

Appendix Two

Parliamentary Inspector's Report

**MISCONDUCT BY AN OFFICER OF THE
CORRUPTION AND CRIME COMMISSION:
REPORT ON THE EXECUTION OF A SEARCH
WARRANT ON THE SHIRE OF HALLS CREEK**

Sections 199 and 201 of the *Corruption, Crime and Misconduct Act 2003 (WA)*

6 September 2018

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1. EXECUTIVE SUMMARY

On 26 September 2017 Commission investigators, led by then-Senior Investigator Officer Z , executed a search warrant on the residence of the Chief Executive Officer of the Shire of Halls Creek, Mr Kerr-Newell, as part of its investigation of alleged serious misconduct on the part of Mr Kerr-Newell in his role with the Shire. His residence is owned by the Shire and he resided in it as part of his employment package. I understand he has now left the Shire and returned to his place of origin, New Zealand

Officer Z had applied for, and was granted, the search warrant from the Supreme Court of Western Australia on 21 September 2017. The warrant was to be executed within 14 days. He had ascertained through enquiries with airlines on 29 August 2017 that Mr Kerr-Newell was booked on a flight from Kununurra to Perth on 22 September 2017, and on a return flight on 30 September 2017. Officer Z deliberately chose to arrive at the Shire with his investigators on 26 September 2017 while Mr Kerr-Newell was absent.

Officer Z and his investigators, accompanied by local police officers, gathered the Shire staff in the Council's chamber, and informed two senior Shire officers, Messrs Mono (Acting CEO of the Shire in Mr Kerr-Newell's absence) and Burgess (Director of Infrastructure and Assets), of his possession of a search warrant for Mr Kerr-Newell's Shire office. Officer Z had Mr Mono witness and assist his search of that office, a notably different situation from that which ultimately applied to the search of Mr Kerr-Newell's residence.

Later in the day Officer Z told Messrs Mono and Burgess he also possessed a search warrant for Mr Kerr-Newell's Shire-owned residence, and that he had arranged for the Officer in Charge of the local Police Station, Senior Sergeant Jenal, to accompany him and his investigators during the execution of the warrant as an 'independent witness'.

But Senior Sergeant Jenal was not an independent witness in the true context of an execution of another agency's search warrant. The Commission's investigation was into alleged corruption by Shire officers, particularly Mr Kerr-Newell, within the local Police District, and the Commission's officers were based at the Police Station and operated in conjunction with some of its personnel.

Critically, Officer Z told Messrs Mono and Burgess that neither of them would be required to be present during the execution of the search warrant due to Senior Sergeant Jenal's asserted independence, but requested Mr Burgess to attend the residence with a key to give Officer Z , his investigators and Senior Sergeant Jenal entry. Mr Burgess was told to remain outside during the search so that he could lock the residence afterwards.

Officer Z had no legal power, either under the terms of the search warrant or otherwise, to deny Messrs Mono and Burgess entry to Mr Kerr-Newell's residence. Nor did he tell either man that, as senior Shire officers, both had a legal right to be present on Shire property during the search had they so wished. Their right of entry to that property was thereby deliberately set at naught by Officer Z .

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Officer Z did not attempt to find any other person who could be considered to be genuinely an 'independent witness' to be present during the execution of the search warrant. Mr Burgess later complained of three or four instances of Officer Z and his investigators' raucous laughter from within Mr Kerr-Newell's residence during the search.

The video recording of Officer Z and his investigators' search of Mr Kerr-Newell's premises was demonstrably poor and beneath any acceptable standard expected of an integrity agency like the Commission. None of the footage recorded the laughter complained about by Mr Burgess (admitted to by Officer Z and his investigators), or the moments various materials, including cash, were allegedly found by them.

Multiple rooms of the premises were searched simultaneously when only one video camera was used, and there were frequent instances when the video camera was deliberately turned off during the search. The pattern was to turn the camera on and film an officer showing some item to be seized, indicating where it had been found, a process without the benefit of being recorded on film.

Pursuant to my function under s 195(1)(b) of the *Corruption, Crime and Misconduct Act 2003 (WA)* I have determined that Officer Z deliberately ensured that neither Mr Kerr-Newell, nor any other Shire officer, nor any genuinely independent witness, would be present during his execution of the search warrant.

I have determined that Officer Z's conduct involved a breach of the trust placed in him as a senior officer of the Commission, falling within s 4(d)(iii) of the Act as a disciplinary offence providing grounds for the termination of his employment, as described in sub-section (vi), and as such was an act of misconduct. As a Senior Investigator in the Commission, his conduct was an indefensible abuse of power.

I have made recommendations at the end of my report to the Commission to help it ensure that such a deliberate manipulation of circumstances is not repeated by its investigators.¹

2. COMPLAINT MADE BY SALERNOLAW

The legal practice SalernoLaw represented the Shire of Halls Creek and (perhaps) Mr Kerr-Newell at the time of Officer Z's execution of the Commission's search warrants. It complained in writing to the Commission about the described conduct two days afterwards. Its points of complaint were:

1. Mr Burgess intended to witness the execution of the search warrant but was told by the Commission investigators he could not;

¹ I make no adverse observations or findings concerning Senior Sergeant Jenal's conduct as a Police Officer. To do so would not be part of my function in any event.

2. Senior Sergeant Jenal could not be considered to be an 'independent witness' given the nature of the Commission's investigation and given that he had been detected 'liking' adverse social media posts concerning Mr Kerr-Newell and similar adverse posts about the Shire being investigated by the Commission, and
3. While Mr Burgess remained outside Mr Kerr-Newell's residence while the premises were being searched he could hear loud, cackling, hysterical laughter and intermittent banter coming from the Commission investigators inside.

The initial enquiries into the complaint made by SalernoLaw were conducted by the Commission's Legal Services Directorate and involved requesting a written response, by email, from Officer Z and each of his investigators in respect of each issue in the complaint, except that which related to the presence of Senior Sergeant Jenal.

In relation to Mr Burgess being instructed that he could not attend the execution of the search warrant, Officer Z responded by saying that he told Mr Burgess at the Shire before leaving for Mr Kerr-Newell's residence 'that it was not a necessity for him to be present during the search of the premises, as Commission officers would be accompanying the (sic) S/Sgt Peter JENAL from the Police Station.'

None of Officer Z's investigators responded by saying that they overheard Officer Z's conversation with Mr Burgess, or that they had any conversation themselves with Mr Burgess at that time.

In relation to the issue of the sound of loud laughter coming from the premises during the search, Officer Z and his investigators individually responded by saying they laughed at one of the investigators who was short in stature and who was unable to reach the top of a cupboard he wanted to search. Their response inferred that their laughter occurred on only one occasion, in contrast to Mr Burgess' complaint.

3. THE COMMISSION'S REFERRAL OF THE ALLEGATION TO ME AND MY INVESTIGATION

Commissioner McKechnie QC referred the allegations made by SalernoLaw to me on 25 October 2017 pursuant to s 196(4) of the Act. He said:

The appointment by Commission investigators of Sergeant Jenal as the 'independent witness' was entirely reasonable and appropriate in the circumstances. Commission officers had no knowledge of any social media activity said to be attributable to Sergeant Jenal. It was incumbent on Sergeant Jenal to speak up if he felt he was unable to faithfully and impartially execute his duties.

In my view, there is no substance to any of the complaints and I do not intend to remove any Commission officers from the investigation, which appears to be the outcome Ms Salerno desires.

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The Commission has confirmed receipt of Ms Salerno's email and will shortly write to her in line with the views expressed above.

On 7 November 2017 I wrote to SalernoLaw saying I was now investigating its allegations. I requested a detailed account of them.

On the same day I responded to Commissioner McKechnie QC saying I had written to SalernoLaw asking for further particulars of its allegations. I asked for a detailed account of how the Commission came to choose Senior Sergeant Jenal as a so-called 'independent witness' and whether any other person, including someone from the Shire's office, was approached to undertake the task. I also asked for a copy of the video recording of the execution of the search warrant.

On 20 November 2017 Commissioner McKechnie QC replied with Officer Z's written account of how he came to choose Senior Sergeant Jenal, and with a copy of the video recording of the execution of the search warrant.

Commissioner McKechnie QC also objected to me having communicated with SalernoLaw, adding that the Commission's investigation into the Shire was an active investigation and that in the future 'I would appreciate it if you could let the Commission know of your intention to make enquiries with legal counsel acting for any person of interest to the Commission's investigations, prior to doing so.'

Officer Z said he asked Senior Sergeant Jenal to act as an 'independent witness' on 15 September 2017, and that he had one of his investigators ensure that the sergeant had no adverse disciplinary findings made against him in the past. No other person was asked by Officer Z to act in that role.

On 21 November 2017 SalernoLaw replied to me saying:

1. Mr Mono, after being told by Officer Z of his intention to execute a search warrant on Mr Kerr-Newell's residence, said it would be preferable to await Mr Kerr-Newell's return so that he could provide access and be present during the search;
2. Officer Z said that given Mr Kerr-Newell's home was a Shire asset the Shire was required to provide him with access in order for investigators to execute their search warrant, and enquired which staff member held the keys for Shire assets;
3. Mr Mono said Mr Burgess held the keys to all Shire assets. He took Officer Z to Mr Burgess' office where Mr Mono heard Officer Z say to Mr Burgess:

We are going to execute a search warrant on the home of Mr Kerr-Newell and you have the keys. We will need you to come with us and unlock the home, so we can gain entry, and then you will remain outside the premises until we leave and we will need you to lock up. We have appointed Sergeant Jenal as the independent witness who will accompany us inside the premises during our search.

4. Mr Mono understood from Officer Z's words that the Shire did not have the option to request a staff member accompany him and his investigators during their search;
5. Neither Officer Z nor any of his investigators afforded Mr Mono the option, nor stated the Shire's right, to have a staff member act as an independent witness during the search, and
6. Mr Burgess corroborated Mr Mono's account of Officer Z's direction given in point 3 above.

On 21 November 2017 I wrote to Commissioner McKechnie QC requesting a more detailed account of the conduct of Officer Z than that previously given, a copy of the search warrant, the warrant application and the affidavit used to have the warrant issued; when the Commission ascertained that Mr Kerr-Newell would not be present in Halls Creek in September 2017 and when he was due to return.

I rejected his assertion that I should contact him prior to communicating with a complainant whose complaint I was investigating, saying:

Following the notification to me it was incumbent upon me to review the matter and my letter to Ms Salerno was merely a preliminary part of that process, which I considered to be necessary and possible without any danger to the capacity of the Commission to pursue its investigation.

I reject the observation in the last paragraph of your letter, but at the same time assure you that in a case where there is an on-going investigation and when I can see no reason to act under s 196(5) of the Act, I will, as I always have been, be alert to ensure that no action of mine may compromise the Commission's investigation.

For now, please attend to the matters raised above so far as the pursuit of your investigation in Operation Oakley permits. As at present advised, I see no reason to change the course of that investigation or the officers involved in its pursuit.

On 14 December 2017 Commissioner McKechnie QC replied with the requested materials, and said:

1. It is standard procedure for Commission investigators to contact the OIC of the local Police Station if they require assistance in executing a warrant;
2. The Act does not set out a procedure for executing search warrants, so the Commission is guided by the procedures in the *Criminal Investigation Act 2006 (WA)*. There is no requirement in the latter Act for an independent witness to be present if the occupier of the premises is not home, so the Commission arranges for an independent witness as a matter of 'best practice';
3. No employee of the Shire was invited to be an independent witness to the execution of the search warrant because:

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- Lawfully intercepted telephone communications indicated that the officers and employees of the Shire have close relationships and regularly socialise outside work;
- The scope and purpose of the Commission's investigation is to determine whether any public officer employed by or elected to the Shire may have engaged in serious misconduct, and although the focus of the investigation is on Mr Kerr-Newell, the Commission has not uncovered the full extent of serious misconduct that may have been engaged in by Shire officers and employees, and
- It is Mr Kerr-Newell who employs Shire employees and it was not considered appropriate to ask an employee to be an independent witness.²

I replied to Commissioner McKechnie QC on 18 January 2018 saying that it was difficult to accept that Senior Sergeant Jenal was an independent witness, given that the Commission's grounds for obtaining its search warrants were its assertions that Mr Kerr-Newell had committed acts of corruption, presumably within the sergeant's jurisdiction.

I said the perception existed that Senior Sergeant Jenal's office prevented him from achieving the purpose meant to be achieved by having an independent witness present, and that the situation was clearly slanted in favour of the Commission by creating the impression that Officer Z and his investigators were fulfilling a criminal law function when they did not have one.

I said that, given that Officer Z's affidavit focussed exclusively on the alleged conduct of Mr Kerr-Newell and not on public officers of the Shire, it was difficult to accept that there was not one single public officer in the Shire, or somebody in the town, who could not attend as an independent witness, either on their own or in combination with Senior Sergeant Jenal, so that some degree of balance in perception might be achieved. I added:

The perceptions described are reinforced by one aspect of the complaint before me, which is that the Commission's officer excluded Mr Mono and Mr Burgess (or anyone else) from the search.

These circumstances were, of course, deliberately created by the Commission's decision, made some time prior to 26 September 2017, to execute its warrant at Mr Kerr-Newell's home when it was known that he was absent (and when the Commission strongly suspected that he was travelling to New Zealand). The basis for the decision, and how it was thought that it would aid the Commission's investigation, has not been explained in your correspondence to me.

² However Officer Z affidavit submitted to the Supreme Court in his application for his search warrants did not identify any other Shire officer as being suspected of corruption or having engaged in serious misconduct.

The inevitable effect of all this is the suspicion that the Commission wanted to conceal from any truly independent eyes the search of Mr Kerr-Newell's home, despite it being, first and foremost, Shire premises. Compounding the effect of these factors is a disturbing aspect of the video recording of the Commission's search: the alleged findings of items seized were not captured by the recording. The findings occurred when the recording, for unexplained reasons, was stopped and restarted – at times, for minutes.

On 8 February 2018 Commissioner McKechnie QC replied:

I agree that the occupier of the premises is generally required to be present when a search warrant is executed, although there may be operational reasons for deciding not to follow this practice.

I have directed that any future decision to execute a search warrant while the occupier is not present must be approved by the Director Operations or Deputy Director Operations.

I share your concerns regarding the video recording of the search warrant. I have initiated a review of the Commission's practice in that regard.

In relation to your comments about the Commission's choice of independent witness, I respectfully disagree. This operation is a broad ranging investigation into all officers and employees of the Shire of Halls Creek. The Commission's policies and practices are consistent with those of other agencies.

On 15 March 2018 I finalised my investigation into the allegation of Officer Z's conduct, and wrote to Commissioner McKechnie QC informing him of my reasons for determining that Officer Z's conduct constituted misconduct within the meaning of s 4(d)(iii) of the Act, and constituted a disciplinary offence providing grounds for the termination of his employment, as described in subsection (vi).

On 16 March 2018 I wrote to SalernoLaw informing it of my determination.

4. REPRESENTATIONS PURSUANT TO S 200 OF THE ACT

Invitations to make representations

On 5 April 2018 I wrote to Commissioner McKechnie QC and Officer Z providing them with a copy of my draft report into my investigation and requested that representations they may wish to make to me pursuant to s 200 of the Act be made by 19 April 2018.

On 9 April 2018 Commissioner McKechnie QC replied, saying the following³:

³ The letter was delivered by email at 4.50pm on that day and was not seen by my office until 10 April 2018.

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1. I did not have sufficient basis for concluding that Officer Z's statement to Messrs Mono and Burgess on 26 September 2017 in which he told them they could not be present during the execution of the search warrant was wilfully made;
2. The statement made by Officer Z could have been mistakenly or negligently made;
3. Messrs Mono and Burgess' accounts of Officer Z's statement should not be accepted because they were provided through the Shire's legal representative, SalernoLaw;
4. Officer Z was not accorded procedural fairness, and as a result any disciplinary action the Commission might take against Officer Z would be likely to be tainted;
5. My draft Report did not remedy the lack of procedural fairness accorded to Officer Z ;
6. However, if the allegation made against Officer Z is true, his conduct is serious;
7. The Chief Executive, Mr Ray Warnes, has decided to institute an investigation 'into the incident with a view to ascertaining the facts' and because of that investigation, he (Commissioner McKechnie QC) is not in a position to make representations to me under s 200 of the Act by 19 April 2018;
8. Because of the Chief Executive's investigation, he (Commissioner McKechnie QC) strongly requested that it is not necessary to identify Officer Z or any other person in the final Report;
9. Officer Z submitted his resignation on 20 March 2018, to take effect on 24 May 2018, and
10. The Commission had not informed Officer Z of my determination of his misconduct in my letter to Commissioner McKechnie QC dated 15 March 2018 prior to 6 April 2018 when my draft Report was delivered.

On 11 April 2018 I received by email a letter dated 9 April 2018 from the Chief Executive which said:⁴

1. He had authorised a disciplinary investigation under s 179(4) of the Act into Officer Z's 'alleged unlawful exclusion of Shire officers during the execution of the search warrant at the Shire of Halls Creek';

⁴ The letter was delivered by email at 4.42pm on that day and was not seen by my office until 12 April 2018.

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2. He sought the materials I relied upon to form my determination of misconduct on Officer Z's part, in particular, the accounts of the two Shire officers who were present during the search;
3. The information requested would determine what further steps should be taken to properly investigate the matter, including 'whether it is necessary to interview the Shire officers and other witnesses to the incident', and
4. The Commission would respond to my draft Report once the disciplinary investigation was complete.

On 11 April 2018 I completed my response to Commissioner McKechnie QC's letter dated 9 April 2018. I said:⁵

1. All parties were given the opportunity, without interrogation, to provide their account of the material facts, knowing the views of the other persons involved and knowing the nature of the Shire's complaint;
2. My determination of misconduct by Officer Z considered his account, given to the Legal Services Directorate on 3 October 2017, of his conversation with Messrs Mono and Burgess, this being the core issue in the allegation made against him. Officer Z had not altered his account;
3. Three people were present at the conversation in which Officer Z said to Messrs Mono and Burgess that they could not be present during the execution of the search warrant. I considered the three accounts given of the conversation, and all the circumstances of the matter, and was persuaded that Officer Z did exclude the two men from the warrant's execution;
4. Officer Z's exclusion of Messrs Mono and Burgess was a willed act and was unlawful because he did not have the power to exclude them;
5. As acknowledged by Commissioner McKechnie QC on previous occasions, the Commission does not have jurisdiction under the Act to determine minor misconduct by its own officers, but I do, and any facts relevant to determining such misconduct within the definition of s 4 fall within my misconduct function;
6. If the scope of the Chief Executive's intended investigation is to discuss the facts with Officer Z, as determined by my draft Report, to understand any subjective factor which might be relevant to the decision of the Commission as to the nature of the disciplinary action to be taken, if any, then that is a matter for him;
7. The Chief Executive will need to take care that his investigation is not concerned to result in a version of the facts which is inconsistent with, or contrary to, the facts I have determined on the question of Officer Z

⁵ My letter was dated 12 April 2018 and was delivered to the Commission by email by my office at 8.36am on that day.

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conduct, because the Commission has no power under the Act to undertake such an exercise or express such a view;

8. The determination of the allegation made against Officer Z is therefore concluded by my investigation, and any disciplinary action to be decided upon by the Chief Executive should not interfere with the finalisation of my report, and
9. Due to the delay caused by the exchange of this correspondence, I agreed to extend the timetable for the Commission's and Officer Z's delivery of their representations to me under s 200 of the Act from 19 April 2018 to 3 May 2018.⁶

Representations made

Despite Commissioner McKechnie QC and the Chief Executive stating an intention not to submit representations to me until the completion of the latter's investigation of the facts of the allegation, the Commission did make its representations on 3 May 2018. The Commission reiterated the points made in the correspondence detailed immediately above, and raised new grounds for objecting to my determination of misconduct.

The Commission stated that Officer Z's version of his conversation with Messrs Mono and Burgess – that it was 'not necessary' for them to be present during the search of the premises – was neither an invitation, nor a prohibition, to observe the search, and that in any case there was no legal requirement on the part of Officer Z to extend an invitation to either man.

Officer Z's current legal representative, Oswald Legal, also made representations to me on 3 May 2018. They were the same as the principal points raised by the Commission in its representations. The representations were carefully considered, as were those made by the Commission, before finalising my Report.⁷

My assessment of the representations

The Commission's representations to me appeared to reflect a belief on the Commission's part that the sole basis of my determination of misconduct by Officer Z was his conversation with Messrs Mono and Burgess on 26 September 2017, the effect of which was to convey to them that they could not be present during the execution of the search warrant. That is not so.

The basis of my determination of misconduct by Officer Z is his deliberate course of conduct designed to result in, and which did result in, the exclusion of

⁶ I also wrote to Officer Z on the same day to inform him of the extended timetable for my receipt of his representations.

⁷ I extended a second invitation to the parties to make further representations pursuant to s 200 of the Act on 2 August 2018 after certain information was received from the Commission regarding its disciplinary investigation of Officer Z's conduct (described below in Chapter 5). My report took into consideration the parties' representations made.

Messrs Mono and Burgess (or any independent person) from being present during the execution of the search warrant on Mr Kerr-Newell's residence.

It was the effect of Officer Z's statement to the two men on 26 September 2017, in the context in which it was made, not the precise words he used, that successfully completed his strategy, thereby dissuading the two men from exercising (or even to be informed of) their legal right to be present during the search.

Officer Z's conduct ensured that only Commission officers and Senior Sergeant Jenal searched the premises. This stands in conspicuous contrast to Officer Z asking Mr Mono to be present during his search of Mr Kerr-Newell's Shire office, and even having Mr Mono assist him in it.

The motivation of Officer Z in treating Mr Kerr-Newell's place of residence differently in this regard remains unknown. The known circumstances of that search invite suspicion about that motivation, but my finding of misconduct does not depend on a conclusion about motivation.

The Commission stated in its representations that Officer Z should have been given the opportunity to confirm his version of the conversation he had with Messrs Burgess and Mono.

This ignores the fact that Officer Z gave his version of his conversation to the Commission's own lawyers who were conducting a preliminary investigation of the complaint made by SalernoLaw. They unambiguously put the central allegation to him very soon after the execution of the search warrant, and he was asked by them what he had said to the two men.

He provided his answer in writing without qualification and without expressing any uncertainty. He has never sought to amend or change his answer during the Commission's investigation, or during mine. The Commission never suggested that he may have fabricated his answer, so no investigative requirement arose to repeat the simple question asked of him.

There was therefore no denial of procedural fairness to Officer Z before the matter was determined and, although I do not wish the focus of this Report to be diverted by the statements made by the Commission which clearly imply a denial of proper procedure on my part, I cannot refrain from their refutation.

The Commission also suggested that Mr Kerr-Newell had an exclusive right of possession of the Shire premises where he lived as part of his employment with the Shire, and that despite the premises being owned by the Shire, neither Messrs Mono nor Burgess had any legal right to enter upon them. The Commission suggested that the Shire's right of entry to its premises was 'significantly limited' as a landlord under the *Residential Tenancies Act 1987 (WA)* (without explaining why) and that the legislation does not specifically contemplate any right of entry when a search warrant is executed.

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I reject the Commission's point. The corollary, if the point was accepted, is that Mr Burgess trespassed the moment he entered the Shire's property to unlock the premises for Officer Z and his officers (at the behest of Officer Z).

The Commission also said the provisions of the Act that provide it with power to obtain and execute a search warrant do not include a power to exclude, or permit, a person who is not a Commission officer from attending any premises during a search. For this reason, it says, it did not have the power to invite Messrs Mono or Burgess to attend.

The Commission's logic leads to the inevitable conclusion that the Commission did not have power to invite Senior Sergeant Jenal to be present, and that he too must be considered a trespasser (again, at the behest of the Commission). The Commission did not, however, acknowledge this conclusion or attempt to reconcile it with its view.

The point missed by the Commission is this: the premises searched by Officer Z and his officers were Shire property used by Mr Kerr-Newell as his residence under the terms of his employment by the Shire, and Officer Z had no power to prevent Messrs Mono or Burgess' access to that property. His violation of their legal right of entry was unlawful.

The Commission said it does not intend to accept my recommendation that it refrains from using a Police officer as an independent witness to the execution of its search warrants, or to document its efforts to identify such a person.

The Commission also said it does not intend to accept my recommendation that its officers require education to ensure a proper understanding of their legal powers when executing a search warrant because, it says, there is 'nothing to suggest [arising from my investigation] that Commission officers have misused their powers in any way.'

Finally, the Commission requested that Officer Z's name not be published in my report. While accepting that this issue is solely a matter for the exercise of my discretion, it based its request on my decision in a previous report not to identify the Commission officer the subject of a determination of misconduct.

I have exercised my discretion to publish Officer Z's name. Officer Z is no longer a Commission officer. His conduct was a serious abuse of power committed in circumstances of his own deliberate construction. In my view the need to ensure a suitable degree of accountability of officers of the Commission for their misconduct requires the risk of ultimate public exposure to be made good in this case.

I understand that the Commission applies this policy in relation to the officers of other public agencies which it investigates. I agree, subject to any special countervailing factors in a particular case.

5. THE COMMISSION'S DISCIPLINARY INVESTIGATION

Recorded interviews with Messrs Mono & Burgess

As part of the Chief Executive's disciplinary investigation into the misconduct of Officer Z , the Commission conducted a recorded telephone interview with Mr Mono while he was on holidays, and a face-to-face recorded interview with Mr Burgess, in relation to the Commission's operation conducted at the Shire's premises, including the execution of its search warrant at the residence of Mr Kerr-Newell. Both recordings were forwarded to me on 11 May 2018, along with the statements of both men, drafted by Commission officers and drawn from parts of those interviews.

The interviews were conducted on 24 April 2018. The Commission officers who conducted them⁸ had conversations with both men prior to the recorded interviews. I understand that the officers told Mr Mono they were investigating 'an internal disciplinary matter', and told Mr Burgess they were 'tasked with a disciplinary *and* internal investigation'.

The Commission officers who conducted the interviews knew that neither Mr Mono nor Mr Burgess had access to their own notes taken at the time of the Commission's operation at the Shire, some seven months before.

The Commission's investigation into Mr Kerr-Newell and the Shire was still being undertaken at the time of the interviews. I do not know the extent of any role Mr Mono or Mr Burgess had in relation to the Commission's ongoing investigation at that time.

In the statement drafted by the Commission Mr Mono said:

1. When the Commission's search warrant was given to me, I made it clear that I and the other Shire officers present had nothing to hide and would cooperate fully. We were taken to the Council's chambers by the investigators and told what was going to happen, so I introduced the Shire's records manager to them so she could assist with finding the records sought;
2. The investigators went to Mr Kerr-Newell's office and took his computer and a number of documents. I had no issue with this and believed they were acting in a professional manner. I asked what the complaint was but the investigators would not tell me;
3. Officer Z told me in the afternoon he had a search warrant for Mr Kerr-Newell's residence. I replied that I do not have any control of people's personal houses, that I can agree to the search of the Shire's offices but not people's houses. Officer Z did not ask me to go inside the house, but I thought that was what was expected of me;

⁸ The Acting Director Operations, a Senior Lawyer and a Senior Investigator in the case of Mr Mono, and in the case of Mr Burgess, the Acting Director Operations and a Senior Lawyer. Mr Burgess also had his legal representative present.

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4. I asked if it would be better to execute the warrant when Mr Kerr-Newell was present, but the investigators said no, they were going to do it now and that we either cooperate with them and open the house or they would break in. I made it clear to Officer Z I was not comfortable going into Mr Kerr-Newell's house when he was not there without him first knowing. I was not comfortable to do so without Mr Kerr-Newell giving me permission to do so;
5. Officer Z told me he does not need me to go into Mr Kerr-Newell's house as he had arranged for Senior Sergeant Jenal to accompany him as an independent person. I took Officer Z to Mr Burgess' office and explained to him that the investigators had a search warrant for Mr Kerr-Newell's house and that Officer Z was going to go in with Senior Sergeant Jenal;
6. Mr Burgess agreed to open Mr Kerr-Newell's house for Officer Z, but said he was not comfortable going inside when Mr Kerr-Newell was not present. Officer Z said he does not need either of us to go in the house because of the neutral person with him. After the search Officer Z gave me a document detailing the materials that had been seized. Then Mr Burgess came to me complaining that the investigators were laughing when they were inside Mr Kerr-Newell's house;
7. My main concern was that the investigators would not delay the execution of the search warrant until Mr Kerr-Newell had returned and could be present during the search. I later gave my account of what had happened to SalernoLaw; I told them the same information as in this statement, but in less detail, and
8. I did not make the complaint to SalernoLaw and was not part of it. I had advised Mr Kerr-Newell what happened that day and he decided he had issues with the search and decided to complain. All this occurred more than six months ago, and I am presently on leave and unable to refer to any notes or documents in my office. Due to the amount of time that has since elapsed, I cannot rule out the possibility of recall error.

Mr Mono's statement consists of 26 small paragraphs, but the Commission's recorded interview with him is almost 30 minutes in length. It was not fully transcribed. The following additional relevant information was provided by him in his recorded interview:

- The investigators arrived at the Shire in a team of five or six, showed us their search warrant for the Shire offices and asked whether we would cooperate or not. I said I would cooperate. I asked what the complaint was, but they wouldn't say;
- Officer Z allowed me to be present when he executed his first search warrant on Mr Kerr-Newell's Shire office, and I assisted him in his search. Documents and other materials were seized by him;
- I made it clear to Officer Z I wasn't comfortable going into Mr Kerr-Newell's house when he wasn't present, and suggested it would be better to

execute the search warrant there when Mr Kerr-Newell was present, but Officer Z answered by saying no, he didn't care. We're going to go into the house. Cooperate with us or we'll break into the house;

- I said I wasn't comfortable about accompanying Officer Z to the house because Mr Kerr-Newell wouldn't expect any of his employees to go into his house. I was uncomfortable about this and Officer Z told me he does not need me to go into the house;
- When I went with Officer Z into Mr Burgess' office to get the keys to Mr Kerr-Newell's residence, Mr Burgess said he wasn't comfortable going into his home, to which Officer Z replied that they don't need us to go into the house with them because they've got a neutral person to go with them. But it turned out that their neutral person was the officer-in-charge of the local police station. Mr Burgess told Officer Z he was uncomfortable about going into Mr Kerr-Newell's residence, and he replied by telling him to just open the house;
- The investigators said they'd be in the town for three or four days, so I asked them again why not wait until Mr Kerr-Newell returns so that they can search his home with him. They were not prepared to do that. I wanted them to delay their search because Mr Kerr-Newell would return during their stay in the town;
- Officer Z was working from the local police station, and said if anybody in the Shire had anything they wanted to say about anything then they should come to the station and talk to them, and that anything said would be confidential;
- The Assistant Director Operations said to him, 'I'm just trying to make sure we have a consistent story, so if you've given one account to David [a SalernoLaw employee] and then given another account today, I'd just like to make sure they're consistent, that's all. That the reason for my enquiry';
- The Senior Investigator asked him, 'When you said you were uncomfortable about going into the house, did the lead investigator ask you to go in?' He answered, 'No he didn't';
- The Senior Investigator then asked, 'Do you think you were expected to go in?' He answered, 'Yeah, I was expected. When they showed me the search warrant for the offices, they asked for my cooperation. When they went to the offices, they asked me to be present. So when he said he was going to Mr Kerr-Newell's house I told him I wouldn't be comfortable';
- The Senior Investigator then asked, 'So when you expressed that to him, he stated that ... you ... did he tell you that you wouldn't be required to go in and that there'd be an independent person that was going to go in instead?' He answered, 'He just said that there was an independent person going with him to Mr Kerr-Newell's house';

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- The Senior Investigator then asked, ‘Yes, do you understand what the role of that independent person would be?’ He answered, ‘Similar to the role I played with the first search warrant’;
- The Senior Investigator then asked, ‘And were you happy that there’d be an independent person in place of yourself?’ He answered, ‘Well, I would’ve preferred for him [Mr Kerr-Newell] to be present himself when they went down there’, and
- The Senior Investigator then asked, ‘Yeah, I understand that, but in the absence of that happening, were you happy ... or were you ... did you accept that there would be an independent person there?’ He answered, ‘Yes, he said that he was going there with the officer in charge [of the police station]’.

In his statement drafted by the Commission Mr Burgess said:

1. The first I knew of the search warrant was when I was asked to go across to the council’s chambers for a briefing from Officer Z , who told us what was going to happen with the warrant. We were then released to go back to our offices and to go about our business;
2. Officer Z later came to my office while Mr Mono was with me and he said, ‘There were bad things going on at the Shire that involved the boss being corrupt.’ This surprised me. I was not happy with him saying that and thought it was out of line;
3. Officer Z later returned with Mr Mono to get the keys to Mr Kerr-Newell’s home because he had a search warrant to execute there. I was concerned about this, but I looked at Mr Mono who nodded his head, so I agreed to give over the keys. Officer Z said that all I had to do was to unlock the door, wait around then lock up and make sure everything was secure when he and his investigators left;
4. When I arrived at the house I was taken aside by Officer Z and Senior Sergeant Jenal and they explained to me what was going to happen. Officer Z explained that I was not required to go inside the house because Senior Sergeant Jenal was there as an independent witness. I thought maybe I should have been present during the search, but I was not really sure how it all worked and I could not ask anyone. I didn’t raise the issue with Officer Z at the time or push it any further, and just took him at his word that the independent witness would oversee the search;
5. As I was the person responsible for the Shire’s assets I was a bit concerned about people going into the house without an escort, but I presumed it was all correct and let them do what they needed to do. I was amused by the fact that Senior Sergeant Jenal was the independent witness, as I do not believe that he and Mr Kerr-Newell get along very well. I do not think Mr Kerr-Newell was very happy when he found out about it. If I had to go inside I would have felt uncomfortable because it was my boss’s house;

6. I heard raucous laughter coming from Mr Kerr-Newell's bedroom [during the search] and thought that that was unprofessional behaviour. Sometime later there was laughter again when the investigators were deeper in the house. I would say there was at least two or three occasions when I heard laughter coming from inside the house. I locked the house up after they had finished searching it;
7. SalernoLaw telephoned me later and asked what had happened and I told them the same as what I told the investigators during this interview. They said I should have been in the house during the search, and
8. I found the Commission officers to be very nice and informative and had no other issues with them. However, a few other people at the Shire were not happy about the investigators wearing handcuffs and other accoutrements on their belts when they were at the Shire.

Again, Mr Burgess' statement is made up of 25 small paragraphs, but the Commission's recorded interview with him is about 30 minutes in length. As with Mr Mono, there had been a prior conversation between Mr Burgess and the Assistant Director Operations and Senior Lawyer before the recorded interview commenced, but the details of that conversation are not known.

The following relevant information was gained from his recorded interview:

- Officer Z and his investigators were wearing handcuffs and other bits and pieces when they took us into the Council's chamber. They also brought police officers with them because they didn't have enough people;
- Officer Z later came into my office and said, 'Ooh, there's bad things going on here. There's corruption.' He said he wanted me to let him into Mr Kerr-Newell's home and that he had a warrant. I looked at Mr Mono and said, 'Oh, um ...' and Mr Mono said that it was fine. I assumed Mr Mono had seen the warrant;
- I said up front that I don't understand this stuff and that I've never been involved in stuff like this. With warrants and stuff I'm really naïve and don't understand a lot of it. Officer Z said that Senior Sergeant Jenal was the independent witness, and both of them took me aside and explained to me what they were going to do. They told me I wasn't required to go inside the house. I thought that this was a bit strange – being responsible for infrastructure and assets I thought going into the house without an escort was a bit strange, but hey, I didn't know a real lot about the triple C and that sort of thing;
- Officer Z told me, 'All you need to do is unlock for us and make sure, you know, wait there for us to lock up and make sure it's all secure.' At Mr Kerr-Newell's home he said to me, 'You're not required inside. Senior Sergeant Jenal is the independent witness';

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- When I had unlocked Mr Kerr-Newell's house for them, and sat outside waiting, I heard raucous laughter.
- Later SalernoLaw asked me what had happened, and I told her the same story. What I didn't like was when Officer Z came in and told me and Mr Mono that there was massive corruption, that Mr Kerr-Newell was really crooked and that we should be standing up and saying things. I thought that was out of hand. It took me back to my military days, you know, divide and conquer. Because he wanted us to stand up and say things. How was I supposed to say that when I didn't know what was going on? I didn't have a frigging clue. I didn't know why he was taking that tack, because everybody else was nice to talk to. And I had to go across to the police station and give them the written stuff they'd asked for;
- I heard other Shire staff say that the investigators shouldn't have had handcuffs out when they talked to them. I don't know what you guys do; I thought it must be part of your uniform. Police have them so ... but people were grumbling about it;
- When asked by the Assistant Director Operations whether he had wanted to be in Mr Kerr-Newell's home at the time of the search, he answered, 'Um, I thought I should've been, but like I said before, I was a bit naïve and I wasn't really sure. And you can't talk to anyone because they say you can't talk to so-and-so.
- I would've felt uncomfortable being in the boss' house to be frank. I didn't raise it, I didn't push it, but they said Senior Sergeant Jenal was the independent witness so I took them at their word. And it was filmed, so I thought it must be alright';
- When asked by the Assistant Director Operations whether he expressed a desire to enter the house when he was briefed by Officer Z, he answered, 'No, no, too nervous, didn't really understand it, but ... in hindsight ... but...';
- When asked by the Assistant Director Operations whether he had had any concerns about Senior Sergeant Jenal's independence, he answered, 'I don't think he and Mr Kerr-Newell get on, and I don't think he likes the Shire.⁹ There is animosity there. They work together when they have to, but there's tension between them. There were smirks between Senior Sergeant Jenal and the investigators', and
- I told SalernoLaw pretty much what I've told you today. First, I didn't know anything, and I think that things should've been explained to me. Mr Kerr-Newell said that I should've been in the house, but I didn't know that. I still don't know it to this day. SalernoLaw intimated this to me too, so I think this should've been explained to me. I was nervous and didn't want to be part of it.'

⁹ At this point Mr Burgess described instances when Senior Sergeant Jenal had stood during council meetings criticising the Shire.

Based on these interviews the Chief Executive of the Commission decided he would therefore not be taking any disciplinary action against Officer Z because he had not done anything wrong. He assured me that measures would be taken to ensure Commission officers would not, in future, laugh while executing search warrants and searching premises because he considered such conduct to be inappropriate and unprofessional.

The operation of the Act in relation to disciplinary investigations

Section 179(4) of the Act gives the Commission the power to ‘remove, suspend and discipline staff and to terminate the employment of staff’. This was the power under which the Chief Executive conducted his investigation to determine if the Commission would take any action against Officer Z. In contrast, the Commission does not have a function (or power) under the Act to determine whether Officer Z (or any public officer) committed minor misconduct within the definition of s 4 of the Act. The function of determining minor misconduct by a Commission officer is mine under s 195(1)(b).

Once I have determined a Commission officer has committed minor misconduct – as in this case – the decision how, or whether, the officer is disciplined is a decision for the Commission under s 179(4) of the Act. The situation is identical to cases in which the Commission forms an opinion of serious misconduct by a public officer in another agency; the opinion is expressed and the agency, as the officer’s employer, determines how, or whether, the officer will be disciplined.

In the case of the Commission, once it has decided how, or whether, its officer will be disciplined, I am precluded by s 196(9) of the Act from reviewing that decision because it constitutes an industrial matter.¹⁰

The construction of the Act as described, clearly delineates the Commission’s disciplinary power from my misconduct function. Each power and function is unique to its holder and cannot be exercised or performed by the other, directly or indirectly, unless the Act so provides, which it does not in relation to this subject-matter.

Further, the Commission may only exercise its powers pursuant to the functions given to it under the Act, or as prescribed by the Act or by another written law.¹¹ This legal principle, of course, extends to me in the exercise of my powers and to the performance of my functions. The Commission’s obtaining and use of its interviews with Messrs Mono and Burgess pursuant to its disciplinary power under s 179(4) of the Act were therefore restricted to the Commission’s exercise of that power.

To sum up – the determination of misconduct on the basis of the facts as I find them to be is the first step in a case such as this. The Act then supposes that the final

¹⁰ A point repeatedly made by the Commission when seeking to exclude me from performing my functions in response to the conduct of a Commission officer constituting misconduct, in contrast to the Commission’s disciplinary action about the officer (which is the industrial matter under s 196(9) of the Act). See generally the Joint Standing Committee’s Report No. 25 in November 2015, and my opinion at 37-39.

¹¹ As extensively discussed by the Court of Appeal in *A v Maughan* [2016] WASCA 128, per Martin CJ at [103] – [151].

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investigation and determination of the disciplinary and industrial consequences is for the Commission and does not involve me, except in the making of my recommendations to the Commission under s 195(1)(d), which the Commission has the power to accept or reject.

The Chief Executive's investigation in this case was mistimed because my report was in draft and subject to change as a result of the process undertaken pursuant to s 200 of the Act. However, the outcome, as can be seen from the above discussion, has only served to strengthen my satisfaction that my conclusion of a deliberately engineered exclusion process by Officer Z was the appropriate view.

The important point is to assist the Commission to a better appreciation of our respective roles.

The performance of my misconduct function

I remain satisfied by the information in my possession that Officer Z has committed minor misconduct by purposefully bringing about the circumstances whereby Messrs Mono and Burgess were not only prevented from being present during the execution of a search warrant on Mr Kerr-Newell's residence, but were deliberately left uninformed of their legal right to be present. They were deceived by Officer Z in this respect, as they were in relation to Senior Sergeant Jenal being capable of fulfilling the role of an independent person during the search. He was not apparently an independent person to a reasonable observer who knew that the local police were participating in and supporting the Commission's investigation.

Had I the benefit of the additional information elicited by the Commission from Messrs Mono and Burgess on 24 April 2018 and forwarded to me on 11 May 2018 (much of which was known by the Commission prior to my provisional determination of misconduct on 15 March 2018), the grounds of my determination would not only have been amplified, but reinforced.

In light of this additional information it is now evident that the Commission's operation at the Shire was facilitated by working in conjunction with Senior Sergeant Jenal and his officers. Officer Z and his investigators were housed at the police station and used the facility to record and store seized materials from the Shire, to interview Shire officers and to perform other activities related to their operation. Police officers attended the Shire with Officer Z and his investigators when the latter gathered the Shire officers in the Council's chamber.

No doubt, all these arrangements required prior explicit agreement and coordination between the Commission and the Police. None were disclosed to me by the Commission in December 2017 when I first questioned the Commission's assertion that Senior Sergeant Jenal could properly be considered to be an independent person at the search of Mr Kerr-Newell's residence.

It is also now evident that the presence of police officers in company with Officer Z and his investigators at the time Officer Z gathered the Shire's officers in the Council chamber, along with the unnecessary (and similarly undisclosed by the Commission) wearing of handcuffs and other weapons by the

investigators, was quite capable of having an intimidating effect on the Shire officers. Some of them complained about it to Mr Burgess.

This disproportionate conduct by Officer Z and his investigators established the authoritarian tone to the Commission's operation which contributed to his strategy of eventual exclusion from the execution of the search warrant on Mr Kerr-Newell's residence.

It is also now evident that Officer Z was content to have Mr Mono present during, and to assist him with, the execution of his search warrant on Mr Kerr-Newell's Shire office, but not in the execution of his search warrant on Mr Kerr-Newell's residence. The reason for this inconsistency remains unexplained.

The additional matters of the Commission's incomplete video recording of the search conducted at that residence and the absence of a truly independent person to witness it, are consistent with the view that Officer Z was, from the outset, intent on maintaining secrecy over that search, or was inept in the execution of this warrant, rather surprisingly in view of his senior status and long experience.

The full extent of Messrs Mono and Burgess's expressed opposition to Officer Z's execution of the search warrant on Mr Kerr-Newell's residence is also now evident. That Officer Z without explanation, refused Mr Mono's suggestion that it would be better to proceed with the search in the presence of the soon-to-return Mr Kerr-Newell, is again consistent with the view that he was intent on maintaining secrecy over that search.

Fundamental to assuaging Messrs Mono and Burgess' expressed reservations about Officer Z's search of Mr Kerr-Newell's residence in his absence was Mr Officer Z's assurance that Senior Sergeant Jenal would be an independent person to that search, when clearly he was not.

The Commission was in possession of this material that reveals the full extent of Officer Z's conduct when the Chief Executive, for disciplinary purposes, concluded that the former did nothing wrong and therefore should not be disciplined. That is a matter for him and, as discussed, is a matter the Act precludes me from reviewing.

6. CONCLUSION & RECOMMENDATIONS

Whatever be the motivation for the conduct, my determination of misconduct on the part of Officer Z reflects the degree of seriousness involved when a senior investigator in the Commission consciously manufactures circumstances to exclude public officers from premises for which they are responsible, and which are in their de facto possession, during and throughout the execution of a search warrant.

This was a calculated act, made worse by the fact that the premises were also Mr Kerr-Newell's residence in which his private property would most certainly be located. Central to Officer Z's tactics was to time the search while Mr Kerr-Newell was away.

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Officer Z misrepresented Senior Sergeant Jenal to Messrs Mono and Burgess as being a person capable of fulfilling the role of an independent person during the execution of his search warrant. It is not to the point to say that to secure the presence of an independent observer is 'best practice' and then to pay only lip service to that principle.

I would suggest that Officer Z tactics can be contrasted to the procedures used pursuant to the provisions of the *Criminal Investigation Act 2006 (WA)*, which are designed to provide protections and rights to the occupier of searched premises for the sake of transparency and fairness, including the occupier's presence during the search, while at the same time protecting the effectiveness of the investigatory procedure.

Officer Z's actions, when combined with the hopelessly flawed video recording of the search, demonstrate investigative procedures that fall short of those to be expected of an integrity agency.

I find that Officer Z's actions go beyond mere ineptitude and constitute a breach of the trust placed in him by virtue of his office of such severity that, had he not left the employ of the Commission, there would be reasonable grounds for his dismissal. His conduct was deliberate and calculated to remove any possibility of independent oversight, or oversight by the Shire, of the execution of the warrant.

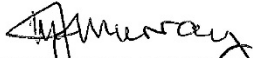
As to the Commission's intervention in my misconduct investigation by the exercise of its unreviewable disciplinary power pursuant to the Act, while that is a matter for it, it is distinct from the performance of my misconduct function and should follow my final determination. It is my finding of the facts surrounding a complaint of misconduct by a Commission officer that determines whether misconduct has occurred. If otherwise, the delineation between the Commission's disciplinary power and my misconduct function would be compromised.

I make the following recommendations to the Commission:

1. In all cases when executing a search warrant the Commission should insist that the lawful occupier is present, unless this is impossible, or there are grounds to suppose that the person's presence may interfere with the effective execution of the warrant.
2. If the Commission makes a decision, as it should wherever possible, to have an independent witness attend the execution of a search warrant, a police officer should only be called upon to perform this role in combination with a non-police independent person, whenever that may be reasonably arranged.

A written record should be kept of the Commission's efforts to identify an independent witness. The record should include the name of the Commission officer who speaks to the person, when the person is spoken to, the person's name, address, position (if any), his or her response and the reasons for the Commission's decision.

3. When executing a search warrant the entirety of each aspect of the search should be video recorded, so that the discovery of any material afterwards seized is recorded.
4. Commission officers appear to require education to ensure a proper understanding of their legal powers while executing a search warrant. The Commission should utilise and adopt, where appropriate, the W.A Police guidelines on the execution of search warrants to achieve best practice.
5. A report is to be made to me one year from the date of my report on the success of the above-mentioned education of Commission officers, and on the number and particulars of search warrants executed by the Commission during that period.



**HON MICHAEL MURRAY AM QC
PARLIAMENTARY INSPECTOR**