



**PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA**

**ASSESSMENT OF PROCEDURES OF THE
CCC USED TO ASSESS COMPLAINTS OF
SERIOUS MISCONDUCT MADE BY
MR IAN QUARTERMAINE**

Section 199 of the *Corruption and Crime Commission Act 2003 (WA)*

21 July 2011

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THE PURPOSE OF THIS REPORT

The purpose of this report is to inform Parliament of an assessment made by me under s 195(1)(c) of the *Corruption and Crime Commission Act 2003 (WA)* ('CCC Act'). The assessment concerns serious deficiencies in the procedures adopted by the Corruption and Crime Commission ('CCC') when addressing a complaint to it made by Mr Ian Quartermaine. The complaint related to the conduct of officers of the Western Australia Police (WAPOL). Mr Quartermaine had been shot by a WAPOL officer near Narrogin on 4 December 1990.

PRELIMINARY COMMENTS

In this report I refer to, and include as Annexure A, a memorandum prepared by an investigator employed by the Kennedy Royal Commission ('KRC').¹ That memorandum is highly critical of named police officers and of the processes employed by them. The memorandum was not a final report. It recommended that further action be considered. The memorandum and its recommendations were (as I shall later explain) never formally adopted, or implemented, by the KRC. Rather, as I have concluded, the memorandum was left over for the CCC to assess. In these circumstances, I invited the Commissioner of Police, Dr Karl O'Callaghan APM, to comment on my draft report. He has submitted (very reasonably) that the memorandum should not be made public.

I have given close consideration to that submission. In the end, it seems to me that this report, which addresses the CCC's response to the memorandum, cannot adequately be understood without attaching a copy of it. However, in order to protect the persons concerned, I have redacted Annexure A by replacing the names of police officers and others criticised in it with alphabetical letters. I should also make it plain that I do not intend by this report to express any view, one way or the other, concerning the merit of the conclusions expressed in the memorandum, other than by saying that they were such as to demand further inquiry.

I should also mention that in this report I quote from a letter addressed by the CCC to the Commissioner of Police which is critical of police procedures. I should make two comments in that respect (arising from the Commissioner's submission to me). The first is that WAPOL was not a party to, or an observer at, the CCC hearings that led to those criticisms and is consequently in no position to assess their validity. The second is that the Commissioner of Police has informed me that, in any event, since the events considered in this report (which took place as long ago as 1990), WAPOL has taken significant steps to improve its response to and investigation of 'critical incidents' arising from the discharge of firearms.

¹ *Royal Commission Into Whether There has been Any Corrupt or Criminal Conduct by Any Western Australian Police Officers*

BACKGROUND

In 1990, Mr Quartermaine was 40 years old. He lived near the town of Narrogin. On 27 November 1990, he was pursued in his car by police in the Narrogin area. He eluded the pursuing police, but was later arrested and charged with unlawfully possessing a firearm.

On 4 December 1990, complaints were received by police from friends and relatives of Mr Quartermaine concerning his behaviour. One complaint, the truth of which was not established, was that he had, that day, possessed a firearm when he attended the home of his de facto wife's father in search of his de facto wife.

Later that day, Mr Quartermaine, was seen driving his car. He was pursued by three police cars. Police initially claimed that during this pursuit, while driving at high speed in the direction of Wickepin, Mr Quartermaine discharged a firearm (variously described as a double barrelled shotgun or a rifle) from his driver's side window at a pursuing police car. Mr Quartermaine denies that this was so and says that he did not have a firearm of any kind during the pursuit. The only weapon allegedly found in his possession at the end of the pursuit was a hammer.

Police formed a road block in O'Brien Road, near Wickepin, in an attempt to stop Mr Quartermaine. Mr Quartermaine alleges that, when he approached the road-block, a police officer fired shots from his service revolver at Mr Quartermaine's car. That officer denies that this was so. Mr Quartermaine avoided the road block and the pursuit continued.

A second road-block was set-up on the Cuballing Road. When Mr Quartermaine reached that point, he attempted a u-turn to get away from the road-block. Two police officers fired shots from their service revolvers at Mr Quartermaine's car. They allege that they did so in self-defence because they feared that Mr Quartermaine would seriously injure or kill one of them by running him down. Mr Quartermaine alleges that he was shot only after his car had come to a standstill when its wheels had become caught in a deep drain running parallel with the road.

Mr Quartermaine's car was hit by two, or possibly three, bullets. Two bullets penetrated the driver's side door of his car. One of these went on to hit him in the left leg.

At the time, and throughout the pursuit, Mr Quartermaine's nine year old son, Phillip, was in the front passenger seat of his car. Phillip Quartermaine was not injured.

Mr Quartermaine was arrested and charged with two counts of attempting to wilfully kill a police officer, two counts of assaulting police with intent to avoid apprehension and one count of attempting to unlawfully shoot a police officer.

A preliminary hearing was later held in relation to the charges against Mr Quartermaine. The prosecution case was that Mr Quartermaine had discharged a firearm at the pursuing police vehicle and that, having completed a u-turn at the second road-block, he had driven his car towards an officer with the intention of hitting him. He was said to have assaulted police with the intention of avoiding arrest.

The prosecutor called a witness, Tyson, who said that he had witnessed part of the police pursuit, that he saw Mr Quartermaine fire a shotgun at police and that he then saw him throw something from his car. It was suggested by police that the object thrown by Mr Quartermaine was the shotgun. No firearm was ever found at the location indicated by Tyson, nor along the route of the police pursuit, despite a police search.

Mr Quartermaine was committed for trial on all counts.

At his subsequent trial, Mr Quartermaine was convicted by a jury of two counts of assaulting police with intent to avoid apprehension, but was acquitted of all other charges. He was sentenced to a term of 6 years' imprisonment with eligibility for parole.

Tyson was not called to give evidence at Mr Quartermaine's trial. His evidence at the preliminary hearing had been false and he subsequently pleaded guilty in the Perth District Court on counts of perjury and creating a false belief in respect of that evidence.

Shortly after the shooting, an internal investigation was conducted by WAPOL's Internal Investigations Branch (IIB). The investigating Inspector prepared a report of his findings dated 4 January 1991. The officers involved in the shooting were exonerated.

MR QUARTERMAINE'S COMPLAINTS

After being released from prison, Mr Quartermaine made a number of complaints concerning the police conduct during and arising out of the events of 4 December 1990.

The Parliamentary Commissioner for Administrative Investigations

Mr Quartermaine first complained to the Parliamentary Commissioner for Administrative Investigations, Mr Robert Eadie, who then had jurisdiction in respect of allegations of police misconduct. Mr Quartermaine's complaints were that:

- (a) he had been unlawfully shot by police;
- (b) he was assaulted upon being arrested;
- (c) his car was damaged by police when they searched it after his arrest;
- (d) following his arrest, his son Phillip was kept in police custody, assaulted and threatened;
- (e) Phillip Quartermaine was made to accompany police along the pursuit route to locate the place where his father had allegedly thrown a firearm out of the window of his car and was questioned and threatened for a number of hours without an independent adult being present, despite being only 9 years old;
- (f) he (Mr Quartermaine) was unable to obtain proper legal representation;
- (g) the allegation made by police that he had shot at a pursuing vehicle was false; and
- (h) police had made use of a witness (Tyson) who had given false evidence against him at the preliminary hearing concerning the charges against him.

After investigating the complaints, Mr Eadie wrote to Mr Quartermaine on 3 June 1994. In his letter, he said that the last three issues complained of by Mr Quartermaine (issues (f) to (g)) had been 'resolved as a result of court hearings in 1991' (a reference to Mr Quartermaine's trial).

Mr Eadie expressed reservations as regards the question whether shooting at Mr Quartermaine's car was 'the most appropriate way of preventing' Mr Quartermaine from hitting the police officers with his car. However, he was unable to resolve the conflicts between the evidence of the police and that of Mr Quartermaine.

Mr Eadie closed his file on the grounds that WAPOL had conducted three investigations of Mr Quartermaine's complaints and that his complaints had 'been given a full hearing in court.' The 'three investigations' were presumably the investigation by IIB, the preliminary hearing and the trial.

On 9 August 1994, Mr Quartermaine again wrote to Mr Eadie. He asked him to reopen his investigation and interview two witnesses who might be able to provide further evidence. Mr Quartermaine provided the details of those two witnesses. He also raised two new issues connected with his original complaint and asked Mr Eadie to investigate them. They were that:

1. The police officer who had shot Mr Quartermaine on 4 December 1990 had, a fortnight before then, knowingly arrested him on a Children's Court arrest warrant which had been issued against one of Mr Quartermaine's sons, whose name was also Ian. Because of this, Mr Quartermaine (who, as I have mentioned, was then 40 years old) was incarcerated for almost a week in Canning Vale Prison, despite having told the officer of his error. He was subsequently released without apology, or compensation.
2. Police in Wickpin had previously ordered two of Mr Quartermaine's sons out of that town.

These complaints, if true, provided evidence of possible prejudice by the police officer against Mr Quartermaine before he was shot on 4 December 1990. Notwithstanding this, Mr Eadie declined to investigate them because the events complained of were then more than 12 months old at the time of the complaint being made (a factor which affected Mr Eadie's jurisdiction).

In June 1997, Mr Quartermaine made a further complaint to Mr Allen, the new Parliamentary Commissioner for Administrative Investigations. He asked for a reinvestigation. Mr Allen responded on 25 June 1997, saying that, having reviewed his predecessor's conclusion, there would be no justification for any further consideration of the matter unless new and relevant evidence of sufficient weight became available.

Mr Quartermaine subsequently informed Mr Allen that a police aide who had been involved in his pursuit and arrest had allegedly told people subsequently that police intended to shoot Mr Quartermaine even before he was pursued.

On 9 December 1997, Mr Allen again wrote to Mr Quartermaine. He informed him that an investigator had spoken to the aide, who had been unable to provide any information which would enable the conclusions previously reached by Mr Eadie to be changed.

The Kennedy Royal Commission

Mr Quartermaine subsequently complained to the KRC.

His complaints were assessed during 2002 and 2003 by a KRC investigator, Mr Brian Smith, who prepared an interim report dated 7 April 2003. It recommended further investigations. Mr Stephen Hall, one of the counsel assisting the KRC, did not see the matter as warranting priority, given the age of the complaint and what he mistakenly saw as the likelihood that many of those involved might already have left the police force. However, Mr Smith persisted with his recommendation and, on 9 April 2003, he was given approval to go ahead if he could 'keep it small and discreet'.

Mr Smith subsequently prepared a memorandum dated 8 August 2003, addressed to Mr Hall and another recipient. After summarising what he had learned in the course of his investigations, he said:

‘I believe that there is evidence to suggest that police colluded to construct a version of what took place to justify the use of police firearms. Having done this, they were locked into giving that evidence and perjuring themselves during the preliminary hearing and trial.’

Curiously (given the date of the memorandum), the concluding sentence of the memorandum reads as follows:

‘A complete review, containing summary, conclusions and recommendations is contained within a memo dated 12 August 2003.’

The memorandum dated 12 August 2003 (‘Smith report’) contains 26 pages. As I have mentioned, the document is Annexure A to this report. The relevant conclusions drawn by Mr Smith were as follows:

1. The shooting of Mr Quartermaine was probably unjustified and contrary to regulations and law (page 5).
2. Ballistic evidence concerning the bullet holes in Mr Quartermaine’s car showed that the shots which hit his car were fired from right-angles to it and that the police claim that they had fired from directly in front of Mr Quartermaine’s car in self-defence for fear of being seriously injured, or killed, by him was flawed, or deliberately false (pages 3 and 5).
3. There was a “contrived ‘cover up’ for an act of frustration” caused by Mr Quartermaine being again about to make his escape after “a long and no doubt hazardous adrenalin pumping pursuit” (page 5).
4. The independent witness, the alleged possession of a firearm and purported firing at pursuing police were “an elaborate ruse ... to justify the irresponsible shooting” of Mr Quartermaine for what were ostensibly traffic offences (page 5).
5. There were serious questions as to the possible impropriety of police in locating a witness (Tyson) who was “able to provide such timely and specific information regarding Quartermaine shooting at pursuing police” (pages 3 and 13 – 17). Although he accepted that Tyson had come forward of his own volition, there were indications that Tyson had been ‘coached ... in the detail of his statement’ (page 16).
6. The record of an interview with Mr Quartermaine that had been prepared was a sham and that interview and another conducted during the subsequent investigation of the shooting had all the hallmarks of a ‘police verbal’ (page 23).

7. It was fortunate that Mr Quartermaine was not convicted of the more serious charges brought against him and the “veracity” of his conviction on the two counts of assaulting police to avoid apprehension was now questionable (page 5).
8. The number of police officers who were prepared to perjure themselves for the common cause raised the level of seriousness of the matter (page 5).
9. The “superficial investigation” conducted in respect of the shooting “smack[ed] of a cover-up” (page 22).
10. The report prepared after this “superficial investigation” had wrongly identified the officer who shot Mr Quartermaine. The firearm register maintained by police and the ballistic evidence revealed that the bullet that struck Mr Quartermaine was fired by a different officer. (Pages 3 and 4)

The report made 15 recommendations for further action (pages 25 and 26). Amongst these were recommendations that:

- “Consideration be given to further determining that the shooting of Quartermaine was unlawful and to demonstrate that it could not have happened as portrayed by police”;
- “If it can be demonstrated that police fabricated the story, consideration be given to invoking criminal sanctions for the conspiracy and the perjury offences that followed in the preliminary hearing and trial”;
- “If the evidence indicates that the shooting of Quartermaine ... was unjustified, then consideration be given to charging [the police officer who shot him] with the appropriate criminal offence/s”; and
- “ ... Quartermaine and his counsel be apprised of findings as appropriate”.

The CCC

The complaint dated 26 June 2006

On 26 June 2006, Mr Quartermaine (who was unaware that Mr Smith had prepared a report) made a written complaint to the CCC about having been shot by police in 1990. In his complaint, he provided a brief explanation of the incident and mentioned that he had previously complained to WAPOL and to the Parliamentary Commissioner for Administrative Investigations.

On the following day, Mr Quartermaine was telephoned by a CCC officer. He told the CCC officer, *inter alia*, that:

1. Mr Smith from the KRC had interviewed him (and that KRC officers had visited him on about four occasions);

2. the KRC investigators had told him that his complaint would go back before the courts due to anomalies in the WAPOL internal investigation; and
3. he remained dissatisfied with the WAPOL outcome.

Also on 27 June 2006, the officer who had telephoned Mr Quartermaine confirmed that the CCC held the relevant KRC files and arranged for her supervisor to allocate Mr Quartermaine's complaint for assessment. On 28 June 2006, the complaint was allocated to a CCC officer ('first officer') for assessment.

Almost a year later, on 11 May 2007, the first officer wrote to Mr Quartermaine. The letter informed Mr Quartermaine that the CCC had determined that it was not in the public interest to conduct any further investigation because:

- *it is over sixteen years since the incident and the passage of this amount of time will seriously impact upon the ability of witnesses to accurately recall the incident;*
- *the incident has already been subject to an internal police investigation and more recently, a preliminary investigation by the Kennedy Royal Commission; and*
- *the police officer who conducted the initial police investigation has since retired from the Police.*

None of these reasons is supportable.

As to the first, some three and a half years of the time that had elapsed was ascribable to the inaction of the CCC. No apology, or even an explanation for its inactivity, was offered to Mr Quartermaine by the CCC. Moreover, when the CCC received a complaint from my office on 17 November 2009, Commissioner Roberts-Smith did not consider it too late to conduct an investigation. In his letter to me dated 4 February 2010, the Commissioner acknowledged that the lapse of time should not have been seen as a significant factor. He went on to say:

'There is considerable documentary and other objective evidence and the events and circumstances in dispute are significant in themselves (e.g. did police officers concoct a false account?). These are not likely to require recollection of fine detail or of things which were unremarkable at the time.'

The second reason offered by the first officer was misleading, notwithstanding his assertions to the contrary. It conveys the impression that both the internal police investigation and the preliminary investigation by the KRC had rejected Mr Quartermaine's complaints. As will be apparent, nothing could have been further from the truth. The KRC investigation had concluded that there appeared to have been serious misconduct by police officers involved and that the internal police investigation appeared to have been a 'cover-up'.

In his letter dated 4 February 2010, Commissioner Roberts-Smith acknowledged only that the first officer's letter 'could be regarded as misleading in the way suggested'.

He said that it was not deliberately so, 'but rather reflected a misapprehension by [the first officer] of the Ombudsman's investigation and KRC assessment'.

The first officer had said (in a memorandum to the Commissioner dated 2 February 2010) that his assessment of Mr Quartermaine's complaint was commenced with the knowledge that other agencies had conducted investigations into the complaint. He read the Smith report as indicating bias in favour of Mr Quartermaine (four instances of 'apparent bias' were recorded by him) and contended that the report was inaccurate in a number of respects (only two were identified, one relating to guidelines to be applied to the interrogation of indigenous persons and the other relating to the question whether police radio communications were recorded at the relevant time). He also contended that there were inconsistencies in the report relating to the police aide.

Even if the first officer was right in the criticisms made by him, it is, as the Commissioner subsequently recognised, 'difficult to see why Mr Smith's report and recommendations would not have been acted upon to the extent of requiring some further investigation at least'. It is also difficult to see how these criticisms could have provided any justification for the terms in which the letter dated 11 May 2007 was written.

The third reason is difficult to comprehend. It is not apparent why it should have been thought that it was not in the public interest to investigate Mr Quartermaine's complaints merely because the police officer who had conducted the IIB investigation had since left the Police.

The telephone call on 17 May 2007

Mr Quartermaine telephoned the CCC on 17 May 2007. He told the officer to whom he spoke that a police officer involved in his shooting had recently boasted to Mr Quartermaine's grandson about getting away with the shooting and that a witness who gave evidence at his trial was willing to recant and admit perjury. From the notes taken by an unknown CCC officer of this conversation, Mr Quartermaine was told that his complaint was 16 years old, that he should instead obtain legal advice about having his conviction quashed and that he should perhaps go to the Aboriginal Legal Service for help.

The telephone call on 21 November 2008

On 21 November 2008, Mr Quartermaine again telephoned the CCC. He spoke to yet another officer. He said that he had heard nothing from the CCC about his complaint (made on 26 June 2006). This officer explained that the CCC's file was closed and that a letter had been sent to him in May 2007 informing him of that decision and of the reasons for it. Mr Quartermaine told the officer that he had not received that letter. The officer said that he would resend it to him. Mr Quartermaine said that he intended to again complain to the CCC.

The written complaint on 7 August 2009

On 7 August 2009, Mr Quartermaine made a second written complaint to the CCC. This recorded that he 'was shot by police in Narrogin in December 1990 ... for no real reason'.

On 7 September 2009, a different CCC officer ('second officer') wrote to Mr Quartermaine, quoting the CCC's reference number which appeared on the CCC's letter to him dated 11 May 2007 and saying that Mr Quartermaine had not recorded in his letter of 7 August 2009 sufficient information that might be considered to amount to misconduct on the part of police. He said that Mr Quartermaine was required to provide sufficient information to establish or substantiate a complaint before an assessment could be made.

The telephone call on 10 September 2009

On 10 September 2009, Mr Quartermaine telephoned the second officer and objected to his assessment. He was told that if he had evidence of misconduct then he was free to send it to the CCC for assessment.

The letter dated 27 September 2009

On 27 September 2009, Mr Quartermaine wrote to the second officer. He repeated his complaint about being shot. He also complained that his son had been mistreated by police. He reiterated that a witness who had given evidence in his trial, wanted to tell the 'whole truth'. The second officer replied to Mr Quartermaine by letter dated 4 November 2009. He told Mr Quartermaine that his complaint had been assessed by the KRC and by the first officer. He attached a copy of the first officer's letter and informed Mr Quartermaine that further assessment had not altered the CCC's decision and that his file would remain closed.

The complaints to me

Mr Ian Quartermaine

On 9 November 2009, Mr Quartermaine complained to me about the CCC's decision. On 17 November 2009, I raised the issue with Commissioner Roberts-Smith.

In his letter to me dated 4 February 2010, the Commissioner informed me that the CCC would itself investigate Mr Quartermaine's allegations to determine if any misconduct had been committed by any public officer in relation to Mr Quartermaine.

Mr Phillip Quartermaine

On 18 January 2010, I received a letter of complaint from Mr Phillip Quartermaine. In his letter, he made a number of complaints concerning the manner in which police officers had dealt with him on 4 December 1990, including allegations that they had assaulted and threatened to kill him. He was asked to refer these allegations to the CCC.

THE SUBSEQUENT MISCONDUCT INVESTIGATION BY THE CCC

The misconduct investigation subsequently conducted by the CCC concluded on 17 May 2011.

As part of its investigation, the CCC conducted private examinations from 29 November 2010 to 2 December 2010. The CCC did not adduce evidence from Mr Smith. Its reason for not doing so, subsequently expressed by Acting Commissioner Herron (who was appointed as an Acting Commissioner in January 2011), was that Mr Smith had no direct knowledge of events and had conducted 'only a cursory review' of the matter. Phillip Quartermaine was also not asked to give evidence.

The CCC's conclusions expressed in its letter to Mr Quartermaine dated 17 May 2011

The principal conclusions drawn by the CCC, as expressed in its letter to Mr Quartermaine dated 17 May 2011, can be summarised as follows:

1. The CCC could not accept any witness's account at face value. This was because 'the passage of time and other factors such as conversations with others about that night's events can influence the accuracy of each individual's recollection'.
2. The two police investigations conducted in the aftermath of the shooting failed to properly isolate and preserve the crime scene to have it forensically examined. They also failed to attempt to recreate and/or re-enact the events of that day. Both of these failures have hampered the CCC's attempts to gather objective material.
3. Ten specific issues were identified. The letter summarised the available evidence in respect of each and expressed the CCC's conclusions in respect of each issue. The issues and the CCC's conclusions were as follows:

Issue 1

Were police justified in attempting to stop Mr Quartermaine on 4 December 1990?

Conclusion

Police had reasonable grounds to approach Mr Quartermaine on 4 December 1990 and sufficient justification for suspecting that he might be armed with a firearm or firearms.

Issue 2

The alleged discharge of firearms at O'Brien Road (the first road-block).

Conclusion

The evidence available to the CCC is insufficient to support the allegation that police fired at Mr Quartermaine's vehicle at the roadblock at O'Brien Road.

Issue 3

The Cuballing roadblock and arrest.

Conclusion

Mr Quartermaine's version of events conflicted with that of police. Due to the absence of independent supporting evidence, it is unlikely that this conflict can be satisfactorily resolved. The CCC could not rely on witness evidence alone. If it did, this would effectively be detrimental to Mr Quartermaine's position on this issue.

The evidence of the police officers who discharged their firearms in Mr Quartermaine's direction was that they did so while his vehicle was in motion and because they were in fear that Mr Quartermaine was about to run down one of them. The evidence of other police officers who witnessed the event also supports this description of the circumstances and contradicts Mr Quartermaine's account of the incident.

Following events at Cuballing, the incident scene was not preserved by the attending officers for a forensic examination. The failure to preserve the incident scene for a proper and thorough forensic examination deprived any investigation into the matter of the opportunity to obtain and consider what should have been independent and objective evidence.

The failure to preserve and examine the incident scene had deprived Mr Quartermaine and the police of an opportunity to secure a valuable avenue of supporting evidence.

Issue 4

The forcible removal of Mr Quartermaine from his vehicle.

Conclusion

The police had reasonable grounds and sufficient justification for suspecting that Mr Quartermaine might be armed with a firearm or firearms and thereby forcibly removing him from his vehicle.

Issue 5

The alleged assault on Mr Quartermaine.

Conclusion

The available evidence did not allow the CCC to conclude that Mr Quartermaine was unlawfully assaulted by one of the officers when apprehended at Cuballing, although the evidence indicated that this was unlikely.

Issue 6

The alleged assault and threats made to Phillip Quartermaine.

Conclusion

The available evidence did not allow the CCC to conclude whether these events occurred.

Issue 7

Unreasonable damage caused to Mr Quartermaine's vehicle.

Conclusion

The damage to the front of Mr Quartermaine's vehicle was most likely to have been caused by impact with a power pole, as alleged by police.

Issue 8

Mr Quartermaine's liquor consumption prior to the pursuit.

Conclusion

It is likely that Mr Quartermaine had consumed more than the two glasses of beer admitted to by him. Whether this had an influence on his perception of events or his actions is not known.

Issue 9

False testimony of Mr Tyson.

Conclusion

Inquiries by the Commission did not discover any evidence that Mr Tyson conspired or colluded with police to fabricate evidence against Mr Quartermaine.

Issue 10

The diligence of the Narrogin Police and IIB investigations.

Conclusions

The CCC's conclusions in this respect read as follows:

'Examination of the police investigation process in 1990 indicates that this event could have been investigated more thoroughly through a better application of forensic processes. There is however no evidence that had a more thorough forensic examination of the event scene occurred, an alternative outcome would have been achieved by the police or any subsequently involved investigative agency.

The initial IIB investigation into whether the discharge of police firearms that resulted in your injury was justified was inadequate in that it lacked rigour and diligence.

Both investigations failed to either preserve or reconstruct the incident scene when the opportunity existed to do so. The consequences of those failures are that a proper forensic examination of the incident scene never occurred.

The criminal outcome of this matter remains as it did in 1991 when a Supreme Court considered the evidence available to it at the time, and a jury determined based on that evidence that your actions did not amount to an attempt to murder [one of the police officers].'

4. The CCC's overall conclusions, as expressed in the letter, were as follows:

'The failure to preserve the incident scene for a proper and thorough forensic examination deprived any investigation into this matter of the opportunity to either obtain or consider what should have been independent and objective evidence. Primarily as a consequence of those shortcomings any investigation into these events was unlikely to achieve a conclusive outcome.

The Commission's investigation sought to determine whether or not any police officer did or did not commit misconduct in relation to the events at Cuballing in 1990. That investigation was however unable to form opinions about misconduct because its assessment of the evidence relied largely on the personal accounts of those individuals involved.

The evidence available is insufficient to conclude that in relation to your apprehension on 4 December 1990 and any subsequent investigation concerned with that matter, any police officer employed by the Western Australia Police engaged in misconduct.'

The letter dated 17 May 2011 from the CCC to the Commissioner of Police

In a separate letter dated 17 May 2011 addressed to the Commissioner of Police (not copied to Mr Quartermaine), the CCC brought the following matters to the Commissioner's attention:

'The investigation of the incident by Narrogin Police was not conducted diligently. Essentially:

- there was no specific investigation of the shooting by police conducted by police at the scene at the time it occurred;
- the Officer-In-Charge (OIC) did not take steps to instruct officers to preserve the scene in respect of the shooting nor did he instruct officers to search Mr Quartermaine's vehicle, although he assumed that this was done;
- the OIC did not think it was appropriate to mark the scene in terms of where the officers were when shots were fired as he thought that would be taken care of by IIB officers (which was a belief without substance);
- without the scene being preserved, by the time IIB officers arrived the evidence that could have been obtained was lost;
- the fact that a bullet was located at the scene but that there was not evidence as to who found it, when it was found or where it was found demonstrates a fundamental failure to properly secure evidence and ensure its continuity;
- the OIC never considered whether the shooting was unlawful, which appears to have played a significant part in his failure to investigate the shooting (and which he considered in hindsight, during the Commission private examination, would have been investigated differently had, for example, Mr Quartermaine shot at police);
- the failure of police to take steps to preserve the scene of the shooting, establish some basic facts such as where people and vehicles were when shots were fired and to secure evidence located at the scene in a manner consistent with proper police investigative methodology denied IIB officers crucial evidence that may have assisted in the proper determination of the matter; and
- there seems to have been an implicit acceptance by the police present at the scene that the shooting by police was justified in the circumstances.

The investigation of the actions of police by IIB officers was not conducted diligently. Essentially:

- the apparent acceptance of the legitimacy of the shooting appears to have also played a part in the investigation by the IIB investigator;
- there is no readily acceptable explanation for the failure of the IIB investigator to have correctly identified the officer responsible for shooting Mr Quartermaine (when regard was had to the ballistics report it was abundantly clear which officer was responsible for firing the bullet that wounded Mr Quartermaine);
- this fact should have immediately caused the IIB investigator to consider the positioning of the officer when he discharged his firearm to determine whether or not his life was in jeopardy (consistent with stated beliefs);
- it appears to have been accepted that police were justified in discharging their firearms because of the dangerous circumstances that existed (no regard seems to have been given to determining the details of the shooting and there was no investigation to determine whether the shooting by police was justified);
- there was a failure to consider inconsistencies in the accounts of witnesses;
- reports from relevant officers were not subject to any degree of scrutiny by the investigator, nor did he subsequently interview the officers (the material obtained appears to have been taken at face value);
- the investigator had had prior dealings with Mr Quartermaine and appeared to have formed a negative view prior to the investigation, and which the investigator did not raise with anyone (such a perception of bias could well be seen to indicate that the investigation was not impartial);
- the failure of the investigator to have correctly identified the officer responsible for the shooting led to other more senior officers being unaware of the error (as the investigator failed to establish in his report which officer had which particular firearm at the relevant time, and without this information the forensic report did not indicate anything contrary to the balance of the investigator's report and that in turn explains why the error was not detected);
- the firearm register was not part of the investigator's report (therefore, it was not possible, relying solely on the report, for any senior officer to note the error);
- the investigator failed to properly investigate the scene to establish the events that occurred (for instance, there was no attempt to recreate the scene with the two officers responsible for discharging their weapons);

- the investigator appeared to have returned to the scene to conduct some form of re-enactment with an officer who did not even see the shooting; and
- photographs allegedly taken at the scene at the time of the event were never located and certainly do not appear to have been taken into account by the investigator.'

MY ASSESSMENT OF THE CCC'S PROCEDURES

My investigation of Mr Quartermaine's complaint to me reveals fundamental shortcomings in the procedures adopted by the CCC in assessing Mr Quartermaine's complaint of misconduct by police officers.

Referral of Mr Quartermaine's complaint from the KRC to the CCC in 2003

The materials from the KRC relating to Mr Quartermaine's complaints, including the Smith report, were referred to the CCC upon its creation pursuant to s 19(3) of the CCC Act. Under s 19(2), the CCC had the statutory function of assessing matters referred to it and, where appropriate, initiating or continuing an investigation and otherwise dealing with those matters.

When I first raised Mr Quartermaine's complaints to me with the CCC, Commissioner Roberts-Smith QC informed me that, following receipt of the KRC documents, they were reviewed by then Commissioner Hammond and by the CCC's then Executive Director, Mr Matthew Byrne, but that the CCC's records '... were deficient in that there is no notation or other record to indicate what action was taken in relation to Mr Quartermaine's complaints from the time of the [CCC's] inception to the receipt of Mr Quartermaine's further complaint dated 26 June 2006'. He acknowledged, by letter dated 4 February 2010, that if the file had been reviewed it was 'difficult to see why Mr Smith's report and recommendations would not have been acted upon to the extent of requiring some further investigation at least'.

However, by letter dated 12 July 2011 (as supplemented by a letter dated 15 July 2011), the CCC informed me that further inquiries by it indicate that this last statement was incorrect. The CCC relies in this respect on a document that was not previously produced or mentioned by it.

The document is an 'Investigation Summary Sheet', bearing a 'Date Received' of 30 October 2003, generated by the KRC. It provides an 'Objective Reference', which presumably relates to an electronic file. Attached to it is a summary of facts relating to Mr Quartermaine's complaint. That document is in some respects identical to Mr Smith's report dated 8 August 2003. However, a number of sentences (and in some cases whole paragraphs, including those earlier quoted in this report) have been deleted from it. In other cases, sentences have been amended. The foot of the document bears the notation 'SUMMARY SHEET – INTERNAL AFFAIRS UNIT'. After reciting the differing version of events that had respectively been offered by police and Mr Quartermaine, and after commenting on the deficiency of police investigations of the shooting, the summary concludes as follows:

'A full report detailing the review of this matter is contained within T2/Preliminary Investigation "Quartermaine – internal Working notes/memo – summary, conclusions and recommendations" dated 8 August 2003.'

No reference is made to Mr Smith's report dated 12 August 2003. However, a review of his memorandum dated 8 August 2003 would presumably have drawn the later document to a reader's attention (I have earlier mentioned that the earlier memorandum refers to the later report).

The Investigation Summary Sheet contains a section headed '**Actions**' under which are four boxes, the applicable box being required to be shown by a cross. These were respectively 'Submission for Final Report', 'Intelligence for CCC', 'Operational Handover to CCC' and 'Other'. The box marked 'Intelligence for CCC' contained a cross designating it as applicable.

The CCC's contention in this respect is that because:

- Senior Counsel assisting the Royal Commission (Mr Hall) had authorised only limited enquiries, indicating that, absent substantive support for Mr Quartermaine's allegations, the matter was not to proceed;
- Mr Smith's investigations produced no evidence to support a full investigation and the Royal Commission did not pursue the matter; and
- the Investigation Summary Sheet was marked 'Intelligence for CCC' rather than 'Operational handover to CCC',

the matter appears to have been dealt with in accordance with the KRC recommendation and 'filed for intelligence purposes'. It contends that matters categorised as being 'for intelligence purposes' were placed in an electronic management system which CCC analysts were able to, and regularly did, search when dealing with complaints regarding police misconduct. It also contends that the matter was consequently not, and not required to be, subject to any separate assessment for investigation by the CCC.

In its 'Final Report Volume I', the KRC states (page 603) that 'If the [KRC] decided not to investigate a complaint ... the complainant was advised accordingly'. No such advice was ever received by Mr Quartermaine. However, the CCC says that it has:

'further examined the electronic files and some archived records of the [KRC] and has been unable to locate copies of the correspondence sent to any complainant associated with the [KRC's] decision not to investigate a complaint associated with any of the 26 matters not investigated by [it] and subsequently passed to the [CCC] for intelligence purposes.'

The CCC goes on to say that it is 'most regrettable that a record of the [KRC's] decision not to investigate Mr Quartermaine's complaint is unavailable' but adds that it is 'not responsible for decisions taken by the [KRC] nor for the adequacy of its administrative processes'. It adds that it 'is prepared to write to Mr Quartermaine in terms regretting any distress caused should the [KRC] have failed to inform him of its decision not to investigate his allegations'.

These justifications offered by the CCC for its conduct are unconvincing.

The assertion that the KRC made a decision not to investigate Mr Quartermaine's complaint is not justified. The KRC Investigation Summary Sheet does not refer to any such decision and nor can any other record of it be found. The most logical conclusion is consequently that no such decision was made, a conclusion that is

supported by the fact that Mr Quartermaine was never notified of any such decision in accordance with the KRC's acknowledged practice.

The mere fact that CCC officers have not been able to locate any other such notifications, having examined 'electronic files and *some* archived records of the [KRC]' (my italics) does not mean that all other unsuccessful complainants were also not informed, notwithstanding the KRC's assurance to the contrary. Nor does it cast any doubt upon Mr Quartermaine's assertion that no such notification was sent to him.

The fact that Mr Hall had authorised only limited inquiries says nothing at all about the outcome of those enquiries, once made. It is simply not correct to assert, as the CCC does, that any decision was taken by Mr Hall that, absent 'substantive support' for Mr Quartermaine's allegations, the matter was not to proceed.

In any event, it is apparent from Mr Smith's report that he believed that there was 'substantive support' for Mr Quartermaine's allegations. It is also quite wrong for the CCC to assert, as it now does, that there was no evidence to support a full investigation. There was, as a reading of Annexure A to this report quite plainly reveals, ample evidence to justify a full investigation. The CCC's assertions in this respect are contradicted by its own decision to conduct a full investigation, after receiving a complaint from my office. Also, I have earlier mentioned that Commissioner Roberts-Smith subsequently recognised that it was, 'difficult to see why Mr Smith's report and recommendations would not have been acted upon to the extent of requiring some further investigation at least'.

Reliance upon the categorisation of the matter in the Investigation Summary Sheet seems to me to be an 'after the event' justification that does not withstand scrutiny. The Summary Sheet, which was an edited version of Mr Smith's report dated 8 August 2003, was prepared after receipt of that report (and of his report dated 12 August 2011), presumably with a view to the handover which was soon to take place. There is nothing surprising in the fact that the matter was categorised 'Intelligence for CCC' rather than 'Operational Handover to CCC'. If, as seems to me to be the most logical explanation, no decision had been made as regards further investigations, the sensible course would be to leave that decision to the CCC which was obliged by s 19(2)(a) of the *CCC Act* 'to receive and assess all matters referred to [it] by the [KRC]'. The categorisation given to the document seems to me to have been the only sensible choice in those circumstances.

Indeed, that is how the first officer saw the position when he first dealt with the issue. In an email addressed to another CCC officer on 1 December 2006, the first officer said that he had 'located documents on the Royal Commission Objective that indicate that the KRC assessed [Mr Quartermaine's] complaint but appears not to have conducted any formal investigation, possibly leaving it for the CCC'.

There is another point that might be made in this context. In its letter to me dated 15 July 2011, the CCC contends that the phrase 'intelligence purposes' is generally understood as conveying the 'expectation ... that the recipient of the information will assess it within its own operational and strategic context and make whatever use of it, if any, the agency deems appropriate'. However, the CCC accepts that,

notwithstanding this categorisation, it would have been open to it under s 22(2)(e) 'to make an assessment or form an opinion on the basis of' the information provided (albeit there 'was no imperative to do so').

It consequently seems to me to be evident that the CCC did not fulfil its statutory obligation, imposed by s 19(2) of the CCC Act, to assess Mr Quartermaine's complaint when it was referred by the KRC in 2003. No record exists within the CCC to indicate that any assessment of the file relating to Mr Quartermaine's complaint was made at that time, or at any subsequent time, prior to Mr Quartermaine's written complaint to the CCC on 26 June 2006.

This was a serious omission. Because the events about which Mr Quartermaine complained were already 13 years old in 2003, it was especially important to follow up, at once, Mr Smith's recommendations, or at least to further investigate them. This was even more important in circumstances in which Mr Smith had questioned the 'veracity' of Mr Quartermaine's convictions and in which he had recommended that Mr Quartermaine and his legal counsel be informed of his conclusions.

Mr Quartermaine was not aware of the CCC's failure to assess his complaint when it was transferred from the KRC in 2003. Nor, as I have said, was he aware of Mr Smith's conclusions or even that he had prepared a report. Consequently, a period of more than three years passed before the complaint was assessed, as a result of his written complaint dated 26 June 2006.

CCC's assessment of Mr Quartermaine's complaint dated 26 June 2006

After Mr Quartermaine had complained in writing to the CCC on 26 June 2006, he was, as I have said, telephoned during the following day by an officer of the CCC. In that telephone conversation, Mr Quartermaine provided an outline of the history of his complaint. I have mentioned that the first officer was allocated Mr Quartermaine's complaint for assessment.

The delay

It took almost a year before the first officer wrote to Mr Quartermaine to inform him of his assessment. I have said that no explanation was offered to Mr Quartermaine for the delay. However, the first officer has since explained the delay by saying that there had been a significant backlog of work in the CCC's Investigations Review and Complaints Assessment section, to which he had been seconded. The first officer said that, because of the backlog, coupled with other responsibilities he had, the process he adopted 'was to prioritise the most current and recent notifications for assessment over a historical complaint which had been previously assessed by the Kennedy Royal Commission, the Ombudsman and investigated by WA Police'.

This explanation (accepted by Commissioner Roberts-Smith in his letter to me dated 4 February 2010) ignores the fact that the latest of the previous assessments referred to by the first officer had concluded that there appeared to be substance to Mr Quartermaine's complaint, that the police officers concerned might well have perjured themselves and that the subsequent internal investigation bore the hallmarks of a 'cover-up'. It was then obvious that the matters addressed by Mr Smith raised very

serious issues that called, at the very least, for further investigation, the police investigation having been patently inadequate (as has now been confirmed). The delay in addressing the issues made it more, rather than less, urgent that they be addressed at once.

To describe Mr Smith's investigation as having been 'cursory' also seems to me to provide no answer. Firstly, it was not cursory. It was as thorough as circumstances had permitted and was carefully reasoned. Secondly, its conclusions and recommendations were so serious as to demand further investigation even if it could be described as 'cursory'.

The first officer's reasons for not investigating the complaint

I have said that the first officer's justifications for his assessment were unsupportable and misleading. Indeed, so unsupportable were the justifications offered that it is difficult to accept that any serious consideration could have been given to the file. The subsequent attempts by him to justify the decision are equally unsupportable, as has effectively been acknowledged by Commissioner Roberts-Smith.

In its letter to me dated 12 July 2011, the CCC has suggested that the first officer's position must be considered in the context of Mr Hall's reluctance to pursue the matter and the decision to pass it to the CCC for intelligence rather than for operational handover. However, this justification, which has not previously been offered by the first officer, seems not to be supportable in the light of his email sent on 1 December 2006.

Mr Quartermaine's subsequent complaints

It was seemingly the first officer's flawed assessment which resulted in the rejection of Mr Quartermaine's subsequent complaints to the CCC made both orally (on 17 May 2007, 21 November 2008 and 10 September 2009) and in writing (on 7 August 2009 and 27 September 2009). I assume that none of the officers who then dealt with Mr Quartermaine could have made any independent assessment, given the unsupportable and misleading character of the assessment that had been made by the first officer. If I am wrong in that assumption, the continuing failure to take any action is even more serious.

Non-disclosure of the existence of Mr Smith's report

The failure of the CCC to disclose to Mr Quartermaine the existence of or the conclusions arrived at in the Smith report is troubling, more especially so in circumstances in which the CCC's letter dated 11 May 2007 created a misleading impression of the conclusions arrived at in the report.

In its letter dated 12 July 2011, the CCC suggests that it was unnecessary for the first officer to bring Mr Smith's report to Mr Quartermaine's attention essentially because:

- it was impossible to reconcile the conflicting accounts of what had occurred and come to a finding with any degree of certainty and provision of the report would not have enabled the conflict to be resolved; and

- it is not, and was not, usual for the CCC to provide copies of documents referred to during assessments (the CCC being required to focus on public sector misconduct and not to act as ‘a complaints resolution agency’).

The CCC also suggests that it was justified in not releasing Mr Smith’s report to Mr Quartermaine at the time of notifying him of the outcome of its own investigation because:

- Mr Smith’s report recognised that consideration should be given to ‘further determining that the shooting of Mr Quartermaine was unlawful’ and was consequently tentative in his conclusions;
- the CCC’s investigation considered and addressed the matters raised in the Smith report and the conclusions contained therein;
- the CCC’s investigations and conclusions undermined Mr Smith’s report leading to the view that it had no probative value;
- providing Mr Smith’s report would not have assisted him in obtaining any clearer understanding of the circumstances in which he was shot or in achieving some resolution; and
- the purpose of the CCC’s investigations was not to determine and/or resolve a dispute between Mr Quartermaine and the police, or to determine whether he had grounds upon which to seek to quash his convictions; rather it was to determine whether there had been any misconduct by police.

These justifications are not persuasive.

Mr Quartermaine was entitled to know that the CCC’s opinion of events was not shared by Mr Smith. He should have been afforded the opportunity to decide for himself, and to have his legal advisers advise him, what weight should be accorded to Mr Smith’s conclusions. While those conclusions were necessarily provisional, they were far from tentatively expressed, as a reading of the report makes plain.

Also, this was not a ‘usual’ case. I have previously said that Mr Quartermaine’s convictions were questioned by Mr Smith. It seems to me to provide no answer to say, as the CCC does, that its investigations led it to doubt Mr Smith’s conclusions (a view that others might not share). It was not for the CCC in effect (if unintentionally) to deny him the opportunity of obtaining advice concerning his ability to quash those convictions in the light of any fresh evidence discovered by Mr Smith, even if it disagreed with some of Mr Smith’s conclusions (and its letter to the Commissioner of Police, not copied to Mr Quartermaine, reveals that it agreed with a number of them).

It is important to bear in mind, as I have earlier mentioned, that Mr Smith had recommended, not only that Mr Quartermaine be apprised of his conclusions as appropriate, but also that his counsel be so apprised.

Apart from anything else, it seems to me to be unconscionable that Mr Quartermaine should have been left labouring under the misconception that was created by the CCC's letter dated 11 May 2007.

The CCC's offer of an apology

In its letter to me dated 12 July 2011, the CCC has agreed to apologise to Mr Quartermaine for its delays in addressing his complaints. It is also prepared to apologise to him for 'any misunderstanding stemming from the first officer's well-intentioned but imprecise language' in his letter dated 11 May 2007. Finally, it has said that, notwithstanding its belief that it was justified in not providing Mr Smith's report to Mr Quartermaine (or telling him of it), 'to the extent not providing [that] report has added to [his] frustration, this was unintended and is regretted and [the CCC] will write to [him] in those terms'.

The CCC has also said, in its letter dated 12 July 2011, that it accepts my recommendation that steps should be taken to ensure that the shortcomings identified by me are not repeated, 'in so far as it relates to the inordinate delay in assessing Mr Quartermaine's complaints throughout the period from the Commission's inception to 11 May 2007'. It says that it has in place systems and procedures whereby the assessment process is documented and its timeliness monitored and reviewed.

My assessment is that Mr Quartermaine has been very badly treated by the CCC. It failed to fulfil its statutory obligation to assess his complaint in the light of Mr Smith's report until more than three years had passed, in circumstances in which it was important to avoid further delay. Then, when it did so, this was done in a manner that was quite unsupportable. The letter written to Mr Quartermaine informing him of the outcome of the CCC's assessment was dismissive and obviously misleading. If, as the CCC says, it was not intended to be misleading, it should plainly have been appreciated that it was so. The CCC's rejections of his subsequent complaints were also dismissive and unjustified. The CCC's failure to provide him with a copy of Mr Smith's report, or even to tell him of it, is unsupportable.

In these circumstances what is needed is a recognition by the CCC of the fact that there were serious shortcomings in its processes, without which there can be little confidence that they will not be repeated. This is best reflected by an unqualified apology to Mr Quartermaine.

MY RECOMMENDATIONS

I recommend that:

1. the CCC should make an unqualified apology to Mr Quartermaine for each of its delays in addressing his complaints, for the misleading character of its letter to him dated 11 May 2007 and for its failure to notify him of the conclusions arrived at in the Smith report; and
2. the CCC should take steps to ensure that none of these shortcomings is repeated.



C D STEYTLER QC
PARLIAMENTARY INSPECTOR