Submission No 202

Inquiry into potential reforms of National Security Legislation

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Mr Jerome Brown
Secretary
Joint Standing Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

Dear Mr Brown

I write for the purpose of providing your Committee with a submission in respect to its reference; "Inquiry into potential reforms of National Security Legislation".

My submission bears on the Committee's review of the Telecommunications (Interception and Access) Act 1979 and in particular:

My principal concerns are the lack of transparency of the grounds upon which warrants to intercept telecommunications are granted particularly in respect to interception for "serious offences"; the authority of the Western Australian Corruption and Crime Commission to provide intercepted telecommunications to others by the mere act of certifying that it is in the public interest to do so; the use to which intercepted communications have been put by at least one agency (CCC) and the lack of reasonable privacy considerations.

This submission dwells in considerable part upon the activities of the Western Australian Corruption and Crime Commission. That in large measure is the inevitable result of author's experience and knowledge of that agency.

In addressing the use of interception for serious crime under the heading of *Effectiveness of lawful covert access to communications* at page 14, the Attorney General's Departmental Discussion Paper states:

"Lawful interception and access to telecommunications data are cost-effective investigative tools that support and complement information derived from other methods.

In 2010-2011 there were 2441 arrests, 3168 prosecutions (2848 for serious offences) and 2034 convictions (1854 for serious offences) based on lawfully intercepted material. Law enforcement agencies made 91 arrests, 33 prosecutions and obtained 33 convictions based on evidence obtained under stored communications warrants.

These figures may underestimate the effectiveness of interception because a conviction can be recorded without entering the intercepted material into evidence. Interception also allows agencies to identify criminal connections, co-conspirators and organised crime associates and assists in establishing the methodology of criminal enterprises. It also plays an important role in identifying child exploitation material, sexual slavery and terrorist organisations. The figures are specific to law enforcement agencies and do not take into account the use of intercepted information by ASIO in carrying out its functions (which is reflected in ASIO's classified annual report).

Telecommunications data is commonly the first source of important lead information for further investigations and often provides a unique and comprehensive insight into the behaviour of persons of interest".

Curiously the Discussion Paper does not disclose the number of interceptions which led to these 2010-2011 statistics nor does it disclose the occasions warrants were obtained in respect to serious offences which did not result in prosecutions for serious offences. It need not be said that warrants may not be obtained for "fishing expeditions".

At page 15 of the Discussion Paper the reader is given an understanding of the nature of "serious crime". Particular reference is made not only to narcotic crimes, but also to murder, kidnapping and offences involving serious personal injury. Statists of victims of assaults, sexual assaults and robberies are provided.

1.3 Serious offences and serious contraventions – Commonwealth and State

The precursor to the TIA Act focused on national security but with the emerging national drug crisis in the 1970s the current Act was passed to ensure that interception powers were also available to the Australian Federal Police to investigate narcotic offences. Since its enactment the TIA Act has been amended to allow a broader range of law enforcement agencies to intercept communications to investigate other serious offences.

Under the TIA Act, serious offences generally include Commonwealth, State and Territory offences punishable by imprisonment for seven years or more. Particular examples of serious offences for which interception can be obtained are murder, kidnapping and offences involving serious personal injury. There are also a range of other offences defined as serious offences in the TIA Act where the use of the Australian telecommunications system is integral to the investigation of the offence.

According to the Australian Institute of Criminology (the AIC), in 2010 there were 260 victims of homicide in Australia. There were also:

- *171,083 victims of assaults,*
- *17,757 victims of sexual assaults; and*
- *14,582 victims of robberies*

At page 16 of the Discussion Paper, particular reference is made to organised crime, its overall threat to Australia and the enormous cost of such crime.

1.4 Organised crime
An interception warrant can also be sought to detect, investigate, prevent and prosecute persons involved in organised crime. Serious and organised crime refers to offences that involve two or more offenders, require substantial planning and organisation and the use of sophisticated methods and techniques and are committed in conjunction with other serious offences.

The Australian Crime Commission (ACC) in its 2010 report Organised Crime in Australia, assessed the overall threat to Australia from organised crime as "High", 11 estimating the cost of such crime at $10 to $15 billion per year.

One might conclude from this outline of matters as they relate to "serious offences" that telecommunication intercepts are used only for and limited to a category of crimes of a particularly grave nature.

The truth is of course that these upper end crimes are not the only offences for which telecommunication intercepts are applied. Their description as set out in the Discussion Paper is liable to be misleading

I need not trace the genesis and history of the Telecommunications (Interception and Access) Act 1979 other than to observe that the legislation was initially introduced to deal with national security, later amended to address narcotics and has subsequently been further widened to include a long list of other offences.

Perhaps with some perspicacity, I voted in the Senate in 1985 against further extensions to the reach of the Telecommunications (Interception and Access) 1979 because I feared it would lead to further extensions and abuse of its provisions. I feel vindicated.

The consequential change in the character of the legislation has led to exclusive Commonwealth authority to intercept telecommunications being replaced by that authority extending as the Discussion Paper notes, to *"seventeen Commonwealth, State and Territory agencies. The AFP and State and Territory police forces have access to interception powers as part of a nationally consistent approach to combating serious crime. The remaining agencies are a mix of agencies whose functions relate to investigating police integrity, anti-corruption and serious and organised crime"*.

This statement is true as far as it goes however that is not the limit of the use of telecommunication intercepts by agencies and nor is it the limit of the purpose of some of these agencies.

The Western Australian Corruption and Crime Commission (CCC) is one such agency. The main purposes of this Act are-

(a) to combat and reduce the incidence of organised crime; and

(b) To improve continuously the integrity of, and to reduce the incidence of misconduct in the public sector.

It might seem at first blush that the CCC's function in respect to the public sector is immaterial to the question of its interception powers. That is not so.

The CCC frequently uses intercepted telephone conversations enabled through warrants relating to 'serious offences' in its public hearings in respect to inquires relating to matters of allegations of misconduct by public servants. Misconduct ought not be confused necessarily with criminal behaviour. Misconduct includes minor misconduct.

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.

As the Act presently stands, (and I restrict myself for the purposes of this submission to the CCC), once the CCC negotiates the initial hurdle of having to satisfy a Judge that information obtained by the interception of a person's electronic communications would be likely to assist in connection with the investigation by the agency of a **'serious offence'** or **'serious offences'**, in which the particular person is involved; or another person is involved with whom the particular person is likely to communicate using the service, the CCC may then use the intercepted communication information in respect to what may reasonably be viewed as minor matters.

I have not audited the comparative public use of telephone intercepts in various CCC references, however it is my impression that the overwhelming public use of intercepts is in matters relating to hearings into inquiries relating to investigations of alleged misconduct of public servants as opposed to hearings into serious offences. I have no doubt that in each instance warrants were obtained for 'serious offences'.

I should be interested to learn how many warrants for intercepts have been obtained for serious offences each year by the CCC, how many intercepts have been played in their hearings each year and how many criminal offences have been successfully prosecuted each year as a direct result of these intercepts.

It is not without significance that the government now has legislation before the parliament to strip the CCC of all its powers in respect to public sector misconduct save for serious misconduct which involves criminality.

The stripping of these powers, 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 of the Corruption and Crime Commission is in considerable part the result of the manner of its use of telephone intercepts.

The following section from page 24 of the Discussion Paper addresses the circumstances where certain offences do not meet the seven year threshold which should perhaps be included in the 'serious offences' category however the question of the use of material gathered for one purpose being used for another and in respect to matters which bear no relationship to the threshold required to obtain a warrant is not considered.

"While traditionally limited to an offence that carries a penalty of at least 7 years' imprisonment (a 'serious offence'), over time numerous legislative amendments have confused the policy in relation to the circumstances in which interception is available. There are occasions where the general penalty threshold is too high to cover a range of offences for which it is already recognised that general community standards would expect interception to be available. For example, child exploitation offences and offences that can only be effectively investigated by accessing the relevant networks (including offences committed using a computer or involving telecommunications networks) do not meet the general 7 year imprisonment policy threshold".

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 that it is in the public interest to do so.

Again, the Commonwealth having facilitated the obtaining of transcripts by agencies, in this case the CCC, loses control over their subsequent distribution and use. The matter then apparently becomes the subject of State legislation.

On a previous occasion I raised with the acting Parliamentary Inspector of the Corruption and Crime Commission, Ken Martin QC, the matter of the CCC having provided intercepts to a Committee of the Western Australian State Parliament.

Mr Martin responded in part in the following terms:

"At the end then, it seems to me that the statutory interpretation concerns you have raised about the CCC's provision by an officer or officers of the CCC as a relevant person or persons, of operational material to the Select Committee of the WA Parliament (whether following on from a request, or even unilaterally on the initiative of the CCC itself to do so, on the basis that that course is necessary in the public interest) is an outcome which has been envisaged by Parliament as open, provided the CCC's certificate is given".

Mr Martin was directing me to Sec 152(4)(c) of the Corruption and Crime Commission Act which provides that an officer ("relevant person") of the CCC may disclose "official information" when the CCC certifies that that is necessary in the "public interest".

As Mr Martin further noted "Whether that is an acceptable or even tolerable situation in a democracy, is not for me to say. Rather, it is a matter for our lawmakers".

I should be dismayed if the view were to be taken by the Committee that in the event that an agency were to obtain a warrant for an intercept, how and in what circumstances it is used is a matter for State legislation and of no moment to the architects of the originating empowering legislation.

It seems to me that there is a compelling case for Commonwealth legislators to be concerned for the ultimate outcome and consequence of granting agencies access to telecommunication interceptions.

It is my submission that there has been in the instance of the CCC, abuse by the CCC of the use of material obtained by telecommunications intercepts.

The JSCCCC reported to the Parliament that *"It is of significant concern to the Committee that this established practice runs somewhat counter to the provisions of the CCC Act. That the CCC ought to provide information to witnesses in advance of their being examined is made clear by section138(1) of the CCC Act".*

The JSCCCC further reported: *That witnesses are often "taken by surprise" was cited by multiple witnesses as being perhaps the most unsatisfactory aspect of the public examination process. In the words of one witness:*

Compounding the problems of the lack of procedural fairness is the acknowledged policy of the Commission not to give witnesses any notice or indication of the issues about which they are going to be questioned. In sworn evidence at the Magistrates Court, [a CCC investigator] said, "We try to provide as little evidence as possible, as little information as possible." When questioned, he agreed that this made it doubly difficult for people to be able to provide the information that they might have in their memory or in their files when they were not warned in any way about what they were to be questioned on.

The Committee also reported: *"Subsequent to this evidence, however, the Parliamentary Inspector made it clear to the Committee that he regarded the CCC practice of providing minimal information to witnesses as most concerning"*.

The Discussion Paper informs its readers: *"The exceptions to the general prohibition against interception recognise the need for national security and law enforcement agencies to access the information necessary to protect community safety and security. The limited focus of the exceptions reflects Parliament's concern to balance the competing right of individuals to freely express their thoughts with the right of individuals to live in a society free from threat to personal safety"*.

In March of 2012 the Western Australian Parliamentary Joint Standing Committee on the Corruption and Crime Commission (JSCCCC) reported on the use of public examinations by the Corruption and Crime Commission. The Report was the result of an inquiry by the JSCCCC brought about in some measure by the use of the publication in public hearings of intercepted telephone intercepts.

Former Parliamentary Inspector of the Corruption and Crime Commission and presently serving Governor of Western Australia, His Excellency, Malcolm McCusker AC CVO QC was particularly critical in his evidence to the Committee of the use of public hearings by the CCC. Mr McCusker gave evidence that:

There have been several instances where, in the course of public hearings, entire private telephone communications between individuals have been played, although only a comparatively small part could conceivably have had any true relevance to the investigation. In particular, such recordings have included (and faithfully reproduced) foul language, reflecting very badly on the user whose conversation has been intercepted, or slanderous or derogatory remarks. Such intercepted conversations have been reproduced, replete with profanities, by the media (and in any event are accessible by the public electronically). I fail to see how material of that nature, titillating though it may be to the media and the general public, could be said to be a "benefit" to be put in the balance against the potential for prejudice or privacy infringements.

The Honourable Chris Steytler QC, a former President of the Appeals Court of the Western Australian Supreme court and the Corruption and Crime Commission Parliamentary Inspector at the time of his giving evidence, also was highly critical of the manner and frequency in which the CCC used public hearings.

In respect to the various public hearings conducted by the CCC relating to a reference it had taken unto itself in which extensive telephone intercept tapes were played, Mr Steytler informed the Committee that:

"It also seems to me that that inquiry provides an example of the kind of inquiry in which there was no basis for having a public hearing or indeed any hearing. By the time the commission's preliminary investigations had concluded and the hearings had started—I was told this after the event, rather than before the event by the former commissioner—the commission had what it believed to be overwhelming evidence. If that was the case, it seems to me there was no need for a hearing of any kind and that evidence should simply have been made available to the prosecuting authorities".

An intended witness in the matter to which Mr Steytler refers who was well aware that his telecommunications and been intercepted and were to be played at a public hearing, committed suicide within days of receiving a summons to be publicly examined.

The public hearings in this matter and the consequent publication of private conversations were for no better purpose than a public show trial.

A regular feature of the public disclosure of telephone interceptions at public hearings by the CCC is for the purpose of entrapment. 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 years earlier of which it already has the answers, then plays the tapes as a method of entrapment and to provide the media with salacious headlines. As we know, the public love nothing better than to listen to the private conversations of others and the media love nothing better to report them.

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.

I labour the matter of the effect and consequence of public hearings by the CCC because in the first instance the CCC in these proceedings is not a judicial or prosecutorial body and almost invariably it has been the playing of intercepted telephone conversations which has caused the headlines and subsequent notoriety of the hearings.

It might not unreasonably be concluded that public hearings have been held for no better reason than the publicity the publication of intercepts will invite. As the Joint Parliamentary Committee noted in its report:

"A number of problems that have arisen out of past public CCC examinations are considered earlier in this report… The notion that opening a particular examination to the public is a sound method of punishing suspected misconduct is perhaps less obvious than some of these problems, but in the view of the Committee this is undoubtedly the most problematic of all aspects of public CCC examinations".

Mr McCusker in his written submission to the JSCCCC had this to say:

However, one must question why it is thought necessary, for the purpose of an investigation, that a "hearing" be held in public, for all the world to see and hear, and the media to report. As noted, police investigations are not conducted by "public hearings". Nor, in my opinion, should they be. The mere fact of being "publicly examined' is likely to cause distress, embarrassment, and damage to

reputation.

I totally agree with the opening remarks made by Mr Steytler QC in his evidence given on the 15 June 2011, TS2. In particular, I agree with his view that "it would be a very rare case in which a public hearing could be justified in the 'public interest'.

A casual observer of CCC hearings could never divine that the default position for hearings of the CCC is that they are to be held in private other than when the Commissioner considers it to be in the public interest to hold public hearings. Of course if they are held in private, the CCC does not get to publicly play its headline grabbing salacious private telephone conversations.

The behaviour of the CCC should be seen in the context of it being an investigative body, not a judicial body. The publication of intercepted telecommunications to which I particularly refer has not occurred in the prosecution of an offence.

Sec 23 of the Corruption and Crime Commission Act provides that:

23 . Commission must not publish opinion as to commission of offence

(1) The Commission must not publish or report a finding or opinion that a particular person has committed, is committing or is about to commit a criminal offence or a disciplinary offence.

(2) An opinion that misconduct has occurred, is occurring or is about to occur is not, and is not to be taken as, a finding or opinion that a particular person has committed, or is committing or is about to commit a criminal offence or disciplinary offence.

This question arose because Counsel Assisting the CCC used intercepted transcripts in public hearings to claim witnesses have lied to the Commission. As Acting Parliamentary Inspector Mr Zelestis made clear in a report to the Parliament, the CCC has no power to make findings or opinions.

In his report he stated: *"Not only is the Commission not given power to publish or report a finding or opinion that a person has committed an offence, but the Commission is expressly prohibited from publishing or reporting such a finding or opinion. However, there is much more to the prohibition in s.23 than this. The express terms of s.23 do not confine the prohibition to a formal expression of opinion at the end of a deliberative process. The nature and purpose of the prohibition are much more fundamental than that.*

The purpose of s.23 is clear. Allegations that a person has committed an offence, etc (including an offence under s.168 of the Act of giving false evidence to the Commission) are to be made and determined in courts and tribunals of competent jurisdiction. No power at all is given to the Commission in that regard. It would be inconsistent with a person's right to a fair trial upon an allegation of commission of an offence to allow the Commission to make public statements about the commission of offences. Thus, the prohibition in s.23 is of fundamental importance in preserving the basic elements of the system of justice that prevails in Western Australia".

As reported elsewhere, Mr McCusker in evidence to the Parliamentary Joint Committee stated: *"In any event, the Commission, being an investigative body, has neither the power to make a finding of misconduct, nor the power to take "disciplinary action". It can only make "recommendations". The body ultimately responsible for making a finding of misconduct, and in that event taking "disciplinary action" is the Public Service Commissioner"*.

As the Joint Parliamentary Committee observed: *"The role of the CCC is to improve the integrity of the Western Australian public sector; it is not the role of the CCC to determine whether or not a person has committed a criminal offence"*.

Mr McCusker provided an example to the Parliamentary Committee of the consequence of a failed public hearing in respect to two public servants, Frewer and Allen which in very large part rested upon telephone intercepts.

McCusker: *"In the cases of Messrs Frewer and Allen, I concluded that the CCC's investigation and reports were seriously flawed. In each case, the Commission made an "adverse report", and recommended that consideration be given to disciplinary action being taken against Mr Frewer and Mr Allen.*

In accordance with that recommendation, and the statutory requirements relating to the public service , the Public Service Commissioner appointed a very competent and experienced senior member of the Public Service (independent of Messrs Frewer and Allen) to conduct a full investigation.

The conclusion of that investigator, Mrs Petrice Judge, expressed in a very thorough and detailed report, after a full investigation, was that no basis existed for disciplinary action. Neither, she said, had a "case to answer". Her conclusions were, essentially, the same as the conclusions that I reached, independently of her. And she reached those conclusions without knowing mine, or my reasons.

I do not know whether the Commission (CCC) does "lack faith" in departmental investigations of alleged misconduct, but I am unaware, if it does, of any basis for it. Indeed, the very thorough investigation conducted by Ms Judge, independently and objectively, was in my opinion far superior in quality to the investigation conducted by the CCC, which resulted in its "adverse report", so damaging to Messrs Frewer and Allen that it destroyed their careers and traumatised their families.

In any event, the Commission, being an investigative body, has neither the power to make a finding of misconduct, nor the power to take "disciplinary action". It can only make "recommendations". The body ultimately responsible for making a finding of misconduct, and in that event taking "disciplinary action" is the Public Service Commissioner".

As Mr McCusker observed elsewhere, Mr Frewer and Mr Allen had their careers ruined, their reputations shredded and their families devastated.

The intercepts used to irreparably damage Mr Frewer and Mr Allen were obtained for allegations relating to 'serious offences'. The matters for which the CCC wrongly made an adverse report and recommended that consideration be given to disciplinary action being taken against them was minor misconduct and did not involve a criminal offence. It most certainly did not constitute a 'serious offence'.

It should not for the moment be understood that my submission is that Joint Standing Committee on Intelligence and Security may have a view about the determinations of the CCC following its use of transcripts in hearings however it is my strongest view that the manner and circumstances in which the CCC uses its Commonwealth legislation enabling powers and the consequences of that enabling legislation are matters for the Committee.

It is not with respect tolerable that the Commonwealth government having given agencies extraordinary powers then washes its hands of the consequences of the distribution of that extraordinary power. Nor is it tolerable for the Commonwealth to pass to the States and Territories, responsibility for the proper use of those extraordinary Commonwealth legislated powers- powers which go to the very heart of a fundamental tenet of an enlightened, sophisticated and modern democratic society- an intrinsic right to personal privacy of thought and word.

It is an obscene political notion that one government may create legislation which suspends all concepts and rights of privacy to then hand to another, the responsibility of monitoring the conduct of those who control that suspended right.

At page 23, the Discussion Paper addresses the matter of privacy protections and contemporary community expectations.

"Strengthening the safeguards and privacy protections in line with contemporary community expectations

Historically, the TIA Act has protected the privacy of communications by prohibiting interception except as allowed under the Act.

Over time the position of privacy in the interception regime has been affected by the balancing inherent in the Act between protecting privacy and enabling agencies to access the information necessary to protect the community. Where the balance between these objectives should lie is left to Parliament to decide.

The need to amend the Act to adapt to changes in the telecommunications environment has seen the range of exceptions to the general prohibition grow. Accordingly, it may be timely to revisit whether the privacy framework within the Act remains appropriate.

As people's use and expectations of technology have changed since the TIA Act was enacted in 1979, so community views about the types of communications that can be accessed and the purposes for which they can be accessed may also have changed.

Reviewing the current checks, balances and limitations on the operations of interception powers will ensure that the privacy needs of contemporary communications users are appropriately reflected in the interception regime.

Consideration is also being given to introducing a privacy focused objects clause that clearly underpins this important objective of the legislation and which guides interpretation of obligations under the Act. By taking these steps, the legislation will be positioned to meet the objective of protecting the privacy of Australian communications from unlawful access.

I respectfully disagree with the observations of Chapter two of the Discussion Paper in which it is observed that access to interception "is tightly regulated and, in relation to content, is limited to the investigation of serious offences under the authority of an independently issued warrant and subject to a range of oversight and accountability measures".

On the basis of that which is on the public record in Victoria and New South Wales, there is clearly a serious question about access to intercepts being "tightly regulated and, in relation to content, limited to the investigation of serious offences under the [effective] authority of an independently issued warrant and subject to an [effective] range of oversight and accountability measures".

In respect to the matter of the process by which the CCC is able to obtain warrants for the interception of telephone conversations I refer to what was known as the Smith's Beach inquiry.
Mr Steytler subsequently informed the JSCCCC in respect to the matter:

"The Smiths Beach inquiry did throw up a number of hearings which might have been held in private that were heard in public…. Equally, some of the hearings that took place damaged particular witnesses who were tarred by association or had allegations put to them which were subsequently proved to be unfounded. That showed—to me at least—that the commission tended to take an all-or-nothing approach to public hearings and it did not assess the public-private question by reference to particular witnesses, and in my opinion it should have done".

Mr McCusker stated: *"There has also been (for example, in the lengthy Smiths Beach investigation) a tendency to have every person called as a witness (even though not suspected of any wrongdoing) to be summonsed to a public hearing. No-one should be subjected to a public hearing unless the Commissioner is satisfied that there is a "public interest benefit" in publicly examining that person, outweighing the potential for prejudice to that person (or some other individual) by reason of the questions and the evidence to be given".*

As matters stand the CCC is beyond scrutiny of its conduct in respect to telecommunication interception warrant information or lawfully intercepted information under the Telecommunication (Interception and Access) Act 1979 (Com).

For the past three years the Annual Report of the Parliamentary Inspector of the Corruption and Crime Commission has contained the following provision.

s 195(1)(cc): audit any operation carried out pursuant to the powers conferred or made available by this Act

(cc) to audit any operation carried out pursuant to the powers conferred or made available by this Act.

This function enables the Parliamentary Inspector to audit all operations and investigations of the Commission, including those conducted pursuant to special powers conferred under the Act. However, it does not permit the Parliamentary Inspector to generally audit or otherwise have access to interception warrant

information or lawfully intercepted information under the Telecommunication (Interception and Access) Act 1979 (Com). The Parliamentary Inspector is only authorised to inspect such materials or information if misconduct on the part of the Commission, or any of its officers, is being investigated.

The legislative inability of the Parliamentary Inspector to conduct a general audit of interception warrant materials and the affidavits of evidence used by the Commission to gain warrants under the Telecommunications (Interception and Access) Act 1979 (Com) is a restriction imposed by this Commonwealth act, rather than any positive restriction imposed by s 196 of the Act.

The restriction imposed by the Commonwealth Act as set out by the Parliamentary Inspector effectively makes it impossible for a complaint to be investigated. Because the content of an affidavit cannot be known, it is for practical purposes quite impossible to make out a complaint. How might a complainant establish sufficient evidence of misconduct on the part of the Commission or any of its officers if the material necessary to do so is hidden from sight?

The powers provided to the Ombudsman in respect to interception 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.

It is I submit, absurd and dangerous that for all practical purposes, the CCC and all other such agencies are beyond scrutiny in such a critical matter. I can think of few other areas of government sponsored conduct where scrutiny is more critical.

It is my submission that the Parliamentary Inspector have access to interception warrant information or lawfully intercepted information under the Telecommunication (Interception and Access) Act 1979 (Com).

Acknowledging in certain circumstances it would be inappropriate for the public disclosure of affidavits such as where to do so may compromise informants or the operations of agencies or subsequent investigations such as organised crime, I further submit that the contents of the affidavit should in the normal course of events be disclosed at a later date upon request by the person whose phone calls have been intercepted.

It is presumably not beyond the wit of legislators to draft appropriate legislation. Presumably the Ombudsman or in the case of the CCC, the Parliamentary Inspector of the Corruption and Crime Commission may be appropriate arbitrators in determining that which may be reasonably disclosed.

Only a knave or fool accepts that the process is entirely without sin. Even federal court judges have been known to swear false affidavits. Law enforcement officers are not beyond colourful and exaggerated claims in affidavits. Judgments and assessments are often subjective.

Lest there be a sense of innocence and dare I suggest of naivety that agencies are invariably beyond reproach and that the grant of extraordinary powers to them may be provided without appropriate powerful safeguards, I offer the following evidence given to the Western Australian Parliamentary Joint Standing Committee on the Corruption and Crime Commission by Mr McCusker.

I appreciate that it does not directly bear upon the terms of your reference however when the Committee reflects upon the enormous weapon the Telecommunications (Interception and Access) Act 1979 places in the hands of such agencies it might contemplate what Commonwealth legislation provides proper and adequate safeguards for its citizens.

McCusker: “I am aware, in some detail, of a particular example of what in my opinion is, on the face of it, an abuse of the power to conduct a public examination.

In 2007 the CCC was conducting an investigation into certain matters concerning the City of Wanneroo, and possible impropriety (never established) by Messrs Brian Burke and Julian-Grill. A solicitor's client (TO) was asked to provide information said to be relevant to that investigation. He said that he was happy to produce the entirety of his files and to answer any questions at a private examination. The solicitor has provided me with the following information:

In the course of a telephone conversation between the solicitor and a CCC officer, the solicitor was told that TO had a prospect of avoiding being called to a public hearing if he could provide evidence implicating Mr Burke in some impropriety.

Subsequently, during the course of an interview of TO by officers of the CCC, he provided all of the information that he had, which could conceivably be relevant to the investigation. He made it clear that he was anxious to avoid a public hearing. He had already seen the damage done to individuals who were called before the Commission to be publicly examined, albeit they had not been guilty of any wrongdoing.

There seemed to be a general public perception that anyone called before the Commission for a public examination must be guilty of some impropriety. TO was told by the investigators, in the presence of his solicitor, that he was to be publicly examined, although that might be avoided if he were able to supply any evidence implicating Mr Burke in some impropriety. TO said that if he knew of any impropriety by Mr Burke he would tell the investigators, but he had no such knowledge.

A further interview took place on 30 January 2007. Again TO, in the presence of his solicitor, said that he knew of no evidence of any impropriety by Mr Burke, but if he had any such information he was willing to disclose it to the CCC. He repeated that he was happy to cooperate in any way that he could, because he wished to avoid a public examination.

On 8 February 2007 TO's solicitors wrote to the Commissioner, expressing concern that the client was being subjected to a public examination, with the

consequential likelihood of damage to his reputation and his company, because of the inevitable adverse publicity which accompanied the appearance of any person before the Commission at a public hearing.

TO was nevertheless subjected to a public examination on 12 February 2007. It was never alleged that he was guilty of any impropriety. He had provided all his files to the Commission; and no adverse finding was made against him in the CCC's ultimate report, a considerable time later. However, the mere fact of his appearance as a witness before the Commission in a public hearing caused him considerable distress, and he was subjected to questions by various acquaintances, implying that he must be guilty of some form of wrongdoing. His photograph appeared in the West Australian, the morning following his appearance before the Commission as a witness, alongside the photographs of Messrs Burke and Grill, and of equal size.

By this time, Messrs Burke and Grill were to say the least, "in odium", and for anyone to appear in a matter in which they were being investigated was likely to result in a conclusion of "guilt by association".

These matters have since been the subject of a complaint made on TO's behalf by his solicitors, initially to the CCC, and subsequently to the Parliamentary Inspector. The Parliamentary Inspector carried out an investigation of the complaint, and provided a detailed report to TO's solicitor".

The Parliamentary Inspector concluded:
"there is insufficient in the available evidence for me to conclude that there was any impropriety in the decision taken by the Commissioner to hold the hearing in public. Nor is there sufficient in the evidence to support the proposition that there was any impropriety attaching to (the decision of counsel assisting the commission) to call (TO) as a witness in the course of that public hearing. It consequently seems to me that I can take this issue no further".

"However, no-one from the CCC has ever explained to the solicitor or TO, just how it could be said that the *"benefits of public exposure and public awareness"* outweighed the "potential' (which was very real) *"for prejudice or privacy infringements"* in TO's case.

In my opinion, that was not a view which could reasonably have been held, prospectively, or justified retrospectively.

TO (I shall not state his full name, as he has had more than his fill of public exposure) is convinced that the threat of a public examination was used in an attempt to induce him to give evidence of impropriety against Mr Burke, He had no such evidence to give".

As High Court judge Dyson Heydon was on one occasion moved to observe*: "A major difficulty in setting up a particular court.., is that the separate court tends to lose touch with the traditions, standards and mores of the wider profession and judiciary ". Special courts he said "tend to become over enthusiastic about vindicating the purpose for which they were set*

up ". Some might be inclined to question whether the Corruption and Crime Commission risks falling into that category.

Noel Crichton-Browne