



Inspector of the New South Wales Crime Commission

ANNUAL REPORT
of
the Inspector of the
New South Wales Crime Commission

For the year ended
30 June 2016



Inspector of the New South Wales Crime Commission

The Hon. Donald Harwin MLC
President
Legislative Council
Parliament House
Sydney NSW 2000

The Hon. Shelley Hancock MP
Speaker
Legislative Assembly
Parliament House
Sydney NSW 2000

Dear Mr President and Madam Speaker

In accordance with section 68 of the *Crime Commission Act 2012* I hereby furnish to each of you for presentation to the Parliament my Annual Report for the year ended 30 June 2016.

My report has been prepared in accordance with the requirements of the *Crime Commission Act 2012*. I recommend that it be made public forthwith.

Yours sincerely

The Hon Graham Barr QC
Inspector, New South Wales Crime Commission
28 October 2016

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PART 1

THE INSPECTOR'S OFFICE TO BE ABOLISHED

The report of Mr. Andrew Tink AM, referred to at paragraph 2.5 of the Inspector's report for the year ended 30 June 2015, was published on 31 August 2015. On 26 November 2015, the Hon Troy Grant MP, Deputy Premier and Minister for Justice and Police, announced that a Bill would be introduced into Parliament to give effect to Mr. Tink's recommendations.

The Law Enforcement Conduct Commission Bill 2016 was introduced into the Legislative Assembly on 13 September 2016. When the Bill becomes law this office will be abolished. That is expected to happen at the end of the present calendar year.

PART 2

THE INSPECTOR'S ROLE AND FUNCTIONS

2.1 THE INSPECTOR

In accordance with section 61 (1) of the *Crime Commission Act 2012*, the Hon Graham Barr QC was appointed to the position of the Inspector of the Crime Commission on 22 April 2013. Mr Barr was appointed in a part-time capacity for a period of 5 years.

The Inspector derives authority from the *Crime Commission Act 2012* and is accountable through a reporting requirement to both Houses of Parliament. The Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission is authorised to examine each annual and other report of the Inspector and to report to both Houses of Parliament with such comments as it thinks fit on any matter concerning the Inspector.

2.2 FUNCTIONS OF THE INSPECTOR

The principal functions of the Inspector are:

- to audit the operations of the Crime Commission for the purpose of monitoring compliance with the law of the State,
- to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Crime Commission or officers of the Crime Commission,
- to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Crime Commission or officers of the Crime Commission, and
- to assess the effectiveness and appropriateness of the procedures of the Crime Commission relating to the legality or propriety of its activities.

In order to carry out these functions, the Inspector may hold inquiries and has the powers, authorities, protections and immunities conferred on a commissioner under the *Royal Commissions Act 1923* for the purpose of such inquiries.

The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission.

2.3 THE POWERS OF THE INSPECTOR

The Inspector:

- may investigate any aspect of the Crime Commission's operations or any conduct of officers of the Crime Commission,
- is entitled to full access to the records of the Crime Commission and to take or have copies made of any of them,
- may require officers of the Crime Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Crime Commission's operations or any conduct of officers of the Crime Commission,
- may require officers of the Crime Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Crime Commission's operations or any conduct of officers of the Crime Commission,
- may investigate and assess complaints about the Crime Commission or officers of the Crime Commission,
- may refer matters relating to the Crime Commission or officers of the Crime Commission to other public authorities or public officials for consideration or action, and
- may recommend disciplinary action or criminal prosecution against officers of the Crime Commission.

PART 3

THE OFFICE OF THE INSPECTOR OF THE CRIME COMMISSION

3.1 STAFF

At the end of the reporting period, the Inspectorate was constituted by the Inspector and two support staff. Support staff are supplied to the Inspectorate by the NSW Department of Justice.

The Executive Assistant to the Inspector works one day per week.

The other staff member of the Inspectorate is a Senior Policy Analyst, who is engaged for approximately one day per week. The Senior Policy Analyst undertakes legal and professional duties at the request of the Inspector and is the primary contact at the Inspectorate.

The Inspectorate is additionally supported by staff of the Department of Justice who provide technology and communications support, as required.

3.2 PREMISES

During the reporting period the premises of the Inspectorate were located in the Sydney central business district.

Postal address: GPO Box 3015, Sydney NSW 2001

Telephone: (02) 9212 9208

Facsimile: (02) 9258 0936

Email: inspector@oicc.nsw.gov.au

3.3 WEBSITE

www.oicc.nsw.gov.au

3.4 BUDGET AND FINANCE

In 2015-16, a grant of \$356,000 was received from the Department of Justice for the Office of the Inspector of the Crime Commission.

The grant was used to pay rent for the leased premises of the Inspectorate, salaries and sundries.

3.5 THE INSPECTOR'S CONFERENCES AND MEETINGS

During the reporting period the Inspector held many conferences with the Commissioner of the Crime Commission and staff of the Commission. The Inspector attends the quarterly meetings of the Internal Audit and Risk Committee of the Crime Commission.

Other consultations took place during the period to discuss operational and policy matters, including conferences with the Commissioner and the Assistant Commissioner of the Police Integrity Commission.

PART 4

THE WORK OF THE INSPECTOR DURING THE REPORTING PERIOD

4.1 COMPLAINTS DEALT WITH DURING THE REPORTING PERIOD

Two of the principal functions of the Inspector are stated thus in subs 62(1) of the Act:

- (b) to deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*
- (c) to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and*

Subsection 62(4) provides:

- (4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:
 - (a) contrary to law, or*
 - (b) unreasonable, unjust, oppressive or improperly discriminatory, or*
 - (c) based wholly or partly on improper motives.**

Two complaints remained outstanding at the commencement of the reporting period.

The first depended on the establishment of events said to have taken place in 2012. It appeared that the same events were a subject of the Ombudsman's enquiry into 'Operation Prospect'. It seemed likely, therefore, that any enquiry by this office would be superfluous. In March 2015, having spoken to Mr Barbour, Ombudsman, the Inspector decided to take no action on the complaint pending receipt of the Ombudsman's report, which was then due to be handed down by 30 June 2015.

The Ombudsman's report was not published during the year under report and the best estimate was that it would not be handed down until the end of the 2016 calendar year. That would coincide with the date intended for the abolition of this office by the Law Enforcement Conduct Commission Act. Accordingly, the file was closed on 30 June 2016.

The second complaint was investigated at length and dismissed in June 2016.

Three new complaints were received during the year under report. The first challenged the legality and enforceability of a summons to attend and give evidence issued under s24 of the Crime Commission Act, 2012. The Inspector declined to deal with the matter because it raised questions substantially if not exactly the same as those raised by the same complainant in proceedings then on foot in the Supreme Court of New South Wales. In due course all the grounds of objection were dismissed by the Court or abandoned.

The second complaint accused an officer of the Crime Commission of having committed serious misconduct. The Inspector investigated the complaint and presided at a hearing in which witnesses were examined and cross-examined. The Inspector was

satisfied that the alleged misconduct had not occurred and dismissed the complaint. The papers were referred to the NSW Director of Public Prosecutions.

The third complaint alleged bizarre misconduct on the part of unidentified persons who were said to be officers of the Crime Commission. A letter requesting particulars necessary for an investigation was not answered. On enquiry it appeared that the complainant was known for making unsubstantiated complaints. The file was closed.

At 30 June 2016 there was no complaint outstanding against the Crime Commission or its officers.

4.2 PUBLIC INTEREST DISCLOSURES MADE UNDER THE PUBLIC INTEREST DISCLOSURE ACT 1994

Under the *Public Interest Disclosure Act 1994* the Inspector of the NSW Crime Commission is a public official to whom a complaint can be made only about serious wrongdoing by the NSW Crime Commission or its officers.

No public interest disclosure was made to the Inspector during the reporting period.

4.3 CONFLICT OF INTEREST REGISTER

On 31 July 2014 the Commission published a Conflict of Interest Policy and established a Register of Conflicts of Interest.

The Inspector inspected the register on 24 November 2015. It contained three entries, all made by employees who had during the course of their duties encountered documents mentioning people known to them or circumstances involving people known to them. In each case the employee declaring the fact withdrew from the job concerned and recorded the fact. In each case the employee concerned acted appropriately.

PART 5

5.1 AUDITS CONDUCTED DURING THE REPORTING PERIOD

One of the principal functions of the Inspector under s62(1)(a) of the *Crime Commission Act 2012* is to audit the Crime Commission's operations to monitor its compliance with NSW law.

The Inspector conducts a number of audits each year, notably of the Crime Commission's exercise of powers under the following legislation:

- *Crime Commission Act 2012*
- *Surveillance Devices Act 2007*
- *Criminal Assets Recovery Act 1990*
- *Law Enforcement (Controlled Operations) Act 1997*
- *Law Enforcement (Controlled Operations) Regulation 2012*

During the year the Inspector completed an audit of the Crime Commission's use of human sources that had been commenced in the 2014/15 reporting year.

The Crime Commissioner was provided the results of each audit undertaken by the Inspector. A summary of the results of these audits is provided below.

Summary of audits undertaken

5.2 *Surveillance Devices Act 2007*

In assessing the Commission's compliance with the *Surveillance Devices Act*, the Inspector inspected the files for three investigations undertaken by the Crime Commission.

Section 17 of the Act outlines the requirements for an application for a surveillance devices warrant. It includes the following:

- (1) *A law enforcement officer (or another person on his or her behalf) may apply for the issue of a surveillance device warrant if the law enforcement officer on reasonable grounds suspects or believes that:*
 - (a) *a relevant offence has been, is being, is about to be or is likely to be committed, and*
 - (b) *an investigation into that offence is being, will be or is likely to be conducted in this jurisdiction or in this jurisdiction and in one or more participating jurisdictions, and*
 - (c) *the use of a surveillance device is necessary for the purpose of an investigation into that offence to enable evidence to be obtained of the commission of that offence or the identity or location of the offender.*
- (2) *The application may be made to:*
 - (a) *an eligible Judge in any case, or*
 - (b) *an eligible Magistrate in the case of an application for a surveillance device warrant authorising the use of a tracking device only.*
- (3) *An application:*
 - (a) *must specify:*
 - (i) *the name of the applicant, and*

- (ii) the nature and duration of the warrant sought, including the kind of surveillance device sought to be authorised, and*
- (b) subject to this section, must be supported by an affidavit setting out the grounds on which the warrant is sought.*

In each file inspected the Inspector was satisfied that affidavits were made and filed in court in accordance with section 17 (3)(b) of the *Surveillance Devices Act 2007*.

Section 51 of the Act requires that the Attorney General be informed of the Crime Commission's intention to bring any application for a surveillance device.

In accordance with section 51(1) of the Act the Attorney General was informed of the Crime Commission's intention to bring each application. In each application, the Attorney General by its delegate informed the Crime Commission that it did not wish to be heard.

Subsection 44(1) of the Act provides:

- (1) A person to whom a surveillance device warrant is issued must, within the time specified in the warrant, furnish a report, in writing, to an eligible Judge (if the warrant was issued by an eligible Judge)...*
- (a) stating whether or not a surveillance device was used pursuant to the warrant, and*
- (b) specifying the type of surveillance device (if any) used, and*
- (c) specifying the name, if known, of any person whose private conversation was recorded or listened to, or whose activity was recorded, by the use of the device, and*
- (d) specifying the period during which the device was used, and*
- (e) containing particulars of any premises or vehicle on or in which the device was installed or any place at which the device was used, and*
- (f) containing particulars of the general use made or to be made of any evidence or information obtained by the use of the device, and*
- (g) containing particulars of any previous use of a surveillance device in connection with the relevant offence in respect of which the warrant was issued, and*
- (h) in the case of a surveillance device warrant issued in this jurisdiction and executed in a participating jurisdiction:*
 - (i) giving details of the benefit to the investigation of the use of the relevant surveillance device and of the general use made or to be made of any evidence or information obtained by the use of the device, and*
 - (ii) giving details of the compliance with the conditions (if any) to which the warrant was subject.*

Where appropriate the Crime Commission filed within the prescribed time a return under section 44(1) stating any use it had made of each warrant.

Section 41(1)(a) of the *Surveillance Devices Act* requires that records obtained from the use of surveillance devices must be kept in accordance with guidelines established by the Chief Officer of an agency, not be accessible to those not entitled to access and destroyed if the Chief Officer satisfied that the record is unlikely to be required. The Inspector was satisfied that the files inspected were kept in accordance with guidelines established by the Crime Commission.

Similarly, the surveillance device warrants were appropriately recorded in the Commission's register of warrants and emergency authorisations as required by s47(1) of the *Surveillance Devices Act*. The appropriate details were also recorded in the register for emergency authorisations in accordance with section 47(3).

In accordance with section 47(2) the register appropriately detailed the date each warrant was issued, the law enforcement officer named in the warrant, the relevant offence for which the warrant was issued and the period for which the warrant was in force.

In one investigation there were instances where the initial reports to the Court and the Attorney General on the use of surveillance devices (in accordance with section 44 of the *Act*) incorrectly described the use to which surveillance device warrants had been put. This error was later identified by the Crime Commission and reports were provided to the Court and the Attorney General correctly describing the use made of the warrants. The Inspector was satisfied that the reporting requirements of the Act had been met.

It was concluded that all applications inspected for surveillance device warrants complied with the requirements of the *Surveillance Devices Act 2007*.

5.3 Sections 24, 28 & 29 of the *Crime Commission Act 2012*

These sections confer power on the Commission to acquire information and require the production to it of documents and things in much the same way as parties to Court proceedings can interrogate and serve Notices to Produce on each other and have the Court issue subpoenas to others. Section 28 concerns itself with the acquisition of information from government agencies and Section 29 with production by others.

The sections specify, among other things, who may give such notices and what they shall contain. Section 29 specifies how documents and things produced in response must be kept.

On each occasion the Inspector was satisfied that the notices issued complied with the requirements of the *Crime Commission Act*.

Section 29 notices were issued in two of the three investigations reviewed and in each case the Inspector was satisfied that each notice was approved by an Executive Officer with legal qualifications in accordance with section 29(1) of the Act and that the documents produced to the Crime Commission were fastened in a file in accordance with section 29(4) of the Act.

Section 28 notices were issued in two investigations. In each case the notices were appropriately issued by an Executive Officer (section 28(1)), appropriately specified or described the information concerned and fixed a time, date and manner for compliance with the notice (section 28(2)).

Summonses were issued in two investigations in accordance with section 24 of the Act. In each case a summons was issued by an Executive Officer with appropriate legal qualifications (section 24(1)) and the Executive Officer believed on reasonable grounds that a delay in attendance to appear before the Commission would result in adverse circumstances as outlined in section 24(2). Each summons was accompanied by a notice to which the hearing related

(section 24(3)) and the general nature of the matter in which the Commission intended to question the person.

5.4 Settlement Guidelines for orders made by consent under the *Criminal Assets Recovery Act 1990*

Section 57 of *Crime Commission Act 2012* requires the Crime Commission's Management Committee to furnish guidelines (the Guidelines) regarding negotiation by the Commission of the terms of agreements and orders made by consent under the *Criminal Assets Recovery Act 1990* (the CAR Act). Relevantly, the section is as follows:

- 57(1) The Management Committee may give directions and furnish guidelines to the Commission with respect to the exercise of its functions.*
- (2) The Commission must comply with any such directions or guidelines.*
- (3) Without limiting subsection (1), the Management Committee:*
 - (a) must furnish guidelines with respect to the negotiation by the Commission of the terms of agreements regarding orders made by consent under the Criminal Assets Recovery Act 1990 ...*

The Guidelines are attached at Appendix A. They came into effect on 5 February 2013. The Guidelines require that where a settlement is contemplated by the making of confiscation orders by consent, a Delegated Negotiator represent the Commission in negotiations.

In recommending the terms of settlement to the Decision Maker (the Commissioner or Assistant Commissioner with special legal qualifications), the Delegated Negotiator must be of the opinion that the terms of the settlement represent the most appropriate outcome for the Crown.

The Negotiator must also confirm that the financial investigation of the defendant has been thorough, that any interest the defendant has in any property has been identified, that factors relevant to making the confiscation order have been considered and that the investigation was undertaken by an appropriately qualified person. The Decision Maker must then certify that he or she is satisfied that the Delegated Negotiator's certification has been made on a reasonable basis.

In addition, section 62(4) of the CAR Act requires that a confiscation order may be made by consent only if the Crime Commissioner certifies that any guidelines concerning the negotiation of the terms of agreement have been fully complied with.

The Inspector audited all the orders made by consent in 2015/16. In all of them the necessary certifications and confirmations were made in accordance with the Guidelines, including confirmation by the Delegated Negotiator that the terms of the settlement represented the most appropriate outcome for the Crown and certification by the Decision Maker that the Delegated Negotiator's certification was made on a reasonable basis.

In each matter a certification by the Commissioner of the Crime Commission that the Guidelines had been fully complied with was made in accordance with section 62(4) of the CAR Act.

5.5 Controlled operations pursuant to the *Law Enforcement (Controlled Operations) Act 1997*

During the year under report, the NSW Crime Commission did not exercise its power to undertake controlled operations in accordance with the Law Enforcement (Controlled Operations) Act 1997 and Law Enforcement (Controlled Operations) Regulation 2012.

5.6 The management of human sources

The audit of the Crime Commission's management of human sources, referred to in paragraph 4.1 of the Inspector's Annual Report for the year ended 30 June 2015, was concluded on 20 October 2015. A report bearing that date was made to the Commissioner.

The report recommended a number of measures, notably a restructure of management to ensure that human sources were managed by officers dedicated to that function and not by officers concerned with investigating criminal activity.

An audit completed on 15 March 2016 established that arrangements had been changed as recommended, with the result that human sources were being managed only by dedicated officers.

A further audit of individual human sources records was completed on 15 March 2016. This audit inspected reports of management of human sources for the period 1 January 2015 to 29 February 2016.

In all records inspected, the Inspector found that the recording of contacts with human sources during the reporting period was satisfactory. The Inspector was also satisfied that the preparation of human source information reports was carried out as required by the Crime Commission's Human Source Management Policy and the Human Source Standard Operating Procedures.

PART 6

THE MANAGEMENT OF THE CRIME COMMISSION DURING THE LIFE OF THE INSPECTORATE

Since taking office in April 2013 the Inspector has met the Commissioner, Mr. P. S. Hastings, QC, many times and relations with Mr. Hastings have always been cordial. Mr. Hastings and the officers of the Crime Commission have always given their complete co-operation with the result that the Inspector has been able to supervise the Commission efficiently and deal thoroughly with complaints against its officers. The small number of complaints received has been unsurprising in view of the exemplary way in which the Crime Commission has been managed. The Inspector records his appreciation.

The Hon Graham Barr, QC
Inspector, New South Wales Crime Commission
28 October 2016

APPENDIX A: *Crime Commission Act 2012* section 57(3)(a) Guidelines

CRIME COMMISSION ACT 2012

PARAGRAPH 57 (3) (a)

GUIDELINES

By resolution passed on 5 February 2013, pursuant to paragraph 57 (3) (a) of the *Crime Commission Act 2012*, the Management Committee of the New South Wales Crime Commission furnishes to the Crime Commission the following guidelines with respect to the negotiation by the Commission of the terms of agreements regarding orders made by consent to resolve finally proceedings under the *Criminal Assets Recovery Act 1990*.

1. Settlement negotiations may only be conducted by a person delegated by the Commissioner to do so ('the Delegated Negotiator'). Standing delegations may only be made to the Assistant Commissioners, lawyers or members of the Financial Investigation Division. Other staff members may only receive delegations specific to particular cases.
2. The terms of settlement may only be approved by the Commissioner or an Assistant Commissioner with special legal qualifications ('the Decision Maker').
3. When recommending terms of settlement to the Decision Maker the Delegated Negotiator must be of the opinion that the terms of settlement represent the most appropriate outcome for the Crown (measured not only by the absolute value of any confiscation order involved but also having regard to other factors such as an assessment of the commerciality of, and risks associated with, continued litigation). In formulating this opinion the Delegated Negotiator is to have regard to factors including:

- (a) the sufficiency of the evidence available to prove a relevant serious crime related activity;
- (b) the sufficiency of the evidence available to quantify the defendant's derivation of, or acquisition of property derived from, proceeds of illegal activities;
- (c) the particulars of any previous confiscation proceedings taken by the Commission against the defendant;
- (d) the likelihood that the defendant would be able to discharge his or her onus to prove that he or she has not derived proceeds of illegal activities;
- (e) the estimated value of the defendant's interests in property and the degree of futility in seeking to secure a larger order;
- (f) the likelihood of other person(s) successfully claiming an interest in property that may be subject to an assets forfeiture order or may become security for an proceeds assessment order or unexplained wealth order;
- (g) the likelihood of a successful application for hardship being made from an interest in property potentially subject to an assets forfeiture order;
- (h) the likelihood of the defendant successfully applying for an order for the release of reasonable legal expenses and the estimated quantum of such an order; and
- (i) the cost to the Commission of continuing to litigate the matter rather than settling the matter (such costs including not only the Commission's internal costs but also the estimated costs of briefing external counsel and the opportunity cost of continued litigation of the matter rather than devoting the Commission's resources to potentially more productive other matters) and the risks of a costs order being made against the Commission.

4. The Negotiator must also confirm to the Decision Maker that:

- (a) the financial investigation of the defendant has been appropriately thorough and extensive (having regard to the likely return to the Crown) and has been sufficient to provide a reasonable level assurance that all of the defendant's interests in property have been identified (in so far as it is feasible to do so) and that all factors relevant to the making of the confiscation order have been considered; and
 - (b) the financial investigation has been conducted by an appropriately qualified and skilled person.

- 5. Should the Decision Maker approve the Delegated Negotiator's recommended terms of settlement:
 - (a) the Delegated Negotiator must certify that, having regard to factors that include those listed above, the Delegated Negotiator is of the opinion that the terms of settlement represent the most appropriate outcome for the Crown (measured not only by the absolute value of any confiscation order involved but also having regard to other factors such as an assessment of the commerciality of, and risks associated with, continued litigation) ('the Delegated Negotiator's Certification'); and
 - (b) the Decision Maker must certify that he or she is satisfied that the Delegated Negotiator's certification has been made on a reasonable basis.

