PARLIAMENTARY COMMISSIONER'S SUBMISSION ON THE REVIEW OF THE OPERATION OF SECTION 329 OF THE CRIME AND CORRUPTION ACT 2001

1. I have been invited by the Parliamentary Crime and Corruption Committee to provide a submission with respect to the following:

   - the definition of improper conduct;
   - the operation of the provision with respect to notifications received by the Committee and the Parliamentary Commissioner;
   - the current *Protocols governing the reporting of improper conduct complaints against officers of the CCC.*

2. In preparing this submission I have also considered, to some extent, issues arising out of the 21 September 2017 meeting of Parliamentary Inspectors and Commissioners in Fremantle. Of particular relevance were the States of Western Australia and Victoria whose reporting regimes most resemble Queensland's position.
3. Further I have included in this submission historical background to a number of the provisions for the benefit of the Committee.

History of the Development of Section 329 of the *Crime and Corruption Act* (the Act) and Protocols

1999 to 2001 Protocols for Dealing with Misconduct Complaints

4. Prior to 1 January 2002 (the introduction of the *Crime and Misconduct Act 2001*) no legislation existed with respect the reporting of improper conduct. Under the *Criminal Justice Act 1989* (the earlier version of the *Crime and Corruption Act)* there was no legislative requirement for the Criminal Justice Commission (CJC – the earlier incarnation of the Crime and Corruption Commission) to report improper conduct on the part of its officers to the then Parliamentary Criminal Justice Committee (PCJC- the equivalent of today's Parliamentary Crime and Corruption Committee). However in early 1999 the CJC, the PCJC and the Parliamentary Criminal Justice Commissioner began formulating guidelines for complaints against CJC Staff - a responsibility not previously held by the CJC.
5. Ms Julie Dick SC (as Her Honour then was), the then Parliamentary Criminal Justice Commissioner, by letter dated 15 April 1999 observed that the guidelines as amended by the Committee:

> *…reflect the role of the Committee in the process of accountability of the CJC. It is my view that it is the Committee which has the primary role and that the role of this office is to enhance the accountability process when required to do so in accordance with the Act. The amendments place the Committee in the first line of accountability, as it should be, and appear to me to be more consistent with the spirit of the legislation and the relationship between the Commission, the Committee and this Office.*

6. The view expressed by Ms Dick is reflected in the current form of the legislation, that is, that the Committee has the primary role with respect to accountability and the Parliamentary Commissioner assists the Committee in the performance of its functions.

7. The PCJC considered tabling guidelines but ultimately determined not to take that formal course. Instead, the Committee tabled "Protocols for Dealing with Misconduct Complaints against Personnel of the Criminal Justice Commission" in September 1999.[1] The PCJC determined to monitor the operation and effectiveness of the protocols.

8. Pursuant to the Protocols:

> 5. Where the Chairperson of the Commission assesses any complaint and he reasonably suspects that conduct the subject of the complaint:
>
> (a) involves a possible unauthorised release of confidential information from the Commission; or
>
> (b) has been the subject of media coverage or is otherwise in the public domain; or
>
> (c) is misconduct;
>
> the Chairperson of the Commission shall notify the Chairman of the Parliamentary Committee of the receipt of the complaint as soon as is practicable.

9. The definition of "complaint" in the Protocols also included "information" – which might not be in the form of an actual complaint. Therefore, the Chairperson was obliged to notify the Committee not only of complaints received, but also of relevant information coming to the Chairperson's attention – including information received from sources within the Commission. That remains the case under the current Act and Protocols.[2]

<u>2001 Introduction of the Crime and Misconduct Bill</u>

10. In 2001 the Crime and Misconduct Bill was introduced. The Explanatory Notes in relation to clause 329 (subsequently s. 329) stated as follows:

> **Duty of chairperson to notify improper conduct to the parliamentary committee**
>
> Clause 329 - imposes a duty upon the commission chairperson to notify the parliamentary committee of any conduct of a commission officer that the chairperson suspects may involve improper conduct as required by the parliamentary committee. This reflects the obligation on other public officials to notify official misconduct to the commission. The clause envisages that the parliamentary committee may set protocols or table guidelines governing the investigation and notification of misconduct by commission officers.

[1] *A report on protocols for dealing with misconduct complaints against personnel of the Criminal Justice Commission* Parliamentary Criminal Justice Committee - Report No. 48, September 1999. The protocols commence at page 12 of the Report

[2] The current Protocol still refers to the *"Receipt and notification of a <u>complaint/information</u> of possible improper conduct."* (My underlining.)

11. In the Committee stage of the debate on the Bill it was recognised that the duty to notify the Committee should also apply to improper conduct of former Commission officers. An amendment was passed to the effect that *"commission officer" includes former commission officer*. (My underlining.) The amendment was made to ensure *"…that if the parliamentary committee has to deal with the conduct of an officer of the commission, the mere fact that the officer has resigned does not put the matter outside the jurisdiction of the parliamentary committee."*[3]

The *Crime and Misconduct Act 2001*

12. On 1 January 2002 the operative sections of the *Crime and Misconduct Act 2001* commenced. At this time the reporting of improper conduct of an officer was first introduced into legislation. The then s. 329 of the *Crime and Misconduct Act* as originally enacted (before it was substantially amended in 2014) provided:

> **329 Duty of chairperson to notify improper conduct to the parliamentary committee**
>
> (1) The chairperson must notify the parliamentary committee, in the way, and within the time, required by the committee, of all conduct of a commission officer that the chairperson suspects involves, or may involve, improper conduct.
>
> (2) In this section—
>
> **"commission officer"** includes former commission officer.
>
> **"improper conduct"**, of a commission officer, means -
>
> (a) disgraceful or improper conduct in an official capacity; or
>
> (b) disgraceful or improper conduct in a private capacity that reflects seriously and adversely on the commission; or
>
> (c) conduct that would, if the officer were an officer in a unit of public administration, be official misconduct.

13. It is important to recognise, as stated in the Explanatory Notes, that by including the words *"in the way, and within the time, required by the committee"* Parliament envisaged that the Parliamentary Committee could set protocols or table guidelines governing the notification and investigation of suspected improper conduct by Commission officers.

14. In 2002 the Parliamentary Crime and Misconduct Committee (PCMC- the precursor to the PCCC) undertook a review of the Protocols. In a submission to the PCMC dated 29 November 2002, the then Parliamentary Commissioner, Mr Robert Needham, noted that the enactment of s. 329 *"…means that Protocols are no longer required to establish the obligation to report incidents of suspected improper conduct by Commission personnel."* However, Mr Needham recognised that *"…it would be of benefit to still have Protocols dealing with some of the subsidiary issues that could arise during such reporting."*

15. The reporting of incidents of improper conduct by the CMC Chairperson pursuant to s. 329 and the reporting arrangements under the Protocols appear to have operated reasonably effectively until 2012. The section remained unchanged from its enactment in 2001 until

[3] Record of Proceedings 31 October 2001 at page 3241 per Mr R. Welford MP.

2014 except for the relocation (in 2006) of the extended definition of "commission officer" to the definition section in Schedule 2 of the Act.

2013 Inquiry into the release of Fitzgerald Inquiry documents

16. In 2013 a further change was introduced into the Act. In March of that year the PCMC became aware of the destruction and dissemination of former Fitzgerald Commission of Inquiry (Fitzgerald Inquiry) material through the CMC's holdings at the Queensland State Archives. The PCMC's *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents*[4] dealt with issues, inter alia, concerning s. 329. The PCMC noted that the Chairperson of the CMC and each staff member involved since May 2012 failed to report the release of the Fitzgerald Inquiry documents under s. 329 and in addition, the Code of Conduct, the risk management framework, and corporate governance policies.

17. The PCMC stated that the destruction of, and access to, the Fitzgerald Inquiry records *"should have been notified to the Committee, both pursuant to section 329 and as part of proper practice for an agency such as the CMC to proactively keep an oversight committee with a wide monitor and review role appropriately informed of major issues. The failure of the CMC to notify the Committee of these events raises the question whether section 329 in its present form is adequate."*[5] (My underlining.)

18. The PCMC considered that changes were required to s. 329 to require a broader reporting framework[6] and made the following recommendation:

> ***Recommendation 20***
>
> The Committee recommends that the present, broad and subjective obligations on the Chairperson or the CEO under section 329 of the *Crime and Misconduct Act 2001* be increased to include:
>
> a) Any allegations of unauthorised disclosure of information or other material that is confidential;
>
> i. Whether the dissemination breaches the CMC Act; or
>
> ii. Breaches some other legislation; or
>
> iii. Might not breach any legislation;
>
> b) Any instance of registers not being up to date and complete or required documentation is not on file and correctly noted on the registers;
>
> c) Any instance of required authorisations for the exercise of power not being properly obtained, regardless of whether acting without authority was inadvertent or deliberate;
>
> d) Any instance of any policy or procedural guidelines set by the Commission not being strictly complied with, regardless of whether the breach was inadvertent or deliberate;
>
> e) Any allegation of an inappropriate use of power;

[4] *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents* – Parliamentary Crime and Misconduct Committee, Report No. 90, April 2013.
[5] Ibid at pages 88 and 89
[6] Ibid at page 88

f) Any significant matters (as defined within the CMC's Corporate Governance Framework [see section 5.5 of this report].[7]

It is important that the redrafted section 329 is inclusive of all definitions required without reference to external documents such as the CMC's Code of Conduct or the provisions of others Acts.

Crime and Misconduct and Other Legislation Amendment Act 2014 – renamed as *Crime and Corruption Act 2001*

19. The *Crime and Misconduct Act 2001* was substantially amended by the *Crime and Misconduct and Other Legislation Amendment Act 2014.* The Amendment Act renamed the CMC the Crime and Corruption Commission as from 1 July 2014 and renamed the Act as the *Crime and Corruption Act.* Section 329 of the Act was amended consistent with the above recommendation of the PCMC to substantially[8] its present form. The conduct referred to in Paragraphs (a) to (e) of Recommendation 20 (above) was included in the definition of "improper conduct" in s. 329(4) under subsections (d) to (h).

329 Duty to notify the parliamentary committee and the parliamentary commissioner of improper conduct

(1) The person mentioned in column 1 of the following table (the ***notifier***) must notify the parliamentary committee and the parliamentary commissioner of all conduct of a person mentioned opposite the notifier in column 2 of the table that the notifier suspects involves, or may involve, improper conduct.

Column 1	Column 2
chairperson	commissioner other than the chairperson
	chief executive officer
deputy chairperson	chairperson
chief executive officer	commission officer other than a commissioner or the chief executive officer

(2) A notification under subsection (1) must be given in the way and within the time required by the parliamentary committee or parliamentary commissioner.

(3) In forming a suspicion for subsection (1) in relation to the conduct of a person, the notifier must disregard the intention of the person in engaging in the conduct.

(4) In this section—

improper conduct, of a person, means—

(a) disgraceful or improper conduct in an official capacity; or

(b) disgraceful or improper conduct in a private capacity that reflects seriously and adversely on the commission; or

(c) conduct that would, if the person were an officer in a unit of public administration, be corrupt conduct; or

[7] Ibid at page 90

[8] A further amendment by s. 41 of the *Crime and Corruption Amendment Act 2016* reconfigured the table under s. 329(1) relating to the appropriate notifier, to the form set out above.

(d) disclosure of confidential information without the required authorisation, whether or not the disclosure contravenes an Act; or

(e) failure to ensure—

(i) a register kept by the commission under an Act is up to date and complete; or

(ii) all required documentation is on a file kept by the commission and correctly noted on a register kept by the commission under an Act; or

(f) exercise of a power without obtaining the required authorisation, whether inadvertently or deliberately; or

(g) noncompliance with a policy or procedural guideline set by the commission, whether inadvertently or deliberately, that is not of a minor or trivial nature; or

(h) exercise of a power conferred on the person under this or another Act in a way that is an abuse of the power.

20. The Bill (later to become the Act) was considered by the Legal Affairs and Community Safety Committee which commented:

> *Committee Comment*
>
> *The Committee considers the new section 329 is a vast improvement on the current section. The type or types of conduct which is considered to be improper conduct is much clearer and leaves no doubt about what should be subject to investigation or otherwise by the oversight committee.*
>
> *The Committee considers the notification requirements are an improvement of the current situation and does not leave the Chairman in the unenviable position where he or she would need to notify themselves.*
>
> *Finally, the Committee notes these provisions will enable the Parliamentary Commissioner to determine whether he or she considers a matter ought to be investigated without a referral from the committee. While it appears there may need to be some co-ordination between the committee and the Parliamentary Commissioner in how they deal with matters, especially in the circumstance where there are differing opinions, the Committee expects policies or protocols to be developed between the two entities to ensure matters are dealt with appropriately. In any event, the Committee considers the new section 329 will add to the transparency and accountability of the CCC which in some instances, as evidenced in recent inquiries, has been severely lacking.*[9] (My underlining.)

The Bill was passed and the operative sections of the renamed *Crime and Corruption Act* commenced on 1 July 2014.

THE DEFINITION OF IMPROPER CONDUCT

21. The issue of the definition of "improper conduct" is a wide ranging topic in that it has been the subject of substantial judicial consideration over the years with respect to other Acts. The term "improper conduct" is not unique to the *Crime and Corruption Act*. For example it also used in the *Tattoo Parlours Act 2013 (Qld),* the *Federal Court of Australia Act 1976 (Cth),* the *Telecommunications (Interception and Access) Act 1979 (Cth),* the *Australian*

[9] *Crime and Misconduct and Other Legislation Amendment Bill 2014* Report No. 62, Legal Affairs and Community Safety Committee, April 2014 at page 66.

Crime Commission Act 2002 (Cth), the *Local Government Act 2009 (Qld)* and the *Right to Information Act 2009 (Qld)*.

22. Interestingly most of the Acts which use the term "improper conduct" do not expressly define its meaning. Instead they frequently specify the particular behaviour which would constitute improper conduct. It seems, therefore, that much of the legislation relies on the common law interpretations of "improper conduct" which are frequently specific to the activities the subject of the relevant Act.

23. Considerable assistance can be found in *Investigating Corruption and Misconduct in Public Office.*[10] In that text Peter Hall QC sets out eleven propositions with respect to the meaning of "improper conduct":

1. *"Improper" is an indefinite term not susceptible to any precise meaning which can vary according to context.*
2. *In public law terms "improper" is often considered in the context of the performance of public functions.*
3. *Factors relevant to the context of conduct include: the roles, functions, responsibilities, powers, codes of conduct and duties of the position occupied by the person who carried it out.*
4. *Improper conduct is likely to be conduct that is inconsistent with the proper discharge of the duties, obligations and responsibilities of the person who carried it out.*
5. *Whether or not particular conduct is "improper" must be determined objectively.*
6. *For conduct to be improper it must be intentional, but the person who carried it out need not have intended to act "improperly".*
7. *Improper conduct does not depend on a consciousness of impropriety but consists of a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authorities of the position and the circumstances of the case.*
8. *Improper conduct might consist of conduct by omission.*
9. *The particular state of mind of the person in question is important when "abuse of power" is said to constitute impropriety. However, impropriety is not restricted to abuse of power.*
10. *In making an objective judgement as to the seriousness of the conduct in the circumstances in which it occurred, if there is evidence of bad faith or dishonest intention, that will add to the seriousness of the conduct but it is not a prerequisite to a finding of impropriety.*
11. *Improper conduct may occur where an act is undertaken by a public official who knew or ought to have known that the conduct was not a valid exercise of his or her office, for example, where he or she had no authority to do the act.*

[10] *Investigating Corruption and Misconduct in Public Office*, Peter Hall QC, Lawbook Co (2004) at page 132.

23. It should be noted that proposition 6 does not apply to subsections (f) and (g) of s. 329 as those provisions specifically provide for improper conduct whether it is inadvertent or deliberate.

24. Section 329 of the Act provides a comprehensive definition of "improper conduct" at subsection (4)(a) to (h). It provides for eight circumstances in which improper conduct could be found. (See paragraph 19 above.) Those subsections, apart from (a) (b) and (c), are directed toward specific acts within the management and operations of the Commission itself. As discussed above, subsections (d) to (h) were introduced in accordance with Recommendation 20 of the PCMC's Report no. 90 - *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents*.

25. The impact, however of the introduction of subsections (d) to (h) is that the Committee now receives s. 329 notifications with respect to managerial and procedural issues in relation to the efficient management of the Commission itself. There is no doubt that the consequences of the Commission not complying with subsections (d) to (h) can, on occasions, have serious consequences. However the fact that the Committee is required to monitor such conduct could be of concern in the event that the notifications become significant in number. However, on the basis of the most recent figures it appears the Committee has only been required to deal with a handful of such matters. For example, for the period 2016-2017 there were only 12 notifications. Of those, a number related to serious instances and a number were returned to the Commission for investigation and/or report. At this stage it would appear that the subsection (d) to (h) notifications are not excessive but this situation will have to monitored carefully.

26. In conclusion, although "improper conduct" can be considered a nebulous term, all in all it has served the Commission and other entities throughout Australian reasonably well. In instances in which its meaning was unclear, there are a number of cases including High Court decisions which can assist in its interpretation.

NOTIFICATIONS RECEIVED BY THE COMMITTEE AND THE PARLIAMENTARY COMMISSIONER – OTHER JURISDICTIONS

27. In considering the notification process, it is of assistance to consider other jurisdictions - some of which have different processes. Under the Western Australian regime it is only the Parliamentary Inspector who is notified. Under the Victorian regime only the Victorian Inspectorate is notified. The Inspectors may report to the relevant Committee on any matters of which they have been notified. It should be noted that the Victorian Inspectorate has a staff of 16 and the Western Australian Office of the Inspector of the Corruption and Crime Commission has a staff of two. However, unlike Queensland, the Western Australian Inspector is not required to undertake the extensive auditing of its Corruption and Crime Commission's records. A comparison of notifications indicates that Western Australian Inspector received 54 notifications in the 2016-2017 financial year. The Victorian Inspectorate received 38 notifications in 2013-2014, 23 in 2014-2015 and 32 in 2015-2016. Queensland received 13 notifications in 2014-2015, 28 in 2015-2016 and 12 in 2016-2017.

<u>Western Australia and Victoria</u>

28. In Western Australia, pursuant to s. 196(4) of the *Corruption, Crime and Misconduct Act 2003*, the Corruption and Crime Commission (WACCC) is required to notify the equivalent of the Parliamentary Commissioner - the Parliamentary Inspector:

196. (4) The Commission is to notify the Parliamentary Inspector whenever it receives an allegation that concerns, or may concern, an officer of the Commission and at any time the Parliamentary Inspector may review the Commission's acts and proceedings with respect to its consideration of such an allegation.

28. Similarly, in Victoria, pursuant to s. 71 of the *Independent Broad-based Anti-corruption Commission Act 2011* the Independent Broad-based Anti-corruption Commission (IBAC) is required to notify the equivalent of the Parliamentary Commissioner - the Victorian Inspectorate:

> **71 The IBAC to disclose to Victorian Inspectorate complaint or notification involving conduct of the IBAC or IBAC Officers**
>
> The IBAC must notify the Victorian Inspectorate of any complaint or notification to the IBAC if that complaint or notification involves conduct of—
>
> (a) the IBAC; or
>
> (b) any person who is, or was at the time of the conduct, an IBAC Officer.

29. Until the 1 July 2014 amendment to s. 329, notification under the *Crime and Misconduct Act* was only required to the Parliamentary Committee. The additional requirement under the *Crime and Corruption Act* to also notify the Parliamentary Commissioner enables the Parliamentary Commissioner to determine whether a matter ought to be investigated on his or her own initiative pursuant to s. 314(4). Although the Parliamentary Commissioner's role in the accountability process was enhanced by the 1 July 2014 amendment, I endorse the view expressed by the then Parliamentary Criminal Justice Commissioner, Ms Julie Dick SC (see paragraph 5) that it is the Committee which should have the primary role in the accountability regime.

30. In a submission to the Legal Affairs and Community Safety Committee concerning the Crime and Misconduct and Other Legislation Amendment Bill 2014 dated 30 March 2014, Mr Robert Needham (former Parliamentary Commissioner and CMC Chairperson) discussed the importance of the Committee as the primary oversight body for the Commission:

> *The oversight role over the Commission was properly given by the Criminal Justice Act to the Parliamentary Committee and maintained ever since. It was found that some practical difficulties, confidentiality, etc, necessitated the appointment of a person to act as the agent of the Committee to look more closely into matters within the Commission and report to the Committee. This included any necessary investigations of allegations of misconduct involving the Commission or its officers.*
>
> …
>
> *However, the oversight role was the Committee's;* [as Parliamentary Commissioner] *I was its agent. It is appropriate that the Committee should determine when and how its investigations are to be carried out.*
>
> *It is the Committee that is responsible for the carrying out of its functions to the Parliament and ultimately, through Parliament, to the people.*[11]

[11] Submission No. 007 to Legal Affairs and Community Safety Committee, *Crime and Misconduct and Other Legislation Amendment Bill 2014*, 30 March 2014.

31. I have compared the notification obligations under the Western Australian legislation (when it receives an allegation that concerns, or may concern, an officer of the Commission) and the Victorian legislation (any complaint or notification that involves conduct of the IBAC or an IBAC Officer). In my view both of those provisions are too broad and could lead to an excess of trivial complaints being received. The position under s. 329 is preferable as the conduct in respect of which notification is required is qualified such that it must be conduct that the notifier suspects involves, or may involve, improper conduct.

32. In my view the Committee should remain the first recipient of all notifications and I agree with the opinions expressed by Ms Dick and Mr Needham in that the Parliamentary Commissioner is, in a sense, the agent of the Committee and *"It is the Committee that is responsible for the carrying out of its functions to the Parliament and ultimately, through Parliament, to the people"*. [12] On a practical level, many notifications do not require extensive investigation and many are returned to the Commission for its attention.

Duty to Notify in Various Jurisdictions

Queensland

33. Section 329 requires that the Parliamentary Committee and the Parliamentary Commissioner must be notified of *"all conduct… that the notifier suspects involves, or may involve, improper conduct"*. This obligation means that notification is required not just of allegations received (Western Australia) or complaints and notifications received (Victoria), but also of any information coming to the notifier's attention – including information from within the Commission. (Refer to paragraph 9 above.) This position remains essentially unchanged since the original CJC Protocol from 1999.

34. In its 2013 Report on the *Inquiry into the Crime and Misconduct Commission's release and destruction of Fitzgerald Inquiry documents* the PCMC noted that then s. 329 was couched in subjective terms such that the Commission Chairperson (now the notifier) was required to notify the Committee of conduct only if it was suspected that conduct involves, or may involve, improper conduct. The PCMC considered it would be more appropriate for the reporting obligation to arise once there is an allegation of improper conduct. The Committee could then decide how any investigation ought to proceed.

35. The view that every allegation of improper conduct must be reported was not reflected in the subsequent amendments to s. 329. I consider there is some merit in the existing legislative requirement to have the notifier make an assessment as to whether it is suspected that conduct involves, or may involve, improper conduct. That assessment will identify trivial and/or baseless allegations and information which need not occupy the Committee's valuable time. This indulgence, so to speak, in favour of the Commission leaves open the perception that the Commission may select to not refer matters which should be referred. To overcome this perception, the Commission must be required (as they are) to maintain a register of all such allegations and information and a record of the reason it was not suspected the conduct involves, or may involve, improper conduct.

36. This information is already provided to the Committee and the Parliamentary Commissioner on a bi-monthly basis pursuant to terms of the present Protocol:

[12] Ibid.

The CCC records will include details on any complaints or information concerning possible improper conduct by a commission officer or former commission officer in relation to which the notifier did not form the requisite suspicion under s. 329 of the Act.

The CCC will provide the PCCC and Parliamentary Commissioner with a register of complaints/information against CCC staff at regular intervals.

37. Between the s. 329 notifications and this Register of complaints and information in relation to which the notifier did not form the requisite suspicion, the Committee and the Parliamentary Commissioner will be advised of all complaints or information concerning possible improper conduct within the Commission.

Western Australia

38. In Western Australia pursuant to s. 196(4) of the *Corruption, Crime and Misconduct Act* the WACCC must notify the Parliamentary Inspector *"whenever it receives an allegation"* that concerns, or may concern, an officer of the Commission.

39. Prior to 2015, the WACCC construed this reporting obligation narrowly. The WACCC *"restricted the notification of an allegation to the PI* [Parliamentary Inspector] *to those circumstances in which the CCC itself unilaterally determined that the subject-matter of an allegation would constitute misconduct if substantiated."*[13] The unilateral determination of the WACCC is similar to the assessment by the notifier under s. 329 as to whether it is suspected that conduct involves, or may involve, improper conduct. However, unlike in Queensland, the Western Australian Parliamentary Inspector was not provided with a record of other allegations which the WACCC determined would not constitute misconduct if substantiated.

40. To correct this omission, the approach taken in Western Australia was to formulate a Protocol which specified in more detail than s. 196(4) of the *Corruption, Crime and Misconduct Act*, the information that must be notified to the Parliamentary Inspector. In June 2015 the Joint Standing Committee on the Corruption and Crime Commission tabled a report in the Western Australian Parliament annexing the reporting Protocol agreed upon by the Parliamentary Inspector and the Commissioner of the WACCC.[14]

41. As a result, pursuant to the Protocol the WACCC's reporting obligation to the Parliamentary Inspector includes a more specific category of matters:

    1. *The subject of this Protocol is any matter or information received in any way by the Commission which concerns, or may concern, the conduct, by act or omission, publicly or privately, of an officer of the Commission in an adverse manner in that it may, directly or indirectly, reflect adversely upon the person's fitness for office as an officer of the Commission.*[15]

[13] *The Operation of Section 196(4) of the Corruption and Crime Commission Act 2003*, Report No 20 Joint Standing Committee on the Corruption and Crime Commission, June 2015, at page 9.
[14] Ibid.
[15] Ibid at Annexure A – Protocol, paragraph 1.

And pursuant to paragraph 6, the reporting obligation is not restricted only to allegations but also includes matters or information from within the WACCC:

> 6. *If the Commission becomes aware of a matter or information of a kind described in [1] from other than a source external to the Commission, the Parliamentary Inspector is to be notified of it in accordance with [3] and [4] of this Protocol.*[16]

43. Under the Western Australian Protocol, upon reviewing a notified matter, the Parliamentary Inspector may remove the matter from the Commission to himself for consideration and determination. The Protocol states, to the effect that, if the Parliamentary Inspector does not remove the matter, the default position is that the WACCC will investigate the matter internally and inform the Parliamentary Inspector of its final determination.

44. According to the Parliamentary Inspector's most recent Annual Report, in the 2016-2017 financial year the Parliamentary Inspector was notified under s 196(4) of the *Corruption, Crime and Misconduct Act* of 54 allegations made against WACCC officers. The allegations included misconduct, unfair or incorrect use of powers, inadequate assessment or investigation of complaints made to the Commission, alleged incompetence, and alleged corruption of Commission officers.[17] The report does not indicate how many matters the Parliamentary Inspector removed from the WACCC to himself for consideration and determination.

Victoria

45. In Victoria the IBAC must notify the Victorian Inspectorate of any complaint or notification to the IBAC which involves conduct of the IBAC or an IBAC officer. There is no requirement to notify the Victorian Inspectorate of information originating from within IBAC. The definitions of "complaint" and "notification" relate to corrupt conduct so the reporting obligation for IBAC would also involve an initial assessment similar to the assessment made by the notifier under s. 329. However, there is no requirement to provide details of complaints and notifications which are assessed as not relating to corrupt conduct of the IBAC or an IBAC officer. In the 2015-2016 financial year the Victorian Inspectorate received notifications from IBAC of 32 complaints against IBAC officers.

PROTOCOLS GOVERNING THE REPORTING OF IMPROPER CONDUCT COMPLAINTS AGAINST OFFICERS OF THE COMMISSION – PRIOR CONDUCT

Conduct of a Commission officer prior to employment by the Commission

46. An issue which has arisen this year is whether the Commission is required to notify the Committee and the Commissioner of an officer's improper conduct prior to employment by the Commission. Section 329(1) presently states that the relevant notifier "*must notify the parliamentary committee and the parliamentary commissioner of all conduct of a*

[16] Ibid at Annexure A – Protocol, paragraph 6.
[17] *Annual Report 2016-2017*, Parliamentary Inspector of the Corruption and Crime Commission, page 3.

person … that the notifier suspects involves, or may involve, improper conduct." The issue to be determined is whether the requirement to notify refers also to conduct prior to the period of a Commission officer's employment, secondment or engagement by the Commission (prior conduct).

The Commission's position re prior conduct

47. I understand the Commission has expressed the view that s. 329 does not require notification of prior conduct. The Commission is concerned that the obvious practical difficulty with interpreting s. 329 to apply to prior conduct is that the obligation to notify becomes unlimited in time and it is difficult to determine what instances of prior conduct must be notified.

48. It would be of assistance to know how many such matters are received by the Commission each year. Perhaps this point could be clarified by the Committee inquiring of the Commission as to how many matters of the above nature have been received by the Commission in the past five years. It may be that these notifications are recorded in the Register of complaints discussed above at paragraph 36.

49. I also understand that the Commission obtained an Advice[18] on this issue which is consistent with its view. It would be of assistance if the Commission would be prepared to waive the legal and professional privilege, if any, which attaches to that Advice and provide the Committee and myself with a copy of the Advice.

CONCLUSION

50. As explained in paragraph 24 there is no express definition of "improper conduct" in the Act. Instead, s. 329(4) provides a number of general subsections ((a) (b) and (c)) with respect to improper conduct followed by a series of subsections ((d) to (h)) which provide specific details of conduct that amounts to improper conduct. Although it could be argued to be a nebulous term, "improper conduct" is incorporated in a wide range of Acts both in Queensland and the Commonwealth (see paragraph 21 above). Those Acts deals with industries such as the tattoo industry (*Tattoo Parlours Act 2013 (Qld)*) and conduct regulated by the *Fair Work Act 2009 (Cth)*. In most of those Acts there is no express definition of improper conduct. Instead they set out specific behaviour which is determined to be improper conduct. In instances where the meaning is unclear, the term has been considered by the High Court and other courts. Generally speaking the term "improper conduct" functions well within most of those legislative regimes, including the regime under the *Crime and Corruption Act*. It has served the Committee, the Commission and the Parliamentary Commissioner reasonably well to date. My view is that there is no need for any change.

51. As discussed at paragraph 19, in 2014 the definition of "improper conduct" was widened to include improper conduct with respect to various procedural and managerial issues in relation to the operation of the Commission. To date those changes have not resulted in a marked increase in improper conduct notifications. However the situation needs to be monitored to ensure that the Committee is not overwhelmed with notifications of less

[18] See letter from Mr Forbes Smith to the Chair of the Parliamentary Crime and Corruption Committee dated 17 May 2017 at page 4.

significant matters relating to procedures and management. For the time being, however, my view is that the regime operates in accordance with the Act in that the Committee is the primary oversight body and the Parliamentary Commissioner assists the Committee. The position should be monitored however, as at the date of this submission, no changes are required.

52. Further with respect to the issue of the notification regime, notwithstanding the necessity for an initial assessment by the notifier, I consider the requirement for the Commission to notify of *"all conduct… that the notifier suspects involves, or may involve, improper conduct"* is appropriate. This is so as the Commission is required to maintain and provide to the Committee and the Parliamentary Commissioner a Register of all complaints in relation to which the notifier did not form the requisite suspicion. (See paragraph 36.) As a result with the combination of the actual section 329 notifications and the Register entries the Committee and the Parliamentary Commissioner are apprised of all relevant matters.

53. With respect to the issue of "prior conduct", the views expressed in this submission are preliminary only, given that I have not had the benefit of considering the Advice the Commission received in relation to prior conduct. (See paragraph 49 above.) I respectfully request that the Committee consider requesting a copy of that Advice.

54. I trust that the above comments are of assistance to the Committee in the conduct of its Review.