NCA. The CJC would, like other participating agencies, devote resources and use its powers as part of the national effort but concentrating its investigations within Queensland. The advantages flowing from this is that the CJC participates in the overall national effort which have direct benefits of gaining a better understanding and attacking organised crime in Queensland.

The CJC has also worked closely with the NCA (particularly through its Brisbane regional office) in the collection of criminal information concerning a national project being co-ordinated by the NCA. Further, the NCA Brisbane office is working jointly with the CJC and Queensland Police Service in a general investigation into major manufacture and trafficking in amphetamines. Whilst the CJC is working with the Queensland Police Service investigating alleged state criminal activities, the NCA works on and co-ordinates national aspects of investigations.

In these investigations, communication and liaison lines are well established and the various investigative arms of the NCA and CJC work co-operatively and harmoniously and in a complementary manner. Indeed, the co-operation in Queensland is amongst the best in Australia.

An important joint initiative between the CJC and the QPS involved the establishment of a Joint Organised Crime Task Force in December 1992. This Task Force has focused the effort of Queensland's primary law enforcement agencies in a concerted effort against organised and major crime in Queensland. As a result of its work, national links are being identified which will relate to the NCA's role and provide valuable assistance to a co-ordinated approach to be taken by the NCA relating to organised crime where it transcends State boundaries.

Any proposal to shift the organised crime function from the CJC would need to be able to demonstrate the potential effectiveness of the function relative to the current situation, with efficiency issues then being considered. At the current time there appears to be insufficient justification for shifting the function from the CJC.

Conclusion

The Committee believes that there is a continuing need for the Criminal Justice Commission to be involved in the combating of organised and major crime.

The Committee understands the concern that has been expressed that there is a danger of the Official Misconduct Division becoming "too close" to the Queensland Police Service through the organised and major crime function. Therefore, the Committee proposes the creation of a new Division within the Commission which will be responsible for the investigation and combating of organised and major crime. The result will be two proactive investigative Divisions within the Commission. The Official Misconduct Division, which will remain responsible for the investigation of complaints of official misconduct and the Organised and Major Crime Division which will be responsible for the investigation of organised and major crime. The creation of such a Division will have a number of distinct benefits:

- **it will recognise that the CJC has the primary role in the investigation of organised and major crime;**
- **it will enable the resources being allocated to the function to be more readily identified;**

- **it will further reduce the possibility, or impression, of the current official misconduct function coming too close to the QPS.**

Recommendation

The Committee recommends the creation of a new division within the Commission called the Organised and Major Crime Division which will be responsible for combating organised and major crime.

The Organised and Major Crime Division of the CJC will work with other Divisions to fulfil its charter.

The Official Misconduct Division will be required to report to the Organised and Major Crime Division any matter that appears to involve organised and major crime. Conversely, the Organised and Major Crime Division will be required to report any suspected incidence of official misconduct to the Official Misconduct Division. Once established, the lateral transfer of personnel between these Divisions should be avoided.

The functions of the Organised and Major Crime Division should be clearly spelt out by the *Criminal Justice Act 1989*.

The functions should reflect those currently being undertaken by the Official Misconduct Division in respect of organised and major crime.

The Organised and Major Crime Division will be able to exercise the powers currently available to the Commission in relation to organised and major crime, as amended by other recommendations within this report. The Division will be required to keep and monitor separate powers registers.

3.2.4.4 The use of coercive powers - definitional problems

Concern has also been that the Commission is using the powers of a standing Royal Commission in relation to "ordinary" criminal proceedings. Of particular concern is the apparently wide discretion to investigate anything that is "organised or major crime". Many submissions argued that these terms are undefined in the legislation and therefore too wide.

In relation to this argument, the Council for Civil Liberties stated:

> *It is noted that, under section 21, the Commission shall discharge such functions in the administration of criminal justice as, in the Commission's opinion, are not appropriate to be discharged, or cannot be effectively discharged, by the police service or other agencies of this State.*
>
> *When regard is had to this particular provision, it is clear that the Criminal Justice Commission can decide to arrogate to itself significant criminal justice functions which are otherwise carried out by various government departments.*
>
> *In effect, the QCCL contends that the Commission has quietly and subtlety interpreted this function description in a manner such as to override and ignore the objects provision of the Act particularly in relation to its organised or major crime function.*

> *Indeed, it should be observed that the phrase "organised or major crime" contains a significant distinction . The phrase does not simply relate to organised crime (whatever that may mean) as this term is not defined in the interpretation section of the Act.*
>
> *The phrase also relates to something called major crime which is also not defined and which can be seen to, alternatively, be something more serious or less serious than the concept of organised crime.*
>
> *A recent case in the Court of Appeal raised the issue of what organised or major crime means and what the difference between the two concepts are but the Court of Appeal declined in that case to define the two concepts.*
>
> *Consequently, the concept of organised or major crime is what the Criminal Justice Commission decides it will be, particularly having regard to the functions to be discharged described in section 21(1)(b).*
>
> *Leaving aside the issue of organised or major crime, there should be an obligation on the part of the Criminal Justice Commission to outline in each of its Annual Reports what functions it has exercised in a particular year which were not appropriate to be discharged by the police service or other agencies of the State.*
>
> *There should be a description of the work undertaken by the Criminal Justice Commission under this heading and an explanation as to why the Criminal Justice Commission is discharging a function which otherwise would be discharged by the police service or some other State agency.*
> ...
>
> *It will be seen that the responsibility of the investigation of organised or major crime relates to investigation <u>not</u> taking measures to <u>combat</u> organised or major crime.*
>
> *Nevertheless, as indicated above, the Criminal Justice Commission has taken on a super police law enforcement role in the <u>actual combating</u> of so-called organised or major crime rather than simply the <u>investigation</u> of this area.*

The Commission has defined major crime as *criminal activity which is unusually serious or insignificant*.

The Commission reported that it has only undertaken investigations into five matters under its major crime jurisdiction in the last twelve months. Further, the Commission reported that all of these matters have related to alleged murders or attempted murders and that in each case the Queensland Police Service's investigations had been frustrated prior to the referral of the matter to the CJC. Four of the murder investigations undertaken by the CJC were drug related. These matters involved the use by the Commission of either its compulsive powers to require witnesses to attend and give evidence in relation to the matter the use of listening devices.

At page 43 of its submission to the Committee, the Commission outlined the procedure for referral of these matters from the Queensland Police Service:

- the matter is vetted by the Assistant Commissioner, State Crime Operations, QPS and the Deputy Commissioner, Operations;

- before forwarding to the Commission, the matter is also closely scrutinised by a senior member of the legal staff of the Commission *to see that the criteria referred to above are satisfied*;

· finally, the matter is referred to the Commission's chairperson for his consideration.

The Committee has queried what was meant by the statement *to see that the criteria referred to above are satisfied*, as it was not apparent from the Commission's submission what the matters *referred to above* were. The Committee has been informed that the above statement was referring to an earlier portion of the Commission's submission which stated:

> *"Major crime" arguably means something more than "serious crime", an expression with which most people are familiar and which the legislature could have used had it intended to refer only to criminal activity which leads to the commission of criminal offences of a serious nature. "Major crime" (as distinct from "serious crime") means "criminal activity which is unusually serious or significant".*

The Committee is not convinced that the above statement could be classified as "criteria".

Conclusion

The Committee is of the opinion that appropriate criteria is required to be developed by the Commission which sets out the circumstances in which the Commission will investigate a matter involving major crime.

Recommendation

The Committee recommends that the Commission develop, in consultation with this Committee, criteria which must be satisfied before a major crime matter is referred to the Commission for investigation.

Conclusion

It was the clear intention of the Fitzgerald Report, as reflected within the *Criminal Justice Act*, that the CJC be able to investigate both organised and major crime and matters not appropriately investigated by the Queensland Police Service.

The Committee is not convinced that it is desirable that the terms `organised crime' and `major crime' within the *Criminal Justice Act* be defined within the Act.

The Committee believes that these matters should be determined on a case by case basis according to the particular merits of each matter. Later recommendations by the Committee are designed to ensure that the decision by the Commission to investigate matters are open to scrutiny by the Supreme Court.

In addition, to enable effective monitoring of the Commission's jurisdiction to investigate major crime, on each occasion the Commission undertakes an investigation within its major crime jurisdiction the Commission should forward a complete report to the Committee outlining the circumstances of the matter establishing conclusively compliance with predetermined criteria.

Recommendation

On each occasion the Commission undertakes an investigation within its major crime jurisdiction the Commission should forward a complete report to the Committee outlining the circumstances of the matter establishing conclusively compliance with predetermined criteria.

3.3 Investigative Hearings

3.3.1 The Fitzgerald Report

The Fitzgerald Report made the following observation regarding the powers of the Official Misconduct Division:

> *The Official Misconduct Division would have access to more powers than most investigative bodies. Each such power should only be able to be used by any member of the Official Misconduct Division on judicial authority. The standard of control on the exercise of those powers must be unreservedly high. The circumstances of and need for the exercise of the power must be recorded, even when it touches on confidential or sensitive matters. Where the matters are confidential, the record should be kept secret, to be viewed only by the leave of the court (on public interest immunity principles).*
>
> *Even in circumstances of dire urgency, judicial authority should be mandatory.*
>
> *The Official Misconduct Division and all its officers, including consultants and seconded police officers, must be obliged on pain of severe penalty to make known to the court or a judge all information relevant to the authorizing of the use of any such power. That information must include all that is known about the adverse effect which the use of that power would have upon an individual. The court or judge must have every chance to take competing considerations into account.* (1989:314)

In respect of hearings by the Commission Fitzgerald QC made the following observations:

> *The CJC will need to be able to conduct hearings of two types.*
>
> *It should be able to conduct public hearings on matters of general significance with respect to the administration of criminal justice in the way law reform commissions from time to time conduct such hearings. Equivalent mechanisms should be provided to it.*
>
> *The CJC from time to time may also need to conduct hearings for investigative purposes. Mention has earlier been made of the need for judicial control of that, along with other special powers. No such hearing should be possible without judicial leave.*
>
> *It is not necessary again to treat here, in detail, the competing considerations of individual right to liberty and expectation and protection of individual privacy and of public interest in the detection and suppression of major crime. Whether and on what terms such an hearing ought be held and whether publicly or wholly or partly in private should be decided judicially upon application brought by the CJC. That application may be made, as necessary, ex parte and in camera. It may be expected that the applicant will seek such hearing to be in camera because of the disadvantage of open hearings to the investigative process. Whether a hearing should be held and whether the whole or any part of it should be in camera should be on the basis of all*

> *the circumstances of the matter and the particular balance between those considerations which the circumstances warrant in the unfettered discretion of a Judge of the Supreme Court. The Court should have the power to vary such leave or any conditions of such leave.* (1989:322)

The above quote from the Fitzgerald Report clearly demonstrates that the Fitzgerald Report contemplated two types of hearings:

(1) hearings with respect to the administration of criminal justice to be held in public, and

(2) investigative hearings were to be subject to judicial approval and upon terms decided judicially.

Judicial approval and control of the proceedings, through the setting of the terms of the inquiry, is considered by the Committee to be an important safeguard.

However, the Committee anticipates that there may be difficulties in determining when a matter is an "investigative hearing" or a hearing on "matters effecting the administration of criminal justice".

The Committee recognises that on occasions matters will involve elements of both an investigation into the role and conduct of individuals, and of the system as a whole. For example, the inquiry into the selection of the jury for the trial of Sir Johannes Bjelke-Petersen was directed at uncovering whether there was any illegality attaching to the selection of the jury, in addition to reviewing the jury selection process, which concerned the administration of criminal justice generally.

3.3.2 The Criminal Justice Act 1989

Section 25(1) of the *Criminal Justice Act 1989* provides that the Commission is authorised to conduct a hearing in relation to any matter relevant to the discharge of its functions or responsibilities under the Act. Section 25(2) of the Act provides for the constitution of a Commission hearing when the Commission is conducting a hearing for the purpose of discharging its functions or responsibilities allotted to the Official Misconduct Division.

Section 74 of the Act provides that the Chairperson of the Commission (or his or her delegate) may summons a person to attend before the Commission to give evidence in relation to the subject matter of the Commission's investigations, and\or require the person to produce documents in the person's custody or control as specified by the summons.

The procedures for taking evidence in an investigative hearing are outlined in Part 3 Division 2 of the Act the effect of which can be summarised as follows:

- A person who attends before the Commission as a witness or proposed witness, is obliged to attend at the proceeding each day on which the proceedings are to continue, and report at or before the proceedings each day, unless otherwise excused. (s.87)

- Pursuant to s. 88 the Commission may, by order, prohibit the publication of:

  - the fact that a person has given, or may give, evidence before the Commission;

  - information that may help to identify a person who has given, or may give evidence before the Commission;

  - evidence given before the Commission;

- the contents of, or a summary of, a record produced to the Commission, seized by the Commission, or produced to a person during the course of a hearing.

- a description of a thing produced to the Commission, seized under a warrant, or produced to a person during the course of a hearing.

· Hearings by the Commission are to be held in public unless the Commission orders that it is to be closed to the public. (s.90(1). The Commission may order a hearing to be closed only where the Commission considers that an open hearing would be unfair to a person or contrary to the public interest. (s.90(2))

· Evidence taken before an investigative hearing may be required to be made under oath or affirmation, and may be administered by the person constituting the Commission for the purposes of the hearing, or a person nominated by that person. (s.89)

· The Commission is not bound by the rules or practice of any court or tribunal in exercising its powers, including investigative hearings, and may conduct its proceedings as it considers proper and may inform itself on any matter in the way it considers appropriate.

· Subject to claims of legal professional privilege, Parliamentary privilege, Crown privilege or other public interest privilege, a person is not entitled to be excused from furnishing information, or producing any record or thing, to the Commission upon a claim of privilege on any ground. In particular, a person attending before the Commission is not entitled to remain silent with respect to any matter that in the Commission's opinion is relevant to the subject matter of the Commission's investigation.

  However, a statement or information furnished by a person to the Commission, or a disclosure made by a witness before the Commission, after the person has objected to furnishing the statement or information or making the disclosure on the ground that it would tend to incriminate the person or witness, is not admissible against the person unless it is in respect of proceedings for a contempt of the Commission or the offence of perjury. (s.96)

· Section 95(1) provides that a person may appear in person or be represented by counsel or solicitor, or agent approved by the Commission. Section 95(2) provides that any person representing a person before the Commission may examine and cross-examine any witness on any matter relevant to the subject matter of the Commission's proceedings, subject always to the direction of the person conducting the proceedings.

A comparison between the recommendations made by the Fitzgerald Report and the provisions of the Act in relation to hearings by the Commission reveals that there is a clear divergence between them. In particular, the Act does not reflect the recommendation of Fitzgerald QC that the investigative hearing power be subject to the approval of the Judiciary. As will be discussed in more detail later, there are legitimate concerns that the Act as it is currently drafted does not enable effective judicial review of the power. Later in this report the Committee recommends changes which will enable effective scrutiny of the CJC's powers by the judiciary.

3.3.3 Use of the Power

The Commission reports that since its inception there have been 150 discrete private hearings and 10 public hearings. The Commission further states that this represents 417 sitting days for the

private hearings, compared with 210 sitting days for the public hearings. The number of witnesses examined was 643 and 547 respectively.

The method for securing the attendance of witnesses at both public and private hearings is a summons pursuant to s.74 of the Act. The Committee notes the apparent increase in the number of summonses issued by the Commission in the last three years:

1991\92	**1992\93**	**1993\94**
281	382	520

Conclusion

The Parliamentary Committee believes that the investigative hearings power is the most coercive of all powers entrusted to the Commission. Submissions to the Committee tend to support this view. The investigative hearing process is also costly, not only to those that have to appear before it, but to the community at large.

As such, the Committee believes that the power should be used sparingly, and only in circumstances where the gravity of the matter is significant and other less intrusive investigative techniques are insufficient. It was the intention of the Fitzgerald Report that the power be subject to strict judicial control. Therefore, the Committee concludes that the Act needs amendment to adequately reflect the Fitzgerald Reports recommendations.

3.3.4 Criticism of Investigative Hearings

Throughout the Committee's review there were many criticisms made of the investigative hearing power of the Commission.

For the purposes of this analysis, the criticism of the power to conduct investigative hearings and the use of that power by the Commission can be summarised as follows:

(i) the Commission is over-using and misusing the power;

(ii) there is no derivative use immunity;

(iii) there are problems with the non-publication orders associated with the power;

(iv) persons required to attend are not provided with sufficient information;

(v) the use of the power is effectively not reviewable.

Each of these criticisms will be considered in detail.

(i) Overuse and Misuse of the Power

The submission from the Queensland Council for Civil Liberties suggested that the increase in the number of summonses issued by the Commission indicated that the Commission was relying too heavily on the investigative hearing process.

In particular, the Council suggested that the Commission's investigative hearing power was being improperly utilised by the Queensland Police Service:

> *A pattern has emerged where Queensland Police are manoeuvring wherever possible to attach an investigation in one form or other to the CJC so that compulsive self-incriminatory procedures of the investigative hearing can be availed of by Queensland Police.*

The Queensland Law Society submission stated:

> *Recent cases that have been decided throughout 1993 in the Queensland Court of Appeal combined with the various experience of some of the Society's criminal law practitioners causes some considerable concern in relation to the current use to which investigative hearings are being put.*
>
> *The concept of an investigative hearing was justified at the time of the passage of the Criminal Justice Act as relating primarily to the compulsory examination of official misconduct (ie, misconduct with the public service).*
>
> *However, in practice, what is starting to emerge is a very definite pattern where the investigative hearing process is being used in relation to criminal proceedings which are currently before the Court.*
>
> *...*
>
> *It is the view of the Society members with professional experience in this field, that a very definite trend has emerged in recent times whereby otherwise traditional-type criminal cases are being characterised by the CJC using their compulsive powers in respect of investigative hearings to force witnesses (many of whom could be expected to be defence witnesses) to give their version of events well in advance of any committal hearing or trial.*

Further, in a similar vein the Criminal Law Association of Queensland submitted:

> *Various members of the Association who are not only experienced in the criminal jurisdiction, but also in appearing before the Criminal Justice Commission in Investigative Hearings, have expressed serious concerns at the possible inappropriate use by the Criminal Justice Commission of Investigative Hearings and its wide coercive powers. As we understand the Criminal Justice Act, these coercive powers are to be limited to in the investigation of major and/or organised crime. The Association has concerns that the Criminal Justice Commission may have been embarking upon investigations that do not fall within that category but in which the Commission has used these wide coercive powers. Members of the Association have given examples of Investigative Hearings being used in relatively minor investigations, such as a police officer allegedly using excessive force in the arrest of a defendant. The Association has difficulty in seeing how it could be justified for the Commission to use the extraordinary power of obtaining evidence by compulsion for minor matters. It must be remembered that the resultant cost to the community of these investigations is considerable.*
>
> *We do not believe that it was ever the intention of the legislature for Investigative hearings to be used as a means of "evidence gathering" in "ordinary investigations", which appears to be the present practice.*
>
> *This concern about the inappropriate use of its wide coercive powers is further highlighted when it is noted that the "certification" by the Commission that the investigation is into major and/or organised crime or is an appropriate use of powers of the Criminal Justice Commission is not effectively reviewable. Recent*

> *decisions of the Supreme Court have made it clear that the Supreme Court will not interfere unless the applicant, that is the person the subject of the summons to give evidence, is able to prove to the satisfaction of the Court that the certification of the Chairman as to the appropriateness of the investigation, is wrong. The difficulty with that is that the Commission with its secrecy provisions, does not provide sufficient information surrounding the investigation for any proper argument to be mounted by any applicant to the Supreme Court. The secrecy provisions of the discharge that onus before the Supreme Court. The decision of the Criminal Justice Commission to embark upon an investigation is therefore arguably not presently effectively reviewable by the Supreme Court.*

At the public hearings, Mr Shane Herbert QC clearly indicated that he thought the investigative hearing process was being over-used:

> ***Mr Herbert:*** *They have become routine. They are not unusual; they are normal. That is the point. What I am sure Mr Fitzgerald there meant is when a lawyer says, "from time to time", he means pretty infrequently, and he was talking about the sort of thing almost that led to his inquiry. You see, there are always idiots going around thieving a dozen cars and chopping them up and selling them and people dealing here and there in half an ounce of heroin or so on. These are common or garden crooks. They are always around; the coppers are always chasing them; they are always getting arrested; they are always going in and out of the gaols. What he was referring to are things analogous to what had happened by the time his inquiry began. There, you had almost a challenge to the sovereignty of the State. You had a police force that from top to bottom was committed to profiting from and running crime rather than suppressing it, according to the report and according to much of what was said later. It had reached, I think, what Evan Whitton's analysis is of organised crime where one end of it is where the local beat copper accepts an apple from the grocer for having an extra look after hours up to the point of the police force itself organising and running crime. Now, it had almost gotten to that point, according to Fitzgerald. It was almost to the point where, in truth, the sovereignty of the State was being undermined by those people. It is things not necessarily that strong but things in that direction that need to be tackled with remarkable powers, not common or garden drug dealers, burglars, car thieves, those sorts of people.*

The Chairman of the Commission, Mr Rob O'Regan QC, made the following response at the public hearing to the allegation that the investigative hearing process was being over-used:

> *Mr O'Gorman, Mr Quinn and Mr Herbert waxed lyrical about investigative hearings and the injustice that they asserted was necessarily involved in their conduct. They suggested that investigative hearings were now routine. That suggestion is false. The Commission has conducted some 150 investigative hearings in the course of conducting some 9 000 investigations. Therefore, investigative hearings constitute 1.6 per cent of those investigations. So they are exceptional and in our submission they do not involve unfairness to the person subjected to the investigation. If an investigation is challenged, then, contrary to what was said by Mr Herbert, it is the practice of the Commission to detail with some particularity the nature of the investigation in order to argue the position that the investigation is warranted or that it is being conducted fairly.*

A number of oral and written submissions also expressed concern that the investigative hearings power was being exercised when persons had already been charged or even after they had been committed for trial.

The Queensland Law Society submitted:

> *The Society contends that it was not within contemplation at all at the time of the passage of the Criminal Justice Act 1989 that investigative hearings would be used as a means of furthering the gathering of evidence for the prosecution by compulsive means and at times when a person has not only been charged but been committed for trial.*

At the public hearing Mr O'Regan QC addressed the suggestion that the power was being used where persons had already been charged. Mr O'Regan stated:

> *I think that both Mr Robertson and Mr Terry O'Gorman criticised the Commission for exercising its coercive powers with respect to investigative hearings after people had been charged. The situation is that that has been done in only six of 9 000 cases, and it has been done only in exceptional circumstances where the evidence indicated, or there was a suggestion, that attempts were being made by persons associated with the investigation to abuse the process of the court by falsifying evidence and things of that sort. That is a power of last resort. It is certainly not one exercised routinely. I accept that that sort of thing should happen only rarely.*

The Commission's supplementary submission provided further detail in respect of when the Commission's investigative hearing process had been used in these circumstances:

> *Of the cases in which investigative hearings have been held, there have been very few in which criminal proceedings were pending. In those few cases, there have been exceptional reasons justifying the hearing being conducted:*
>
> · *In one case, witnesses, against whom criminal proceedings had been commenced, approached the Commission because they wanted to give information about an alleged murder and other serious offences. The Commission convened a private investigative hearing so that they could be examined after claiming privilege thereby ensuring that those proceedings would not be jeopardised. Those hearings were extended after the Commission obtained information that the witnesses' approach to the Commission was part of a conspiracy to pervert the course of justice by falsely accusing another person of murder and other serious offences.*
>
> · *In two cases, a small number of witnesses could not be summonsed prior to the laying of charges because of the covert nature of the investigation.*
>
> · *In three or four other cases the Commission conducted hearings where there was information suggesting that police officers had fabricated evidence which was to be used in pending court proceedings against accused persons. Such hearings resulted in the Director of Prosecutions or the Police Service withdrawing the charges against those accused persons.*

Conclusion

There is currently insufficient evidence before the Committee to support assertions that have been made that the investigative hearing process has been used in an inappropriate manner by the Commission. However, throughout its review the Committee has taken into account the diverse and constant criticism this power.

(ii) Derivative Use

A number of the submissions received suggested that the protection afforded by s.96 of the Act

was insufficient, as that protection only afforded use immunity and did not give derivative use immunity.

The Queensland Council for Civil Liberties correctly pointed out that the protection afforded by s. 96 is dependant upon the person objecting to the provision of that evidence and that:

> *Whilst the answers given by a person under compulsion are not directly useable against a person, there is nothing to stop the Commission from using those answers to gather other materials which latter materials can be used against the person under compulsion.*
>
> *While it is true that the evidence given by a witness in an investigative hearing cannot be used directly against them, this apparent protection against self-incrimination is of only very limited value because of the derivative use to which the Criminal Justice Commission can put of the information compulsorily gained during such investigative hearings.*

Other submissions made similar references to the limits of the protection.

Authors in other jurisdictions have criticised the absence of derivative use immunity in relation to the hearings of other bodies such as the NSW ICAC (Roser, 1992:241-242).

Whilst the Committee appreciates the concerns expressed in relation to the absence of derivative use protection in the Act, the Committee is not convinced that a sufficient case has been established to cause a change in the Act. In taking this view the Committee is conscious of other safeguards that it has recommended later in this report.

(iii) Non-Publication Orders

The Queensland Council for Civil Liberties submitted that non-publication orders issued by the Commission in respect of particular inquiries caused considerable difficulties. In particular, the Council submitted that it is extraordinary that lawyers cannot legitimately speak to other lawyers about the conduct of a case.

The Queensland Police Union of Employees also submitted that there were difficulties with non-publication orders. At the public hearing Mr J O'Gorman stated:

> *There are problems with the secrecy provisions at investigative hearings. People who go to investigative hearings are not able to tell anyone that they have been there. The difficulty with that situation is illustrated by the fact that, when you are subpoenaed to go there, it is reasonable to believe that you are going to tell somebody that you have a subpoena to attend a CJC investigative hearing, because it is a fairly serious incident in anyone's life to get a subpoena to attend an investigative hearing at the CJC. It is unreasonable to expect that you are not going to tell somebody that you think you might have a little problem because you have to go to the CJC for an investigative hearing. Once you have gone there, you are then told that you cannot discuss with anybody anything that has been spoken of there, and you are not to tell anybody that you have actually attended. It is impossible in some circumstances to honestly comply with that direction.*
>
> *I should expand on that in another minor way. Often a police officer is required to attend such a hearing while on duty. Obviously, there are a lot of patrol logs or duty logs at stations where police officers have to account for their time. If you go to an investigative hearing and you are missing for three or four hours, I am at a loss to know what you put on your duty log as to where you have been for those three or four*

hours if you are not allowed to say you have been to the CJC. Failure to comply with the Commissioner's instructions in completing duty logs is a breach of discipline.

The Queensland Law Society also criticised non-publication orders:

A related matter of concern is the use of Section 3.20 dealing with the prohibition of publication of evidence in investigative hearings.

In the scenario described above, what is frequently occurring is that the presiding member at an investigative makes a prohibition order preventing the person who is being questioned at an investigative hearing from even mentioning that he was present at an investigative hearing, let alone telling any person the questions he was asked or the answers he gave.

However, such prohibition orders are noteworthy for the fact that they are expressly declared not to apply to any person or group that might at the time of the making of the prohibition order be connected with the prosecution or law enforcement side of the equation.

As the Commission correctly pointed out, there are a number of legitimate reasons for the issue of non-publication orders. These include preserving the integrity of the investigation and the protection of a person's reputation. The Committee concurs with the Commission that the effectiveness of the Commission's hearing power would be substantially undermined if witnesses or their lawyers were allowed to discuss the evidence with others. There is also a potential for information, even inadvertently to be disclosed. Non-publication orders no doubt appear foreign to most lawyers. However, it must always be borne in mind that the CJC is not a court and its hearings are not judicial proceedings which bring about final determinations.

Section 88 of the Act provides:

The Commission may, by order, prohibit the publication of any of the following matters if it considers that publication of the matter would be unfair to a person or contrary to the public interest -

(a) the fact that a person has given, or may give, evidence before the Commission;

(b) information that may help to identify a person who has given, or may give, evidence before the Commission;

(c) evidence given before the Commission;

(d) the contents of, or a summary of, a record-

(i) produced to the Commission; or
(ii) seized under a warrant issued under this Act; or
(iii) produced to a person during a Commission hearing;

(e) a description of a thing-

(i) produced to the Commission; or
(ii) seized under a warrant issued under this Act; or
(iii) produced to a person during a Commission hearing.

The Commission submitted to the previous Parliamentary Committee that s.3.20 [s.88] of the Act should be repealed and replaced with a new section:

> ***3.20*** *Prohibition of publication of evidence. The Commission may direct that-*
>
> *(a) any evidence given before it; or*
>
> *(b) the contents or summary of any record, or a description of any thing produced to the Commission or seized under a warrant issued under this Act; or*
>
> *(c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified; or*
>
> *(d) the fact that any person has given or may be about to give evidence at a hearing,*
>
> *shall not be published if, in its opinion, publication thereof would be unfair or contrary to the public interest.*

The previous Committee's report no. 13 recommendation no. 29 stated:

> *The Committee endorses the recommendation of the Criminal Justice Commission that s.3.20 [s.88] of the Criminal Justice Act 1989-1991 be repealed and replaced by a new s.3.10 in the terms suggested by the Commission as follows:*
>
> *The Commission may direct that-*
>
> *(a) any evidence given before it; or*
>
> *(b) the contents or summary of any record, or a description of any thing produced to the Commission or seized under a warrant issued under the Act; or*
>
> *(c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified; or*
>
> *(d) the fact that any person has given or may be about to give evidence at a hearing, shall not be published if, in its opinion, publication thereof would be unfair or contrary to the public interest.*

Conclusion

The Parliamentary Committee appreciates that non-publication orders may in some cases be necessary, particularly to prevent the publication of information which may be adverse to witnesses or persons under investigation. Non-publication orders may also be necessary to ensure the integrity of investigations being undertaken.

However, the Committee has difficulties with the proposition that employees are not able to inform their employers that they have attended an investigative hearing at the Commission. As this section currently stands persons who complain to the Committee about the conduct of the Commission in any investigation which has a blanket non-publication order may commit an offence against the Act by informing the Committee of the details of that hearing.

Recommendation

The Committee endorses the previous Committee's recommendation no. 29 that the current s.88 of the Act be repealed and replaced in the terms suggested by the previous Committee. However, the Committee recommends the insertion of a s.88(2) which will provide:

> **(2) (i) Unless specifically stated, any non-publication order made by the Commission will not operate to prevent any person called before the Commission from informing that persons employer of the fact that that person was called before an investigative hearing;**
>
> **(ii) Any non-publication order made by the Commission will not operate to prevent any person called before the Commission from making a submission to the Parliamentary Criminal Justice Committee about the conduct of the Commission's investigation.**

(iv) Insufficient Information

A number of submissions argued that there was general unfairness to witnesses who attended at investigative hearings because the witnesses were not provided with sufficient information.

Mr John O'Gorman for the Police Union submitted:

> *We believe that people who are witnesses at an investigative hearing, as distinct from people under investigation, have a right to be clearly told in what capacity they have been subpoenaed to attend an investigative hearing. There are a large number of examples where police officers have been contacted by telephone or served with a subpoena to attend an investigative hearing and have absolutely no idea why they are going there, in what capacity—whether it is as a suspect or a witness—or what the matter under investigation is. I will clarify that last statement. Of recent times especially, the matter under investigation has been outlined, but you have no idea whether you are going there as a potential suspect or as a witness.*

Mr John Jerrard QC, on behalf of the Queensland Bar Association, referred to similar concerns expressed by members of the Association in respect the investigative hearings procedure:

> *I should perhaps immediately express those of the Bar Association that have been communicated to me—that is, a number of members of our profession have expressed concern about the manner in which the coercive powers of which you have just been speaking have been exercised, particularly when citizens are given summonses to appear and answer questions. The nature of the inquiry being conducted or its purpose is not really disclosed and it is extremely difficult for barristers to advise their clients as to their rights or lack of them and to advise upon whether any challenge can be made to the powers being exercised, simply because of an absence of information. It may be that in the course of time this can be overcome by the development of some protocols between the Bar Association and the Law Society on the one hand and the authority exercising those powers on the other hand, as has happened with search warrants. At the moment, our members are complaining that they fear people they represent do not really know what they are in for, why they are there, and cannot really be advised.*

Conclusion

In the view of the Parliamentary Committee it appears appropriate that, in the interest of fairness, witnesses called before an investigative hearing be informed as to the general nature of the hearing or of allegations made against them. However, it is not necessary that attendees be provided with the minutia of evidence previously presented or anticipated to be presented. Further, the Committee is also of the view that it is not necessary for the witnesses to have access to all documentation relevant to the investigation.

(v) The Power is Not Reviewable

A number of written and oral submissions made to the Parliamentary Committee described the investigative hearing power of the Commission as being effectively not reviewable.

Section 34 of the Act provides that a person may seek judicial review of the Official Misconduct Division's activities:

> ***34.*** *A person who claims -*
>
> *(a) that an investigation by the Official Misconduct Division is being conducted unfairly;*
>
> *or*
>
> *(b) that the complaint or information on which an investigation by the Official Misconduct Division is being, or is about to be, conducted does not warrant an investigation,*
>
> *may make application to a Judge of the Supreme Court for an order in the nature of a mandatory or restrictive injunction addressed to the Director of the Official Misconduct Division.*

Section 120(1) of the Act provides remedies available to a successful applicant:

> ***120.(1)*** *If the Judge who hears the matter of an application under section 34 is satisfied as to the matter claimed by the applicant, he may, by his order -*
>
> *(a) require the Director of the Official Misconduct Division to conduct, and cause to be conducted, the investigation in question in accordance with guidelines specified in the order;*
>
> *or, as the case may require,*
>
> *(b) direct the Director of the Official Misconduct Division to cease, or, as the case may be, to not proceed with, an investigation on the complaint or information to which the application relates.*

However, s.120(2) provides limitations upon the information which may be sought by the applicant from the CJC:

> ***(2)*** *In proceedings on an application under section 34, made on the ground that any information or complaint cannot be believed, the applicant is not entitled to be provided by, or on behalf of, the Commission with particulars of the information or complaint or of the source thereof.*

In addition, s.143 provides that the Chairperson of the Commission can issue a certificate which, in the absence of evidence to the contrary, is conclusive evidence of the matters contained therein:

> **Proof of Commission actions.**
>
> ***s.143*** *Where in proceedings before any court or tribunal it is relevant to prove -*
>
> *(a) a matter relevant to an investigation by the Commission or the Commission's operations;*
>
> *(b) the taking of a step by a person purporting to act in so doing under authority conferred by this Act;*
>
> *(c) the purpose for which an act was done, or omission made, by a person purporting to act in so doing for the purposes of the Commission,*
>
> *a certificate purporting to be that of the Chairman relating to such proof shall be evidence and, in the absence of evidence to the contrary, conclusive evidence of the matters contained therein.*

The recent decision of the Queensland Court of Appeal in *Kolovos v. O'Regan* (unreported Appeal No. 198 of 1993 delivered on 13 May 1994) provides an example of how s.120(2) and s.143 combine to defeat the ability of the CJC to be effectively reviewed on these types of issues. That case has probably been the catalyst for much of the criticism that the CJC is not reviewable. Therefore, it is appropriate that this decision is given some attention in the Committee's review.

The appellant in that case was charged some years before with having attempted to murder Robert Gordon McDermott, as well as the unlawful use of a motor vehicle and the unlawful arson of that vehicle. At the committal the magistrate found that there was insufficient evidence to put the appellant on his trial and the appellant was discharged. On 17 June 1993 the Chairman of the CJC, Mr O'Regan QC, directed the Official Misconduct Division to conduct an investigation into:

> *the circumstances surrounding the attempted murder of Robert Gordon McDermott on 6 March 1986 and the circumstances surrounding the theft and subsequent arson of a ... motor vehicle ... previously the property of Beverley Young and the vehicle used in connection with the attack upon McDermott.*

The appellant was subsequently summonsed before an investigative hearing of the Commission to give evidence. He attended, however, before he gave evidence his legal representatives challenged the investigator's rights to ask the appellant any questions. That challenge made before de Jersey J. (*Kolovos v. O'Regan* (unreported) OS No 757 of 1993) failed because the appellant had not discharged the onus of proof upon him to show that the CJC was acting outside its jurisdiction, or that the CJC was not acting in a bona fide manner. The appellant had alleged that the CJC's jurisdiction to investigate "major crime" was limited to the investigation of matters regarding aspects of the criminal justice system in a wider sense, and not to particular matters. His Honour found that there was no reason to conclude that the particular investigation did not fall within the CJC's responsibility to investigate "organised or major crime" or that the CJC was acting in a non *bona fide* manner.

During the course of his judgment his Honour noted that on a prima facie level the case did raise questions. However, on a strict evidentiary basis the applicant had failed to disprove the onus of proof. At this point it must be noted that the applicant was not able to force the CJC to disclose material which would shed light on the reasons for the decision.

The appellant then applied to the Court of Appeal to have the Chairman's decision to hold the investigation set aside and/or order the Commission not to proceed with the investigation.

The Court of Appeal also refused relief and dismissed the appeal on the basis that the appellant had failed to discharge the onus of proof required.

The Court, during the course of its judgment, made the following comments:

> *"The Chairman's opinions that the investigation concerns "major crime" and cannot effectively or appropriately conducted by the Police Service, or by another agency of the State Government, are not beyond judicial scrutiny. And there would be no foundation sufficient to sustain the investigation as a lawful exercise of the powers of the Commission were it made to appear, for example, that the Chairman had not addressed matters which the legislation makes necessary to such an investigation, that he had taken into account some extraneous consideration or had ignored a material concern, or that no grounds existed to support his conclusions ... In this case, however, there is no evidence to show that an error influenced the Chairman's conclusions ... It suffices to observe that the evidence before us does not reveal any reason to doubt the Chairman's opinion that the investigation is of "major crime".*
>
> *... We do not know why the Chairman considered that neither the Police Service or any other State agency could effectively or appropriately undertake the investigation. However, a transcript of proceedings in the Official Misconduct Division records the investigator's telling the appellant's solicitor that, since the committal hearing, the Commission had received "additional information" on which it had relied in deciding that an investigation by the Chairman was desirable."*

This judgment highlights the difficulties in challenging an investigation by the Commission.

Neither the appellant nor the court were aware of the facts upon which the Commission had acted.

The Court appears to take at face value the assertion made at the investigative hearing that the Commission had received "additional information" which it had relied upon in deciding the issue. No attempt was made to look behind the reasons for the decision. Indeed, s.120(2) would appear to preclude such an examination.

How could the court really determine whether the Chairman had considered unrelated matters, or that CJC was acting in a *mal fide* manner?

This case is not the first time that such a discretion by the Chairman, or his delegate, has been challenged and failed because the onus of proof has not been displaced in circumstances where the applicant has not been informed of the basis of the decision (see In Re Bryant).

At the public hearing Mr Shane Herbert QC was strongly critical of the drafting of the *Criminal Justice Act* which resulted in the *Kolovos* decision:

> *In Queensland, there is a tendency to think that the right to silence is not for real men; that we are all wimps if we talk about these things—for example, the right to not have your home trespassed. But these things are real, as anybody who is investigated, for example, for travel expenses could attest, as could any of the hundreds of citizens who have been dragged into that place for no proper reason, they would say. These are real things. If you want to challenge the holding of one of these extraordinary draconian hearings, you have a right to do so under section 34 of the Act.*

You can head off to the Supreme Court and complain that an investigation that is being conducted is either unfair or is not warranted. In fact, the exact language of the section is that the complaint or information on which an investigation by the division is being conducted does not warrant investigation. It seems like a useful method of controlling this body. It seems to be a provision that we can all rely upon to provide some judicial review of this outfit. If it starts to do things that are not justified, we can do something about it—the Supreme Court can do something about it. The trouble is that the draftsman was not for real about this.
Firstly, if you want to make out a case that the complaint or information does not warrant an investigation, it is helpful if you can tell the court what the complaint or information is, because you bear the onus of proof. It is not merely a matter of costs—although that is terribly important, as Mr O'Gorman says—it is a matter of rights. You first have to prove that the complaint or information is this or that. You have to be able to tell the court what it is. The CJC will not tell you; that is its basic approach.

If you go to court and say, "Look, Your Honour, we say that this does not warrant investigation. We do not know why we are here." The judge would then say, "How would you know?" You would then have to say, "We don't know. We can't be told anything. The CJC will not tell us." The judge would then say, "Well, you can't prove your case."

That is especially so because of the provisions of section 120 (2) of the Act, which states that in proceedings on an application under section 34 made on the ground that any information or complaint does not warrant an investigation—that is the language of section 34—the applicant, the citizen, is not entitled to be provided by or on behalf of the Commission with particulars of the information or complaint or the source of the information or complaint. This is illusory; this judicial review is a joke.The legislation creates it and then completely removes it.

Whoever drafted this thing must have known it, because the language of section 120 is so absolutely precise. It picks up the precise language of section 34. It follows a provision that someone like me reviewing this Act—or this Bill as it was 48 hours before it was to be passed—might miss. Section 120 (1) provides for all of the wonderful remedies that a judge can give you when you apply for judicial review. It is subsection 2 that tells you that you cannot do it.

This is so because of the pervasive view on the part of the CJC that to let any information out would prejudice the investigation. To tell the person, the subject of the investigation—that is, what he or she is being investigated about—seems to be something that is sacred. To let that out of the bag might makes things worse for the investigation. The trouble is that it often might be able to be immediately answered. It might be that the person under investigation could say, "Look, that is a nonsense and the person telling you that is mentally ill", but, no, you are not to be told these things. That is a structural problem.

The difficulty is that to say that there is a problem with this is almost taken as some criticism of the people at the CJC. In the end, this legislation provides no protection, and the judicial review that it creates is illusory. Where it involves the type of example under section 34 that I mentioned, the Act itself conspires to defeat it.

The submission from the Criminal Law Association of Queensland is typical of the criticism:

This concern about the inappropriate use of its wide coercive powers is further highlighted when it is noted that the "certification" by the Commission that the investigation is into major and/or organised crime or is an appropriate use of powers of the Criminal Justice Commission is not effectively reviewable. Recent

> *decisions of the Supreme Court have made it clear that the Supreme Court will not interfere unless the applicant, that is the person the subject of the summons to give evidence, is able to provide to the satisfaction of the Court that the certification of the Chairman as to the appropriateness of the investigation, is wrong. The difficulty with that is that the Commission with its secrecy provisions, does not provide sufficient information surrounding the investigation for any proper argument to be mounted by any applicant to the Supreme Court. The secrecy provisions of the Criminal Justice Commission make it impossible for any applicant to discharge that onus before the Supreme Court. The decision of the Criminal Justice Commission to embark upon an investigation is therefore arguably not presently effectively reviewable by the Supreme Court.*

The Committee is acutely conscious that at the time the Criminal Justice Bill was being considered there was a clear understanding that the Commission would at all times be subject to Judicial Review (Hansard 18/10/1989:1630). However, the *Kolovos* decision clearly indicates that the protection apparently afforded by the Criminal Justice Act is in practice quite illusory.

3.3.5 Reforms

A number of oral and written submissions suggested that reforms to the investigative hearing power of the Commission were necessary.

The Queensland Police Union submitted that the power should only be used for the investigation of major and/or organised crime.

Conversely, the Queensland Law Society expressed the view that the power should only be used for the investigation of official misconduct. Mr John Robertson, representing the Law Society at the public hearings gave the following explanation of the Society's objection to the use of the investigative hearing process with respect to organised and major crime as opposed to the investigation of official misconduct:

> ***Dr WATSON:*** *... The second distinction that you seem to be making is that the use of those special powers—coercive powers—was okay when you were looking at official corruption, but questionable when looking at organised crime.*
> ***Mr Robertson:*** *Official misconduct.*
> ***Dr WATSON:*** *I am sorry, official misconduct. Is that a distinction that you drew?*
> ***Mr Robertson:*** *Yes, it is.*
> ***Dr WATSON:*** *Can you just elaborate on why you thought that?*
> ***Mr Robertson:*** *I will adopt Commissioner Fitzgerald's argument, that is, official misconduct investigations do not always lead to disciplinary charges. I am not cognisant of the statistics, but the use of that power has a preventative aspect to it as well. There may be official misconduct going on in a public sector area—a Government department—but even using those coercive powers, insufficient evidence can be gathered to bring disciplinary charges. However, I believe that if you make a distinction between the investigation of misconduct and criminal activity, that is a valid distinction to make because the law itself makes that distinction.*
> *I will give you an example. In relation to disciplinary proceedings brought against professional persons that are in the nature of misconduct in a professional sense, the law accepts that in many cases the rules of evidence do not apply. It accepts that the onus of proof is much lower than the criminal standard. It is for that reason that the Law Society makes that distinction between using those coercive powers in relation to investigation of official misconduct and criminal activity.*

Conclusion

The Committee believes that the power to hold an investigative hearing is necessary in respect of both official misconduct and organised crime.

However, the Committee believes that the power should be subject to approval, and on terms set by the judiciary as recommended by Fitzgerald QC.

The Council for Civil Liberties submitted that:

> *The investigative hearing concept, applied as it is with powers of compulsion which override the fundamental protection against self-incrimination, needs a basic re-think.*

Although the Council submitted that there was a strong case for the abolition of the investigative hearing process, the Council stated that at the very least, the investigative hearing procedures should be subject to qualifications similar to those that exist in relation to telephone interceptions, and that the holding of an investigative hearing should be subject to approval first being obtained from a Supreme Court Judge.

Mr Herbert QC made the following comments in respect of investigative hearings:

> ***Mr Herbert:*** *... In the end, the submission I make to you is this: that such things as investigative hearings should occur only in what we would say are exceptional circumstances. My personal view—and I do not want to associate anyone else with it—is that at the end of the day we should reverse the onus of proof and require the CJC to justify in court these investigative hearings. One cannot do that with the stroke of a pen. Some consideration has to be given to questions of security and the efficacy of the investigation itself and so on, but, fundamentally, I think that we should reverse the onus of proof and say simply this: if you are going to embark upon widespread infringement of the rights of people who are presumptively innocent and free, then you will be required to justify it, instead of the situation now, where you are the victim of remarkable and draconian powers, a body that is by law not compelled to tell you a single thing, and you then try to take it to court against what Mr O'Gorman says are the best QCs in the State with the risk of costs, when you bear the onus and you do not even have the right to be told what you are being investigated about. It is almost like the experience that Joseph K. went through in The Trial, the book by Kafka. You do not know what is going on; you do not know what it is about; there is no-one you can go to for a review of it; and at the end of it you get stabbed between the shoulder blades. That is perhaps dramatic language, but that really is the result for many people or the view that many people have of these investigative hearings. They go too far; they are held too often.*
>
> *Naturally, if you are in a position to receive complaints, you are going to think the complaint you receive is an important one; you investigate it, and therefore it is justified, and so on. Everybody can justify some particular concern, but what is given here are not minor concerns—not that someone is flogging too many tins of paint from the Government panel beating shop, or something like that. What is given at these investigative hearings are remarkable powers and they are powers that nobody in this room would think ought to be exercised against them. There is no particular reason to assume that those who are targeted should have them exercised against them either, and the purpose of my submission is to say that those who want to exercise them ought to be required to justify rather than the citizen always trying to defeat this body.*

At the public hearing the Committee Chairman read to Mr Herbert the recommendation of

Fitzgerald QC concerning investigative hearings, to which Mr Herbert responded:

> ***Mr Herbert:*** *Mr Chairman could I say this—the result has been, contrary to what Fitzgerald recommended, that we have to rely upon paradoxically, once again, the judgment of individuals. Fitzgerald recommended judicial review but also recommended, as I have just learned from you, Mr Chairman, that such a hearing should not happen without judicial leave. Instead, it is the contrary and you cannot stop them. You cannot get judicial leave to stop these things. Now, I would not suggest for a moment that we should not trust people who are there now, particularly like Rob O'Regan or Mark Le Grand, for heaven's sake—I would not suggest that for a moment—but to be blunt, I do not trust anyone and I do not think we should trust anyone to be exercising powers of this kind when they are unreviewable and in practice unreviewed. When someone goes to Rob O'Regan with this beaut idea, "Let's have an investigative hearing about this, Mr O'Regan, this is dreadful what they are doing out there. They are getting $2 out of every raffle that the West End State School puts on." You know, is there someone there in the office arguing strongly the case against having an investigative hearing? Well, there is not; it is all one way. There is someone going and saying, "Let's have one", and then, "Yes, sure." Whoever suggests it presents the material that they want presented and so on. As the Chairman I think points out, what happens in practice is the opposite of what was intended.*

Mr John O'Gorman, representing the Queensland Police Union, said that if it could be justified to the District Court, or a member of the judiciary, that an investigative hearing was necessary, that would go a considerable way to addressing the Union's concerns about investigative hearings.

The Queensland Justice Association submitted that the exercise of the power should be subject to the approval of the Committee on a case by case basis.

At the public hearing, the Chairman of the Commission, Mr O'Regan QC, suggested that the CJC would find no problem with the requirement for judicial approval:

> ***Mr O'Regan:*** *It is true that the Fitzgerald report itself requires or contemplates that there would be judicial approval before an investigative hearing. That requirement, however, has not been translated into legislative form in the Criminal Justice Act, as members of the Committee would well know. What the Commission does is try to adhere to the provisions of the Act and to the spirit of the Fitzgerald report. It seems to me that in circumstances where there is a discontinuity between one and the other, our legal obligation is to conform to the Act. That is what we try to do. It is a bit tough being criticised for not complying with the Fitzgerald report when you are complying with the fruit of the Fitzgerald report, which is the Criminal Justice Act.*
> ***The CHAIRMAN:*** *Can I just clarify, Mr O'Regan? I do not think that in any of the comments I made I criticised the CJC for not complying with the Act. I was pointing out and asking questions as to whether there were inconsistencies. You will recall I did that yesterday in relation to the section within the report which suggested that the parliamentary committee have the power to direct the CJC. That is not manifested in the report, but I was asking questions yesterday as to your view on that. As part of the overview process, it obviously means that we may revisit some of those recommendations which did not find their way into the Act.*
> ***Mr O'Regan:*** *Yes, I understand that, Mr Chairman. Thank you.*

Conclusion

When Fitzgerald QC recommended that the CJC have the power to conduct investigative

hearings, he clearly intended that such hearings would be subject to judicial approval. The *Criminal Justice Act* does not reflect the recommendations of Fitzgerald QC in this respect. The Committee recognises that these hearings are necessary, from time to time, to enable the Commission to fulfil its various functions. However, the Committee is of the opinion that the power to hold investigative hearings should be subject to, and on terms approved by the judiciary.

Recommendation

The Committee recommends that the *Criminal Justice Act 1989* be amended to reflect the recommendations contained within the Fitzgerald Report that the Criminal Justice Commission's power to hold an investigate hearing be subject to, and on terms approved by, a District or Supreme Court Judge.

Further, the Committee recommends that an application by the Commission for approval to conduct an investigative hearing may be made ex parte and in-camera. Further, the Committee recommends that a person affected by the operation of an investigative hearing, either as a witness or as the subject of such a hearing, be enable to apply to the Court which approved the hearing for a variation of the terms of that hearing.

3.3.6 Public Hearings v Private Hearings

The Queensland Council for Civil Liberties submitted that the public interest type hearings which have been conducted by the Commission, such as the inquiry into the jury of Mr Johannes Bjelke-Petersen, have performed an invaluable role in publicising shortcomings in the criminal justice system. However, the Council noted that these types of hearings have caused irretrievable damage to the reputation of some persons. The Council stated that it was currently satisfied with the procedures for public hearings into public interest type inquiries.

An important issue is whether, and when, hearings conducted by the Commission should be held in public.

Mr Victor Sirle, who was a witness in the inquiry into the selection of the jury for the trial of Sir Johannes Bjelke-Petersen, submitted to the Committee that there were inconsistent approaches taken by the CJC in deciding which investigative hearings are held in private and which are held in public:

> *What is obvious is that the CJC operates in an arbitrary manner in deciding if hearings should be held in private. It acts politically, even if not in a partisan manner, because the decision is at times based on the degree of public interest in matters of a political nature. ... it would seem necessary in the interest of procedural fairness and natural justice that all hearings of the criminal misconduct unit be done in private.*

The Committee notes that the ability of the CJC to decide whether hearings are held in public or private, even according to the presumptions in the Act, creates the potential for criticism that the Commission is acting in a partisan manner. This in turn effects the public perceptions about the CJC's independence.

Further, the Committee notes that public hearings are likely to cost witnesses and the community more than private hearings. Public hearings are also liable to take longer to finalise than private hearings.

The Act currently provides for a presumption to hold hearings in public. Section 90 of the Act provides:

> ***90. (1)*** *A hearing of the Commission is open to the public unless the Commission orders, whether before or during the hearing, that it be closed to the public.*
>
> ***(2)*** *The Committee may order that the hearing be closed to the public only if the Commission considers an open hearing would be unfair to a person or contrary to the public interest, having regard to-*
>
> *(a) the subject matter of the hearing; or*
>
> *(b) the nature of the evidence expected to be given.*
>
> ***(3)*** *The Commission may order that the hearing be closed to the public while it considers whether to make an order under subsection (2).*
>
> ***(4)*** *If the Commission orders that a hearing be closed to the public, it may give a direction about who may be present at the hearing.*
>
> ***(5)*** *A person must not knowingly contravene a direction under subsection (4).*
>
> *Maximum penalty - 85 penalty units or imprisonment for 1 year.*
>
> ***(6)*** *In this section - "**hearing**" includes part of a hearing.*

Conclusion

The Committee believes that the injustice that may be caused to witnesses, or those under suspicion, through the use of the investigative hearing power is so great that all investigative hearings should *prima facie* be conducted in-camera unless the CJC or individuals affected by the hearing can establish to the Court which gives approval for the hearing in accordance with the Committee's previous recommendation, that the public interest outweighs the risk of harm to individuals.

Recommendation

The Committee recommends that s.90 of the *Criminal Justice Act 1989* be amended to reflect that hearings of the Commission are to be conducted in private unless the Commission is able to establish to the Court approving the hearing that the hearing would not be unfair to any person or that to hold the hearing in private would be contrary to the public interest.

3.4 Other Coercive Powers

The coercive powers of the Criminal Justice Commission are found in Part III of the Criminal Justice Act - Investigations, Division 1 - powers to assist the collection or presentation of information.

The powers contained therein can be summarised as follows:

- Section 69 provides power for the Chairman to issue a notice to discover information. This power extends to any person. There is no requirement that the receiver of the notice be employed in a unit of public administration.

- Section 70 provides power for an officer of the Commission authorised in writing by the Chairperson to enter and search premises occupied by or used by, or for the official purposes, of a unit of public administration. Power is also given to inspect, seize and remove, or copy and record or thing found therein.

- Section 71 provides that the Chairperson may make application to a judge of the Supreme Court for a warrant to enter, search and seize.

- Section 74 provides that the Chairperson may by notice summon a person to attend before the Commission and give evidence or produce a record or thing.

- Section 82 provides that the Chairperson may apply to a judge of the Supreme Court for an order approving the use of a listening device.

The Committee in Chapter 3 of Report No. 20B entitled *Report of a Review of the CJC's use of its power under section 3.1 of the Criminal Justice Act 1989 Part B - Report, Conclusions and recommendations* gave considerable attention to the Commission's coercive powers. This included the making of recommendations for amendment of the Act. In that report the Committee noted that the Act, as currently drafted, enabled the Commission to utilise its powers in respect of any of its functions and responsibilities and was not limited to its responsibilities to official misconduct and organised crime. Conclusion 1 of that report stated:

> *The Committee has decided not to recommend that the Commission's coercive powers be confined to its two investigative responsibilities, the investigation of official misconduct and the investigation of organised and major crime.*
>
> *Upon consideration the Committee has taken the view that it may be necessary for the Commission in the future to utilise this power to effectively discharge its other functions and responsibilities. However, the Committee will continue to monitor and review the Commission's use of its power in these circumstances. If it is later felt that the power is being used excessively the Committee may reconsider the matter.*

The Parliamentary Committee has not received any evidence that would suggest that its powers have been used excessively in respect of matters that could not be classified as official misconduct or organised crime.

However, after further careful consideration, the Committee has decided that considering the nature of the powers in question, the powers should be limited to those functions.

Recommendation

The Committee recommends that the Commission's coercive powers be confined to its investigative responsibilities in relation to official misconduct or organised crime.

Apart from this amendment, the Committee endorses all of its previous recommendations in report no. 20 part B

In report no. 20 part B the Committee noted the following safeguards in respect of the use of the Commission's powers, both within and external to the Act:

1. The confidentiality provision of s.75 of the Act which the Committee recommended be repealed.

2. Claims of privilege pursuant to s.77 of the Act.

3. The prohibition on notices to produce on persons charged with disciplinary offences pursuant to s.69 of the Act.

4. The limits on the use of evidence obtained once a person has claimed privilege pursuant to s.70(5) of the Act.

5. The restrictions on obtaining evidence which would reveal a secret process of manufacture pursuant to s.70 of the Act.

6. The monitoring and review role of the PCJC.

7. The ability of a person to seek relief from the supreme Court in respect of an investigation by the Commission pursuant to s.34 of the Act.

8. The watchdog role of the media.

9. The safeguard of Parliament.

However, since during the course of this review the Committee has come to the conclusion that as a result of the combined effect of:

· the Chairperson of the Commission being able to issue a certificate pursuant to s.143 of the Act;

· the confidentiality provisions of the Act; and

· s.120(2) of the Act;

the Commission is not sufficiently reviewable by the Supreme Court.

It is imperative that there be no impediment to the judicial review of the exercise of the CJC's powers.

The Fitzgerald Report noted:

> *The Official Misconduct Division will have to have some special powers in each case subject to strict judicial controls to be established by legislation.*

Later, the Report stated:

> *The activities of the Official Misconduct Division should be open to review by the judiciary on application. Public interest immunity rules, properly applied, are more than adequate safeguards for matters of secrecy or sensitivity. Judicial review should not be able to be used by the corrupt and misguided as a "window" on the Division's activities,*

but rather should act as a balance by allowing individuals affected by a specific activity to call it into question and have it impartially reviewed. There are already statutory models elsewhere for this kind of review. It may sometimes be necessary for a judge to take evidence in camera, in the absence of the applicant or to make rulings about the dissemination of evidence and other information.

The operations of the Official Misconduct Division must also be open to review by the Parliamentary Criminal Justice Committee as earlier mentioned.

It is clear that the Report was advocating judicial supervision that struck a balance between ensuring:

· that the Official Misconduct Division's powers were being exercised in an appropriate manner; and

· that the judicial process did not become an avenue for the corrupt or misguided to come into the receipt of information which could be used to hamper the investigative process.

Therefore, any amendment to the Act which enhances the judicial accountability of the use of the Commission's power must also ensure that the judicial process is not used for mischievous purposes.

The Committee believes that the balance is best struck by:

· removing the conclusive nature of the Chairman's certificate under s.143 of the Act in relation to applications pursuant to s.34; and

· amending s.120 of the Act by providing that a judge when hearing an application pursuant to s.34 may take or receive *in camera* evidence from the Commission as to the basis for the investigation and that at the time of taking such evidence the applicant, or his representatives, are not entitled to be present.

Recommendation

The Committee recommends that s.143 of the *Criminal Justice Act* be amended by providing that a certificate made under that section is not conclusive evidence in respect of an application pursuant to s.34 of the Act.

Recommendation

The Committee recommends that s.120 of the Criminal Justice Act be amended by the insertion of paragraphs (3) & (4) which provide:

(3) A judge when hearing an application pursuant to s.34 may take or receive *in camera* evidence from the Commission as to the basis for the investigation.

(3) At the time of taking evidence referred to in (3) above, the applicant, or his representatives, are not entitled to be present.

3.5 Complaints

3.5.1 The Fitzgerald Report

The need for a complaints function independent of the Police Service or other agencies of the public sector was comprehensively demonstrated by the Fitzgerald Report.

The Report stated:

> *All misconduct or suspected misconduct by police officers other than of a purely disciplinary nature should be required to be reported to an independent body. All ranks should have an obligation to make such report.*
>
> *No police officer should have a discretion whether or not to refer any allegation of police misconduct (other than of purely disciplinary significance) for investigation by the independent body.* (1989:294)

Later, the Report recommended the establishment of the Complaints Branch at the Official Misconduct Division and outlined its role:

> *The Complaints Branch of the Official Misconduct Division will be available to receive complaints of misconduct or suspected misconduct by public officials, including the police, and any other complaints against police or other public officials. It should be able to give assurances of confidentiality to informants or complainants in its discretion and on guidelines to be established. That Branch should have the discretion, subject to guidelines to be established, to:*
>
> . *dismiss frivolous or vexatious complaints summarily;*
>
> . *refer trivial or purely disciplinary matters to chief executives of departments or the Commissioner of Police to investigate and take appropriate action.*
>
> *The role of the Branch involves initially screening matters including those anonymously reported, to determine substance before referring to other agencies.*
>
> *The Commissioner of Police, on guidelines to be determined by the CJC, will be required to refer all internal or external complaints alleging misconduct by police officers to the Complaints Branch in the first place, for determination of the appropriate action to be taken in each case.*
>
> *All other chief executives of Government departments, agencies and statutory authorities will be required:*
>
> . *promptly to notify the Complaints Branch of any complaint of official misconduct or suspicion of official misconduct;*
>
> . *to comply with all written directions of the Chairman of the CJC, including transfer of responsibility for the investigation of such complaint or suspicion.* (1989:314)

In summary, it was clearly envisioned that all allegations or suspicions of misconduct, apart from minor disciplinary matters, would be referred to, and assessed by, the Complaints Section.

3.5.2 The Criminal Justice Act 1989

Division 5 of the Criminal Justice Act provides the legislative framework for the operation of the Complaints Section within the Official Misconduct Division.

Of particular importance is s.36(5) which provides that all complaints or information concerning

misconduct brought to the notice of the Commission are to be communicated to the Complaints Section. This provision should remain as it presently stands, especially in view of other recommendations to be made later in this report.

Initially, the Act did not give the Commission a discretion to determine those complaints to be investigated by the CJC and minor matters best investigated within an agency, particularly those emanating from the Police Service.

However, s.38(2) of the Act now provides that the Complaints Section does not have to investigate frivolous or vexatious complaints. Section 38(1) provides that the Complaints Section may decide not to investigate a complaint or other matter communicated to it. Section 38(3) provides that the Complaints Section may discontinue the investigation of a complaint, information or matter.

Section 38(4) provides that the Complaints Section may refer to the principal officer any complaint, information or matter which involves or may involve disciplinary action. Section 39(1) provides that it is the duty of a principal officer, when a matter is referred from the Official Misconduct Division which discloses a prima facie case of misconduct, to charge the prescribed person with misconduct, and to have the person dealt with by a Misconduct Tribunal.

Amendments to the Act have largely resolved the earlier problem. Current arrangements allow the CJC to agree specifically with the Commissioner of Police and other Chief Executives of public and local authorities to implement particular systems, methods and safeguards to manage the reporting of suspected official misconduct.

3.5.3 Structure, Resourcing and Operation

The Complaints Section is allocated approximately 50% of the resources of the Official Misconduct Division, which represents approximately 25% of the Commission's total resources.

The Complaints Section receives between 180 and 230 complaints per month. Approximately 70% or these complaints are in relation to the Queensland Police Service, 12% involve State agencies, and 6% relate to local authorities. Approximately 70% of all complaints are dealt with within one month, and some 10% to 20% of complaints in these categories are substantiated following the investigative process.

The Complaints Section comprises five functional units:

- the Complaints Registry
- the Assessment Unit
- the Assessment Committee
- two Complaint Investigation Teams
- the Review Unit.

Although there have been some legitimate grievances expressed about the role and operation of the complaint and investigation process in particular matters, these are in the minority given the number of complaints being referred and successfully investigated by the Commission on a daily basis.

Recently, steps have been taken in co-operation with the Police Service and the Department of Education, where a larger volume of complaints were originating, to implement improved

administrative processes. These processes ensure that the CJC is informed of the incidence of problems. However, for less serious allegations the investigation and disciplinary action process occur within the particular agency. The CJC still conducts a review of these matters to monitor consistency and quality.

This is considered to be the preferred way to permit agencies to provide exemption, rather than to give a blanket exemption from reporting suspicions of misconduct of a minor nature.

The recent enactment of the *Whistleblowers Protection Act 1994* ensures that those people who raise legitimate complaints with the appropriate authorities are not subjected to punitive action within their organisation or by other parties with vested interests.

One interesting example of the successful impact of the complaints function, is the trend in substantiated allegations of assaults by serving police officers. Over the four year period, the incidence of these complaints has grown slightly. However, most importantly, the nature of complaints has changed dramatically. In the twelve month period immediately following the establishment of the Complaints Section, many of the substantiated complaints involved severe assaults in circumstances where members of the community were in police custody.

This problem has been virtually eliminated. This is a most significant result.

Substantiated complaints of assault now involve more understandable circumstances where police are involved in provocative, confrontationist and violent situations. It will now be up to the CJC and the Police Service to mount joint educative and training programs to better equip police officers to deal with these situations. Because of the nature and frequency of violent incidents encountered by police during their duties, it is likely that allegations arising from this type of incident will continue to account for a high proportion of complaints received.

Another significant impact of the Commission of Inquiry's findings was the introduction of video taping of evidence. This initiative, which occurred as a result of action by the Police Service, reinforced by the CJC complaints process, provides reassurance that the practice of verballing, which was widespread, has now been virtually eliminated from complaint allegations.

The Parliamentary Committee monitors the complaints process by receiving complaints directly from aggrieved persons or their elected representatives and taking these up with the CJC. On occasions the Committee requests the Commission to undertake further investigations, or reconsider its decision not to investigate. However, the Committee has no power to require the Commission to undertake an investigation.

Conclusion

The Committee considers the overall achievements of the Complaints Division to be substantial. The Committee believes that the section is operating in an efficient manner and is achieving the objectives envisaged by Fitzgerald QC.

Recommendation

The Committee considers it to be absolutely essential that the independent complaints process continue operating as currently constituted, as it appears to be working successfully.

3.5.4 Complaints against the Corrective Services Commission

The Jurisdiction of the CJC to investigate misconduct is limited to misconduct within a unit of public administration. The Corrective Services Commission is not a unit of public administration as defined by the Act. Therefore, the CJC has no jurisdiction to investigate complaints against the Corrective Services Commission.

At the Public Hearings Mr Terry O'Gorman on behalf of the Queensland Council for Civil Liberties made the following submission:

> *Finally, the Council would strongly contend that the Parliamentary Committee needs to look at bringing the Queensland Corrective Services Commission within the purview of the Criminal Justice Commission. It is our view that the Corrective Service Investigation Unit, which is a group of police who are seconded to the Corrective Services Commission, are simply too close to the police. They see crims as crims. There was one inquest last year that I was involved in where it was alleged by a number of people that an officer from the Corrective Service Investigation Unit stood in the fishbowl of the Arthur Gorrie Unit while a youth tried to hang himself in full view from a rafter. I refer particularly to the McNeil inquest, which was heard recently, and the coroner's decision handed down. The Corrective Services unit investigating transgressions in relation to police officers is a joke. It has absolutely no confidence in relation to complainant prisoners, and that area needs to be addressed.*

The previous Committee in report No.13 endorsed the recommendation of the Criminal Justice Commission that s.4(1) [s. 1.4] of the Criminal Justice Act 1989-1991 be amended by including in the definition of "unit of public administration" the Queensland Corrective Services Commission, so that the Act would apply to the Corrective Services Commission.

In its submission to this Committee the Commission stated:

> *The primary concern that the Commission has in relation to the specific inclusion of the Queensland Corrective Services Commission as a unit public administration, relates to the special needs and difficulties associated with the investigation of complaints of official misconduct within the State's prisons.*
>
> *These needs and difficulties are:*
>
> · *The Commission's compulsory powers are substantially nullified by the prison environment. The hierarchy among serving prisoners largely centres upon gangs or groups led or influenced by long-term, violent and hardened criminals. Hardened criminals serving long terms of imprisonment are not persuaded to tell the truth by the mere threat of an additional short term of imprisonment if they are found in contempt of the Commission.*
>
> · *Effective investigation of crimes committed in prison require an understanding of prison practices, procedures and methodologies. Investing the Commission with jurisdiction whereby it would operate from afar would deny investigators the necessary experience and expertise to successfully undertake such investigations. The current arrangements whereby investigations within the prison system are undertaken by a specialist unit composed of QPS members should not lightly be put aside.*
>
> · *The necessary experience and expertise also presupposes a knowledge of who is who in the prison system, that is, who are the "top dogs" among the prisoners and who are the suspect prison officers. Such knowledge could*

> *only be gained from an intimate knowledge of the prison system stemming from the co-location of investigators and the ability to "plug into" prison intelligence both formally through the prison intelligence service and informally through recruiting confidential informants among prisoners and prison officers.*
>
> *To disband the present arrangements whereby such a specialist investigative unit exists and is reasonably effective in discharging its responsibilities and to replace that facility with the Commission with its many competing demands, without prison expertise and located at a distance would, in the Commission's strong view, act to the substantial prejudice of the investigation of official misconduct within the prison system.*

The Committee believes that the Corrective Services Commission could, in future, be subject to CJC jurisdiction. There is no doubt that if this occurs, it will present a significant challenge for the CJC.

The investigation of complaints within corrective services institutions presents special challenges requiring specific strategies, systems and processes. The Internal Investigations Unit established and operated by the Corrective Services Commission appears to already exhibit many of the essential features. However, the CJC should exercise oversight of the function to ensure proper standards of complaint lodgement, investigation and reporting are being applied.

Conclusion

The Committee believes that s.4(1) of the *Criminal Justice Act* requires amendment to include the Corrective Services Commission in the definition of a "unit of public administration".

Recommendation

The Committee recommends that s.4(1) of the *Criminal Justice Act* be amended to include the Corrective services Commission in the definition of a "unit of public administration".

3.5.5 The Use of Police Officers

A number of submissions to the Parliamentary Committee were critical of the use by the Commission of police officers seconded to the Commission to investigate allegations made against the Queensland Police Service.

There are approximately 48 seconded police investigators attached to the Commission who investigate, under the direction of a legal officer, more serious complaints against police officers.

Frequently, the Commission refers complaints that have been received concerning members of the Queensland Police Service to the Service for investigation.

The Commission's submission notes that 21% of matters are referred back to the Queensland Police Service for investigation on behalf of the Commission. However, the same paragraph notes that the investigation time to settle these "more minor matters" varies from 18 to 28 weeks depending upon the police region to which the complaint is assigned. This compares to the situation where two-thirds of complaints dealt with by the Commission are completed within four weeks of receipt.

The Commission has supported the introduction of mediation as a means of settling disputes and the introduction of an informal resolution dispute mechanism.

The Commission's submission explains the development and purpose of these programmes:

> *The Commission's policy is to support and enhance the disciplinary process within the QPS. It has sought to achieve this by referring minor matters back to the QPS for investigation, (subject to review of those investigations) thus fostering greater responsibility for personnel management within the QPS. As the reform process has gathered pace within the QPS, and attitudes have changed, the Commission has raised the threshold of matters being referred back so that some 21% of all complaints received are referred to the QPS for investigation.*
>
> *The Commission next introduced the mediation of complaints through the auspices of the Community Justice Program of the Attorney-General's Department. A pilot scheme was conducted in South-East Queensland for six months in 1992. Thereafter the scheme was adopted and has been progressively extended to regional areas.*
>
> *The Commission more recently introduced a further initiative jointly with the QPS involving a system of Informal Resolution which has been practised with success in the United Kingdom since the mid-1980s.*
>
> *In essence, this program devolves responsibility for dealing with minor complaints to properly trained local supervisors. It has the advantages of speed of resolution and an enhancement of the management role of line supervisors. However, it must be accompanied by the necessary training and certification together with checks on abuse through review by an outside body.*
>
> *In the United Kingdom it is estimated that up to 50% of complaints against police are dealt with in this way. Given that 70% of complaints received by the Commission are complaints against police, it has the potential to radically alter the profile of the investigation of disciplinary offences and minor misconduct.*
>
> *The potential benefits flowing from the introduction of this system are great, in particular in respect of enhanced personnel management and the saving of many thousands, perhaps tens of thousands of hours of senior investigators' time; clearly a boon to the QPS.*
>
> *Research undertaken by the Commission's Research and Co-ordination Division shows that the introduction of informal resolution has:*
>
> · *significantly reduced the amount of time required to finalise complaints of a minor nature against the police*
>
> · *markedly improved complainant satisfaction with the complaints investigation process.*

The Commission notes that the introduction of the informal resolution process has more than halved the time taken to finalise matters.

In addition, the Research and Co-ordination Division conducted a survey of complainants whose complaints had been handled formally by the QPS and those who had participated in the informal resolution process.

The survey indicated that:

- 75% of those complainants whose complaint was informally resolved said that they were very or fairly satisfied with the way the complaint was handled, compared with only 39% of those whose complaint was formally investigated.

- 51% of the informal resolution complainants said that they were very or fairly satisfied with the outcome, compared with only 26% of those whose complaint was formally investigated.

- 77% of the informal resolution complainants said that they were kept very or fairly informed during the process, compared with only 33% of those whose complaint was formally investigated.

Mr John Matthews in his submission to the Committee made the following statement:

> *The CJC has most especially failed in its duty and responsibility to investigate complaints against the Queensland Police Department.*
>
> *Recently, with a considerable degree of self satisfaction, the CJC announced at a media conference the creation of a "new" process for the investigation of complaints against police. In the same conference the CJC informed that this new process had been operating for some time. Further, the CJC took great pleasure in informing the assembled journalists that this "new" process had proved in itself to be a major success.*
>
> *Never in the long history of police corruption and abuse of police powers has so many been fooled by so little.*
>
> *This process is not "new", but is the process of "old". This new process is simply authorising police to investigate police. This was the very process which led to the abuse of police powers and police corruption that caused the formation of the Fitzgerald Inquiry.*

The Associated Mens Electoral Network Inc made a similar observation:

> *The Criminal Justice Commission announced with much fanfare the establishment of a "new" process for handling complaints against police. This "new" process was to forward all complaints made against any member of the police department to the immediate superior of the officer against whom the complaint was made. Then the investigation would be conducted by that officer's immediate superior.*
>
> *This process is not "new" as claimed by the Criminal Justice Commission, but is the process of old, whereby police would investigate police. This was one of the major problems leading up to the establishment of the Fitzgerald Inquiry.*
>
> *The process, whereby police investigated police, is the exact process which the Criminal Justice Commission was to stop - not to recommence under a new facade ...*
>
> *The method and the personnel used by the Criminal Justice Commission to investigate complaints made against police makes the Commission totally ineffective. What is worse this method and the personnel have been chosen by the Criminal Justice Commission. It is not a method forced upon the Commission by outside influences.*

> *Whilst the Criminal Justice Commission maintains its current practices, the situation is ideal for corruption to grow and fester again within the Queensland Police.*

The Fitzgerald Report never intended that all allegations against police or other public officers would be investigated by the Criminal Justice Commission. It was always envisaged that minor, purely disciplinary matters would be handled by the QPS or the relevant Department.

The Fitzgerald report stated:

> *Complaints about police misconduct vary from the trivial, such as minor discourtesies, to the grave, such as complicity in serious criminal offences. It is necessary to identify priorities and realistic objectives, so as to conserve and apply resources properly in respect of official misconduct, as for any other area of law enforcement.*
>
> *Despite difficulties of definition and areas of overlap, the law recognises a distinction between criminal offences and disciplinary offences. The latter, although called offences and punishable, are merely breaches of a disciplinary code. Tribunals which deal with disciplinary offences are administrative, not judicial.*
>
> *In a force of over 5,000 police officers there will obviously be an enormous number of disciplinary incidents. The bulk of these will not involve civilians and will never come to the attention of the public. The gravity of such incidents will range from mere inefficiency through insubordination and negligence to serious misconduct which nonetheless falls short of criminal conduct.*
>
> *The distinction between criminal and disciplinary offences ought to be maintained in relation to the police.*
>
> ...
>
> *Subject to what is said later, disciplinary matters should be dealt with by commissioned officers in a simple, streamlined way. Complaints of a purely disciplinary nature should be dealt with at regional level by the Regional Commanders or their commissioned nominee.* (1989:294)

It is also clear that Fitzgerald envisaged that police would be attached to the CJC:

> *Whatever the structure and powers of an ICAC, it has to use police. It may have police officers seconded to who work at its direction and are immune (at least theoretically) from countermand or obligation to report to the Police hierarchy, or it may use other police on an ad hoc basis, for example, in task forces on field operations. Any ICAC or equivalent body has to find and depend upon honest dedicated police officers.*
>
> ...
>
> *The Official Misconduct Division will be served by police seconded to it for appropriate finite periods and on guidelines to be established by the Criminal Justice Commission. Police serving with the Official Misconduct Division will be relieved of any obligation to obey, provide information to or account to any other police officer save police posted to the Official Misconduct Division.*
>
> *All secondments to serve in the Official Misconduct Division should be for a relatively short time of two to three years, and non-renewable save when necessary to complete particular investigations where continuity is essential.* (1989:311)

Conclusion

The Committee is of the view that it is neither desirable nor possible for all complaints against police or other public officials to be investigated by the Commission. The Fitzgerald Report did not intend that the Commission investigate all complaints against police or public officials. The Committee considers that there needs to be an efficient mechanism in place within the QPS and other government bodies to investigate and determine minor or purely disciplinary matters. The Commission should be able to refer matters of a minor or disciplinary nature to the QPS or the relevant Department. This process is an efficient manner of handling complaints and also aids the QPS and Government Departments in taking responsibility for the actions of its personnel. However, at all times the Commission must maintain a supervisory role to ensure that:

- **adequate investigations are undertaken, by properly trained officers;**
- **that complainants are being informed and are assured that their complaints are being properly processed;**
- **any disciplinary or other action that is warranted is promptly taken; and**
- **appropriate penalties are being imposed.**

Conclusion

The Committee believes that it is necessary that strictly vetted police investigators from the QPS are attached to the Commission.

3.5.6 The Queensland Police Service Disciplinary Process

After a matter has been investigated by the Official Misconduct Division, and it is considered that disciplinary action is warranted:

- the Chairman of the Commission may authorise the Director of the Official Misconduct Division to refer a report to the Commissioner of Police to cause an officer to be charged with official misconduct (s.33(2)(g)). In these circumstances the Commissioner of the QPS is obliged to take disciplinary action by charging the officer with official misconduct; or
- the Complaints Branch may refer a report to the Commissioner of the Police Service for disciplinary action if, in the opinion of the Chief Officer of the Section, the matter involves or may involve cause for taking disciplinary action other than official misconduct.

Official Misconduct is the most serious type of disciplinary offence. It requires evidence of misconduct which could amount to a criminal offence or a breach of discipline warranting dismissal.

The Commission has stated that during 1991 and 1992 it became increasingly concerned that the Misconduct Tribunals were taking an excessively legalistic view of the evidence gathered by the Commission investigations and were dismissing charges which the Commission considered could be fairly made out. The Commission also stated that the hearings were taking a long time to finalise.

As a result, the Commission began to refer more matters to the QPS for disciplinary action, despite the fact that if the allegations were proven the matters could amount to official misconduct.

However, after a period the Commission began to have concerns at some of the decisions being reached by the QPS disciplinary process.

Therefore, in mid 1993 the Commission engaged Mr Terry Frankcom, a former Stipendiary Magistrate, to review the handling of a number of disciplinary matters which had been referred to the Police Service by the Commission. It should be noted that all of these matters could have been referred to the Misconduct Tribunal. Some of the matters which made allegations of serious criminal offences were not referred to the Director of Prosecutions for his consideration.

Mr Frankcom reviewed 15 matters involving 30 disciplinary charges against 19 police officers. Mr Frankcom concluded that there was sufficient evidence to substantiate 23 of the 30 charges. However, only four of the charges were found proved against the officers by the Queensland Police Service.

In relation to the four matters that the Service found sufficient evidence existed, Mr Frankcom considered that in two of those matters the penalty imposed was manifestly inadequate.

Mr Frankcom concluded that there were 12 charges against eight police officers where he considered that justice had not been done.

Mr Frankcom observed that:

- there was inordinate delay in the resolution of the matters;
- amendments to the *Criminal Justice Act 1989* to enable the appeal by the CJC from decisions of the QPS were necessary; and
- matters of breach of discipline be referred to the Misconduct Tribunals, where the proof falls short of the Criminal standard, unless they are very minor discipline matters, which may be referred to the QPS.

In some of the cases reviewed by Mr Frankcom no reasons had been provided as to why the matters were found to be unsubstantiated.

In fairness to the Queensland Police Service it must be noted that the matters in question are relatively few in number as compared with the total number of matters referred.

Section 49 of the Act provides for an appeal from a decision concerning a disciplinary matter by an *aggrieved person* to the Misconduct Tribunals. However, it is clear that the CJC would not be an aggrieved person for the purposes of the section. Therefore, the current position is that the CJC cannot appeal from a decision in relation to a disciplinary matter.

The submission from the Queensland Civil Liberties Council stated:

> *The 1991-92 CJC Annual Report notes that there is a Review Unit within the CJC that reviews the completed investigation of minor matters of complaint against a police officer which has been referred to the Queensland Police Service for investigation.*

Whilst the existence of this Review Unit is noted, we contend that deficiencies in Queensland Police Service investigation of minor complaints which a Review Unit brings to the notice of the Queensland Police Service should be noted in the Annual Report.

Further, it is our understanding that, if a so-called minor matter of police misconduct is referred to the Queensland Police Service itself for investigation and discipline measures are taken by the Queensland Police Service, the Criminal Justice Commission cannot now take any remedial or appellate action if it considers the penalty imposed by the Police Commissioner or the Deputy Commissioner of Police is inadequate.

In this regard we refer to the Paynter allegation in 1993 when it was revealed by the press, not the CJC, that the Juvenile Aid detective who assaulted Paynter when he went to the unit for assistance was given a very lenient sentence, namely dismissal from the Service which was then effectively reversed by the dismissal being suspended.

It is our understanding that the CJC claims that it does not have the power to take an appeal against leniency of sentence in relation to this type of matter to either the Misconduct Tribunal or to the Supreme Court.

If that is the CJC's view of its current powers, then the powers need to be amended.

In the ordinary criminal law, the Attorney-General, usually at the instance of police, frequently appeals against perceived lenient sentences.

It is farcical that the CJC can apparently do nothing about lenient sentences which have been imposed by the Commissioner in respect of so-called minor matters which the CJC refers to the Commissioner for attention.

The Commission, in its supplementary submission, stated in response:

As the Committee knows, the Commission has proposed the engagement of an independent person to audit the police disciplinary process. The Commissioner of the Police Service has agreed in principle to this proposal and a draft memorandum of understanding has been prepared by the Commission and is currently being considered by the Police Service. It is envisaged that the functions of the appointee would be:

- *to review individual cases that come to attention where it is alleged that inadequate disciplinary action has been taken;*
- *at least once in each period of six months, conduct an audit review of a cross-section of matters in which disciplinary action has been taken or considered;*
- *to make recommendations to the Commission and the Police Service to address any problems which emerge during the review.*

However, the Commission has no disagreement in principle to the QCCL proposal should the PCJC consider that such a reserve power is indicated.

Conclusion

The Committee believes that the Commission should be able to refer matters of a minor or disciplinary nature to the Queensland Police Service for action. However, matters of a more serious nature, that if proved would constitute official misconduct (that is, which could result in dismissal or would constitute a criminal offence), should not be referred to the Police Service. Further, the Committee is convinced that the Commission should have the ability to appeal from decisions of the Police Service, or any other Department, pursuant to s.49 of the Act.

Recommendation

The Committee recommends that s.49 of the Act be amended to provide that the Commission may appeal from a decision in respect of a disciplinary charge of misconduct.

4. MISCONDUCT TRIBUNALS

Introduction

This chapter examines the recommendations of the Fitzgerald Report in relation to the Misconduct Tribunals and reviews the implementation of those recommendations. The Chapter then examines whether the Misconduct Tribunals are operating in a manner anticipated by the Fitzgerald Report and makes recommendations for the future of the Misconduct Tribunals.

4.1 The Fitzgerald Report

The Fitzgerald Report concluded that minor disciplinary matters concerning police should normally be dealt with at Regional level. However, it was clear that the Report intended that the more serious matters should be dealt with by an external process that did not involve the Police Service:

> *The same body which reviews decisions on police disciplinary matters should also make original administrative decisions in relation to the more serious matters of police misconduct which do not result in charge of criminal offence or, if charges are laid, are undisposed of or result in acquittal.*
>
> *All that body's original decisions should be open to judicial administrative review on the basis of want of natural justice or error of law.*
>
> *Arrangements for administrative action must accordingly be formulated which are sensitive to any pending trial.* (1989:297)

The Report criticised the then disciplinary system and emphasised the difference between the position of the police officer and other members of society:

> *Much has been said, loudly and often, by police, through their unions, about the entitlement of police officers to enjoy the same standing, protection and immunities as do other citizens.*
>
> *That concept does not, however, justify the conclusion that if a police officer is acquitted in criminal proceedings, all allegations cease to be of any relevance to that officer's continuing in the Force.*
>
> *The law, however, clearly and correctly recognises that a person may be guilty of conduct amounting to a criminal offence, although the available evidence will not support a criminal conviction. This is because of the difficult, exceptionally stringent requirements which are, properly, applied to criminal trials.*
>
> *Police and the Police Force can only be served by a disciplinary regime in which all matters affecting the suitability of any person to remain a police officer can be reviewed and in which discipline and efficiency is enforced quite independently of any other criminal or civil considerations.* (1989:294)

The Report advocated that the procedure for dealing with disciplinary matters should be uncomplicated and inquisitorial. The Report also noted that disciplinary proceedings are administrative in nature and that there is considerable difference between criminal and disciplinary proceedings:

> *The Tribunal should at least have the power to take evidence on oath, to dispense with the rules of evidence, to inform itself as it may think fit, to give directions in respect of its own proceedings, to impose sanctions including dismissal, reduction in rank, fines and forfeiture of benefits, to compel attendance of any person and the production of documents and things of all sorts and the provision of any information, and to override privilege against self-incrimination (with appropriate controls). Its process will be inquisitorial and administrative.* (1989:)

The Report also identified a need for a body to act as an avenue of appeal from disciplinary decisions:

> *A police officer aggrieved at disciplinary determination or penalty should be able to appeal to an independent body ... That body may investigate the issues afresh, and exercise the investigating officer's power to determine and punish as appropriate.*
>
> *It should not be bound by the rules of evidence and should proceed as an inquisitional administrative body. There should not be appeal from or review of its purely disciplinary review function.* (1989:295)

Fitzgerald QC recommended that as part of the Commission there would be a Misconduct Tribunal whose role would be:

> *(i) to review decisions on disciplinary matters within the Police Service; and*
>
> *(ii) to make original administrative decisions in relation to allegations of official misconduct on the part of police and such other officials as may be made subject to it by Order-in-Council.* (1989:315 and 374)

The Report also stated that the proposed Misconduct Tribunal:

> *... must be demonstrably independent of Government agencies and the Police and include people of impeccable reputation, who have the experience and training to understand the proper administration of criminal justice.*
>
> *Police representation of the Tribunal (whether by serving or former police) is both unnecessary and undesirable. When necessary, the Review Tribunal can have the advice of assessors, for example, retired commissioned rank police of good reputation, as to the significance of or implication of any particular infraction, as an aid in deciding the matter.* (1989:315)

It was envisaged by the Fitzgerald Report that each Misconduct Tribunal should be comprised of one member appointed to a given matter by the Executive Director from a panel of three appointed part-time members. The members were to be recommended by the CJC through the responsible Minister. Each member was to be qualified for appointment as a Judge of the Supreme Court or Federal Court of Australia or the Supreme Court of any other State or Territory of the Commonwealth. Each part-time appointee was not to have any other office in or in connection with the Commission.

It was also considered necessary that the Misconduct Tribunal have the ability to remit any matter to the Official Misconduct Division for investigation or further investigation.

Although the Fitzgerald Report recognised that circumstances might arise where it would be necessary to conduct a hearing with the examination of witnesses, it is clear from the Report that the Misconduct Tribunals would be conducted as an informal, non-legalistic and inquisitorial body.

In summary, the Misconduct Tribunals envisaged by the Fitzgerald Report were to have two important characteristics:

- Independence within the structure of the CJC; and

- An informal, non legalistic and inquisitorial body with original and appellate jurisdiction;

4.2 The *Criminal Justice Act 1989*

The Misconduct Tribunals are specifically the subject of Divisions 6 and 7 of Part II of the Act. Section 41 of the Act establishes the Tribunal as part of the Official Misconduct Division.

The Misconduct Tribunals have jurisdiction over the following **"prescribed persons"**:

(a) a member of the Police Service

(b) a person who holds an appointment in a unit of public administration (other than the Police Service), which appointment is declared by regulation to be subject to the jurisdiction of a Misconduct Tribunal.

The Misconduct Tribunals have:

(a) **original jurisdiction** to investigate and determine every charge of a disciplinary nature of "official misconduct", made against a "prescribed person". If such charges are found to be established the Tribunals can order disciplinary punishment.

Appeals against decisions of the Tribunals in this jurisdiction lie to the Supreme Court.

(b) **appellate jurisdiction** to review certain decisions (other than that of a Court or Misconduct Tribunal) made in respect of disciplinary charges of "misconduct" against a "prescribed person".

Section 47 provides that decisions of the Tribunals in this jurisdiction are binding and final.

The procedures to be observed in bringing and conducting proceedings before a Tribunal are set out in ss.51 - 54 of the Act.

The powers of the Tribunals are set out in s.55, which, for example, allows the Tribunals in their original jurisdiction to dismiss a person, reduce their rank or order a monetary penalty. However, the Tribunal's jurisdiction is entirely disciplinary, therefore, they cannot make orders for penalties such as imprisonment, community service or probation. These penalties are available only in the criminal jurisdiction.

4.3 Operation of the Misconduct Tribunals

It is clear that the legislation and operation of the Tribunals do not reflect the recommendations of the Fitzgerald Report.

The 1991 September submission from the CJC to the previous Parliamentary Committee on amendments to the Act concluded that:

- the Tribunals were not perceived to be independent, particularly as a result of s.41 of the Act which provides that the Tribunals are a part of the Official Misconduct Division. The involvement of the Executive Director in the composition of the Tribunals further added to the perception that the Tribunals were not truly independent. The Commission noted that the current legislative arrangement appears to be contrary to the recommendation of the Fitzgerald Report that *the Misconduct Tribunals must be demonstrably independent of government agencies and the police.*

- the Tribunals were becoming more legalistic than what was intended by the Fitzgerald Report. In particular, the Commission had concerns that counsel assisting the Tribunal were not being permitted to undertake the traditional role undertaken in respect of counsel assisting Commission's of Inquiry, and that they were instead being cast in a prosecutorial role.

The Commission proposed a new model for the Misconduct Tribunals with the following features:

- The Tribunal be constituted under its own separate legislation, so as to not only be independent from the Official Misconduct Division, but from the CJC;

- The Tribunal consist of permanent members appointed for a specific period of time. The Commission submitted that two members, the Chairperson and Deputy Chairperson, should be salaried full-time legal members, and the other 4 members should be non-legal lay members appointed from the community on a retainer basis;

- In each case the Tribunal would consist of one legal and two non legal members; and

- All members were to have a deliberative vote on particular matters.

The previous Committee in Report No. 13, Recommendation 23, endorsed the recommendation of the CJC that the Misconduct Tribunals should be constituted under their own separate legislation. The Committee further recommended that the legislation provide that the accountability of the Tribunals be to the Department of Justice (administratively) and that the Tribunals be monitored and reviewed by the PCJC.

In evidence before the previous Committee in June 1992, Sir Max Bingham QC, the then Chairman of the Commission, conceded that the Tribunals had failed to work. He noted:

> *"... I would be giving no secrets away if I say that in my view it has not worked ... More or less immediately, the legal approach to that situation was one of some dismay, because to the lawyer's eye it seems though by setting up a tribunal under the umbrella of the Commission and requiring the Commission to staff it and maintain it so that it can deal with proceedings that arise from investigations carried out by the Commission -investigations into official misconduct and so on-it seems that by establishing that sort of mechanism you are creating something in which the Commission is the judge in the form of staffing the tribunal. It is a prosecutor in the sense of carrying out the investigation, and it is the investigative arm of the tribunal if the tribunal wants more evidence. This leaves the person who is put in front of the tribunal-the defendant so to call him or her-in what most lawyers would find an unsatisfactory position, to put it mildly. It means that, in effect, the Commission by the law is set up in such a way as to appear to be both judge prosecutor in its own tribunal."* (*Report on the public hearing held on 25 June 1992 into allegations made*

> *by Mr Richard Chesterman QC (past member of the Misconduct Tribunals), on 23 June 1992 in the Courier-Mail and The Australian newspapers* (Minutes of Evidence p.39)

In July 1992 the previous Parliamentary Committee was supplied, at its request, a position paper by the future structure and operation of the Commission on the Misconduct Tribunals.

The Commission noted:

> *... the legislative scheme adopted in respect of the Tribunal has not achieved the central philosophy of Fitzgerald that it would -*
>
> *a) be administrative and inquisitorial, and*
>
> *b) not be bound by the fully panoply of an adversarial hearing including:*
>
> *(i) the rules of evidence;*
> *(ii) the examination of witnesses on oath, and*
> *(iii) the accused not having to make a statement or provide an explanation.*
>
> *It is considered that what is important is to achieve this by legislation which clearly establishes the Tribunal as a relatively informal, not legalistic and administrative inquisitorial body which ensures natural justice to persons charged with official misconduct in the sense that they are:*
>
> *(i) informed of the allegation, and*
> *(ii) given a real opportunity to refute it.*

The previous Committee, in its Report No. 17 (1992) entitled *The Committee's recommendations on changes to the method of appointment and conditions of service of members of the Misconduct Tribunals*, proposed a model for the future of the Misconduct Tribunals similar to that proposed by the CJC in its September 1991 submission to the Committee outlined above. The Committee recommended that the Act be amended accordingly.

In terms of outcome, some of the specific criticisms levelled at the Tribunals have been:

- They are conducted in what is considered a too legalist, and adversarial manner, applying rules of evidence rather than administrative and inquisitorial processes.

- Organisation criteria necessary to judge continued suitability for membership have not been applied, such as assessing the adverse impact on the public and other organisation members of reinstating the service of a member who, because of a history of alleged misconduct, has no respect or credibility with other honest organisation members.

- Appeals from the original decisions of the Tribunals might best be handled in an industrial forum rather than a criminal court especially as the matter concerns discipline and organisation membership.

- The Misconduct Tribunal hearings have been prolonged and overly detailed, and in some cases have exceeded by a factor of three, the length of time taken for the original criminal trial.

- The Tribunal process is expensive.

- The Tribunals are not seen by those appearing before them to be sufficiently independent from the Criminal Justice Commission itself (eg, the Official Misconduct Division of the CJC might recommend certain disciplinary action to the Police Commissioner which is acted upon. On appeal to the Misconduct Tribunal, the officer against whom disciplinary action was taken, would observe that Counsel assisting the Tribunal may come from the same Misconduct Division that recommended the original action.)

A consequence of these difficulties is that there are instances where a majority of serving police would claim that officers unfit to remain in the service continue to serve, because of imperfections in the process. There is sufficient disquiet in relation to the effectiveness of the process and its adverse impact requiring immediate review and improvement.

4.4 The Future of the Misconduct Tribunals

The Commission of Inquiry found that the appropriate stringent test for determining guilt or innocence in a criminal trial was not the appropriate basis for reviewing the suitability of a person remaining a member of a public organisation, particularly the Police Service. Certain standards of conduct are required of public officials. The Committee considers that there should be an efficient and fair mechanism for assessing whether or not a public official or police officer, based on past conduct, should continue to serve in a public capacity with the status, powers, and privileges that are currently attached to a particular position.

The Misconduct Tribunal was conceived as a body that might determine, on the basis of probabilities following informal administrative investigations and hearings, whether a public official (or a police officer) was a fit and proper person to remain a public official and, if remaining, the conditions to attach to continued service. It was envisaged that the Tribunals would have the power to dismiss or sanction public officials.

The body would make original administrative decisions, in which case there would be an avenue of appeal, on the basis of natural justice, on matters of law to judicial or administrative review. The body would also have final determination in matters of appeal or review if a police officer or public official sought an independent review of a disciplinary act or penalty imposed by an organisation.

While the report was not explicit about the criteria applied in the investigation of any particular matters of misconduct, the example was given where a convenor of a Tribunal could seek advice from senior police officers, to assist in developing relevant organisational criteria against which misconduct could be judged.

The essential concept was that only those police officers and other public servants who were brought before the Tribunal and who were considered by the Tribunal to be fit to hold public office with given powers, status and conditions of service, should continue to do so.

Unfortunately, this relatively simple concept has proved most difficult to administer in practice. The essence of the problem may be that judgments about the suitability of behaviour in the context of established organisation standards are required. The most suitable people to make such determinations may be those with extensive experience in the management of large public sector organisations. Matters of misconduct and official misconduct warranting dismissal or disciplinary action might best be assessed by those experienced in making such decisions.

For example, the Industrial Commission currently has jurisdiction to hear matters on appeal from administrative decisions of dismissal of an employee by an employer.

The appeal process established within the Public Sector to review decisions not involving dismissal may also be an appropriate forum for resolving some matters.

Not all of the matters coming before the Misconduct Tribunals however have been related to straight forward organisation disciplinary issues. Some have required the careful assessment of fairly complex legal and administrative issues. In these cases, it is desirable that those with the necessary experience of such matters preside at the Tribunal hearings.

The CJC Report on the *Implementation of Fitzgerald Recommendations relating to the Criminal Justice Commission* September 1993 stated:

> *an interdepartmental working group established by the Office of the Cabinet is currently considering these recommendations as part of the review of the Act and its overall structure. The Commission has consistently made representations to the effect that these and other amendments to the Act be effected urgently.*

4.4.1 The District Court Option

It appears that action is in hand for the Misconduct Tribunals to be placed under the jurisdiction of the District Courts.

The Commission of Inquiry found that there could be a serious compromise to judicial independence if serving magistrates or judges were involved in the Tribunal processes. For example, in relation to the previous Police Complaints Tribunal, the Report stated:

> *it is also unsatisfactory for magistrates, who regularly have to decide questions of police credibility in the Courts, to be members of the Tribunal.* (Report:290)
>
> and,
>
> *The reality is neither activity (referring to predominantly investigation, advisory and overviewing activities) is suited to a "tribunal", especially one presided over by a serving judge, and otherwise composed of an unnecessary number of persons with backgrounds as judicial officers or present or former officers of the Justice or Police Departments.* (1989:293)

In a broader context, the Report concluded:

- *The separation of judicial power from legislative and executive power is fundamental to the system of checks and balances designed to achieve a stable democracy. The distinction should not be blurred by those who perform judicial functions also engaging in superficially similar quasi-judicial functions on behalf of the Executive Government.*

- *The essential independence and impartiality of the judiciary, or at least the almost equally important public acceptance of those judicial qualities, particularly in a social environment in which much litigation, and almost all criminal litigation, involves disputes between individual citizens and the State, should not be compromised by judicial officers mixing judicial functions with functions on behalf of the Executive, especially where the issues may attract political or other controversy.*

- *The primary responsibility of the judicial system is the provision of speedy and efficient justice according to law, and its capacity to perform that*

> *function is diminished by any requirement that it perform other tasks on behalf of the Executive.* (1989:328)

A decision to place the Tribunals with the District Court would compromise these principles. Administrative matters and disciplinary matters would best be determined and reviewed by bodies external to the Courts, if at all possible.

In a situation where one of the major complaints about the Misconduct Tribunals is that they are "overly legalistic", it appears irreconcilable to place the Tribunals in the jurisdiction of a court of law. This action ignores the essential administrative nature of the Tribunals. With due respect to members of that Court, the Committee remains to be convinced that judges, who on a daily basis act judicially in deciding legal matters are able, when confronted with an administrative action, to act "administratively".

Conclusion

The Committee does not agree that the Misconduct Tribunals should be transferred to the jurisdiction of the District Court. The Committee believes that the transfer of the Misconduct Tribunals to the District Court is in conflict with the recommendations contained within the Fitzgerald Report.

Recommendation

The Committee recommends against the transfer of the Misconduct Tribunals to the jurisdiction of the District Court.

Conclusion

The Committee believes that the administration of the Misconduct Tribunals should be along the lines recommended by the CJC and the previous Committee, emphasising the importance of having people well experienced in disciplinary action in major organisations involved, and an appeal or review process through to an Administrative Appeals Tribunal if one is established.

The essential principle to be followed, is that public officials and serving police officers have an obligation to perform and behave to an acceptable standard. Organisational standards and codes of conduct are now well established, particularly in the Police Service. The Community deserves the highest standards from the Police Service. The Misconduct Tribunals are an important method of enforcing and maintaining those standards.

There can be no defence or justification for retaining members in a Police Service, or for that matter, any other public organisation, if they are unable to conform to the norms and standards of that organisation and discharge their obligations to the public responsibly.

A fair but simple system is required to assess, on the balance of probabilities, an appropriate course of action to suit each particular case.

As Mr P Keane QC in a written advice to the previous Committee recognised, there are differences between proceedings in the Misconduct Tribunals and ordinary litigation, particularly the prosecution of a criminal charge:

> ***... the Misconduct Tribunal is concerned with the fitness of particular persons for public office, requiring high standards of rectitude and integrity. The sanctions imposed by the Misconduct Tribunal relate to the continued enjoyment of public office, rather than imprisonment. The issue before the Misconduct Tribunal is not whether a citizen should be exposed to punishment for an offence, but whether an officer of the state is entitled to continue to command the confidence of the community and to enjoy the rewards of his office.***

Recommendation

The Committee endorses the previous Committee's Recommendation 23 contained within Report No. 13:

> **The Committee endorses the recommendation of the Criminal Justice Commission that the Misconduct Tribunals should be constituted under their own separate legislation and recommends that the legislation should provide for the accountability of the Tribunals to the Department of Justice (administratively) and be monitored and reviewed by this Committee. The Committee also recommends that the Tribunals should have a discretion to conduct appeals from disciplinary decisions of the Deputy Commissioner of the Police Service either by way of rehearing or review of the original decision.**

Further, the Committee recommends that the Misconduct Tribunals be constituted according to the proposed model recommended by the previous Committee in its Report No.17.

5. THE RESEARCH AND CO-ORDINATION DIVISION

Introduction

The Fitzgerald Report recommended that there be established within the Commission a Research and Co-ordination Division which was to have an on-going research role and co-ordinate activities relating to the criminal justice system. This Chapter will examine in detail the recommendations made by the Fitzgerald Report concerning the Research and Co-ordination Division. Particular regard is paid in this chapter as to the feasibility of the Division maintaining the co-ordination role envisaged by the Fitzgerald Report.

The Fitzgerald Report left an agenda for completion by the Division. This Chapter will examine the progress which has been made in respect of that agenda.

Finally, this chapter will address whether the Commission should retain a research role or whether that role should be transferred to another entity.

5.1 The Fitzgerald Report

Fitzgerald QC made it clear that the Report of the Commission of Inquiry could not address all of the problems identified with the administration of justice in Queensland. Fitzgerald QC observed:

> *Making recommendations now without comprehensive research would be as counterproductive as ignoring the problem altogether. There is a need for on-going objective research, analysis and inquiry.* (1989:14)

Later he said:

> *The making of appropriate reforms will involve the need for mature, objective, dispassionate analysis, the balancing of competing interests and the identification of realistic and necessary social objectives having regard to available resources.* (1989:15)

Fitzgerald QC said that in the past, problems, when they emerged, had tended to be presented as isolated dilemmas with simple solutions. In response Governments were tempted to solve the problems by passing laws forbidding certain behaviour. In Fitzgerald QC's view this process had often been undertaken without any real research and without any regard to the ability of the law enforcement system to cope with the burden of extra enforcement. Rather, law reform research had been undertaken in a reactive manner.

The Report concluded that it was vital that an on-going mechanism for research and reform of the criminal law and the administration of criminal justice be developed.

Fitzgerald QC stated that the permanent role of the Criminal Justice Commission should include:

- acquisition of the resources, skills, training and leadership necessary for the administration of criminal justice;

- advising the Parliament on the implementation of the recommendations in the report of the Commission of Inquiry relating to criminal justice and the Police Force, particularly those

matters set out for the CJC's consideration;

- monitoring and reporting on the use and effectiveness of investigative powers;

- providing Parliament with regular reports on the effectiveness of criminal justice administration, with particular reference to the incidence and prevention of crime with special emphasis on organised crime, and the efficiency of law enforcement by the Police Force;

- monitoring the performance of the Police Force to ensure that the most appropriate policing methods are being used, consistent with trends in the nature and incidence of crime, and the ability of the Police Force to respond;

- monitoring the use, suitability and sufficiency of law enforcement resources and the sufficiency of funding of law enforcement and criminal justice agencies (including the Director of Prosecutions and Public Defender's respective offices);

- providing the Commissioner of Police with policy directives based on CJC research, investigation and analysis. These directives would cover law enforcement priorities, police education and training, revised methods of police operation and the optimum use of law enforcement resources;

- overseeing the reform of the Police Force;

- researching, generating and reporting to Parliament on proposals for reform of the criminal law and law relating to the enforcement of or the administration of criminal justice, including assessment of relevant initiatives and systems elsewhere.

All of the above functions are in some way related to the operations of the Research and Co-ordination Division.

In recommending the establishment of the Research and Co-ordination Division as part of the Criminal Justice Commission, Fitzgerald QC outlined the Division's responsibilities as follows:

> *This Division would comprise a multi-disciplined group of professionals, including lawyers. The functions of the division to and through the CJC should be to:-*
>
> - *define emerging trends in criminal activity including organised crime, identifying competing needs and establishing priorities for the allocation of law enforcement resources;*
>
> - *develop compatible systems for and foster co-operation between law enforcement, prosecution, judicial, and corrective services agencies to promote optimum overall use of available resources;*
>
> - *co-ordinate and develop procedures and systems for co-ordinating the activities of the CJC;*
>
> - *provide information to the Parliament, judiciary, law enforcement and prosecution agencies in relation to criminal justice matters;*
>
> - *co-ordinate with other Government departments with respect to criminal justice related issues;*

- *research and recommend law reform pertinent to criminal justice and reform of administrative processes to enforce criminal law;*

- *review the effectiveness of Police Department programs and methods on a continuing basis, especially compliance with CJC recommendations or policy instruction, community policing, prevention of crime, and those related to selection, recruitment, training and career progression of police officers and supporting staff;*

- *review Police Department use or treatment of criminal intelligence including as required by the Intelligence Division;*

- *report to the CJC on all the above to aid its determinations and alert it as necessary.*

Amongst its other activities the Division will prepare draft reports and directions for the CJC to the Commissioner of Police detailing the trends, opportunities or problems observed, and preferred courses of response or remedial action.

An important part of this process, will be the prompt and accurate identification of the extent and nature of resources required within the Police Department to carry out policing programs considered essential in the community interest.

The Division will also provide reports to the CJC on implementation progress and impact of CJC directives within the Police Department to supplement direct reporting by the Commissioner of Police to the Criminal Justice Commission.

The Division's role will be flexible, may be expanded and may embrace liaison with similar research and co-ordination specialist bodies. For example, it could investigate the use of sharing research with the Australian Institute of Criminology. Its role will be to supplement and complement research and the activities of other efficient, productive agencies elsewhere and relate that to State needs, rather than to duplicate or replicate their functions in Queensland. (1989:308-309)

In summary, there was a clear intention by Fitzgerald QC that the CJC, and the Research and Co-ordination Division in particular, would have a very broad mandate to take an overall or system-wide role in reviewing, researching, monitoring and reporting to Parliament and relevant agencies on the operation and performance of the criminal justice system in Queensland.

5.2 The *Criminal Justice Act 1989*

The above recommendations by Fitzgerald QC are reflected within the *Criminal Justice Act 1989*. Section 23 of the Act (formerly s.2.15), which sets out the responsibilities of the CJC is almost identical to the recommendations of Fitzgerald QC.

The role and functions of the Research and Co-ordination Division are set out in s.56 of the Act:

56(1) *The Research and Co-ordination Division is the unit within the Commission that will -*

(a) conduct research into the problems that from time to time beset, or could beset, the administration of criminal justice in the State;

(b) work towards co-ordinating the activities of the Commission and the activities of all other agencies in the State concerned with the

administration of criminal justice in the State;

(c) make known its findings on matters relating to the system of criminal justice in the State to the Chairman and, with his approval, all other agencies in the State concerned with the administration of criminal justice in the State.

(2) It will operate of its own initiative as well as in response to requests of other Divisions of the Commission.

(3) It is the function of the Division -

(a) to co-ordinate and to develop systems and procedures for co-ordinating the activities of the Commission;

(b) to define trends in criminal activity, in particular any trend to organised crime, to identify competing needs, and to establish priorities for allocation of resources for enforcement of the criminal law;

(c) to develop compatible systems for, and to foster co-operation between, agencies for -

(i) law enforcement;
(ii) prosecution of offenders;
(iii) judicial administration; and
(iv) corrective services,

with a view to securing optimum use of available resources;

(d) to research and make recommendations on -

(i) law reform pertinent to criminal justice; and
(ii) reform of processes of enforcement of the criminal law.

(e) to inform the Parliamentary Committee, the judiciary, and agencies for enforcement of the criminal law or prosecution of offenders in relation to matters affecting criminal justice;

(f) to review on a continuing basis the effectiveness of programs and methods of the Police Department, in particular in relation to -

(i) compliance by the department with the Commission's recommendations or policy instructions;
(ii) community policing;
(iii) prevention of crime;
(iv) matters affecting the selection, recruitment, training and career progression of members of the Police Force and their supporting staff.

(g) to review the use and treatment by the Police Department of intelligence information concerning criminal activity, in particular when required by the Intelligence Division to do so;

(h) to prepare for the Commission reports, and suggested directions to

the Commissioner of Police, relating to its findings in the course of discharging its functions and to its recommendations as to remedial action or appropriate response;

(i) to report to the Chairman, as the Director of the Division thinks appropriate, or as required by the Chairman, on the discharge of the Division's functions with a view to alerting the Commission and aiding the Commission's determinations.

It is also clear that the Court has interpreted (as the Report intended) that certain research and co-ordination functions listed under the Commission's responsibilities in Section 56 of the Act should be ongoing responsibilities.

5.3 Boe v. The Criminal Justice Commission

The decision of Andrew Boe v Criminal Justice Commission [Appl No 319 of 1993], is an important decision and requires further discussion.

Andrew Boe, a solicitor who has a criminal law practice that is funded substantially by the Legal Aid Office, wrote a letter to the CJC on 12 February 1993 requesting that the CJC conduct an inquiry into the sufficiency of funding for criminal justice agencies including the Office of the Director of Prosecutions and the Legal Aid Office.

On 1 March 1993 the Chairman of the CJC responded to Mr Boe's letter of 12 February. The Chairman's response referred to consultation that had taken place in respect of Legal Aid funding in 1992. However, the Chairman informed Mr Boe that the Research Division had been conducting research into a number of subjects relevant to criminal justice but had not, and in the immediate future could not, research the sufficiency of funding for criminal justice agencies. The reasons given for not having done so were insufficient funding and the deferral of this matter on the Commission's list of research priorities.

According to the judgment *"Boe wrote to the Commission again on the 5 March 1993 requesting that `the Commission properly discharge' its statutory responsibility under s.2.15(c)"* [s.23(c)].

The Commission responded on 12 March 1993 in similar terms to the 1 March letter.

On 16 April 1993 Mr Boe wrote to the Commission again. In this letter he made it clear that he was not requesting a public inquiry but that the Commission hold a hearing pursuant to s.25 of the Act and discharge its responsibilities under s.23(c) of the Act.

By letter dated 19 April 1993 the Chairman of the Commission refused Mr Boe's request.

Mr Boe then applied under the *Judicial Review Act 1991* for an order reviewing the decision of the CJC on 19 April 1993.

His Honour, Mr Justice De Jersey found that the CJC had improperly exercised its decision not to hold a hearing because it had incorrectly proceeded on the basis that the responsibility could be deferred.

On 10 June 1993 His Honour made the following orders pursuant to section 30(1) of the *Judicial Review Act*:

1. Set aside the Commission's decision refusing to conduct the hearing requested by Mr Boe, as communicated by the Commission's letters dated 1 and 12 March 1993 and 19 April 1993;

2. Declare that the nature of the Commission's responsibility under section 23(c) of the Criminal Justice Act is such that the discharge of that responsibility cannot be deferred in the manner in which the Commission has deferred it:

3. Refer back to the Commission the question whether a hearing should be conducted, or what other step taken, in order to ensure that the Commission discharges its responsibility under section 23 to monitor and report on the sufficiency of funding for criminal justice agencies in this State, namely the Office of the Director of Prosecutions and the Legal Aid Office;

4. Direct the Commission to inform Mr Boe prior to 10 August 1993 of the steps to be taken to ensure the discharge of that responsibility.

During the course of his decision His Honour found the following facts to be proved:

1. That affidavit material filed by Boe provided a *"comprehensive and compelling basis for the conclusion that the Government does not adequately fund the legal Aid Office on the criminal side or the Office of the Director of Prosecutions"*. His Honour pointed out that the CJC never advanced any contrary evidence.

   His Honour at p.7 said:

   "On the uncontradicted material before me, the deficiency in the proper funding of the prosecution and defence in Queensland is so marked that I would, on this material, conclude that were there a hearing into the matter, it is highly likely that increases would be recommended which no responsible Government could ignore."

2. That the CJC had never monitored the sufficiency of funding for criminal justice agencies. In particular that a seminar held by the CJC in 1992 was not a commencement of the discharge of its duties under s.23(c). His Honour also noted that there was no suggestion it would happen in the next three years.

   His Honour said at p.11:

   "One obviously does not monitor a situation of a continuing character like this by doing virtually nothing with respect to it for more than three and a half years and offering no great hope of doing anything about it for the best part of the ensuing three years".

His Honour made a number of other important findings of more general application during the course of his decision including:

1. The responsibility of the CJC under s.23(c) is a duty rather than a mere matter of authority.

2. The term "monitor" as used in s.23(c) means that the CJC must:

   (i) Keep the matter under review, measuring its adequacy from time to time.

   (ii) Ascertain the amount being spent on those agencies.

(iii) Inquire as to the manner in which the agencies apply that money.

(iv) Determine whether the amounts provided are adequate to run the offices properly.

(v) Consider what if any services cannot be properly provided because of shortage of money etc.

3. The Commission is not obliged to discharge all of its functions concurrently, and to do so would be impractical.

4. The refusal of the Commission to hold a hearing pursuant to s.25 was within the Commission's power. In other words, the Commission did not have to hold a hearing to discharge its obligations under s.23(c).

5. The nature of the obligation in s.23(c) required it being "discharged on a more or less continual or regular or recurrent basis". However, some of the Commission's responsibilities do not necessitate continual or regular discharge, that is, some do not have a "continuing character".

His Honour felt that s.23(e), (f) and (h) fell into this later category.

The Commission submitted to the Committee that the decision has created difficulties for the Division because of the large number of continuing responsibilities allocated to it under the Act.

The Committee, after careful consideration, is not convinced that the above decision has created insurmountable problems for the Research Division. As will be discussed in more detail later, the Committee notes that the Division has failed to complete the Research Agenda set down by Fitzgerald QC. At the same time the Division has undertaken projects that the Committee does not consider were of a high priority.

The "continuing" responsibilities of the Commission and the Research Division provided in the Act are based upon the recommendations contained within the Fitzgerald Report. The Report obviously considered those matters to be of importance and of some priority.

The decision of *Boe v. the CJC* does not require the Research Division to undertake all of its responsibilities simultaneously. The decision does not prevent the Commission from prioritising its work.

What the decision does is to make it clear that important continuing responsibilities not be ignored for three years whilst other less important projects are pursued.

5.4 Structure and Operation

The Research and Co-ordination Division has had an establishment of between 18 and 19 staff since it was formally established in 1990.

The philosophy to this point of time, appears to have been to establish a multi-disciplined team with a set of core skills and experience, and to draw on specific external expertise when this might be required for particular reviews and research projects. This approach appears to be in line with the recommendations made by Fitzgerald QC.

As of July 1994 the Commission reported that it had a complement of 19 staff. Currently, the

structure of the Division is as follows:

1 Director
1 Assistant Director
1 Principle Research Officers
7 Research Officers
3 Research Assistants
3 Support Officers
3 Library staff

As indicated above, the Division also supplements the above staff resources by engaging external consultants to undertake specific tasks when required. There are usually between four to five external consultants engaged by the Division at any one time throughout the year.

The Research Division's Budget for 1994/95 is $1,050,052. The Commission claims that this represents about 5% of the Commission's overall budget. This amount includes the sum of $130 000 which is the budgetary component for consultants.

However, this amount does not include substantial expenditure met from the Corporate Services Division's budget, such as: the cost of printing reports; the cost of furniture and accommodation; the cost of general stationary; and the provision of computer technology. The Research Division's budget only covers items such as salaries, oncost associated with salaries, consultants fees, staff travel and library resources.

Precisely how much of the Corporate Service's expenditure which, in the 1994/95 year is $7,507,667, is attributable to the Research Division is unknown. However, the Committee notes that it would include a significant proportion of accommodation (budget of $2,697,000 in 1994/95), printing and publications (budget of $190,000 in 1994/95), and information technology and retrieval (combined budget of $541,000 in 1994/95). The real cost of the Research and Co-ordination Division in the 1994/95 budget is therefore probably somewhere between $1.5 million and $2 million, and is closer to 10% of the Commission's annual budget. However, the Committee is unable to inform the Parliament as to the exact costs of the Division.

5.5 Performance

For the purpose of this review the Research and Co-ordination Division's functions and responsibilities may be organised into five broad categories:

- Researching and reporting on the reform of the criminal law and the criminal justice administration;
- General criminal justice research;
- Reform of the Queensland Police Service;
- The Co-ordination of the criminal justice system; and
- Intra Commission research.

It is necessary to review the above categories and assess the Division's performance with respect to each.

5.5.1 Research and Reform of the Criminal Law and the Criminal Justice System

Since its establishment the CJC's Research Division has researched and produced a number of reports concerning the reform of criminal law in Queensland.

In its earlier years, there was well publicised criticism of some of the reports emanating from the Research and Co-ordination Division. Criticisms included a lack of balanced objective analysis, errors of fact, and the denial of natural justice to those subject to investigation. These deficiencies and accompanying criticisms damaged the CJC's overall reputation and credibility despite the fact that the Commission's other functions may have been performing well.

The previous Committee, in Report No. 18, noted:

> *The Committee has been concerned about the factual errors made in some of the Commission's reports and believes that the CJC should give priority to ensuring greater accuracy in the substance of its reports. These errors have detracted from the Commission's work.* (1992:13)

However, this Committee acknowledges the point made in the Commission's submission:

> *The 1990's Gaming Machine Report, which seems to have attracted the most criticism was produced several years ago primarily by the then Special Adviser to the then Chairman. At the time, the author of the report was not a member of the Research and Co-ordination Division.*

The Committee believes that the earlier criticisms of the Research Division's Reports have largely been addressed and are no longer evident in the Division's most recent work, for example, the Police Powers Report. In particular, the Committee notes the introduction within the Commission of procedures which decrease the likelihood of a report emanating from the Commission which denies natural justice to individuals.

Any assessment of the quality of the reports that have been produced by the Research Division is difficult because such assessments are always prone to be highly subjective. Each report provokes varied responses. However, the Committee does note that the reports from the Division do stimulate public debate, and that the entire process enables various groups, and the public at large, to become involved in the review process.

It is instructive to repeat observations that have been made about the Division's performance throughout the Committee's review process.

Mr John Robertson, now Robertson DCJ, representing the Queensland Law Society, made the following comment at the public hearing:

> *The final comment I wanted to make by way of my primary submission was that the Queensland Law Society very much favours the maintenance within the Criminal Justice Commission of its Research and Coordination Division. The Research and Coordination Division has, with respect, performed a very good public service for the Queensland community since its inception. I think it is important to note that the reports of that division as opposed to the reports of a research division, say, attached to the Department of Justice and Attorney-General, have the advantage of being clearly independent of Government agencies, their reports are always made public and, of course, the final decision about implementation of any reports still remains with the Government. So we certainly favour the retention of the Research Division as an independent arm of the Commission.*

Mr John Gerard QC, representing the Queensland Bar Association, was less enthusiastic:

> *The Research and Coordination Division has published a number of papers. Many of them appear to be sound efforts. I have not myself been aware of any glittering achievements, but I have read the review of police powers, or skim read it, and it is a very detailed, sound work.*

Mr Terry O'Gorman made the following comment at the public hearing:

> *Moving on to the Research and Coordination Division—we regard this, along with the complaints work of the CJC, as being probably the success part of the Criminal Justice Commission.*
>
> ...
>
> *we see the work that has been done firstly by Dr Mukherjee and now by Dr Brereton as being work of a very high standard, notwithstanding that from time to time they come up with some quite incredible proposals like covert search warrants, but leaving those aberrations aside, their standard of work has been very high and we see the Research and Coordination Division as having achieved one of the major recommendations of the Fitzgerald report and that is to depoliticise or take the petty politicking out of law and order.*

5.5.1.1 The failure to complete the Fitzgerald Report Research Agenda

Fitzgerald QC formulated a research agenda for the Commission to undertake. The Commission has stated that to date, the Research Division's program has been determined largely by the review program set by the Fitzgerald Report.

Appendix A is a schedule which sets out the agenda Fitzgerald QC left for the Research Division, and the action taken in respect of those items.

At the public hearings Mr O'Regan QC made the following comment about the Fitzgerald Report agenda:

> *Something was said yesterday about the tendency in the past for the Research and Coordination Division's projects to be associated with law enforcement matters, and reference was made to the police powers reports. Of course, that is so, but henceforth now that the prescribed agenda—that is, the agenda prescribed by the Fitzgerald report—has almost been completed, the Research Division will have more discretion in determining the priority of its research projects. I assure the Committee that it certainly will not be confined to law enforcement issues.*

However, a review of the agenda, and the action taken by the Research Division reveals two interesting facts:

- A number of the reviews have been undertaken by other agencies, with little or no input from the Research Division:
    - Paramount amongst these reviews have been the review of the Criminal Code undertaken by the Criminal Code Review Committee, and the Review of the Vagrants Gaming and other Offences Act, undertaken by the Committee of the same name. Both of these reviews were established by the Department of Justice

and Attorney-General. These reviews have largely disposed of the general review of the criminal law listed as item 2 on the Fitzgerald Agenda. In addition, item 12 on the Fitzgerald Agenda, a review of the sufficiency of penalties for perjury, was undertaken by the Criminal Code Committee as part of its review of the Criminal Code.

- Two of the matters left by Fitzgerald QC for the Research and Co-Ordination Division, the review of the *Oaths Act* (item 11) and the review of the *Commissions of Inquiry Act* (item 15), have been undertaken by the Law Reform Commission.

- The Public Sector Management Commission has undertaken reviews touching upon the Commission's function to oversee the implementation of the Fitzgerald Reform process as it relates to the Queensland Police Service.

  In April 1993 the Public Sector Management Commission presented a report on its *Review of the Queensland Police Service*. This review was conducted as a result of an invitation to the PSMC by the then Minister for Police and Emergency Services and the Commissioner of Police.

  The report noted:

  > *that while the primary function of the review was not to monitor implementation of the Fitzgerald Report, it is inevitable that many of the issues covered in the terms of reference of the review were either recommended by the Fitzgerald Report recommendations or were significantly affected by them.* (1993:34)

  The terms of reference for the review included the `implementation of the Fitzgerald reform progress and co-ordination of the civilianisation process'.

  The Committee notes that it is the express intention of the Fitzgerald Report which is reflected in the *Criminal Justice Act*, that the Commission oversee the reforms of the Police Service as recommended by the Fitzgerald Report.

  In late 1991, the previous Committee recommended that the CJC conduct a review of the implementations of the Fitzgerald Report so far as they related to the Police Service. That report was to be submitted in the first half of 1993. The report, entitled *Implementation of Reform within the Queensland Police Service - The Response of the Queensland Police Service to the Fitzgerald Inquiry Recommendations*, was presented to the Speaker on 1 September 1994 - almost three years after the Commission was requested to undertake the review.

  The review undertaken by the Public Sector Management Commission in 1993, was in many particulars, the responsibility of the CJC. However, at that time the CJC had failed to discharge the responsibility.

- The review of the laws relating to conflict of interest by public officials, as recommended by Fitzgerald to be undertaken by the Commission, was undertaken by the Electoral and Administrative Review Commission.

- A number of major review items, in particular the suggested review of regulatory laws, has had little or no resources allocated to it by the Criminal Justice Commission. The Commission has indicated that it has no intention of undertaking such a review.

The Committee has some difficulty in understanding how the assertion could be made that the Commission has completed the agenda set by Fitzgerald QC. There appear to be a number of major items which require attention by the Division. This includes not only matters within the agenda left exclusively for the Research and Co-ordination Division, but also matters within the agenda for reform left for the Queensland Police Service, which the CJC and the Research Division are required to oversee. For example, THE Fitzgerald Report clear recommendation that the Director of Prosecutions take over the role of the QPS police prosecutions corps.

In addition, the Committee is of the belief that there are a number of criminal law reform issues, not specifically suggested by Fitzgerald QC, that should be researched by the Division which may enhance the efficiency and fairness of the criminal justice system. The first matter which must be researched is whether pleadings should be introduced in criminal proceedings. The Commission should give priority to these types of issues. However, the Committee is concerned that less important and more theoretical research projects are being given priority by the Division. The Committee is of the opinion that Fitzgerald QC intended that research and recommendations for reform of issues which had the potential to improve the efficiency of the Criminal Justice System were to be given priority by the Division. The Division was not created to undertake research for the sake of research.

There are at least three outstanding items from the Fitzgerald Report that require the Commission's immediate attention:

· The Commission of Inquiry recommended that the Commission, as an essential part of its immediate functions, undertake a general review of regulatory laws aimed at the regulation or licensing of essentially legal activities. The Commission has stated that rather than conducting the general review called for in the Fitzgerald Report recommendation, it has approached the issue incrementally. It is noted that Volume I of the Police Powers Report did identify and consider some regulatory law enforced by the police, and questioned the Police Service's administrative responsibility in terms of these regulatory laws. However, apart from the areas touched upon in that report, little progress has been made or attempted by the Commission in relation to this issue.

  The possible advantages of such a review include:

  (i) The identification of resources involved in the enforcement of regulatory laws.

  (ii) The impact of the enforcement of regulatory laws on police resources, which diverts resources from crime prevention and protection.

  (iii) Once the cost of the regulatory enforcement is determined, the government would then be in a position to determine whether costs are justified.

  (iv) Any savings made could be applied to further the efficient prevention and detection of crime, and the more efficient utilisation of court resources.

  The Committee recognises that there are potential disadvantages that may need to be offset against the above advantages, for example, some departments may be required to provide their own enforcement mechanisms or change their enforcement regimes. However, the Committee is convinced that this matter requires urgent and prioritised attention.

· The Commission of Inquiry also recommended that the Commission review law enforcement funding and consider additional or alternative funding strategies. The

Commission has not discharged this recommendation, although funding considerations have been incidental to other projects.

The Committee considers that this recommendation was intended to cover the funding of many law enforcement activities which may or may not be the current responsibility of the Queensland Police Service. The review of the sufficiency of resources for agencies in the criminal justice system and the review of regulatory laws discussed above are associated matters. Therefore, a research program could be developed in relation to regulatory offences which incorporates this issue.

· The Commission of Inquiry recommended the formation of a professional education and review unit within the research and co-ordination unit of the CJC, which, with the assistance of academics and education experts, would review aspects of police education and training.

The Research Division maintains that it has substantially discharged this function by establishing and supporting the Police Education Advisory Council. This assisted the development of a new recruitment training program, the undertaking of a six year longitudinal evaluation training program, and the publishing of a report on recruit training and education.

The Police Education Advisory Council's primary focus has been the restructuring of the police academy and the design and implementation of recruit training.

The Parliamentary Committee has concerns that the Fitzgerald Report's recommendations in this regard have not been followed up authoritively by the CJC. The Committee believes that the intention was that police education, its direction, policies, practices and long term results would be a direct development and monitoring function of the Research and Co-ordination Division. The recommendation by Fitzgerald QC regarding the establishment of a professional education and review unit within the Research and Co-ordination Division of the CJC was of critical importance. Therefore, the Commission should take steps to immediately carry out the recommendation.

The Parliamentary Committee notes that the CJC's report on the implementation of the Fitzgerald recommendations regarding the Service was in some respects critical of the Service. However, some of the deficiencies may have been addressed at an earlier stage had a professional education and review unit been established by the CJC.

The Committee believes that this matter should also be addressed as a matter of priority.

5.5.2 Criminal Justice Research

The Commission was given a clear role to research broader aspects of the law and operation of the criminal justice system. It is arguable that its multi-disciplinary resources are able to contribute a broad perspective to these issues. Individual agencies may not have a similar broad perspective, although this is an arguable point.

The Division has published a number of research papers and reports dealing with crime and criminal justice in Queensland. The Commission has stated that the aims of the Division in publishing this material has been to:

· fill basic information gaps about the level and nature of crime in Queensland and to provide a base for mapping crime trends

- make the results of research carried out by the Commission and other agencies accessible to a wider audience

- contribute to more informed public debate and discussion on criminal justice issues.

The Commission asserted that:

> *The publications which have been released to date have been widely disseminated, have attracted considerable media interest, and have been the subject of considerable favourable comment from criminological researchers and other commentators.*

The Commission further asserted that these research projects are undertaken in accordance with s.23(c) and (i) and s.56(3)(b) of the *Criminal Justice Act 1989*.

The Parliamentary Committee notes that there has been an increasing trend by the Division to conduct research into general criminal justice issues. The Committee further notes that the Commission has indicated it will publish an ongoing series of short research information papers. The Committee does not see substantial benefit in those types of reports, which could be undertaken by other bodies or within academic circles. This is particularly so in light of the other substantive matters left by Fitzgerald QC which have not been addressed. Whilst the Committee does not suggest that such research is undesirable, it does not agree that it needs to be undertaken by an agency such as the Criminal Justice Commission, and certainly not at the expense of the Fitzgerald reform agenda.

The Commission's *Guidelines for Selecting and Conducting Research Projects* states:

> *The project should directly assist in the development, implementation and\or evaluation of policy and practices in the area of criminal justice. It is not the Division's function to undertake "pure" or basic research for its own sake.*

The Parliamentary Committee concurs with this guideline.

The Committee observes that research being undertaken by the Criminal Justice Commission which has no substantive practical and/or immediate benefit to the criminal justice system diverts resources from other research which does have the potential to pass on immediate and substantial savings or efficiencies to the criminal justice system. It also diverts resources from the Division which may ensure the completion of the Fitzgerald agenda. Therefore, these matters are not a priority for the Division.

5.5.3 Co-ordination Role

It would appear that the Co-ordination role of the Research and Co-ordination Division has not proved to be successful.

The CJC's submission to the Committee noted:

> *As discussed later in this submission, the Division has not been able to carry out its co-ordination role to the extent envisaged by the Fitzgerald Inquiry and prescribed by the Criminal Justice Act. The Division simply does not have the resources or powers to co-ordinate the activities of the various agencies responsible for the administration of criminal justice in Queensland. In addition, were the Division to take on this role, it would arguably be usurping the functions of Executive*

Government. However, as detailed in the 1993 Report on the Implementation of the Fitzgerald Recommendations Relating to the Criminal Justice Commission, the Division has tried to avoid duplication and to ensure effective liaison with other departments and agencies involved in the areas with which it has been concerned. A number of projects have also been undertaken in collaboration with other agencies, in particular the QPS.

Later the submission stated:

The Division's co-ordination role is in need of clarification. Part of the difficulty is that the Criminal Justice Act defines different levels and forms of co-ordination. Section 56(1)(b) of the Act states that the Division is the unit within the Commission which will:

> *work towards co-ordinating the activities of the Commission and the activities of all other agencies in the State concerned with the administration of criminal justice in the State.*

On one reading, this provision requires the Division to play a role similar to that performed by the Office of Cabinet, or a similar central executive agency. However, s. 56 (3), which sets out the functions of the Division, talks in more modest terms of developing compatible systems and fostering co-operation between agencies [s. 56(3)(c)]. Section 57 (1) simply requires the Commission to liaise with and co-ordinate its own activities, with departments that are concerned with the administration of criminal justice.

It is unrealistic to expect the Division to take on the broad co-ordinating role envisaged by s. 56(1)(b) because:

- *The Division does not have the resources to carry out such a role. To perform this function, it would be necessary to devote several staff full-time to liaising with agencies, convening meetings, developing co-ordinated responses, and so on. Without extra resources, this would detract significantly from the ability of the Division to discharge its other statutory functions.*

- *The Division lacks the necessary authority. There is no statutory obligation on other criminal justice agencies to keep the Commission informed of their activities, or to otherwise provide information required by the Division. The Division has good co-operative working arrangements with most of the criminal justice agencies, but there would be strong resistance from these agencies if any attempt was made to direct them to act in particular ways, or to provide specified information to the Commission.*

- *As a matter of principle the co-ordination role as envisaged by s. 56(1)(b) is properly an executive function, not one which can or should be performed by the Commission.*

The current problems with the Act could be fixed simply by re-wording s. 56(1)(b) to read:

> *co-ordinate the activities of the Commission with other agencies in the State to ensure that there is no duplication of effort. [Emphasis added]*

There is no need to amend the other sections which refer to the Division's co-ordination function.

The Council for Civil Liberties made the following comment in its submission:

> *Whilst the research role of the Division is appreciated, its Co-ordination role is less appreciated.*
>
> *Section 56 provides that the Division is to work towards coordinating the activities of the Commission and the activity of all other agencies in the state concerned with the administration of justice.*
>
> ...
>
> *The statutory framework and functions expected of the Research and Co-ordination Division are quite considerable.*

In addition to an active research role, the Fitzgerald Report envisaged the CJC as having an active co-ordination function with regard to other organisations involved in components of the criminal justice system.

The Committee acknowledges that an impediment to the CJC fulfilling this co-ordinating role has been a lack of authority. There is no power within the Act for the CJC to adopt an active co-ordinating role with other agencies.

The Commission, in its submission to the previous Committee, reported:

> *The Division understands co-ordination to mean to bring the Departments and agencies concerned with the criminal justice system into proper relation and cause them to function together in proper order. The difficulty that the Division faces in attempting to fulfil this role is that it has no power to direct another Department or agency to function in a manner other than that which the Department or agency chooses.*
>
> *Mr Fitzgerald QC, in his report, said that the administration of criminal justice involves dealing with deep and peculiar problems which are not addressed by ad hoc fragmented responses to issues by individual agencies and indicates that the Commission's role should be to supplement and complement the research activities of other agencies, one of the purposes being to avoid duplication. While the Division has attempted to do this, this has not necessarily been the goal of other Departments or agencies in the State. The Division has tried to avoid duplication and to ensure effective liaison with other Departments and agencies involved in the areas with which it has been concerned, however, it recognises that this, in itself, does not fulfil the co-ordinating role ...*
>
> *It is recognised that true co-ordination will be a long-term exercise. Before the various Government agencies will accept the advantages of co-ordination of their work it will be necessary to introduce legislation which facilitates this.*
>
> *This co-ordination role will necessarily include the development of compatible systems for co-operation between these criminal justice agencies. This will have an impact on the resources of the Division not only in terms of funding but in recruiting staff with specialist skills.*

In its report, the first Parliamentary Committee recommended that the *Criminal Justice Act 1989* be amended to require Government departments and agencies to inform the Division of their activities (Report No. 13, Recommendation 15). This recommendation was not intended to enable

the CJC to "direct another Department or agency to function in a manner other than that which the Department or agency chooses". It was intended only to facilitate dialogue and co-ordination between the CJC and other departments and agencies conducting criminal justice research and reforms, so that the CJC and other bodies would not be operating in a vacuum.

However, the Parliamentary Committee concurs with the submission made by the Commission that the co-ordination role is essentially an executive function. The Committee does not believe that any amendment to the Act would be able to cure this basic problem. The function simply cannot exist within an independent agency.

The Committee notes that in any event, since the Fitzgerald Report, there has been increased co-ordination within Government and the Courts.

Since the Report of the Commission of Inquiry, the Office of Cabinet has been established to integrate Government policy across Government departments. The Litigation Reform Commission has also been established to reform the administration of the Courts.

The Office of Cabinet (at the request of the Chair, CJC) has established an Inter Agency Forum on Law Reform which includes the Law Reform Commission, the Litigation Reform Commission, the Department of Justice and the Attorney General, the Queensland Police Service, the Department of Family Services and Aboriginal and Islander Affairs and the Criminal Justice Commission.

This forum is a useful mechanism which endeavours to integrate and rationalise review and research activity across the agencies with research responsibilities, including those which review and enhance aspects of the criminal justice system.

The CJC, unlike a body such as the Office of Cabinet, has no clear leadership role for integration, co-ordination and implementation of initiatives to enhance the Criminal Justice system overall.

A body that attempts to undertake a co-ordination role would require considerable authority to ensure information and compliance. In this regard, "power" that may be conferred upon the CJC by legislation, should not be confused with "authority". The latter can only be vested within the executive arm of government.

In summary, it would appear that the Co-ordination role of the Division envisioned by Fitzgerald QC is in reality not appropriately undertaken by an independent organisation, but is a purely executive function.

5.5.4 Police Service Reform

The Research Division is charged with the responsibility of monitoring reform in the Queensland Police Service and assisting in the development of new policing strategies.

The Commission reported that the Division has discharged this responsibility in the following manner:

- researching and producing reports dealing with issues that effect the general area of police service reform;

- providing general assistance to the Queensland Police Service in the development and monitoring of policing projects, such as the police beat project and the Inala Police-Community Network Project;

- providing advice to the QPS on education and training issues;
- providing the QPS with feedback on the Annual Report;
- participation in the implementation of the PSMC review of the QPS;
- providing the QPS with feedback on drafts of the QPS revised policies and procedures manual.

The Commission suggested that the QPS has taken up many of the Division's recommendations and/or utilised the research which has been conducted by the Division.

The Committee considers that a compelling argument for retaining a comprehensive research capacity at the CJC is the ongoing and essential role of providing independent research and advice to the Police Service about appropriate crime prevention and policing methods. Such research requires extensive investigation and analysis in a research environment unlikely to be established in the Police Service or easily replicated elsewhere in Government.

To achieve results, this function also requires a working relationship with, and acceptance by, the Police Service. The role and functions of the CJC ensure that the Division is able to work closely with the Police Service in conducting these activities. At the present time, the Research Division and the Police Service appear to be working together in a constructive and effective way.

It appears that new initiatives are being trialled, evaluated, negotiated and, where appropriate, implemented by the QPS with a minimum need for imposition. This in itself is a significant achievement. All Police Services have a history of endeavouring to address their own problems without utilising external skills. Often these skills are necessary to analyse the cause of problems.

This acceptance has been growing within the Police Service. Further improvement in police performance can be expected as the results of properly structured research and pilot projects seeking the best ways to improve policing effectiveness become available. The power given to the CJC to direct certain activities of the Police Service goes hand in hand with this research role.

Fitzgerald QC left an agenda for reform of the Queensland Police Service. It was always envisaged that the Research Division of the CJC would oversee these reforms.

However, the Parliamentary Committee notes that a number of important recommendations made by Fitzgerald QC have not been implemented, and that the Research and Co-ordination Division must give priority to assisting the Queensland Police Service in providing a solid research basis from which to implement this reform.

The Commission of Inquiry was forceful in its recommendation that the prosecutions function of the Queensland Police Service be transferred to the Director of Prosecutions:

> *The Prosecution Corps is said to be an economical way of dealing with the vast number of summary criminal matters and committals. It also provides a training ground for the Police Force's Legal and Training staff.*
>
> *The Legal and Training Section's role includes responsibility for the preparation of legislation administered by the Department and for advising the Minister for Police.*
>
> *The Prosecution Corps has a policy of accelerated promotion as a conscious endeavour to attract staff. Even so, the loss of overtime for prosecutors has meant a*

> *dearth of applicants. Some who have qualified have treated the training as a promotional device. After costly and extensive training, they serve a minimum time in the Corps before getting transfers to a higher rank elsewhere. This accelerated promotion and transfer has often been at the cost of police who have been performing duties for some time with the expectation of promotion. It is generally resented and is said to create morale problems.*
>
> *The employment of experienced police officers as Police Prosecutors absorbs resources which might be better employed on other essential policing duties.*
>
> *It is undesirable that the courts be seen as having to rely upon the Police Force to exercise important discretions in bringing and pursuing charges. That is made worse by any public perception that the Police have special standing or influence in the prosecution process.*
>
> *A large number of complaints are pursued by Police Prosecutors when they are unwilling or, because of Departmental practice, unable to withdraw charges which are either misconceived in law or inappropriately brought. These actions are very wasteful of valuable court time and of police resources.*
>
> *Independent, legally qualified people could be employed by the Director of Prosecutions to conduct prosecutions.*
>
> *This course of action may involve increased initial costs, but they must be balanced against the ability to recruit staff with specialized skills, the cost of training and employing approximately 100 police exclusively on prosecution duties, and the other costs of present practices.*
>
> *Independent, legally qualified prosecution staff will in all likelihood bring about efficiencies and reductions in the case load of prosecutions. Defective cases can be identified and either remitted for further investigation or, if the defect is incurable, be dropped. Better prepared cases from which avoidable legal flaws have been eliminated will result in fewer contests, with savings in time and resources.*
>
> *It may not be feasible to provide fully trained prosecution staff, independent of the Police Force, for all minor offences particularly in remote areas. Experienced police could be allowed to prosecute very minor offences in remote areas. Otherwise, the police resources taken up by the Police Prosecution Corps could be redirected to ordinary police duties, except for those prosecutors who are in the process of completing tertiary study with a view to becoming part of the Director of Prosecutions office.* (1989:237-238)

Very little has been done to implement this recommendation, and superficial economic arguments are being used to maintain the status quo.

The Police Prosecutions Corps (PPC) now involves 110 police officers.

In 1992, a Treasury Resource Review within the Department of Justice and Attorney General and the Police Prosecutions Corps found that the PPC operates relatively efficiently and effectively. The Review recommended maintenance of the PPC but with closer liaison with the Director of Prosecutions Office.

There are reported continuing difficulties in ensuring the quality of briefs transmitted to the Director of Prosecutions Office by Police Prosecutors. Further, responses to requests by the police for additional material are often slow.

There are instances where inappropriate matters have been committed for trial in the higher courts as a consequence of the activity of police prosecutors.

There are reported inconsistencies in sentencing, with matters finalised in Magistrates Courts attracting heavier sentences than do similar matters in the District Courts.

Almost 30% of matters committed for trial to higher courts result in the entry of a *nolle prosequi* on the morning of the trial.

An estimated 90% of work of police prosecutors relates to the prosecution of "simple offences" (60% of these matters are traffic offences). The introduction of the Self Enforcing Ticketable Offence Notice System for traffic offences has streamlined the use of police resources, including those used in the prosecution function.

The cost to the QPS of the Police Prosecution Corps in 1992/93 was estimated by the Police Service at approximately $3.8m, excluding the cost of police facilities. Although it is understood that some police prosecutors also perform other policing duties, this figure would appear to be extremely conservative as it equates to $34,500 approximately per officer of the PPC. The base salary for a Senior Constable is in the range of $32,500 to $35,000 per year, while that of a Sergeant is in the range of $36,900 to $39,000 per year. These amounts include no allowance for salary on-costs which would be in excess of 30%.

The Director of Prosecutions Office estimated that it would require an additional $3.4m per year to effect the transfer of the committals function and that there is unlikely to be any offset available by way of transfer of resources from the Police Service to the Director of Prosecutions Office.

While the Fitzgerald Report envisaged that legally qualified members of the PPC could be transferred to the Office of the Director of Prosecutions those who wished to make this transition would be required to be appointed to positions in the Office on the basis of merit.

The transfer of responsibility for prosecutions in committal hearings would involve considerable "up front" costs for the Director of Prosecutions including staffing, training and accommodation costs. While there are likely to be net savings overall in costs to the criminal justice system, these costs cannot be estimated as no data is presently available relating to the overall costs and outcomes of the operations of existing systems.

In New South Wales, the transfer of responsibility for prosecutions in committal proceedings to the Office of the Director for Public Prosecutions to 1991 resulted in:

- minimisation of delays in preparing cases for trial, with 95% of cases now prepared within one month of committal

- increased potential for case flow management arising from discontinuance of inappropriate charges and an increased proportion of pleas of guilty to appropriate charges

- reductions in the number of cases being registered in the District Court - this resulted in a reduction of more than 20% in the number of District Court cases registered in 1991/92 compared to those in 1989/90

- reductions in District Court backlogs of more than 25% in the period of 1990/1992.

In the United Kingdom, the Crown Prosecution Service assumed responsibility for all prosecutions in England and Wales in 1986. These arrangements were more expensive than anticipated and did

not achieve the anticipated savings in police resources or improvements in the standard of case preparation which were expected. Many of the former police prosecutors were involved in the "vetting" of briefs and there is a continuing problem of late delivery of files from the police.

In parts of Canada, the prosecution and the defence are required to conduct a conference prior to the committal hearing. This scheme has been operating very effectively and efficiently.

A Police Prosecutions Working Party was established by the Criminal Justice Commission to review and resolve issues arising from the recommendations of the Fitzgerald Report.

Proposals were developed for the introduction of a graduated scheme to give responsibility for committal proceedings and defended summary trials in specific matters to the Director of Prosecutions. A Pilot Scheme was proposed for 1991/92. However, funding for this scheme was not forthcoming.

The Working Party then proposed that the Director of Prosecutions assume responsibility for all committal matters with the Police Prosecutions Corps retaining responsibility for the majority of other matters.

The use of town agents/local solicitors to carry out prosecutions functions in country areas was also considered.

Recently, as an initiative of the Director of Prosecutions and the Legal Aid Office, a pilot scheme has been operating at Ipswich. The Research and Co-ordination Division has indicated that it will be analysing the results of that scheme and expects to report on the matter in June 1995. It is important to note that this pilot project was not the initiative of the Commission, who has effectively done little regarding this issue for almost five years.

Since September 1993 the Committee has been agitating for more priority to be given to this matter by the Research Division.

The Committee notes that Fitzgerald did not recommend a pilot scheme. Rather the report stated that the function should be transferred to the Director of Prosecutions.

The Committee believes that this matter is of the highest priority and that the CJC should report at an earlier stage.

5.5.5 Intra-Commission Research

The Commission states that the Research and Co-ordination Division has an important role to play in assisting other Divisions in the discharge of their functions.

According to the Commission, this work has included:

- advice on a questionnaire for the Liquid Waste Inquiry;
- practically-orientated research aimed at improving the efficiency and efficacy of informal complaint resolution procedures in the QPS;
- development of a methodology for obtaining the views of complainants concerning the complaints investigation process.

The Commission has also indicated that it plans to initiate a program for on-going statistical

analysis of CJC complaint files to assist the OMD in the identification of trends and problem areas. The Division reports that it will also assist the Corruption Prevention Division in evaluating the effectiveness of various anti-corruption strategies.

The Committee recognises that the Division is able to analyse and make recommendations upon the information gathered by the CJC, especially confidential information gathered from the complaints process and from the Intelligence Division.

However, the Parliamentary Committee is concerned that these types of projects, whilst attractive theoretically, distract the Division from its primary responsibilities. The Committee is also generally concerned at the Research Division being able to access and rely upon complaints files from the Official Misconduct Division. There is a danger that an over emphasis will be placed upon these internal files, which relate to perhaps a small percentage of incidents, and are therefore not representative. There are also a number of privacy issues which need to be addressed.

Conclusion

The Committee does not believe that the co-ordination role envisaged by Fitzgerald QC can be undertaken by the Research and Co-ordination Division. The Committee concurs with the CJC that this role is properly an executive function.

Recommendation

The Committee recommends that the CJC cease to have a co-ordination role, and that the *Criminal Justice Act* be amended accordingly.

Conclusion

The Committee is of the opinion that there remains a vital need for an independent body to research and report on criminal law and criminal justice reform.

Conclusion

The Committee is of the opinion that there is still a vital need for an independent body to oversee the reform of the Queensland Police Service. The Committee believes that there are substantial recommendations made by Fitzgerald QC in respect of the Queensland Police Service that need to be addressed by the Queensland Police Service and the CJC which oversees that reform.

Recommendation

The Committee is of the opinion that the Research Division should, as a matter of priority, research and report on the substance of the outstanding matters on the Fitzgerald Report agenda which have not been satisfactorily addressed by the Service.

Conclusion

The Committee does not believe that the Research Division has yet completed the research agenda left for it by Fitzgerald QC.

Recommendation

The Committee recommends that the Research and Co-ordination Division, as a matter of priority, address the following outstanding items of the Fitzgerald Report agenda:

- **General review of regulatory laws (Item 1).**
- **Review of law enforcement funding to consider additional or alternative funding strategies (Item 3).**
- **The formulation of a professional education and review unit (Item 5).**

Conclusion

The Committee does not believe that the general criminal justice research by the Research and Co-ordination Division is of a high priority, unless such research can be demonstrated to have the potential for the creation of efficiencies within the criminal justice system. The Commission's guidelines for research should be amended to reflect that priority is to be given to matters contained in the Fitzgerald Agenda for the Division.

5.6 Compatibility of the Research and Co-ordination Division

Perhaps the major issue in respect of the Research and Co-ordination Division is whether the Division should be located within the Criminal Justice Commission. There have been strong arguments advanced that the role of the Division should be transferred elsewhere, or that a "stand alone" body should be created.

At the public hearing Mr Shane Herbert QC expressed his personal view that the Research Division should not continue within the CJC:

> *The Research and Coordination Division—my personal view is that it absolutely must be removed from the CJC. The Law Reform Commission is the proper home for the Research and Coordination Division. I think there can be no doubt about that. To have a body whose other roles are investigating, prosecuting and judging coppers—that is one role. The other role is looking after witnesses for the coppers or for the prosecution—witness protection. Intelligence is looking after investigations of criminals, and the major crime in organised crime is being a super sophisticated police force. I think it is ridiculous that a body that is so structured should also have the job of being an independent arbiter of the efficacy of the criminal justice system judged from the point of view not merely of kills and sentences but also from the point of view of the protection of people's liberties and rights. It cannot do it.*
>
> *As to the Intelligence Division—I do not know enough about it. I am not qualified to talk about where it should be, because I really do not know what it does. But I know what the other things do. As I say, the mixing of roles with this thing has reached the point that it would be far better to break it down a bit. It would also mean that we do not have this great big thing called the CJC that we are all so terrified of, which has*

> *a budget of over $20m and is such a terribly important institution. After all, it is a number of different functions that have been rolled up into one and given a logo like the Commonwealth Bank has. After all, that is all it is. I think that sufficient history has now passed for us to see what its proper role should be and to see that they can be really adequately performed by other bodies that have now themselves been reformed. That is my analysis of what should stay.*

The submission from the Queensland Council for Civil Liberties also identified the problem of conflict of interest:

> *There is something of a conflict of roles even within the Division itself when regard is had to its brief to develop compatible systems between law enforcement agencies on the one hand and the requirement imposed on it on the other to engage in criminal justice law reform.*
>
> *As well as there being a conflict in functions within the Division itself (as provided in Division 8 of the Act outlining its functions), there is also a significant conflict of roles in having the one organisation (the Commission) having a so-called organised crime fighting role and a criminal justice system law reform role.*
>
> *...*
>
> *While it is correct to observe at the time of that Report that the Commission was independent of Government, the subsequent Annual Reports of the Criminal Justice Commission have failed to even advert to the impossible conflict of interest the Commission itself has arrived at as a result of its growing super police force role.*

This issue has been discussed prior to the Committee's current review of the Commission. The Queensland Law Society, in its submission to the Committee in relation to Volumes I and II of the Criminal Justice Commission's Police Powers Report made the following comment:

> *The Society would question whether the Criminal Justice Commission is a body ideally suited to develop law reform proposals, specifically those relating to police powers, having regard to the very substantial involvement of the Commission in the investigation of serious crime. It is relevant in this regard to refer to the widespread community concern regarding the Commission's allegedly arbitrary use of its own extraordinary investigatory powers in the course of investigations of breaches by its own staff members.*

The Criminal Justice Commission has submitted that the Research and Co-ordination Division should remain within the CJC:

> *The Research and Co-ordination Division is an integral part of the Commission and vital to its effective functioning. The Division informs and advises the Commission on policy and operational issues and, as indicated above, assists other Divisions on research-related issues.*
>
> *The main argument for establishing the Division as a stand alone organisation appears to be that there would be less scope for the Division's work to be "tainted" by the law enforcement perspective of other sections of the Commission. However, in practice this has not been a problem. The Division has enjoyed a good deal of autonomy within the Commission and is answerable for its reports only to the Commissioners, not other sections of the organisation. To date, the Division has issued four of a projected five volumes of its police powers report. In preparing this Report the Division has benefited considerably from the practical advice provided by operational personnel within the Commission, but there has been no suggestion that*

the recommendations contained in the report have been unduly favourable to law enforcement interests. From a research perspective there are, in fact, considerable benefits associated with being located in the Commission:

- *The Division has substantial monitoring functions in relation to the QPS. If the Division is detached from the Commission, there would be no one left to perform this role. Even if these functions were allocated to a new, stand-alone body, it would be very difficult to discharge them effectively. For there to be adequate monitoring, it is essential that there be good lines of access to the QPS. It would be very doubtful that the degree of access which the Division currently enjoys could be maintained if it was split off from the rest of the CJC.*

- *An increasingly important data source for the Division are the complaints files held by OMD. These files have been used in preparing the police powers report, and will be the primary source material for a major project on police complaints to be undertaken later in the year. Due to strict confidentiality requirements, it would not be possible for an outside body to access this information.*

- *The high public profile of the Commission makes it relatively easy to win public and media attention for the work of the Division. This is an important consideration, given that one of the most important functions of criminal justice research organisations is to promote informed public debate and discussion.*

From a budgetary perspective, there are considerable economies of scale to be achieved from basing the Division in a larger organisation, as it is not necessary to operate a separate administrative structure.

The Commission submitted that there are currently no other agencies which could appropriately carry out the Division's functions. The Commission submitted that:

- Whilst the Queensland Police Service should have its own research and evaluation capability, it was very important that some independent monitoring and evaluation role is retained. The Commission also submitted that it was important that independent evaluations are made public and that stimulation from an outside body such as the CJC provokes action by bodies such as the QPS.

- The Law Reform Commission is currently reference-driven, and that it was vital that any body invested with the Criminal Law Reform be able to operate on its own initiative. Further, the CJC submitted that the LRC currently has a legalistic focus, whereas the CJC, because of its multi-disciplinary character, is able to bring a variety of perspective to bear on law reform related issues.

- The Litigation Reform Commission should not be given a monopoly on conducting research in relation to the courts, because the reports of the Commission are not normally public documents and that it was important that there be an independent purview.

The Parliamentary Committee recognises that attempts to improve the Criminal Justice system prior to the Fitzgerald Report were piecemeal, fragmented and ineffectual. However, since the Fitzgerald Report, Government has implemented a range of measures designed to improve the situation, including:

- the Office of Cabinet to develop, co-ordinate and integrate Government policy including

criminal justice issues

- the Litigation Reform Commission to recommend and oversee improvements to the working of Courts and the administration of Courts

- the Public Sector Management Commission which has a review and reporting role in regard to the managerial effectiveness of agencies in Government

- additional resourcing of the Law Reform Commission

- the establishment of several committees eg to review the Criminal Code, to review the Criminal Justice Act, and a forum established by the Office of Cabinet to co-ordinate research and review activity in relation to the criminal justice system

As a result of these initiatives the research and, in particular the co-ordination capacity, within Government has been improved.

As noted earlier in this report at 5.5.1.1, much of what the Fitzgerald Report set for the Research and Co-ordination Division has been undertaken by some of the above bodies.

Should the role of the Research Division be transferred to the Law Reform Commission?

Fitzgerald QC made the following comments about the Law Reform Commission:

> *It has undoubtedly had outstanding Chairmen. All of them have been serving Supreme Court judges and therefore able to devote only limited time to the Commission's work. It has produced considered reports which reflect a variety of opinions, with explanations for the recommendations offered. No more could have reasonably been asked of it.*
>
> *What is significant is that relatively few of the references to the Law Reform Commission have concerned highly sensitive matters relevant to the administration of criminal justice. Such matters have generally been retained in the hands of the bureaucracy or departmentally controlled committees.*
>
> *(The Commission) has neither the time nor the resources to monitor the operation of ... the law relevant to the administration of criminal justice.*
>
> *(The Commission) has no expertise or capacity to perform a wider function of assessing what resources are available, at what cost and what social objectives realistically can be obtained with what resources and at what costs, in recommending changes to the ... criminal laws. Such a function is no part of its proper statutory role.*
>
> *It should be made plain that the recommendations in this report do not, implicitly or otherwise recommend the abolition of or downgrading of the Law Reform Commission. The recommendations presuppose a continued (and, indeed, enhanced) functioning of the Law Reform Commission. (1989:316)*
>
> *... its role [the Research Division] will be to* ***supplement and complement*** *research and the activities of other efficient productive agencies elsewhere and relate that to State needs rather than to duplicate or replicate their functions in Queensland.* (1989:317-318)

There has been some debate about whether the CJC or the Law Reform Commission (LRC) is the better body to undertake certain types of research in respect of the criminal justice system in

Queensland. In discussing this issue, it is preferable to consider matters of principle first and then address practical issues such as resourcing.

The Parliamentary Committee notes the following matters:

· The LRC undertakes research commissioned by the Government in a totally independent way. One of the LRC's objectives is to prepare thoroughly researched law reform recommendations that Government accepts and implements. Members of the LRC must be qualified for appointment by the holding of a judicial office, by experience as a barrister or a solicitor, or as a teacher of law in a University.

  The CJC has a broader primary research obligation to inform the Parliament of the pros and cons of matters impacting on the criminal justice system including at times, issues where the Government may not necessarily have a reform priority. The CJC has a responsibility to bring these matters to the attention of Parliament, and is charged to do so in a balanced way. It is then for Government to make appropriate decisions including whether or not to present a preferred legislative approach to the Parliament.

  The CJC also has as responsibility to recommend the need for new laws that will improve the criminal justice system and gain Government commitment for these laws.

· The LRC operates under reference from the Attorney General, and would be expected to cover a broad range of law reform issues in both the civil and criminal areas. The LRC cannot ordinarily initiate work of its own undertaking, but could raise matters of priority with the Attorney General for consideration. The LRC is independent in the researching of matters referred. The reports of the LRC must be tabled in the House within 14 sitting days of receipt by the Attorney General.

  Alternatively, the CJC is conceived as a permanent, independent body which may initiate research which it considers necessary, respond to suggestions by the Parliamentary Committee, and fulfil obligations in the Act to conduct ongoing research and investigation into the criminal justice system. It reports to Parliament and other relevant agencies. It is completely independent.

· The LRC, to this point in time, has had a legal focus to the work it performs. An expression commonly used to describe this traditional role is reform of black letter law. This is an appropriate role for the LRC. However, the LRC can and does review social issues relevant to the development of new laws.

  The CJC has a broader social research focus in researching issues impacting on policing and the criminal justice system, for example, issues such as prostitution, cannabis and law enforcement.

· The CJC has been charged with the ongoing responsibility to research and co-ordinate various parts of the criminal justice system.

  The LRC has no ongoing responsibilities in relation to functions such as this within the criminal justice system. It is arguable that, given the broad civil and criminal law reform mandate of the LRC, its role does not include responsibility for ongoing commitments in any one area of the law.

· To this point, the CJC has been deliberately structured to include several different disciplines as well as the law, with a particular focus on the development of the capacity to

conduct research into social issues impacting on the criminal justice system. To date, the LRC has not been in a position to establish a research base of this type.

- At the present time, there appears to be good co-operation and liaison between the CJC and the LRC. Further, efforts have been made to reduce the likelihood of duplication.

- The LRC operates under separate legislation, is Chaired by a Justice of the Supreme Court of Queensland and, in addition, comprises a small number of Commissioners (some full time and some part time) and research officers with legal and related backgrounds.

However, despite the immediate differences between the bodies, the Committee believes that the Law Reform Commission, or another stand alone body, could be given appropriate resources and jurisdiction to undertake the research work currently being undertaken by the Research Division of the CJC.

A potentially contentious issue raised by the Commission of Inquiry was that relating to research and review of the effectiveness, efficiency, administration and operation of the Court system. The Litigation Reform Commission now has the role of ensuring that the statute law and administration practices governing Courts are modern, relevant and just, and it now has a direct mandate to undertake this task.

The Litigation Reform Commission however, reports to the Minister the results of recommendations under current arrangements may or may not become publicly known.

The Litigation Reform Commission no doubt takes into consideration the work of other agencies such as the Law Reform Commission and the CJC.

The Committee is not convinced that the arguments raised by the CJC against either the creation of a stand alone agency undertaking the research functions of the Research and Co-ordination Division, or the transfer of this function to the Law Reform Commission are insurmountable.

In particular:

- the Law Reform Commission could be given the power to initiate its own reform agenda, in addition to the researching of references forwarded by the Attorney-General;

- the LRC could be resourced and operated in a multi-disciplinary character, similar to the Research and Co-ordination Division;

- the CJC could retain the monitoring and evaluation role of the QPS, despite the fact that the Research Division's other responsibilities were transferred elsewhere;

- legislative amendment could be made which would permit the CJC to reveal material to the LRC, or another stand alone body, which inherits the Division's responsibilities, if such an amendment is felt necessary; and

- the costs of a stand alone body, or the transfer of the responsibilities to the LRC, would not necessarily exceed the current costs of the Research Division, without sacrificing the quality or quantity of the work performed.

The transfer of the Research Division functions to another body would enable the work of that body to be viewed as totally independent and divorced from law enforcement. In particular, such a body could review matters which touch upon the other functions of the CJC, without attracting

criticism of bias.

Conclusion

The Committee supports the Fitzgerald Report findings that Queensland requires an independent body which conducts criminal justice research and reports publicly thereon. However, the Committee does not believe that such a body should undertake research for the sake of research. Rather, that body is required to undertake research that promotes an efficient and equitable criminal justice system.

In theory the Research and Co-ordination Division of the Criminal Justice Commission is consistent with the Fitzgerald Report recommendation for an independent criminal justice research body.

In practice, however, the Committee is concerned that a number of matters set by the Fitzgerald Report for the Research Division have not been addressed or have not been adequately addressed.

The Committee is not convinced that it would not be possible, or eventually desirable, to transfer the research function of the Division to another stand alone entity.

The Committee is currently of the opinion that the research function of the Research Division should remain within the CJC until the completion of the Fitzgerald agenda.

The Committee is of the view that it would not be desirable to transfer the Commission's responsibility of monitoring reform in the Queensland Police Service to any other body. This is a vital function which the Commission is ideally placed to discharge.

Recommendation

The Committee recommends that the research function of the Research Division should remain with the Commission until the completion of the agenda left for the Division by the Fitzgerald Report. The Division is to give priority to the completion of that agenda.

The Committee recommends that the Police Service Reform function of the Research Division should remain with the Division. The Committee recommends that a separate review to be completed in 1996 by the next Committee with particular emphasis being placed upon whether the Division has satisfactorily completed the Fitzgerald reform agenda, whether the Division should retain its law reform research function, or whether that function should be transferred to another body such as the Law Reform Commission.

6. INTELLIGENCE DIVISION

6.1 Introduction

This chapter focuses on the role and functions of the Intelligence Division. The chapter discusses the findings and recommendations of the Commission of Inquiry and the provisions of the *Criminal Justice Act 1989* in respect of the Division. The chapter then considers the structure and operation of the Intelligence Division, in particular, the security of intelligence material and the role of the Commission to report to Government on matters of criminal intelligence. The following issues are then addressed:

- whether the Commission's intelligence function duplicates that of the Queensland Police Service
- the accountability of the intelligence process
- co-operation with other law enforcement agencies.

6.2 Findings and Recommendations of the Commission of Inquiry

6.2.1 Organised Crime and Disorganised Law

Fitzgerald QC recognised the central importance of criminal intelligence collection systems and correct information processing in combating organised crime and major crime. Fitzgerald QC observed:

> *Comprehensive accurate information is essential to combating crime, especially organised crime. Yet our national system of sharing and acting on intelligence about crime is hopelessly inadequate.*
>
> *A fragmented, inefficient or incomplete intelligence gathering network is an enormous reassurance for organised criminals. It means that essential connections will be missed, and only an incomplete picture will be gained of their activities.*
>
> *As it stands, Australian law enforcement agencies and Government instrumentalities are fragmented and hampered by jealousies, rivalries and lack of co-operation. Information exchange, when it happens at all, is on an ad hoc basis.*
>
> *Our law enforcement agencies are failing to keep up with organised crime. As a result, criminal organisations are flushed with increasing profits, more adept staff and the latest equipment.*
>
> *This is happening at the same time as law enforcement agencies are becoming increasingly understaffed, under-equipped and poorly financed. (1989:168)*

6.2.2 The Queensland Police Service Information and Intelligence Systems at the Time of the Fitzgerald Inquiry

The Fitzgerald Report concluded that the two major units responsible for information and

intelligence within the police force, namely the Information Bureau and the Bureau of Criminal Intelligence (BCI), were ineffective, requiring review and significant improvement.

Fitzgerald QC made the following comments in respect of the role of the BCI:

> *The Bureau is expected to assist all sections of the Force with their intelligence requests, however, it relies on a card system and has limited capacity to generate or disseminate intelligence.*
>
> *Information held by the Bureau is insecure because of poor controls over individual access to the system, and a lack of voice protection facility on radio communication.*
>
> *The Bureau was designed to collate and integrate information from all special squads, but in practice this has not been achieved*. (1989:270)

A comprehensive review of all information systems within the QPS was suggested by Fitzgerald QC as the necessary prerequisite to setting up any new information systems and functions. An essential part of this reform was oversight to be exercised by the Commission.

In particular, the Report of the Commission of Inquiry stressed that there are fundamental practical objections to appointing police officers to lead, manage and develop police information and intelligence services, especially if such officers were accountable to other senior police personnel. (1989:270)

6.2.3 The Intelligence Division within the Criminal Justice Commission

Fitzgerald QC expressed the view that an Intelligence Division should be formed within the Commission to:

> *provide an effective criminal intelligence service as a hub of an integrated approach to major crime, especially organised crime, and criminal activity transcending the normal boundaries associated with local policing. Its own intelligence data base and information gained from other sources, particularly the Official Misconduct Division, will be of the highest sensitivity, and must be carefully secured, to ensure only those individuals with a need to access the material are able to do so. It must have unqualified access to the whole gamut of intelligence sources of all sorts, including those of the Queensland Police and from inter-state and Commonwealth sources.* (1989:317)

The Fitzgerald Report highlighted the central importance of information and criminal intelligence in respect of organised crime as well as the need for liaison with law enforcement agencies elsewhere, and other official bodies. Fitzgerald QC observed:

> *There is a need for an orderly flow of information about criminal justice into the political process and back to the general community.* (1989:317)

Further, Fitzgerald QC envisaged that the permanent role of the Commission would include overseeing criminal intelligence matters and managing criminal intelligence with specific significance to major crime, organised crime and official misconduct (1989: 372).

The Commission of Inquiry recommended that the Intelligence Division be established as a suitably equipped, professional and specialist criminal intelligence unit, independent of the Police Force, with the following functions:

(a) to provide an effective criminal intelligence service as the hub of an integrated approach to major crime, and criminal activity transcending the normal boundaries associated with local policing

(b) to build up an intelligence database using its own information, and information from other sources including the Official Misconduct Division, the Queensland Police Force and all interstate and Commonwealth sources

(c) to carefully secure the database to ensure only those individuals with a need to access the material are able to do so

(d) to oversee the role now performed by the Bureau of Criminal Intelligence of Queensland, part of the Police Department, including the Police Department's liaison with other Federal and State law enforcement agencies and the National Crime Authority

(e) to take control of the data accumulated to date by this Commission

(f) to report to the Government, subject to CJC consent, on criminal intelligence matters pertinent to Government considerations, policies or projects. (1989:375)

6.3 The Criminal Justice Act 1989

The recommendations of the Commission of Inquiry were subsequently incorporated into the *Criminal Justice Act 1989*. The Act provides for the oversight role by the Commission of the Queensland Police Service (QPS) information and intelligence functions, and establishes the functions of the Intelligence Division. Section 23(d) of the Act provides that the responsibilities of the Commission include:

overseeing criminal intelligence matters and managing criminal intelligence with specific significance to major crime, organised crime and official misconduct.

Fitzgerald QC envisaged that the Intelligence Division would concentrate specifically on building a suitable database of intelligence information and managing such information to ensure its integrity and correct use. Section 58 of the Act provides the specific role and functions for the Intelligence Division in meeting this responsibility:

58(1) The Intelligence Division is the unit within the Commission to function as a professional and specialist criminal intelligence unit providing an effective criminal intelligence service as the hub about which an integrated approach to major crime, in particular -

(a) organised crime; and

(b) criminal activity transcending the normal boundaries of criminal activity that is the subject of local police action;

may be structured.

(2) It is the function of the Intelligence Division -

(a) to build up a data base of intelligence information concerning criminal activities and persons concerned in criminal activities, using for the purpose information acquired from -

(i) its own operations;

(ii) the Official Misconduct Division of the Commission;

(iii) the Police Service;

(iv) sources of the Commonwealth or any state or Territory, which supplies such information to it;

(v) any other source available to it;

and to disseminate such information to such persons, authorities and agencies, and in such manner, as the Commission considers appropriate to the discharge of its functions and responsibilities;

(b) to assume possession and control of all data and records of the Commission of Inquiry continued in being by the Commission of Inquiry Continuation Act 1989;

(c) to secure such data base and records in its possession and control so that only persons who satisfy the director of the Intelligence Division or the chairperson that they have the legitimate need of access to the same are able to have access to them;

(d) subject to the direction of the Commission, to assume or, as the case may be, oversee -

(i) the performance of the role of the Bureau of Criminal Intelligence of the Police Service; and

(ii) the Police Service's liaison with law enforcement agencies of the Commonwealth or any state or Territory and with the National Crime Authority;

(e) subject to the Commission's approval, to report to the Minister and the Minister of the Crown responsible for the Police Service on matters of criminal intelligence pertinent to the deliberations, policies and projects of the Government.

Further, to facilitate the collection of criminal intelligence information, section 60 of the Act provides for such material to be forwarded to the Intelligence Division by the Official Misconduct Division (OMD) and by the QPS. In addition, section 59 of the Act provides for the relinquishment of data of the Commission of Inquiry.

6.4 Criminal Intelligence

The main attention of the Intelligence Division of the Commission has been to build up a reservoir of knowledge about organised criminal activity within the state of Queensland, in particular the organisations and syndicates involved and the persons who are involved in those activities.

Intelligence is a pro-active method of identifying criminal activity and, in identifying that activity, also identifying the organisations and the individuals involved. The intelligence product can be used to commence an operation against a particular target; it can be used in support of an operation that

is ongoing; or it can be used simply to aid in the decision-making process by providing advice on trends, patterns and potential threats.

By its very nature intelligence is based on unconfirmed information. Its value, therefore, varies considerably from mere allegations, innuendo or rumour through a scale to information that is all but confirmed to be 100 per cent accurate. Wherever intelligence fits into that reliability scale, there is always a need for more work to be done to establish its worth. As that work is done, the information is either proven incorrect and disposed of or the probability of its truthfulness is steadily increased as corroboration becomes available from other sources.

6.5 The Structure of the Intelligence Division

The Intelligence Division became operational in June 1990 with an initial establishment of 16 persons. At present, the structure of the Division includes three specialised teams of analysts performing intelligence duties whilst a fourth team is responsible for the management of the Commission's Criminal Intelligence Database (CID) and related material.

When the Division was first established 11 analysts were recruited to meet the needs of the Commission. The analytical component remains unchanged; however, a further seven officers have been provided in the area of data management and support to allow for the effective operation of the database including systems administration, quality control, data collection, data entry, and information retrieval duties.

6.6 The Operation of the Intelligence Division

6.6.1 The Criminal Intelligence Database

As recommended by the Fitzgerald Report the Commission has developed a database which is managed by the Intelligence Division. The Commission reported that it approached the task of building a database by:

- commencing the back-capture of relevant intelligence material from the Fitzgerald Inquiry
- collating intelligence material resulting from the operations of the Commission of Inquiry
- commencing proactive collection of data relevant to organised crime and major crime with a view to assessing the potential threat posed to Queensland by the traditional areas of organised crime.

In January 1992, the Commission implemented a computerised storage platform for the database which was a modified version of the system used by the Australian Bureau of Criminal Intelligence (ABCI). That platform operates in a stand-alone environment on the Commission's premises. The Database was upgraded in early 1994 to incorporate enhancements developed by the ABCI which included a new document registration system to replace the earlier independent system developed by the Division.

The Police Service does not have on-line access to the criminal intelligence database at the Commission. However, there is a liaison facility in place should the QPS require information from the Commission.

The Division maintains that it has developed and adopted guidelines which address privacy

principles, the security of information and its correct handling, storage and retrieval. The objective of these guidelines is to ensure that the integrity of the database is maintained and that only crime related data is retained within the Division's holdings.

The Committee acknowledges that the establishment of integrated and effective intelligence databases and development of these systems to a stage where they can provide meaningful strategic intelligence to direct the priorities and strategies of organised crime investigations takes some years.

Conclusion

The Committee concludes that the establishment of an integrated and effective intelligence database takes some time. Establishing the criminal intelligence database has involved a lengthy acquisition process however, the system is now operational.

6.6.2 Security of Intelligence Material

As indicated above, section 58(2)(c) of the Act provides that the database and records in the possession and control of the Division must be secured so that only persons who satisfy the Director of the Intelligence Division or the Chairperson that they have a legitimate right to the information have appropriate access to it. This reflects the Commission of Inquiry recommendation that the Commission's:

> *... own intelligence data base and information gained from other sources, particularly the Official Misconduct Division, will be of the highest sensitivity, and must be carefully secured, to ensure only those individuals with a need to access the material are able to so do.* (1989:37)

The Commission submitted:

> *The Division is an independently secure area within the Commission's premises. Physical access is restricted to Commission personnel and staff of other law enforcement agencies during the course of legitimate law enforcement duties where a need exists to liaise with the Division's staff. The Division's hard copy records are securely stored with access subject to the authorisation of the Director. With respect to the Database, the entry, manipulation and retrieval of information is restricted to Division staff and is subject to stringent security measures. These measures have been in place since the Division began its operation and have been amended as necessary with the advent of new equipment. For example, the installation of the Division's dedicated hardware and software to house the Database resulted in enhanced security.*
>
> *Access to the database is electronically controlled and a full audit log is maintained in this respect. Senior staff of the Division conduct audits on a regular basis. The hardware itself is maintained in a secure area with restricted access. Awareness of security measures remains an integral part of in-house training provided to Division staff. Procedures are in place to document all requests for information searches either from within the Commission or from external agencies. Upon satisfactory confirmation that the request is in accordance with the Division's procedures and that the inquiring person or agency has a justified need and right to know, a senior member of the Division may authorise dissemination of material in reply to the request. All disseminations, whether at the Division's instigation or in response to a request, are documented and regularly audited.*

During 1993 the Commission experienced occasions where unauthorised access was gained to

intelligence material. In the first instance, articles appeared in The Courier-Mail on 12 February 1993 with reference to an Italian Organised Crime Report which was sourced from the Commission. The Commission was able to identify the source of the security breach as being a former employee of the Commission.

On 7 August 1993 two articles appeared in the Weekend Australian written by Ms Madonna King titled *Japan's Gangsters Here: Secret Report* and *Japanese Money: The Evil Within*. Investigations by the Commission concluded that these articles were sourced from the Commission's report on Japanese Organised Crime. However, investigations were unable to determine the source of the leak.

Further on 20 November 1993 an article appeared in The Weekend Australian, also written by Ms Madonna King, titled *Asian crime gangs lead heroin imports*. Subsequent investigation revealed that this article was sourced from the Chinese Organised Crime Report prepared by the CJC. Investigations failed to identify the source.

Following the Commission's investigation into the first security breach, the Parliamentary Committee conducted a review of the Commission's use of its power under s.3.1 of the Act (now s.69). On 23 September 1993 the Committee tabled Report No. 20B entitled *Report of the Review of the CJC's use of its powers under section 3.1 of the Criminal Justice Act 1989 Part B - Report, Conclusions and Recommendations*. The Committee concluded:

> *The CJC is under a statutory duty to ensure that material gathered by the Intelligence Division is secured, and to ensure that material is not released to persons who do not have a legitimate need of access. The CJC's internal security guidelines provide that confidential material is not to be removed from the CJC's premises unless there are extraordinary "circumstances". ... It is imperative that information retained by the Intelligence Division be secure. The Committee recognises that the Director of the Intelligence Division is working closely with the Chairman in order to prevent a recurrence of the present events. However, it is essential that the CJC establish a reputation for the security of information given to it by informants and other law enforcement agencies. (1993:101)*

The Committee recommended that the security procedures of the Commission, in particular the Intelligence Division, be reviewed by an outside agency such as ASIO or the National Crime Authority (NCA) to ensure those procedures are adequate. (1993:106) This review was undertaken by the Mr Nattress of the NCA who made a number of observations and recommendations.

There have been other occasions on which there has been unauthorised release of information from the Commission the details of which are canvassed in Report No. 25 of the Committee. In that report the Committee acknowledged that the CJC had, since the Parliamentary Committee's Report No. 20B, taken steps to improve its internal security. In particular, following Report No. 20B, the Commission's security was reviewed by Mr Nattress of the NCA, and the CJC had commenced implementing the recommendations made by Mr Nattress. Of paramount importance was the Commission's appointment of a security manager.

In Report No. 25 the Parliamentary Committee concluded:

> *If the CJC is unable to ensure the security of the information it gathers, it calls into question whether it can properly fulfil its role as an intelligence gathering and dissemination agency. If the leaks continue to occur, other agencies and informants generally will be reluctant to supply the CJC with confidential or sensitive information. In these circumstances, the Parliamentary Committee must begin to question whether the large public expenditure outlaid on the CJC's intelligence data gathering, storage and dissemination is justified.*

> *If the Commission is unable to secure its data, the Parliamentary Committee may question whether a powerful intelligence body which holds unproven and speculative information, some of which may destroy or seriously damage individual reputations, should continue.*
>
> *The Parliamentary Committee recognises the contribution made by the Commission to combating organised crime, within this state. However, if breaches of security continue to occur then the Parliamentary Committee must question whether the Commission's intelligence function will become impotent or if the risk it poses to person's reputations and their civil liberties outweighs its benefits.*
>
> *The Commission's security must be significantly improved and the unauthorised release of information must stop. (1994:61)*

The Committee recommended that:

- *the Commission fully implement the recommendations relating to internal security made by Mr Nattress of the NCA (Recommendation 2)*
- *the Commission's security manager report in full on a monthly basis to the Committee until all of those recommendations are implemented (Recommendation 3)*
- *the Commission undertake on an on-going basis a full internal security audit, the results of which are to be reported to the Parliamentary Committee (Recommendation 4)*
- *the Commission institute inservice training for all Commission personnel to familiarise them on aspects of internal security including the procedures for dealing with confidential material (Recommendation 5).* (1994:61)

On several occasions the Parliamentary Committee has reviewed Commission security, identified shortcomings and made recommendations for the improvement of security procedures. Continuing breaches of internal security of the Commission will have the effect of destroying its credibility, effectiveness and operational integrity.

The Parliamentary Committee acknowledges that in respect of the Japanese Organised Crime Report and the Chinese Organised Crime Report this material was provided to members of the Commission outside the Intelligence Division for reference purposes. For example, the Japanese Organised Crime Report was provided to Commission officers outside the Intelligence Division who did not have a need to know. Consequently, the potential for failure of security was increased. The Committee also acknowledges that the decision to distribute this material outside the Intelligence Division was not made by the current Director of the Intelligence Division.

Further, in the case of the Commission's failure to account for two copies of the November monthly report the Committee recognises that the problem was that intelligence information was provided to other Divisions of the Commission which lacked appropriate security measures. Persons with no need of access, such as the media liaison officer and the research Division, were provided with access to the information.

The Committee acknowledges that, in respect of the November monthly report, the deficiencies revealed in relation to the internal security of the Commission were not within the Intelligence Division.

Conclusion

The Committee concludes that it is imperative that information retained by the Intelligence Division is secure. The Commission must ensure that internal security guidelines are strictly enforced. The Commission must also ensure that the intelligence material of the Division is not distributed to persons outside the Division unless satisfied that there is a need of access. Further, the Commission must accept that the security of intelligence material is a matter of ongoing concern.

6.6.3 Oversight of the Bureau of Criminal Intelligence

Fitzgerald QC recommended that the police intelligence function should be subject to oversight. This recommendation is reflected in section 58(2)(d) of the Act which provides that the functions of the Intelligence Division include overseeing the performance of the role of the BCI and the Police Service's liaison with law enforcement agencies of the Commonwealth or any state or Territory and with the NCA.

Further, in recommending the formation of the Commission's intelligence function, Fitzgerald QC commented that the success of the recommendation would:

> *depend upon the close and sensitive development of co-operative procedures and liaison between the CJC and the new leadership of the Police Force [and acceptance of] the importance and worth of an integrated and cross-checked and balanced approach to information collection and analysis and the assessing and use of criminal intelligence.* (1989:317)

There is no statutory provision as such for an intelligence function within the QPS. However, it is well accepted that no modern law enforcement agency can function without a dedicated intelligence service. The BCIQ, together with regional and district intelligence sections, provides that service for the Queensland police. The intelligence role of the Police Service is mainly tactical in nature and is designed to support the operation of the service.

The BCIQ has the role of co-ordinating the intelligence services within the QPS. The BCIQ is in two parts, the BCI and the Counter Terrorist and VIP Protection Section. The BCI is responsible for the general intelligence function within the QPS. The BCI has developed the Queensland Police Intelligence Network (QPIN), which links intelligence officers from District, Regional and Police Headquarters level. The QPS has created new positions to facilitate the establishment of the QPIN. The QPIN is supported by the QPS Intelligence Database (QUID). Terminals to access the network are available to all district intelligence officers and the BCI. This structure promotes the flow of intelligence across the Police Service.

There are several means by which the Intelligence Division carries out its oversight role. In 1990, the Division completed a detailed assessment of the BCI that recommended significant changes to the Bureau's structure, procedures and relations with other sectors of the QPS. Those recommendations were implemented in 1992. As part of the implementation of these recommendations, the BCI produces a monthly management return which enables certain aspects of the BCI's work to be reviewed.

The Intelligence Division of the Commission has on-line access to the QUID. This access serves two purposes. It facilitates the Commission's own operations and allows the Commission to monitor the content of the material in the QUID to ensure that it is storing the correct material and that the integrity of the database is appropriate.

The Commission is also able to oversee the QPS intelligence function via the daily logs which the BCI provides to the Commission. The daily logs of the BCI indicate what they have been working on for the past 24 hours.

The Commission advised that the relationship between the two units is fostered by regular meetings between the Director of the Intelligence Division and the Assistant Commissioner (Crime), who is in charge of the State crime operations of which the BCI is a part, and also between the Director and staff of the Intelligence Division and senior staff of the BCI. Regular contact also occurs between the intelligence officers of both areas during joint operations and other areas where they are working on matters of mutual interest.

The Intelligence Division of the Commission oversees the activities of the CTS specifically by regular audit of its function, storage of material and its activities. The Division conducts audits every six months which examine the intelligence holdings and filing procedures to ensure that the Section is operating within its approved charter, that the material maintained is in accordance with the charter, and that any material that is no longer useful is culled and put aside for destruction. Written audit reports are provided to the Targeting Control Committee consisting of the Chairman of the Criminal Justice Commission, the Commissioner of Police, the Assistant Commissioner State Crime Operations Command, the Director of the Intelligence Division and the Superintendent of the BCI. The Targeting Control Committee meets on a quarterly basis and is responsible for monitoring the Section's operations.

In addition to its formal oversight role the Commission referred to the close work it has undertaken with the BCI to prepare target proposals and conduct strategic projects. The Commission submitted that it has actively supported the development of the QUID. Further, the Division and the BCI have trialled an exchange of intelligence analysts as a means of improving the understanding of each area's operations and enhancing inter-agency co-operation.

The Commission also reported that the Division has facilitated the merger of the Commission's own intelligence training course with that of the BCI. Full-time Intelligence Analyst Training Courses are run approximately every six months with the Commission and the Bureau providing full-time instructors.

Conclusion

The Commission has implemented procedures to oversee the role of the BCI and the Police Service's liaison with other law enforcement agencies. The Committee concludes that the oversight role of the Commission is important to the development of the Police Service intelligence function.

6.6.4 The Role of the Commission to Report to Government

Section 58(2)(e) of the Act provides that it is the function of the Intelligence Division, subject to the Commission's approval, to report to the Minister and the Minister of the Crown responsible for the Police Service on matters of criminal intelligence pertinent to the deliberations, policies and projects of the Government.

The Queensland Council for Civil Liberties (QCCL) submitted that whilst it is recognised that the Commission's reports on organised crime cannot be fully publicly revealed if such revelation may result in the disclosure of sensitive criminal intelligence, nevertheless, this is often a smoke screen used by the Commission to be non-accountable for its activities whilst at the same time providing

secret reports to the Government which are designed to influence government policy in relation to police powers and allied aspects.

The Commission made the following points in response to this criticism:

- The Fitzgerald Report recommended that the functions of the Division include reporting to the government, subject to the Commission's consent, on criminal intelligence matters pertinent to government considerations, policies or projects. The purpose of this recommendation was to assist the government by ensuring it was properly briefed on such matters as the sources of foreign investment funds or known connections of persons or bodies with organised crime. This recommendation was given effect to by section 58(2)(e) of the *Criminal Justice Act*.

- The Division has provided only three written reports pursuant to this provision, all of which dealt with organised crime matters.

- The Division provided a verbal briefing on organised crime matters to the Minister responsible for the Police Service in 1993.

- This function is important from both the crime prevention and corruption prevention perspective.

Fitzgerald QC envisaged that it would be necessary from time to time for the Commission to report to the Government and that such reports would contribute to the decision making process. The Committee accepts that such reports are designed to provide a greater understanding of organised crime and the work of the Commission. Further, there is no obligation for the advice given to be heeded.

The Parliamentary Committee concurs with the view of Fitzgerald QC that there is good reason for the requirement for the Commission to provide the Government with some advice on organised crime matters. Reports of this nature may assist in the decision making process. From time to time it may be possible to close loopholes exploited by organised crime through administrative procedures. In this respect it may be necessary to combine the endeavours of various agencies and Government to achieve sufficient results.

The Parliamentary Committee is of the view that sensitive and confidential reports, particularly reports containing operational material, should only be provided to government agencies if the Commission can ensure the appropriate standard of security is maintained.

Further, the Committee notes that the Fitzgerald Report states that "The Intelligence Division may also perform a role with the consent of the Criminal Justice Committee of reporting to the Government..." (1989:318). However, this contradicts the recommendation in the Report which says "subject to the consent of the Criminal Justice Commission". The Act appears to have been drafted from the recommendations in the Fitzgerald Report. The Act says that it is subject to the Commission's approval to report to the Minister. The Commission submitted that the Act is correct and in accordance with the recommendation. The Committee supports this view.

Conclusion

The Committee concludes that there is good reason for the requirement for the Commission to report to the Government on matters of criminal intelligence pertinent to the deliberations, policies and projects of the Government. Reports of this nature may assist in

the decision making process.

Recommendation

The Committee recommends that the Intelligence Division should remain as an independent and suitably equipped professional and specialist criminal intelligence unit independent of the police force.

6.7 Other Issues

6.7.1 Does the Commission's Intelligence Function Duplicate that of the QPS?

Concern has been expressed relating to perceptions of duplication of resources and activities by the Intelligence Division of the Commission and the BCI.

The Commissioner of Police, Mr Jim O'Sullivan, submitted that scope may exist to review the current arrangements whereby two separate intelligence sections are maintained. Mr O'Sullivan submitted that both intelligence divisions are there to provide high quality information on organised crime and corruption-related activities and questioned whether there is a need for two similar divisions to support the function.

On behalf of the Queensland Justices and Community Legal Officers Association (Inc) it was submitted at the public hearing:

> *We have to stop the CJC's duplication of crime data development. We have the NCA, we have the Institute of Criminology, we have the AFP and we have other agencies, all well resourced with taxpayers' money. Why do we need the CJC overlaying it? As an example of the CJC's own concern about the legitimacy of its operations, surely we should look at the enormous hullabaloo the CJC makes—with again a compliant, willing media, an unquestioning media—about its work in crime statistical reporting, modelling and all of the other processes involved in its criminal intelligence gathering networks.*
>
> *We should give the job of intelligence gathering in relation to crime back to a better resourced police force. That is where it belongs—certainly not in another Queensland parochial arm of organisations such as the NCA, the Institute of Criminology and the AFP.*

The Commission submitted that there is no foundation for the view that the roles of the Commission's Intelligence Division and the QPS intelligence function involve a duplication of resources, rather, the reality is that the two functions are complimentary to each other in several areas.

The Commission referred to the QPS intelligence function which exists to support the operational needs of the QPS, and the distinct statutory obligations of the Intelligence Division pursuant to the *Criminal Justice Act 1989*. These obligations are specific to organised crime and major crime, including criminal activity transcending the normal boundaries of criminal activity that is the subject of local police action.

The Commission argued that the BCI and the related QPS intelligence network necessarily concentrate their resources on the day-to-day police intelligence needs in support of operational police work. In contrast, the Intelligence Division has concentrated its resources and analytical

expertise on building a database of intelligence on organised criminal activity.

The Commission acknowledged the potential for some overlap in terms of operational targets. However, the Commission submitted that several strategies are in place to ensure this possibility is reduced to an absolute minimum including that:

- the Commission is represented on the QPS operational target committee, which enables close liaison in respect of each agency's operations
- the Division maintains close contact with the BCI on operational matters
- regular monthly meetings are held between all law enforcement agencies within Queensland to minimise any overlap of investigations
- the majority of tactical intelligence work conducted by the Commission is in support of the Joint Organised Crime Task Force (JOCTF), which is jointly managed by senior members of the Commission and the QPS.

The Commission of Inquiry considered that combining the two intelligence services was not the best long term solution. Fitzgerald QC observed that the Intelligence Division of the Commission should be established:

> *... to provide an effective criminal intelligence service as the hub of an integrated approach to major crime, especially organised crime, and criminal activity transcending the normal boundaries associated with local policing ...*
>
> *... the Intelligence Division be established as a suitably equipped professional and specialist criminal intelligence unit independent of the police force ...* (1989:375)

The Parliamentary Committee is of the opinion that the prime obligation of the Commission function is that of strategic intelligence gathering, assessment and development regarding organised and major crime. The Division engages in pro-active and longer term intelligence collection efforts, which includes working closely with the Commission's OMD. Members of the multidisciplinary teams are involved in longer-term pro-active probes into the activities of organised crime. More recently, that has included the activities of the Joint Organised Crime Task Force. Multi-disciplined teams, led by civilians not answerable to a police hierarchy or responding to day-to-day operational priorities, are able to provide the best means of developing such a strategic intelligence database.

By contrast, the QPS has a primary obligation to gather operational intelligence (strategic and tactical), to complement police operations in the immediate to medium term. The Police Service's intelligence role is primarily target driven and aimed at persons, that is, individuals involved in crime at the various levels. The BCI also has a small strategic capability.

The encouragement of the QPS to improve and redevelop the BCI under the supervision of the Commission was considered the best way forward for this operationally focussed intelligence function.

Further, an important aspect of dealing with organised crime is the need for expertise and experience and long-term dedication. The BCI has a problem that is common in a lot of police areas, that is, it is very difficult for it to gain and retain expertise within the intelligence area. However, the officers of the Intelligence Division of the Commission are not subject to frequent transfers and promotions.

Both the Commission and the BCI are involved in the collection and analysis of operational and tactical information. However, it is the Commission's role to ensure that information contributing to the strategic intelligence picture of organised criminal activity in Queensland is identified and collated, leaving tactical intelligence functions to the BCIQ, in support of Police Service operations involving crimes of all categories at regional and local level. The Commission's strategies are long term and strategically based, whereas the BCI's strategies are more tactically oriented in support of the operational demands of the QPS.

It has been suggested to the Committee that the QPS should have intelligence gathering powers back. The Committee is of the opinion that this is a misunderstanding. The QPS did not have such powers initially.

The relationship between the Intelligence Division of the Commission and the BCIQ appears to be constructive, professional and productive. The Police Service, understandably, would like to take control of all intelligence functions. However, for the reasons discussed above, that would not be the best long term solution.

At the present time effective foundations have been laid for both the Commission and BCIQ intelligence functions to produce the quality work that would be expected to provide lasting benefits. Further, liaison and oversight of the BCIQ function provides for an effective exchange of information while avoiding duplication.

Conclusion

The Committee concludes that the Commission's intelligence function does not duplicate that of the Queensland Police Service. However, the Committee accepts that there is potential for some overlap in terms of operational targets. The Bureau of Criminal Intelligence and the Intelligence Division have separate and distinct functions. The priority assigned to the Queensland Police Service following the Fitzgerald Inquiry, was to enhance crime prevention and operational criminal detection activities, leaving strategic intelligence matters and the major focus on organised crime to the Commission.

The Queensland Police Service intelligence function is tactical, providing support to operational policing. By contrast, the Intelligence Division of the Commission undertakes pro-active, longer-term, strategic and tactical work towards organised crime. That includes the multidisciplinary teams and the Joint Organised Crime Task Force.

The Committee is not satisfied that there is any good reason to change the arrangements. There is a definite need for the Queensland Police Service to have an intelligence function to support its day-to-day operations. Equally so, there is a definite need for an intelligence function to support the investigation of organised crime in this State. At present, there is no capability within the Queensland Police Service to do the latter function.

6.7.2 Accountability of the Intelligence Process

The QCCL submitted that supervision of the implementation of proper privacy principles in relation to the collection of intelligence data cannot be performed by the Commission itself and that proper external controls should be maintained over the Intelligence Division, particularly given the growing super police force role of the Commission. The QCCL argued that this role should be performed by a State Privacy Commissioner/ Committee with the power to spot audit both the Commission and the QPS in relation to the criminal intelligence database. The QCCL also proposed that a Privacy Commissioner at state level would also perform a data protection role in relation to State

Government departments.

Notwithstanding this criticism, the QCCL acknowledged the initiative taken by the Commission in publishing its privacy information principles upon which criminal intelligence data is collected.

In relation to the issue of accountability the Commission submitted that the Intelligence Division:

- reports directly to the Chairperson and to the other Commissioners in sufficient detail for them to effectively oversee the operations of the Division
- reports to the Committee at the regular monthly meetings and in respect of particular issues as they arise
- maintains auditable records which are available for inspection by the Committee
- has been the subject of two external reviews during the last three years, each of which has confirmed that the Division was operating in compliance with its guidelines
- has always operated in accordance with federal privacy principles in anticipation of privacy legislation being enacted in Queensland.

The Commission submitted that the intelligence function is accountable and argued that such matters as privacy and individual rights and the balance of these matters with effective law enforcement are always at the forefront of the minds of the Commission's officers.

The Commission argued that to ensure the integrity of the database is maintained, certain staff of the Division are now specifically designated as Systems Administrator, Quality Control Officer and Data Entry Officers. The Commission referred to the guidelines it has developed for the management of intelligence material which incorporates the same provisions as the federal privacy legislation and related privacy principles to ensure that individual rights are protected and proper procedures are adhered to.

The Commission acknowledged that public concerns about the intelligence function will never be totally removed but argued that it has taken steps to allay these fears including oversight of the QPS intelligence function and pro-active measures to make the public more generally aware of the procedures and guidelines under which the intelligence function operates.

The Committee notes that the Commission has policies and guidelines in place which incorporate privacy principles the objective of which is to ensure the security of information, its correct handling, storage and retrieval.

The Committee receives reports and conducts audits of the Intelligence Division. An audit of the Intelligence Division was conducted recently. The Committee can report that the results of this audit were satisfactory and the Division's records were complete. Further, the Committee notes that the Intelligence Division has impressive internal audit procedures which attempt to ensure that information passed from the Division is correctly documented and cross-referenced.

The Parliamentary Committee acknowledges the comments of the QCCL in respect of the need for a State Privacy Commissioner. The Committee accepts that if there was a Privacy Commissioner one of the roles of the position would be to review the collection of intelligence data.

There is considerable potential for organisations to misuse intelligence information. A Privacy Commissioner would constitute another body to ensure that a person's civil liberties are maintained.

It is the role of the Parliamentary Committee to monitor and review the Commission. The Committee considers that a Privacy Commissioner, in allowing the Parliamentary Committee to discharge this function, should advise the Committee of the outcome of any investigations. Further, the Committee is of the view that a Privacy Commissioner having the power to conduct audits does not exclude the role of the Parliamentary Committee.

Conclusion

The Committee concludes that the role of a State Privacy Commissioner if introduced could include the review and audit of the collection of intelligence data. However, the role of the Privacy Commissioner to conduct audits should not exclude the role of the Parliamentary Committee to monitor and review the Commission. Further, a Privacy Commissioner, if introduced, should advise the Committee of the outcome of any investigations.

6.7.3 Co-operation with Other Law Enforcement Agencies

The Fitzgerald Report referred to the lack of co-operation and fragmentation of Australian law enforcement agencies and Government instrumentalities. The Report also referred to the need for liaison with law enforcement agencies elsewhere, and other official bodies.

The Commission submitted:

> *The Intelligence Division has always practised a philosophy of co-operation and mutual assistance through an established recognition that organised crime cannot be successfully attacked by agencies working independently. The Division has established an extensive liaison network with other law enforcement and government agencies throughout the country and overseas. The Division regularly liaises with these agencies and is an active participant in the nationally co-ordinated efforts which target certain aspects of organised crime.*
>
> *The Commission's intelligence holdings benefit the CJC and other law enforcement agencies, both State and Federal, with information frequently exchanged for law enforcement purposes in accordance with Memoranda of Understanding. The quality of the database is highlighted by the high rate of relevant responses to inquiries from other agencies about criminal activity in Queensland.*
>
> *Information is disseminated regularly, either at the instigation of the Division or in response to a request from another law enforcement agency. From July 1992 to June 1993, the Division disseminated intelligence to other law enforcement agencies at its own initiative on 218 occasions. In addition, during the same period, the Division also responded to 171 requests for assistance from other agencies and was able to provide useful intelligence in 120 of these occasions. From July 1993 to June 1994, the Division experienced a similar demand with intelligence disseminated at its own initiative on 226 occasions. In reply to 173 external requests for assistance the Division was able to positively respond on 115 occasions.*
>
> *The figures relating to dissemination at the Division's own initiative include disseminations which range from individual pieces of information concerning activities more appropriately dealt with by other law enforcement agencies, to more lengthy tactical and strategic intelligence assessments relating to organised crime activities. Forty-one such reports have been disseminated since the Division commenced operation. More specifically from July 1992 to June 1993 the Division disseminated 10 tactical and five strategic reports, and from July 1993 to June 1994 nine tactical and three strategic reports were disseminated.*
>
> *Internally, the Division works closely with OMD. It also provides a dedicated information retrieval service for officers of the Commission engaged in investigations and analysis. The service facilitates the smooth access to information held by the Division and to other information through specialised liaison with other*

> *agencies within Queensland and nationally. The centralisation of this service allows for appropriate checks and balances in respect of access to various data and provides a suitable audit trail. The workload of this area has increased considerably as the Commission's investigations have advanced. In 1991/92 the section responded to 3976 requests, whilst in the past two years (1992/93 and 1993/94) requests have totalled 5069 and 5077 respectively.*

The NCA submitted that it has been significantly assisted by the Commission through its collection and analysis of criminal intelligence relating to areas of organised or major crime and made reference to major joint operations which have achieved significant success. The NCA also submitted:

> *The Intelligence Division of the CJC is developing a significant data base on organised crime in Queensland which not only relates to its criminal investigations in Queensland but may also link in with investigations conducted and co-ordinated on a wider scale by the NCA. The resulting exchange of information benefits both NCA and CJC investigations.*
>
> *Accurate and reliable contemporary intelligence will also play an important part in identifying priority national crime problems which can then be attacked in a more co-ordinated and focused way making best utilisation of available resources. It is now widely recognised and accepted that no single agency acting alone can combat organised crime. The CJC has made and will continue to play an important role in the co-operative effort now being mounted nationally against organised crime in Australia and its links internationally.*
>
> *Access to intelligence data bases maintained by the CJC is seen as important to the NCA in its more focussed role in providing strategic criminal assessments. At this time, the CJC's holdings on organised crime in Queensland would appear to be the most comprehensive as it relates to crime committed in that State and therefore is in a position to support the national effort.*

The NCA noted that it has had very good co-operation with the QPS and that there is a high degree of co-operation between the QPS and the Commission in matters involving the NCA.

The Committee recognises that activities associated with crime may fall into areas of responsibility covered by more than one law enforcement agency. Therefore, co-operation between agencies is essential to combating crime, especially organised crime. Law enforcement agencies in Queensland meet on a monthly basis and discuss each other's operations and name targets and share information.

At the time of the Commission of Inquiry, federal agencies were reluctant to discuss or share information freely with the QPS. Since then, the Commission, as the integrating agency, has made a substantial contribution to improving the flow of intelligence information.

The Parliamentary Committee is of the opinion that the Intelligence Division, as well as working closely with the OMD, acts as a focal point for other state and federal law enforcement agencies. Further, the memoranda of understanding that have been exchanged with major law enforcement agencies facilitate the free flow of intelligence information. The Committee has received favourable reports from other agencies, such as the NCA, as to the level of co-operation and the quality of intelligence material of the Intelligence Division of the Commission.

Conclusion

The Committee concludes that the Commission has developed a good relationship with other law enforcement agencies. Co-operation between agencies is essential to combating crime, especially organised crime. The Commission has established effective links with other law enforcement agencies to a stage where meaningful information is now being shared.

6.8 Impact of Freedom of Information Legislation

Section 58(2)(c) of the *Criminal Justice Act* requires the Commission to secure the Database and records in its possession and control so that only those persons with a legitimate interest in the information they contain are able to have access to that information.

The *Freedom of Information Act 1992* (the FOI Act) applies to the Commission. The FOI Act contains a number of provisions which exempt particular kinds of information from disclosure.

When the FOI Act was originally enacted section 48 provided for an exemption from disclosure for certain material if there was in force a provision in another Act applying specifically to material of that kind and prohibiting persons specified in that provision from disclosing that kind of material.

There was the added requirement that its disclosure would, on balance, be contrary to the public interest (s. 48(1)(b)).

Subsection (3) of section 48 inserted a sunset clause into the provision so that section 48 had effect for only two years from the date of assent, that is, from 19 August 1992.

The *Freedom of Information (Review of Secrecy Provisions Exemptions) Amendment Act 1994* amends section 48 of the FOI Act. The Act is based on the recommendations of the Queensland Law Reform Commission (QLRC) in Report No 46, *The Freedom of Information Act 1992 Review of Secrecy Provision Exemption*. Only the specific 'secrecy provisions' mentioned in the schedule to the Act provide the basis of a claim for exemption, although other exemptions may be available under the Act.

The Commission has interpreted section 58(2)(c) of the Criminal Justice Act as a `secrecy provision' within the terms of section 48 of the FOI Act and has relied on the provision as a basis for the exemption from disclosure in respect of a number of applications made under the FOI Act.

When cabinet considered the FOI legislation, it also determined that the QLRC should review all existing secrecy provisions in Queensland legislation with a view to its recommending which of these secrecy provisions should continue to prevail over the FOI Act after the scheduled expiry of section 48.

The QLRC concluded that section 58(2)(c) of the *Criminal Justice Act* was not a secrecy provision within section 48 (pp. 64-65 and Appendix C at p. 128). As a result, the QLRC did not recommend section 58(2)(c) for inclusion in the proposed schedule.

The Commission submitted that:

> *It will no longer be possible for the Commission to rely on section 48 of the FOI Act as a basis for refusal to grant access to material which is stored in the Database.*
>
> *The Commission is concerned that there will be situations where information contained in the Database cannot be properly withheld from disclosure sought pursuant to the FOI Act, because in the absence of the application of s. 48, there will*

be no exemption available to it.

For that reason, the Commission strongly urges that the Database be specifically excluded from the operation of the FOI Act, by virtue of a regulation made pursuant to s. 11(1)(q) of the FOI Act.

In a further submission the Commission acknowledged that there will be situations where one or more of the exemptions available within sections 42 or 46 of the FOI Act could be relied upon to allow an exemption from disclosure to be properly claimed. However, there may be situations where none of the exemptions are available in respect of a particular application.

The Parliamentary Committee accepts that the act of claiming an exemption does not guarantee that a claim will be upheld. Whilst the Commission can take certain steps to provide for the security of the database, the Commission has no control over the FOI provisions.

Conclusion

The Committee concludes that the Commission should be able to claim the matter on the Intelligence Division's database as exempt from disclosure under the FOI Act.

Recommendation

The Committee recommends that the Intelligence Division database maintained pursuant to s.58(2) of the *Criminal Justice Act 1989* be prescribed pursuant to s.11(1)(q) of the FOI Act.

7. WITNESS PROTECTION DIVISION

7.1 Introduction

The Fitzgerald Inquiry recommended that the Witness Protection Division be established within the Commission. This chapter addresses the role and functions of the Witness Protection Division as provided in the *Criminal Justice Act 1989*.

The chapter then considers:

- the National Witness Protection Program
- whether the Witness Protection Division should be located within the Queensland Police Service or the Commission
- the accountability of the Division.

7.2 Witness Protection at the Time of the Fitzgerald Inquiry

Witness protection came into existence in Queensland during the Fitzgerald Commission of Inquiry when it became necessary to protect several significant witnesses who were able to give direct evidence of crime and corruption. A Witness Protection Unit was formed to specifically service the requirements of the Fitzgerald Inquiry. Prior to the Fitzgerald Inquiry, Queensland, like most other Australian States and Territories, had no formalised witness protection program, nor was there any legislation in place.

7.3 Findings and Recommendations of the Commission of Inquiry

The Fitzgerald Report identified the need for a witness protection program to assist in combating organised crime and corruption in Queensland. Fitzgerald QC observed that:

> *The essential feature of witness protection is the assurance of safety for those upon whose information and testimony the criminal justice system depends. A professional witness protection unit is an essential component of a progressive criminal justice system.* (1989:318)

Fitzgerald QC made the following findings in respect of the role of witness protection:

> *The Witness Protection Division should be separate from the rest of the Police Force ...*
>
> *... The Witness Protection Division should not be answerable to any police officer, and its police members should be answerable only to their superiors in the Unit.*
>
> *... The division should be set apart from the rest of the Criminal Justice Commission, and the detail of its activities should be known only to a small number of its members, the Director of the Division, the Executive Director, and the Chairman of the Commission.*

> *... The Witness Protection Division should have secure and fortified premises for use in emergencies and the means of urgently acquiring other premises for extended periods.*
>
> *... Witness Protection officers should also be used to provide VIP protection. This type of duty is similar in some ways to witness protection, but is less psychologically stressful. The rotation of duties would help relieve the tedium and stress of protecting witnesses.*
>
> *... It should be emphasised, however, that police involved in a particular witness protection program should not be involved in VIP protection while that program is still underway.* (1989:319-320)

The Commission of Inquiry recommended that the Witness Protection Division be established within the Commission. (1989: 375)

7.4 The *Criminal Justice Act 1989*

Section 62(1) of the Act provides that the role of the Witness Protection Division is as:

> *the unit within the Commission directly responsible for providing witness protection to persons who, in the opinion of the chairperson, following consultation with the director of the division, are in need of it.*

The legislation does not limit the provision of protection to persons who have, or may give evidence to the Commission or a court. It includes persons who have assisted the Commission or any law enforcement agency of the state in the discharge of its functions and responsibilities. Section 61 of the Act defines "witness protection" in the following terms:

> *"witness protection" means protection of the personal safety of a person who -*
>
> > *(a) whether or not the person has been summonsed or called as a witness before the Commission, has assisted the Commission in the discharge of its functions and responsibilities; or*
> >
> > *(b) whether or not the person has been summoned or called as a witness before a court, has assisted any law enforcement agency of the State in the discharge of its functions and responsibilities.*

The functions of the Witness Protection Division are set out in section 62(2) of the Act which provides:

> ***(2)*** *It is the function of the Division -*
>
> > *(a) to provide witness protection through officers of the division to persons who are considered, as prescribed by subsection (1), to be in need of it by reasons that they have assisted the Commission or a law enforcement agency of the State in the discharge of its functions and responsibilities;*
> >
> > *(b) to provide, to persons receiving witness protection, facilities and means by which they may assume new identities and may be relocated and re-established in employment or business, if in the*

opinion of the chairperson, such facilities or means are necessary;

(c) to devise programs for training, and to train personnel, whether officers of the Division or not, for the duties involved in providing witness protection;

(d) to accurately maintain a register of the factual particulars and the assumed particulars of persons who have assumed new identities for the purpose of witness protection provided to them;

(e) to advise the Minister and the Commission in relation to arrangements with authorities of the Commonwealth and the other States and the Territories, with a view to the establishment and operation of a national witness protection program.

The Act also provides that witness protection provided to any person shall be terminated if the person so requests (Section 62(3)).

Further, access to the witness protection register is restricted to the Chairperson of the Commission, the Executive Director of the Commission and the Director of the Witness Protection Division.

In respect of the function of the Division provided in section 62(2)(b) of the Act the Committee is aware that this process is not without some difficulties.

7.5 The Structure of the Division

The Witness Protection Division was established within the Commission in November 1989. It is a separate organisational unit within the Commission.

The Division operates from the Commission's premises, which includes:

- secure, video monitored, self contained witness accommodation
- a fortified armoury
- a 24 hour communications room - witnesses and Unit members can be in contact with base at all times
- secure records filing rooms
- a secure parking area for covert motor vehicles.

The Division is headed by a Director who is also the Director of Operations and an Assistant Commissioner of Police. The Officer in Charge of the Division, an Inspector of Police, is responsible for the overall operation of the Division and is directly responsible to the Director.

The Division consists of six persons in the Directorate, 21 police personnel and two support officers:

- Operations Co-ordinator (Senior Sergeant) responsible for the conduct of ongoing Witness Protection operations.

- Administration Officer (Sergeant) responsible for all administrative functions within the Division.

- Intelligence and Research Officer (Sergeant) responsible for the preparation, research, organisation, conduct or co-ordination of the relocation of witnesses and for arrangements for new identities.

- Firearms training Officer (Sergeant responsible for the ongoing firearms training of Commission staff and in particular Witness Protection staff).

The remainder of the Witness Protection staff are organised into three teams consisting of a Team Leader (Sergeant) and four or five team members (Senior Constables and Constables). Each team within the Division is assigned a number of witness protection operations which are the responsibility of the team leader.

The Communications Room forms an integral part of the Division as well as the Commission as a whole. The Communications Room:

- operates 24 hours per day, seven days per week

- is staffed by team members from the Witness Protection Division

- provides a means by which witnesses may contact the Division at any time of day or night

- enables witness protection staff to be contacted at any time if required

- serves as a reception point for calls from the public, including after hours complaints to the Official Misconduct Division.

7.6 The Operation of the Witness Protection Division

Witness protection functions range from continuous direct protection to less resource intense forms of safe place protection. The Inspector in charge of the Division is responsible to the Director of Operations.

All major decisions of the Division are taken before a Witness Protection Committee comprised of the Director of Operations as Chairperson, the Director of the Official Misconduct Division, the Executive Director and other senior members of the Commission when considered necessary. All decisions made by the Committee must be ratified by the Chairperson of the Commission. The Witness Protection Committee assesses all applicants for Witness Protection.

The Witness Protection Division has close contact with and is assisted by technical and surveillance officers of the Commission as the need arises.

The Commission reported that from 4 November 1989 to 30 June 1994, 170 operations involving 390 individuals were referred to the Witness Protection Division for threat assessments. The Commission noted that although threat assessments were conducted in each case not all were subsequently accepted to the Witness Protection Program:

- 264 people from 117 operations accepted an Offer of Witness Protection and were provided with some form of protection by the Division

- Including the operations transferred from the Fitzgerald Inquiry the Division provided protection to a total of 381 people in 161 operations.

As at 30 June 1994 the Division was providing protection to 104 people in 42 operations.

In addition, the Division reported that no witness, whilst on the program, has come to any harm.

The Commission noted that there has been a steady increase in the number of persons placed on the program from year to year. The Commission expressed the view that as law enforcement agencies in Queensland acquire a better understanding of and become more familiar with the Witness Protection Program those numbers are expected to increase.

The Division also referred to a number of initiatives it has taken.

The Division reported that it has established effective liaison with various federal and state government agencies. Further, the Division has actively supported and taken every opportunity to participate in the establishment of a National Witness Protection Program. In addition, the Division:

- conducted a major close personal protection operation which lasted six months

- has obtained the services of medical general practitioners and specialists in psychiatry so that the psychological and physical well being of witnesses can be monitored on a regular basis

- conducted a VIP/Witness Protection course jointly with the QPS

- is completing the development of a computerised recording system to allow quicker access to records.

The Parliamentary Committee does not dispute the need to protect persons who provide information and evidence to law enforcement agencies.

The Parliamentary Committee is of the view that the recommendations of the Fitzgerald Report concerning the protection of witnesses have been implemented with the possible exception of the shared responsibilities of Witness Protection and the VIP unit in the Police Service. To this point the Division does not have any close working relationships with the VIP Squad of the QPS. These functions are considered by the Police and the Commission to be quite different in practice. Further, the interchange has not been actively pursued by the Commission or the Police Service. The Committee has some doubts as to the practicalities of such interchange.

The Committee acknowledges that witness protection is a specialist function. Witness protection, by its nature, is a very costly exercise if performed effectively, irrespective of location. It is both labour and resource intensive. Mistakes or errors of judgment can be fatal to witnesses. Witness protection staff require specialist training. However, the costs must always be balanced with the risks associated with witness protection.

The Committee recognises that the Witness Protection Division encounters operational problems at times. Many persons protected by the Division are hardened criminals who are difficult to manage and at times non-compliant but who fear for their safety and lives. Further, the combination of the criminal background and fear creates situations and problems which would not be encountered in other law enforcement activities. Officers of the Division deal with problems such as heroin addiction, family disputes and health and occupational problems on a daily basis. Further, witness

protection is psychologically demanding for both the protector and the protected.

In respect of the cost of providing witness protection, the Committee is of the opinion that the details of the costs associated with providing witness protection should not be publicly disclosed. This information is confidential and sensitive and disclosure may reveal the level of protection afforded and may endanger the witness.

The Committee is of the opinion that it is the Parliamentary Committee which acts as the accountability mechanism in respect of the operation of the Division. Persons dissatisfied with the decisions and operation of the Witness Protection Division can make a complaint to the Committee. To date, the Committee has not received complaints through its complaint system that would cause appreciable concerns as to the operation of the Witness Protection Division. The Committee remains receptive to any complaints of this nature and the individuals concerned can be assured that the Committee will take appropriate action to ascertain the full circumstances of any complaint.

In addition, the Witness Protection Division is subject to judicial review. This acts as a further safeguard to ensure that the Division complies with the provisions of the Act.

The Parliamentary Committee considers that the Division appears to be operating effectively and efficiently in catering for a substantial number of witness protection operations. The Committee is of the opinion that the Division appears to have responded capably and well to the tasks and responsibilities envisaged by the Report of the Commission of Inquiry.

Conclusion

The Committee concludes that the Witness Protection Division has operated effectively and efficiently in providing witness protection. The Witness Protection Division in Queensland has built up effective principles, standards and operating practices.

7.7 The National Witness Protection Program

The National Witness Protection Bill was introduced into the Senate on 23 March 1994.

The National Witness Protection Bill was passed by Parliament on 10 October 1994 and received the Royal Assent on 18 October 1994. Subsection 2(2) provides that the Act will come into force on 18 April 1995.

In essence the *National Witness Protection Act* requires:

- the Australian Federal Police to assume an expanded national Witness Protection role
- the national arrangements to be underpinned by complementary Federal and State/Territory legislation.

The Commission has expressed support for the concept of a National Witness Protection Program (NWPP), and indicated that it would participate when the legislation was in place. However, the Commission recommended that the NWPP be independent from a police body. This proposition was not accepted by the Senate Committee to which the Bill was referred.

The Report by the (Commonwealth of Australia) Parliamentary Joint Committee on the National

Crime Authority - at page 77, paragraph 5.31 - in reviewing the National Crime Authority suggestion for an independent national witness agency stated:

> *"stress was laid on the fact that many operational police dislike the task of providing protection to accomplice witnesses whom they regard in the same light as any other criminal. Furthermore, many witnesses distrust police and there are sound arguments for not having police guarding witnesses who are given evidence against corrupt police officers".*

A National Witness Protection Scheme poses problems about which agency will handle the role and who will monitor and be responsible for the costs of such a scheme. Suggestions have been made that the Australian Federal Police should provide a hub of the service.

Conclusion

The Committee is of the opinion that this scheme should be evaluated on its merits when and if it develops to a viable national solution to witness protection needs of the States.

7.8 Should the Witness Protection Program be Located Within the Queensland Police Service or the Commission?

The appropriateness of locating the Witness Protection Program within the Commission has been questioned. It has been suggested that the QPS should undertake this function.

On behalf of the Criminal Law Association, Mr Shane Herbert QC made the following submission to the Committee at the public hearing:

> *I cannot see why the Witness Protection Division is with the CJC. I think it may be there for odd historical reasons. During the Inquiry, there were a number of people who had to be protected. Early on, some of those people were the ones who broke the ice with the Fitzgerald Inquiry. I do not want to say her real name; I am trying to think of the name-Katherine James was one who actually helped in bothering the bad guys into getting pretty nervous. She had to be protected for a long time, and so did a number of other people. I think that may be the Witness Protection Division has ended up with the CJC because of that historical fact. I see no reason for it to be there.*

In relation to the transfer of some of the Witness Protection Division's responsibilities back to the QPS, the Commission referred the Committee to the following statements of Fitzgerald QC:

> *The Witness Protection Division should be separate from the rest of the Police Force ...*
>
> *The Witness Protection Division should not be answerable to any police officer, and its police members should be answerable only to their superiors in the Unit.* (1989:319)

The Commission noted that as a result:

- *The Division is established separately from the QPS.*
- *Its police members are answerable only to the direction and control of the*

Director of the Division, who in turn is subject to the direction and control of the Chairperson.

- *Neither the Director nor the other police members of the Division are subject to the control and direction of the Commissioner of the QPS in the performance of their witness protection function.*

- *All significant matters affecting witness protection operations are considered by the Witness Protection Division.*

- *The Committee is chaired by the Director of Operations, who is also the Director of the Witness Protection Division (an Assistant Commissioner of the QPS), and who is assisted by the Director of the OMD and the Executive Director.*

- *All Committee decisions must be ratified by the Chairperson.*

The Commission also referred to the Report of the Permanent Sub-Committee on Investigations of the Committee on Governmental Affairs, Unites States Senate on the Witness Security Program in 1981 which recognised that there were advantages in having the Witness Security Program maintained by a non-law enforcement body. The summary of the report observed that:

> *... there was logic in putting witness security in the Marshal's Service. Law enforcement officers wanted the protecting and relocating agency to be in the Criminal Justice System but to be as far removed as possible from both investigating agents and prosecutors. That way, the Government could more readily counter the charge that co-operating witnesses were being paid or otherwise unjustifiably compensated in return for their testimony.*
>
> *It was correct not to give the security function to the FBI, to Federal drug enforcement agents or to any other investigating organisation. A separate entity in the Justice Department was the appropriate Federal component to have the duty* (1981:54)

The Commission also argued that the separation of witness protection programs from a police authority minimises the possible development of the "Stockholm Syndrome". The Commission submitted that although this term relates to the captor/hostage situation, its effect can be extrapolated to the guard/witness situation. The essence of the theory is that the initial objective and impersonal contact between the captor and hostage is replaced by a developing relationship between the parties as time progresses, resulting in one party becoming sympathetic to the other's view. This in turn manifests itself by one party adopting the other party's point of view and providing every assistance to support it.

The Commission submitted that where witnesses are being protected by a police authority, it could be argued that the "Stockholm Syndrome" might affect the veracity of their final evidence offered as they may embrace the cause of the police authority.

Queensland's system is considered by CJC senior staff to be operating to a high standard when related to systems operating in other States that have functions established in their Police Services.

The Commission submitted that it is not appropriate for its witness protection responsibilities to be transferred back to the QPS when the following matters are considered:

- The CJC being an overviewing agency of the QPS should not be placed in a position where it would need to place its witnesses on a program operated by the QPS bearing in mind that CJC

witnesses may well be providing information and/or evidence against members of the QPS. A situation such as this would require that the CJC operate its own Witness Protection Program.

- 22 persons who were placed on the program during the Fitzgerald Commission (between 28 August 1987 and 3 November 1989) are still on the program. There remains a threat to these persons.

- Five witnesses who have provided information against serving Queensland Police officers were accepted into the Witness Protection Program from January 1993 to June 1994. It is inappropriate for any such witnesses to be protected by police officers who are not separate from the rest of the QPS.

- The present arrangements allow the Division to operate within secure premises with access to persons with diverse professional skills including legal officers, financial analysts, intelligence officers, technical officers, surveillance officers and police officers.

- The protection of witnesses is facilitated by the expertise of each of the various classes of persons mentioned to:

    - prepare legal documents

    - provide financial assistance

    - monitor the safety and security of safe houses

    - provide surveillance of persons considered to be threats to witnesses

    - provide research and intelligence into the background of witnesses and threats.

- Present arrangements preclude any suggestion of political interference in the conduct of the Division. Such interference was demonstrated recently in New South Wales when witness protection arrangements for the notorious criminal, Raymond John Denning (deceased), were terminated without stated reasons. The matter was the subject of considerable media attention and investigation by the Ombudsman in NSW.

- Should the responsibility for the protection of witnesses be vested in the QPS, a real tendency may exist to utilise the services of witness protection personnel in other areas of operation within the QPS.

- VIP duties presently being performed by police at Police Headquarters are not consistent with the functions and duties of the Witness Protection Division. Whilst the VIP Squad caters for high profile persons, in most cases on a relatively short term basis, the Witness Protection Division is responsible for the ongoing security, safety and well being of persons who are predominantly of unsavoury character.

  The cost of relocating premises including the armoury, secure accommodation, communications room and other facilities would be an enormous drain on available budgets.

- Witnesses are more likely to assist the QPS and/or the CJC with the knowledge that an independent body is responsible for their protection.

- Police Officers attached the Division are not subject to the control of senior officers within the QPS.

- Report by the (Commonwealth of Australia) Parliamentary Joint Committee on the National Crime Authority – at page 77, paragraph 5.31 – in reviewing the National Crime Authority suggestion for an independent national witness agency stated:

> stress was laid on the fact that many operational police dislike the task of providing protection to accomplice witnesses whom they regard in the same light as any other criminal. Furthermore many witnesses distrust police and there are sound arguments for not having police guarding witnesses who are giving evidence against corrupt police officers.

The Commission also stressed that autonomy and independence is vital to the success of the Witness Protection Division. The Commission submitted that it is important for a Witness Protection Program to be seen to be totally independent of investigating and prosecuting authorities.

In addition, the following exchange took place at the public hearing:

> ***The CHAIRMAN:*** *In terms of what would be the most appropriate future option for the location of the Witness Protection Division, you have, through your experience and position, a foot in both camps. Being an Assistant Commissioner of the Queensland Police Service located within the Criminal Justice Commission, should witness protection go back to the Queensland Police Service?*
> ***Assistant Commissioner McDonnell:*** *I do not believe it should. I believe it should be——*
> ***The CHAIRMAN:*** *I should not say "go back." Should it go to the Queensland Police Service?*
> ***Assistant Commissioner McDonnell:*** *I think it should stay where it is at the moment. In my submission, you will see where I have set out that the marshals—the police—do not like, if they are involved with them, to look after them. There are a number of concerns. One is the fact that, I think, the budget given to the Witness Protection Division back in the Police Service may be skimmed off to another more urgent point at that time, whereas at the Criminal Justice Commission, it is not; it sits separately as a division. The overall confidentiality and supervision of the police there is also accountable to myself and then to the Chairman, not to the Commissioner of Police.*
> ***The CHAIRMAN:*** *I think I can probably take it from what you are saying that you do not perceive any desire of the Queensland Police Service to undertake the witness protection role.*
> ***Assistant Commissioner McDonnell:*** *I do not think they would, Mr Chairman.*

The Parliamentary Committee is of the opinion that the need to have an independent witness protection function separate from the Police Service is paramount given the types of people requiring witness protection services, and the possible involvement of serving police in issues related to or directly relevant to witnesses. For example, the Witness Protection Division is responsible for protecting a number of persons involved in matters concerning serving police members.

Prior to the Commission of Inquiry the Police Service did not have any formalised and structured Witness Protection responsibility or activity. Any witness protection was carried out in an informal and unofficial manner.

The present arrangements allow the Witness Protection Division to operate within secure premises and to make use of the expertise of staff of the Commission. Access to a range of professional skills such as legal, financial, intelligence, surveillance and technical allow the present arrangements to operate sensibly and efficiently. In this context, witness protection staff do not necessarily need to be police officers. However, in some circumstances, there are real advantages if seconded serving police officers are used.

The protection of witnesses is facilitated by the expertise of each of the various classes of persons

mentioned above, in that legal documents need to be drawn up; financial assistance needs to be given; safe houses are required to be monitored; surveillance of persons considered to be threats to witnesses may be necessary; research and intelligence is required of the witnesses themselves, and threats to them; senior police officers of the Commission provide invaluable information in relation to the activities of persons posing threats to witnesses and have an intimate knowledge of the operations involving witnesses. Witnesses are referred to the Division for protection through Target Committee Meetings at Police Headquarters, and senior police officers have access to details of all relevant circumstances.

The Parliamentary Committee is of the view that the Police Service is appropriately subject to the authority of senior police officers and a Minister. People independent of the Police Command structure may be in a better position to assess risks to potential witnesses for entering such a program. Further, potential witnesses may have a greater willingness to deal with an independent agency rather than the Police Service.

The Committee considers that there is some justifiable concern that if Witness Protection responsibilities were given to the Police Service, there may be a tendency to utilise the services of Witness Protection personnel for other important operations because of pressure on resources

Conclusion

The Committee concludes that it is essential to have an independent witness protection function separate from the Police Service. The present arrangements where the Witness Protection function is a separate unit within the CJC is considered the best available option at this time.

Recommendation

The Committee recommends that the Witness Protection Division should remain as the unit within the Commission directly responsible for providing witness protection to persons who, in the opinion of the Chairperson, following consultation with the Director of the Division, are in need of it.

7.9 Accountability

The accountability of the Witness Protection Division for its activities has been questioned. The Queensland Council for Civil Liberties (QCCL) submitted:

> *Whilst we agree that considerable sensitivity needs to be exercised in relation to persons who are the subject of witness protection, the Committee needs to ensure that the Witness Protection Division is accountable for its activities both at the instance of lawyers for accused persons and in respect of third parties.*
>
> Great, even excessive, secrecy surrounds the operation of the Criminal Justice Commission's witness protection programme and the QCCL has concerns that the Witness Protection Division is subject to a necessary degree of accountability.
>
> Clearly, it is not possible for the accountability in respect of the Witness Protection Division to be exercised through the Criminal Justice Commission itself. The accountability needs to be external.

Further, the Whistleblowers Action Group (Qld) Inc (WAG) also submitted that the Division lacks accountability. The WAG made the following remarks in its written submission:

> *There have been instances where persons who have blown the whistle to the Commission have received threats of violence and have requested protection from the Commission. This protection has been denied. Whilst this is very disconcerting to the person involved (and to that person's family), an even more serious aspect is that the Commission is not accountable to anybody in its decision making on this very vital issue. The criteria used by the Commission, if indeed there is any, in the determination of these issues is not public information. Because of this lack of public disclosure, no objective evaluation can be made of the Commission's decisions.*

In response to the criticism that the Division is not sufficiently accountable for its actions and accountability needs to be external the Commission submitted in the supplementary submission to the Committee that:

- Decisions relating to witness protection are made by a committee comprised of the Director of the Witness Protection Division, the Inspector in charge of the Division, the Director of the Official Misconduct Division or his nominee and the Executive Director or his nominee.

- All decisions of the committee are submitted to the Chairperson of the Commission for ratification.

- The Division reports at the monthly meetings with the PCJC and responds to other queries from the Committee as required.

The Commission also addressed the issue that the Commission needs to ensure that the Division is accountable for its activities at the instance of lawyers for accused persons and in respect of third parties. The Commission submitted:

- The Division ensures that all court orders brought to its attention are served on persons in witness protection and complied with by those persons.

- In relation of rights of access to children, Division staff facilitate and supervise access to ensure that such rights are preserved.

- In relation to the creditors of persons in witness protection, each person in witness protection signs an agreement undertaking to meet all of his or her legal obligations. Officers of the Division supervise such matters and take steps to ensure that witnesses comply with this undertaking.

The Parliamentary Committee does not accept the submission that the accountability of the Division needs to be external. The Committee considers that the Witness Protection Division is subject to accountability. As discussed above, it is the role of the Committee to act as the accountability mechanism. The Division is required to report to the Committee at the monthly meetings and must respond to other enquiries from the Committee. The Committee appreciates the sensitive nature of the functions performed by the Witness Protection Division as well as the importance of ensuring that the requirements of the Act are met.

Conclusion

The Committee concludes that it is the role of the Parliamentary Committee to act as the

accountability mechanism in respect of the Witness Protection Division.

8. CORRUPTION PREVENTION DIVISION

8.1 Introduction

This chapter outlines the findings and recommendations of the Fitzgerald Report and the provisions of the *Criminal Justice Act 1989* in respect of corruption prevention. The chapter discusses the operation and structure of the Corruption Prevention Division. In particular, the chapter examines whether the functions of the Corruption Prevention Division should be carried out by the Commission or a public sector agency such as the Public Sector Management Commission (PSMC), the Office of Public Sector Ethics (OPSE) and the Queensland Audit Office (QAO).

8.2 Findings and Recommendations of the Commission of Inquiry

The Report of the Commission of Inquiry headed by G.E. Fitzgerald QC made a number of observations relating to corruption prevention in the public sector. Fitzgerald observed that:

> *the evidence before this Inquiry plainly established common and, apparently, growing manifestations of other official misconduct and its central importance in facilitating major and organised crime. (1989:299)*

The Fitzgerald Report referred to the importance of education and good management:

> *Education and good management would also eradicate relatively minor misbehaviour such as misuse of public resources and deliberate time-wastage, which help develop attitudes which lead, in turn, to more serious misconduct.*

and

> *Ethical education must also play a role in long term solutions to problems. Such education would help individuals to find the correct balance between competing considerations, and should help groups of employees to establish a supportive atmosphere within which it would be harder for corruption to flourish.*
>
> *The quality of internal management and supervision has a significant influence on the behavioural standards of employees. Equally, in the absence of meaningful work, staff find other ways to occupy their time. (1989:133)*

Further, Fitzgerald QC commented on the difficulty of encouraging public servants to blow the whistle on corruption:

> *It is enormously frustrating and demoralising for conscientious and honest public servants to work in a department or instrumentality in which maladministration or misconduct is present or even tolerated or encouraged. It is extremely difficult for such officers to report their knowledge to those in authority.*
>
> *It is also necessary to establish a recognised, convenient means by which public officers can disclose matters of concern. (1989:134-135)*

Fitzgerald QC was of the view that "barriers to reintroduction and expansion of misconduct must be erected. A new influential leadership must be established which is committed to excellent ethical

performance and discipline". (1989:307)

Following these observations, the Commission of Inquiry recommended that among its other functions the Official Misconduct Division (OMD) should act on its own initiative to:

> *perform an educative or liaison role with other agencies and departments and private institutions and auditors in relation to preventing and detecting official misconduct. (1989:374)*

It is important to note that at the time of the Fitzgerald Report there was no effective corruption prevention mechanism in the public sector.

The Parliamentary Committee has commented on corruption prevention activities in two reports.

In Report 13 the Committee expressed the view that:

> *... [the Corruption Prevention Officer] is a vital position which should attract greater significance as time passes. The Committee is of the view that its role should be proactive, aimed at raising awareness in the public sector about proper conduct and public duty. ... It is not sufficient if the public sector is asked to resist corruption and the public is asked to support it, if they are not fully conversant with what it is. (1991:76-77)*

Report 18 of the Committee recommended an increase in resources allocated to Corruption Prevention activities:

> *[t]he Parliamentary Committee strongly supports this Corruption Prevention Strategy and recommends to the Commission that the resources of this section be increased, and that the section be enhanced. The Committee is firmly of the view that a prevention strategy is the most effective way to improve the standards of behaviour in the public sector. (1992:14)*

The PSMC had not been established at the time of the Fitzgerald Inquiry. Further, since that time the OPSE legislation has been passed.

8.3 The Criminal Justice Act 1989

The recommendation of the Commission of Inquiry is embodied in section 29(3)(e) of the *Criminal Justice Act 1989* which provides that it is a function of the OMD to:

> *offer and render advice or assistance by way of education or liaison to law enforcement agencies, units of public administration, companies and institutions, auditors and other persons concerned with the detection and prevention of official misconduct.*

Initially, a Corruption Prevention Unit was set up under the OMD. The OMD appointed a corruption prevention officer who established the Corruption Prevention Program in August 1991. This Unit subsequently became a Division in March 1993 pursuant to section 19(2)(a) of the Act which permits the establishment of additional units within the Commission.

8.4 The Structure and Operation of the Corruption Prevention Division

The stated goal of the Corruption Prevention Division is to provide education, training and public awareness services to agencies and the public. The Commission has described the Division's philosophy of operation as follows:

- Proactive prevention - prevention is the best strategy.
- Corruption prevention is the responsibility of line managers in organisations.
- Line managers are accountable for the activities of all their staff.

The Corruption Prevention Division is allocated three per cent of the Commission's budget and has a staff of six. The Division operates four sub-programs:

- Public Sector Liaison
- Management Systems Reviews
- Education and Training
- Whistleblowers Support.

8.4.1 Public Sector Liaison

The Commission views this function as involving liaison with principal officers and the boards of management of units of public sector administration and with companies and institutions, auditors and other persons concerned with the detection and prevention of official misconduct. Organisations may approach the Division to seek advice regarding corruption prevention strategies, methods and systems which might be put into place in their organisations. Further, the Commission maintains that part of this function involves providing advice to organisations about how to conduct proper risk assessments, and establish systems to ensure that the likelihood of official misconduct is minimised.

8.4.2 Management System Reviews

The Commission established the management system review sub-program in August 1993 which involves conducting management audits of systems which have been found to be deficient, and where corrective action has been taken by the organisation. The Commission maintains that management system reviews go beyond financial audits to examine issues which could allow official misconduct such as misuse of power, neglect of duty, criminal acts and omission and information breaches. The Commission has said that these reviews analyse what management systems are in place to control these types of corrupt behaviour and identify the weak points and loopholes that could be exploited. The reviews also make recommendations on ways of improving the systems through better internal controls and through more effective corruption prevention strategies.

8.4.3 Education and Training

The Commission referred to an education strategy developed by the Division the objective of which is to train and inform public sector employees about what is involved in official misconduct, how to report suspect behaviour internally and to the Commission and how to carry out a corruption risk assessment. The Division also publishes material, such as the Corruption Prevention Manual, aimed to assist organisations in assessing risk and in implementing corruption prevention programs.

The Commission has outlined the main approaches the Corruption Prevention Division has utilised

in carrying out its education role as follows:

- conducting workshops\seminars
- presenting papers at conferences
- lecturing at universities, TAFE colleges and schools on corruption prevention
- publishing manuals, worksheets, newsletters, articles and pamphlets on corruption prevention
- presenting lectures to Aboriginal and Torres Strait Islander communities, ethnic communities, professional bodies and community groups on the role and function of the Commission.

8.4.4 Whistleblowers Advice and Support

The Division established the Whistleblowers Support Program (WSP) in June 1994 which aims to offer advice, support and referral for persons who have made a complaint to the Commission and are experiencing harassment or added stress as a result. The program is managed by a psychologist. The role and functions of the WSP are discussed in more detail in Chapter 9 of this report.

8.5 The Role of the Corruption Prevention Division at the Criminal Justice Commission

The Commission has submitted that there is a need for the Corruption Prevention Division as a cost effective response to many of the issues raised in the Fitzgerald Report. The Commission maintained that the Division has gained a reputation both in Queensland and nationally as a centre of expertise that addresses a range of issues through senior public sector liaison, management system reviews, education programs and whistleblowers support that are not addressed by other activities of the Commission or by other Queensland public sector agencies.

At the public hearings Mr Barrie Ffrench (Commissioner) supported retaining the Corruption Prevention Division at the Commission. Referring to both the Corruption Prevention and Research and Co-ordination Divisions he commented:

> *... I see them as very vital parts of an organisation not only for what they do themselves but also for the way they are integrated with the rest of the CJC. If it were intended to hive either one or both of them off to another organisation, firstly, you would be hiving them off to agencies of a public service nature which might initially defeat the purpose of having them there anyway, making them partly covered by the conditions that gave rise to the Fitzgerald inquiry, but also you would still be moving the bodies that were doing it to another organisation, and I think we would be fooling ourselves if you did not think that they would employ at least as many people, if not more, knowing the nature of public service organisations, that they sometimes do proliferate, as Mr Parkinson said. Therefore, unless there is a real reason for doing so, I am afraid that I cannot see the point for it.*

and

> *... I believe the Corruption Prevention Division's existence is justified, first of all, by what I could call the interrelationship or synergy with other divisions within the CJC, also by the demands for its product, which are pretty self evident because it is*

> *in demand within its constituency of public service and local-government-type bodies and for the lack of obvious reason for its removal, as far as I have seen.*

further

> *... I think those two divisions are the pro-active and educational side of the CJC that I believe is possibly the most beneficial of them all, and this again is not to denigrate the activity ones, but if you can prevent crime or if you can enable crime prevention to be applied intelligently to the place where it ought to be applied, then you are saving a lot of crime being committed, and whether or not we are as efficient at it as we should be is obviously another question. I tend to believe we are. But the thing is rather than taking away the props that we need, I think we should concentrate on making sure they are very efficient ones.*

The Commission rejected the suggestion that the functions of the Corruption Prevention Division should be carried out by a public sector agency. The Commission detailed a number of arguments in support of this view which are addressed below.

8.5.1 Education and Liaison

The Commission argued that one of the statutory functions of the Commission is to `offer and render advice or assistance, by way of education or liaison, to law enforcement agencies, units of public administration, companies and institutions, auditors and other persons concerning the detection and prevention of official misconduct'. (s.29(3)(e) of the *Criminal Justice Act*)

The Parliamentary Committee accepts that there is a well justified need for educative activities in the public sector and for liaison with other agencies, departments, private institutions and auditors to give advice and assistance in relation to preventing and detecting official misconduct, including how to improve their organisations and systems. However, since the Fitzgerald Report in 1989 agencies have been established and others proposed to be established which should perform this function.

The *Public Sector Ethics Act 1994* proposes the establishment of the OPSE within the PSMC. The PSMC had not been established at the time of the Fitzgerald Inquiry. Fitzgerald QC recommended that codes of conduct for officials be further developed and proposed that the Electoral and Administrative Review Commission (EARC) undertake the formulation of codes of conduct for public officials, and review related public sector ethics issues. EARC and the Parliamentary Committee for Electoral and Administrative Review (PCEAR), in their respective reports on Codes of Conduct for Public Officials recommended the establishment of an Office of Public Sector Ethics.

Public sector ethics covers a broad range of issues, including the proper role of public servants in relation to the Minister and the government of the day, resolution of conflict between professional and employer obligations, and control of public comment by public servants on Government policy, as well as matters formally defined in the Criminal Justice Act and the Criminal Code.

The main objective of the *Public Sector Ethics Act* is to declare the fundamental ethical obligations of public officials as the basis of good public administration, and to provide for agency based codes of conduct, effective implementation of such codes, and related administrative mechanisms, including sanctions for breaches of codes. (Second Reading Speech, p.5)

The Act declares five "ethics principles" to be the basis of good public administration, namely:

- respect for the law and system of government
- respect for persons
- integrity
- diligence
- economy and efficiency.

The Act defines those principles in general terms in the form of "ethics obligations" which are to apply to pubic officials, through agency-specific codes of conduct. Part 4 imposes an obligation on the chief executive officer of each included public sector agency to develop and implement a code of conduct for that agency, consistent with the ethics obligations.

To assist agencies with the training and casework functions, and to provide a co-ordinated policy approach to interpretation of the new ethics standards, it is proposed that an OPSE be established as a central training and advice function within the PSMC.

Allegations of "official misconduct" will continue to be referred by principal officers to the Commission for investigation under the *Criminal Justice Act*.

Further, the *Public Sector Ethics Act* will complement the proposed *Whistleblowers Protection Act* by placing an obligation on public officials to expose fraud, corruption and maladministration of which they are aware.

In summary, the Act and its agency-based codes of conduct provide a clear basis for agencies to take effective disciplinary action for breaches of ethics standards by staff, and to encourage exemplary standards of official conduct. The Act provides for a comprehensive approach to setting appropriate standards of professional ethics for public servants and other public officials. Further, the Act requires all chief executive officers to provide adequate training and education in public sector ethics.

At the public hearing the following exchange occurred:

> ***MR BARTON**: Can I ask a question? It is on the same issue. There is a worldwide trend that has been happening, to my knowledge, for the last seven or eight years, primarily lead in the private sector but becoming much more apparent in the public sector, that line management is made much more responsible directly for everything that happens....If you have line management, is it not unhealthy believing that something in the order of corruption prevention is really, "Someone else has to come along and pick up with them"?*
>
> *Since it has been formed the Public Sector Management Commission has developed a whole range of standards on most primary employment issues and they have become quite common. Most of them were put in place in the first two or three years of its operation. Would it not be much better for there to be a PSMC standard on corruption prevention that went right across the public sector and that function left with line management re the Directors-General of the departments and the divisional heads of the departments to run that agenda rather than have the Corruption Prevention Division coming in and trying to set those standards for them? In reality, is not a lot of your work also reactive if you are following on from what OMD has done? Why will that not work?*

> ***Mr Hailstone****: Firstly, we do not manage corruption prevention for the public sector. My division, and the documents connected with my division, are based on three principles - that corruption prevention is cheaper than cure; that corruption prevention is a management responsibility, not the Commission's responsibility; and, third, that public sector corruption prevention is aided by accountability procedures. Secondly, we do not in fact set up guidelines or tell them how to manage. As the Act says, we advise them. We offer them advice in a whole range of areas. We do not direct. In my view, Corruption Prevention has no authority to direct. We are simply there to advise them in a whole series of ways.*
>
> *Corruption is prevented really through an equation. The equation is made up of motivation to act in a corrupt way, things which can be involved in corruption, such as things worth stealing or misuse of power or the exercise of favouritism and so on. There is then access to those areas that can be exercised corruptly and, finally, the opportunity to do so. What my division does is advise them on how you can demotivate staff so that they are not going to act corruptly, how to run a risk assessment program so you can reduce the access and opportunity to steal, pilfer or misuse power. All we are doing is advising them. We are not in any sense setting up guidelines or directives because it is not our responsibility to do so. We are simply an advisory body to the organisations. I agree with you that it is other organisation' responsibility to set guidelines and so on, it is not ours. As the Act says, we are there to advise through education and liaison, and that is what we do.*

The Parliamentary Committee questions whether the functions of the Corruption Prevention Division are duplicated by public sector agencies such as the PSMC, the QAO and the OPSE.

The Committee notes that Fitzgerald QC emphasised the importance of education and good management in relation to preventing and detecting official misconduct. The Committee considers that the PSMC, which was not established at the time of the Fitzgerald Report, is the appropriate entity for the discharge of that role of the Corruption Prevention Division.

The Committee maintains that corruption prevention is a management responsibility. Any employer has responsibilities, and one of those responsibilities is to make sure that the persons who are employed are fully briefed as to what the expectations are for employees. It behoves an employer, such as the State Government, to have systems in place to make sure that their employees are behaving ethically and are held accountable for their actions. The actual lodging of a complaint of corruption or official misconduct is something quite different. One of the responsibilities of the employer is to make sure that there are systems in place to ensure that their employees behave properly. If they fail to do so, the investigative role of the OMD remains. Therefore, in terms of the Queensland Government's overall organisational philosophy as an employer, the responsibility for corruption prevention including advice, education and ethical training should lie with management.

In addition, the Parliamentary Committee considers that there is potential for overlap and duplication of the functions of the Corruption Prevention Division and the QAO. Management systems audits undertaken by the Corruption Prevention Division could be dealt with by the QAO. The *Financial Administration and Audit Act 1977* states that there is to be an Auditor-General and a statutory office, the QAO. *The Financial Administration and Audit Act* gives the Auditor-General the authority to conduct audits of performance management systems as well as financial and compliance audits. The Act also establishes the framework for the financial administration of public sector entities and their accountability to the Parliament. The QAO is independent and reports directly to Parliament.

An integral part of the accountability framework is the part played by the Auditor-General who

must audit all public sector entities and report audit outcomes to auditee management, and to Ministers and Parliament when warranted. The Auditor-General has the responsibility to report to Parliament. These reports are the principal form of independent assurance provided to Parliament in the way in which public sector entities have discharged their functions and responsibilities in terms of the Act and other relevant legislation.

The Public Accounts Committee is required to review all Reports of the Auditor-General. The Parliamentary Committee can then initiate a review of any issue which it considers should be pursued in the interests of the Parliament and the public.

Further, advice complementary to the external audit role is provided to public sector entities concerning the development and maintenance of sound financial administration and reporting systems within the public sector generally.

The Parliamentary Committee considers that the functions of the Corruption Prevention Division duplicate those of the proposed OPSE and the QAO. The Commission can properly discharge this statutory duty by referring the matters to outside agencies with the appropriate capacity.

8.5.2 The Official Misconduct Division

The Commission also argued that the work of the Division complements the investigative work carried out by the Official Misconduct Division. The Commission submitted that to be effective in reducing official misconduct, it is crucial that the Commission not rely solely on its investigative strategies.

At present, the Corruption Prevention Division operates, to a large extent, on referral from the OMD. The Parliamentary Committee considers that the basis of that referral could be identical for an organisation such as the proposed OPSE. Referrals from the OMD are generally taken at the conclusion of an investigation by the OMD. Once an investigation is concluded the information, on the basis of referral, could be given to another agency.

The role of the OMD is as the investigative unit within the Commission. The Parliamentary Committee suggests that where an OMD investigation identifies a problem within the administration of a unit of public administration it could dispose of the corruption prevention aspect by referring it to an appropriate outside agency such as the QAO. Under the *Public Sector Ethics Act* allegations of official misconduct will continue to be referred by principal officers to the Commission for investigation under the *Criminal Justice Act.*

Further, the Parliamentary Committee is of the view that the body responsible for investigating complaints should not also be responsible for providing advice or even implementing measures to prevent the recurrence of problems. That is, the Commission should maintain necessary independence. For example, the Commission should be ideally placed to provide advice to complement inspectorial and investigative roles, but should not actively implement corruption prevention systems in organisations it might later be called on to investigate. The role of the Corruption Prevention Division could be carried out elsewhere just as effectively.

8.5.3 Other Agencies

The Commission also submitted that the categories of agencies and persons to which the Commission provides such advice and assistance are substantially wider than those covered by the PSMC.

The *Criminal Justice Act* provides that the functions of the OMD include offering and rendering

advice concerning the detection and prevention of official misconduct by way of education or liaison to law enforcement agencies, units of public administration, companies and institutions, auditors and other persons. Section 2 of the *Public Sector Ethics Act* provides:

> *"public sector entity" means any of the following-*
>
> *(a) the Parliamentary Service;*
>
> *(b) the administrative office of a court or tribunal;*
>
> *(c) a department;*
>
> *(d) a local government;*
>
> *(e) a university, university college, State college or agricultural college;*
>
> *(f) a commission, authority, office, corporation or instrumentality established under an Act or under State or local government authorisation for a public, State or local government purpose;*
>
> *(g) an entity, prescribed by regulation, that is assisted by public funds;*
>
> *but does not include any of the following-*
>
> *(h) a GOC;*
>
> *(i) the following entities under, or within the meaning of, the Education (General Provisions) Act 1989-*
>
> *(i) a parents and citizens association;*
>
> *(ii) a school that is not a State school;*
>
> *(iii) an advisory committee;*
>
> *(iv) an international educational institution;*
>
> *(j) an entity prescribed by regulation.*

The Committee considers that the agencies covered by the PSMC are similar to those currently covered by the Corruption Prevention Division. Any deficiencies with respect to the agencies covered may be cured by legislative amendment.

8.5.4 The Public Sector Management Commission

It was also submitted by the Commission that the PSMC does not provide corruption or crime prevention advice and training and does not have the expertise to do so.

The Parliamentary Committee acknowledges that at present the PSMC does not provide corruption or crime prevention advice and training. However, that current lack of expertise can be overcome. The *Public Sector Ethics Act* declares basic ethics principles as the foundation of good public sector management to apply across the public sector. The OPSE can develop policies to facilitate corruption prevention and can obtain advice on the formulation of such strategies.

8.5.5 Access to Confidential Information

The Commission submitted that the Division has access to confidential information resulting from investigations of the Official Misconduct Division thereby enabling it to provide timely and cost effective advice and training to relevant units of public administration and other bodies. The PSMC and other agencies would not normally have access to such information.

The Parliamentary Committee does not consider this argument persuasive. However, the Committee accepts that legislative amendments may be necessary to facilitate the free flow of information to the appropriate corruption prevention agency.

8.5.6 The Reputation of the Corruption Prevention Division

Finally, the Commission argued that the Division has already established a good reputation in the public sector and with professional bodies such as the Australian Institute of Internal Auditors as a result of which its advice is often sought on corruption prevention measures. The Commission explained that this is supported by the evidence given by the Commissioner of the Police Service and by the representative of the Australian Institute of Internal Auditors to the PCJC's hearing, and also by statistical feedback from units of public administration contained within the July submission.

The Committee acknowledges that the Corruption Prevention Division has received favourable comment in respect of the performance of its functions. However, the Committee does not view this argument as a compelling reason for retaining the Division at the Commission. The Committee contends that it is more important to prevent duplication of functions, thereby increasing efficiency.

Conclusion

The primary functions of the Corruption Prevention Division are education, advice and investigation. The Division has also initiated a Whistleblower Support Program.
The Committee maintains that an independent body is not required for the role of corruption prevention. Corruption prevention is a management responsibility.

The Committee also concludes that it is not appropriate for the Official Misconduct Division to be responsible for the role and functions of the Corruption Prevention Division. The Official Misconduct Division, which is the body responsible for investigating complaints, should not also be responsible for providing advice or even implementing measures to prevent the recurrence of problems.

The Committee concludes that the role of the Corruption Prevention Division, excluding the Whistleblowers Support Program, duplicates the functions of the Public Sector Management Commission, the Office of Public Sector Ethics and the Queensland Audit Office. Approaches to codes of conduct and ethics training should be cost effective and avoid unnecessary duplication. The Committee proposes that the role of the Corruption Prevention Division should be the responsibility of outside agencies such as the Public Sector Management Commission through the Office of Public Sector Ethics, which is the Government's principal Commission dealing with ethics, and the Queensland Audit Office.

Recommendation

The Committee recommends that upon setting up the Office of Public Sector Ethics the Corruption Prevention Division should cease operation to avoid duplication.

The Committee recommends that the functions of the Corruption Prevention Division should be carried out by public sector agencies such as the Public Sector Management Commission, the Office of Public Sector Ethics and the Queensland Audit Office. The Committee also recommends that any necessary legislative amendments be made to ensure the confidentiality and jurisdiction of the Public Sector Management Commission and the Office of Public Sector Ethics.

9. WHISTLEBLOWERS

9.1 Introduction

This chapter examines the role and function of the Whistleblower Support Program (WSP). The chapter discusses:

- the findings and recommendations of the Fitzgerald Inquiry
- the Electoral and Administrative Review Commission (EARC) *Report on Protection of Whistleblowers*
- the *Whistleblower Protection Act 1994 (Qld)*.

The chapter then considers whether the Criminal Justice Commission (Commission) is the appropriate authority to protect whistleblowers.

9.2 Findings and Recommendations of the Commission of Inquiry

The Fitzgerald Report recommended that legal protection be given to honest public officials who expose wrongdoing. The Fitzgerald Report stated that:

> *Honest public officials are the major potential source of the information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced.*
>
> *It is enormously frustrating and demoralizing for conscientious and honest public servants to work in a department or instrumentality to which maladministration or misconduct is present or even tolerated or encouraged. It is extremely difficult for such officers to report their knowledge to those in authority.*
>
> *Even if they do report their knowledge to a senior officer, that officer might be in a difficult position. There may be no-one that can be trusted with the information.*
>
> *If either senior officers and/or politicians, are involved in misconduct or corruption, the task of exposure becomes impossible for all but the exceptionally courageous or reckless, particularly after indications that such disclosures are not only unwelcome but attract retribution.*
>
> *There is an urgent need, however, for legislation which prohibits any person from penalizing any other person for making accurate public statements about misconduct, inefficiency or other problems within public instrumentalities. Such measures have recently been made law in the United States of America by the Whistle Blowers Protection Act 1989.*
>
> *Obviously, there will be some within the bureaucracy who will make malicious and untrue allegations. Any legislation should prescribe penalties for people who make damaging public statements knowing them to be untrue.*
>
> *The bureaucracy, however, must not penalize people simply because they are outspoken. In an open society people have a right to speak freely on matters of*

> *concern to them.*
>
> *The public interest in good administration means that Governments should be prepared to withstand robust, and even ill-founded criticism. This is particularly true in the absence of empirical evidence that such public criticism is harmful to established institutions.*
>
> *It is also necessary to establish a recognised, convenient means by which public officers can disclose matters of concern. What is required is an accessible, independent body to which disclosures can be made, confidently (at least in the first instance) and in any event free from fear of reprisals.*
>
> *The body must be able to investigate any complaint. Its ability to investigate the disclosures made to it and to protect those who assist it will be vital to the long term flow of information upon which its success will depend.* (1989:134)

Further, the Fitzgerald Report recommended that the EARC implement and supervise electoral and administrative reforms including:

> *... preparation of legislation for protecting any person making public statements bona fide about misconduct, inefficiency or other problems within public instrumentalities, and providing against knowingly making false public statements.* (1989:370)

9.3 The Electoral and Administrative Review Commission Report on Protection of Whistleblowers

EARC presented its *Report on Protection of Whistleblowers* (Serial No 91/R4) in October 1991. EARC re-affirmed the conclusion of the Fitzgerald Report that the public interest requires special protection for public officials who expose wrongdoing in the workplace. The EARC report recommended that comprehensive whistleblower protection legislation be enacted to improve the protections available to whistleblowers in Queensland.

The Parliamentary Electoral and Administrative Review Committee (PEARC) unanimously endorsed EARC's recommendations and the provisions of the draft Bill, subject to certain amendments.

9.4 Whistleblowers Protection Act 1994

The objective of the *Whistleblowers Protection Act 1994* is to enhance the legal protections for public officers, and, in certain circumstances other persons, who expose wrongdoings. The Act protects whistleblower disclosures by public officers and, in certain circumstances, by other persons including private sector employees.

9.4.1 Application of the Scheme to Public Officers

Section 8 provides that the *Whistleblower Protection Act* protects a public officer who makes a "public interest disclosure" which includes:

- official misconduct (s.15); or
- maladministration by a public sector entity which adversely affects a person's interests in a

substantial and specific way (s.16). "Maladministration" is defined as administrative action that is unlawful, or arbitrary, unjust, oppressive, improperly discriminatory or taken for an improper purpose; or

· negligent or improper management by a public officer, public sector entity or a government contractor resulting or likely to result in a substantial waste of public funds (s.17);

· conduct by another public officer, or by anyone, causing a substantial and specific danger to public health or safety or to the environment (s.18).

The term "public officer" means any constituent member or employee (whether permanent or temporary) of a public sector entity in Queensland (s.7(4)). The Act gives the public officer the legal right to make a public interest disclosure to any public sector entity that is an "appropriate entity" (s.26). A public sector entity is an "appropriate entity" if:

· the disclosure concerns the conduct of the entity or its staff; or

· the entity otherwise has authority to investigate the disclosure; or

· the person making the disclosure has an honest belief that the entity is an appropriate entity to receive the disclosure.

A public officer can disclose the information to their own public sector entity or to any external public sector entity empowered to investigate or remedy the conduct. Depending on the conduct, such external authority could include a Parliamentary Committee, the CJC, the Queensland Police, the Queensland Audit Office, the Ombudsman, a Regional Health Authority, the Queensland Heritage Council and a range of other investigatory bodies. For those officers who choose to use external channels, the Act does not require them to first disclose their concerns internally.

The *Whistleblower Protection Act* does not confer statutory protection on public interest disclosures made to the media. The intention of the legislation is to ensure that disclosures are made to agencies that can take appropriate action on the information disclosed. Disclosures to the media would not necessarily further this objective.

To qualify for protection the Act requires the whistleblower to demonstrate that they had an honest belief on reasonable grounds that the information they disclosed showed the wrongdoing in question (s.14(2)). However, is not necessary to show that the disclosure was objectively true. Provided that the disclosure was made honestly on reasonable grounds, individuals named or referred to in the disclosure will have no recourse through defamation proceedings or other legal action which could otherwise be taken against the whistleblower.

9.4.2 The Protections for Whistleblowers

The *Whistleblower Protection Act* provides comprehensive legal protections for whistleblowers:

· A whistleblower will not incur criminal or civil liability for making a disclosure to an appropriate entity, and will have absolute privilege in defamation proceedings (ss.39 and 40).

· it is unlawful for anyone to take a reprisal against a whistleblower for making a disclosure. Public officers who do take reprisals will be guilty of a criminal offence and a disciplinary offence of misconduct (s.41).

- The Commission has authority to investigate reprisals by public officers that would constitute misconduct.

- Public officers who have access to employee appeal mechanisms will be able to utilise these mechanisms if they suffer reprisals for whistleblowing (s.45).

- A departmental employee may seek to be relocated to another department if there is a continuing risk of reprisal to them. They can do this by appealing to the Commissioner of Public Sector Equity. If the Commissioner upholds the appeal, the Governor-in-Council is empowered to re-locate the officer (s.46).

- Any person who suffers a reprisal can apply for civil damages (s.43).

- Any person dismissed for whistleblowing can apply to the Industrial Relations Commission for reinstatement or compensation.

- The whistleblower can apply for an injunction from the Industrial Relations Commission to prevent any reprisal involving breach of employment conditions. The whistleblower will also be able to apply to the Supreme Court if the reprisal is not an employment matter. If the whistleblower is a public officer, the CJC can seek the injunction on their behalf (ss.47-54).

9.4.3 Application of the Scheme to Private Sector Employees

The Act provides protection for both private and public sector employees who disclose information in the following categories:

- information given to any appropriate entity about substantial and specific danger to the health or safety of a person with a disability

- complaints made to the Health Rights Commission about health services

- information given to any appropriate entity about the commission of a prescribed offence where the commission of such an offence constitutes a substantial and specific danger to the environment (s.19).

Any person, including a private sector employee, who makes a disclosure under clause 19 of the Act will have the following protections:

- immunity from civil proceedings (ss.39 and 40)

- damages entitlement (s.43)

- a right to seek injunctive relief from the Industrial Relations Commission or from the Supreme Court. The injunction may be sought by the employee or by his or her union (ss.47-53).

The unfair dismissal provisions of the *Industrial Relations Act* also apply to any person making a public interest disclosure under s.19 of the Act.

9.4.4 Confidential Counselling for Whistleblowers

A confidential advisory service for whistleblowers will be provided by the PSMC. Persons

contemplating whistleblowing under the *Whistleblowers Protection Act* and who seek counselling from the PSMC, the Commission, a private legal adviser, or from any other source are protected by section 41 of the Act which deals with unlawful reprisal. Section 41 makes it unlawful to take a reprisal against a person in the belief that they have made or may make a public interest disclosure. Therefore, if an employer learns that an employee has sought counselling from the PSMC, the Commission or from anyone and victimises them in the belief that they are contemplating making (or have made) a disclosure the employer would be in breach of the Act.

9.5 The Role and Function of the Whistleblower Support Program

In June 1994 the Commission established the WSP as part of the Corruption Prevention Division. The objective of the Whistleblower Support Program is to offer advice, support and referral for persons who have made a complaint to the Commission and are experiencing harassment or added stress as a result.

The Commission submitted that the role and functions of the program are to:

- provide confidential advice and support to whistleblowers and other complainants to the Commission
- provide training to Commission staff dealing with whistleblowers and witnesses and provide professional support for staff including counselling, referral and field work
- provide telephone and personal advice, counselling and appropriate referral to persons making complaints to the Commission
- contribute to the debate on whistleblowing protection and support through policy advice, professional papers and participation in conferences and workshops
- provide training, supervision and consultancy to Commission staff on matters related to the handling of whistleblowers and complaints
- provide liaison, consultancy and policy advice to other agencies involved in whistleblowers support
- prepare and monitor confidential and accurate case records and reports to assist in the support of whistleblowers
- provide counselling support and referral on a confidential basis
- carry out appropriate research on whistleblowing and its effect on complaints
- provide practical help and assistance to whistleblowers.

IS THE COMMISSION THE APPROPRIATE AUTHORITY TO PROTECT WHISTLEBLOWERS?

It has been suggested that the Commission is not the proper body to protect whistleblowers. The Commission has been criticised in respect of its treatment of whistleblowers in that the Commission uses the information provided by whistleblowers without providing adequate follow-up counselling and support to those persons.

The Whistleblowers Action Group (Qld) Inc. (WAG) submitted that it is inappropriate for the Commission to have the two completely diverse functions of investigator and protector. The WAG referred to the PEARC Report which stated that the Commission is not the desirable location for a whistleblowers counselling unit.

The WAG expressed concerns about the Commission's:

- inability to understand the impact of whistleblowing on whistleblowers and their families
- ability to conduct an effective and efficient Whistleblowers Support Program.

WAG recommended that the PCJC monitor more closely the activities of the Commission in respect to the granting of effective protection to whistleblowers.

The WAG expressed disappointment with the Commission's attitude towards whistleblowers and its handling of the initiative on the following grounds:

1. Tokenism

It ought not to be inferred by the comments we make under this heading that we believe the CJC is a proper or capable authority in the whistleblower area. Having said that, we feel that the CJC is prodding this huge social issue with a small stick. A single appointment will allow the CJC to say it's doing something, But whichever way you look at it, it's sheer tokenism. We firmly believe that if the CJC (in the sense of its being an administrative culture) were really serious about whistleblowers it would have established a new section, or at least have given our delegation a feeling that whistleblowing is a priority area and will come up on forward estimates.

2. Inappropriate Job Description

Our second source of disappointment in the response framework used by the CJC concerns the manner of conceptualising the position of `manager' in the whistleblower service.

... in summary of this point, we believe that the CJC operative selected to `handle' whistleblowers will, despite good intentions, be ineffective and even counter-productive if they come to the job from a conventional counselling background.

3. Counselling or Referral?

... the manager will be doing more referral then counselling. To put it bluntly, the last thing a whistleblower needs is somewhere else to go. Their disclosure experience is always one of being shunted from pillar to post. Now the CJC will enter this buck-passing phenomenon as another player full of directions to the whistleblower.

We also believe there is no merit in the emphasis you give to referral in the job description because, as the Industries Commission Brisbane hearing into charities was told recently by the Queensland Council for Social Services, the non-government sector is bursting at the seams. It simply cannot handle any more referrals.

The Commission made the following response to the concerns raised by the WAG:

1. Tokenism

The Commission rejects the notion that the WSP is "tokenism". I would expect WAG would agree that there is much work to be done in providing support and advice to potential and actual Queensland whistleblowers, in addition to promoting change in people's attitudes towards whistleblowers. One might have thought that WAG would have welcomed the introduction of a new resource to tackle these objectives rather then criticising the initiative as "tokenism". Budget and staff establishment constraints prevent the Commission from allocating further resources to this area.

Debate about the location of a "whistleblowing Counselling Unit" focuses on the capacity of the "unit" to maintain its independence and integrity in the achievement of its objectives and not be subject to influence that would subvert its attainment of those objectives. As you know, the WSP is located within the Corruption Prevention Division which is separate to the investigative arm of the Commission namely the Official Misconduct Division. The Manager of the WSP reports to the Director of the Corruption Prevention Division who reports to myself. The Corruption Prevention Division has a statutory obligation to advise and assist units of public administration to establish proper reporting mechanisms and adequate protections for whistleblowers in their organisation. It has a clear role to play in whistleblower support as an effective corruption prevention strategy.

I do not anticipate that there will be any conflict in functions between the Official Misconduct Division and the Corruption Prevention Division. Indeed, there are potential benefits for the WSP to establish a limited liaison with the OMD as OMD is a major potential referral source for WSP and OMD plays an important role in whistleblower protection.

I can assure the WAG that the WSP will be given the professional autonomy that it requires to perform its duties. The Manager of the WSP is conscious of his responsibilities with regards to acting with integrity in accordance with his own professional code of ethics as a psychologist. The Commission believes that the WSP can operate independently and with integrity and will not compromise these principles. The threat of effective whistleblower support comes more from public attacks on those who are providing the service than anywhere else.

The Commission rejects the view that it is not an appropriate organisation to be involved in the protection of whistleblowers. The Commission is already involved in whistleblower protection via provisions of the Criminal Justice Act and looks forward to any future legislation that strengthens the capacity of the Commission to protect whistleblowers from disadvantage because they have assisted the Commission fulfil its function. Any difficulties the Commission is experiencing in effectively protecting whistleblowers, relate to the legislation under which it currently operates.

The Commission regards whistleblower support as an important element in corruption and detection and offers its full support for the WSP. The Commission would not have established the program if it did not consider that this was the case.

2. Inappropriate Job Description

... The Commission holds the view that a component of the work of the WSP is the provision of counselling to whistleblowers. For this reason it sought an applicant with qualifications and experience in the field of counselling who could apply these skills to whistleblowers, in addition to a range of other skills. You would agree that many whistleblowers experience distress of a severity that requires professional intervention. The WSP is able to provide this.

You make a valid point in stating that the counselling of whistleblowers should not

be placed in the framework of personalising the problem for the whistleblower and ignoring the structural and systemic aspects of the problem. Indeed, a competent counsellor would acknowledge the interaction between the external organisational forces operating on the whistleblower and how they impact on the individual.

3. Counselling and Referral

The WSP will provide counselling, advice and referral for whistleblowers who have assisted the Commission. The Manager of the WSP is a professional psychologist who is able to make decisions about when provision of counselling, advice and referral is required in any particular case. Clearly, with one person in WSP, it is not feasible to engage in long term counselling of whistleblowers and it therefore becomes necessary to make use of other external resources. The WSP will play an important role in ensuring that whistleblowers receive assistance that they require and WAG can also play its role here.

In addition, the Commission submitted that it supports whistleblowers in the following ways:

- Under section 131 of the Act, a person who prejudices the safety or career of another person or does any other act that is likely to be to the detriment of another person because that person (or any other person) has given evidence to or assisted the Commission in the discharge of its responsibilities commits an offence against the Act and is liable to a penalty of 85 penalty units. Furthermore, where a person engages in conduct that contravenes section 131, the Commission may apply to the Supreme Court for an injunction in any terms the court thinks appropriate. The Committee notes that the Commission has utilised this section to protect whistleblowers.

- The Commission has appointed a psychologist to carry out the role of Whistleblower Support Officer.

- Where a person who assists the Commission is subjected to threats to the safety of the person or the person's relatives, the Commission conducts a threat assessment for the purpose of determining whether the person should be admitted to the Commission's Witness Protection Program.

The Committee is of the view that it is appropriate that the Commission is involved in the protection of whistleblowers. The WSP is an important function of the Commission. The Committee considers that it is essential that whistleblowers who have assisted the Commission have the opportunity to obtain counselling, advice and referral. As discussed above, the new *Whistleblowers Protection Act* strengthens the capacity of the Commission to protect whistleblowers from disadvantages.

At present the WSP is located within the Corruption Prevention Division. In Chapter 8 of this report the Committee recommend that the Corruption Prevention Division excluding the WSP, should cease operation in order to avoid duplication.

The Committee considers that it is inappropriate that the WSP be located within the OMD. The Committee is of the view that the WSP should remain separate and independent of the investigative arm of the Commission. However, the Committee recognises that liaison with the OMD is important as a source of referral for the WSP.

The Committee considers that the WSP should be a separate organisational unit within the Commission referred to as the Whistleblower Support Unit (WSU). This will ensure that the WSP maintains independence and integrity and establishes a clear role for whistleblower support. The

WSU should be directly accountable to the Chairperson.

The Committee believes that it is important that the Commission has the capacity to provide effective support and advice to whistleblowers. The Committee is of the view that the role of the WSP should be enhanced, as reflected in the new Whistleblowers Protection Act.

Conclusion

The WSP is an important function of the Commission. The Committee believes that the importance of this function should be recognised by constituting the WSP as a separate organisational unit within the Commission referred to as the Whistleblower Support Unit (WSU). The WSU should be directly accountable to the Chairperson. The Committee is of the opinion that this will assist in ensuring that the WSU maintains its independence and integrity.

Recommendation

The Committee recommends that the WSP should constitute a separate organisational unit within the Commission referred to as the Whistleblower Support Unit (WSU). The WSU should be directly accountable to the Chairperson.

10. OFFICE OF GENERAL COUNSEL

10.1 Introduction

The Office of General Counsel was not included in the structure of the Commission initially formulated by Fitzgerald QC. This chapter discusses the background to and structure of the Office of General Counsel. The chapter then addresses the role of the Office.

10.2 Background

The Fitzgerald Report did not specifically recommend the establishment of an Office of General Counsel. The Office of General Counsel does not derive from any particular legislative provision in the Act.

In December 1992, pursuant to section 19(2) of the Act the Commission resolved that the Office of General Counsel be established as an organisational unit within the Commission with divisional status. The Commission expressed the view that this was necessary in order that General Counsel be able to exercise powers as the Chairperson's delegate when required, particularly in making decisions concerning the issue of compulsory processes. The Commission noted that under section 140(1) of the Act, the Chairperson's powers may only be delegated to a Director of the Commission.

10.3 The Structure of the Division

Initially, the Office of General Counsel was staffed by General Counsel alone supported by a personal secretary assigned to the Executive.

In mid 1993, when the Office was staffed by seven personnel including General Counsel, the Chairman requested the Consultancy Bureau to review "the role and deployment of legal sources within the Commission, with an initial focus on the role and functions of the Office of General Counsel and clients of that Office".

Following that report, some of the work being done by the Office of General Counsel was undertaken by staff in other Divisions, and the Office of General Counsel staff was reduced.

The Commission submitted that in the past 12 months the Office of General Counsel has been reduced from eight staff (General Counsel, Official Solicitor, four other lawyers and two support officers) to four (General Counsel, Official Solicitor, one other lawyer and one support officer). The Commission commented that this has enabled more legal resources to be allocated directly to the OMD to facilitate it to carry out more of its own legal work.

The Commission observed that the Official Solicitor acts for the Commission in any proceedings in which it is involved, and briefs barristers, including General Counsel, who advise, represent or act for it. General Counsel is also administratively responsible for the Misconduct Tribunals, and presides at Commission hearings.

10.4 The Role of the Division

The Commission described the role of the Office of General Counsel as providing professional legal and strategic advice to the Commission, its organisational units and the Chairperson, and representing or acting for it in legal matters. The Commission noted that the Office advises the Commission in many areas, including criminal, administrative, contract, industrial, statutory interpretation and policy issues. Further, the Commission submitted that the Office works with the Research and Co-ordination Division in the preparation of submissions on criminal justice and legislative issues as well as providing legal education for the Commission by circulating advice concerning new legislation and important court decisions.

At the public hearing the Chairman of the Commission, Mr O'Regan QC, made the following comments:

> *Dr Watson I think it was, referred to the redeployment of staff in the Office of General Counsel and asked whether that redeployment had resulted in any loss of the capacity to obtain independent legal advice within the Commission. A few observations might be made about that. One is that redeployed lawyers from the Office of General Counsel remain independent wherever they are working. They still retain the capacity to provide legal advice which is independent. If they did not, they would not be behaving professionally. What they do, however, is provide advice interstitially, so to speak, rather than from a distinct office. A great many legal matters arise in the context of the work of the Commission, and decisions about them are often best made by those who have particular experience in that area of the law. I refer to such matters as questions of public interest immunity, the procedural requirements for applying to the Supreme Court for judicial approvals with respect to the exercise of powers, and things of that sort. It seems to me that there is no loss in the quality of advice in a system which has arranged for those giving that advice to be widely deployed within the organisation.*
>
> *In the Commission's view, the arrangement which has evolved as a result of the redeployment of staff is less bureaucratic and more efficient. The review itself was undertaken, as Mr Irwin indicated, by independent consultants, and it is working well. It is right, however, to retain the function of an Office of General Counsel for long-term legal matters—matters which require more considered advice; matters which touch upon issues which affect the organisation as a whole, FOI applications and things of that sort. So it is necessary to have both forms of legal advice available to the Commission and to its divisions.*

The Commission's written submission made reference to the fact that General Counsel currently has administrative responsibility for the Misconduct Tribunals. However, the previous Committee and the Commission have expressed the view that the tribunals should be independent of the Commission. The Attorney-General has indicated that the tribunals will be transferred to the District Court. However, as discussed in Chapter 4 of this report, the Committee has further considered the issue and recommended that the tribunals should be independent of the Commission and not transferred to the District Court.

The Commission also submitted that in conjunction with the Personnel Services Section of the Corporate Services Division, the Office of General Counsel prepared the Commission's human resource policies and updated contracts of employment, confidentiality agreements, consultancy agreements, and the Commission's standard forms for the exercise of compulsory powers.

The Commission reported that since the previous Three-Year Review, the Office has:

- established a database to record information in relation to its work

· completed the Code of Conduct, which was regarded by the Committee in Report No. 18 as an important part of the Office's work, and this has been adopted by the Commission.

The Commission also noted that, since Report No. 18, it is the responsibility of General Counsel to consider all reports under s. 26 of the Act and certain other Commission publications prior to release to ensure that they comply with the principles of procedural fairness before release. The Committee acknowledges that this process is an important safeguard.

The Commission submitted that General Counsel is personally responsible for preparing proposed amendments to the Act and consulting on behalf of the Commission with the Department of Justice and the Attorney-General, the Office of Cabinet and Parliamentary Counsel in relation to these matters.

Further, the Commission noted that General Counsel has represented the Commission before the Supreme Court and Court of Appeal. He and other Office lawyers have also been junior counsel in these jurisdictions. In addition, Office lawyers have appeared throughout the State, and, on one occasion, interstate in answer to summonses and subpoenas seeking material held by the Commission. Since the previous review there has been an increasing number of these applications. Responding to each involves a significant diversion of the Commission's resources from other pressing work – in addition to the direct costs involved, the preparation of affidavits and court appearances takes an average of two working days' effort. On a number of occasions, applications were not proceeded with after this work had been done. The Commission is seeking to address this matter through an amendment to the Act that would strike an appropriate balance between the essential confidentiality aspects of the Commission's functions and the need to make relevant evidence available to parties in legal proceedings.

In its written submission the Commission commented that the commencement of the *Freedom of Information Act 1992* has also significantly taxed the Commission's resources. The Commission supported this legislation and the application of the legislation to it. The Office provided the legal foundation to respond to FOI requests. It prepared an FOI Manual. The Freedom of Information and Administrative Law Division of the Department of Justice and Attorney-General acknowledged the valued contribution of the legal officer responsible in the preparation of its Freedom of Information Policy and Procedures Manual. Office lawyers have also conducted many of the internal or external reviews arising from FOI applications.

The report prepared by Mr L Wyvill QC on his review of the Office of General Counsel concluded that there is a need for the Office of General Counsel to perform the following functions:

(1) To provide proficient and timely legal advice to the Commission in general and the Chairman in particular.

(2) To provide representation for the Commission before courts in respect of externally generated processes such as summonses and challenges to the conduct of Commission's operations and in such other matters as may be deemed appropriate depending upon the nature of the matter and the complexity of the work involved. Upon a consideration of those matters it may be appropriate to brief private counsel and where senior counsel is briefed, the Office of General Counsel ma provide junior counsel to assist.

(3) Where appropriate to provide counsel to assist the Commission in respect of its hearings.

(4) To provide counsel to preside at private investigative hearings from time to time.

(5) Through the Commission's Official Solicitor to brief and/or instruct private counsel to

advised, represent to act for the Commission.

(6) To provide for the certification of public reports of the Commission for procedural fairness.

(7) To draft submissions on behalf of the Commission in respect of legal matters affecting the Commission as a whole, such as desired amendments to the Criminal Justice Act or the making of comments on proposed government legislation upon which the Commission's input is sought or upon which the Commission should have an input.

(8) To discharge such other functions and responsibilities on behalf of the Commission as the Chairman directs.

The Committee acknowledges that the Commission needs the advice of lawyers, particularly in-house lawyers. The Committee supports the use of in-house legal expertise by the Commission as opposed to briefing-out. The Committee believes that the use of in-house legal expertise is an effective cost saving measure which should be encouraged.

The Committee is of the opinion that it is the role of the Office of General Counsel to provide independent legal and strategic advice to the Commission, in particular, the Commissioners and the Directors. That is, the Office should be responsible for providing independent advice within the Commission. The Committee recognises the importance of independent legal advice, that is, independent from the OMD for example.

The Committee is of the opinion that the Office should act as an internal accountability mechanism to ensure that the Commission is acting within the Act. The Office of General Counsel acts as a check on the activities of the Directors and provides the Chairman and Commissioners with independent advice. It is the role of the Office to ensure that the Commission operates in an appropriate manner.

The Committee notes that there is significant expenditure by the Commission on seeking legal advice from the private bar. The Committee suggests that where appropriate such inquiries should be encouraged to be conducted in-house which would be an effective cost-saving device.

Conclusion

The Committee concludes that it is the role of the Office of General Counsel to provide independent internal legal and policy advice to the Commission.

11. THE CORPORATE SERVICES DIVISION

11.1 Introduction

This chapter examines the role and functions of the Corporate Services Division of the Commission.

11.2 Fitzgerald Report Findings and Recommendations

Fitzgerald QC made the following observations in respect of the organisation of the Commission:

> *For administrative purposes the CJC will require the services of a competent secretariat. An Executive Director should be appointed to control the CJC's Secretariat and to co-ordinate the CJC's operational functions.*
>
> *The Executive Director will not be a member of the CJC, but will be responsible to the Chairman for administration and direction of its functions.*
>
> *The Executive Director will co-ordinate the activities of the CJC through Divisions, each headed by an appointed Director. (1989:310-311)*

11.3 The Criminal Justice Act 1989

Section 64(1) of the *Criminal Justice Act* states:

> *The Commission may employ an executive director and such directors and other staff as are necessary for the effective and efficient discharge of the functions and responsibilities, and exercise of the powers, of the Commission and of each of its organisational units.*

Pursuant to section 19(2) of the Act, the Commission established a Corporate Services Division.

11.4 The Operation of the Corporate Services Division

The Corporate Services Division is under the control of the Executive Director and assists the operational Divisions of the Commission.

The Commission submitted that the Division develops policies and procedures necessary for the provision of administrative and logistical support and the control and co-ordination of the Commission's operational functions.

In the Commission's 1993/94 Annual Report the Commission reported that the Corporate Services Division provides support to the Commission's operational Divisions by:

- developing and implementing administrative and logistical policies and procedures
- making recommendations to meet organisational, staffing and overall budgetary needs

- establishing procedures for external and internal accountability in compliance with the *Financial Administration and Audit Act 1977*, as well as the Commission's responsibilities under the *Criminal Justice Act 1989*.

Further, the Commission stated that the Division offers support through the following functional areas:

- Finance and Administration Section
- Personnel Services Section
- Information Management Branch
- Executive Support Unit
- Media Unit.

The Commission submitted that as part of the Division's ongoing support services the Division carries out regular reviews of the financial, computing and human resource systems. The Commission reported that:

- with respect to human resources, a training and professional development strategy has been developed and is being implemented
- in Finance, the cash management program has been refined to permit improved budget formulation, monitoring and review
- in Information Management, equipment and software have been upgraded to increase availability and achieve a standard working environment
- the Intelligence database has been upgraded.

The Commission also submitted that some of the major achievements of the Division since 1992 include:

- the completion of a comprehensive physical security upgrade at the Commission's premises
- the installation of an electronic banking interface to enhance bank reconciliation procedures and provide timely information for cash flow purposes
- the development of an inventory system for stores and stationery
- the continued enhancement of computing facilities available across the network of 250 workstations
- the commencement of a three-year strategy to achieve a standard computing operating environment for all officers
- the enhancement of three major computer applications - RECFIND, records management software; CID, the Intelligence Division database; and the database of the Complaints System
- the maintenance a rigid program of returning to source, external material acquired through

compulsory process, investigative hearings or voluntary collection

- the development of a Training Development Strategy to ensure staff training and professional development is conducted in a co-ordinated and cost effective manner

- the production of a comprehensive Human Resource Management Policy and Procedures Manual

- the preparation and implementation of an Equal Opportunity Management Plan.

11.5 Freedom of Information (FOI) Unit

The Executive Director has administrative responsibility for this function. However, the Commission submitted that the unit operates independently.

The Commission submitted that since the unit commenced operations 121 of the 130 applications for access to documents have been finalised.

Initially, the FOI unit had a staff of three. However, that has been reduced to one as a consequence, in the Commission's submission, of a reduction and stabilisation in the number of applications received.

11.6 Staff Ceilings

In 1990 the number of positions approved for the Commission was determined as 263. The Commission submitted that during its four years of operation the Commission has found it necessary to engage additional employees on a casual, temporary or program dependent basis.

The Attorney-General has approved criteria for a temporary increase of the establishment base of 263.

The Commission's permanent staff establishment consists of 171 civilians and 92 police. The police are dispersed across two Divisions as follows:

- Witness Protection (including Operations Directorate) - 26

- Official Misconduct Division - 66.

The Commission reported that within the Official Misconduct Division, police officers perform the following tasks - surveillance and technical support (18), Joint Organised Crime Task Force activities (5) and general investigations and operations (43).

11.7 Security

On several occasions the Committee has reviewed the Commission's security, identified shortcomings and made recommendations for the improvement of security procedures.

Report No. 20B of this Committee entitled *Report of the Review of the CJC's use of its powers under section 3.1 of the Criminal Justice Act 1989 Part B - Report, Conclusions and Recommendations* recommended that the security procedures of the CJC be reviewed by an

independent agency, such as ASIO or the NCA, to ensure those procedures are adequate.

Mr Nattress, Director of Intelligence of the NCA, undertook the review and made a number of observations and recommendations. Subsequently, this Committee recommended that the Commission fully implement the recommendations relating to internal security made by Mr Nattress.

Mr Nattress recommended the creation of a permanent position of Security Manager. The appointee commenced duty in April 1994. The Commission submitted that the Security Manager has reviewed the Commission's Security Guidelines and modified them where necessary. These guidelines are now incorporated into a manual.

The Commission has informed the Committee that all but one of the recommendations in the abovementioned report have been implemented by the Commission. The Commission has determined not to implement recommendation 28 that the Commission develop a policy of random bag/vehicle search, having regard to the possible industrial implications associated with such a policy.

However, the Committee notes that Fitzgerald observed:

> *All CJC staff should be closely vetted to prevent infiltration, and their dedication to purpose should be reflected in their willingness to disclose assets, interests and associations and to submit to and understand the need for (and not take umbrage at) periodic and unannounced vetting.* (1989:322)

The Committee concurs with the view of Fitzgerald QC that Commission staff should be closely vetted on a continuous basis. The staff of the Commission must accept that security is a matter of ongoing concern given the nature of the organisation.

Conclusion

The Committee concludes that the Commission must ensure that all recommendations for the improvement of security procedures are implemented expeditiously. The Commission must strictly enforce internal security guidelines.

Recommendation

The Committee recommends that the Commission implement recommendation 28 of the report of Mr Nattress which specifies that the Commission develop a policy of random bag/vehicle search.

11.8 Budget

The Commission's budget for 1993/94 was $21,050,000 comprising a $20,651,000 appropriation from the Consolidated Revenue Fund and $399,000 income from the sale of assets etc. The Commission reported that of the budget, 68% ($14,300,000) represents labour costs and 32% ($6,750,000) is non-labour costs.

The Commission indicated that in 1993/94 the Corporate Services Division budget was $6,740,999. However, the Committee notes that this is expenditure on behalf of the other

Divisions.

11.8 The Media Unit

Prior to January 1994 the media liaison officer was directly responsible to the Chairman of the Commission and was not a member of a particular Division. The position is now within the Corporate Services Division, which is administered by the Executive Director. Therefore, the media liaison officer is now responsible to the Executive Director.

During the Parliamentary Committee Inquiry relating to the November 1993 Report the role of the media liaison officer was discussed by the Commission Chairman, the Commissioners and the Director of the Official Misconduct Division in their evidence to the Committee. The Director testified:

> *... the Media Liaison Officer is the go-between between the Commission and the media at large.*

The Chairman of the Commission, Mr R O'Regan QC, said:

> *The role of the media liaison officer is to constitute a link between the Commission and the media - a channel of communication. So people in the media seeking to ask questions about things that are going on or thought to be going on in the Commission in relation to its investigations or other matters communicate with the media liaison officer, who in turn communicates with me for the most part or with various other people in the organisation who have first-hand knowledge of the matter under consideration. That person confers with people within the Commission about it, and may be responsible for providing a response or may facilitate arrangements for an interview to be conducted by me or some other officer of the Commission. That person drafts media releases and arranges media conferences, and assists also in developing strategies to project the work of the Commission in the media.*

Further, in response to a question from the Committee's Chairman as to whether Mr O'Regan would agree that the media liaison officer is virtually the public image of the Commission Mr O'Regan replied:

> *... the role of the media liaison officer is to facilitate the dissemination of work which is being done by the Commission. The public image of the Commission is as much the various people who compose it as the media officer.*

In the Supplementary submission to the Committee in respect of its inquiry relating to the November 1993 monthly report the Commission referred to the hundreds of calls received each week from media operatives seeking information about particular operations and investigations. The Commission commented that it would be extremely wasteful of the time of the Chairman and Directors if, notwithstanding their individual competence in communicating with the media, the Commission did not have the general policy that media inquiries be directed to the media liaison officer. This is particularly so as inquiries are received outside normal working hours.

The Commission submitted that it is also valuable for Commission officers to be able to discuss issues with the media liaison officer before being interviewed. The Commission maintained that this enables issues to be anticipated and properly considered and answers to be communicated in language which is readily understandable to the community. The Commission submitted that for similar reasons the role of an expert practitioner in media communications is essential to the preparation of media statements.

The Commission maintained the need for the position of a media liaison officer. The Commission submitted that the person occupying the role has an important role in minimising the amount of time which senior officers of the Commission are required to spend on matters involving the media.

The Commission also expressed the view that the position of media liaison officer does not pose adverse implications for the security of the Commission.

In the Commission's 1993/94 Annual Report the Commission reported that the Media Unit staff continue to foster productive relations with the media throughout the State and Australia by:

- acting as the primary point of contact for all media inquiries
- keeping the media aware of CJC activities
- preparing accurate and informative summaries of news-worthy issues
- facilitating productive media conferences and interviews of key CJC staff.

The Commission also reported that the Media Unit responded to thousands of requests for information from the media in the past 12 months. The Commission noted that 90 media statements were issued, 13 formal media conferences were held and many CJC staff participated in interviews with print, radio and television journalists.

The Commission has previously informed the Committee that it adopts the following philosophy with regard to its relationship with the media:

- To provide information as readily and cordially as the Commission's obligations under the Act permit.
- To correct promptly and emphatically any mis-reporting of the Commission's activities.
- To contribute, when appropriate, to media discussion of issues relating to the responsibilities and functions of the Commission under its Act.
- To initiate debate on such issues by inviting comment on Commission reports and conducting seminars.

The Criminal Law Association made the following written submission:

> *For some time various members of the Association have been concerned at not only "leaks" to the media from the Criminal Justice Commission, but by authorised media releases. The scope for misinterpretation, misuse, prejudice and damage to citizens and indeed the investigation itself, by "media releases" is wide indeed. The Association is of the view that it is not appropriate for the Commission to be giving "briefings" to the media about its investigations, as those media releases can be damaging to the judicial process and can result in irreparable damage to the reputations of innocent persons and prospects of a fair trial of persons the subject of the investigation. Public and media speculation about investigations can also lead to unnecessary concerns and anxiety within the community. All that the Commission should say about an investigation in response to a media inquiry is, the very responsible reply of "Investigations are pending or are continuing". There cannot simply be any valid objection to that course being followed by the Commission.*

> *Various members of the Association have also noted with concern that the media seems to be better informed on the current position of investigation than is the person or persons the subject of the investigation. That is to say, the media is informed of what is happening in an investigation before and in most cases, in more detail than the person or persons the subject of the investigation.*

The Committee notes that this problem has previously been identified to the Committee. The Committee is of the view that the Commission should actively discourage unauthorised leaks of material from the Commission.

Whilst the Commission is undertaking an investigation no comment should be made by the Commission except to acknowledge that it is undertaking inquiries. Once an investigation by the Commission is completed the Commission should simply state that the investigation has been completed and:

- it was found to have no substance;
- it has been referred to the Director of Prosecutions for action;
- it has been referred to the Misconduct Tribunal: or
- it has been referred to the relevant department for further action.

No statement should be made by the Commission about the details of the matter which may prejudice a fair trial or which would impinge the rules of natural justice.

Findings by the Commission that persons may have committed official misconduct are not final determinations. Therefore, the persons the subject of the investigation are entitled to the presumption of innocence.

No statement should be made which substantially interferes with this presumption. For example, evidence upon which the Commission has made a determination that the matter should be referred to the Director of Prosecutions for consideration should not be disclosed. Disclosure of this evidence may receive wide media attention. However, that evidence may later be ruled inadmissible.

The position is different with respect to allegations which the Commission's investigations have revealed to be baseless. In these circumstances the Commission is entitled to address why the allegations were found to be unsubstantiated.

The Committee is of the opinion that prior to the public hearings into the November 1993 monthly report the media unit was not functioning properly. In particular, it became evident to the Committee that there were communication problems within the Commission that may have interfered with the operation of the Media Unit.

The Committee was also concerned that confidential and sensitive material was being provided to the media liaison officer. This practice, which had developed in the earlier years of the Commission, continued until the Committee's inquiry. However, it was not necessary for the media liaison officer to be provided with such information.

The Committee recognises that an organisation such as the Commission will be required to have dealings with the media. The Committee emphasises that it is essential that:

- the Commission is fair and impartial in its dealings with the media
- those officers of the Commission who have dealings with the media are familiar with media practice
- security and confidentiality are maintained and that only necessary information is provided to the Media Unit.

As a consequence any journalist accepting a position at the Commission, including the position of media liaison officer, must accept and comply with the provisions of the Act and the policies of the Commission. That person should maintain the ethical standards of the position. However, the Code of Ethics of journalists in relation to sources of information cannot be claimed. That is, once the person accepts the position of media liaison officer with the Commission they put on hold their career as a journalist even though they have been employed on the basis of their professional capacity. Further, the confidentiality provisions of the *Criminal Justice Act 1989* would make it impossible for the employment of a journalist on the basis that they can claim the Code of Ethics for journalists.

Conclusion

The Committee concludes that it is essential that the Commission is fair and impartial in its dealings with the media and that the Media Unit should perform this role.

The Committee also concludes that any journalist accepting a position at the Commission, including the position of media liaison officer, must accept and comply with the provisions of the *Criminal Justice Act 1989* and the policies of the Commission.

All officers of the Commission are bound by the confidentiality provisions of the Act. These provisions would make it impossible for the employment of a journalist on the basis that they can claim the Code of Ethics for journalists.

12. ACCOUNTABILITY ISSUES

Introduction

In chapter 2 of this report the role and operation of the Parliamentary Criminal Justice Committee was discussed in detail. This chapter supplements chapter 2 by focusing upon particular accountability issues pertaining to the Commission. The following issues will be examined:

- the exemptions contained within the *Criminal Justice Act* of the Commission reporting to the Committee;
- the handling of complaints against the Commission or its officers and staff; and
- the issue of the Commission reporting confidentially to the Committee.

This chapter makes various recommendations that the Committee believes will serve to increase the accountability of the Commission.

12.1 The Fitzgerald Report

Fitzgerald QC, in his report, noted the inherent problems with an Independent Commission Against Corruption (ICAC), which he described as an autonomous body which was not accountable:

> *There is the risk that any autonomous investigative body, particularly one infused by its own inevitable sense of importance and crusading zeal, may become increasingly insensitive to the delicate balance between conflicting public and private interests, which is traditionally and best struck by judges.*
>
> *Apart from anything else, there must be concern that an ICAC, no matter how well-intentioned, may in time become part of the corruption problem, which means that criminals may then have access not only to enormous funds, but also to a powerful body well placed to intimidate people and pervert the process.*
>
> ...
>
> *There is nothing in the experience, demonstrated capacities and structures of ICAC's which warrants the adoption of the approach in Queensland.*
>
> *It may be possible to combat corruption by some other means than an autonomous institution. The difference between independence and autonomy must be understood. An independent body is needed, an autonomous one is not.*
>
> *The idea of an autonomous body can at first be comforting, because it is beyond the control of those in power who may be corrupt. However, just as such a body is (theoretically at least) beyond the reach of illegitimate power, it is also beyond the reach of practical proper control. If accountability is to be effective, it must relate to the exercise of power in specific cases, not just overall explanations. Accountability in the political sense is different from the necessary every day accountability when investigative powers are being exercised.*(1989:302)

Fitzgerald QC rejected the concept of an ICAC for Queensland and adopted the approach of an independent but accountable body:

> *It is necessary that an independent body exist with the resources and powers to*

> *investigate official misconduct. It should not be autonomous.*
>
> *For Queensland the preferable solution is that such an independent body exist as part of a wider structure which not only addresses official misconduct but which operates an integrated cohesive criminal justice administration.*(1989:302-303)

Therefore, Fitzgerald QC recommended the introduction of the Criminal Justice Commission which was to be independent but not autonomous. The major mechanism for accountability of the Commission was the creation of the Criminal Justice Committee:

> *Periodic reforms to the administration of criminal justice tend to provide for the introduction of substantially autonomous bodies, by which Parliament effectively places some matters beyond its control and the control of the Executive.*
>
> *One mechanism which is sometimes adopted to retain a measure of control over such a body is the constitution of a parliamentary committee to monitor its operations.*
>
> *Such a committee can provide an effective democratic mechanism to determine which controversies should be fully investigated to allay public concern.*
>
> *This course has the advantage that it makes the members of the parliamentary committee (and their political parties) responsible for the body's activities. Any other approach puts at risk the reputation for independence and impartiality of the body, which will always be vulnerable to criticism for its inability to investigate every complaint or public controversy, particularly if it has limited staff and resources.*
>
> *What is really at issue is the degree of control which can realistically be retained within the political system if improprieties in public administration are to be exposed and punished.*
>
> *The administration of criminal justice should be independent of Executive controls. It is an apolitical, vital public function. Such administration must be accountable for its activities and should be open to public review and accountable to the Parliament. (1989:307)*
>
> *...*
>
> *A standing parliamentary committee, not charged with any other responsibility and known as the "Criminal Justice Committee" should oversee the operations of the CJC. The membership of the committee should reflect the balance of power in the Legislative Assembly.*
>
> *The Criminal Justice Committee should have the power to formulate policies and guidelines to be obeyed by the CJC, and to direct the CJC to initiate and pursue investigations or to report to the Parliament. Whilst the Criminal Justice Committee should be entitled to be informed of the basis on which any investigation or category of investigation is being undertaken, it should not have the power to prevent or hinder any investigation by the CJC, (or any of its organs or officers), or do more than require the CJC to review a decision to carry out any investigation.*
>
> *The exclusion or reduction of party political considerations and processes from the decision-making process with respect to the administration of criminal justice is an important consideration underlying the establishment of the CJC. Accordingly, executive authority and connection with the CJC must be limited to what is necessary to finance it, provide administrative and resource needs, and that necessary for public financial and other accounting purposes. For those purposes, but not*

> *otherwise, a Minister should be responsible for the CJC. Subject to what is later said about transitional arrangements, which Minister should be responsible for the CJC depends upon adoption of the earlier recommendation in respect of the role and office of the Attorney-General. If the Attorney-General's ministerial responsibilities are changed as recommended earlier in this report, the Attorney-General should be responsible for the CJC. Otherwise the Premier or a Minister assisting the Premier (with no other responsibility) should be responsible for the CJC.* (1989:309)

Some aspects of the accountability of the Criminal Justice Commission have been addressed in the Committee's Report No. 25. It is not intended to repeat all of the observations and recommendations of the Committee in that report. In addition, subsidiary accountability issues are touched upon throughout this report. As they relate to matters which are discussed in detail, these matters will also not be repeated.

However, it is necessary to address three major matters that have arisen throughout the review.

12.2 Exemptions to Reporting

The Parliamentary Committee is the only non-judicial accountability mechanism of the Commission established by the *Criminal Justice Act 1989*.

The Committee is given the onerous task of monitoring and reviewing the Commission. As has been noted in Chapter 3 of this report, there are currently impediments to the effective review of the CJC by the Supreme Court. It is intended that recommendations made throughout this review will address the deficiencies in this respect. However, there is no guarantee that future impediments to the Court's ability to monitor the CJC will not occur. It must also be acknowledged that the Court is only able to provide relief when an action is commenced and bought before the court. The Court does not have a roving brief to monitor the operations of the CJC. That is not the role of the Court.

The Committee is the body properly charged with monitoring and reviewing the CJC, and reporting thereon to the Parliament and the people of Queensland.

The only manner in which the Committee can effectively discharge its obligations is by obtaining information from the Commission.

In regard to reporting by the CJC Fitzgerald QC recommended that:

> *The CJC will report:*
>
> · *on a regular basis;*
> · *when instructed to do so;*
> · *when it decides it is necessary to do so.* (1989:308)

Later Fitzgerald QC said:

> *The Criminal Justice Committee should have the power to formulate policies and guidelines to be obeyed by the CJC, and to direct the CJC to initiate and pursue investigations or to report to the Parliament. Whilst the Criminal Justice Committee should be entitled to be informed of the basis on which any investigation or category of investigation is being undertaken, it should not have the power to prevent or hinder any investigation by the CJC, (or any of its organs or officers), or do more than require the CJC to review a decision to carry out any investigation.*

...

The CJC should report to the Criminal Justice Committee.

In contrast to the position of the Electoral and Administrative Review Commission, many of the matters to be the subject of report by the CJC, including some of its operational priorities and methods and the subject matters of its concern, may need to be confidential. In consequence, the reporting of the CJC should not be to the Parliament in the first instance, and, in some cases, not at all.

The Criminal Justice Committee's members should all be subject to specific obligations of confidentiality. The Criminal Justice Committee must have the power to conduct hearings in camera. It should decide what material matters reported to it can be reported to and tabled in the Parliament and when that is to be done. Some matters may never be tabled.

However, that should not prevent the necessary, effective and sufficient oversight of the operations, methods and priorities of the CJC being had by the Criminal Justice Committee, against the background of the constitution of the CJC and reinforced by the checks and balances within it. (1989:309)

12.3 The *Criminal Justice Act 1989*

Section 21(3) of the Act provides that:

Subject to section 26, the Commission shall report to the Parliamentary Committee-

(a) on a regular basis, in relation to the Commission's activities;

(b) when instructed by the Parliamentary Committee to do so with respect to that matter, in relation to any matter that concerns the administration of criminal justice;

(c) when the Commission thinks it appropriate to do so with respect to that matter, in relation to any matter that concerns the administration of criminal justice.

The above mandatory reporting provision is in accordance with what was recommended by Fitzgerald QC.

Section 26 of the Act provides for reports by the Commission, including reports to the Committee:

26.(1) *Subject to section 27, a report of the Commission, signed by its chairperson,. shall be furnished-*

(a) to the chairperson of the Parliamentary Committee; and
(b) to the Speaker of the Legislative Assembly; and
(c) to the Minister.

(2) *The Commission may furnish a copy of its report to the principal officer in a unit of public administration who, in its opinion, is concerned with the subject matter of the report.*

(3) *If a report is received by the Speaker when the Legislative Assembly is not*

sitting, the Speaker shall deliver the report and any accompanying document to the Clerk of the Parliament and order that it be printed.

(4) *A report printed in accordance with subsection (3) shall be deemed for all purposes to have been tabled in and printed by order of the Legislative Assembly and shall be granted all the immunities and privileges of a report so tabled and printed.*

(5) *A report received by the Speaker, including one printed in accordance with subsection (3), shall be tabled in the Legislative Assembly on the next sitting day of the Assembly after it is received by the Speaker and be ordered by the Legislative Assembly to be printed.*

(6) *No person shall publish, furnish or deliver a report of the Commission, otherwise than is prescribed by this section, unless the report has been printed by order of the Legislative Assembly or is deemed to have been so printed.*

(7) *This section does not apply to an annual report of the Commission referred to in section 7.10.*

(8) *Notwithstanding subsection (6) the Commission, prior to furnishing a report in accordance with subsection (1), may-*

(a) publish, furnish or deliver a copy of a report of the Commission to the Government Printer; and
(b) make arrangements for the preprinting by the Government Printer of copies of such report for the purposes of this section.

However, s.27(2) of the Act provides:

Notwithstanding any other provision of this Act, if the Commission is of the opinion that information in its possession is such that confidentiality should be strictly maintained in relation to it-

(a) the Commission need not make a report on the matter to which the information is relevant; or
(b) if the Commission makes a report on that matter it need not disclose that information or refer to it in the report.

12.4 The Problem

In the recent decision of the Court of Appeal of the *Criminal Justice Commission v. Nationwide News Pty Ltd and Madonna King* (Appeal No 21 of 1994 delivered on 08/09/1994) His Honour Fitzgerald P. stated in respect of s.27(2):

This unusual case raises important questions concerning the Criminal Justice Commission (the "Commission") and the Parliamentary Criminal Justice Committee (the "Committee"), which monitors and reviews the Commission's performance of its functions. Both are established by the Criminal Justice Act 1989 (the "Act") in accordance with the Report of a Commission of Inquiry dated 3 July 1989 which is referred to in that Act.

The following is a brief extract from that Report:

"The CJC should report to the Criminal Justice Committee.

> *... many of the matters to be the subject of report by the CJC, including its operational priorities and methods and the subject matters of its concern, may need to be confidential. In consequence, the reporting of the CJC should not be to the Parliament in the first instance, and, in some cases, not at all.*
>
> *The Criminal Justice Committee's members should be subject to specific obligations of confidentiality. The Criminal Justice Committee must have the power to conduct hearings in camera. It should decide what material matters reported to it can be reported to and tabled in the Parliament and when that is to be done. Some matters may never be tabled."*
>
> *As can be seen from that passage, it was envisaged that the Commission might include in its reports to the Committee confidential information which would not become public. The need to avoid publication of such information is obvious: cf. Freedom of Information Act, 1992, section 42. Indeed, subsection 27(2) of the Act permits the Commission to withhold even from its reports to the Committee "information in its possession [which] is such that confidentiality should be strictly maintained in relation to it."*
>
> *Subject to that exception, however, the Act proceeds on the basis that all reports by the Commission to the Committee will soon afterwards become public.* [emphasis added]

There is little doubt that s.27(2) of the Act provides an exemption for the Commission to report on matters which it deems should remain confidential. It is questionable as to whether the Commission is even required to inform the Committee that it has withheld information from the Committee, or the basis for the decision. This is of particular concern to the Committee.

The Parliamentary Committee is not suggesting that this section has been utilised in this manner, nor is the Committee suggesting that the Commission, as currently constituted, would withhold information from this Committee. Although the Committee notes that on 4 January 1994 the issue was raised, the Commission assured the Committee that the restriction of information to the Committee was never seriously considered. In Report No. 25 the Committee noted in respect of this matter:

> *The Commission should never contemplate not fully informing this Parliamentary Committee of any relevant matters.* (1994:65)

Despite the Committee's confidence that the Commission, as currently constituted, would inform the Committee of requested material, it must be recognised that the membership of the Commission and the Committee will change. Therefore, the relationship between the Commission and the Committee may also change. There is always a risk that the section may be utilised in a manner to withhold information from the Committee. Equally, there is the risk that it will be used for *mala fide* purposes.

The submission from the QCCL noted s.27(2) and stated:

> *Section 26 and 27 of the Act provide for reports of the Commission to be made to the Parliamentary Committee.*
>
> *However, we have concerns with section 27(2) of the Act ...*
>
> *In its terms, and we suspect sometimes in practice, this particular provision provides a very wide exemption for the Commission to report in respect of its activities.*

> *We acknowledge that there can be some legitimate cases where it would be inappropriate for the Commission to report in detail in relation to a particular matter.*
>
> *However, the experience of the National Crime Authority and its historical turbulent relationship with its supervising parliamentary committee gives the QCCL grounds for concern that this particular exemption is at risk of being invoked when there is no justification for it being used.*

It is worthwhile in this context to review some of the history between the National Crime Authority and the Parliamentary Joint Committee (PJC).

In 1985, the first Report of the fourth PJC *Who Is To Guard the Guards?* criticised the National Crime Authority for not providing sufficient information to the Committee. The PJC claimed that the failure to provide this information meant that the Committee could not undertake its functions. The PJC noted that it and the National Crime Authority shared different views as to *the nature of the relationship between the bodies and as to the extent of the Committee's powers to seek information.*

The PJC recommended that the Act be amended to give the PJC the power to *do such things and make such inquiries as it thinks necessary for the proper performance of its duties*, and if highly sensitive material was sought then the National Crime Authority could make a separate report to the Chairman and the Deputy Chairman of the PJC.

The PJC noted:

> *unless section 55 of the National Crime Authority Act is amended along the lines proposed ..., there is no point in retaining a parliamentary committee to act as a watchdog over the National Crime Authority. Indeed, in the absence of the necessary amendment, the retention of the Committee would be a charade, as it provides the appearance but no the substance of the Authority's accountability to Parliament.*

The power has never been given to the PJC. Instead, shortly after the report, consultation took place between the PJC, the Commonwealth Minister and the National Crime Authority. Following this consultation process, the National Crime Authority supplied comprehensive briefings to the PJC.

The PJC later noted its satisfaction with the amount of information it had received since the consultation. The PJC also noted that the National Crime Authority had been commendably forthcoming on operational matters. The PJC stated that should this approach be adopted the PJC could fulfil its functions. The PJC further noted that a degree of mutual trust had developed between the PJC and the National Crime Authority, although, it reserved judgment as to the efficacy of the National Crime Authority's operations.

In 1990 problems between the National Crime Authority and the PJC arose again because of the interpretation of ss.51 and 55 of the Act. Section 55 provides for confidentiality restrictions upon the National Crime Authority as to its investigations. A number of conflicting opinions concerning the interpretation of these sections were sought and obtained by the National Crime Authority and the PJC.

Opinions taken from community based organisations concurred with the PJC's opinion that without reform the PJC could not fully carry out its duties. The PJC's final report to the Parliament recommended that the Act be amended to make it clear that s.55(2) of the Act did not intend to

prevent the PJC from investigating maladministration within the National Crime Authority or the general inadequacy of procedures with the National Crime Authority.

The PJC also recommended that s.51 of the Act be amended to make it clear that the provision did not prevent members and staff of the National Crime Authority providing any information or documents to the National Crime Authority, or appearing before it.

This Parliamentary Committee wishes to avoid any possible conflict between it and the CJC concerning the supply of information. In addition, the PCJC is of the opinion that it is not possible to provide a credible accountability mechanism which does not have the power to be provided with all relevant information.

The existence of s.27(2) as it currently stands reduces the accountability of the CJC. Its existence is more appropriate in respect of an autonomous body rather than an independent accountable body.

In its September 1991 submission to the previous Parliamentary Committee the CJC submitted that s.27(2) be amended by the addition of paragraph (c) to the effect that if information in the CJC's possession is of such a nature that confidentiality should be strictly maintained in relation to it, and the CJC makes a report on the matter without disclosing that information or referring to it in the report, in accordance with paragraph (b), it:

> *(i) may separately disclose that information to the-*
>
> *(a) Chairman of the Parliamentary Committee;*
> *(b) Speaker of the Legislative Assembly;*
> *or*
> *(c) the Minister*
>
> *and*
>
> *(ii) any such disclosure, shall be deemed not to be a report or part of the report for the purposes of section 26 of the Act.*

The previous PCJC endorsed the above recommendation of the CJC. However, the PCJC recommended that a further subsection (3) be added to s.27:

> *(3) It is an offence against this Act for any person who receives information from the Commission pursuant to subsection (2) to wilfully disclose such information except where such disclosure is in discharge of a function under the Act.*

The current PCJC generally agrees with the thrust of the previous PCJC's recommendation, in that it provides the CJC with a mechanism for the CJC to report on highly confidential matters. However, the Committee notes that the proposed amendment does not overcome the CJC's discretion to not report on a matter when it deems it appropriate not to do so.

Conclusion

The Committee is of the opinion that s.27(2) of the *Criminal Justice Act,* as it currently stands creates the potential to reduce the efficacy of the accountability process and effect the ability of the PCJC to monitor and review the CJC.

Recommendation

The Committee endorses recommendation 34 of the previous Committee.

In addition, the Committee recommends that s.27(2) of the *Criminal Justice Act* be amended to reflect that the section is not intended to apply to reports from the Criminal Justice Commission to the Parliamentary Criminal Justice Committee.

The Committee recommends that s.27(2) of the Act be amended as follows:

> ***Notwithstanding any other provision of this Act, if the Commission is of the opinion that information in its possession is such that confidentiality should be strictly maintained in relation to it-***
>
> > ***(a) the Commission need not make a report on the matter to which the information is relevant; or***
> >
> > ***(b) if the Commission makes a report on that matter it need not disclose that information or refer to it in the report;***
> >
> > ***(c) where the Commission makes a report in accordance with paragraph (b) of this subsection it-***
> >
> > ***(i) may separately disclose that information to the-***
> > ***(a) Parliamentary Committee;***
> > ***(b) Chairman of the Parliamentary Committee;***
> > ***(c) Speaker of the Legislative Assembly;***
> > ***or***
> > ***(d) the Minister***
> >
> > ***and***
> >
> > ***(ii) any such disclosure, shall be deemed not to be a report or part of the report for the purposes of section 26 of the Act.***
> >
> > ***(d) nothing in this section is intended to provide an exemption to the Commission reporting to the Parliamentary Committee when required to do so by s.26 of the Act.***

12.5 Complaints Against the Commission

The *Criminal Justice Act*, whilst it provides for the PCJC to monitor and review the operations of the Commission, does not provide any specific provisions dealing with complaints against the Commission, or its officers.

As explained in detail in Chapter 2, the Committee does accept and review complaints against the CJC.

In addition, the Commission has formulated in conjunction with other bodies, a mechanism for the review of complaints against the Commission. The Commission in its 1991-1992 Annual Report made the following statement:

> ***Complaints Against the Commission and Commission Officers***
>
> *It is inevitable, though regrettable, that complaints will be made against the*

> *Commission and its officers. Perhaps more importantly, because the Commission aspires to be a model of accountability, those complaints should be rigorously and independently examined.*
>
> *After discussions with the Attorney-General, the Director of Prosecutions, and the Commissioner of the Police Service, a mechanism has been established whereby complaints against Commission officers are investigated by a senior Crown prosecutor (nominated by the Director of Prosecutions) and a senior police officer or officers (nominated by the Commissioner of the Police Service). They report to the Commission Chairperson, the Attorney-General, and the Minister for Police and Emergency Services.* (1992:)

Whilst the above described arrangement is laudable in the absence of any statutory guidance as to complaints against the Commission, the Committee has always maintained serious reservations as to the appropriateness of this mechanism.

The Parliamentary Committee is the creature recommended by the Fitzgerald Report, and established by the *Criminal Justice Act 1989*, to monitor and review the Commission. The above arrangement does not recognise the role of the Committee. Further, the arrangement provides for the reporting of the results of investigations to the Attorney-General and the Minister for Police and Emergency Services. Neither of these Ministers play a role in the accountability process envisaged by Fitzgerald QC and established by the Act. To the contrary, the Fitzgerald Report accountability process emphasised the need for the Commission to be divorced from executive government.

The Committee in its Report No. 25 made the following observations about the arrangement:

> *The arrangement entered into by the Commission with the Attorney-General, and the Minister for Police and Emergency Services is as the Parliamentary Committee understands designed to establish an independent mechanism to deal with complaints against the Commission's officers in the course of performing their duties. It is the Parliamentary Committee's view that the complaints mechanism, as referred to in the CJC Annual Report 1989-1990, is designed for situations whereby external complaints against Commission officers may be dealt with expeditiously.*
>
> ...
>
> *An objective observer may well question the appropriateness of an investigative "arrangement" which excludes the statutory body whose function it is to monitor and review the operation of the Commission. Under the "arrangement" the QPS reports not to the Parliamentary Committee, but rather to the Attorney-General, the Minister for Police and Emergency Services, and to the Chairman of the Commission, none of whom have a role to play in the accountability process.*
>
> *The Parliamentary Committee is of the opinion that the tripartite referral must be re-assessed to ensure that this Parliamentary Committee is not by-passed in the investigative and reporting stages.* (1994:)

The Queensland Council for Civil Liberties in its submission made the following statements concerning complaints against the Commission:

> *We would observe that the complaints mechanism in respect of complaints against CJC officers is particularly inadequate in that it involves police and prosecution operatives who are themselves engaged in working with and prosecuting for the Criminal Justice Commission.*

> *As the CJC moves inexorably down the road of its new-found super policing role, the issue of the investigation of complaints against the CJC for excessive power is going to become quite critical.*
>
> *Without in any way being personally critical of any particular member of the Parliamentary Criminal Justice Committee, it is our view that complaining to the Parliamentary Criminal Justice Committee in respect of an abuse of power by the CJC is an inadequate procedure.*
>
> *One of the serious problems which has emerged in the last two years or so is the mechanism for effective and credibly independent mechanisms for investigating complaints against the CJC. This is a substantial issue which necessitates urgent attention.*

The Council's submission fails to explain why complaining to the Parliamentary Committee is an inadequate procedure. The Committee also notes that the submission fails to suggest an alternative accountability mechanism in this regard.

It is important to note that complaints against the Commission in the context being referred to in this section of the Committee's report, are complaints of misconduct, rather than complaints of administrative actions which are liable to judicial review.

The Committee has examined how complaints against the Hong Kong Independent Commission Against Corruption, the New South Wales Independent Commission Against Corruption and the National Crime Authority are investigated.

12.5.1 Complaints against The Hong Kong Independent Commission Against Corruption

Within the operations department of the Hong Kong Independent Commission Against Corruption (Hong Kong ICAC) there is established an internal investigation and monitoring unit. This unit investigates allegations of corruption against ICAC personnel and is also responsible for vetting CJC personnel. The unit reports directly to the Deputy Director, Operations.

Complaints against the Hong Kong ICAC are also reviewed by a committee, referred to as the Complaints Committee. That committee is comprised of nine prominent people including the Attorney-General, the Commissioner of Administrative Complaints (Ombudsman), and members of the Legislative Councils. These persons are appointed by the Governor to monitor and review the handling by the ICAC of complaints against it or its officers. The Complaints Committee may report to the Commissioner of the ICAC or, when it deems necessary, the Governor. It may also make recommendations concerning procedures that lead to complaints against the ICAC.

It has been claimed that the Complaints Committee subjects the Hong Kong ICAC to intense scrutiny and is very tenacious. However, it is noted that the committee does not have any legislative power to require information. Nonetheless, the existence of the Committee means that there is a formalised, recognised structure for the consideration of complaints against the Hong Kong ICAC.

12.5.2 Complaints against the National Crime Authority

In 1991 the Parliamentary Joint Committee for the National Crime Authority concluded that the mechanisms for reviewing individual complaints against the National Crime Authority were inadequate. Therefore, the Committee recommended that the Inspector-General of Intelligence and Security be given jurisdiction to investigate complaints against the National Crime Authority, its

staff and those seconded to work for it.

The present Parliamentary Committee has recently stated that the continuing lack of a complaints mechanism is unacceptable, and recommended the immediate introduction of legislation to cater for an Office of Inspector-General of the National Crime Authority.

12.5.3 Complaints against the NSW Independent Commission Against Corruption

The Parliamentary Joint Committee on ICAC accepts unsolicited complaints about the operation of ICAC. The Committee's complaints process is similar to that employed by the PCJC.

In addition, the ICAC Act establishes the Operations Review Committee (ORC) which consists of:

- the Commissioner;
- Assistant Commissioner;
- the Commissioner of Police;
- a person appointed by the Governor, nominated by the Attorney-General; and
- four persons who represent the communities views, appointed by the Governor on the recommendation of the Minister.

The ORC also considers complaints against the Commission.

The ORC structure has been criticised because it does not have to report to the Parliamentary Joint Committee, nor anyone else. The Parliamentary Joint Committee has recommended in its report on *The Operations Review Committee and Assistant Deputy Commissioner* tabled in July 1992, that the jurisdiction of the ORC be expanded and that the ORC have the power to summon the ICAC staff to give evidence before it.

However, the PJC also recommended that the ORC be accountable to the Parliamentary Joint Committee.

12.5.4 Complaints against the Criminal Justice Commission

The Committee is not convinced that any of the above mechanisms employed within those jurisdictions would be of assistance in resolving the issue as to how complaints against the Criminal Justice Commission can be adequately investigated.

The Committee has consistently taken the view that it should be involved in the processing of complaints against the Commission. This process enables the Committee to gain a wider appreciation of the general trends in complaints against the Commission. The identification of these trends are of assistance to the Committee in its monitor and review role. The Committee also notes that complaints against the Commission, whilst they may not always be substantiated, sometimes reveal deficient practices or questionable procedures.

The Committee in its report no. 20 part B noted that it was an undesirable practice for institutions to investigate their own members, although it may sometimes be necessary. The Committee further stated:

> *The CJC should inform this Committee, in detail, everytime it is necessary to institute an internal investigation.*

However, the Committee noted that the Commission, despite this previous comment, had not informed the Committee in detail of an internal investigation. The Committee therefore

recommended:

> *In view of the failure of the Commission to comply with a previous direction by the Parliamentary Committee, to inform it in detail everytime it is necessary to conduct an internal investigation, it is recommended that an express statutory obligation be included within the Criminal Justice Act requiring the Commission to report to the Parliamentary Committee in detail when it becomes necessary to conduct such an investigation.*

The Committee does not resile from the above recommendation, however, it feels that it is necessary to further expand upon the issue.

The Committee does not recommend the existence of any other body to receive and investigate complaints against the Commission. The Committee is convinced that it is the appropriate body to receive and assesses complaints against the Commission. The PCJC should also be the body that decides whether any further action, and if so what action, is required in relation to complaints on a case by case basis. The Committee must have the widest possible discretion in relation to action to be taken against the complaint. In some instances, where the matter is relatively trivial, the Committee may refer matters to the Commission for investigation and report. Alternatively, the Committee should be able to refer the matter for investigation to other bodies for investigation and report, or in rare circumstances, engage its own investigators.

Conclusion

The Committee is of the opinion that there is a necessity for a formalised, recognised structure within the *Criminal Justice Act 1989* for receiving and assessing complaints against the Commission and/or its officers. The Committee is of the opinion that this mechanism should be centred around the current accountability mechanism within the Act, namely, this Committee. The Committee believes that the creation of another mechanism for investigating complaints against the Commission would be potentially duplicitous.

Recommendation

The Committee recommends that the *Criminal Justice Act 1989* be amended to provide for a formalised structure to handle complaints against the Commission. The Committee endorses its previous recommendation 1 in report no. 25 that the Commission be under a statutory obligation to report to the Committee in detail whenever a complaint of misconduct is made against the Commission or its officers.

In this regard the term misconduct should be the same as is currently provided within the Act.

The Act should be amended to provide that the Committee upon receipt of a complaint against the Commission may:

- **require a report from the Commission in relation to the matter;**
- **elect to not investigate the matter without any further action;**
- **refer the matter to the Queensland Police Service or any other agency for investigation and report to the Committee;**
- **refer the matter to the Criminal Justice Commission for investigation and report to the Committee;**

- **appoint its own investigators to investigate the complaint and report to the Committee; or**
- **take any other action that the Committee deems appropriate.**

The Committee upon consideration of a complaint may refer the matter to whatever agencies it deems appropriate for action.

12.6 Reports from the Commission to the Committee

In the previous Committee's report No. 13 the Committee endorsed a recommendation made by the Commission that s.26 [s.2.18] be amended to define a "report of the Commission".

The Commission in its submission at this time noted that:

> *Other than the exclusion of annual reports, the Act gives no indication of what documents prepared by it are included as reports for the purposes of the section. Subsection (1) requires that a "report of the Commission, signed by its Chairman, shall be furnished" in accordance with its terms. However, it is legitimate to ask whether every document, signed by the Chairman which refers to an aspect of the work of the Commission is a "report of the Commission" with the consequences that this implies. For example, the Chairman may be asked to inform the Committee about what action the Commission has taken in respect of an investigation. He may be instructed to "report" to the Committee under section 2.14(2) [s.21(3)]. This is an appropriate step in ensuring the accountability of the Commission. However, does any response signed by the Chairman [e.g. a letter], therefore become "a report of the Commission" for the purpose of s.2.18 of the Act? Further, does the decision by the Commission as to whether or not to describe a document as "a report of the Commission", determine whether it is such, for the purposes of the section? It was surely not intended that this be the case. However again, the issue is not free of doubt. It is recommended that this be clarified by an amendment to the section, to define "a report of the Commission".*

Predicably, the point in respect of s.26 was subsequently taken by a litigant.

In early 1994 action was taken by the Commission to prevent by injunction *The Australian* newspaper from printing the contents of a monthly report from the Commission to the Committee which had been released without authorisation. The defendant newspapers claim, and the determination by His Honour Dowsett J. is best summarised by the judgment:

> *The defendants advanced an interesting and, at first glance, compelling argument that it was impossible for the plaintiff to establish that the report should be protected. This was based upon the construction of ss.2.14, 2.15, 2.18 and 2.19 of the Act. The thrust of the submission was that ss.2.14 and 2.15 provide the authority for the plaintiff to report to the Parliamentary Committee and require that it report only in accordance with s.2.18. Such a report will, in due course, become public upon its being tabled and printed in accordance with the latter section. For present purposes, I assume that a tabled and printed document is in the public domain. It was submitted that the present report must be a report as contemplated by s.2.14 and so subject so s.2.18. Hence it must be tabled and printed, and therefore no purpose would be served by protecting it.*
>
> *The defendants also relied upon s.2.19 in support of this argument. The section contains two subsections, the first relating to reports concerning courts and the second dealing with confidential information. The two subsections do not seem to be*

> *related in any way, except that both deal with circumstances in which the public reporting process is truncated. Subs.(2) excuses the plaintiff from reporting confidential information. The defendants submitted that this strongly implies that any report must be public, confidential information being protected by non-inclusion.*
>
> *This argument assumes that it is not open to the plaintiff to communicate with the Parliamentary Committee other than by statutory report and that wherever the word "report" is used in the Act, it is used as a term of art having a specific meaning. The way in which the Act is drafted points very much in that direction, and the argument is not without appeal, however it pays no attention to the provisions of s.6.7. If the plaintiff may only communicate with the Parliamentary Committee by report and in accordance with s.2.18, then there will be no circumstance in which the obligation of confidentiality imposed upon members of the Parliamentary Committee by subs.6.7(2) can operate, save in the very short time between receipt of the report and its tabling in Parliament. S.6.7 clearly contemplates members of the Parliamentary Committee receiving information which is, and is to remain confidential. It must therefore follow that the Act contemplates the plaintiff communicating information which is not to be immediately released into the public domain. It also follows that the plaintiff must be permitted to communicate with the Parliamentary Committee other than by report pursuant to s.2.18.*
>
> *It may be arguable that this report is nonetheless a report for the purposes of subs.2.14(2) or s.2.15, and that it should have been submitted in accordance with s.2.18. It is a routine report, prepared and presented pursuant to an established practice, for the purpose of facilitating the discharge by the Parliamentary Committee of its responsibilities. This sounds very much like one of the reports contemplated by s.2.14(2)(a). It is possible that the plaintiff has mistaken its obligations under ss.2.14 and 2.18, and that an appropriate party could compel the present plaintiff to proceed to distribute the report in accordance with s.2.18, however I doubt that the report should be characterised as a report of that kind. Its purpose was the communication of confidential material to the Parliamentary Committee with no intention that it be more widely distributed. Once it is accepted that the plaintiff may communicate confidential material to the Parliamentary Committee other than by a report to which s.2.18 applies, there is no reason why a report intended to be confidential should be characterised as a public report. I reject the submission that the plaintiff may not communicate with the Parliamentary Committee on a confidential basis.*

On appeal the Court of Appeal also rejected the claim made by the Respondents that the Commission could not report to the Committee on a confidential basis. His Honour Fitzgerald J. stated:

> *Except for those already referred to, there is no presently material provision with respect to the Commission informing the committee by "report", a concept which is not defined by the Act but is left to have its meaning determined in accordance with ordinary usage. However, it is important to note that the Act appears to recognise that the Commission may inform the Committee otherwise than by report. Subsection 132(3) assumes that the Committee may acquire information from the Commission otherwise than by report, and that is also consistent with subsections 118(1) and (2); see also section 23. The importance of this for present purposes is that the Commission is able to inform the Committee on a confidential basis if it acts otherwise than by report. It is unnecessary at this point to identify the methods by which that can be done.*

Conclusion

Despite recent decisions which recognise that the Commission may report to the Parliamentary Commission in a confidential manner, the Committee believes that the Criminal Justice Act should be amended to expressly provide for confidential reporting from the Commission to the Committee. The Committee also concurs with the previous recommendations made by the Commission, and supported by the first PCJC that the term "report of the Commission" requires definition.

Recommendation

The Committee endorses the previous Committee's recommendation that a definition of "a report of the Commission" referred to in s.26 [s.2.16] of the Criminal Justice Act be provided in the Act.

In addition, the Committee recommends the insertion of a sub paragraph (e) in s.27 which provides:

> **(e) the Commission may provide information or a report to the Parliamentary Committee either at the Committee's request or the Commission's initiative which is not a report for the purposes of s.26 of the Act.**

13. THE CHAIRMAN AND COMMISSIONERS

13.1 Introduction

The Fitzgerald Report recommended that the Commission consist of a Chairman and four community members. This chapter describes the constitution and structure of the "Commission". The chapter then addresses the role of the Chairman and the part-time Commissioners, the qualifications for appointment of members, and the process of appointment.

13.2 Fitzgerald Report Findings and Recommendations

Fitzgerald QC made the following observations in respect of the membership of the "Commission":

> *The CJC should consist of a Chairman and four community members. Those four community members should serve on a part-time basis. The demands and responsibilities of the Chairman's office suggest that it will need to be a full-time office.*
>
> *It will be necessary to attract persons of the highest calibre and expertise to the membership of the CJC. Conditions of such membership must be attractive. That is particularly so for the Chairman. Flexibility will be required to attract the best available talent.*
>
> *Legal considerations will be a significant part of many, if not most, of the multitude of problems and issues with which the CJC will have to deal. The Chairman may also have to preside over hearings. (1989:310)*

Fitzgerald QC also discussed the tenure of office of both the Chairman and the part-time Commissioners:

> *Each other member of the CJC should be appointed for a term of not less than two or more than five years. Upon the expiration of his or her term of office, each member of the CJC should be eligible for re-appointment, except fo the initial Chairman who should not be re-appointed. No Chairman should be eligible to serve any term or terms of office which aggregate to more than five years.* (1989:310)

In respect of the constitution of the "Commission" and the appointment of its members the Commission of Inquiry recommended that:

> *the CJC consist of a full-time chairman and four part-time community members selected on the following basis:*
>
> *(a) the Chairman be qualified for appointment as a judge of, or have been formerly a judge of the High Court or Federal Court of Australia, or a Supreme Court in Australia*
>
> *(b) the Chairman be appointed for a term of not less than two or more than five years, with the first Chairman being appointed for not more than three years.*
>
> *(c) the Chairman's position be widely advertised and filled only after evaluation of and report upon all applicants by independent consultants and consultation with*

the Criminal Justice Committee

(d) the community appointees to the CJC comprise:

(i) a practising lawyer with demonstrated interest in civil liberties, to be drawn from a panel of four; two to be nominated by each of the Bar Association of Queensland and the Queensland Law Society. The appointee need not be a specialist in criminal law nor a member of the Queensland Council for Civil Liberties

(ii) three persons of proven ability in community affairs, one of whom must have proven senior managerial experience in a large organisation

(e) a person not be eligible to be appointed as Chairman or a member of the CJC if that person is a Judge, a Member of Parliament, a public servant or crown employee, a member or servant of any other statutory body, or a police officer, or has been a police officer in the previous five years. (1989:373)

The Commission of Inquiry also recommended that:

the CJC act by resolution of a simple majority. The Chairman will have a deliberative vote, and, in the case of equal division, a casting vote. (1989:373)

13.3 Criminal Justice Act 1989

The "Commission" is composed of a Chairperson and four part-time Commissioners appointed by the Governor-in-Council on the recommendation of the Minister (s.8).

Section 9 of the Act sets out the qualifications for appointment to the Commission. In particular, the Act provides that the Chairperson shall be a person who has served as, or is qualified for appointment as, a judge of the High Court or Federal Court of Australia, or a Supreme Court in Australia (s.9(1)). The Act also requires that one of the other members of the Commission is a legal practitioner with a demonstrated interest and ability in civil rights (s.2(a)). Disqualifications for appointment as a member of the Commission are provided in s.10.

Section 11 deals with the selection for appointment of the chairperson. Section 11(1) provides that the Minister's intention to make the selection of appointment of chairperson to be advertised nationally. However, that requirement does not apply to the reappointment of a person as chairperson (s.11(2)). The Minister is required to consult with the Parliamentary Committee before proceeding to the selection of any person for appointment as chairperson (s.11(3)). Section 11(4) provides that a person shall not be appointed as chairperson unless the person's appointment is supported by members of the Committee, either unanimously or by a majority of the members, other than a majority consisting wholly of members of the political party or parties in Government. The procedure set out in subsections 11(3) and (4) also applies to the appointment of the part-time Commissioners (s.12(4)).

The Act provides for the appointment of members of the Commission and tenure of office in ss.12 and 14 respectively. Section 13 of the Act provides for the appointment of acting Commissioners.

The Parliamentary Committee is of the view that the recommendations of the Fitzgerald Report in respect of membership of the Commission are adequately reflected in the Act.

13.4 The Role of the Chairman and Part-Time Commissioners

Fitzgerald QC emphasised the importance of appointment to the Commission:

> *Membership of the CJC should not be seen as an occasional pastime, and appointments to it should not be given as honorifics. Service as a member of the Commission should be seen to be an highly responsible public office, demanding and challenging, and constituting a valuable public service.* (1989:310)

The Chairperson is the chief executive officer of the Commission (s.16(1)). The Chairperson exercises a discretion, has specific powers, and has responsibility for a wide range of matters under the Act. The Chairperson is responsible for the stewardship of the Criminal Justice Commission and the conduct of relationships with the Parliamentary Committee, the Premier and other Government Ministers, the Commissioner of the Police Service, the judiciary and magistracy, governments and agencies of other states, the media and the people of Queensland. The Chairperson also represents the Commission on formal occasions.

The Parliamentary Committee is of the view that the role of the part-time Commissioners includes:

- to provide informed and relevant contribution to the deliberations of the Commission
- to offer the Commission with a broad range of expertise and knowledge to assist the Commission in achieving its objectives
- to act as an internal accountability mechanism to ensure the Commission acts appropriately.

The role of the part-time Commissioners is distinct from the statutory responsibilities exercised by the Chairperson alone or in conjunction with appointed officers of the Commission.

The Parliamentary Committee believes that the Commissioners should play an active role in advising and assisting the Chairperson and staff, especially within their primary areas of responsibility. However, the Committee is of the view that persons holding the position of part-time Commissioner should be encouraged to become involved in other aspects of the operation of the Commission apart from their main area of interest.

The collective responsibility of the Commission includes decision making on policy and strategic matters, and the content and recommendations of published papers and reports.

Conclusion

The Committee concludes that the role of the Chairman is central to the administration of the Commission. The Committee considers that the part-time Commissioners play a crucial role in administering the Criminal Justice Commission. It is the role of the part-time Commissioners to offer a broad range of professional and practical experience to the Commission.

13.5 Appointment of Members of the Commission

The appointment process of the Chairperson and Commissioners has received criticism. In particular, the QCCL submitted:

> *Whilst the current Commissioners of the Criminal Justice Commission are*

independent and cannot in any way be fairly regarded as toadies of the government, the process by which appointments are made to the Commissioner positions of the Criminal Justice Commission needs to be carefully reviewed.

Steps need to be taken to ensure that the relevant Minister does not "stack" the Commission with Commissioners who are sympathetic to the government of the day.

In this regard, the QCCL contends that the process of appointing Commissioners to the Criminal Justice Commission needs to be reviewed.

The Parliamentary Criminal Justice Committee should be required to conduct appointment confirmation public hearings in relation to both the Chairman of the Commission and the Commissioners themselves.

Whilst ultimately it is the right of the Government to choose the Chairman and the Commissioners, that should not be an unqualified right.

If the Criminal Justice Commission is not to be neutered in the future by the appointment of politically sympathetic Commissioners and if the role of the Parliamentary Criminal Justice Committee is to be more than a symbolic one, the appointment process of both the Chairman and the Commissioners should be subject to the actual vote and confirmation of the Parliamentary Committee itself.

The unseemly and personally embarrassing process by which Mr O'Regan was appointed as the current Chair of the Criminal Justice Commission needs to be avoided in the future.

It is consistent with the proposed extended role of Parliamentary Committees in this State that the Parliamentary Criminal Justice Committee should have the right in public confirmation hearings of the Chairman and Commissioners to have access to all details of approaches made by the supervising Minister of the CJC (currently the Attorney-General) to prospective appointees to ensure that the consultation process envisaged by section 12 is carried out in a substantive rather than a nominal manner.

In respect of this issue, the following exchange took place at the public hearing:

Dr WATSON: *There is a lot in your submission that we could have spent some time on. We will discuss it with other people. One item that you have discussed that is unique relates to the role of the appointment of the Commissioners—the Chairman of the Commission, the Commissioners and the role of the PCJC. I think most of us would probably agree that there may need to be some adjustment to that process. I am intrigued, or perhaps even concerned, about the proposal for extended confirmation hearings. Certainly from my observation of confirmation hearings, at least in the United States, there does not seem to be an absence of political point scoring. At times one may even see on both sides of the political spectrum, at least in the United States, the issue of the embarrassment of the President or whatever. I am also reminded of the fact that in the recent extension of the Chairman of the CJC most members of the PCJC found out the Attorney-General's proposals from the media rather than from the Attorney General himself. Would you like to elaborate on what you perceive to be the way that would function to get over some of the problems you have identified with respect to the personal embarrassments?*
Mr T. O'Gorman: *The reason we put up the Committee is that if the Committee really is to be the oversight of the Commission, it is simply a joke to say that the Committee cannot even examine a potential appointee, be he or she a Chair or a Commissioner. How do you get over the perceived excesses of the US system? In the*

same way that you get over the perceived excesses of the questioning of jurors prior to empanelling. I mean, it has been suggested that O. J. Simpson is going to take something like three weeks to get a jury. Currently, on proposals that have been put forward as a result of particularly the Herscu case, there is a Queensland adaptation in relation to the questioning of jurors from the American scene. We can do a similar adaptation here. Simply because there are confirmation proceedings suggested does not mean to say they need to go the way of Bork or Thomas when they got on to the Supreme Court of the United States.

Dr WATSON: *Are you talking about a public confirmation? Certainly the Committee has the capacity, or at least does extend——*

Mr T. O'Gorman: *I am saying public.*

Dr WATSON: *To actually interview. You are saying it is a public process?*

Mr T. O'Gorman: *I am saying public and, of course, in relation to certain matters—and this is to be worked out—there may be certain matters that are inappropriate to be brought out publicly, but if notice is given of that to the potential appointee, he or she can decide if they are going to go on with the prospective appointment.*

Dr WATSON: *Let me just take it one step further. You say that you think that it is the ultimate right of the Government to choose the Chairman of the Commission, in other words, to make the recommendation and the Parliamentary Committee has a right, if you like, of veto. Do you think that it may be appropriate if the Parliamentary Committee had some greater process in the selection?*

Mr T. O'Gorman: *Yes, because the position of Chair of the CJC is, for all the reasons I have indicated, a very powerful one. The current Chair and the previous Chair, with the exceptions that I have indicated in relation to certain problems, have exercised their powers reasonably responsibly. That is not to say in the future we will not have some Government tame cat appointed with much abuse that can be perpetrated, because if you have got the wrong person in that job, a veritable litany of disasters can befall this State. I do not think that is being overly emotive when you look at the abuses that were done under the previous Government in relation to the Special Branch. So if you get the wrong appointment to the Chair position, you have got big problems on your hands, and that is why there should be public confirmation hearings and, yes, I would think something greater than simply the Committee saying to the Government, "We do not like it." There, maybe, ought to be a special veto power.*

The Parliamentary Committee acknowledges the importance of the process of appointment of the Chairperson and the part-time Commissioners. As discussed above, the Act requires that the appointment of a person as Chairperson or part-time Commissioner requires that the person's appointment is supported by the members of the Committee either unanimously or by a majority of the members (s.11(4)). In the case of a majority decision, the Committee's decision must be supported by at least one non-government member.

The Parliamentary Committee rejects claims that the current appointment procedure is a symbolic one. The Committee believes that such claims ignore the fact that the current procedure involves significant input from the Committee. The Committee accepts that it does not have a specific veto power. However, it has the same effect as a veto. The Committee can either reject or approve the recommendation by the Attorney-General. Hence, the appointment process is subject to the approval of the Committee.

The Committee emphasises that the Government members cannot alone guarantee appointment of a particular individual to the position of Chairperson or Commissioner. At least one Opposition Member must support the appointment. The Committee has adopted criteria for the selection process of Chairperson and Commissioners to help depoliticise the process. Further, in the case of the appointment of Mr R O'Regan QC for his initial term as Chairperson, the Committee reviewed

all applications.

It must be emphasised that the representation of opposition parties prevents the control of the Commission by the government.

The Parliamentary Committee is of the opinion that it is not appropriate to conduct appointment confirmation public hearings. The Committee is sceptical of the US style confirmation hearings. There is the danger that such hearings may be used as a forum to unjustifiably attempt to discredit people before they take up a position. The Committee does not accept that the appointment of the Chairman and Commissioners should be a public process.

Conclusion

The Committee concludes that there is no substantial evidence to demonstrate that the current appointment procedure is not working effectively. The Committee rejects the submission that the Committee should be required to conduct appointment confirmation public hearings in relation to the Chairman and part-time Commissioners.

14. INVESTIGATION OF ELECTED OFFICIALS

14.1 Introduction

This section discusses the scope of the jurisdiction of the Commission to investigate suspected official misconduct on the part of elected officials.

14.2 Findings and Recommendations of the Commission of Inquiry

When describing the role of the Official Misconduct Division Fitzgerald QC observed:

> *The Division will be responsible for independent investigations of any suspected official misconduct. It may investigate individual cases or conduct broader based inquiries into the incidence of official misconduct.* (1989:)

Fitzgerald QC noted that official misconduct, including corruption, can involve not only police but Ministers of the Crown, parliamentarians, judges, law officers and public servants of all types. (1989:285)

Fitzgerald QC reported that the central features of police misconduct similarly characterise other manifestations of official misconduct within the wider public sector. (1989:299)

Fitzgerald QC observed that official misconduct problems should be addressed by laws which:

- provide for an independent body to investigate official misconduct;
- oblige public officials to report all official misconduct or any reasonable basis of suspicion of misconduct by any person;
- forbid any action by any person to disadvantage any other person because he disclosed official misconduct or reasonable suspicion of misconduct;
- require public officials to provide all reasonable help in investigations of misconduct;
- forbid the exercise of any official authority, discretion or use of public resources in relation to the investigation of any conduct by any complainant or potential witness in relation to the investigation of any suspected official misconduct (other than in respect of an investigation of such person which had previously been commenced) except with the written authority of a designated officer in charge of such investigation into suspected official misconduct. (1989:300)

14.3 The Criminal Justice Act 1989

The Commission has jurisdiction to investigate the conduct of persons who hold office in units of public administration. The conduct which the Commission is authorised to investigate is official misconduct. The term "official misconduct" is defined by subsections 32(1) and (2) of the Act as follows:

32.(1) *Official misconduct is -*

(a) conduct of a person, whether or not the person holds an appointment in a unit of public administration, that adversely affects, or could adversely affect, directly or indirectly, the honest and impartial discharge of functions or exercise of powers or authority of a unit of public administration or of any person holding an appointment in a unit of public administration; or

(b) conduct of a person while the person holds or held an appointment in a unit of public administration -

(i) that constitutes or involves the discharge of the person's functions or exercise of his or her powers or authority, as the holder of the appointment, in a manner that is not honest or is not impartial; or

(ii) that constitutes or involves a breach of the trust placed in the person by reason of his or her holding the appointment in a unit of public administration; or

(c) conduct that involves the misuse by any person of information or material that the person has acquired in or in connexion with the discharge of his or her functions or exercise of his or her powers or authority as the holder of an appointment in a unit of public administration, whether the misuse is for the benefit of the person or another person;

and in any such case, constitutes or could constitute -

(d) in the case of conduct of a person who is the holder of an appointment in the unit of public administration, a criminal offence, or a disciplinary breach that provides reasonable grounds for termination of the person's services in the unit of public administration; or

(e) in the case of any other person, a criminal offence.

(2) *It is irrelevant that proceedings or action in respect of an offence to which the conduct is relevant can no longer be brought or continued or that action for termination of services on account of the conduct can no longer be taken.*

The definition of "unit of public administration" (s.4(1)) includes members of the Legislative Assembly, members of Cabinet and elected members of councils of local authorities. The scope for investigation of official misconduct on the part of such persons is confined to cases where the conduct constitutes or could constitute " a criminal offence, or a disciplinary breach that provides reasonable grounds for the termination of the person's services in the unit of public administration ..." (s.32(1)(d)).

14.4 Does the Commission Have Jurisdiction to Investigate Elected Officials?

The Commission, in its written submission, stated that it is uncertain whether the Commission has jurisdiction to investigate the conduct of an elected official where the conduct does not constitute a criminal offence. The Commission expressed the view that the uncertainty arises because, in the case of elected members of local authorities and members of the Legislative Assembly, no code of

discipline exists prescribing standards of conduct. The Commission obtained the opinion of Senior Counsel who advised as follows:

- The reference to `disciplinary breach' in the definition of `official misconduct' means a disciplinary breach that actually provides reasonable grounds for termination, which necessarily involves reference to an identifiable standard of conduct required of the person in question and reference to a regime which provides for dismissal in the event that the requisite standards are not observed.

- The Minister's Code of Ethics does not supply the requisite disciplinary regime as it does not constitute an objective standard of legally binding rules governing conduct in office and does not provide a mechanism for dismissal by reference to failure to adhere to prescribed standards of conduct. Furthermore, the standing rules and orders of the Legislative Assembly, the *Constitution Act 1867* or the *Legislative Assembly Act 1867* do not provide the necessary regime as they do not contain any provision for removal from office of a Member of the Legislative Assembly.

- In respect of elected members of local authorities, the *Local Government Act* does not deal with the question of dismissal from office and there are no separately prescribed standards of conduct.

- As no code of discipline providing for dismissal is prescribed in relation to either Members of the Legislative Assembly or elected members of local authorities, there can arise no occasion for the termination of a member's services for a `disciplinary breach' within the meaning of the definition of official misconduct.

- Therefore, if a member is suspected of having breached an ethical standard, or engaged in other improper conduct, that does not constitute a criminal offence, the Commission does not have jurisdiction to investigate that conduct.

- The definition of `official misconduct' in the *Criminal Justice Act* is to be contrasted with the definition of `corrupt conduct' in the *Independent Commission Against Corruption Act 1988* (the ICAC Act). In the ICAC Act, the ICAC is empowered to investigate corrupt conduct if the conduct constitutes or involves:

  (a) a criminal offence; or
  (b) a disciplinary offence; or
  (c) reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official.

The Commission noted that the *Criminal Justice Act* definition of `official misconduct' departs from the ICAC Act definition of `corrupt conduct' in that the commission of a disciplinary offence is not of itself sufficient to attract this Commission's jurisdiction. Secondly, the existence of reasonable grounds for dismissing an official is not itself sufficient ground to attract the Commission's jurisdiction. The Commission submitted that the definition requires additional elements such as conduct that:

- is not honest or impartial;

- involves the misuse of information; or

- involves a breach of trust.

- The decision in *Greiner v ICAC* (1992) 28 NSWLR 125 is consistent with the interpretation Senior Counsel gave to the definition of `official misconduct' in that it was there held that in determining whether corrupt conduct meets the criterion set out in paragraph (c) above, is it necessary to apply objective standards established and recognised by law.

The Commission submitted that it accepted Counsel's advice that the conduct of elected officials will only attract the Commission's jurisdiction if the alleged conduct constitutes or could constitute a criminal offence. Therefore, there will be cases involving conduct constituting an abuse or misuse of the powers of office which will not be subject to investigation by the Commission as the conduct falls short of criminal conduct.

Conclusion

The Committee accepts advice provided to the Criminal Justice Commission which states that it currently has jurisdiction to investigate alleged misconduct by elected officials which may constitute a criminal offence. For example, the Commission investigated Members of Parliament for alleged misappropriation of travel entitlements.

However, as the Act currently stands, the Commission does not have jurisdiction to investigate elected officials for alleged misconduct that would not constitute a criminal offence. This is because at present there is no code of conduct for Members of the Legislative Assembly or elected members of local authorities which provides for dismissal for non-criminal conduct.

When codes of conduct are formulated for Members of the Legislative Assembly and elected officials of local authorities which provide dismissal for a disciplinary breach the Commission will have jurisdiction to investigate those matters.

The real question to be determined is whether the CJC should have jurisdiction to investigate elected officials for disciplinary matters.

14.5 Should the Commission have Jurisdiction to Investigate Elected Officials for Disciplinary Matters?

The Commission submitted that it has given careful consideration to whether it should have jurisdiction to investigate elected officials for non-criminal conduct (or purely disciplinary breaches) and has formed the following view:

- In the case of elected members of local authorities, as no regime exists for regulating the conduct of members, the *Criminal Justice Act* should be amended to extend the Commission's jurisdiction to investigate such conduct.

- On the other hand, Members of the Legislative Assembly are liable to expulsion from Parliament in certain cases. Although most of the cases have involved criminal conduct, there have been some cases where Members have been expelled for lesser conduct. Therefore, the Commission believes that such cases should be left to Parliament itself to regulate and that the Commission should only investigate where the alleged conduct involves or may involve criminal conduct.

At the public hearing, on behalf of the QCCL, Mr Terry O'Gorman commented:

> *Should the CJC investigate parliamentarians - I note the CJC have given parliamentarians a present and said, "We should not". I suspect there is a bit of a cynical motive there: that they want to get you all on side in order that they can go on with their unabashed march towards greater and greater powers to themselves. We take the view - unpopular though it may be with you individually - that the CJC needs to retain the power to investigate parliamentarians even in relation to non-criminal conduct.*
>
> *What happens if you had a Terry Griffiths in Queensland - Terry Griffiths being the New South Wales Police Minister who, it is alleged, spent a substantial amount of his time in the office with doors closed touching female staff? Even if that is not a criminal offence i.e., if there is doubtful evidence about lack of consent, there must be a mechanism for the CJC to examine that type of complaint. ICAC is currently looking into the complaint against Mr Griffiths and is looking into an allied complaint that members of the Premier's office and/or Griffith's office tried to stifle it by buying off the staff. We will not wear any derogation from the CJC's power to investigate politicians.*

The Committee does not accept these comments made by Mr O'Gorman.

The examples given by Mr O'Gorman would be subject to investigation by the CJC because both examples involve allegations of suspected criminal conduct.

The Commission's submission was also criticised by the media. Various media reports suggested that Queensland Members of Parliament accused of misconduct would be out of reach of the Commission under the submission put forward by the Commission. These reports interpreted the Commission's submission as a request for a reduction of the Commission's powers of investigation with respect to the conduct of State Parliamentarians. The media reports suggested that this was an attempted trade-off to give politicians immunity from investigation in exchange for Government willingness to boost the Commission's role in combating organised and major crime. In summary, some sections of the media suggested that the Commission was trying to get away from investigating politicians.

The Parliamentary Committee is of the opinion that these reports create misconceptions and confusion as to the effect of the Commission's submission. The Committee rejects the suggestion that the Commission's submission in respect of this issue is an attempt to avoid the investigation of politicians.

The Chairman of the Commission, Mr O'Regan QC, has made it clear to the Committee that the Commission would not hesitate to assume the jurisdiction of Parliament if it so chooses.

The Parliamentary Committee emphasises that the Commission has jurisdiction to investigate suspected official misconduct. However, at the commencement of an investigation the Commission does not determine whether the conduct in fact constitutes a criminal offence.

The Committee notes that the Act, as is presently stands, does not prevent the Commission from investigating matters such as the possible misuse of parliamentary travel entitlements by Members of the Legislative Assembly. There is no intention, nor has there been any suggestion, to change this position.

However, at present, there is no code of conduct for members of the Legislative Assembly. Therefore, the Commission has no jurisdiction to investigate the conduct of an elected official

where the conduct does not constitute a criminal offence but is merely a disciplinary breach.

In 1992 EARC released a *Report on the Review of Codes of Conduct for Public Officials* (1992) which made recommendations on a code of conduct and associated ethics measures for elected officials. The Parliamentary Committee for Electoral and Administrative Review (PCEAR) in its report entitled *Codes of Conduct for Public Officials* (1993) endorsed EARC's proposal that Codes of Conduct should be prepared for both elected and appointed officials.

In summary, the PCEAR proposed that:

- *a Code of Conduct, to apply to Members of the Legislative Assembly as elected Members, is to be prepared;*

- *the Speaker must take the steps necessary to ensure the preparation of a Code of Conduct for Members of the Legislative Assembly, which may include referring the preparation of the Code to an appropriate Parliamentary Committee;*

- *the Legislative Assembly may approve, by resolution, a Code of Conduct prepared for Elected Representatives of the Legislative Assembly;*

- *breaches of a Code of Conduct for Elected Representatives of the Legislative Assembly should be dealt with as provided for by resolution of the House, or where appropriate, under the Criminal Code or the Criminal Justice Act;*

- *the Premier should prepare a Code of Conduct applicable to Ministers acting in their capacity as Ministers of the Crown, to be tabled in the Legislative Assembly;*

The Committee notes that in respect of members of the judiciary, there is an attempt within the *Criminal Justice Act* to preserve the integrity of the judiciary. The Act provides that to the extent that an investigation by the Division is, or would be, in relation to the conduct of a judge of, or other person holding judicial office, the authority of the Division to conduct the investigation is limited to investigating misconduct such as, if established, would warrant his or her removal from public office (section 29(4)(a)). The Act also provides that the authority of the Division to conduct the investigation shall be exercised by the Commission constituted by the Chairperson and in accordance with appropriate conditions and procedures settled in continuing consultations between the chairperson and the Chief Justice of Queensland (s.29(4)(b) and (c)).

The Committee notes that there is no specific code of conduct for the judiciary. The duty obligations of judges arise from their unique position and the terms of the oaths taken on their assuming office as well as case law. The PCEAR in its Report on Codes of Conduct for Public Officials (1993) recommended that:

- judges and magistrates should not be subject to the Committee's proposed legislative scheme for public sector ethics

- the matter of the development of a Code of Conduct for judges and magistrates should be referred to the Litigation Reform Commission for consideration and action.

However, the Committee notes that, in respect of Parliament, the *Criminal Justice Act* does not develop measures to ensure its integrity. The Committee also notes that Parliament itself has an internal mechanism, developed over many years, for dealing with breaches of privilege or the conduct of members being the Privileges Committee.

The Parliamentary Committee is of the view that a body, such as the CJC, investigating non criminal allegations against Members of Parliament may impinge upon the privileges of the Parliament and be an enigma to the constitutional framework developed over the course of our history. Procedures that have been developed over hundreds of years should only be changed after careful consideration of all the implications. We must be careful in our attempts to expose corruption and other misconduct, that well-tested constitutional structures are not ignored or trampled upon.

Conclusion

The Committee is of the opinion that when a Code of Ethics is developed for Members of Parliament breaches of that Code should be referred to the Privileges Committee. The Commission should continue to have jurisdiction to investigate suspected official misconduct which may constitute a criminal offence. However, if the investigation does not substantiate the allegation to the requisite criminal standard but does disclose a possible breach of a Code of Ethics, then the Commission should refer the matter to the Privileges Committee for investigation and report to the Parliament.

Due to the absence of a formalised instrument for dealing with misconduct which does not constitute a criminal offence in respect of members of Local Government, the Committee concludes that the Commission should have jurisdiction to investigate disciplinary breaches and criminal offences in respect of local government members.

Recommendation

The Committee recommends that when a Code of Ethics is developed for Members of Parliament breaches of that Code should be referred to the Privileges Committee.

The Commission should continue to have jurisdiction to investigate suspected official misconduct which may constitute a criminal offence. However, if the investigation does not substantiate the allegation to the requisite criminal standard but does disclose a possible breach of a Code of Ethics, the Commission should refer the matter to the Privileges Committee.

The Committee also recommends that the Commission should have jurisdiction to investigate all disciplinary breaches and criminal offences in respect of members of Local Government, given that there is no formalised instrument for dealing with misconduct which does constitute a criminal offence. The Act should be amended accordingly.

SUMMARY OF CONCLUSIONS

Conclusion 1

The Committee believes that it is desirable, and in accordance with the recommendations of the Fitzgerald Report, that the Parliamentary Criminal Justice Committee be able to formulate policies and issue general guidelines to the Commission that must be adhered to by the Commission. 15

Conclusion 2

In order to maintain the Commission's independence and integrity it is essential that the Committee should not be able to prevent or hinder an investigation by the Commission. However, it is difficult to justify the proposition that the Committee should not have the power to require the Commission to conduct an investigation. To the contrary, it is arguable that enabling the Committee to request the Commission to undertake an investigation is an important safeguard. 16

Conclusion 3

The fight against organised crime has improved since the establishment of the multi-disciplinary teams within the Commission. The location of these functions at the CJC permits the development of Joint Organised Crime Task Forces, designed to target organised and major crime.

The involvement of Joint Organised Crime Task Forces in the investigation of major and organised crime is a positive development which has the potential to assist the efforts of the Police Service towards greater involvement of multi-disciplinary teams in the long term.... 41

Conclusion 4

The Committee believes that there is a continuing need for the Criminal Justice Commission to be involved in investigating and combating organised and major crime.

The Committee understands the concern that has been expressed that there is a danger of the Official Misconduct Division becoming "too close" to the Queensland Police Service through the organised and major crime function. Therefore, the Committee proposes the creation of a new Division within the Commission which will be responsible for the investigation and combating of organised and major crime. The result will be two proactive investigative Divisions within the Commission. The Official Misconduct Division, which will remain responsible for the investigation of complaints of official misconduct and the Organised and Major Crime Division which will be responsible for the investigation of organised and major crime. The creation of such a Division will have a number of distinct benefits:

- **it will recognise that the CJC has the primary role in the investigation of organised and major crime;**

- **it will enable the resources being allocated to the function to be more readily identified;**

Conclusion 13

The Committee has come to the conclusion that the combined effect of:

- **the Chairperson of the Commission being able to issue a certificate pursuant to s.143 of the Act;**

- **the confidentiality provisions of the Act; and**

- **s.120(2) of the Act;**

results in the Commission not being sufficiently reviewable by the Supreme Court.

It is imperative that there be no impediment to the judicial review of the exercise of the CJC's powers.

The Fitzgerald Report noted:

> ***The Official Misconduct Division will have to have some special powers in each case subject to strict judicial controls to be established by legislation.* (1989:313)**

The Act requires amendment to enhance the judicial accountability of the use of the Commission's power and to ensure that the judicial process is not used for mischievous purposes.

The Committee believes that the balance is best struck by:

- **removing the conclusive nature of the Chairman's certificate under s.143 of the Act in relation to applications pursuant to s.34; and**

- **amending s.120 of the Act by providing that a judge when hearing an application pursuant to s.34 may take or receive *in camera* evidence from the Commission as to the basis for the investigation and that at the time of taking such evidence the applicant, or his representatives, are not entitled to be present.**..... 79

Conclusion 14

The Committee considers the overall achievements of the Complaints Section of the Official Misconduct Division to be substantial. The Committee believes that the Section is operating in an efficient manner and is achieving the objectives envisaged by Fitzgerald QC.

The Committee considers it to be absolutely essential that the independent complaints process continue operating as currently constituted, as it appears to be working successfully. 82

The Committee believes that the administration of the Misconduct Tribunals should be along the lines recommended by the CJC and the previous Committee, emphasising the importance of having people well experienced in disciplinary action in major organisations involved, and an appeal or review process through to an Administrative Appeals Tribunal if one is established.

The essential principle to be followed, is that public officials and serving police officers have an obligation to perform and behave to an acceptable standard. Organisational standards and codes of conduct are now well established, particularly in the Police Service. The Community deserves the highest standards from the Police Service. The Misconduct Tribunals are an important method of enforcing and maintaining those standards.

There can be no defence or justification for retaining members in a Police Service, or for that matter, any other public organisation, if they are unable to conform to the norms and standards of that organisation and discharge their obligations to the public responsibly.

A fair but simple system is required to assess, on the balance of probabilities, an appropriate course of action to suit each particular case.

As Mr P Keane QC in a written advice to the previous Committee recognised, there are differences between proceedings in the Misconduct Tribunals and ordinary litigation, particularly the prosecution of a criminal charge:

> ***... the Misconduct Tribunal is concerned with the fitness of particular persons for public office, requiring high standards of rectitude and integrity. The sanctions imposed by the Misconduct Tribunal relate to the continued enjoyment of public office, rather than imprisonment. The issue before the Misconduct Tribunal is not whether a citizen should be exposed to punishment for an offence, but whether an officer of the state is entitled to continue to command the confidence of the community and to enjoy the rewards of his office.*** 100

Conclusion 21

The Committee does not believe that the co-ordination role envisaged by Fitzgerald QC can be undertaken by the Research and Co-ordination Division. The Committee concurs with the CJC that this role is properly an executive function. 124

Conclusion 22

The Committee is of the opinion that there remains a vital need for an independent body to research and report on criminal law and criminal justice reform. 125

Conclusion 23

The Committee is of the opinion that there is still a vital need for an independent body to oversee the reform of the Queensland Police Service. The Committee believes that there are substantial recommendations made by Fitzgerald QC in respect of the Queensland Police Service that need to be addressed by the Queensland Police Service and the CJC which oversees that reform. 125

Conclusion 24

The primary functions of the Corruption Prevention Division are education, advice and investigation. The Division has also initiated a Whistleblower Support Program.
The Committee is of the view that an independent body is not required for the role of corruption prevention. Corruption prevention is a management responsibility.

The Committee also concludes that it is not appropriate for the Official Misconduct Division to be responsible for the role and functions of the Corruption Prevention Division. The Official Misconduct Division, which is the body responsible for investigating complaints, should not also be responsible for providing advice or even implementing measures to prevent the recurrence of problems.

The Committee concludes that the role of the Corruption Prevention Division, excluding the Whistleblowers Support Program, duplicates the functions of the Public Sector Management Commission, the Office of Public Sector Ethics and the Queensland Audit Office. The Committee notes that Parliamentary scrutiny would remain through the Estimates Committee process. 178

Conclusion 41

The Whistleblower Support Program is an important function of the Commission. The Committee believes that the importance of this function should be recognised by constituting the Whistleblower Support Program as a separate organisational unit within the Commission referred to as the Whistleblower Support Unit. Administratively, the Whistleblower Support Unit should be directly accountable to the Chairperson. However, one of the part-time Commissioners should take a special interest in this area of the CJC and should report to the Parliamentary Committee on the operation of this unit. The Committee is of the opinion that this will assist in ensuring that the WSU maintains independence and integrity. 187

Conclusion 42

The Committee concludes that it is the role of the Office of General Counsel to provide independent internal legal and policy advice to the Commission. 193

Conclusion 43

The Committee concludes that the Commission must ensure that all recommendations for the improvement of security procedures are implemented expeditiously. The Commission must strictly enforce internal security guidelines. 197

Conclusion 44

The Committee concludes that it is essential that the Commission is fair and impartial in its dealings with the media and that the Media Unit should perform this role.

The Committee also concludes that any journalist accepting a position at the Commission, including the position of media liaison officer, must accept and comply with the provisions of the *Criminal Justice Act 1989* and the policies of the Commission.

All officers of the Commission are bound by the confidentiality provisions of the Act. These provisions would make it impossible for the employment of a journalist on the basis that they can claim the Code of Ethics for journalists. 201

Conclusion 45

The Committee is of the opinion that s.27(2) of the *Criminal Justice Act,* as it currently stands creates the potential to reduce the efficacy of the accountability process and therefore the ability of the PCJC to monitor and review the CJC. 210

Conclusion 46

The Committee is of the opinion that there is a necessity for a formalised, recognised structure within the *Criminal Justice Act 1989* for receiving and assessing complaints against the Commission and/or its officers. The Committee is of the opinion that this mechanism should be centred around the current accountability mechanism within the Act, namely, this Committee. The Committee believes that the creation of another mechanism for investigating complaints against the Commission would be potentially duplicitous. 215

Conclusion 47

Despite recent decisions which recognise that the Commission may report to the Parliamentary Commission in a confidential manner, the Committee believes that the Criminal Justice Act should be amended to expressly provide for confidential reporting from the Commission to the Committee. The Committee also concurs with the previous recommendations made by the Commission, and supported by the first PCJC that the term "report of the Commission" requires definition. 218

Conclusion 48

The Committee concludes that the role of the Chairman is central to the administration of the Commission. The Committee considers that the part-time Commissioners play a crucial role in administering the Criminal Justice Commission. It is the role of the part-time Commissioners to offer a broad range of professional and practical experience to the Commission. 222

Conclusion 49

The Committee concludes that while there are other mechanisms possible for the appointment of the Chairperson and part-time Commissioners, the Committee does not accept the necessity for a public confirmation hearing process. 224

Conclusion 50

The Committee accepts advice provided to the Criminal Justice Commission which states that it currently has jurisdiction to investigate alleged misconduct by elected officials which may constitute a criminal offence. For example, the Commission investigated Members of Parliament for alleged misappropriation of travel entitlements.

However, as the Act currently stands, the Commission does not have jurisdiction to investigate elected officials for alleged misconduct that would not constitute a criminal offence. This is because at present there is no code of conduct for Members of the Legislative Assembly or elected members of local authorities which provides for dismissal for non-criminal conduct.

When codes of conduct are formulated for Members of the Legislative Assembly and elected officials of local authorities which provide dismissal for a disciplinary breach the Commission will have jurisdiction to investigate those matters. 228

Conclusion 51

The Committee is of the opinion that when a Code of Ethics is developed for Members of Parliament breaches of that Code should be referred to the Privileges Committee. The Commission should continue to have jurisdiction to investigate suspected official misconduct which may constitute a criminal offence. However, if the investigation does not substantiate the allegation to the requisite criminal standard but does disclose a possible breach of a Code of Ethics, then the Commission should refer the matter to the Privileges Committee for investigation and report to the Parliament.

Due to the absence of a formalised instrument for dealing with misconduct which does not constitute a criminal offence in respect of members of Local Government, the Committee concludes that the Commission should continue to have jurisdiction to investigate all suspected criminal offences in respect of Local Government members. The Committee also concludes that the Local Government Association should develop:

- **a Code of Ethics for Councillors in Queensland Local Government Authorities**
- **a mechanism for the investigation of a suspected breach of that Code**
- **appropriate penalties for a breach of that Code.** 232

SUMMARY OF RECOMMENDATIONS

Recommendation 1

In accordance with the recommendations of the Fitzgerald Report, the Committee recommends that the *Criminal Justice Act* be amended to enable the Parliamentary Criminal Justice Committee to formulate policies and issue general guidelines to the Commission that must be adhered to by the Commission.

The Committee further recommends that any such guidelines issued by the Committee to the Commission be tabled in the Legislative Assembly by the Chairman of the Committee within 14 sitting days of those guidelines being issued to the Commission. 15

Recommendation 2

The Committee recommends that the *Criminal Justice Act* be amended, in accordance with the recommendations contained within the Fitzgerald Report, to specifically provide that the Committee has the power to direct the Commission to undertake or pursue an investigation. 16

Recommendation 3

The Committee recommends the creation of a new Division within the Commission called the Organised and Major Crime Division which will be responsible for investigating and combating organised and major crime.

The Organised and Major Crime Division of the CJC will work with other Divisions to fulfil its charter.

The Official Misconduct Division will be required to report to the Organised and Major Crime Division any matter that appears to involve organised and major crime. Conversely, the Organised and Major Crime Division will be required to report any suspected incidence of official misconduct to the Official Misconduct Division. Once established, the lateral transfer of personnel between these Divisions should be avoided.

The functions of the Organised and Major Crime Division should be clearly spelt out by the *Criminal Justice Act 1989*.

The functions should reflect those currently undertaken by the Official Misconduct Division in respect of organised and major crime.

The Organised and Major Crime Division will be able to exercise the powers currently available to the Commission in relation to organised and major crime, as amended by other recommendations within this report. The Division will be required to keep and monitor separate powers registers. 49

Recommendation 4

The Committee recommends that the Commission develop, in consultation with this Committee, criteria which must be satisfied before a major crime matter is accepted by the Commission for investigation. 52

Recommendation 5

On each occasion the Commission undertakes an investigation within its major crime jurisdiction the Commission should forward a complete report to the Committee outlining the circumstances of the matter and establishing compliance with the predetermined criteria. 53

Recommendation 6

The Committee endorses the previous Committee's recommendation no. 29 of Report No. 13 that the current s.88 of the Act be repealed and replaced in the terms suggested by the previous Committee. However, the Committee recommends the insertion of a s.88(2) which will provide:

> **(2) (i) Unless specifically stated, any non-publication order made by the Commission will not operate to prevent any person called before the Commission from informing that persons employer of the fact that that person was called before an investigative hearing;**
>
> **(ii) Any non-publication order made by the Commission will not operate to prevent any person called before the Commission from making a submission to the Parliamentary Criminal Justice Committee about the conduct of the Commission's investigation.** 64

Recommendation 7

The Committee recommends that the *Criminal Justice Act 1989* be amended to reflect the recommendations contained within the Fitzgerald Report that the Criminal Justice Commission's power to hold an investigate hearing be subject to, and on terms approved by, a District or Supreme Court Judge.

Further, the Committee recommends that an application by the Commission for approval to conduct an investigative hearing may be made ex parte and in-camera. Further, the Committee recommends that a person affected by the operation of an investigative hearing, either as a witness or as the subject of such a hearing, be able to apply to the Court which approved the hearing for a variation of the terms of that hearing. 74

Recommendation 8

The Committee recommends that s.90 of the *Criminal Justice Act 1989* be amended to reflect that hearings of the Commission are to be conducted in private unless the Commission is able to establish to the Court approving the hearing that the hearing is of an administrative nature, and/or would not be unfair to any person and/or that to hold the hearing in private would be contrary to the public interest. 75

Recommendation 9

Recommendation 26

The Committee recommends that the Commission implement recommendation 28 of the report of Mr Nattress which specifies that the Commission develop a policy of random bag/vehicle search. 197

Recommendation 27

The Committee endorses recommendation 34 of Report No. 13 of the previous Committee:

> ***The Committee endorses the recommendation of the Criminal Justice Commission that s2.19(2) of the Criminal Justice Act 1989-1991 be amended so that confidential information which is not disclosed in a Commission report (as permitted by s2.19(2)(b) of the Act) may nonetheless be disclosed to the Committee and where appropriate to the Minister. The amendment is achieved by the addition of a new paragraph (c) as follows:***
>
> ***(c) where the Commission makes a report in accordance with paragraph***
> ***(b) of this subsection it -***
> ***(i) may disclose that information to the -***
> ***(a) Parliamentary Committee;***
> ***and***
> ***(b) if the Committee or the Commission so determines to the Minister***
> ***and***
> ***(ii) any such disclosure, shall be deemed not to be a report or part of the report for the purposes of section 2.18 of the Act.***

In addition, the Committee recommends that s.27(2) of the *Criminal Justice Act* be amended to reflect that the section is not intended to apply to reports from the Criminal Justice Commission to the Parliamentary Criminal Justice Committee. 210

Recommendation 28

The Committee recommends that the *Criminal Justice Act 1989* be amended to provide for a formalised structure to handle complaints against the Commission. The Committee endorses its previous recommendation 1 in Report No. 25 that the Commission be under a statutory obligation to report to the Committee in detail whenever a complaint of misconduct is made against the Commission or its officers.

In this regard the term misconduct should be the same as is currently provided within the Act.

The Act should be amended to provide that the Committee upon receipt of a complaint against the Commission may:

- **require a report from the Commission in relation to the matter;**
- **elect to not investigate the matter without any further action;**
- **refer the matter to the Queensland Police Service or any other agency for investigation and report to the Committee;**

- **refer the matter to the Criminal Justice Commission for investigation and report to the Committee;**

- **appoint its own investigators to investigate the complaint and report to the Committee; or**

- **take any other action that the Committee deems appropriate.**

The Committee upon consideration of a complaint may refer the matter to whatever agencies it deems appropriate for action. 216

Recommendation 29

The Committee endorses the previous Committee's recommendation that a definition of "a report of the Commission" referred to in s.26 [s.2.16] of the Criminal Justice Act be provided in the Act.

In addition, the Committee recommends the insertion of a sub paragraph (e) in s.27 which provides:

> **(e) the Commission may provide information or a report to the Parliamentary Committee either at the Committee's request or the Commission's initiative which is not a report for the purposes of s.26 of the Act.** 218

Recommendation 30

The Committee recommends that when a Code of Ethics is developed for Members of Parliament breaches of that Code should be referred to the Privileges Committee.

The Commission should continue to have jurisdiction to investigate suspected official misconduct which may constitute a criminal offence. However, if the investigation does not substantiate the allegation to the requisite criminal standard but does disclose a possible breach of a Code of Ethics, the Commission should refer the matter to the Privileges Committee.

The Committee also recommends that the Commission should continue to have jurisdiction to investigate all suspected criminal offences in respect of members of Local Government. The Committee also recommends that the Local Government Association develop:

- **a Code of Ethics for Councillors in Queensland Local Government Authorities**

- **a mechanism for the investigation of a suspected breach of that Code**

- **appropriate penalties for a breach of that Code.** 232

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APPENDIX 1

LEGISLATIVE ASSEMBLY
QUEENSLAND

Parliamentary Criminal Justice Committee

Call for Public Submissions on the three yearly review of the operations of the Criminal Justice Commission

The Parliamentary Criminal Justice Committee is an all party Committee of the Legislative Assembly of Queensland. Its main functions are to monitor and review the discharge of the functions of the Criminal Justice Commission and to report to the Legislative Assembly.

Under section 118.(1)(f) of the *Criminal Justice Act 1989-1993* the Parliamentary Criminal Justice Committee is obliged to conduct a three yearly review of the operations of the Criminal Justice Commission.

To assist the Committee to undertake a comprehensive and objective review of the operations of the Commission, it is calling for written submissions from individual members of the community and interested groups and organisations.

Submissions made to the Committee will be treated as public documents unless the Committee determines that confidentiality is required. Requests for confidentiality should be clearly marked.

Persons or organisations proposing to make submissions should do so by 4.00pm on Friday 17 June 1994. Submissions should be forward to:

Research Director
Parliamentary Criminal Justice Committee
Parliament House
George Street
BRISBANE QLD 4000

Inquiries regarding submissions may be directed to the Research Director on (07) 226 7258 or the Senior Research Officer on (07) 226 7909 or by facsimile (07) 210 0128.

Ken Davies MLA

Chairman

APPENDIX 2

REVIEW PROGRAMME	ACTION UNDERTAKEN	COMMENT
This Commission recommends that the Criminal Justice Commission, as an essential part of its immediate functions, undertake investigation, review, reform, and consideration of criminal justice matters arising from this report, including: 1. general review of regulatory laws aimed at the regulating or licensing of essentially legal activities, to: (a) identify activities which could be legalized or decriminalized (b) introduce pecuniary penalties as an effective way of punishing minor breaches of law which are not essentially criminal (c) establish whether such legislation could cease to be the administrative responsibility of the Police Department and be administered by the government department or agency most concerned with the area (d) establish whether responsible departments or agencies could have their own enforcement staff and develop their own enforcement priorities and strategies on a self-funding basis;	Commission has stated that rather than a "general review" called for in the recommendation, it has approached the issue incrementally. Volume I of the police powers report, which dealt with the consolidation of police powers, identified and considered some regulatory law enforced by police and questioned the police's administrative responsibility in terms of these regulatory laws.	Apart from the areas touched upon in the police powers report, little progress has been made or attempted in relation to this issue. A review should be undertaken. The possible advantages of such a review, include: • The identification of resources involved in the enforcement of regulatory laws. • The impact of this type of enforcement activity on police resources, which diverts resources from crime prevention and detection, could be objectively assessed. • Once the cost of the enforcement of regulatory enforcement is determined, government could then be in a position to determine whether costs are justified. • Any savings made could be applied to further the efficient prevention and detection of crime, and the more efficient utilisation of court resources.

REVIEW PROGRAMME	ACTION UNDERTAKEN	COMMENT
2. general review of the criminal law, including laws relating to voluntary sexual or sex-related behaviour, s.p. bookmaking, illegal gambling, and illicit drugs, to determine: (a) the extent and nature of the involvement of organised crime in these activities (b) the type, availability and costs of law enforcement resources which would be necessary effectively to police criminal laws against such activities (c) the extent to which any presently criminal activities should be legalized or decriminalized (if at all)	The Commission has undertaken reviews and submitted to the Parliament reports on: • homosexuality • prostitution • SP Bookmaking and illegal gambling • Cannabis The Commission has stated that it has no plans to conduct a "general review" of the criminal law.	More general reviews of the criminal law have taken place outside of the Criminal Justice Commission. • The Criminal Code Review Committee • The Committee to review the Vagrants, Gaming and Other Offences Act.
3. review of law enforcement funding to consider additional or alternative funding strategies;	No legislative review of law enforcement funding has been made by the Commission. Funding considerations have been incidental to other projects.	No systemic review of law enforcement funding has been undertaken. Some cursory consideration given in Commission's review of the QPS implementation of the Fitzgerald reforms.

REVIEW PROGRAMME	ACTION UNDERTAKEN	COMMENT
4. comprehensive review of all investigative powers, to critically examine the use of current powers, assess the need for other or more powers, and upgrade control of investigative powers, including: (a) adequate supervision by responsible senior officers (b) external judicial control of powers (c) restriction of the use of powers to designated people or offices (d) making misuse of powers and information offences (e) exclusion of the admissibility of illegally obtained evidence;	Police powers in Queensland have been reviewed and assessed by the Commission in its reports on the subject - volumes I-V. However, there has been no wider review of powers by Research Division, especially as regards the CJC itself.	Substantial progress made in respect of police powers. However, no wider review of powers. These types of reviews highlight the possible conflict of the CJC's roles, in that, it is arguable that it is not appropriate that the Research Division carry out a review of the CJC's other divisions powers.

REVIEW PROGRAMME	ACTION UNDERTAKEN	COMMENT
5. formation of a professional education and review unit within the Research and Co-ordination Division of the Criminal Justice Commission, which, with the assistance of a small panel of part-time academics and educational experts, will review all aspects of police education and training, including: (a) evaluation of all Police Academy training staff to establish and maintain adequate standards (b) critical review of induction training programs run at the Academy, particularly with regard to training in ethics, morals, community expectations of police, and acceptable standards of behaviour (c) development of recommendations on the most suitable methods of improving the further education of existing police with particular reference to developing tertiary courses in criminal justice processes and social science, preferably to be studied with people from other disciplines (d) a general review of in-service training and promotional examinations to match the new rank structure and recommend a revised overall approach and curriculum;	• with QPS established Police Advisory Council (PEAC), develop new recruit training programme. • Research division conducting a six year longitudinal evaluation of training programme. • Published a report on QPS implementation of Fitzgerald recommendations regarding recruit, training, education.	Claim by the CJC that establishment of PEAC obviated need for dedicated unit within Division. However, PEAC's role and responsibilities are much narrower than the professional education and review unit proposed by Fitzgerald.

REVIEW PROGRAMME	ACTION UNDERTAKEN	COMMENT
6. comprehensive review of police information systems in co-operation with specialist external consultants and officers of the Police Department to achieve objectives as follows: (a) development of an information bureau, professionally managed by civilian specialists, and responsible for all of the Department's criminal records, associated information and intelligence, and the collection, analysis, storage, access, and dissemination of information by the police (b) definition of the complementary roles of the police Information Bureau and the Intelligence Division of the CJC, and arrangements by which the Intelligence Division will oversee the Information Bureau and its liaison with federal and interstate agencies, including the National Crime Authority and ASIO (c) re-organization of the Computer Branch under a civilian manager (d) development of control systems which facilitate legitimate access by field staff to enable them to do their work effectively but prevent unauthorized access to departmental information from inside or outside the Police Force, specify penalties for misuse, and ensure the integrity of information held;	The Queensland Police Service and the Commission of Inquiry Implementation Unit conducted reviews and made recommendations about QPS information systems, prior to formulation of the Research Division. In 1991 the CJC/QPS Committee formed to conduct the review. In 1992 a report on the review submitted to Minister. The QPS has undertaken its own review of the computer branch under a civilian officer.	Most of the work completed independent of the CJC.

REVIEW PROGRAMME	ACTION UNDERTAKEN	COMMENT
7. development of legislation dealing with misconduct within public institutions in general, which would: (a) oblige public officials to report all official misconduct or any reasonable basis of suspicion of official misconduct (b) require public officials to provide all reasonable help in investigations of misconduct (c) forbid the exercise of any official authority, discretion or use of public resources in relation to the investigation of any conduct by any complainant or potential witness in any case of suspected official misconduct, except under written authority of the officer in charge of the investigation;	Most of this subject matter was dealt with by the introduction of the Criminal Justice Act.	Legislation developed and implemented without the input of the Research Division.
8. review and proposal of reforms of guidelines for and controls on police practices in respect of interviews;	Comprehensive review and report undertaken by the Research Division. Police Powers in Queensland especially Volume IV.	Report undertaken by the CJC.

REVIEW PROGRAMME	ACTION UNDERTAKEN	COMMENT
9. consideration of the obligation of public officials to be accountable for their activities and whether that obligation should be reinforced by the prescription of criminal offences constituted by: (a) the holder of any public office lying in connection with that office (b) any person lying to Parliament in respect of any matter of his or any other person's personal conduct;	The Commission states that it has been unable to devote any resources to the matter.	No action taken by the CJC.
10. consideration of and advice to the Criminal Justice Committee on the circumstances in which and terms upon which interrogation upon statements reported in Hansard should be allowed;	The Commission states that it has been unable to devote any resources to the matter.	No action taken by the CJC.
11. review of the oath in evidence or making affidavits or declarations to consider where retention of the oath serves any useful purpose;	Law Reform Commission has completed a review of the Oaths Act.	No action taken by the CJC. Matter undertaken by Law Reform Commission.
12. review of the sufficiency of present penalties for perjury;	Criminal Code Review Committee considered matters as part of review of Criminal Code.	No action taken by the CJC.
13. consideration of the necessity for law to prevent, facilitate the detection of, and punish officials who act when private interest conflicts with their official duty;	Matter considered by EARC.	No action taken by the CJC apart from making a submission on EARC's review.

REVIEW PROGRAMME	ACTION UNDERTAKEN	COMMENT
14. consideration of: (a) the necessity for registration of all property seized in the course of law enforcement, whether illegally owned contraband or otherwise (b) rules in respect of the disposal or acquisition of property seized in the course of law enforcement and forfeited to the Crown or confiscated (c) necessity for adequate audit and supervision of such seizure and disposal of property;	Matters under consideration by QPS in accordance with review of policeman's manual and development of operational procedures manual. The CJC contributed to review and represented on Committee reviewing the draft of operational procedures manual. Incidental portions considered in Review of Police Powers, and working party of illegal drugs.	The CJC has had input into review being undertaken by the Queensland Police Service.
15. consideration of amendment of the Commissions of Inquiry Act to make it most suitable for ordinary use.	Law Reform Commission is undertaking a review of Commissions of Inquiry Act.	No action taken by the CJC. Law Reform Commission discharging the matter.

PARLIAMENTARY CRIMINAL JUSTICE COMMITTEE
COMMITTEE MEETINGS ATTENDANCE RECORD
47TH PARLIAMENT

Meeting Date	Barton	Bird	Briskey	Davies	Lester	Turner	Watson
11 November 1992	x	x	x	x	x	x	x
12 November	x	x	x	x	x	x	x
13 November	x	x	x	x	x	x	x
20 November	x	x	x	x		x	x
23 November	x	x	x	x	x	x	x
26 November		x	x	x	x		x
4 December	x	x	x	x	x	x	x
14 December	x	x	x	x	x	x	x
15 December	x	x	x	x	x	x	x
18 January 1993	x	x	x	x	x	x	x
11 February	x	x	x	x	x	x	x
12 February	x	x	x	x	x	x	x
22 February	x	x	x	x	x	x	x
23 February	x	x	x	x	x	x	x
2 March		x	x	x	x	x	x
5 March	x	x	x	x	x	x	x
12 March	x	x	x	x	x	x	x
16 March	x		x	x	x	x	x
2 April	x	x	x	x	x	x	x
16 April	x	x	x	x	x	x	x
29 April	x	x	x	x		x	x
7 May	x	x	x	x	x	x	x
11 May	x	x	x	x	x	x	x
13 May	x	x	x	x	x	x	x
18 May	x	x	x	x	x	x	x
11 June	x	x	x	x	x	x	x
30 June	x	x	x	x	x	x	x
12 July (am)	x	x	x	x		x	x
12 July (pm)	x	x	x	x	x	x	x

Meeting Date	Barton	Bird	Briskey	Davies	Lester	Turner	Watson
13 July	x	x	x	x	x	x	x
15 July	x		x	x	x	x	x
16 July	x	x	x	x	x	x	x
10 August	x	x	x	x	x	x	x
24 August	x	x	x	x	x	x	x
31 August	x	x	x	x	x	x	x
10 September	x	x	x	x		x	x
14 September	x	x	x	x	x	x	x
17 September		x	x	x	x	x	x
23 September	x		x	x	x	x	x
4 October		x	x	x		x	x
7 October	x	x	x	x		x	x
12 October	x	x	x	x		x	x
25 October	x	x		x			x
8 November	x			x		x	x
9 November	x	x		x	x	x	
16 November	x	x		x	x	x	x
25 November	x		x	x			x
26 November	x		x	x			x
30 November	x		x	x	x	x	x
7 December (am)	x	x	x	x	x		x
7 December (pm)	x	x	x	x	x		x
10 December	x	x	x	x	x	x	x
17 December	x	x	x	x	x	x	x
14 February 1994 (am)	x	x		x	x	x	x
14 February (pm)	x	x	x	x	x	x	x
15 February	x	x	x	x		x	x
22 February	x	x	x	x	x	x	x
11 March (am)		x	x	x	x	x	x
11 March (pm)	x		x	x	x	x	x

Meeting Date	Barton	Bird	Briskey	Davies	Lester	Turner	Watson
24 March (am)	x		x	x	x	x	x
24 March (am)	x		x	x	x	x	x
12 April	x	x	x	x	x	x	x
15 April (am)	x	x	x	x	x	x	x
15 April (pm)	x	x	x	x	x	x	x
19 April	x	x	x	x		x	x
20 April (am)	x	x	x	x		x	x
20 April (pm)	x	x	x	x	x	x	x
21 April	x	x	x	x	x	x	x
22 April (am)	x	x	x	x	x	x	x
22 April (pm)	x	x	x	x	x	x	x
26 April	x		x	x	x	x	x
28 April	x		x	x	x	x	x
13 May	x	x	x	x	x	x	x
6 June	x	x	x	x	x	x	x
7 June	x		x	x		x	x
23 June			x	x	x	x	x
8 July	x	x	x	x	x	x	x
12 July	x	x	x	x	x	x	x
13 July	x	x	x	x	x	x	x
14 July (am)	x	x	x	x	x	x	x
14 July (pm)	x	x	x	x	x	x	x
27 July	x	x	x	x	x	x	x
2 August	x	x	x	x	x	x	x
5 August	x	x	x	x	x	x	x
12 August	x	x	x	x	x	x	x
22 August	x	x	x	x	x		x
30 August	x	x	x	x		x	x
5 September	x	x	x	x	x	x	x
6 September	x	x	x	x	x		x
4 October	x		x	x	x		x
5 October	x		x	x	x		x

Meeting Date	Barton	Bird	Briskey	Davies	Lester	Turner	Watson
18 October	x	x		x	x		x
27 October	x	x	x	x	x	x	x
14 November	x		x	x	x	x	x
15 November	x		x	x		x	x
22 November	x	x	x	x	x	x	x
9 December (am)	x	x	x	x		x	x
9 December (pm)	x	x	x	x		x	x
12 December (am)	x	x	x	x		x	x
12 December (1.58pm)	x	x	x	x		x	x
12 December (4.05pm)	x	x	x	x		x	x
31 January 1995	x	x	x	x	x	x	x
6 February	x	x	x	x		x	x