Submission No 221

Inquiry into potential reforms of National Security Legislation

Organisation: **WA Corruption and Crime Commission**

CORRUPTION AND CRIME COMMISSION

15 October 2012

Mr Jerome Brown
Secretary
Parliamentary Joint Standing Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Mr Brown

SUBMISSION BY MR NOEL CRICHTON-BROWN

Last week the Commission's attention was drawn to a submission made by Mr Noel Crichton-Browne to the Parliamentary Joint Standing Committee on Intelligence and Security ('PJCIS') that is available on the website (submission number 202).

Mr Crichton-Browne is perfectly entitled to have made a submission to the PJCIS. However, that submission contains errors that the Commission feels compelled to correct.

Please find enclosed a response to Mr Crichton-Browne's submission that the Commission would respectfully request you also make publically available.

Yours faithfully

Roger Macknay QC
COMMISSIONER

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FURTHER SUBMISSION BY THE CORRUPTION AND CRIME COMMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY IN RESPONSE TO MR NOEL CRICHTON-BROWNE'S SUBMISSION

The Commission refers to Mr Noel Crichton-Browne's submission to the PJCIS. This submission contains a number of serious flaws and errors. Before addressing some of these the Commission highlights that the Committee should exercise care when weighing any submission from Mr Crichton-Browne.

The Commission responds to a number of matters raised by Mr Crichton-Browne in his submission to the PJCIS as follows:

'The CCC frequently uses intercepted telephone conversations enabled through warrants relating to 'serious offences' in its public hearings in respect to inquiries relating to matters of allegations of misconduct by public servants.'

The Commission can only obtain telecommunications intercept warrants in relation to a suspicion of the commission of a serious offence and intercepted information has lawfully been utilised in public examinations in relation to allegations of misconduct by public officers on occasion.

Since its inception in 2004 the Commission has conducted a total of sixteen public examinations. Only six of these involved the use of telecommunications interception material.

'The CCC's habit is to not only use and play telephone conversations at public hearings in matters of public servants alleged misbehaviour, it uses the intercepts for matters entirely unrelated to the purpose for which the warrant was originally sworn'

This comment minimises the serious misconduct the Commission has investigated to 'alleged misbehaviour', significantly misrepresenting the scope of the Commission's work. The alleged misconduct in this particular matter related to obligations in relation to disclosure of electoral funding and whether decision making processes in government had been improperly influenced by lobbyists.

Mr Crichton-Browne seems to imply that the Commission's use of telecommunications interception material for matters entirely unrelated to the purpose for which the warrant was originally sworn is improper.

It is not unlawful for the Commission to use information obtained pursuant to warrants issued under the *Telecommunications (Interception and Access) Act 1979* ('TIA Act') for other purposes. The TIA Act is very clear on this.

Section 67 gives an agency which holds telecommunications intercept material the power to use it for a 'permitted purpose'. 'Permitted purpose', as defined in section 5(1)(g) in the case of the Commission is an investigation under the *Corruption and Crime Commission Act 2003* ('CCC Act') into whether misconduct (within the meaning of the Act) has or may have occurred, is or may be occurring, is or may be about to occur, or is likely to occur; or a report of such an investigation.

The following was contained in the Commission's report on an Administrative Matter relating to the Functions of the Commission:

> *The Commission's Smiths Beach investigation into allegations of serious misconduct commenced in September 2005. It was initially concerned with the dealings of Canal Rocks Pty Ltd and the lobbyists Messrs Burke and Grill with local councillors and council officers. However, it soon became apparent that the lobbyists' activities and strategy were multi-stranded and extended to other public officers..... It is therefore simply incorrect for the Parliamentary Inspector to assert (as he does at [12] of the Allen Report) that neither of their examinations "had anything to do with the original purpose of the CCC's investigations, for which it had obtained TI and SD warrants", nor that they were "entirely collateral matters".*[1]

'...the unanimous view of the Parliamentary oversight committee of the CCC that CCC public hearings are now to be held rarely and the spankings it has received from successive Parliamentary Inspectors is in considerable part the result of the manner of its use of telephone intercepts.'

The Commission has never had any allegation as to the misuse or abuse of telephone interception product in public hearings brought or substantiated against it.

The terms of reference for that particular Joint Standing Committee of the Corruption and Crime Commission ('JSCCCC') inquiry into the use of public hearings were:

- What factors the Commission of the CCC takes into account when deciding whether or not to conduct a public hearing;
- How the CCC preserves procedural fairness in conducting public hearings;
- How the CCC's practices in this regard compare to other jurisdictions;
- Whether the CCC should maintain a statutory discretion to conduct public hearings in the conduct of its misconduct function and
- If so what statutory criteria should apply.

[1] Page 28

Clearly the Commission's use of telephone interception did not form part of this inquiry.

The Parliamentary Inspector being critical of the use by the Commission of public hearings, which is a discretionary decision by the Commissioner, does not amount to criticism of the utilisation of telecommunications intercepts.

'The effect of the principal findings of the Committee into the matter of public hearings is that in future, public hearings of proceedings of the CCC will occur only in very rare circumstances.'

The recommendation from the JSCCCC that I believe Mr Crichton-Browne is referring to is that the Commission should engage a 'weighing process' when deciding whether to conduct a public examination. This in fact reflects the legislative requirement pursuant to section 140(2) of the CCC Act.

The vast majority of Commission examinations are conducted in private.

'The further matter of concern to me is that once the CCC has sought and obtained intercepts it may use them as it wishes provided it is certified it is in the public interest to do so.'

This is legislatively incorrect. The Commission's use of telecommunications intercept material is very tightly constrained under the provisions of the Commonwealth legislation. Whilst section 152(4)(c) of the CCC Act gives the Commissioner discretion to release material in the public interest the Commonwealth TIA Act overrides this provision and the relevant provisions governing use and disclosure under this Act clearly apply.

The Commonwealth facilitates obtaining transcripts by agencies and loses control over their subsequent distribution and use – the matter then apparently becomes the subject of State legislation.

Again this is not a matter for state legislation as to the circumstances in which the Commission utilises telecommunications intercept material, it is the Commonwealth legislation.

Mr Crichton-Browne raises the matter of the Commission providing intercepts to a Committee of the Western Australian Parliament, which was a Select Committee. This telecommunications interception material to which Mr Crichton-Browne refers was disclosed lawfully to the Select Committee.

The proceedings of the Select Committee are an 'exempt proceeding' under that TIA Act and lawfully intercepted information can be given in evidence pursuant to section 74 of the TIA Act.

The Select Committee on Privilege was appointed to inquire into and report on whether there had been any disclosure of deliberations of the Standing Committee on Estimates and Financial Operations relating to a proposed inquiry into the State's iron ore industry.

The inquiry aimed to determine whether any members of the Committee breached parliamentary privilege by disclosing deliberations of the Committee.

Commission officers who were involved in this investigation gave evidence at the Committee hearings including evidence of telecommunications interception material.

The Committee found that:[2]

- Mr Noel Crichton-Browne made an unauthorised secondary disclosure of the deliberations of a meeting of the Standing Committee on Estimates;
- There were inconsistencies in the evidence given by Noel Crichton-Browne in his two appearances before the Committee;
- Mr Noel Crichton-Browne gave false answers to questions asked by the Committee; and
- The false answers were a contempt of Parliament.

As a result of this inquiry the Committee recommended that:

- The Legislative Council order Mr Noel Crichton-Brown to provide an unreserved written apology to the Legislative Council for a secondary unauthorised disclosure of the deliberations of the Standing Committee on Estimates and Financial Operations;
- The Legislative Council Order Mr Noel Crichton-Browne to provide an unreserved written apology to the House for giving false evidence to the Committee; and
- That the Legislative Council direct the Attorney General to assess whether to conduct a prosecution against Mr Noel Crichton-Browne under section 57 of the Criminal Code for giving false evidence to the Committee.

[2] Report: Select Committee of Privilege on a Matter arising in the Standing Committee on Estimates and Financial Operations, November 2007, pp. xxi - xxii

'..The Commission compels the attendance of witnesses without disclosing the purpose of the hearing, ambushes the witnesses with detailed questions of events which may have occurred earlier of which it already has the answers, the plays the tapes as a method of entrapment and to provide the media with salacious headlines.'

This is an incredibly affronting misrepresentation of the situation by an individual who is aggrieved as a result of his dealings with the Commission.

Mr Crichton-Browne has previously been a witness before a Commission public examination, namely the Smiths Beach Inquiry. As a result of the Commission's investigation and public examinations the State Government banned public servants' contact with the former Liberal senator.

On 20 March 2007 The Australian reported that the ban coincided with a warning by former Commissioner Hammond once the conduct was exposed throughout the Commission's investigation:

> *'...Mr Hammond said it was inevitable charges would be laid following disclosures at a continuing CCC inquiry that have led to the sacking of three ministers, the dumping of a Liberal frontbencher, the tainting of other MPs and the forcing of senior public servants from office.*
>
> *Phone taps were central to exposing corrupt activities ranging from ministers leaking confidential cabinet information through to improper influence being exerted on state and local government decisions'.*
>
> *As well as destroying state ministers, the fallout from the CCC hearings triggered a new focus on morality in politics that indirectly snared two federal ministers.'*

The Commission only uses telecommunications intercept material as an investigative tool. It confronts witnesses with the material if it is believed they are not being wholly truthful in their evidence to the Commission. The material is certainly not used for the purpose of 'salacious headlines' or 'entrapment'.

The Commission may only conduct examinations in public if is satisfied that the requirements of section 140(2) of the CCC Act are met in that the Commission, having weighed the benefits of public exposure and public awareness against the potential for prejudice and privacy infringements, it considers it is in the public interest to do so.

During the course of the Smith's Beach public examinations, and in furtherance of the public interest the Commission published a transcript of proceedings on its website, which included portions of the transcripts of the telecommunications intercept material given in evidence during the hearing. The Commission did not

provide access to audio recordings of the telecommunications intercept material on its website. The Commission gave the media a limited number of audio recordings, those that it considered necessary to advance the investigation and ensure fair and accurate reporting.

This was done in a highly controlled environment in which specific requests were made by the media for particular calls and each request was scrutinised and release approved by the Commission's Executive. The Commission certainly did not hand out voluminous amounts of material to gain salacious headlines.

The Commission imposes stringent controls on all of this material.

In providing access to a limited number of audio recordings the Commission is very careful to ensure that telecommunications intercept material is not misused. The Commission's website requires any person who seeks access to telecommunications intercept material to read and acknowledge warnings and the media sign acknowledgments of these warnings outlining the strict provision of the TIA Act.

As matters stand the CCC is beyond scrutiny of its conduct in respect to telecommunication interception warrant information or lawfully intercepted information under the TIA Act.

As Mr Crichton-Browne correctly states at page 11 of his submission the TIA Act does not permit the Parliamentary Inspector to generally audit or otherwise have general access to interception warrant information.

Mr Crichton-Browne states that the restriction makes it impossible for a complaint to be investigated.

This is incorrect. If an allegation of misconduct on behalf of a Commission officer is raised with the Parliamentary Inspector the Commission can provide telecommunications intercept material to the Parliamentary Inspector pursuant to section 68(k) of the TIA Act.

The role of oversight and auditing is performed by the State Ombudsman who is required to report to the Commonwealth Ombudsman and the Commonwealth Attorney-General's Department.

'The powers provided to the Ombudsman in respect to intercept warrant information is restricted to statistical information and is entirely irrelevant in respect to the scrutiny of the conduct and activities of agencies such as the CCC'

The Commonwealth TIA Act regulates the interception of telecommunications. The Western Australian TI Act is complementary legislation that was enacted in 1996 to enable law enforcement agencies in WA to obtain TI warrants.

The Commission is a declared agency that can apply for TI warrants under section 34 of the TIA Act. Section 35 of the TIA Act outlines the preconditions that are required before an agency can be declared. Section 35 requires State legislation that imposes very onerous obligations and requirements on an eligible authority, including the requirement for regular inspections of the agencies' TI records.

The WA TI Act establishes a rigorous scheme for the inspection of the Commission's TI records, giving the 'principal inspector'[3] responsibility for inspecting all the TI records. The Principal Inspector must inspect the Commission's records at least twice during the financial year and to report to the WA Attorney-General as to the results of the inspections. The Principal Inspector reports on any contravention of a provision of the Commonwealth TIA Act. Pursuant to sections 13 and 14 of the WA TI Act the principal inspector's powers include the entitlement to full and free access to all records of the eligible authority and examination power.

'...law enforcement officers are not beyond colourful and exaggerated claims in affidavits. Judgments and assessments are often subjective.'

Applications for telecommunications interception warrants are taken very seriously by the Commission and they undergo a rigorous internal screening process prior to the application even being made. A Commission officer will only provide information in a sworn affidavit that they reasonably suspect is connected to the commission of a serious offence.

To suggest Commission officers would make 'colourful and exaggerated claims' in affidavits is completely unwarranted and unsubstantiated.

[3] The 'principal inspector' in WA is the Ombudsman