

**MISCONDUCT: FALSE AFFIDAVIT SWORN BY
AN OFFICER OF THE CORRUPTION AND
CRIME COMMISSION**

Sections 199 and 206 of the *Corruption, Crime and Misconduct Act 2003 (WA)*

21 December 2017

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1. SUMMARY

This is a report of my investigation of an allegation that on 3 April 2017 officer X, a principal investigator in the Corruption and Crime Commission, falsely swore an affidavit to obtain a warrant under the *Surveillance Devices Act 1998 (WA)* (SD Act) from a Judge of the Supreme Court of Western Australia (the Judge).¹

The allegation was made by another officer in the Commission and was compulsorily notified to me pursuant to s 196(4) of the *Corruption, Crime and Misconduct Act 2003 (WA)* (CCC Act). At the time of the notification, Commissioner McKechnie QC said he was investigating whether X had engaged in serious misconduct pursuant to s 4(c) of the CCC Act by having committed an offence against s 169 of the *Criminal Code (WA)* (Code).²

The investigation of the allegation determined the following central facts.

X swore his affidavit before a Justice of the Peace on 3 April 2017. In it he said that Commissioner McKechnie QC's written authorisation for the warrant application had been obtained and was attached, something the SD Act requires before an application is made. Those statements were false because Commissioner McKechnie QC's authority for the application was never sought. He would not learn of the application, or another made using the same affidavit, until 15 days later.

X placed his warrant application documentation before the Judge on 4 April 2017, and the warrant was issued. The Judge apparently failed to notice the absence of Commissioner McKechnie QC's written authority. No doubt his Honour accepted the sworn assertion in the affidavit that the authorisation had been obtained and that the document evidencing the authorisation was attached to the affidavit.

The Commission subsequently discovered that the expiry date for the warrant, set out in it, was incorrect. The Legal Services Directorate of the Commission dealt with this problem by writing a letter to the Judge in which it described the error and requested the revocation of the warrant and the issue of a new warrant. Accompanying this letter was a copy of X's affidavit used in the first application, and a new draft warrant with the correct expiry date.

The Judge revoked the first warrant and issued the new warrant on 7 April 2017, despite the continuing absence of Commissioner McKechnie QC's written authority. In the circumstances it is unsurprising that this again did not come to notice.

At no time did any Commission officer involved in the application process alert Commissioner McKechnie QC to the error in the first warrant, or to the second warrant application.

Eight days after the new warrant was issued, a Commission officer whose responsibility it was to register and ensure that issued warrant documentation

¹ The principal investigator has been a Commission officer since 2006. He will be described as X in this report.

² The criminal offence of Making a False Statement on Oath.

complied with the SD Act, discovered that the documentation in question did not include Commissioner McKechnie QC's written authorisation. He drew this to the attention of X on 13 April 2017.

On 18 April 2017, the Easter holiday period intervening, the decision was made to tell Commissioner McKechnie QC of the unauthorised warrant applications and the errors involved, and X and a senior Commission lawyer met with him on that day. X told the Commissioner that he had no intention to apply for the warrants without his authority or knowledge, but could not account for his error (for which he accepted responsibility). He explained that he thought the Commissioner had been informed of the application, and that he had approved it.

Commissioner McKechnie QC wrote to the Judge on the following day to inform him that he had not authorised either of the warrant applications, that in his opinion the warrants were invalid, and that neither of them had been, or would be, executed.

My investigation of the allegation against X involved the determination whether he committed serious misconduct or minor misconduct (within the meaning of the CCC Act) by falsely swearing his affidavit, and the assessment of the effectiveness and appropriateness of the Commission's procedures used to apply for warrants under the SD Act and associated actions.

There can be no doubt that the application for a warrant under the SD Act by a Commission officer is a very serious matter. The consequential powers of surveillance that are able to be exercised – via optical, listening and tracking devices – are highly intrusive of the privacy of persons against whom they are executed, and potentially to other persons whose privacy might be infringed although they are not the object of a Commission investigation.

The application process for the issuing of such warrants must strictly accord with the provisions of the SD Act. That a Commission officer has the necessary authority from the Commissioner prior to approaching a Judge with an application, and attaches the authority to the application, is clearly paramount in this process, the circumvention of which, intentionally or otherwise, cannot be condoned.

It is for the Commission officer who swears the affidavit to ensure that the Commissioner's written authority is obtained, and that all materials referred to in the affidavit as annexures – including the Commissioner's authorisation – are present when it is sworn and when the application is placed before a Judge. It is essential that the Commission officer is completely familiar with the content of his or her affidavit, and that all aspects of it are true. Nothing less can be expected of any Commission officer in these circumstances – especially the most senior Commission investigators.

For reasons set out later in this report, I have determined that X committed an act of misconduct under s 4(d)(iii) and (vi) of the CCC Act by failing to obtain Commissioner McKechnie QC's authorisation to make the application before doing so, by falsely swearing in his affidavit that the Commissioner had authorised the application, and by falsely swearing in his affidavit that the Commissioner's authorisation was attached to it, albeit inadvertently.

For reasons explained later in this report, I have assessed the Commission's procedures used in preparing and making the warrant application to be ineffective and inappropriate.

2. THE SD ACT

The purpose of the SD Act is to regulate the use of listening devices in respect of private conversations, optical surveillance devices in respect of private activities, and tracking devices in respect of the location of persons and objects. The SD Act prohibits the publication or communication of private conversations and activities except in authorised circumstances.³

In regulating the use of surveillance devices, the SD Act, in most instances, prohibits the use of such devices unless a warrant is issued under s 13 by a Judge (or Magistrate in the case of a tracking device) to a police officer, a Commission officer, an officer of a designated Commission or an officer of the Australian Crime Commission (with any restrictions the judicial officer thinks appropriate to impose so as to reduce the chance of unjustified infringements of privacy).

A Judge or Magistrate may only issue a warrant under s 13(1) of the SD Act if an application is made in accordance with the requirements in s 15, and if the judicial officer is satisfied there are reasonable grounds for believing that:

- (a) an offence has been or may have been, is being or is about to be, or is likely to be, committed; and
- (b) the use of a listening device, an optical surveillance device, or a tracking device would be likely to assist an investigation into that offence or suspected offence, or to enable evidence to be obtained of the commission of that offence, or the identity or location of the offender.⁴

When the Judge or Magistrate is considering issuing a warrant under s 13(1) of the SD Act, he or she must consider the following factors:

- (a) the nature of the offence or suspected offence in respect of which the warrant is sought;
- (b) the extent to which the privacy of any person is likely to be affected by the use of a surveillance device under the warrant;
- (c) the extent to which evidence or information is likely to be obtained by methods of investigation not involving the use of a surveillance device;

³ The SD Act, Part 3.

⁴ The onus of satisfaction required on the part of the judicial officer when the applicant for a warrant is a Commission officer is lower in certain circumstances (s 18A), however the section does not detract from the requirement that an authorisation by the Commissioner is attached to the application.

- (d) the intelligence value and the evidentiary value of any information sought to be obtained;
- (e) any other warrants sought or issued under this Act or the *Listening Devices Act 1978* in connection with the same matter; and
- (f) the public interest.⁵

A Commission officer may only apply for a warrant under s 13(1) of the SD Act if the officer makes the application in writing and attaches to it an authorisation from the Commissioner ‘for the action proposed.’⁶

This statutory provision is critical because its purpose is to assure the Judge or Magistrate that the Commissioner is aware of the application and has authorised it to proceed. It is a provision that contributes to preventing a Commission officer from surreptitiously obtaining a warrant for improper purposes, or obtaining a warrant without the critical consideration of the Commissioner having first been applied to its grounds. It is a provision that is central to my investigation of the allegation made against X.

3. OFFICER X’S WARRANT APPLICATIONS

The first warrant preparation and application

In January 2017 Commissioner McKechnie QC approved a preliminary investigation into suspected serious misconduct within an aspect of the business of a government department. The Commission’s preliminary investigation eventually became a joint investigation with the department itself, and X, from an investigative perspective, was in charge of it.

On 24 March 2017 X completed the first draft of his affidavit which he intended to use in a warrant application under the SD Act.⁷ On that day he sent the affidavit to a Commission lawyer in the Legal Services Directorate by email with a request for her to review and finalise it.

The Commission lawyer who received the affidavit had little experience in reviewing affidavits for warrants under the SD Act, so she sought the guidance of a more senior Commission lawyer, which she received on 27 March 2017. The two lawyers agreed that the format of X’s affidavit was not appropriate, and that other changes should be made to it. He was advised of this.

Despite the warrant application documentation being incomplete, and Commissioner McKechnie QC not having been consulted about the application, the Legal Services

⁵ The SD Act, s 13(2).

⁶ The SD Act, s 15(3)(aa). The only exception to this requirement is if the application is made by radio or telephone in a case where it is impractical to apply in the ordinary way: s 16.

⁷ In a normal and properly prepared application for a warrant under the SD Act, the application will consist of the applicant officer’s affidavit, the Commissioner’s written authorisation, the proposed warrant itself (the judicial officer to whom the application is made has to sign it in order for it to be issued) and any other annexure to the officer’s affidavit relied upon to ground the warrant.

Directorate contacted the Supreme Court and requested an appointment with a Judge so that the application, when the documentation had been completed, could be made. The appointment was fixed by the Court for 2.15pm on 29 March 2017, and X was informed of this.

On the morning of 28 March 2017 X asked the Commission lawyer to cancel the appointment because he had forgotten to tell her that the Commission's surveillance officers, who would provide him with the technical assistance to operate the surveillance devices, would not be available to do so until the following week. He also had to confirm with those officers precisely when they would be available.

Shortly afterwards the Commission lawyer replied asking if X expected to know the surveillance officers' availability on that day, as the appointment was fixed for the following day. He replied that he was waiting for a response from the surveillance officers, but that they may not be available for the rest of the week. She replied saying that it would have been better for her to have known about the officers' unavailability earlier, and that if she didn't hear anything from X before the end of the day, she would have the appointment cancelled.

This last response from the Commission lawyer to X is indicative of the tension that existed between the two. There is further evidence of it and I will comment upon this later in this report.

In mid-afternoon on 28 March 2017 the Commission lawyer emailed X's affidavit back to him, having made and electronically tracked some suggested alterations, and having raised some evidentiary questions which needed his clarification before the affidavit could finally be settled. He did not reply that day to say if he had heard from the surveillance officers.

In the morning of 29 March 2017 the Commission lawyer again emailed X, asking if he had heard from the surveillance officers, adding that she would cancel the appointment with the Court that had been arranged for that afternoon. An hour later he replied telling her to cancel the appointment because the surveillance officers would not be available until 5 April 2017. He concluded his email by saying:

'Amongst other things, I will now try to review the affidavit and get back to you soon.'

Later that morning the Commission lawyer cancelled the appointment with the Court, and arranged another for 4 April 2017, despite X's affidavit being incomplete (Commissioner McKechnie QC not having been made aware of the intended warrant application).

In the afternoon of 30 March 2017 X tersely replied to the Commission lawyer about the alterations made to his affidavit, criticising many of those changes and complaining that to correct them has 'occupied a great deal of time'. To recite the final three paragraphs is sufficient to demonstrate the degree of friction that existed between the two and, in particular, his attitude towards her:

‘As this document is a statement that I am attesting to, I have also removed wording that I would not normally be inclined to use such as “inter-alia.” I have also removed other superfluous wording and repetitious sentences that serve only to state the obvious.

Please review the document again. You will see that regardless of size of the paragraph I have tracked all changes. In future I would be grateful if you do the same. Due to the number of changes I have not concerned myself with formatting. When you have read the document I am prepared to discuss my reasons.

Had it not been for the fact that ISS was unavailable it was unlikely that this affidavit was ever going to make Court by 2.30pm yesterday afternoon.’

The Commission lawyer replied at length shortly afterwards in a far more courteous and conciliatory tone, and concluded by pointing out to X that her role was to assist by advising him, and that ultimately, decisions concerning his affidavit were his to make.

On 31 March 2017 the Commission lawyer emailed X’s finalised affidavit to him, and on 3 April 2017 he took his affidavit to a Justice of the Peace and swore to the truthfulness of its content under the *Oaths, Affidavits and Statutory Declarations Act 2005 (WA)*. Importantly, the second paragraph of his affidavit stated:

The Commissioner has authorised an application for a composite warrant under the *Surveillance Devices Act 1998* (SD Act). A copy of the Commissioner’s written authorisation is attached hereto and marked “**Annexure A**”.

During the swearing process the Justice of the Peace asked X if there were any attachments to his affidavit to be sworn. He replied ‘no’. Afterwards he returned the sworn affidavit to the Commission lawyer for safekeeping until the warrant application appointment the following day with the Judge. She did not review the affidavit when he gave it to her.

The Commission lawyer and X attended the Court on 4 April 2017 and placed the application before the Judge. The Judge issued the warrant, but only after X was requested by the Judge’s associate to sign the warrant application form, something he had neglected to do.

Before leaving the Court, X checked that the Judge had signed the warrant, but did not check any other part of the application documentation which had been returned to him.

On 6 April 2017, before the warrant was executed, the Legal Services Directorate discovered that it had recorded the wrong expiry date on the warrant. The Judge had not noticed this error when he granted X’s application.

The lack of care by X at a number of stages in the process is evident. It should not be forgotten that he was effectively the applicant and responsible for its content.

The second warrant preparation and application

The Director of the Legal Services Directorate and other lawyers discussed the problem with the first warrant and decided that a letter should be written to the Judge explaining the error, and requesting that the warrant be withdrawn and a new warrant be issued with the correct expiry date. It was decided that the affidavit previously sworn by X would be used for this purpose, and that a new affidavit would not need to be sworn.

The letter was written by the Legal Services Directorate and on 7 April 2017 it, along with the other necessary documentation, was emailed to the Court. Although he remained the applicant, X played no direct part in this second application. Once again the application documentation did not include Commissioner McKechnie QC's authorisation because he still had not been consulted.

The Judge issued the second warrant on 7 April 2017 and X subsequently deposited the warrant application documentation with a compliance officer whose responsibility in the Commission, as I have said, was to record the documentation and to ensure that the relevant legislative provisions had been complied with.

On 13 April 2017 the compliance officer queried the absence of Commissioner McKechnie QC's authorisation from the documentation. X responded by telephoning the Commission lawyer and, for some reason, emailed a copy of his original application form⁸ to her, asking her if it was the document being sought by the compliance officer. The Commission lawyer replied by saying that the document he had emailed was not the Commissioner's authorisation, but the warrant application form, and that it was X's responsibility to have sought and obtained the Commissioner's authorisation before proceeding with the application.

It was then realised that Commissioner McKechnie QC's authorisation had not been obtained for either application. The Commission lawyer spoke to the Director of the Legal Services Directorate and it was determined that the second warrant, for this reason, was invalid and that X would have to apply for another warrant (after having obtained Commissioner McKechnie QC's written authorisation) if he wanted to proceed with the surveillance. That advice was emailed to X on that day.

Five days later, as I have said, following the Easter break, on 18 April 2017, X forwarded the Commission lawyer's email described above to a senior Commission lawyer,⁹ saying that he should have checked the affidavit as he knew it had referred to an annexure, and that he thought the warrant application form was the Commissioner's authorisation.

Later that day the senior Commission lawyer and X met with Commissioner McKechnie QC to advise him of these events.

⁸ The application form he had neglected to sign before making his first warrant application on 4 April 2017.

⁹ The Commission lawyer had commenced annual leave on 14 April 2017 to be away until 26 April 2017.

Commissioner McKechnie QC wrote to the Judge on 19 April 2017, explaining that in his opinion the second warrant issued by the Judge was invalid due to the absence of his authorisation. He apologised for the error and assured the Judge that neither warrant had been executed, and nor would they be.

X's explanation

In the meeting with Commissioner McKechnie QC on 18 April 2017 the Commission's documents show that X said:

1. He had no intention to seek a warrant without the Commissioner's knowledge or authority;
2. He did not obtain or produce the Commissioner's authority to the Justice of the Peace when he swore the first affidavit;
3. He cannot account for why he did not realise the mistake;
4. It was his belief that the Commissioner had been informed of and approved the application for the warrant, and
5. He accepted responsibility for the error.

After Commissioner McKechnie QC notified me of the allegation made against X, the officer was subsequently requested by the Commission to prepare a document detailing his role in the warrant applications.¹⁰ In relation to the swearing of his affidavit before the Justice of the Peace on 3 April 2017, when he was asked if there were any attachments to his affidavit requiring swearing (to which he had replied 'no'), he wrote:

'At this time I was of the belief that the JP was referring to any attachment such as the copy of the TI [telecommunications interception] affidavit that I originally intended to include with the affidavit.

I have previously applied for TI and search warrants, and extensions to those warrants, and have included other documents, such as a previous affidavit, as attachments to provide evidence in support.

¹⁰ X commenced the document by saying:

'The information contained in this document and attached supporting documents have been provided in response to a request for information to be provided to the Parliamentary Inspector of the Corruption and Crime Commission.

The request for this information has been received via senior officers of the Corruption and Crime Commission.

The information sought is required to account for circumstances in which I am suspected to have committed a criminal offence.

I confirm that I have not been cautioned as to whether I have any obligation to provide this information or what may occur if I provide information that might incriminate me.

I know that any failure to cooperate with this request could render me liable to disciplinary action by my employer. For that reason I agree to provide the requested information and supporting documentation on the understanding that it has not been produced as a result of a voluntary process and cannot be used in evidence for the purpose of any criminal or civil proceedings.'

It did not enter my mind that the JP might have been referring to the Commissioner's authorisation.

I still do not know if the JP was in fact referring to the Commission's authorisation or inquiring in general as to whether any form of attachment was to be included.

I understand that paragraph 2 of the affidavit states that the Commissioner's Authorisation has been obtained and is attached as an annexure to the affidavit.

On this occasion I misunderstood the purpose of paragraph 2 to mean that the Commissioner's Authorisation would need to be annexed to the affidavit when the application was made before the Justice, not at the time it was being sworn before the JP.

I cannot account for why I have misunderstood this requirement.

When I compiled the affidavit I was focussed on the content and accuracy of the supporting information. I did not compile the information contained in paragraphs 1 to 7. These paragraphs form part of the affidavit template and appear in all affidavits prepared at the Commission. I only inserted details of my name and title where required.

I was of the belief that the required authorisation had been obtained by [the Commission lawyer] and that it would be presented to the Justice together with the sworn affidavit when [the] application for the warrant was made.

I did not inquire as to whether the Commissioner had actually signed any authorisation. I assumed that this had occurred.

Once the content of the affidavit was settled with [the Commission lawyer] I did not review the affidavit any further before making an appointment with the JP.

I did not re-read the affidavit at the time that it was being sworn.

It was never my intention [to] swear the affidavit without having obtained the required authority.'

In respect of the warrant application made to the Judge on 4 April 2017, X said that the envelope containing his affidavit, the warrant and application was delivered to the Judge's associate by the Commission lawyer, and he and she waited in the waiting room until the Judge had considered the application.

He said he made the application believing that all necessary documents had been compiled by the Commission lawyer, and that she had placed them in the envelope (which was sealed at the time they left the Commission to make his application). He inferred that the Commission lawyer was responsible for him not having signed the

warrant application form because she had failed to give it to him before the application was made.

In respect of the warrant application made to the Judge on 7 April 2017, X said that the application was made in the belief that the Commission lawyer had included all the necessary documents. He also said that he believed Commissioner McKechnie QC was informed of, and had approved, his warrant application, but he did not support his beliefs with any documentary or other evidence.

X also suggested that the Commission's procedures for the making of warrant applications under the SD Act were confusing and out-of-date, inferring this to be a contributing reason for his conduct.¹¹

He also said that Commissioner McKechnie QC expressed the view in their meeting on 18 April 2017 that it was the responsibility of the Legal Services Directorate to verify that all relevant documents for the warrant application were properly completed.

In summation, X offered the following comments:

- I consider the situation to be the result of a number of mistakes resulting from lack of attention to detail by myself and the attending lawyer;
- The failure to produce the Commissioner's Authorisation at the time that the affidavit was sworn, and not realising the same, is a matter that I am highly embarrassed about;
- I did not want to also bring embarrassment to the professional reputation of the Commission by seeking to apply for the same warrant on a third occasion without a valid reason;
- I have no excuse for failing to produce the Commissioner's Authorisation to the Justice of the Peace as an annexure to my affidavit;
- I acknowledge that in essence I have sworn an affidavit that contains a false particular. This occurrence was the result of a mistaken belief that I held at the time;
- I had no intention or motivation to make a false declaration or to deceive the Justice of the Peace or the authorising Justice;
- I had no intention to seek a warrant without the knowledge or authority of the Commissioner;
- I accept responsibility for not confirming that all required documents had been prepared;

¹¹ However, there is nothing to suggest that X consulted these procedures before or at the time of making the warrant application. Rather, it appears that he did so as part of responding to the Commission's request for his detailed account of the events.

- My preoccupation at the relevant time was the accuracy, adequacy and reliability of the facts provided in the affidavit. Had I considered that the information relied on was not sufficient to seek the Commissioner's Authority I would not have made an application for the warrant;
- When seeking a TI warrant I prepare an affidavit and ensure that it contains relevant adequate grounds. When the affidavit has been completed I provide a draft to a Commission lawyer for review and request the preparation of the warrant and other forms required to make the application. In some instances, and by arrangement with the lawyer, I will also prepare the other forms;
- In this instance I specifically asked the lawyer to attend to the preparation of all documentation other than the affidavit. For that reason I did not prepare any document other than the affidavit;
- I believe that the difference in process [in applying for a TI warrant as opposed to a SD warrant] could have contributed to the mistaken belief that I held at the time that the affidavit was sworn. I realise that paragraph 2 of the affidavit outlines the fact that the Commissioner's Authorisation has been obtained and is attached as an annexure. Although aware of the existence of paragraph 2 I have for some unknown reason failed to acknowledge its purpose and requirement at the relevant time;
- At that time the affidavit, warrants and application forms were drafted by the Operations Lawyer, based on information received from the investigators. The contents of the affidavit were then reviewed, adopted and sworn by the investigator. The position of Operations Lawyer has since been removed;
- Investigators now prepare the affidavit and submit it for review by lawyers in the Legal Services Directorate, depending on consultation between investigators and lawyers;
- On some occasions I have prepared the affidavit and all other forms. On other occasions I have prepared only the affidavit. Either way all documents are provided to the lawyer for review prior to making application for authorisation by a Justice.

The Commission lawyer's explanation

The Commission lawyer was also requested by the Commission to give an account which detailed her participation in the warrant applications process. She said:

- Her changes made to X's affidavit and their tracking had made him angry. He believed that they were deceptive, and his email to her in response to those changes was very terse;
- Once the nature of the changes was discussed and an explanation given by her about a technological issue with the tracking of her changes to the affidavit, it became clear to X that there was no deception involved in the changes she made;

- The Commission's procedure was that upon the final settlement of the affidavit it was to be returned to the investigator so that he or she could use it to obtain the Commissioner's authorisation. She returned the settled affidavit to X by email on 31 March 2017 without annexures;
- The Legal Services Directorate did not see the final hard copy of X's affidavit before it was sworn by him before the Justice of the Peace on 3 April 2017. She received the sworn affidavit sometime on 4 April 2017, the day the warrant application was made;
- Upon realising that the incorrect expiry date had been placed on the first warrant she, her Director and a Senior Commission lawyer decided that a letter to the Judge explaining the situation and requesting a new warrant to be issued was the appropriate course of action. The affidavit used for the second application was that used in the first application, and the new warrant was issued on 7 April 2017;
- On 13 April 2017, when X telephoned her asking where the Commissioner's authorisation for the warrant application was, she was unaware that the Commissioner's authority had not been obtained by him. After discussions with her Director, she emailed him explaining what he would need to do with a new warrant application should he still want to use the surveillance powers given by the warrant, and
- She was on annual leave from 14 April 2017 to 26 April 2017.

The senior lawyer who was consulted during the process in question was also asked for her views, but I need not set out her response here.

4. THE COMMISSION'S INTERNAL INVESTIGATION

The absence of a criminal investigation

Between 12 April 2017, the date of the report by the evidence and compliance officer, and 25 August 2017, the date of the final internal legal advice to Commissioner McKechnie QC to the effect that his conduct did not involve criminality, the Commission did not arrange for X to be interviewed in accordance with the *Criminal Investigation Act 2006 (WA)*.¹² As we have seen, X made that observation himself when asked for his version of the facts.

Rather, the Commission accepted the truth of what X had said in his meeting with Commissioner McKechnie QC on 18 April 2017, and simply requested him to provide a written account of his role in the warrant application process – something he did, but not without first making some protest about having been asked to do so.

¹² The lawyer's advice, and the possible criminal offences which, on the face of the initial allegation, may have been committed by X, are discussed below.

As it transpired, it was only logistical and other issues which prevented the two unlawfully obtained warrants from being executed by the Commission between the issue of the first warrant on 4 April 2017 and Commissioner McKechnie QC's letter to the Judge on 19 April 2017.¹³

The internal legal advice

The Commission's records show that a senior Commissioner lawyer¹⁴ advised Commissioner McKechnie QC on 25 August 2017 about the facts ascertained during the Commission's internal investigation of X's conduct, and why she concluded that X had not committed a criminal offence when he falsely swore his affidavit on 3 April 2017, or when he placed his affidavit before the Judge.

The senior Commission lawyer considered the possibility that X may have committed two criminal offences under the *Code*. The first offence was that of Perjury under s 124, which, so far as material, states:

Any person who, in any judicial proceeding, or for the purpose of instituting any judicial proceeding, knowingly gives false testimony touching any matter which is material to any question then depending in that proceeding, or intended to be raised in that proceeding, is guilty of a crime which is called perjury.

The seriousness of this offence is demonstrated by the fact that it is a crime which must be dealt with on indictment and is punishable under s 125, generally, by imprisonment for 14 years.

The second offence under the *Code* was that of making a False Statement on Oath under s 169, which, so far as material, states:

- (1) Any person who, when under oath or any sanction that may be lawfully substituted for an oath, knowingly makes a statement, whether orally or in writing, that is false in a material particular is guilty of a crime and is liable to imprisonment for 7 years.

Summary conviction penalty: imprisonment for 3 years and a fine of \$36,000.

The senior Commission lawyer advised Commissioner McKechnie QC that, in essence, X had not committed either of these offences because he honestly believed that the Commissioner's authorisation for the warrant application had been given in writing (having mistakenly assumed that the Commission lawyer had obtained it), and that he had honestly believed the warrant application form was the Commissioner's authorisation, so that it could be said to be attached to the affidavit.

¹³ Both warrants authorised the Commission to use, for 90 days, listening and optical devices to record the private conversations, activities and the geographical location of the person under surveillance at any premises where that person was believed by the Commission to be, or where the person was believed to be likely to be.

¹⁴ A different senior Commissioner lawyer to that previously mentioned in this report.

In respect of the mental element required for both offences, the senior Commission lawyer said that this required more than just an honest mistake, inadvertence, carelessness or misunderstanding on his part in respect of the absence of the Commissioner's authorisation for the warrant application, and for its absence from his sworn affidavit.¹⁵

She concluded that X was merely careless in not checking that Commissioner McKechnie QC had given his authorisation for the warrant application, and in not checking that it had been annexed to his affidavit before swearing it on 3 April 2017 and before placing it before the Judge on the following day.

The senior Commission lawyer qualified her advice about the necessary mental element for both offences by saying that if she was wrong on this point, X could avail himself, in any criminal prosecution, of the defence of 'mistake' in s 24 of the *Code*, which provides:

A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.

The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

My assessment of the legal advice

As will appear, I would state differently the legal position which in my view governs the determination of this matter. I will commence with some general observations.

X was a principal investigator in the Commission. It was incumbent on him to obtain Commissioner McKechnie QC's authorisation for the warrant application before taking any formal steps to progress it. He appears to accept this.

Had he properly approached the Commissioner, Commissioner McKechnie QC's written authorisation would have been obtained (or not) after he had considered X's *finalised*, but at that point, *unsworn* affidavit. Only after Commissioner McKechnie QC had granted his authorisation would X have had cause to swear his affidavit before a Justice of the Peace (as the second paragraph in that affidavit shows).

X was the person with the sole responsibility of finalising his affidavit to his own satisfaction for the purpose of placing it before Commissioner McKechnie QC. In this regard the Commission lawyer emailed X's incomplete affidavit to him on 31 March 2017, suggesting alterations to it (and electronically tracking those changes so that he could either accept or reject them). Her email said:

'Please find attached formatted revised Affidavit. All further minor changes have been tracked. If you are happy with this then it is ready to be signed. You

¹⁵ The senior Commission lawyer's advice properly concluded that all the remaining elements of both offences under s 124 & s 169 of the *Code* were present in X's conduct.

should be able to access this, if not let me know and I will get a word version to you.'

This was the last time the Commission lawyer and the Legal Services Directorate had X's affidavit before he swore it before the Justice of the Peace on 3 April 2017. After 31 March 2017 nobody except X was in a position to progress the process of obtaining Commissioner McKechnie QC's authorisation. It is quite obvious that X did not do so between those dates, or at any time afterwards.

His answer of 'no' to the Justice of the Peace when the Justice asked him if there were any attachments to his affidavit during the swearing on 3 April 2017 compounded (perhaps irretrievably) his gross negligence in having failed to obtain Commissioner McKechnie QC's authorisation. His explanations for his answer are not accepted.

He suggested that he thought the Justice was referring to 'an attachment such as the copy of the TI affidavit that I originally intended to include with the affidavit.' But the Commission lawyer had, from the outset, disagreed with his intention to include that affidavit as part of his application; she had required him instead to detail his grounds for the SD warrant in his eventual affidavit, which he did.

X and the Commission lawyer's interaction over the proposed form of the original affidavit, it seems, was the first of their disagreements which led him to complain about her to the senior Commission lawyer, so the basis for that disagreement was something unlikely to have left his mind by the time he swore his affidavit on 3 April 2017.

Further, X finalised his affidavit himself at some point between 31 March 2017 and 3 April 2017 and he unilaterally took it to the Justice of the Peace for swearing. He knew what was in the affidavit and what was not. As the deponent, it was his sole responsibility to have such knowledge.

X also said that it 'did not enter my mind that the JP might have been referring to the Commissioner's Authorisation' when the Justice of the Peace asked him if there were any annexures to the affidavit, and that he understood the second paragraph of his affidavit 'to mean that the Commissioner's Authorisation would need to be annexed to the affidavit when the application was made before the Justice [Judge], not at the time it was being sworn before the JP.'

This explanation is offered by X despite the unambiguous words in the second paragraph of his affidavit.

His attempt to distance himself further from his legal obligations as the deponent by saying that he was not the person who typed the second paragraph in his affidavit, but 'only inserted details of my name and title where required' in it, is an embarrassment and falls far short of the standards that are expected of a principal investigator in the Commission. He was guilty of substantial negligence in the performance of his duties, rather than mere carelessness.

The true position, so far as it is revealed by the available evidence, may be shortly stated. The question is, when, on 4 April 2017, X supported the original application

for the warrant by tendering the affidavit which falsely stated the position in respect of the provision of the Commissioner's authorisation in Clause 2 and falsely stated that the authorisation was annexed to the affidavit, did he commit an offence or offences against s 124 and/or s 169 of the Code?

The same questions arise when the affidavit, in the same state, was resubmitted to the Judge on 7 April 2017. In my opinion, on the known facts, noting in passing the way in which X's account was obtained by the Commission, by means of a process which was incapable of providing admissible evidence in a criminal court, X is not established to be guilty of serious misconduct in either case, pursuant to s 4(c) of the CCC Act.

The evidence gathered by the Commission simply does not support the expression of an opinion to that effect, for the following reasons, having regard to the accepted law in relation to s 124 and s 169 of the Code.

As to s 124, the offence of perjury, it is clear that when pursuing his application before the Judge on both occasions, X, in that judicial proceeding, gave false testimony on oath in the form of the sworn affidavit that the Commissioner had authorised the application and a copy of the written authorisation was annexed. That was clearly 'material', in the sense known to the law, to the grant of the application and the issue of the warrant.

As to s 169, making a false statement on oath, precisely the same facts as to the falsity of those statements and their materiality were established. The crucial question in each case is whether there is evidence capable of establishing that X's conduct was done 'knowingly'. The evidence must be capable of establishing beyond reasonable doubt that when X swore the affidavit, and when he presented it to the Judge in support of his application for a warrant, on either or both occasions, he actually knew that Clause 2 was false: *Mackenzie v R* [1996] HCA 35; (1996) 186 CLR 348, 374 per Gaudron, Gummow and Kirby JJ.

It is a question of the availability of evidence of actual knowledge. Even grossly negligent failure to ascertain the truth or falsity of Clause 2 of the affidavit will not suffice. X's statements cannot establish that he knew Clause 2 was false, and that is the only available evidence.

However, I should note that it could not be the case that s 24 of the Code had a part to play in the assessment of the matter. As has been seen, that provision would require X, when he did the relevant acts, to have had 'an honest and reasonable, but mistaken, belief' that Clause 2 was true. On his own account, he simply did not turn his mind to that question

The Commission's procedures

During my investigation of the allegation against X, Commissioner McKechnie QC informed me that as a result of the Commission's investigation it was apparent to him that the roles and responsibilities of Commission officers involved in warrant applications under the SD Act were not clearly documented or defined; that practices by officers in such processes varied between them, and the only written policy which

existed at the time of the relevant events did not reflect the current work practices of the Commission.

The Commission's procedure for the preparation of a warrant application under the SD Act (and other types of warrants) in April 2017 first came into being in 2006, and was reviewed twice in 2008. The essential aspects of the procedure stated that all documents associated with the application were to be prepared by the Operations Directorate, and that the Director of the Legal Services Directorate must review those documents before proceeding.

The procedure empowered the Director of the Legal Services Directorate to determine if the application documentation accorded with the legislation under which the warrant was being applied for, and to determine if the grounds offered in the affidavit were sufficiently compelling to satisfy a Judge. In the case of an application for a warrant under the SD Act, the Commissioner was required to sign an authorisation for it before the application was made.

The Commission's documents show that until around 2013 the Operations Directorate had a number of lawyers within it who assisted its investigators with their warrant applications. Since that time all Commission lawyers have been placed within the Legal Services Directorate. Despite the passage of time between 2013 and X's warrant application, part of his explanation for his conduct was that he claimed he found the Commission's procedure for warrant applications, confusing.

Commissioner McKechnie QC also informed me that after his letter to the Judge dated 19 April 2017 he immediately ordered the development of a comprehensive information pack for lawyers within the Legal Services Directorate as to their responsibilities when assisting Commission investigators in applying for a warrant under the SD Act.

The Director of the Legal Services Directorate has also delivered legal training to all Commission officers concerning warrant applications, and has drawn on the lessons learned from the allegation investigated. I have read the pack developed by the Directorate and I consider it appropriate for its purpose and that it has clarified the role and obligations of the Commission's lawyers.

Crucially, the revised policy addresses one of the previous deficiencies in the Commission's warrant application practices which contributed to the inexcusable outcome of these warrant applications. I refer to the former ability of the officer to attend upon a Justice of the Peace to swear his finalised affidavit before Commissioner McKechnie QC's written authority had been obtained and was attached to the affidavit.

The information pack developed by the Directorate is also being used by the Operations Directorate to assist it to draft new procedures for its investigators. In my view this is a satisfactory response to the occurrence of this matter by way of a remedy to prevent such an occurrence in future.

As to the Commission's response to the investigation of this allegation, I have referred above to the absence of a criminal investigation and this is something I have

repeatedly reported in the past in circumstances where allegations of possible criminal conduct have been made against Commission officers.¹⁶

The Commission did not respond to the *prima facie* criminality evident in X's conduct by investigating that conduct, from the outset, in accordance with the provisions of the *Criminal Investigation Act 2006 (WA)* (i.e., by cautioning him and video recording an interview with him, questioned by expert investigators who knew the background facts, to obtain his account of events in a form which would be admissible in any future criminal proceedings against him).

Instead, the Commission relied on X's assertions of innocence to Commissioner McKechnie QC in their meeting on 18 April 2017 to accept that he had not committed a criminal offence under s 124 or s 169 of the *Code*. The Commission's consequent internal investigation – which was restricted to the legal advice to which I have referred – was instead directed to justifying its conclusion in this regard. This was an inappropriate and ineffective procedural response to the nature of the allegation made against X, and all but eliminated any subsequent effective criminal investigation of his conduct, as he himself noted, in effect, although he does say that, if cautioned, he would have given the same account.

There is one final aspect of the Commission's response to the problems that arose in this matter to which I should refer: the time it took X and the lawyers involved to inform Commissioner McKechnie QC of the problems encountered with the warrant applications.

It will be recalled that the application proceeded before the Judge and the warrants were issued on 4 and 7 April 2017, the process having been redone when it was discovered that there was an error in the dates which conditioned the operation of the first warrant. No Commission officer involved in the warrant application realised that Commissioner McKechnie QC had not granted his written authority for the applications until it was pointed out to them on 13 April 2017.

The Commissioner should immediately have been informed on 7 April 2017 when the Legal Services Directorate detected the flawed dates on the (issued) warrant and told X about the issue, that the process had miscarried. Commissioner McKechnie QC should have been made aware of this error so that he could authorise the remedy and the fresh application to ensure that the situation was completely rectified.

The delay between the officers realising on 13 April 2017 that Commissioner McKechnie QC's written authority had never been obtained for either warrant application, and the Commissioner being told of the debacle on 18 April 2017, was contributed to by the Easter break, which simply exacerbated the situation.

¹⁶ This proves to be a persistent problem within the agency: see the Joint Standing Committee's Report titled *The Parliamentary Inspector's Report on Allegations of Misconduct made against Officers in the Commission's Electronic Collection Unit*, November 2015, 37-42; The Joint Standing Committee's Report titled *The Parliamentary Inspector's Report on Misconduct and Related Issues in the Corruption and Crime Commission*, June 2015, 30-45; my Report titled *Misconduct by a Corruption and Crime Commission Officer: Matthew John Lynch*, 8 February 2017, 12 and my Report titled *Misconduct: Unauthorised Disclosure of Confidential Information*, 30 November 2017, 17, 26.

However, I do not think the Commission's revised procedures need to spell-out each and every time the Commissioner should be alerted to a serious problem. Such things must be entrusted to the judgment of senior Commission officers. In this instance, that judgment was either not present, or for some unexplained reason was not exercised in favour of informing Commissioner McKechnie QC of the unfolding situation far earlier.

5. REPRESENTATIONS MADE

In accordance with s 200 of the Act, the Commission and X were provided with an opportunity to make representations to me concerning matters adverse to them in my report.

The relevant aspects of the Commission's representations were:

1. Its internal investigation of X's conduct was not directed to justifying its conclusion, and that I had no basis for making that claim;
2. A genuine mistake, as careless as X's conduct was, is incapable of constituting misconduct, and that his conduct was not something that could be said to provide reasonable grounds for the termination of a person's office or employment under the *Public Sector Management Act 1994 (WA)*;
3. X's conduct had not required its internal investigation to accord with the *Criminal Investigation Act 2006 (WA)*;
4. Its internal investigation did not all but eliminate any subsequent effective criminal investigation of X's conduct, and it had remained possible for me to remove the allegation and refer it to the W.A. Police or to the Director of Public Prosecutions for consideration of prosecution;
5. My criticism of the delay in informing Commissioner McKechnie QC that two warrant applications had been made without his authority first being obtained (that is, between 13 April 2017 when the absence of his authority was discovered, and 18 April 2017 when he was told of the applications) is unjustified.

The basis for this representation was because the decision to tell the Commissioner of the errors was made on 13 April 2017, but because the upcoming weekend was Easter, it was decided to wait until 18 April 2017, and

6. X would not be further disciplined because he has accepted responsibility for his conduct and has been counselled.

The relevant aspects of X's representations to me were:

1. He did not accept my assessment of misconduct on his part;

2. His conduct involved mistake with no dishonesty;
3. It would have been futile to intentionally obtain a warrant without authorisation because the Commissioner would, in due course, have discovered the fact, and
4. Had he been subjected to a criminal investigation and official caution when first questioned, nothing more would have been achieved because his answers would have been the same as those given during the Commission's assessment of the allegation.

I have dealt with the matters raised in the course of my assessment, but I think I should make one further observation upon the proposition that even after the Commission's investigation, including the process whereby X was invited to comment and provide information in respect of the issues, it was always open to me to remove the matter from the Commission and to refer it to the Police for investigation and consideration of criminal prosecution.

I would not do that in a case such as this where the outcome of the Commission's actions removed any question of criminal prosecution. The lack of an arm's length interview process and investigation had provided X with all the information available without testing it and it would, in my view, be unfair to him, in the circumstances, to expose him to a possible process of police investigation.

6. CONCLUSION

Determination

As I have explained, an application by a Commission officer for a warrant under the SD Act, if successful, authorises the Commission to surreptitiously record the private activities and conversations of a person who the Commission is investigating, and to track the movements of the person by using tracking devices placed on motor or other vehicles that might be used by the person.

The very nature of surveillance devices and their use infringes not only the privacy of the person being investigated by the Commission, but also persons who are not being investigated but happen innocently to be present within the range of the devices. Things done and said by such people are recorded by the Commission, even though the person's activities have nothing to do with the Commission's investigation.

For these reasons the SD Act provides that if a Commission officer wishes to utilise its surveillance powers the Commissioner must grant, in writing, his authority for the officer to make a warrant application. Another reason is to guard against a Commission officer corruptly using his or her office by unilaterally applying for, and executing, a warrant. The necessity to obtain the Commissioner's authority for a warrant application to be made, and the legislative safeguards intended by Parliament to be served by this, cannot be overstated. Even inadvertent failure of the statutory process cannot be tolerated.

In this matter the warrants obtained, on their face, authorised X (and other Commission officers) to conduct the requested surveillance for a period of 90 days.

The deponent of an affidavit has sole responsibility to take all steps to satisfy him or herself that the information sworn in his or her affidavit is true, and to ensure that all the statutory requirements for making the application are met before it is placed before a Judge. No Commission procedure designed to ensure the proper preparation of the associated documentation necessary for such an application to be made relieves the deponent of this fundamental obligation.

As a principal investigator in the Commission with over 10 years' experience, X's false swearing of his affidavit on 3 April 2017, his placement of the warrant application before the Judge on 4 April 2017, and his repeat of the exercise without checking that the papers were free of any error, on 7 April 2017, involved a high level of incompetence, negligence, and a serious breach of his statutory obligations under the SD Act.

His conduct constituted or involved a breach of the trust placed in him by reason of his employment as a public officer, and his conduct constitutes, or could constitute, a disciplinary offence providing for the termination of his employment as a public officer. This is the relevant terminology, in my view, for a conclusion and determination, which I make, that X's conduct was misconduct under s 4(d)(iii) and (vi) of the CCC Act.

Due to the absence of a timely, effective and appropriate criminal investigation by the Commission of X's conduct, the capacity for such an investigation to now be conducted is lost. For this reason, I do not refer the allegation to the W.A. Police under s 196(3)(f) & (g) of the CCC Act for their investigation and consideration of criminal prosecution.

Recommendations

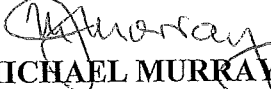
In respect of my determination of misconduct by X made above, I recommend to the Commission that:

1. consideration be given to taking the appropriate disciplinary action against him in respect of his misconduct;
2. the relevant provisions of the *Criminal Investigation Act 2006 (WA)* are followed when an allegation against a Commission officer that potentially involves criminal conduct is being investigated, and
3. it reports to me at the end of each quarter from 1 January 2018 until 1 January 2019 as to the effectiveness of the Commission's new procedures in making applications for warrants under the SD Act.

The Commission, in making its representations to me observes that, '[t]he standard of care exhibited by X and the lawyers involved in assisting X ... was unacceptable and fell well short of what the Commission expects of an experienced investigator and Commission lawyers.' It adds, 'Relevant officers have accepted responsibility and

been counselled. No further disciplinary action will be taken by the Commission against X.' That, of course, is a matter for the judgment of the Commissioner.

The Commission says that it has addressed the issue referred to in my second recommendation, and it accepts my third recommendation.


HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR