



NEW SOUTH WALES

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 2014



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 2014.

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

A handwritten signature in black ink, appearing to read "Graham Barr".

The Hon Graham Barr QC
Inspector, New South Wales Crime Commission
30 October 2014

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PART 1

THE INSPECTOR'S ROLE AND FUNCTIONS

1.1 THE INSPECTOR

Pursuant to section 61 (1) of the *Crime Commission Act 2012*, her Excellency the Governor appointed the Hon Graham Barr QC to the position of the Inspector of the Crime Commission on 22 April 2013. The appointment was also approved by Cabinet and the Parliamentary Joint Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission, the body empowered to veto the proposed appointment (cl 9 (1) of Sch 3 of the *Crime Commission Act 2012*).

The Inspector holds office for such term (not exceeding 5 years) as may be specified in the instrument of appointment, but is eligible (if otherwise qualified) for re-appointment. 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.

1.2 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.

1.3 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 2

THE OFFICE OF THE INSPECTOR OF THE CRIME COMMISSION

2.1 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 Ministry for Police and Emergency Services.

The Executive Assistant to the Inspector works one or two days per week. The Executive Assistant to the Inspector is the primary contact at the Inspectorate.

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

The Inspectorate is additionally supported by staff of the Ministry for Police and Emergency Services to provide technology and communications support, as required.

2.2 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) 9258 0938

Facsimile: (02) 9258 0936

Email: inspector@oicc.nsw.gov.au

2.3 WEBSITE

www.oicc.nsw.gov.au

2.4 BUDGET AND FINANCE

In 2013-14, the Ministry for Police and Emergency Services received a \$347, 000 grant 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.

2.5 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 also met with the Chair of the Management Committee of the Crime 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 Chief Executive Officer and the Executive Director, Policy and Finance, of the Ministry for Police and Emergency Services, the Commissioner of the Police Integrity Commission, the Inspector of the Police Integrity Commission and the Inspector of the Independent Commission Against Corruption.

The Inspector also met the former Minister for Police and Emergency Services, and the current Minister, the Hon Stuart Ayres MP, during the reporting period.

PART 3

THE WORK OF THE INSPECTORATE DURING THE REPORTING PERIOD

3.1 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.**

At the beginning of the reporting period there were two unresolved complaints. During the reporting period five further complaints were received. Of those seven complaints, five were resolved and two remained outstanding at the end of the reporting period. All five of those resolved were dismissed. Written explanatory reports were sent to the persons concerned but the substance and particulars of the complaints have not otherwise been published by the Inspectorate.

Accordingly, no recommendation was made under subs 62(1)(b) or (c).

The cases are so few and their circumstances so peculiar that even a heavy editing of the facts might not be enough to protect the identities of the parties. It is therefore inappropriate to say more about them.

PART 4

4.1 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 conducted audits of five investigations undertaken by the Commission. The Inspector considered whether the Commission had utilised and complied with the *Surveillance Devices Act 2007*, *Crime Commission Act 2012* and the *Criminal Assets Recovery Act 1990*. These are the results of the audits and analysis of the Commission's compliance with the legislation.

Surveillance Devices Act 2007

By section 4 of the *Surveillance Devices Act 2007* the term 'law enforcement officer' includes an officer of 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.*

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.

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.*

In two investigations a total of 30 applications for surveillance device warrants were applied for and granted by judges of the Supreme Court of New South Wales. In each instance the Inspector was satisfied that the requirements of s17 were met.

The audit established that in each application the delegate of the Attorney General was informed and responded by stating that the Attorney General did not wish to be heard in the application.

Where appropriate the Crime Commission filed within the prescribed time a return to the appropriate judge in accordance with s44(1) of the *Surveillance Devices Act* stating any use it had made of each warrant.

Sections 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. S28 concerns itself with the acquisition of information from government agencies and s29 with production by others.

The sections specify, among other things, who may give such notices and what they shall contain. S29 specifies how documents and things produced in response must be kept.

Six notices under s28 and 71 notices under s29 were examined. In each case the Inspector was satisfied that it was approved by an officer having the necessary qualifications and that it contained what the relevant section required. In each case, the documents produced under s29 were kept as required by the Act.

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 of 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 ...**

When the Guidelines, attached at appendix A, came into effect on 5 February 2013 a practice was instituted to manage matters in which settlement was contemplated by the making of confiscation orders by consent. In these matters, the Delegated Negotiator would represent the Commission. If a proposal were made it would be referred to the Decision Maker for consideration. If the Decision Maker approved the proposed terms the Delegated Negotiator and the Decision Maker would recommend, confirm and certify as required by the Guidelines.

Subsection 62(4) of the CAR Act came into effect on 2 September 2013. Section 62 is as follows:

- 62(1) The Supreme Court may, on the application of the Commission and with the consent of all persons whose interest in property will be subject to an order under this Act, make that order by an order under this section (a "consent order") that gives effect to the terms of an agreement negotiated between the Commission and any one or more persons whose interest in property will be subject to the order under this Act.*
- (2) A consent order may be made by the Supreme Court without consideration of the matters that the Supreme Court would otherwise consider before making the order.*
- (3) In particular, and without limiting subsection (2), the Supreme Court is not required to consider the matters set out in section 16A in making a restraining order by consent order that makes provision of the kind referred to in section 10B (3)(b).*
- (4) A confiscation order may only be made by consent order if the Commissioner for the Commission certifies that any guidelines with respect to the negotiation of the terms of agreements with respect to the making of consent orders given under*

section 57 (Directions and guidelines to Commission) of the Crime Commission Act 2012 have been fully complied with.

Before subs 62(4) came in to effect the only certifications necessary were those of the Delegated Negotiator and the Decision Maker. Afterwards, they had to be succeeded by the Commissioner's certificate.

So the practice changed. Negotiations took place as before until the stage was reached at which the Decision Maker was to decide on behalf of the Commission whether to agree to any proposed settlement. If the Decision Maker did so, subs 62(4) had to be complied with before the Court could make consent orders.

On 27 May 2014 the Inspector conducted an audit of CAR Act matters settled by consent orders between 1 July 2013 and 29 April 2014. In every matter to which subs 62(4) applied the appropriate recommendation, confirmation and certifications of the Delegated Negotiator and the Decision Maker were present.

In some matters the Commissioner's certificate under subs 62(4) predated the signature of the Delegated Negotiator or the Decision Maker or both. However, enquiries revealed that in every such matter the Commissioner had made a full enquiry into the facts and the reasons for the intended settlement by perusing the file and discussing the matter with those responsible. In each matter the Commissioner was satisfied that proper consideration had been given to the proposal and that the settlement was appropriate. Accordingly, the Inspector was satisfied that the vice against which the Guidelines are intended to guard was avoided by proper enquiry and that no matter was settled which had not received full and appropriate consideration and approval.

In supplementary audits conducted on 9 and 10 September 2014 the Inspector examined all CAR Act matters settled after the change of practice. In each case subs 62(4) and the Guidelines were fully complied with.

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

The Inspector audited the use of the Crime Commission's power to undertake controlled operations in accordance with the *Law Enforcement (Controlled Operations) Act 1997*. During the year the Crime Commission conducted two controlled operations.

Section 5 states:

- (1) *A law enforcement officer for a law enforcement agency may apply to the chief executive officer of the agency for authority to conduct a controlled operation on behalf of the agency.*
- (2) *An application for an authority may be made:*
 - (a) *by means of a written document, signed by the applicant, or by means of a facsimile transmission of a document so signed (a "formal application"), or*
 - (b) *by such other means as are available, including (but not limited to) orally in person, by telephone or by 2-way radio (an "urgent application").*

Subsection 8(2)(f) and s9 of the Act require that in respect of an urgent authority being granted to undertake a controlled operation, the authority must specify the period (not exceeding 72 hours) for which the authority is to remain in force.

The Ombudsman is required under subs 21(1) of the Act and clause 11 of the *Law Enforcement (Controlled Operations) Regulation 2012* to be notified within 21 days of an authority being granted.

Subsection 15(1) of the Act and cl 9 of the Regulation state that the Chief Executive Officer, which means the Commissioner, must receive a report within two months after completion of an authorised operation, which is to be prepared by the principal law enforcement officer.

The authority to conduct the two operations was approved by the appropriate law enforcement officer in accordance with s5.

In both controlled operations the Inspector found that the authority to conduct the operations was made in accordance with subs 8(2)(f) and s9.

In both instances, the Ombudsman was notified within the time prescribed by subs 21(1) of the Act and cl 11 of the Regulations.

The reports for both operations were prepared within the prescribed time.

The Inspector satisfied himself that all other relevant requirements of the Act were met for both controlled operations.



The Hon Graham Barr, QC
Inspector, New South Wales Crime Commission
30 October 2014

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.