

**SELECT COMMITTEE
INTO THE POLICE RAID ON THE *SUNDAY TIMES***

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
MONDAY, 30 JUNE 2008**

SESSION FIVE

Members

**Hon George Cash (Chairman)
Hon Adele Farina
Hon Giz Watson**

Hearing commenced at 3.52 pm

ROBERTS-SMITH, QC, HON LEN
Commissioner, Corruption and Crime Commission of Western Australia,
186 St Georges Terrace,
Perth 6000, sworn and examined:

The CHAIRMAN: On behalf of the committee, Mr Commissioner, I would like to welcome you to the meeting this afternoon. Before we begin, I must ask you to take either the oath or the affirmation.

[Witness took the oath.]

The CHAIRMAN: You will have signed a document entitled “Information for Witnesses”. Have you read and understood the document?

Hon Len Roberts-Smith: I have.

The CHAIRMAN: Mr Commissioner, these proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you in due course. To assist the committee and Hansard, could you please quote the full title of any document you refer to during the course of this hearing, for the record. Please be aware of the microphones in front of you and try to talk into them and ensure that they are not covered with papers or other material. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today’s proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised, it should not be made public. I advise you that premature publication or disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Mr Commissioner, would you care to make an opening statement?

Hon Len Roberts-Smith: I had thought to do so initially, Mr Chair, and then decided not to; but on reflection, it did occur to me that in light of what I understand has been coming out of the public hearings of this committee recently, it might perhaps be of some assistance if I were to at least make some brief comments.

The CHAIRMAN: Yes, thank you.

Hon Len Roberts-Smith: They are these: what the committee is concerned with here is a consequence of the way the Western Australian police conducted a particular investigation. In the commission’s submission to the committee, that does not demonstrate any deficiency with the legislation—and I refer there specifically to the Corruption and Crime Commission Act. It is the commission’s position that the way police may have conducted a particular investigation is no reason to make changes to legislation. I should make it quite clear that when I say that, the commission is not expressing any view at this stage about the adequacy or competence of the police investigation one way or the other. The commission may have to do that in due course in its monitoring role under section 40 of the act but of course —

The CHAIRMAN: Is that section 40 or 41?

Hon Len Roberts-Smith: Section 41, but of course we have not done that yet and we are not fully seized of all of the activities which have been involved in the police investigation, so it would be premature.

Under sections 33 and 34 of the Corruption and Crime Commission Act the commission has a range of statutory options open to it when considering how to deal with an allegation. Again, there is nothing which comes out of the present situation, in the commission's submission, which suggests either of those sections needs amendment. The "media circus" or whatever other undesirable consequences may be thought to have arisen in this situation was not something which resulted from any lack of coercive powers not available to police officers. It was simply, as I say, the way the police officers conducted a particular investigation. If the suggestion is that the commission or the Corruption and Crime Commission Act should be amended to direct in some way that all alleged offences against section 81 of the Criminal Code, which is disclosing official secrets, must always be investigated by the commission itself, or even to introduce a bias to that end, the commission would strongly oppose it. There are a number of reasons for that. The first is that it would mean the commission would have to divert its limited resources to those investigations even where they could be done using ordinary investigative powers or methods equally available to police, thus diverting those commission resources from cases in which its coercive and other special powers were actually needed. Secondly, it would distort and interfere with the commission's own investigative priorities. Thirdly, such a suggestion, I would submit, is fundamentally flawed in principle. If the act were to be amended so that allegations of criminal offences under section 81 of the Criminal Code had to be investigated by the commission and only by the commission because, in effect, police do not want to do them—and I take that from the material before the committee already—then similar amendments could be argued for when other government departments or agencies do not want to conduct investigations into other forms of misconduct. Legislation arguably should be passed to remove from police responsibility for investigating other offences which they might not want to investigate because of, and I quote, "political sensitivity", which is a term used in Commissioner O'Callaghan's letter to the commission or for some other reason; for example, offences relating to prostitution or morality—which often feature in this area. Shoplifting, for instance, usually involving relatively small amounts or values of goods, may be argued to be offences against business and therefore should be left to business or to the insurers to investigate and sort out. Arguably, the suggestion might be that sexual abuse or assaults by teachers should be left to the commission or to the Department of Education and Training rather than police. That is obviously not an exhaustive list by any means, but the point I make simply is that once an exception of crime is made in a particular category and it is said legislatively that the police do not have to worry about that—it is not their responsibility to investigate—the same principle could be applied universally.

[4.00 pm]

The commission's position is that it is actually very important that the primary responsibility for investigating crime remains with the police. That is their core social function.

Finally, and most importantly, the commission repeats that no case for legislative change of any kind has been, in its submission, demonstrated from the present circumstances, which are only about how the police went about this particular investigation. If the committee sees the need to make a possible recommendation for future investigations into unauthorised disclosure of confidential government information, the commission would suggest the real issue is whether or not that should be a criminal offence at all. If it remains a criminal offence, then primary responsibility for investigating it, in the commission's submission, must remain with the police, as with all crime. I think those are the only opening remarks I should make, Mr Chair.

The CHAIRMAN: Thank you very much, Mr Commissioner. The committee had some earlier discussions, and Hon Adele Farina has been nominated to ask the majority of the questions as they relate to you.

Hon Len Roberts-Smith: Certainly.

The CHAIRMAN: I will hand over to Hon Adele Farina.

Hon ADELE FARINA: Commissioner, in relation to the exercise of the power under section 33 of the CCC Act where the assessment is made in relation to an allegation and the commission determines what action it will take in relation to that allegation, are you involved in that assessment process, as commissioner?

Hon Len Roberts-Smith: I can be. That will depend upon a whole range of things; mostly, though, only if it becomes a matter of some difficulty or some particular importance. The arrangement is that a number of the commissioner's functions under the act can be delegated—some are non-delegable, but a number are delegable—and the powers under section 33 are delegable. I have made delegations of them, as had my predecessor, Commissioner Hammond, to two areas within the commission. One is our complaints assessment unit, and the other is investigations itself. Both of those in fact were involved in dealing with the allegations in this particular matter.

The first decision, which was made in February—I think around 24 February—was made by the investigations people. I can produce, if the committee requires it, a copy of the delegation to Mr Trevor Wynn, who actually made the decision. Having delegated those powers, I would ordinarily not expect to have them referred to me. I should also say, though, it is not as though I therefore do not necessarily know anything about them. We do have structures within the commission that include, for example, an operational review committee meeting, which I have every week with the director of investigations or the deputy director of investigations. We have weekly meetings of that group, at which I am brought up to date with all extant operations, not only what has happened or is currently happening in relation to them, but what is proposed. It does occasionally happen, of course, that in relation to things that may be proposed I will say, "Don't do that before you get back to me. I want to have a hand in that." It depends on what is going on, but I have that facility.

As I said, also we have wider management meetings on a monthly basis, again where there is some discussion of operational matters. Again, I have the opportunity, first of all, to be briefed there, but also to interfere, if that is the appropriate word, and of course each of these officers has access to me directly at any time, and if they are of a view that there is anything that is required to be brought to my attention, whether it is because it might have media ramifications or because it might impinge on some sensitivity with a department or agency, then they will ordinarily bring that to my attention. I would like to think—and I believe it is the case—that I, as Commissioner Hammond was, am pretty much across all of the operational activity of the commission on a daily basis.

The CHAIRMAN: Mr Commissioner, the instrument of delegation that you referred to —

Hon Len Roberts-Smith: Yes. Would you like that, Mr Chair?

The CHAIRMAN: If that is handed up, it will be tabled.

Hon Len Roberts-Smith: This is the delegation made under section 185(1) of the Corruption and Crime Commission Act whereby I delegate the powers and duties of the act under section 42 to Mr Trevor Wynn.

The CHAIRMAN: Thank you.

Hon ADELE FARINA: Commissioner, what guidelines or criteria are in place for determining whether the commission should have a joint investigation with the police, in that section 33 assessment?

Hon Len Roberts-Smith: We do not have specific directives or guidelines in relation to that specific issue. Perhaps it might help the committee, though, if I give an indication very briefly of the way section 33 and section 34 decisions are actually made.

The CHAIRMAN: Yes, that would be helpful.

Hon Len Roberts-Smith: I will produce for you in a moment the actual documentation that goes to that assessment process. Before doing that, though, I should make it clear that this documentation, which is called “Case Categorisation Priority Model”, which feeds into our computerised case management information system, is something which was drawn from a model used by the Australian Federal Police and others, so it has got a recognised law enforcement provenance, and modified for our purposes. However, I should make the point that in this instance we did not actually get to the point of applying this model because it did not get over the threshold of needing to be evaluated according to it. That is because the matter had already been referred to police by Department of the Premier and Cabinet. They had already opened a file and, according to the information we had, had already recognised that there was a potential criminal offence under section 81 and they were therefore investigating it, so we would have to have told them, “Stop your investigation; we want to take it over.”

Hon ADELE FARINA: Or you could have agreed to do a joint —

Hon Len Roberts-Smith: Yes, or we could have agreed to join in with them, but the point is that they actually had an on-foot investigation.

The other point was that we had quite a lot of other resources committed at that time, and, very significantly, there was nothing in the information that we had that suggested that there would be a need to engage the commission’s coercive powers for the conduct of that investigation. That obviously is part of a threshold assessment that we would always make: is this allegation something that could be investigated using only the commission’s coercive or special powers as opposed to ordinary police investigative powers? That would not necessarily answer the question entirely anyway because we might, for other reasons, decide to take it on, even if we thought we did not need to use our special powers. However, in this case, when the operations people looked at these particular matters, their view was that it was with the police; it did not, on the face of it, need our powers; it might as well stay with the police. That was particularly so, as I say, because we already had our resources largely committed. They did not get to actually applying the rather complicated evaluation prioritisation model.

I can hand this up, Mr Chair. It is a document headed “CMIS”—which is case management information system—“attributes and their application to the case categorisation priority model (CCPM) as related to AS/NZS 4360:2004”. You can see it is actually part of the Australian Standards. I hand that up.

The CHAIRMAN: Thank you, Mr Commissioner. That is exhibit number 13B.

Hon Len Roberts-Smith: I might also say that that document is in confidence. It does not strictly have any operational information in it, but I would prefer it not to be made a public document, if the committee could accommodate that.

The CHAIRMAN: Yes. We will certainly bear what you said in mind, Mr Commissioner.

[4.10 pm]

Hon ADELE FARINA: This matter involves potentially a leak from either a Department of the Premier and Cabinet staff person or a Department of Treasury and Finance person, or possibly someone from the Premier’s office, or the Treasurer’s office. That was the circulation of the information that has been disclosed at the time it was disclosed. So, we are crossing over two departments, and possibly two ministerial offices. We have also got the question of the section 81

Criminal Code issue. Given that sort of mix, would you not say that that would be an appropriate time for the CCC to consider taking charge of the investigation?

Hon Len Roberts-Smith: Not necessarily. Almost all section 81 allegations will involve something like that. They will at least come from one department, or one government agency, by definition. Quite often, documents will have been disseminated or made available to more than one. If you are talking about cabinet leaks, for example, you are potentially talking about every department or agency whose minister is in cabinet, and indeed, other departments or agencies that may have access to such documents. So that would be a very common situation with virtually every section 81 investigation.

Hon ADELE FARINA: Given the difficulty of proving a section 81 matter, or in fact finding a person who has leaked any confidential information—it is almost like finding a needle in a haystack—do you not think that in those circumstances the use of the commission's coercive powers would be appropriate?

Hon Len Roberts-Smith: I think there is a misunderstanding, certainly on the part of the police, about what the coercive powers are and how they can be used. We at the commission recognise that what are described as our coercive powers—and I have been describing them, Mr Chair, as you would appreciate, as our coercive and other special powers—are powers that vested in the commission and are not available to police and other agencies. They are—I was going to say exceptional, but I do not want to say that, because that brings in part 4 of the act, which I am trying to avoid—very unusual powers for an investigative agency to have, and the commission is very conscious of the need to use them only where absolutely necessary and subject to all appropriate safeguards. We do not resort to the use of the commission's own special powers first-off. We actually use them as a last resort, because we recognise that they potentially infringe ordinary civil rights and human rights, such as privilege against self-incrimination and things of that kind. So we would seek to use them only as a last resort when no other investigative methodology or power would work. That was not the case, for example, with this investigation. It might in the end have gotten to that point, but we do not know. Certainly looking at it at the time we were looking at it, and even now, I would have thought there was plenty of scope for the exercise of ordinary police investigative powers. For example, even if we had decided to do it ourselves, we would still be using those powers. We would not be falling back on our coercive and other special powers until we had exhausted all avenues with the others. That is really the starting point we are coming from. In terms of what you describe as coercive powers here, I think Inspector Albrecht kept talking about the commission's coercive powers, and it became obvious, I think, that he was simply talking about compulsory hearings. Well, that is just one of them. There is also a very practical investigative reason why you do not use those powers until you are right into an investigation and you have used all of the ordinary methods available to you. That is because if one thinks about how it would work practically, what would happen would be you would call a witness in before you had done much other investigation, and you would say, "You must tell us the truth. You are obliged to tell us the truth. You are on oath. Tell us who you got the cabinet document from." The witness more likely than not would say, "I forget" or "I cannot remember." Where does the commission go from that? It does not work. It is not an appropriate use of the coercive power. As members of this committee would appreciate from the investigations that have been featured in commission reports, for example, to date, you will realise that there is a lot of work that has to be done before you get to that point. You ordinarily would not be calling witnesses to a coercive hearing—there are, of course, some exceptions to this—but in principle you would not be calling witnesses to a coercive hearing unless you were in a position to prove, at least in relation to some aspects of the investigation, whether or not they were telling the truth about questions they were going to be asked. That is just a practical investigative reason. I emphasise that our main reason for not resorting to those powers is that we do recognise that they infringe personal liberties and civil rights, and they are therefore to be used only when absolutely necessary.

Hon ADELE FARINA: Just on a slightly different tack, the commission determined to refer the criminality issue to the police for investigation, and to refer to the DPC to investigate any procedural matter. I am a bit curious about this decision, because the CCC was advised by Mal Wauchope, the CEO of the Department of the Premier and Cabinet, that there were eight officers, from his understanding, who had contact with that document, or the information contained within that document, and they were officers at the Department of the Premier and Cabinet, the Premier's office and the Treasurer's office. Then, in a separate advice, but also known to Mal Wauchope, because he got a copy, was a letter from Tim Marney, the Under Treasurer, indicating that there were four people within the Department of Treasury and Finance who had contact with that document. However, the CCC referred the requirement for a procedural investigation only to the Department of the Premier and Cabinet. To the best of my knowledge, the Department of the Premier and Cabinet cannot conduct a procedural investigation into the Department of Treasury and Finance. Therefore, I am a bit curious as to why the commission did not also seek to refer the matter to investigate procedural matters to, at the very least, the Department of Treasury and Finance as well.

Hon Len Roberts-Smith: I cannot answer that off-hand. I do not know the answer to that. It may have something to do with the fact that as the Director General of the Department of the Premier and Cabinet, Mr Wauchope has in one sense overriding responsibility for a range of departments, so it may have been thought that it would have been sufficient to refer that to him. I am just guessing. I was not aware of that aspect.

Hon ADELE FARINA: Is there anything in the legislation—the CCC act—that would prevent a review of the assessment and an action decision made under section 33?

Hon Len Roberts-Smith: By the commission, do you mean?

Hon ADELE FARINA: Yes.

Hon Len Roberts-Smith: No. Indeed, that is specifically authorised under section 39, which provides that despite having made a decision to act under section 33(1)(a), (b) or (c), the commission may at any time decide to act under another of those paragraphs and may make that decision whether or not it has acted on the decision it made first. So we can pull it back at any time and we can review it. There is no difficulty about that.

Hon ADELE FARINA: Is there a procedure for doing that?

Hon Len Roberts-Smith: Again, there is no formal procedure or directive, but I should emphasise that these things are done. I mean, as Commissioner O'Callaghan said, both organisations are dealing with hundreds—indeed, we are dealing with thousands—of these literally. We are dealing with 2 500 notifications and about 3 000 allegations a year, so there is a lot of these to deal with. We do have very good relationships, not only with the police from officer level right up to the commissioner, but also with most, if not all, government departments and agencies, and we will talk to each other. I would expect that if we referred something, for example, to the Department of the Premier and Cabinet and they had a problem with investigating it and wanted to raise it with us, there would be no hesitation in them doing so.

[4.20 pm]

I would expect the same of the police, and I am sure that that has been the case in the past. If we thought that there was merit in changing the decision that we had made initially, the officer who did so initially would deal with it. Alternatively, if there was some debate or discussion about it, and particularly if it was pressed from the other agencies as, for example, here—if it got to the level of senior police officers formally making an approach to our people—that would have been brought to my attention at that point. I have no hesitation in saying that. However, again, as Commissioner O'Callaghan said, especially at our level and at senior officer level, we have very good communications. We have a joint senior management group that meets quarterly at least. It consists

of the two commissioners and our senior officers; that is to say, a deputy police commissioner and assistant commissioner level and equivalents from the CCC. We have joint meetings at senior officer level at about the same frequency. Commissioner O'Callaghan and I meet frequently and regularly; indeed, we have just put that on a regular monthly basis. In fact, we were supposed to meet this afternoon, but we have had to transfer that to tomorrow. That meeting is a good example because there is no agenda for that meeting; we are just meeting to talk about whatever is going on. I have no difficulty in taking a position that if anybody in either organisation had a serious problem that needed to be raised with the other, it would be raised and resolved.

Hon ADELE FARINA: Are you concerned that Mr Albrecht's requests to both Mr White and Mr Wynn at the commission were not brought to your attention?

Hon Len Roberts-Smith: No, I am not, because the information that I have and that I believe to be the case is that there were no real requests at all. These two conversations—I think you have the file notes or the case notes of them—were late in the morning of the day of the raid, on my understanding. We had not had any contact with the police in terms of the conduct of the investigation at all since it was referred to them initially in February. There was another contact, I think, when Tim Marney sent in a letter and we referred that across as well, but of course that had nothing to do with how the investigation should be conducted; it was just another referral. From February to late in the morning of the day of the raid, there had been no contact. That is my understanding.

Mr Albrecht then spoke to the commission's two officers, Paul White and Trevor Wynn, one after the other, I think, about 11 getting on to 20 to 12 in the morning. He floated a number of possible ways in which the matter might be dealt with at that time. It seems that he was looking expressly to avoid what he was anticipating would be a media circus by asking whether the commission could use its coercive powers to get information from journalists. That, again, betrayed, as I have already indicated, a misunderstanding of the commission's coercive powers and certainly when we might use them. I think the case note indicates what the response was. He spoke first to Paul White, the commission officer, who said that Inspector Albrecht suggested that the commission hold a hearing—that is, instead of the search warrant—to avoid the media fallout and to overcome the fact that the police were unable to compel any witnesses. He subsequently advised Mr Albrecht that the commission was unable to work with them jointly and assist using the commission's hearing powers, as it was not a matter relating to organised crime. I interpolate there that that is wrong. We can do that and there is no doubt about it. We can do that under section 33(1)(b) of the act, which specifically authorises us to do that. However, in any event, he then advised that conducting a hearing for the sole or dominant purpose of compelling a journalist to reveal his or her source is not considered an appropriate use of the commission's hearing powers. I agree with that; that is correct in my view and I would have taken the same view.

Mr Trevor Wynn was the next person immediately afterwards to whom Mr Albrecht spoke. Again, he wanted to know why the commission would not serve a notice to obtain documents from the *Sunday Times* and demand that a journalist reveal his sources in a hearing. He was still on the same point as to how we should use our powers. It was then that he said to Mr Wynn that the police were intending to execute a search warrant on the *Sunday Times*. According to the case note, Albrecht said that it would turn into a media circus and that this could be avoided if the CCC undertook the investigation and issued notices so that it could not be reported. There was then some discussion about the purpose of the search warrants, and Mr Wynn explained the difference between the execution of a search warrant, which either we or the police could do, and the issue of a notice under our act requiring the production of documents. I interpolate here that a search warrant is a far more effective tool for the obtaining of documents in circumstances in which there is a suspicion that somebody may wish to get rid of the documents. How a notice works is that I sign a notice compelling the production of a document, and the person is given time to produce it and must produce it at the commission. The person knows what the documents are and if that person wants to

get rid of them, that person can get rid of them. With a search warrant, you turn up with the warrant and if it is there, you grab it. It is a much more effective tool in that sense. According to the case note, Mr Albrecht continued to assert that no journalist would talk to them and that the CCC was set up to deal with these situations when, for example, a journalist could be called in and made to reveal a source. Mr Wynn told Mr Albrecht that the use of the commission's coercive powers was on a judicious basis and generally used only when no other alternative avenue was available to achieve the desired investigative outcomes. He said to Mr Albrecht that in the current matter, if they had formed a view that a search warrant was needed, Wynn would have thought that a process would then have taken place to review the material located in an attempt to discover the source of any leak regardless of whether a journalist would speak to them. He indicated to Albrecht that for the commission to call in a journalist for the predominant purpose of revealing a source, which, of course, according to his case note, goes against the very fabric of the journalists' code of conduct, although the commission would not completely rule it out, the circumstances would have to be very serious and grave, as there were a number of flow-on effects, such as whistleblowers losing confidence in confidentiality with journalists and so forth. He advised Albrecht that once the investigation was complete, the commission would review it to see then whether there was any further need for the commission's special powers that might advance the investigation. I have to say that I endorse wholeheartedly the sentiments of the position taken by Mr Wynn and Mr White on the joint operation part. Had that conversation been with me, I would have had exactly the same conversation.

Hon ADELE FARINA: Are there any guidelines or a policy position in place in relation to the use of coercive powers by the commission?

[4.30 pm]

Hon Len Roberts-Smith: Well, the reason I hesitate about that is that they are largely restrained by the provisions of the act. Overriding that, of course, is the principle that I have already mentioned, which is that we would ordinarily use them when no other investigative tool will produce a result. Beyond that, I do not know that one could usefully have a particular set of directives or protocols. Having said that, we do have administrative processes which go more to how the decisions are made and recorded. For example, if the investigators get to the point where they are recommending to me that we should have a hearing, be it a public or private hearing, that comes to me in the form of a proposal—fully documented with all their reasons, an explanation of where they are at in the investigation, why the hearing is needed and whether they recommend it be public or private. In those recommendations they specifically refer to the relevant provisions of the act and the criteria in the act that go to the making of those particular decisions and the criteria that have to be satisfied. It is only if I am satisfied with all those matters that I will actually sign off on it. Inevitably, it does not always happen. I have rejected proposals that have been put to me in that way.

Hon ADELE FARINA: Are there circumstances in which the commission would consider using its coercive power to require a journalist to reveal his source?

Hon Len Roberts-Smith: One cannot hypothesise about that.

Hon ADELE FARINA: Are there any circumstances in which you have?

Hon Len Roberts-Smith: Where we have? Yes, in the four years that the commission has been operating, the commission has required the attendance of two journalists in hearing to give evidence, but only two in the four years. That had to do with an offshoot, if you like, into the inquiry in relation to Andrew Mallard. It had to do with the suicide in his cell of Mr Rochford. We were dealing with a death in custody and we needed to get information from the two journalists as to the sources of their information in relation to that. I should also point out that the commission dealt with those two journalists, I think, in a very cooperative way and, I would like to think, sensitively. Neither of them, as far as I know, complained in any way about the treatment they received or having to do it. At least one of them, and possibly the other, but I certainly know that

one of them, in fact, asked if that journalist's appearance could be delayed before the commission so that the sources could be spoken to and their agreement obtained for that journalist to reveal them to the commission. That was done. Although one might describe it as a coercive hearing in the sense that the journalists were required to attend and answer questions, they willingly answered the questions in that context and did so, in at least one case I know, with the acquiescence of the source or sources. I suppose that is the only way to answer the question. It would have to be a very serious case where there was no other investigative way of getting the information and it was serious enough to require it, I guess is what I am saying.

Hon ADELE FARINA: The committee has heard evidence from commission officers that the commission would only consider the use of its coercive powers in serious and grave circumstances. Does the commission have any guidelines to define what are grave and serious circumstances or can you enlighten us on what they might be?

Hon Len Roberts-Smith: Again, it would be impossible to have a guideline of that kind, because circumstances are infinitely variable. I am not sure that the way they have expressed that, from what I hear you say, is necessarily the correct way. They would be trying to reflect, I think, the sentiment that I have been trying to convey to this committee that one would only use those powers where no other investigative method or tool would produce a result. Also, of course, one would not use coercive powers of this kind in an insignificant or trivial matter, even if no other investigative method would work. There has, obviously, got to be an element of seriousness about it. What that might be in a particular case, I could not hypothesise other than to say, again, that in the only two instances where we have done it, it did involve a death in custody and there was no other way of getting the information.

The CHAIRMAN: Referring to the question of serious or grave, Mr Commissioner, it was important we put that to you because that has been passed all the way up to you. What was basically said is, "That is what the commissioner believes to be serious."

Hon Len Roberts-Smith: I am not uncomfortable with that view at all, because, of course, it does act as a constraint on the exercise of the power. I would much prefer that view to be taken than for people to think, "We've got them, we might as well use them."

The CHAIRMAN: I understand. Thank you.

Hon ADELE FARINA: You may have heard when I was asking questions of the Commissioner of Police that I referred to the CCC investigation into an unauthorised disclosure of confidential information in 2004. The report is dated June 2005. I am not sure whether you are familiar with the report. In it, the commission concludes that there is no adequate legislative base for the prosecution of persons involved in the unauthorised access in the disclosure of official information. I found that finding very interesting because it then begs the question: if there is no legislative base to actually bring a successful prosecution, should we be questioning whether we should be investigating these matters in the first place?

Hon Len Roberts-Smith: As the committee is aware, I have been the commissioner there for just over 12 months now, so that was before my time. It does give me, I suppose, the freedom to say that I do not necessarily agree entirely with the conclusion reached in that report. I qualify that by saying that on my reading of it I think, when the report is talking about an adequate legislative base, it is not talking, for instance, about section 81 of the Criminal Code as such. I think they are talking about how you prove two things under section 81: first of all that a public servant has revealed information, which it is the duty of the public officer to keep confidential, and how you define "confidentiality". If one looks at the recommendations that were made, I think this comes up in that context. In the report itself they are talking about things like codes of conduct and rules or regulations to prescribe circumstances for public officers when they have a duty to keep material confidential or whether it is a breach of duty to disclose it. When they talk about legislative underpinning, I think that is what the commission was really talking about. I think that would have

been correct then; I do not think it is correct now. There has been quite a bit of work done—I know even in my brief time at the commission so far—in the public sector in terms of codes of conduct, public sector standards and things of that kind and how they relate to the Public Sector Management Act. Probably in most cases it would not be difficult to prove as a matter of law when information was confidential or subject to a duty not to disclose. Again, I qualify that, as the report did, because it is complicated by the practice of selective government leaks of otherwise confidential information. That was noted in the report, I think.

Hon ADELE FARINA: If it is an unauthorised leak, it is not authorised disclosure of confidential information.

Hon Len Roberts-Smith: Exactly right, but it does introduce a level of complexity in what might otherwise be a much simpler situation. That is the only point I am making.

To come full circle to answer the question, section 81 of the Criminal Code, which creates this criminal offence, has a number of elements, and the short answer is if you prove those elements, then you will get a conviction.

[4.40 pm]

The CHAIRMAN: Mr Commissioner, you may have heard the Commissioner of Police indicate that he intended to have discussions with you at commissioner-to-commissioner level —

Hon Len Roberts-Smith: The feeling is mutual, Mr Chair.

The CHAIRMAN: Yes. Well, I hope that is helpful.

Hon Len Roberts-Smith: I think it is part of our agenda for tomorrow now.

Hon ADELE FARINA: We will not keep you that long.

The CHAIRMAN: Do you see any specific issues that you could discuss with the committee at this stage to assist the committee in making positive recommendations as to how this incident—the management of the incident—perhaps could be avoided if a similar situation arose?

Hon Len Roberts-Smith: It is a bit difficult, I think, to talk about the management of the incident, as I say, if for no other reason than that the commission does not yet know all of the details of the police investigation.

The CHAIRMAN: I guess, Mr Commissioner, in due course it will be subject to a section 41 report?

Hon Len Roberts-Smith: Yes, it will be subject to review in that way. I am just looking through some notes. The committee might wish to consider whether or not, in terms of management and responses between the two organisations, this particular situation may in some way be a consequence of the abolition of the public sector investigation unit, which the police had until the end of last year.

The CHAIRMAN: How has that impacted?

Hon Len Roberts-Smith: The question, I guess, is whether or not it is coincidental that the first time there has been a problem of this kind as between the commission and certain police officers in terms of who should be doing what or whether the commission should do it or whether they should do it or how the commission's powers should be exercised, it has only arisen in this way now. That unit was only abolished in November, I think it was. Prior to then, I think there were something like 395, nearly 400, commission referrals of cases to the police, and we have not had this situation before. That is a lot of cases.

I do not know the answer to the question, which is why I posed it in the way I did; that it may be something that the committee might wish to examine or consider, and it may be, depending upon the committee's consideration, that the committee might make some recommendation as to whether

or not the decision to abolish that unit might be reconsidered. I was here when Commissioner O'Callaghan gave evidence about that, and I certainly understand the imperatives driving the police—a limited number of people, a limited number of FTEs. Clearly, they were trying to make the most effective and efficient use of the limited number of positions they had available. They took the view that offences under section 81 of the Criminal Code are really just another form of crime—which clearly is correct—and, therefore, should go to the major fraud squad, which has responsibility for dealing with them. The commission, at the time this was being debated with police, was asked whether we had a view. We said, “Well, we don't have a view because it is a matter entirely for police as to how they want to organise their own internal organisation of operations.” The only thing the commission asked for was that if the unit was to be abolished, then we would still have a nominated contact person to whom all of our referrals could be made. That arrangement was put in place, and they go to the officer in charge of the major fraud squad. Therefore, we do not have a concern about that. However, if it is not in some way a product perhaps of different personnel, I do not know. I do not know where the people from PSIU went —

Hon ADELE FARINA: Good question.

Hon Len Roberts-Smith: — who may have had a better understanding of how these things work, for example. I am just speculating here. However, if it is not as a result in some way of that change, then it is very coincidental.

The CHAIRMAN: Yes. I also note with interest, Mr Commissioner, that the police contacted the CCC on the thirtieth, after they had in fact made application for the search warrant. It seemed to me that it had dawned on the police that the use or the execution of the search warrant could turn the operation into a media circus, and almost out of frustration they turned to the CCC to see if there was an opportunity for the CCC to use its coercive powers, perhaps avoiding the use of the search warrant.

Hon Len Roberts-Smith: Yes. I think that is clear, Mr Chair.

The CHAIRMAN: When the CCC rejected the proposition on the basis that you have indicated, not a sufficiently serious or grave circumstance to warrant the use, I am unclear as to why the police went ahead with the execution of the search warrant. I know it is not within your bailiwick because you were not directing the operations, but do you have any view on that particular issue?

Hon Len Roberts-Smith: We did not have anything to do with how the police investigation was to be conducted. We had absolutely nothing to do with that. That is the point I should make quite clear, I think.

The CHAIRMAN: Yes.

Hon Len Roberts-Smith: However, I would not wish to express a view on that at the moment. I know you put that question to the Commissioner of Police; he is the proper person to answer it, I think, and certainly not me—certainly not at least until we have done a review.

The CHAIRMAN: Yes, indeed; understood.

Hon GIZ WATSON: If I could just ask a question with regard to the interaction between the CCC and members of the media in particular: are you aware that there are claims within media circles that there have been not two cases of interaction with journalists and the CCC, but actually six in the past couple of years? Do you have a comment on that?

Hon Len Roberts-Smith: Yes, I am aware of that. It is not true. Indeed, I was interested to note that our Media Monitors copy from *The Australian* of Tuesday, 6 May 2008, page 2, under the heading “Correction”, states —

A REPORT in *The Australian* on Friday (“Press freedom in the standover state is bordering on the ridiculous”, Page 5) said six journalists had been compelled to answer questions from the state's Corruption and Crime Commission. This is incorrect. While various West

Australian journalists have been interviewed by CCC investigators, the commission has used its wide-ranging powers to force only two to answer questions during secret hearings.

I can produce that, if you wish.

The CHAIRMAN: It would be very helpful to have that tabled, thank you, Mr Commissioner.

Hon GIZ WATSON: I was not aware of that correction.

The CHAIRMAN: No.

We also indicated—and no doubt you will see it in the transcripts in due course, Mr Commissioner—to your officers who attended this morning that there was possibly an opportunity for some better relations between the media—whatever it is—something alliance and the CCC so these things are in fact reported accurately.

Hon Len Roberts-Smith: Yes, we are working on that and have been for some time, Mr Chair.

The CHAIRMAN: Mr Commissioner, firstly, thank you for your attendance this afternoon. We apologise again for the delay that we have subjected you to, but you have been very helpful to the committee in the terms of reference that it is required to look into. You will receive a copy of the transcript within a short period. Should there be any matter that requires clarification, then we will contact your office; but, again, thank you very much for your attendance this afternoon.

Hon Len Roberts-Smith: Thank you.

Hon ADELE FARINA: Thank you.

Hearing concluded at 4.48 pm