CORRUPTION AND CRIME COMMISSION

Our Ref: *00582/2011/TC*

26 August 2011

The Hon Nick Goiran, MLC
Chairman
Joint Standing Committee on the
Corruption and Crime Commission
Level 1, 11 Harvest Terrace
WEST PERTH WA 6005

Dear Chairman

JOINT STANDING COMMITTEE'S INQUIRY INTO THE CORRUPTION AND CRIME COMMISSION'S USE OF PUBLIC EXAMINATIONS

Thank you for the opportunity to appear before the Committee on 18 May 2011 and to make further submissions in response to the above inquiry.

I note the Commission provided submissions to the previous iteration of this Committee in or about August 2007 for the purposes of an inquiry similar in scope to the present one. Please find enclosed five copies of the Commission's submissions which have been extensively revised and redrafted in light of the Commission's current public examination practices.

When I gave evidence before this Committee on 18 May, I was asked whether there had been any attempts to rectify any shortcomings in the process by which the Commission protects individual reputations from unfair damage due to prejudice or privacy infringements resulting from public examinations. I also note the concerns ventilated by some that the Commission tends to take an 'all or nothing' approach when it comes to examining witnesses when holding public examinations.

The Commission has always been and remains aware of the importance of the requirement of section 140 of the *Corruption and Crime Commission Act 2003* and in particular, subsection 140(2). The Commission's internal processes are shaped by experience and have evolved to the extent that the Commissioner, having undertaken the weighing of considerations required by subsection 140(2), formally confirms the determination by signing a document which records the determination that the attendance of each witness at a public examination has been subject to the weighing process required by section 140 and attendance by the witness is in

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the public interest. Although throughout the course of a public examination, and indeed when the decision is made to hold a public examination, the weighing process in relation to each prospective witness is continuously and separately reviewed, this final determination is usually settled on the day the witness is scheduled to appear to ensure the latest, most relevant and up-to-date information is available to assist the weighing process. This assessment is one that is made according to the individual circumstances of each particular witness and also by reference to the current circumstances of the Commission's investigation.

As a result, it is not uncommon for the Commissioner to make decisions to adjust the conduct of the public examinations so as to avoid prejudice and unfair damage to the reputation of individuals who are peripherally involved in the public examination process. Such decisions might include the conduct of an element of the examination in private, the decision not to adduce certain material during the public examination, the use of code names or suppression orders and other measures in order to protect the identity and reputation of certain persons.

I also make the observation that the use of suppression orders has increased in recent times (refer to Table 1 on page 45 of the submission) with the Commission issuing 41 such orders in the period covering 2010 and 2011.

Lastly, I would ask that a copy of the Commission's submissions be published in their entirety should the Committee decide to table a report as part of this inquiry.

Yours faithfully

Mark Herron
ACTING COMMISSIONER

Encl.

CORRUPTION AND CRIME COMMISSION

SUBMISSION TO THE JOINT STANDING COMMITTEE'S INQUIRY INTO THE CORRUPTION AND CRIME COMMISSION'S USE OF PUBLIC EXAMINATIONS

AUGUST 2011

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EXECUTIVE SUMMARY

[1] The purpose of this submission is to set out, in detail, the approach of the Commission in deciding whether to conduct public examinations, as opposed to private examinations, and how it deals with prejudice or privacy infringements affecting individuals summonsed as witnesses or otherwise mentioned during the examinations.

[2] One of the two purposes of the *Corruption and Crime Commission Act 2003* ("the CCC Act") is to improve continuously the integrity of the public sector. The CCC Act provides the Commission with the power to conduct examinations to assist its investigations. Under section 139 of the CCC Act, all examinations are to be private unless otherwise directed by the Commission. Section 140 stipulates the weighing process to be applied by the Commission in determining whether to conduct public examinations in the public interest.

[3] In passing the CCC Act, it was the Parliament's clear intention that, subject to the requirements of sections 139 and 140, the Commission have the capacity to conduct public examinations, especially given the apparent loss of confidence in its predecessors, the Anti-Corruption Commission and the Official Corruption Commission.[1]

[4] In the period since its establishment to 30 June 2011, the Commission has initiated serious misconduct investigations in respect of 283 matters, under section 33 of the CCC Act.

[5] During that time the Commission has:

- conducted private examinations in respect of 49 matters;
- conducted public examinations in respect of 15 matters; and
- in the course of its public examinations it has had 314 persons appear before it with very many others mentioned collaterally as a result of

[1] Western Australia, *Parliamentary Debates,* Legislative Assembly, 4 June 2003, p 8164b-8173a (John Quigley, Member for Innaloo); pp8183d-8199a (Jim McGinty, Attorney General, Member for Fremantle).

material presented in public.

[6] It is said by some that once the Commission has strong evidence of guilt, there will usually be no need to hold any type of examination. Instead that evidence should be passed on to the relevant prosecuting authority to be used in a criminal prosecution.

[7] For various reasons which will be further expounded upon in this submission, that is not a view which is supported by the legislative framework of the CCC Act. To construe the work of the Commission in this narrow manner is to fail to appreciate the totality of the Commission's statutory functions, namely the 'misconduct'[2] and 'prevention and education'[3] functions.

[8] Public examinations form but one part of the Commission's investigative process, the purpose of which is to get to the truth of a particular matter, that is, whether there has been any misconduct. In some circumstances, there will be a need for the public to be aware of and be educated about the alleged misconduct as it comes to light and is current and relevant. The lessons that can be learnt from such a misconduct inquiry can be lost if appropriate attention is not contemporaneously given to the matter, if public authorities do not act in a timely manner, or if the matter under investigation loses currency as a result of going through a lengthy trial process.

[9] The Commission believes that the conduct of public examinations provides an effective means of improving the integrity of the public sector and promoting community confidence in the independent oversight of public officers in respect of misconduct through the following ways:

- Exposure is a key weapon in the fight against corruption. Organised corruption flourishes on secrecy, codes of silence and on the difficulty of exposing it by criminal proceedings. Revealing it by open investigations is a step towards depriving it of those benefits. By comparison, any criminal trial is limited in the manner in which it may portray a criminal scheme,

[2] CCC Act, section 18.
[3] CCC Act, section 17.

being restricted to the elements of the charge required by law to be laid. In addition, a criminal trial may take place several years after the event, by which time public interest has waned.

- The exposure of some of the matters raised in public enables public sector agencies within the State to take immediate remedial action to ensure good governance is not compromised.
- The conduct of inquiries in the open allows an opportunity for other individuals to come forward with information where they would not otherwise have known a particular matter was under investigation. At the same time, openness helps avoid suspicion and rumour.
- Because the Commission operates in the interests of the public, it should be prepared to account for itself to the public. The Commission's performance of its tasks in the open is conducive to that end.
- The publicity generated by open examinations can be beneficial in changing community attitudes about public sector corruption and fraud.
- They allow the public to become more aware of the range of matters that concerns the Commission and promote awareness of public sector misconduct more broadly. Experience has shown the numbers of matters of suspected misconduct brought to the Commission's attention increases during high profile public examinations.
- The educative benefit of these public examinations of alleged serious misconduct for other public officers cannot be underestimated.

[10] Sections 139 and 140 provide the equivalent or greater legislative direction, in comparison to the legislation for similar commissions in other Australian jurisdictions, to the weighing process when considering whether or not to conduct public examinations.

[11] The common law has manifested an emphatic preference for the open administration of justice. Further, while the Commission's processes are not concerned with the administration of justice, analogously, public examinations do promote public confidence, which is otherwise undermined if examinations are solely conducted in private. This submission identifies a number of

authorities that support this proposition. Broadly speaking, these authorities recognise the greater weight that ought to be accorded the public interest in the conduct of public examinations over that of concerns for the potential for prejudice to, or privacy infringements of, individuals.

[12] There is no presumption that the existence of a potential for prejudice to or privacy infringements of individuals or groups will always outweigh the benefits of public exposure and public awareness, and vice-versa. The overriding concern is what is in the public interest. Where the public interest lies will depend upon a consideration of all the circumstances of the particular case, and even then, may change from time to time as circumstances change.

[13] The Commission takes very seriously its obligations under sections 139 and 140. The Commission's practice is to undertake the weighing process as stipulated in subsection 140(2) for each proposed witness. The Commission documents its reasoning in relation to each witness and engages in a continuing weighing process throughout each investigation, one that is reassessed on a daily basis during the examination process. A weighing process occurs for each witness and is signed off by the Commissioner just prior to their scheduled appearance at a public examination in order to ensure the latest, most relevant information is available when making the final decision.

[14] This weighing process includes continually sifting the evidence and making choices as to what should and should not be adduced in the public interest, conducting selected examinations in private, using non-disclosure (suppression) orders and code names, and lastly, having the capacity to access suitable witness protection programs, all of which play a role in protecting individuals from inappropriate prejudice and unfair damage to reputation.

[15] There are, the Commission believes, adequate means available for aggrieved persons to respond to allegations made in public examinations either by way of seeking non-disclosure orders or through seeking other forms of support or

explanation from the Commission. In expressing this view, the Commission notes that the decision in determining whether it is in the public interest for the examination to be in public, by weighing the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, implicitly carries with it the acknowledgement that some damage to the reputation of individuals is possible. Consequently, the Commission accepts that it has a responsibility, so far as is reasonable, to limit the extent of unfair damage to the reputation of individuals and groups. In the period covering 2010 and 2011 alone, the Commission held four public examinations and issued a total of 41 suppression orders. It is the Commission's position that it has acted reasonably in meeting its obligations and, where the potential for inadvertent damage is perceived, and this has been brought to its attention and action is deemed appropriate, the Commission has taken action to remedy it.

Recommendations

The Commission's position in respect of the current public examinations process and any proposal to adjust the statutory discretion of the Commission in taking oral evidence from persons in open or closed examinations is that:

- First, the default position stipulated by section 139, that examinations be private unless otherwise determined, remains relevant and appropriate.

- Secondly, the provision for opening or closing examinations under section 140 of the *Corruption and Crime Commission Act 2003* is adequate.

- Thirdly, there are sufficient safeguards to protect individual reputations from unfair damage due to either prejudice or privacy infringements resulting from public examinations.

PART 1: INTRODUCTION

[1] One purpose of the *Corruption and Crime Commission Act 2003* ("the CCC Act") is to "improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector" (section 7A). In contributing to the achievement of this purpose, one of the Corruption and Crime Commission's ("the Commission") functions is to deal with misconduct through the conduct of investigations.

[2] The Commission conducts investigations, reports on them and makes recommendations. One avenue available to assist the Commission's investigations is its power to conduct examinations, colloquially called "hearings" (section 137). On some occasions, it conducts its investigations publicly by means of overt investigations, inquiries and public examinations. On many more occasions, those roles are necessarily performed privately by way of covert investigations and inquiries and private examinations.[4]

[3] The starting point for any examination is that all are to be private unless as provided in section 140 (section 139). Whether the examination is public or private is determined by an analysis as to what is in the public interest in terms of the need for the public to know about the matters concerned, in accordance with the stipulations set out in section 140 of the CCC Act. This need to know is not assessed on the basis of some curious interest but is to be measured in accordance with the legislation. Generally the greater the number of people likely to be affected, the more likely the public exposure of a matter would lie in the public interest.

[4] In terms of the numbers of people affected by the issues that the Commission has dealt with in its public examinations, the very high level of interest and

[4] The Commission has conducted public examinations in connection with fifteen particular matters in the period since its establishment on 1 January 2004 through to 30 June 2011. At the same time, it has conducted private examinations in relation to 49 matters.

public discussion of the issues raised supports the notion that many in the general community want to know about the Commission's investigations. This view is supported by the level and intensity of media coverage, the large numbers of letters to the editor and entries at various blog sites and lastly, by anecdotal evidence. Anecdotal reports suggest a high level of public support for the Commission's public examinations. In 2007, an independently-conducted survey of public officers found that 91.6 per cent believed that the Commission should continue to conduct public examinations.[5] In February 2008, another independent survey found that 80.8 per cent of the general community felt that the Commission should conduct its examinations in public.[6]

[5] A Commission investigation is different to a police investigation in that the latter is concerned only to ascertain whether or not there is evidence, admissible in a court of law, that an offence has been committed.

[6] "Misconduct" as defined in section 4 of the CCC Act may involve possible criminal offences, but often may involve conduct which would not constitute criminal offences.

[7] Despite the perception of some, the primary goal of a Commission investigation is not to secure criminal convictions (although this may be one of several possible outcomes). The Commission's public examinations form but one part of the investigative process, the purpose of which is to get to the truth of a particular matter, namely whether there has been any misconduct – the 'misconduct function' – and to explore the systemic issues associated with the conduct in question – the 'prevention and education function'. Therefore a decision to conduct a public examination may be warranted particularly where there are serious policy implications and where there is a need for the public

[5] 3.9 per cent responded 'No' and 4.5 per cent responded '... did not know whether they supported public examinations, citing conflicts between the positive and negative reasons ...'Asset Research, *Corruption and Crime Commission KPI Survey Report 2007*, August 2007, p16

[6] 16.1 per cent believed the Commission should conduct its hearings in private and 3.2 per cent did not make up their mind, Research Solutions, *Corruption and Crime Commission Public Perceptions Survey*, February 2008, p18.

to be aware of the events giving rise to and risks associated with the alleged misconduct as they transpire.

[8] Public examinations are not court processes, nor are they subject to the rules of evidence and procedure. They are not criminal trials and are not adversarial.

[9] Examinations are inquisitorial and part of an investigative process into matters of widespread public interest and importance. While, as a consequence of its investigative function, the Commission is not, and cannot be, bound by the rules of evidence, it is obliged to, and does, apply procedural fairness principles to witnesses in accordance with the CCC Act's legislative scheme. The Commission is particularly mindful that the default position under section 139 of the CCC Act is that examinations are to be conducted in private. An examination is to be open to the public only where, applying the criteria in section 140 of the CCC Act, the Commission considers that to be in the public interest. The Commission acts prior to and continues to do so throughout its examination process to weigh the potential for prejudice or privacy infringements for each and every witness against the benefits of public exposure and public awareness in determining whether it is in the public interest for the examination to be in public. It uses a variety of mechanisms to meet its obligation to provide procedural fairness or assistance to witnesses. These mechanisms include the use of suppression orders, code names, screens, video evidence and private examinations. Nevertheless, it remains the case that the Commission's conduct of public examinations may result in the exposure of the actions of various individuals and groups to public scrutiny.

[10] The Commission has been criticised by some on the use of its powers in conducting public examinations that focussed on the actions of senior members of the Western Australian public service, local government councillors, and members of State Parliament, including some Ministers. In commenting on these particular examinations immediately prior to his retirement, Commissioner Kevin Hammond stressed the particular attention he

paid to the CCC Act's requirements in determining whether the conduct of these public examinations served the public interest or not.

[11] He also remarked that:

> *While it is not the Commission's intention to cause undue stress and discomfort to individuals, the overwhelming need has been to address the public interest in identifying the matters raised during these hearings that go to the heart of good and effective governance in this State.*[7]

1.1 Commission's Submission

[12] This submission contains six parts:

- Part 1 contains the introduction.
- Part 2 is a consideration of the statutory basis for the Commission's exercise of its public examination powers.
- Part 3 is an analysis of the public interest weighing process stipulated at section 140 of the CCC Act.
- Relevant authorities and reference materials are examined in Part 4 in terms of the conduct of examinations in public by standing commissions of inquiry and the privacy and the protection of the reputations of individuals.
- Part 5 addresses the issue of responses by aggrieved persons to allegations made in public examinations.
- Part 6 contains this submission's recommendations.

[7] Commissioner Kevin Hammond, Speech to IPAA, "Corruption, Integrity and the Public Sector", 20 March 2007, pp11-13, available at: http://www.ccc.wa.gov.au/Publications/Reports/Documents/Speeches/commissioner-speech-ipaa-2007-03-20.pdf. See Annexure 1.

PART 2: STATUTORY BASIS

2.1 Legislative Scheme – the Corruption and Crime Commission

[13] The Commission achieves the CCC Act's misconduct purpose (subsection 7A(b)) by assessing and dealing with allegations of misconduct (section 32) and making a decision as to further action under section 33. In doing so, it may decide to conduct an investigation either in cooperation with, or independently of, any other agency. During its investigations, the Commission may conduct an examination for the purposes of an investigation under the CCC Act (section 137). However, in conducting its examinations, it may regulate the conduct of the examinations as the Commission sees fit (section 138). The CCC Act requires an examination to be conducted in private unless otherwise authorised (section 139). Section 140 authorises the Commission to open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so. Pursuant to subsection 140(1), an organised crime examination must be held in private; a public examination is not an option.

[14] Having concluded its investigation, whether it includes the conduct of public examinations or not, the Commission may make assessments and form opinions in respect of the occurrence of misconduct (section 22) and make recommendations and furnish reports on the investigation's outcomes (section 18). Its prevention and education function requires it to prevent misconduct; including providing information to both public authorities and the general community in support of this function (section 17). The Commission cannot and must not publish or report a finding or opinion that a person has committed, is committing or is about to commit a criminal or disciplinary offence. The Commission's opinion concerning the occurrence of misconduct is not, and is not to be taken as, an opinion that either a criminal or disciplinary offence has occurred (section 23). The Commission may report on an investigation's outcomes, which may include its assessments, opinions and

recommendations (sections 84 and 89). To ensure procedural fairness, the Commission is to provide any person or group subject to any matters adverse a reasonable opportunity to make representations to the Commission concerning these matters before any report under section 84 or 85 is tabled (section 86).

[15] In contrast, and as observed by former ICAC Commissioner, Ian Temby QC:

> *... a witness in or stranger to proceedings [in a normal court of law] who is criticised, no matter how savagely, and who wishes to respond, cannot be accommodated. Anybody who knows and observes the legal process realises this happens often.*[8]

2.2 Legislative Scheme – Other Jurisdictions

[16] Annexure 2 is a table which compares the legislative arrangements for the conduct of examinations in public by similar agencies in other jurisdictions. It compares Queensland's Crime and Misconduct Commission (CMC), New South Wales' Independent Commission Against Corruption (ICAC) and Police Integrity Commission (PIC), Victoria's Office of Police Integrity (OPI) and the Tasmanian Integrity Commission (TIC) with the Commission.

[17] Like the Commission, the CMC, ICAC and OPI are generally required to conduct examinations in private unless satisfied that it is in the public interest to conduct public examinations. While each have their respective tests for deciding the public interest, in essence they are similar to that which applies to the CCC.

[18] The TIC is the only commission which is required to conduct examinations in public unless there are reasonable grounds for not doing so.

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[8] Ian Temby QC, 'Accountability and the ICAC', 1990 49(1) *Australian Journal of Public Administration* p5.

[19] PIC's Act has far less guidance, with PIC having the option to conduct examinations in either public or private and being obliged to have regard to any matters that it considers related to the public interest.

[20] In light of this comparison, the Commission considers that the CCC Act provides the equivalent or greater guidance.

PART 3: THE PUBLIC INTEREST

3.1 Defining the Public Interest

[21] *Butterworths Concise Australian Legal Dictionary* defines the 'public interest' as:

> *1. A concern common to the public at large or a significant portion of the public which may or may not involve the personal or proprietary rights of individual people….*
> *3. The concept that publication of information concerning the activities or documents of public or private institutions overrides the interest in preserving confidentiality: Commonwealth of Australia v John Fairfax & Sons Ltd (1988) 147 CLR 39.*[9]

[22] It is possible to define the public interest in a broad context, such as that which occurs at section 24 of the *Surveillance Devices Act 1988* (WA):

> *'public interest' includes the interests of national security, public safety, the economic well-being of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens.*

[23] However, this is an unsatisfactory approach when seeking to define the public interest in the more specific context of the Commission's misconduct examinations. In 2001, the Law Reform Commission of NSW, in considering the issue of the public interest in the context of the intrusiveness of surveillance operations, described it as:

> *a fluid and amorphous concept, being most meaningful in the subjective rather than the objective sense. What constitutes public interest at any time will depend on particular context and perspectives [6.4].*

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[9] *Butterworths Concise Australian Legal Dictionary*, 3rd Edition, 2004, Butterworths: Sydney, p352.

The difficulty in precisely defining the concept of public interest is compounded by the fact that few circumstances give rise to just one interest: usually several public interests either blend into one another, or compete and need to be reconciled [6.5].

In some cases, the public interest may overlap with the rights and interests of private individuals. A person's interest in preventing unjustified intrusions into his or her personal privacy, or protecting the right to a fair trial, are classic examples of private interests which it is in the public interest to uphold [6.7].

Public interest is referred to but not defined across a broad spectrum. Courts and tribunals are required to consider the public interest in assessing whether to allow or prevent particular action, or review a decision to allow or prevent action [6.8].[10]

[24] The courts have described 'the public interest' as a "key concept [which is] broad and flexible": Bellino v Australian Broadcasting Corporation (1996) 185 CLR 183, at 192 *('Bellino')*. In London Artists Ltd v Littler [1969] 2 QB 375, at 391 Lord Denning MR said in reference to a defence of fair comment:

There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.

[25] Textbooks of authority such as *Gatley on Libel and Slander* identify "some subjects [which] are of perennial or, at least, of enduring public interest, even though they are not subjects of active public discussion at the relevant time". Brennan CJ in Bellino at 199-200 considered one such

[10]The Law Reform Commission of NSW, Report 98 (2001), *Surveillance: an interim report.*

example of a subject of enduring public interest to be the "corruption of police by persons engaged in criminal activity and the political sanctioning of corrupt police conduct."

[26] In acknowledging the difficulty of defining the public interest the Parliament has stipulated, at subsection 140(2) of the CCC Act, a weighing process between public and private interests which requires the Commission to decide where the public interest lies. The CCC Act states:

> *The Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.*

[27] There is no statutory definition for the terms 'public exposure', 'public awareness', and 'privacy infringements'. Consequently, in the construction of these terms, this submission applies an ordinary meaning.[11] This submission bases its definition of 'prejudice' on a meaning attributed to it within the CCC Act.

3.2 Other Definitions

[28] **Public exposure.** *Public exposure* is taken to mean:

> *the disclosure or revelation of subject matter, which is generally taken to be private or secret, to the public.*

[29] 'Public', in this context, is taken to mean 'of, concerning, or affecting the community or the people as a whole' and is thus the general community. Additionally, given the CCC Act's specific focus on the public sector generally, the requirement for public exposure is taken as specifically including the public sector as a special and particular subset of the general community.

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[11] *Interpretation Act 1984 IWA)*, section 19.

[30] **Public awareness.** *Public awareness* is taken to mean:

> *the public having knowledge, consciousness, cognisance or being informed about a subject matter.*

[31] This concept has a particular meaning in the context of the Commission's prevention and education function; in particular, the requirement to provide information relevant to its prevention and education function to the general community and to the public sector (subsections 17(2)(b) and (c)).

[32] **Public exposure and public awareness**. Consequently, in considering public exposure and public awareness, in the context of section 140, the Commission is required to give particular attention to the requirement of one of the CCC Act's two purposes, being to 'improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector' (section 7A) and to its prevention and education function that requires it to prevent misconduct, including providing information to both public authorities and the general community in support of this function (section 17). By subsection 17(2)(ca) the Commission is specifically required to ensure "that in performing all its functions it has regard to its prevention and education function." (emphasis added). One of the most effective means of achieving this informing process is by means of electronic and printed news media.

[33] **Prejudice.** Section 99 of the CCC Act provides a reasonable basis for a useful working definition of prejudice. It specifies four factors as requiring attention in terms of the risk of prejudice. These are:

- **The safety of a person.** This is a perennial concern for law enforcement agencies and commissions of inquiry and there are well established processes to enable adequate protection. Measures taken by the Commission include the decision not to call particular witnesses to appear or to adduce particular evidence at public examinations, the use of private examinations, the use of remote witness rooms and

screens to conceal identities, the use of code names and suppression orders and access, if necessary, to witness protection programs.[12]

- **The reputation of a person.** Section 140 of the CCC Act specifically addresses this factor, in terms of privacy infringements and, accordingly, it is dealt with further below in the discussion of privacy infringements.

- **The fair trial of a person who has been or may be charged with an offence.** The Commission has a responsibility to conduct its examinations in ways so as not to prejudice a fair trial. Subsection 23(2) of the CCC Act stipulates that an opinion of the Commission that misconduct has occurred, is occurring or is about to occur is not, and is not to be taken as, a finding or opinion that a particular person has committed, or is committing or is about to commit a criminal offence or disciplinary offence.

  Examination transcripts ordinarily available to the public are removed from the Commission's website when criminal proceedings relevant to the transcript are to take place before a judge or jury. The Commission remains committed to ensuring that the availability of public examination transcripts, reports and other related publications which have the potential to impact upon the fair outcome of a trial do not interfere with the administration of justice.

  In addition, in regard to its examinations, the reality is that a considerable period of time is likely to pass between the conduct of any public examination and any trial, in which a person charged as a result, pleads not guilty, so as to provide ample protection against prejudice. This factor receives particular attention in terms of the timing of the publication or content of a report, an action that is more likely to prejudice any trial.

[12] CCC Act, section 156.

- **The effectiveness of an investigation.** The requirement to protect the integrity of its investigations is a matter given weight by the Commission. Consequently, it affects the way examinations are conducted and relevant material made public in them.

[34] *Prejudice,* within section 140 of the CCC Act, is taken to mean the requirement for the Commission to have due regard for an individual's safety, that his or her reputation is not unfairly damaged, that their right to a fair trial is not infringed and that the Commission's investigations are appropriately protected.

[35] **Privacy infringements.** This term is not well defined within the statutes as the courts have held that the concept of privacy lacks precision. See Gleeson CJ in Australian Broadcasting Authority v Lenah Game Meats Pty Ltd (2001) 208 CLR 199 and Hosking v Runting [2003] 3 NZLR 385. There is no general 'right' to privacy in Australia. However, there exists legislation, such as the Commonwealth *Privacy Act 1988,* designed to prevent the unauthorised disclosure of information such as financial records acquired by certain organisations. Thus the literal meaning of *privacy infringements* within section 140 of the CCC Act requires that due regard be paid to ensure that an individual's capacity to go about his or her lawful business and activities is not unnecessarily violated or transgressed such that his or her reputation is unfairly damaged.

[36] **Prejudice and privacy infringements.** In terms of the definitions for *prejudice* and *privacy infringements* derived above, the requirements to provide for the safety of individuals, a trial without prejudice and to protect appropriately the Commission's investigations are sufficiently self-evident and their meaning clear as to warrant no further discussion, other than to note that the Commission pays continual attention to these requirements throughout its investigation and examination processes, especially when deciding to subject a particular witness to a public examination. However, it is the requirement to determine the public interest by weighing the potential for prejudice and privacy infringements, so as to not unfairly damage the reputation of

individuals, against the requirements of public exposure and public awareness, that is more complex and is further considered below.

3.3 Persons affected by the Public Interest

[37] There are five broad classes of persons likely to be affected by public interest considerations as a result of the Commission's investigations and examinations.

- **The general community.** The Commission has an obligation under the CCC Act to provide information relevant to its prevention and education function to the general community (subsections 17(2)(c) and (ca)). Further, section 140 specifies the need to assess the benefits of public exposure and public awareness in its weighing of the public interest.

- **The Public Sector generally and particular agencies specifically.** One of the CCC Act's purposes is the continuous improvement of the integrity of the public sector (section 7A). Further, its prevention and education function specifies particular responsibilities for informing, advising and training the public sector generally and, therefore implicitly, particular agencies specifically affected by the matters under investigation (subsections 17(2) (b) and (cb)).

- **Persons or groups under investigation.** The Commission's misconduct function encompasses dealing with these persons and groups (section 18). In any public examinations in which those that are the subject of the Commission's investigation appear, there is clearly the strong potential for damage to their reputations. The Commission, having determined what is in the public interest, retains a particular responsibility to ensure that only that material relevant to its investigation is adduced. It accepts it has an obligation to take

reasonable precaution to protect these individuals and groups from unfair damage.

- **Associated persons or groups.** There is a risk for unfair damage to occur to the reputations of individuals and groups collaterally associated with the matters under investigation. The Commission accepts that it has an obligation to take reasonable precautions to protect the reputations of these persons and section 140's injunction to weigh the public interest against the potential for prejudice and privacy infringements applies.

- **Expert witnesses.** The Commission regularly calls on expert witnesses to assist its investigations, in particular in regard to establishing the facts around policies, processes and procedures. These witnesses should have little concern for the consequences of their appearance at a public examination.

3.4 Weighing the Public Interest

[38] Each of the above classes of persons warrant attention as part of the Commission's weighing process in considering whether the conduct of public examinations is in the public interest. Expert witnesses aside, the Commission's consideration is focussed on whether the public interest, in terms of an informed general community, public sector and specific agencies, outweighs the possible consequences of prejudice or unfair damage to the reputation and privacy of the persons or groups either under investigation or in some way collaterally associated with the matters under investigation. How this is achieved is discussed in Part 4 of this submission.

PART 4: RELEVANT AUTHORITIES

[39] Part 4 of this submission reviews relevant authorities in order to identify appropriate principles which might assist in determining the relative weight to be given to each of the weighing process' components in a particular case. It then considers how the Commission meets its obligations, in light of these authorities, in conducting its investigations.

[40] The Commission, established on 1 January 2004, subsumed the functions and responsibilities of the Anti-Corruption Commission (A-CC). The A-CC, by this time, had been discredited as a result of a number of complex factors, not least of which was the loss of public confidence in it. One reason for this loss of confidence was the *Anti-Corruption Commission Act 1994*'s requirement that most of its activities and operations be kept secret. This secrecy included the inability to conduct examinations in public. This particular factor gave rise to a number of comments during the various parliamentary debates associated with the Corruption and Crime Commission Bill 2003.

[41] In McKinnon v Secretary, Department of Treasury (2006) 228 CLR 423, a case concerned with disclosure under the *Freedom of Information Act 1982* (Cth), the High Court accepted that "most questions about what is in "the public interest" will require consideration of a number of competing arguments about, or features or "facets" of, the public interest. In doing so, it recognised the importance of this deliberative process occurring within the statutory context, having regard to the purposes and objects of the legislation in question.

4.1 Parliamentary Debates

[42] During his introduction and first reading speech in the Legislative Assembly, the Attorney General, the Hon Jim McGinty, MLA stated that:

The CCC will have all the powers of the Anti-Corruption Commission, plus the powers currently used by the [WA Police Royal Commission], including powers to examine on oath, both in public and private ...[13]

[43] A number of speakers addressed the topic of public examinations during the second reading debates in the Legislative Assembly.

[44] Mr Matt Birney, MLA said:

... one of the greatest issues of human rights that faces Western Australia today is the ability of a media outlet to print somebody's name in a newspaper or air somebody's name on an electronic media outlet when that person has not been found guilty. It is an absolute tragedy for somebody to wake up one morning and find his name in print associated with all manner of accusations, such as paedophilia, corruption as in this case, stealing or assault. It would be an absolute tragedy for somebody to have his name sullied publicly without being found guilty. We proceed in this country on the basis that one is innocent until found guilty. Unfortunately, public hearings do not recognise the court of public opinion. Like it or not, if somebody's name appears in the media in association with a particular crime, human nature dictates that people automatically assume, rightly or wrongly, that he is guilty. The initial allegations against someone can be printed on the front page of a newspaper, but the conclusion of the court hearing in which that person may be found innocent can be printed on page 185. That is a tragedy for human rights. I greatly fear that public hearings will be misused to sully the name of a person who might subsequently be found to be innocent. I have a very strong reservation about the need for public hearings.[14]

[45] Mr McGinty recognised that:

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[13] Western Australia, *Parliamentary Debates,* Legislative Assembly, 15 May 2003, p786lb-7865a, p7 (Jim McGinty, Attorney General; Member for Fremantle).
[14] Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, p8164b-8173a, p5 (Matt Birney, Member for Kalgoorlie).

The downside of public hearings is that people's names and reputations get besmirched.[15]

[46] Dr Elizabeth Constable, MLA also stated:

Examination in public will be a new power that should be exercised with great caution.[16]

[47] Section 139 of the CCC Act provides that an examination is not open to the public except as provided for in section 140. In drafting the legislation in this manner, there is no doubt that the issues highlighted above played heavily on the minds of the law's proponents. This is the default position from which the Commission must work and it does so when considering where the public interest lies.

[48] However, Parliament also made it abundantly clear that the A-CC's shortcomings, in respect of its lack of transparency and openness, should be addressed by providing the capacity for the Commission to conduct examinations in public – a view which garnered bipartisan support.

[49] Mr McGinty's view was that:

It will be up to the commissioner to decide when to suppress or hold private hearings. All those powers will be available. In the twenty-first century, openness, accountability and transparency are the key words. A system that operates in secret cannot have public confidence. It is therefore important to hold public hearings.[17]

[50] The then Leader of the Opposition, the Hon Colin Barnett, MLA in commenting on deficiencies in functions and powers of A-CC noted that:

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[15] Western Australia, *Parliamentary Debates,* Legislative Assembly, 4 June 2003, p8183d-8199a, p7 (Jim McGinty, Attorney General, Member for Fremantle).
[16] Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 June 2003, p8061b-8070a, p9, (Elizabeth Constable, Member for Churchlands).
[17] Western Australia, *Parliamentary Debates,* Legislative Assembly, 4 June 2003, p8183d-8199a, p7 (Jim McGinty, Attorney General, Member for Fremantle).

... unlike the ACC, the CCC will have the powers to examine witnesses in public. That is important. One of the well-founded criticisms of the ACC was the sense of secrecy of its procedures. When dealing with corruption and crime, accountability, openness and public scrutiny are appropriate. Those provisions relating to secrecy and disclosure are significant, and are a welcome departure from the way in which the ACC was established.[18]

[51] Mr John Hyde, MLA asserted that:

A very important attribute of the Bill is the ability to hold public hearings. It is not compulsory for the CCC to hold public hearings, but the ability is there. We encourage that to occur. We must encourage transparency on all occasions.[19]

[52] Mr Birney, having earlier expressed his reservations about public hearings, went on to say:

Having said that, I understand that the former [A-CC] was somewhat hamstrung because it could not speak publicly about ongoing investigations ... [20]

[53] At the Bill's third reading in the Legislative Assembly, Mr John Bradshaw, MLA asserted:

One of the things that concerns me about this Bill is that unless the investigations are made more open and public, the [Commission] will face the same problems that occurred with the [A-CC].[21]

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[18] Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, p8 I 83d-8 199a, p4, (Colin Barnett, Leader of the Opposition; Member for Cottesloe).
[19] Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, p8164b-8173a, p10, (John Hyde, Member for Perth),
[20] Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 June 2003, p8164b-8173a, p5 (Matt Birney, Member for Kalgoorlie).
[21] Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 December, p14906c-14922a, p18 (John Hyde, Member for Murray-Wellington).

[54] The perspective that characterised these speeches, in regard to the CCC Act, was that while there were obvious reputational risks associated with having public examinations, great importance should also be given to the need for transparency in the Commission's conduct.

[55] Although the Parliamentary Inspector and the Joint Standing Committee on the Corruption and Crime Commission play valuable oversight roles, the public has a legitimate expectation in seeing, knowing and having the opportunity to assess for themselves what is happening before the Commission. In this regard, the Commission was given the capacity to conduct public examinations where it was considered in the public interest to do so.

4.2 Police Royal Commission's Recommendations

[56] The *Interim Report of the Royal Commission Into Whether There Has Been Corrupt or Criminal Conduct By Any Western Australian Police Officer* addressed the issue of public versus private examinations. Royal Commissioner the Honourable Geoffrey Kennedy AO QC concluded in his interim report that:

> *the benefit of public hearings was seen as demonstrating to the public that the external oversight agency was doing its job, which is of importance in retaining the confidence of the public.*[22]

[57] Kennedy also observed that the conduct of inquiries into corruption in public has been the subject of judicial approval of the High Court, citing Victoria v Australian Building Construction Employees and Builders Labourers Federation (1982) 152 CLR 25 ('Australian Building Construction Employees' and Builders Labourers' Federation case'), the NSW Supreme Court, citing Bayeh v AG NSW (1995) A Crim R 270 and the NSW Court of Appeal, citing Independent Commission Against Corruption v Chaffey (1993) 30 NSWLR 21

[22] *Royal Commission Into Whether There Has Been Corrupt or Criminal Conduct By Any Western Australian Police Officer, Interim Report*, December 2002, paras 7.20 to 7.23.

('ICAC v Chaffey').[23] The Royal Commission's Interim Report also recommended that 'the new agency have the power to conduct examinations in public, on the same basis as the Police Integrity Commission in NSW.[24]

4.3 Public Examinations Powers and the Parliament

[58] The Parliament considered the weaknesses of the former A-CC and the lessons available from the experiences of standing anti-corruption commissions in other jurisdictions and provided the capacity for the Commission to conduct public examinations in the CCC Act, at sections 139 and 140.

[59] The *Corruption and Crime Commission Act 2003* is a law for the peace, welfare and good government of the State of Western Australia, (Dainford Ltd v ICAC (1990) 20 ALD 207), established by the Parliament exercising its "ample and plenary" powers to do so (Union Steamship Co of Australia Ltd v King (1988) 166 CLR 1). The Parliament established the Commission with the purpose of improving continuously the integrity of the public sector (section 7A of the CCC Act), implicitly acknowledging its social contract with the people of Western Australia to ensure the peace, welfare and good government of the State, especially in regard to the delivery of goods and services to the people, protection from harm, and an enduring commitment to the public interest in exchange for the power to enact laws and levy taxes. This protection from harm includes protection from abuses of power by public officers empowered to act in the public interest, that is, the purpose of the CCC Act in regard to improving continuously the integrity of the public sector.

[60] The Parliament, in establishing the Commission as successor to the A-CC and its predecessor, the Official Corruption Commission, deliberately acted to enhance the powers of the Commission relative to those of its predecessors. These powers, including the power to conduct public examinations, reflected:

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[23] *Ibid*, paras 9.43 to 9.45.
[24] *Ibid*, para 13.1(k).

...the willingness of government and the community to accept the suspension of fundamental civil rights in the interests of detecting forms of serious wrongdoing with the capacity to undermine the integrity of public institutions.[25]

4.4 Public Examinations Versus Prejudice and Privacy Infringements

[61] Section 140 of the CCC Act explicitly recognises the tension in deciding the public interest when weighing the benefits of public exposure and awareness against the potential for prejudice and privacy infringements. This is a most important process, reserving to the Commissioner the discretion to determine where the public interest lies. In doing so, he has a broad range of authorities on which to draw for guidance in making a determination. Broadly speaking these authorities recognise the greater weight that ought to be accorded the public interest in the conduct of public examinations over that of concern for prejudice and privacy infringements of individuals.

[62] The position that the public interest may often have primacy over private interest is supported by Gleeson CJ, in ICAC v Chaffey, who asserted that while there is a requirement to weigh a number of competing factors there is:

no general obligation in a commission of inquiry to avoid or minimise publicity in order to protect reputation.[26]

...[T]here is a danger in confusing two rather different ideas. The authorities amply demonstrate that potential damage to the reputation of a person who is the subject of a complaint being investigated at a hearing by the Commission enlivens the requirement to observe the rules of natural justice and entitles that person to procedural fairness...there remains to be considered however, the question of the practical content of those rules in a given case. There is a fallacy in passing from the premise that the

[25] Hall, P.M. 2004, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, Lawbook Co, Sydney, p639
[26] *Ibid,* p652.

danger of harm to reputation requires the observance of procedural fairness to the conclusion that fairness requires the proceedings be conducted in all respects in a such a way as to minimise damage to reputation.[27]

[63] Peter M Hall, QC effectively summarised this public interest weighing process, when stating that:

Investigative commissions with far-reaching coercive powers are required to bring into account a number of factors in deciding what procedural fairness means in a particular case, striving at all times to achieve a proper balance in their use. Such a balance takes into account the public interest for which the commission and its powers exist (such as the legitimate exposure of corruption by public officials and those dealing with them) and an individual's interest, among other things, in his or her reputation. However, as Gleeson CJ in Chaffey pointed out, proceedings before courts frequently carry a risk, sometimes involving almost a certainty of damage to the reputation of persons who may not be parties to the proceedings. Notwithstanding the fact of publicity, sometimes of a sensational nature, such persons have no right to be represented or to place material before the court to gainsay the adverse evidence.[28]

[64] Hall further acknowledged the tension between public interests and the protection of privacy and from prejudice of individuals. In doing so, he acknowledged that the establishment of Royal Commissions carries with it the presumption of open examinations and open justice and, by inference, public examinations by standing commissions of inquiry. He noted that:

The public airing of evidence is an inherent part of the process. While hearings that are conducted publicly potentially expose individuals to the risk of damage to reputation, the risk needs to be balanced against the disadvantages of taking evidence in private hearings.[29]

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[27] *Ibid*, pp652 -653.
[28] *Ibid*, p653.
[29] *Ibid*, p654.

[65] Hall then cited Mason J, as he then was, in support of this position. Mason J stated, in regard to the conduct of private examinations, in the Australian Building Construction Employees' and Builders Labourers' Federation case at 97:

> *However ... [a private hearing] seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breathes the suspicion that the inquiry is unfair or oppressive. Especially is this so when the inquiry has power to compel attendance and testimony.*
>
> *The denial of public proceedings immediately brings in its train other detriment. Potential witnesses and others having relevant documents and information in their possession, lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.*
>
> *... Here the ultimate worth of the...Commission is bound up with the publicity that the proceedings attract and the public has a substantial and legitimate interest in knowing what is happening before the Commissioner.*[30]

[66] Hall, in analysing ICAC v Chaffey, which concerned an inquiry by ICAC into the relationships between police and criminals, extracted a number of propositions from the resultant judgement by the Court of Criminal Appeal. These were:

- *Potential damage to the reputation of a person being investigated at a hearing enlivens the requirement to observe the rules of natural justice;*

[30] *Ibid.*

- *The practical content of what is required by the rules of natural justice, however, does not require that proceedings be conducted in all respects in such a way as to minimise damage to reputation;*
- *There may exist competing and valid considerations which the commission of inquiry is required to consider in determining whether to conduct hearings in public. Matters such as the public interest in the subject matter of the proceedings and/or the outcome of the inquiry may (and in some cases must) be brought into account.*[31]

[67] Commissioner the Hon Terence Cole RFD QC, in the *Final Report of the Royal Commission into the Building and Construction Industry* addressed this issue in a similar fashion writing that:

> *In deciding to conduct hearings primarily in public, I was conscious that the conduct of hearings in public has the capacity to injure the reputation of both people about whom evidence was given and people who gave evidence. Often any damage to such a person's reputation resulted simply from the public revelation of his or her conduct. In that circumstance, it was really the person's conduct, rather than the Commission's revelation of it, that damaged their reputation. In other circumstances, however, where for example false, misleading or unfounded evidence was given to the Commission, people's reputations were damaged through no fault of their own.*
>
> *It was necessary for me to weigh the risk that reputations might be unfairly damaged against the public interest in the matters that I was required by my Terms of Reference to investigate. I had to make a judgment regarding the competing interests. Reasonable minds may differ in relation to which portions of evidence should be taken in public and which in private. But the public interest in a Royal Commission conducting its hearings in public should not be underestimated. Public hearings are important in enhancing public confidence in a Royal Commission as they allow the public to see the Commission at work. They also enhance the ability of Commissions to obtain information from the public, as they demonstrate to the public the types of matter with which the Commission is concerned, and they allow*

[31] *Ibid*, p652.

potential witnesses to see that they would not be alone in giving assistance to a Commission. Summarising concerns of this type, Mason J emphasised in the Australian Building Construction Employees' and Builders Labourers' Federation case (State of Victoria and Commonwealth of Australia v Australian Building and Construction Employees' and Labourers' Federation (1982) 152 CLR 25, at 97) that conducting Royal Commission hearings in private:

Seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report Independent Commission Against Corruption v Chaffey (1993) 30 NSWLR 21, at 30 and 53-54).

...This Commission was required to inquire into a subject matter of widespread public interest and importance. In my judgment, because of the factors outlined above, it was appropriate that hearings were conducted in public wherever possible.[32]

4.5 Benefits of Public Examinations

[68] In 1990, the NSW Parliamentary Committee on the Independent Commission Against Corruption's *Report on Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations* concluded that 'the public interest' requires that examinations be conducted in public because:

- First, exposure is a key weapon in the fight against corruption. Organised corruption flourishes on secrecy, codes of silence and on the difficulty of exposing it by criminal proceedings. Revealing it by open investigations is a step towards depriving it of those benefits. By comparison, any criminal trial that may result from a public examination

[32] *Final Report of the Royal Commission into the Building and Construction Industry – Conduct of the Commission – Principles and Procedures*, volume 2, February 2003, p29.

that is part of an investigation is limited in the manner in which it may portray a criminal scheme, being restricted to the elements of the charge required by law to be laid. In addition, a criminal trial may take place several years after the event, by which time public interest has waned.

- Secondly, the conduct of inquiries in the open allows opportunity for other individuals to come forward with information where they would not otherwise have known a particular matter was under investigation. At the same time, openness helps avoid suspicion and rumour.
- Thirdly, because the Commission operates in the interests of the public, it should be prepared to account for itself to the public. The Commission's performance of its tasks in the open is conducive to that end.
- Lastly, the publicity generated by open examinations can be beneficial in changing community attitudes about public sector corruption and fraud.[33]

[69] It is said by some that once the Commission has strong evidence of guilt, there will usually be no need to hold any type of examination. Instead that evidence should be passed on to the relevant prosecuting authority to be used in a criminal prosecution.

[70] To construe the work of the Commission in this narrow manner is to fail to appreciate one of the main reasons why the Commission was established - to help public sector agencies minimise and manage misconduct, and to improve the integrity of the public sector.

[71] In some circumstances, there will be a need for the public to be aware of and be educated about the alleged misconduct as it comes to light and is current and relevant. The lessons that can be learnt from such a misconduct inquiry can be lost if appropriate attention is not contemporaneously given to the matter, if public authorities do not act in a timely manner, or if the matter under investigation loses currency as a result of going through a lengthy trial

[33] Committee on the NSW ICAC report *Openness and Secrecy in Inquiries into Organised Crime and Corruption: Questions of Damage to Reputations*, November 1990.

process.

[72] For example, in the case of misconduct by authorised motor vehicle examiners, public examinations were held in January 2009 to October 2009 (private examinations preceded the first public examinations and also took place at various stages throughout 2009). The Commission's opinions were subsequently tabled in September 2010. The Commission's view was that it was in the public interest to conduct the examinations in public at the relevant time because of the physical safety risks the activities in question posed to a large proportion of the community.

[73] Acknowledging that subsection 140(1) expressly prohibits an organised crime examination being held in public, the Commission notes the following additional benefits in the conduct of public examinations in terms of public exposure and public awareness:

- First, public examinations enhance the public's confidence in the Commission's work, as it enables the work to be observed and through this the public can judge for itself the Commission's worth.
- Secondly, it allows the public to become more aware of the range of matters that concerns the Commission and promotes awareness of public sector misconduct more broadly. Experience has shown the numbers of matters of suspected misconduct brought to the Commission's attention increases during high profile public examinations.
- Thirdly, the educative benefit of these public examinations of alleged serious misconduct for other public officers cannot be underestimated.
- Lastly, the exposure of some of the matters raised in public enables public sector agencies within the State to take immediate remedial action to ensure good governance is not compromised.[34]

[34] Refer footnote 8, p13.

4.6 Procedural Fairness

[74] The common law has historically manifested an emphatic preference for the open administration of justice: see Scott v Scott [1913] AC 417. Consequently, in light of this, it would be paradoxical if the requirements of procedural fairness were found to include an obligation to conduct inquisitorial proceedings in such a way as to minimise the risk of damage to reputation. Of all tribunals, those which are most obviously bound by the rules of natural justice are courts of law, and, far from observing any such requirement in their own procedures, courts conduct their business upon the basis that justice should be administered in public, even though that carries with it the obvious potential for damage to reputation. This is a consideration which is enlivened in subsection 140(2) of the CCC Act. Balog v ICAC [1990] HCA 28; 169 CLR 625 provides some support for this approach, where the High Court indicated:

> *Although the pernicious practices at which the [ICAC] Act is aimed no doubt call for strong measures, it is obvious that the Commission is invested with considerable coercive powers which may be exercised in disregard of basic protections otherwise afforded by the common law.*

[75] Similarly in Annetts v McCann (1990) 170 CLR 596, at 598, it was said, as a general principle, that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment. Personal reputation is one of the interests comprehended within that principle [at 608].

[76] Where an obligation to observe procedural fairness is imposed by law upon a decision-maker, its practical content varies to reflect the common law's perception of what is necessary for procedural fairness in the circumstances of the particular case: Haoucher v Minister for Immigration (1990) 169 CLR 648, at 652 per Deane J. In Mahon v Air New Zealand [1984] AC 808, for example, Lord Diplock said [at 820] that:

...an authority having power to inquire and make a report which may include adverse findings must listen fairly to such relevant evidence and rational argument against the finding as a person likely to be adversely affected may wish to put. That is a very different thing from saying that the proceedings must be conducted in such a way as to minimise any damage to the person's reputation [emphasis added].

4.7 Safeguarding Reputations

[77] Hall, in discussing the issue of the need for safeguards in respect of private and public examinations, asserted that 'Today, permanent commissions... adopt a more circumscribed use of public examinations as an investigative tool than was formerly the case.'[35] He continued by identifying a number of matters that require assessment when considering whether to deal with matters in public or private examinations. These included:

- *Whether the anticipated evidence is hearsay in nature. If so:*
    - *Whether there is a legitimate and worthwhile objective or purpose to be served in calling the evidence.*
    - *Whether the anticipated evidence should be treated in the nature of intelligence data that is best given in a private hearing and used for developing new lines of inquiry or for the discovery of evidence that would be admissible in a criminal prosecution.*
- *Where the evidence expected to be given by a witness will implicate another in alleged wrongdoing, an assessment of the need to obtain corroborative evidence before adducing it in public hearings may be indicated.*
- *An assessment as to the nature and quality of the evidence (as for example, whether the evidence is in the nature of admissions or observation evidence).*
- *An assessment of the reliability of a witness before evidence of serious allegations is adduced publicly. The assessment may confirm or support it sufficiently to warrant it being adduced in public.*

[35] Hall, P.M. 2004, Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures, Lawbook Co, Sydney, p651.

- *Whether there is a compelling public interest reason or other circumstance that justifies calling the evidence in public.*[36]

[78] Hall also cited Lord Salmon, Chairman of the 1966 *Royal Commission on Tribunals of Inquiry*, who emphasised:

> *...the importance of conducting hearings in public but also the need for careful preparation and sifting of statements of witnesses before they are called to give evidence.*[37]

4.8 Section 140's Weighing Process

[79] The above assessment of the authorities provides a guide to the Corruption and Crime Commissioner's (the Commissioner) consideration of the public interest weighing process stipulated in section 140 of the CCC Act. These include:

- Firstl, the Commission's primary responsibility is to act in the public interest.
- Secondly, the Commission must give effect to its legislative obligation to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector.
- Thirdly, in making a determination under section 140, as in performing all its functions, the Commission is obliged to have regard to its prevention and education function.
- Fourthly, ensuring integrity requires that the general community, the public sector and specific agencies are aware of the extent to which that integrity is threatened or degraded.
- Fifthly, public examinations form an important means to such awareness.
- Sixthly, public examinations are intrusive and potentially may prejudice or otherwise affect through unfair damage to the reputations and

[36] *Ibid*, pp651-652.
[37] *Ibid*, p652.

privacy of not only those persons and groups who are the subjects of an investigation but also those collaterally associated with them.

- Seventhly, while the benefits of public exposure and public awareness must be given weight, due and proper attention to the potential for prejudice or privacy infringements is also demanded in determining whether it is in the public interest to open an examination to the public.
- Eighthly, there is no presumption that the existence of potential prejudice or privacy infringements of individuals or groups will always outweigh the benefits of public exposure and public awareness, and vice-versa. Where the public interest lies will depend upon a consideration of all the circumstances of the particular case – and even then, may change as circumstances change.
- Lastly, notwithstanding that a public examination would be in the public interest, the Commission is obliged to take reasonable and appropriate steps to protect the reputations and privacy of individuals from unfair damage.

[80] In summary, in weighing the public interest in determining whether to conduct public examinations, the Commission is obliged to weigh public exposure and awareness against the potential for prejudice and privacy infringements. Having done so, even if it determines to conduct public examinations, the Commission is obliged to take reasonable steps to protect the reputations and privacy of individuals and groups from unfair damage. It is the Commission's position that it has acted reasonably in meeting its statutory obligations and, where the potential for inadvertent damage is perceived and this has been brought to its attention, the Commission has taken action to remedy it.

4.9 Commission's Investigative Process

[81] The Commission's investigative processes are generally protracted, with considerable resources applied in the course of gathering information as to whether misconduct is occurring, has or may have occurred. In the course of these investigations, the Commission may use its powers to conduct

telephone interceptions (*Telecommunications (Interception and Access) Act 1979* (Cth)) and to use surveillance devices (*Surveillance Devices Act 1998* (WA)), and to investigate the activities of individuals and groups, and gather and analyse large quantities of documents and other material (sections 94, 95, 96, 100, 101, 103, and 121 of the CCC Act).

[82] The purpose of its investigations is to identify the facts in order to establish the nature of the matter in the course of determining whether misconduct has occurred or is occurring. Throughout this process the Commissioner is actively involved in receiving both formal and informal briefings as the matters unfold. The Commissioner has a range of non-delegable functions;[38] consequently, investigators require formal authorisation to access them. In this way, the Commissioner is well-informed as to the development of investigations and, as a result, forms views as to the nature and seriousness of the matters under investigation concurrent with their progress.

[83] Once investigations have developed sufficiently, decisions may be taken as to whether examinations might be conducted. It is not uncommon for the Commission to use private examinations to order to develop further the information available to it. The Commission, having gathered sufficient information, may well decide to either not take any further action, to refer the matter to another agency, or to recommend the criminal or disciplinary charges be considered (sections 33 and 43).

4.10 Deciding to Conduct Public Examinations

[84] The Commissioner, who has authorised the major decisions affecting the investigation, will be well-familiar with the information that has been gathered. Occasionally, the Commissioner has determined that a matter is of such public interest as to warrant the conduct of public examinations. Generally, this occurs towards the end of the investigative process. Before this decision is

[38] Subsection 185(2) lists those functions that the Commissioner may not delegate. These non-delegable functions relate in the main, to the Commission's core investigative functions and activities.

made however, a hearing proposal must be developed and submitted by the investigating case officer. The Commission will not hold a public examination unless there is sufficient information to ground an allegation of misconduct – it does not act on mere suspicions. The Commissioner makes such a determination after much discussion and only after a good deal of time, consideration and review and a thoughtful weighing of section 140's requirements.

[85] Before his retirement, in an address to the Institute of Pubic Administration Australia (IPAA) Commissioner Hammond remarked in connection with his approach to determining whether a public examination is required that:

> *I have been a black letter lawyer since graduating in law more years ago than I care to remember and the principle of abiding by the words of the statute has been upmost on my mind in all decisions taken at the Commission over the last three years.*
>
> *Some of those decisions have been difficult - none perhaps more so than that to determine whether or not to conduct a public hearing as part of an investigation.*
>
> *Under the CCC Act, the Commission can only conduct public hearings when the Commissioner reaches the conclusion, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, that it is in the public interest to do so (section 140(2)) of the CCC Act.*
>
> *Clearly, this is not an easy decision and each case has to be individually assessed. Broadly speaking factors such as the seriousness of the allegations, how widespread are the alleged practices and how frequently they are allegedly occurring have to be weighed against the benefit of the public exposure that comes from an open hearing.*[39]

[39] Refer footnote 8, pp10-12.

[86] Having determined in accordance with section 140 that public examinations are to occur, the Commissioner authorises the issue and service of section 96 summonses to prospective witnesses. Prior to authorising these summonses, the Commissioner receives supporting documentation that addresses the question, "Is the examination to be open to the public?", and includes a brief statement addressing the statutory criteria requiring the Commissioner's specific endorsement. This action, when taken, is the Commissioner's formal endorsement of the decision to conduct a public examination of each witness.

[87] At the start of any public examinations, the Commissioner formally announces the scope and purpose of the examinations and his determination that having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements the public examination is in the public interest. Additionally, it is usual for Counsel Assisting the Commission to make an opening statement that lays out the issues to be examined. This process inevitably reinforces the matters to be addressed during the public examination that are in the public interest.

(See Annexures 3 and 4 – Acting Commissioner's Opening Remarks in 'Inquiry into Mr K Spratt, the WA Police and Department of Corrective Services', and 'Inquiry into Curtin University/IELTS', respectively).

4.11 A Continual Weighing Process

[88] When conducting public examinations, the Commission continuously applies the section 140 weighing process. This is especially apparent at the formal daily and weekly preparatory meetings that precede examinations between the Commissioner, Counsel Assisting and relevant senior investigators.[40] During these meetings, the section 140 injunction that the public interest criteria attendant to the conduct of public examinations is applied through the

[40] These meetings take two forms. The first is the weekly meeting at which the past week's examinations are reviewed and the next week's proposed witnesses and material is discussed. The second is the daily meeting that reviews the previous day's examinations and discusses that day's prospective witnesses and material.

Commissioner's discussions with, and consideration of, the recommendations of Counsel Assisting and senior investigators.

[89] The Commission has always been and remains aware of the importance of section 140 and in particular, subsection 140(2). The Commission's internal processes have evolved to the extent that the Commissioner, having undertaken the weighing of considerations required by subsection 140(2), formally confirms the determination by signing a document which records the determination that the attendance of each witness at a public examination has been subject to the weighing process required by section 140 and attendance by the witness is in the public interest. Although throughout the course of a public examination, and indeed when the decision is made to hold a public examination, the weighing process in relation to each prospective witness is continuously and separately reviewed, this final determination is usually settled on the day the witness is scheduled to appear to ensure the latest, most relevant information is available to assist the weighing process.

[90] As a result, it is not uncommon for the Commissioner to make decisions to adjust the conduct of the public examinations so as to avoid prejudice and unfair damage to the reputation of individuals who are peripherally involved in the public examination process. Such decisions might include the conduct of an element of the examination in private, the decision not to adduce certain material during the public examination, the use of code names or non-publication orders and other measures in order to protect the identity of certain persons.

4.12 Protection from Prejudice and Unfair Damage to Reputation

[91] The Commission has consistently acted to avoid publicising salacious or other material of prurient interest. Its focus is on only that material that is relevant to the matter under investigation. This includes, at times, the exclusion of material when the Commission forms the view that the investigative value gained by its use is not warranted due to the unwarranted prejudice to or

unfair damage to the reputations of individuals. Further, it takes very seriously its obligation to make known any exculpatory material in its possession that is relevant to the investigation.

[92] Hall, in his analysis of the use of restrictions on publication (suppression orders), listed a number of factors that warranted consideration. These were similar to those factors to be weighed when determining whether to conduct examinations in public as opposed to private.[41] He concluded his analysis by asserting that:

> *...as a matter of general principle, where a Royal Commission has been established to establish the facts concerning matters of public interest, such as serious maladministration, corruption or a significant corporate collapse, a non-publication order is only likely to be made in relation to evidence where the public interest in an open hearing must give way to other elements of the public interest.*[42]

[93] Commissioner Cole also considered this issue, he noted that:

> *There were, however, some limits. Paragraph 15 of the First Practice Note states that:*
>
> > *The Commission will so far as possible conduct hearings in public. However, the names and identifying details of informants, minors, and witnesses who show a legitimate need for protection will not be made public, unless the publication of such evidence is needed for some other sufficient reason, such as to alert potential sources of significant information to the possibility that they can assist the Commission. Evidence which suggests that the person who has otherwise been identified, whether or not as a witness, has acted as an informant will not be made public. Other evidence which cannot be notified to criminals without serious community detriment, such as prejudice to ongoing covert police operations, police intelligence, police methods of*

[41] Hall, P.M. 2004, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, Lawbook Co, Sydney, p656.
[42] *Ibid*, p657.

investigation, or evidence which would prematurely release details of the Commission's own information and inquiries.

... [this] is an important power, although its too frequent exercise may lead to many of the problems that I have identified above in relation to private hearings. Nevertheless, in some cases, after evidence had been heard, it was clear that considerable harm might be done by the publication of that evidence, and that no public interest would thereby by served ... [43]

[94] The point to be made here is that the purpose of a restriction on publication or suppression order is to protect the broad publication of the identity of certain individuals to the general community. There can be no absolute protection of the knowledge that particular individuals have been mentioned in association with the matter under investigation unless such extreme steps as engagement in a witness protection program or through the use of code names have been applied. Such measures are usually reserved for those who either themselves or their families face the physical threats of death or serious injury. As a result, it is almost always possible for individuals to identify those who have been subject to non-publication orders if they are present in the hearing room at the time the name is used, or if they have particular knowledge of the matters under investigation or they know someone who does. Such privacy infringements are a consequence of the conduct of public proceedings and to a degree, in so far as it affects collaterally others who play public roles, a consequence of their choice to serve the public. This has been long accepted in the courts and for other public inquiries.

[95] In support of this proposition, the authorities indicate that a tribunal should only depart from the requirement of 'open justice' where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. Further, they indicate that the making of the order must be reasonably necessary, that there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication and

[43] *Final Report of the Royal Commission into the Building and Construction Industry – Conduct of the Commission – Principles and Procedures*, volume 2, February 2003, p29.

that mere belief that the order is necessary is insufficient: John Fairfax and Sons v Police Tribunal (1986) 5 NSWLR 465, at 476-477. There is authority for the proposition that procedural fairness does not require that the reputations of individuals affected by an investigation be protected absolutely so as to require that examinations be held in private: ICAC v Chaffey. In general, parties and witnesses have to accept the embarrassment and damage to their reputation and consequential loss which can be inherent in being involved in litigation, being entitled to the protection of a judgment delivered in public which will refute unfounded allegations: R v Legal Aid Board; Ex parte Kaim Todner (a firm) [1999] QB 966, at 978; [1998] 3 All ER 541, at 550; [1998] 3 WLR 925, at 935.

[96] Of course, it is important to appreciate that those authorities concerned courts and tribunals administering justice judicially or quasi-judicially. Different considerations apply to their proceedings than to inquisitorial examinations as part of an investigative process. The latter are not "litigation" to which individuals are parties. Witnesses in Commission examinations appear under compulsion (which witnesses in court or tribunal proceedings may do but not necessarily), have no privilege against self-incrimination and their testimony is not subject to the constraints of the rules of evidence or procedure (other than the requirements of procedural fairness, to the extent they apply).

[97] In describing the Commission's approach to non-publication orders applied during or as a result of public examinations, former Commissioner Hammond has said:

> *Individuals who perceive themselves as inappropriately affected have the opportunity to make submissions to the Commission to seek a suppression order. In the past such orders have been imposed by the Commission unilaterally to protect the interests of persons collaterally or incidentally mentioned at hearings.*
>
> *This Commission uses suppression orders for a number of purposes. One is to support the conduct of the Commission's investigations in public in*

that suppression orders can allow the effective progression of the investigative process.

In other circumstances I, as Commissioner, am concerned to avoid the publication of what sometimes can be gratuitous and occasionally derogatory references to persons only marginally or collaterally involved with the main purposes of these investigations, if at all. In the course of the hearings the Commission applies these suppression orders in order to protect, as far as possible, individuals from unfair damage to their reputations.

During the two recent public hearings I made 17 suppression orders of which about 15 were made on my own initiative without waiting for an application. Many of these were to prevent the publication outside the hearing room of salacious and derogatory comments about others.

Occasionally in the hearings references have arisen, mainly from telephone intercepts, which identify people by first names or some oblique reference. It would be inappropriate and unfair for anyone to make judgments solely on the statements of others that have arisen in an unguarded conversation, to conclude whether misconduct has occurred or not, as these statements of others may be false, malicious or self-serving.

With regard to such references, arising as they do in personal conversations between persons of interest to the Commission, they are only of interest in so far as they touch on the matters under investigation and that alone is not sufficient to warrant the Commission or anyone to form the opinion that an individual has engaged in misconduct. Other corroborative material, independent of the particular conversation in question would be required.[44]

[98] The Commission notes that any decision to conduct public examinations is a most serious one that inevitably affects a range of persons, sometimes adversely. The Commission also accepts that it is obliged to limit the possibility of unfair damage to individuals.

[44] Refer footnote 8, pp18-19.

[99] The Commission's view is that it has sufficient means and flexibility to enable it to provide an appropriate level of protection from prejudice and unfair damage to reputations that may result from its conduct of public examinations.

PART 5: RESPONSES BY AGGRIEVED PERSONS TO ALLEGATIONS

[100] This part addresses the opportunity for persons aggrieved by allegations made before the Commission, particularly during public examinations, to respond to those allegations.

[101] In regard to persons likely to be aggrieved by allegations made before Commission public examinations, these principally fall into two distinct classes. The first are those called to appear before the Commission during a public examination. The second are persons collaterally affected by material produced during a public examination.

5.1 Persons Appearing in Public Examinations

[102] In the first case, those persons appearing before the Commission who are likely to feel aggrieved by the material presented will usually be the subjects of the Commission's investigations. They will most likely have adverse matters put to them either directly or as a result of other material placed before the Commission in the form of either documents or other information or questions put and answers given by other persons appearing.

[103] Some concerns have been raised over the inability of a witness' counsel to cross-examine other witnesses to the same extent as one might expect to see during a criminal trial. First, it is important to highlight the fact that a Commission examination is not a trial nor does it take place in an adversarial setting; it forms part of an information-gathering process. Permitting cross-examination in the manner suggested above would be inappropriate in the circumstances and risks interfering with the Commission's investigative goals. Furthermore, affected persons may not be aware of the totality of the evidence until the close of the examinations.

[104] The Commission's *Hearing Practice Directions*[45] provide guidance for the conduct of examinations including the right to legal representation for those summonsed to appear, the opportunity and processes for examination and cross-examination of witnesses by their legal counsel and the making of submissions to the Commission.[46] Should a person wish to cross-examine a witness, he or she must first be granted leave to do so by the Commissioner. This is done by providing written submissions to Counsel Assisting setting out the basis of such an application and the material contrary to the evidence of the witness who is sought to be examined.

[105] It is not unusual and is, in any event, accepted practice for persons appearing, either themselves or through their counsel, to make submissions in the event they view their reputations as unfairly impugned to seek non-disclosure directions.[47] The Commissioner is able to respond directly to these submissions and will consider, among other factors, the CCC Act's stipulation in regard to the public interest at subsection 140(2). Further, the Commission is obliged to provide procedural fairness to individuals appearing before it both during its examinations and, in accordance with section 86 of the CCC Act, prior to the publication of any adverse matter concerning any individuals or groups.

[106] Private and personal matters raised during the course of the examination and which are irrelevant to the inquiry at hand are suppressed. Table 1 below sets out the number of suppression orders issued by the Commission since 2006. In the period covering 2010 and 2011 alone, the Commission held four public examinations and issued a total of 41 suppression orders.

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[45] *Hearing Practice Directions* http://www.ccc.wa.gov.au/InvestigationAndHearings/Documents/Hearing%20Practice%20Direction%20version%206%20-%204%20March%202010.pdf

[46] See Annexure 5 – Acting Commissioner's Closing Remarks in 'Inquiry into Mr K Spratt, the WA Police and Department of Corrective Services' and *Hearing Practice Directions* – 'Limiting or deferring cross-examination', pp7-8.

[47] See *Hearing Practice Directions* – 'Suppression of evidence at a public examination', pp 9-10.

Table 1 – Number of suppression orders issued by the Commission since 2006 (inclusive)

Calendar year	Matters examined	No. of suppression orders
2006	• Allegation concerning the Honourable John D'Orazio MLA • Inappropriate associations of WAPOL (Traffic Infringements) • Letting of Contracts at Central TAFE • Smiths Beach Development at Yallingup	14 (4 matters)
2007	• Lobbying and alleged public sector misconduct (Wanneroo) • Lobbying and alleged public sector misconduct (Cockburn) • Lobbying and alleged public sector misconduct (Gingin) • Lobbying and alleged public sector misconduct (Whitby) • Lobbying and alleged public sector misconduct (Mining and other matters) • Mallard Inquiry	17 (6 matters)
2008	No public examinations were held	Nil
2009	• DPI – Vehicle Inspection, Licensing and Registration • Allegations of misconduct in the purchase of goods by public officers	1 (2 matters)
2010	• Department of Health – Building Works Hearings • City of Stirling – Procurement Hearings • Mr K Spratt – the WA Police and Department of Corrective Services	21 (3 matters)
2011 to date	• Mr K Spratt – the WA Police and Department of Corrective Services • Curtin University IELTS Investigation	20 (2 matters)

5.2 Persons Not Appearing but Collaterally Affected

[107] In regard to the second group, being persons collaterally affected by material produced during a public examination but not appearing themselves, the situation is more complex. Such persons are unlikely to be present in the examination room when reference is made to them and so the capacity for the Commission to be aware of concerns and to respond immediately to redress the potential for any unfair damage is constrained.

[108] It is for this reason that the Commission continues to sift the material available to it in order to seek to limit the risk of unfair damage to the reputations of those only collaterally involved prior to examinations. Consequently, the Commission frequently chooses either not to produce certain material or to issue non-disclosure directions to protect individuals or groups only collaterally involved.

[109] Should individuals be aggrieved as the result of material produced in examinations it is open to them to raise this with the Commission. However, the capacity of the Commission to respond is limited as those aggrieved may only become aware once details are published either in transcript or raised subsequently in the media.

[110] Since its inception to June 30 2011, the Commission has conducted public examinations into fifteen matters in which it has examined 314 persons and made reference to very many other persons collaterally in one way or another. Of all the persons mentioned collaterally, the Commission has received only four representations concerning a total of six persons from apparently aggrieved persons collaterally affected as the result of public examinations.

[111] These four representations represent a very small proportion of persons mentioned. This is testimony to the attention that the Commission gives to its obligations under subsection 140(2) of the CCC Act to protect individuals from prejudice and privacy infringements.

[112] While it is regrettable that any person should feel that they are collaterally affected by the Commission's public examinations it is impossible to have no such occurrences, especially where such persons are, in one way or another, public figures. It is the Commission's view that the present policies, processes and procedures in place at the Commission that support the object of subsection 140(2) are sufficient and no further measures are required.

PART 6: RECOMMENDATIONS

The Commission's position in respect of the current public examinations process and any proposal to adjust the statutory discretion of the Commission in taking oral evidence from persons in open or closed examinations is that:

- First, the default position stipulated by section 139, that examinations be private unless otherwise determined, remains relevant and appropriate.

- Secondly, the provision for opening or closing examinations under section 140 of the *Corruption and Crime Commission Act 2003* is adequate.

- Thirdly, there are sufficient safeguards to protect individual reputations from unfair damage due to either prejudice or privacy infringements resulting from public examinations.

ANNEXURE 1

Speech by Commissioner Kevin Hammond to IPAA

"Corruption, Integrity and the Public Sector"

20 March 2007

Sheraton Hotel

Thank you for coming along to this breakfast for what will be my farewell after more than 25 years in public life. As most of you know I am retiring at the end of the month so ending three years and three months as the inaugural Commissioner of the Corruption and Crime Commission which commenced operation on 1 January 2004, and which later took over the unfinished work of both the Anti-Corruption Commission and the Kennedy Royal Commission.

After 22 years on the bench of the District Court, I knocked off work at the end of 2003 in order to carry bricks at the Commission.

Before I start, I'm sure you will appreciate that I am unable to comment specifically on the recent public hearings run by the Commission. The Commission's opinions and findings on those matters raised will be made public when the reports are tabled in the Parliament.

The report on Smiths Beach is well advanced and I hope will be tabled sometime in the next couple of months. As to the public hearings on lobbying – that is still an ongoing investigation and I have already indicated it is hoped to have that report tabled by the end of the year.

My retirement will not delay the completion of these reports which will be the result of the efforts of many people. Inevitably, charges will be laid as a result of those investigations.

I must admit that even after more than 20 years on the bench, I've been surprised by the extent of the networks that exist and the way influence could be exerted inappropriately in this state as was revealed at the recent public hearings.

The public hearings have given rise to a broad examination of the level of integrity and propriety that the public ought to expect from politicians, councillors as well as state and local government employees.

This is a worthwhile examination and debate that is currently taking place around Australia and one that I and many others follow with great interest.

That debate needs to be seen in the context that in our system of government, what could be called a social contract exists between governments at various levels, be they federal, state or local, and the people. The basis of this social contract is that in return for the payment of taxes, government not only provides goods and services, but also protection.

This protection incorporates policing and the administration of law, as well as protection from misconduct by corrupt public officers whose place of privilege and trust might enable them to exploit their position to gain a benefit for themselves or others or cause a detriment to others.

A government's election is based on the trust of the electorate. Unfortunately, the public is mistrustful of government, of politicians, of the institutions that serve them, and of business.

Research by the international public relations firm, Edelman [Edelman 2006 Asia Pacific Stakeholder Research], found that fewer than 24% of respondents trusted the government to do the right thing and even fewer trust the business sector.

That represents a low level of trust and is a matter of considerable concern for both governments and business.

Nothing erodes that trust faster than allegations of corruption. People today have little tolerance of public officers who improperly use their position to benefit themselves, their family, friends or business interests.

Corruption by public officers has a corrosive effect on our community. For example, if the public starts to doubt the

effectiveness of the police force, confidence in the system of law and order is shaken.

This is illustrated by recent events in Victoria.

Similar principles apply to planning approvals, the granting of government (local or state) contracts or employment, licences and the many other activities undertaken by government at all levels.

The integrity of each of these activities serves to strengthen or undermine this bond of trust between the electorate and the people.

Unfortunately, there still appear to be people holding public office whose practices have not kept up with the changing and I believe, increasing expectations of our community.

I was asked what was the single most important issue before the public sector today.

On the evidence before us resulting from the Commission's investigation and hearings over the last three years, it is clear there are many quite influential public officers who wouldn't

recognise a conflict of interest if it walked up and kicked them in the backside.

This is very concerning to me and should be to you. The capacity to recognise and properly manage the conflicts of interest that inevitably arise in public life is central to preserving the trust placed in public officers. It is not wrong to have a conflict of interest, it is what you do about it that matters.

It is an area that requires close attention and much greater effort across the public sector. It is an area that is receiving great attention from our Corruption Prevention, Education & Research Directorate whose officers conduct seminars and presentations across the state and to all manner of public sector groups providing literature, information and guidance.

For all that, far and away the great majority of Western Australian public officers are good people dedicated to their jobs. That a few should so severely damage the hard won reputation of the whole public sector is deeply saddening.
It is for this reason that such agencies as the triple-C are critical for the maintenance of trust of Western Australians in their public sector.

Part of the feedback the Commission has received suggests a view held by some that the Commission is out of touch, that it doesn't understand how business is done in the real world. This criticism implies that it is all right for public officers to provide for a few a privileged access to information and assistance not available to everyone.

The Commission's view is that this is not all right and I believe the vast majority of Western Australians supports this view. These inappropriate practices have perhaps been allowed to occur because no agency to this time has had sufficient power and capacity to expose them.

It is an increasing trend for governments to establish commissions such as this. Indeed, it is possible to assert that no modern democratic society can do without such a commission.

Within Western Australia today there is an economic boom, commodity prices, labour costs and real estate prices are all rising. Infrastructure and labour and other resources are under pressure. There is considerable pressure on business to grasp these opportunities to return value to share holders. This in turn places considerable pressure on the public sector with complex decisions required to be made under pressure of time.

Public officers can also find themselves having considerable discretion in the way decisions are taken both in terms of process and timeframe and indeed who benefits from the decision. Under pressure, shortcuts may be taken, mistakes made and on occasion individuals can seek or be offered a benefit to manage decisions in particular ways. If there is an error of process in the decision-making then frequently it is something that the Auditor General or Ombudsman might take up, depending on jurisdiction. However, where there is a benefit or a detriment gained or provided then that is a concern for the Commission. This underlines the need for agencies such as the Commission with the particular function of improving the integrity of the public sector.

The Commission, by its presence and with the mandatory requirement for reasonably suspected misconduct to be reported by Chief Executive Officers, acts to reinforce why individuals should not engage in misconduct and forms part of the corruption prevention mechanism helping to ensure that those who are corrupt are identified and dealt with appropriately.

When serious misconduct is detected it can paralyse agencies for weeks, diverting resources from its principal business while the matter is dealt with. Depending on the seriousness, a single

incident of misconduct or more likely a series of incidents can not only cause this paralysis but can result in a loss of public confidence destroying the reputation of organisations that have taken thousands of people many years to establish.

In a speech delivered in the 2004 National lecture series for the Australian Institute of Administrative Law in April 2004 The Hon. J. J. Spigelman AC Chief Justice of N.S.W. proposed recognition of a fourth branch of Government which he termed an "integrity branch". During his address when dealing with what he termed "The Idea of Integrity", he said "Considered as a branch of government, the concept focuses on institutional integrity, although the latter, as a characteristic required of occupants of public office, has implications for the former. I use the word in its connotation of an unimpaired or uncorrupted state of affairs. This involves an idea of purity, which, in the context of mechanisms of governance should operate in practice. The role of the integrity branch is to ensure that that concept is realised, so that the performance of governmental functions is not corrupt, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice." [Reported (2004) 78 ALJ at 725]

However, vague concepts of public morality have not determined how the Commission has acted in the past 3 years.

That is solely determined by our Act – *The Corruption and Crime Commission Act 2003*, the Criminal Code and other Statutes governing the behaviour of the public sector.

I have been a black letter lawyer since graduating in law more years ago than I care to remember and the principle of abiding by the words of the statute has been upmost on my mind in all decisions taken at the Commission over the last three years.

The Triple C's role as part of the integrity branch of government is to improve continuously the integrity of the public sector. In doing so it has considerable powers available to it. That being said the Commission is committed to working with and assisting CEOs to meet their responsibility for addressing misconduct in their respective agencies. Of course where CEOs are unwilling or unable to act then the Commission will act in its own right using the full extent of its powers if necessary. In this way the Commission plays an important role in promoting transparency and holding the public sector to account on behalf of the people of Western Australia.

However, I don't think it would be correct to conclude that the integrity of public officers in Western Australia is any better or worse than anywhere else in Australia. With highly publicized controversies involving public officials in Queensland, New

South Wales and Tasmania, that is a long bow to draw. It is interesting to however note an apparently higher level of exposure of misconduct in states that have established anti-corruption bodies – those states being Western Australia, Queensland and New South Wales.

Though I realize the CCC has caused the state government considerable pain, the government must be commended for establishing the Commission with strong powers, providing adequate funding and moral support.

PUBLIC HEARINGS

Some of those decisions have been difficult - none perhaps more so than that to determine whether or not to conduct a public hearing as part of an investigation.

Under the CCC Act, the Commission can only conduct public hearings when the Commissioner reaches the conclusion, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, that it is in the public interest to do so (section 140(2)) of the Act.

Clearly, this is not an easy decision and each case has to be individually assessed. Broadly speaking factors such as the seriousness of the allegations, how widespread are the alleged practices and how frequently they are allegedly occurring have to be weighed against the benefit of the public exposure that comes from an open hearing.

Generally speaking, there are three main benefits that result from the conduct of public hearings. First, public hearings enhance the public's confidence in the Commission's work, as it enables the work to be observed and through this the public can judge for itself the Commission's worth.

Second, it allows the public to become more aware of the range of matters that concerns the Commission and promotes awareness of public sector misconduct more broadly. Experience has shown the numbers of matters of suspected misconduct brought to the Commission's attention increases during high profile public hearings.

And thirdly, the educative benefit of these public examinations of alleged serious misconduct for other public officers cannot be underestimated.

Additionally, with regard to the recent hearings, a specific benefit of their conduct in public is that the exposure of some of the matters raised may hopefully enable public sector agencies within the State to take immediate remedial action to ensure good governance is not compromised.

In terms of the importance of openness it is worth remembering our predecessor – the Anti-Corruption Commission – and how its Act forced the agency to operate in great secrecy. That quickly eroded the public's confidence in the Commission and the efforts to combat corruption in the State.

With regard to the potential prejudice to, or privacy infringements of, individuals, the Commission acknowledges that public hearings come at considerable cost to some witnesses and their families. While it is not the Commission's intention to cause undue stress and discomfort to individuals, the overwhelming need has been to address the public interest in identifying the matters raised during these hearings that go to the heart of good and effective governance in this State.

I should add that when witnesses are compelled to give evidence at a hearing, that evidence cannot be used against them in court. However, obviously any evidence gathered by

the Commission from sources outside the hearing room is admissible in court.

Some lawyers have complained that their clients don't get a fair go as unlike a court, the defence is not presented with all the available evidence prior to the commencement of hearings.

This shows a fundamental lack of understanding of the process followed by Royal Commissions and Commissions of inquiry.

This Commission is an investigative body and its functions do not form part of the mainstream administration of justice in that they do not include the making of conclusions or findings with respect to either civil or criminal liability. These public hearings form but one part of the investigative process, the purpose of which is to get to the truth of a matter.

These hearings are not a court process, but an investigative process into a subject matter of widespread public interest and importance. As a consequence of its investigative function the Commission is not and cannot be bound by the rules of evidence.

While witnesses appearing before the Commission may be legally represented this does not necessarily entail a right to

cross-examine the client witness or any other witnesses as the evidence is presented.

The hearings form part of a continuing investigation and in the absence of the knowledge of all of the evidence available to the Commission it is usually not in the witness's interests to be further examined by their counsel at that time.

Rather, in the recent public hearings the legal representatives of affected parties were given the opportunity to recall any witnesses for cross-examination after all the evidence had been presented. I believe this provides a higher degree of procedural fairness.

The requirements of procedural fairness can also be met in other ways such as by giving the person an opportunity to reply to the allegations under oath or to make submissions before an adverse opinion is expressed in a Commission report.

As with Royal Commissions, the rules of procedural fairness do not impose any obligation on the Commission to notify any person that evidence may be given that is adverse to their interests before that evidence was given. This approach is well supported by legal precedent, for example News Corporation v National Company Security Commission case.

The reason is that because in some cases advance notice might adversely affect the investigation and in others the Commission may not necessarily know that a particular name is going to be mentioned. I as Commissioner am keenly aware that it is essential to conduct investigations of this nature with scrupulous care to avoid any prejudice to the investigation itself and to avoid unfair damage to the reputations of those affected.

Many persons appearing as witnesses do so to assist the Commission. They are not the objects of its investigations and will not be adversely affected by the Commission's activities. Consequently, contrary to the views of some, a summons to appear before the Commission does not automatically signal a threat to their reputation or suggest any criticism of their actions in regard to any matter.

In regard to the effect on the reputation of individuals it has been said that often any damage to a person's reputation resulted from the public revelation of his or her conduct. In that circumstance it was really the person's conduct rather than the Commission's revelation of it that damaged their reputation. That being said, the degree to which the reputations of individuals might be inadvertently adversely effected is a matter of careful consideration by the Commission.

I would add further that the Hearing Room procedures the CCC has adopted are not unique to 186 St Georges Terrace. They are essentially similar to those adopted by similar bodies in other states. They are published on the Commission's website and are available in hard copy.

SUPPRESSION ORDERS

Individuals who perceive themselves as inappropriately affected have the opportunity to make submissions to the Commission to seek a suppression order. In the past such orders have been imposed by the Commission unilaterally to protect the interests of persons collaterally or incidentally mentioned at hearings.

This Commission uses suppression orders for a number of purposes. One is to support the conduct of the Commission's investigations in public in that suppression orders can allow the effective progression of the investigative process.

In other circumstances I, as Commissioner, am concerned to avoid the publication of what sometimes can be gratuitous and occasionally derogatory references to persons only marginally or collaterally involved with the main purposes of these investigations, if at all. In the course of the hearings the Commission applies these suppression orders in order to protect, as far as possible, individuals from unfair damage to their reputations.

During the two recent public hearings I made 17 suppression orders of which about 15 were made on my own initiative without waiting for an application. Many of these were to prevent the

publication outside the hearing room of salacious and derogatory comments about others.

Occasionally in the hearings references have arisen, mainly from telephone intercepts, which identify people by first names or some oblique reference. It would be inappropriate and unfair for anyone to make judgments solely on the statements of others that have arisen in an unguarded conversation, to conclude whether misconduct has occurred or not, as these statements of others may be false, malicious or self-serving.

With regard to such references, arising as they do in personal conversations between persons of interest to the Commission, they are only of interest in so far as they touch on the matters under investigation and that alone is not sufficient to warrant the Commission or anyone to form the opinion that an individual has engaged in misconduct. Other corroborative material, independent of the particular conversation in question would be required.

TELECOMMUNICATIONS INTERCEPTS AND SURVEILLANCE DEVICES

Two of the most discussed aspects of our public hearings have been the use of telephone intercepts and listening devices.

We've even had a few calls to the Commission from people asking if their phones or homes were bugged.

Under the strict legislation that controls these activities, we can't tell you.

However, due to the strict conditions controlling these activities the answer is probably not.

TELECOMMUNICATIONS INTERCEPTION

Telecommunications interceptions are intrusive and before the Commission can undertake them we have to establish the necessity for the process before an especially appointed Commonwealth Judicial Officer as telecommunications are controlled by the Commonwealth Government. This means an application has to be made before the Commonwealth judicial officer to obtain the appropriate warrant to intercept specified lines.

Information has to be provided on affidavit to convince a judicial officer that the proposed interception is justified in the light of:

(a) the seriousness of the alleged offences being investigated, which must involve the investigation of a criminal offence punishable by imprisonment for at least seven years;

(b) the importance or significance of the evidence likely to be obtained; and

(c) information as to whether the evidence sought to be obtained could be obtained by any other means.

(There has been some public observation that the Triple-C has some extraordinarily powerful powers in this connection but in fact, the Commission's powers are identical to those possessed by all Police Services in Australia & a number of other agencies declared by the Commonwealth.)

Those interception warrants when obtained must go through a registration process and their auditing and reporting upon by the State Ombudsman who acts as the agent for the Commonwealth Ombudsman is a complex and rigorous procedure as indeed it should be.

A copy of each interception warrant must be lodged with the Attorney General of the State as soon as practicable after it is obtained, and in turn the State Attorney General must inform the Commonwealth Attorney General.

Additionally, however, significant checks and balances on dealing with intercepted information. These are imposed by the *Telecommunications (Interception and Access) Act 1979* ("TI Act") of the Commonwealth. In short, apart from the internal Commission constraints around the integrity, security and record keeping of such information, the Commission can only deal with it for permitted purposes – which are defined in the TI Act – and can only communicate such information to other persons and agencies where this is expressly authorised by the TI Act.

SURVEILLANCE DEVICES

The Commission placed a surveillance device in the home of a witness in the recent public hearings and I know a number of people felt uncomfortable about this revelation. However, at times this procedure may be the only way to obtain evidence critical to the investigation of serious allegations.

The Commission is one of the few bodies in the state permitted, under the *Surveillance Devices Act 1998 of Western Australia* (SDA), to use surveillance devices, such as listening devices and optical surveillance devices. However, again the use of these powers is tightly constrained by the Act.

Under the SDA, the Commission can only use these devices under a warrant issued by a judge of the Supreme Court of Western Australia, except in a few special situations provided for in the SDA.

A Commission officer can obtain a warrant (as part of a specific investigation) if he or she satisfies the judge, on affidavit, that there are reasonable grounds for suspecting a specified offence may have been or is likely to be committed and the use of a specified type of device is likely to yield evidence that will assist the Commission's investigation.

As with the TI Act, there are significant constraints on the Commission's use of surveillance devices. We do **not** have a general power to use devices as and when we feel they may be useful, or may provide interesting information.

The officer applying for the warrant must in the application address a number of criteria, such as the public interest

generally but also, specifically, the nature and seriousness of the offence, the effect of using the specified device on the privacy of others and the value or weight of the information expected to be collected through the use of the device.

A warrant will authorise the use of the device for up to 90 days. The SDA also controls how the Commission deals with information collected through the use of devices. For example, information collected must be stored in a secure area with appropriately limited access. Further, the Commission is constrained by the SDA as well as its own legislation in determining whether it can give information collected through a surveillance device to another person and in what circumstances.

As an aside, I might mention that before any person of whatever status can commence work at the CCC, he or she must be cleared to at least "Highly Protected" security status by an authorised delegate of the Commonwealth Attorney General and this is a lengthy and intrusive process.

USE OF MATERIAL

The Commission is particularly conscious of its considerable responsibility in using material it has gathered only for authorised purposes.

In preparing for the conduct of examinations, specific attention is paid to ensuring that only that material that is directly relevant to the hearing's scope and purpose is used. In doing this the Commission applies what it describes is a proportionality test. Through this test the Commission assesses whether the revelation of the information is relevant to the matter being investigated, whether it is in the public interest and considers the potential for unfair damage to the reputation of individuals and/or organisations.

The Commission sees no benefit to the public interest or indeed its own reputation in disclosing material that is not relevant, especially if it is only gossip or matters outside the scope of the investigation or it results in unfair damage to the reputation of the individuals and organisations concerned.

However, for all that the recent significant revelations at the public hearings of the Commission would have been impossible

without our telephone interception and surveillance devices powers.

THE COMMISSION'S ACCOUNTABILITY STRUCTURE

I would now like to say a few words about the CCC's accountability framework.

The Commission itself is subject to very considerable oversight.

First and foremost the CCC is accountable to the Parliament. This occurs in four ways:

- through the Joint Standing Committee on the CCC;
- the Parliamentary Inspector;
- through annual auditing of its financial statements by the Auditor General; and
- through the CCC's responsiveness to the annual parliamentary estimates process

The last two need no further comment, I will however address the first two.

JOINT STANDING COMMITTEE ON THE CCC

The Committee comprises of four Members, drawn equally from both Houses of Parliament and from the government and opposition parties.

The Committee's functions are as follows

(a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary inspector of the Corruption & Crime Commission;

(b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and

(c) carry out any other functions conferred on the Committee under the *Corruption & Crime Commission Act 2003*

This Standing Committee holds public hearings several times a year as well as private hearings in which the Commission can be questioned about its activities although this does not include operational activities.

PARLIAMENTARY INSPECTOR

The Parliamentary Inspector reports to the Joint Parliamentary Standing Committee.

Mr Malcolm McCusker AO QC, was appointed by Parliament as the inaugural Parliamentary Inspector. He has total access to the premises of the Commission, its staff and records at all times and can investigate allegations against the Triple-C with the powers of a Royal Commissioner.

He has the power to access all case and operational details and can interview any Commission officer on any matter at any time.

OTHER ACCOUNTABILITY MEASURES

In addition to being accountable to Parliament, the Attorney General is the Commission's responsible minister solely for budgetary purposes.

In terms of accountability, the Commission is reliant on its reputation. The maintenance of that confidence is dependent on the broadly held perception that the Commission is effectively and appropriately performing its role. This means using its considerable powers in the public interest, but not in such a

manner that it could be perceived as acting in trivial matters or somehow as not in the public interest.

In its approach to its own accountability the Commission recognises that it lives in its own 'glass house' and so it seeks to meet its responsibilities for accountability stringently. It would do little for public confidence and reputation if the Commission was to breach those public sector standards that it holds others to account for.

ORGANISED CRIME FUNCTION

The CCC Act has two main purposes. One is to improve continuously the integrity of, and to reduce the incidence of misconduct in the pubic sector. The other is to combat and reduce the incidence of organised crime.

Unfortunately, I would have to list this second purpose as one of my disappointments at the Commission. The Commission is not empowered to use its powers to directly undertake investigations into organised crime. Rather, the police are entitled to apply to the Commissioner of the CCC to be able to use so-called extraordinary powers vested in the CCC to investigate organised crime.

However, there have only been two applications from police to use these powers and this has been extremely disappointing.

In a report tabled in the Parliament in December 2005, the Commission detailed difficulties with the current legislation including the definition of organised crime and the Commission's powers to deal with contempt.

ACHIEVEMENTS

Because of the public interest in recent events, my speech so far has mostly focussed on the Commission's activities in terms of the public hearings.

However, our activities extend way beyond that.

Last financial year the Commission:

- Received and assessed 2,361 allegations and notifications of misconduct – 22% of which were substantiated;
- Monitored 1,884 misconduct investigations undertaken by public sector agencies;
- Reviewed 2,083 misconduct investigations conducted by public sector agencies;

- Laid 147 criminal charges against 12 people that includes public officers and non-public officers;
- Tabled five reports in Parliament;
- Undertook four major inquiries and one major review resulting in the tabling of reports in Parliament; and
- Delivered 96 seminars (on managing the risk of misconduct) to 2,700 people including a variety of public sector agency staff across the state.

It is this educational role of the Commission that gives me the most optimism for the future.

Finally, for the first time in Western Australia, there is a government agency that has the responsibility to work with state government departments and local government to raise awareness of corruption and make recommendations on how to deal with it. Neither of our predecessor agencies had this important prevention & education mandate.

The real improvement in the integrity of the public sector will not necessarily come from using our range of powers in public hearings but from working with agencies and the individuals in them to address integrity issues.

This cooperative approach can bring about much broader change and I see this side of the Commission growing over time.

I remarked earlier that a single incident can destroy public confidence in an institution that has taken the work of thousands of people over many years to establish.

That is why an independent and effective anti-corruption agency is so important in a modern democracy. These agencies are a growth business and already exist in a number of Australian states and countries around the world.

They have been created because Parliaments have responded to increasing demands for higher standards expected of conduct and accountability of our politicians and public officers.

In assessing the work of the Triple C to date, I would like to consider the following quote. It is from a speech given by Shirley Heafey, former Chair of the Commission for Public Complaints against the Royal Canadian Mounted Police given to the University of Ottawa Faculty of Law in 1993.

Appropriately, the paper was titled *The Need for Effective Civilian Oversight of National Security Agencies in the Interest of Human Rights.*

Ms Heafey listed five key elements when determining if a civilian oversight agency is effective. They are:

1. Independence – is the agency beholden to the police or security force? Is it beholden to the Minister or Government?
2. Powers – Is the process complaint driven or can the agency audit such activities as it sees fit?
3. Information – does the agency have ready access to all relevant information or does the police or security force control what it sees?
4. Resources – are there enough?
5. Reporting – does the reporting mechanism put the issues in the public domain.
6. I would add a 6th element, namely the strength of the oversight mechanism and I have described to you the details of our local structures involving the Parliament Inspector and the Joint Standing Committee.

I think the Triple C measures up fairly well against each of these criteria.

I have been honoured to serve as the Commission's inaugural Commissioner and as I retire I wish to also publicly acknowledge the tireless work, enormous enthusiasm and dedicated professionalism of the Commission's staff who have come to us from academia, the armed forces, police services across Australia and overseas, the public and private sectors, and other sources who have combined together to form a very effective organisation determined to operate in the manner laid down by the Government of Western Australia and for the benefit of the people of our state.

ANNEXURE 2

Comparison of Legislation Concerning Conduct of Public and Private Examinations

Are examinations conducted 'for the purposes of an investigation'?

CCC	Yes - s. 137 CCC Act [The Commission may conduct an examination for the purposes of an investigation under this Act or for the purposes of an investigation in respect of which an exceptional powers finding has been made under section 46 and an organised crime summons has been issued.]
CMC	No - s. 176 CM Act [(1) The commission may authorise the holding of a hearing in relation to any matter relevant to the performance of its functions. (2) Subsection (1) does not authorise the commission to hold a hearing for a confiscation related investigation.]
ICAC	Yes - s. 30(1) ICAC Act [For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a compulsory examination.]
PIC	Yes - s. 32(1) PIC Act [For the purposes of an investigation, the Commission may hold hearings.]
OPI	Yes - s. 61(1) PI Act [The Director may conduct an examination for the purposes of an investigation.]
TIC	Yes – s. 60 IC Act [If the Board determines that an inquiry be conducted, the Chief Commissioner is to convene an Integrity Tribunal for the purpose of conducting that inquiry, s. 61 The function of an Integrity Tribunal is to conduct an inquiry into a complaint or a matter referred to in section 45(1) and make findings and determinations in respect of the complaint or matter.]

CCC Act = Corruption and Crime Commission Act 2003 (WA); CMC Act = Crime and Misconduct Act 2001 (Qld); ICAC Act = Independent Commission Against Corruption Act 1988 (NSW); PIC Act = Police Integrity Commission1996 (NSW); PI Act = Police Integrity Act 2008 (Vic); IC Act = Integrity Commission Act 2010 (Tas).

Are private or public examinations specified as the norm?

CCC	Private - s. 139 CCC Act [Except as provided in section 140, an examination is not open to the public.]
CMC	Closed to the public - s. 177(1) CM Act [Generally, a hearing is not open to the public.]
ICAC	Private - s. 30(5) ICAC Act [A compulsory examination is to be conducted in private.]
PIC	Either - s. 33 PIC Act [(1) A hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission. (2) Without limiting the above, the Commission may decide to hear closing submissions in private. This extends to a closing submission by a person appearing before the Commission or by an Australian legal practitioner representing such a person, as well as to a closing submission by an Australian legal practitioner assisting the Commission as counsel.]
OPI	Private – s. 65(1) PI Act [An examination is not open to the public except as provided by this section.]
TIC	Public – Schedule 6, clause 1(1) IC Act [Except as provided in subclause (2), a hearing of an Integrity Tribunal is to be open to the public.]

What are the tests to be applied when determining whether to conduct public examinations or not?

CCC	s. 140 CCC Act [(1) This section does not apply to an organised crime examination. (2) The Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.] s. 99(5) CCC Act (Re s 94 & 95 notices) - The notation may be included if the Commission is satisfied that failure to do so — (a) might prejudice — (i) the safety or reputation of a person; (ii) the fair trial of a person who has been or may be charged with an offence; or (iii) the effectiveness of an investigation; or (b) might otherwise be contrary to the public interest.]
CMC	s. 177(2) CM Act [However— (a) for a hearing for a crime investigation, the commission may open the hearing to the public (public hearing) if it— (i) considers opening the hearing will make the investigation to which the hearing relates more effective and would not be unfair to a person or contrary to the public interest; and (ii) approves that the hearing be a public hearing; or (b) for a witness protection function hearing, the commission may open the hearing to the public if it— (i) considers opening the hearing will make the hearing more effective and— (A) would not be unfair to a person or contrary to the public interest; and (B) would not threaten the security of a protected person or the integrity of the witness protection program or other witness protection activities of the commission; and (ii) approves that the hearing be a public hearing; or (c) for a hearing other than a hearing mentioned in paragraph (a) or (b), the commission may open the hearing to the public if it— (i) considers closing the hearing to the public would be unfair to a person or contrary to the public interest; and (ii) approves that the hearing be a public hearing.]

What are the tests to be applied when determining whether to conduct public examinations or not? (Continued from previous page)

ICAC	s. 31 ICAC Act [(1) For the purposes of an investigation, the Commission may, if it is satisfied that it is in the public interest to do so, conduct a public inquiry. (2) Without limiting the factors that it may take into account in determining whether or not it is in the public interest to conduct a public inquiry, the Commission is to consider the following: (a) the benefit of exposing to the public, and making it aware, of corrupt conduct, (b) the seriousness of the allegation or complaint being investigated, (c) any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry), (d) whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.]
PIC	s. 33(3) PIC Act [In reaching these decisions, the Commission is obliged to have regard to any matters that it considers to be related to the public interest.]
OPI	s. 65(2) PI Act [The Director may open an examination to the public if, having weighed the benefits of public exposure and public awareness and public awareness against the potential for prejudice or privacy infringements, the Director considers that it is in the public interest to do so.]
TIC	Schedule 6, clause 1(2) IC Act [An Integrity Tribunal may do any or all of the following at a hearing if it considers that there are reasonable grounds for doing so: (a) make an order that the hearing be closed to the public; (b) make an order excluding any person from the hearing; (c) make an order prohibiting the reporting or other disclosure of all or any of the proceedings at the hearing or prohibiting the reporting or other disclosure of particular information in respect of the hearing.]

ANNEXURE 3

Acting Commissioner's Opening Remarks - Inquiry into Mr K Spratt, WA Police and Department of Corrective Services

11 April 2011

THE ACTING COMMISSIONER: The Commission is about to conduct a number of examinations for the purpose of an investigation under the Corruption and Crime Commission Act 2003, the CCC Act. These examinations are further to examinations conducted in December 2010. I have appointed Mr Peter Quinlan SC, Ms Lisa Smith and Ms Michelle Harries as counsel assisting the Commission in these examinations.

Prior to the commencement of the December 2010 examinations, the then Commissioner Roberts-Smith RFD QC stated that the general scope and purpose of the Commission investigation was to determine if any member of the Western Australian Police or the Department of Corrective Services has engaged in misconduct in connection with the arrest, detention and investigation of matters involving Mr Kevin Spratt.

Due to developments since those investigations, I have broadened the general scope and purpose to include additional matters. Consequently, in relation to the examinations which are about to be conducted, the general scope and purpose of the Commission investigation is to determine, in relation to Mr Kevin John Spratt, whether any employee of the Western Australian Police or the Department of Corrective Services has engaged in misconduct with respect to their dealings with him on or after August 2008, including but not limited to any arrest, detention, use of force, internal investigation and any public release of information pertaining to these matters, and further whether any employee of the Department of Corrective Services has engaged in misconduct with respect to the extraction of a prisoner from his cell at Hakea Prison on 2 August 2010, the internal reporting thereof and any subsequent internal investigation conducted.

The section of the broadened general scope and purpose that refers to the extraction of a prisoner from his cell at Hakea Prison on 2 August 2010 was added as an additional matter on 7 April 2011 after the serving of summonses to attend at a Commission examination.

One of the two main purposes of the CCC Act is to improve continuously the integrity of and to reduce the incidents of misconduct in the public sector. The Commission focuses its attention particularly on the investigation of alleged misconduct in two ways; first, it conducts investigations to form an opinion whether individuals have engaged in misconduct and to initiate action or make recommendations whether consideration should or should not be given to criminal charges being laid or disciplinary action being taken and, secondly and perhaps more importantly, the Commission seeks to identify faults and weaknesses in and to recommend improvements to systems, process, policies and procedures in order to assist and prevent future misconduct in the public sector.

In this way the Commission is not focused merely on criminal conduct or breaches of discipline by public officers, but rather it is required to consider how to improve the integrity of the public sector as a whole. In this regard the Commission has worked closely with numerous public authorities in the past 12 months including WA Health, Curtin University of Technology, City of Stirling, Department of Transport, Department of Planning, University of Western Australia, Department of Corrective Services, Public Transport Authority, Department of Education and Western Australian Police.

As explained by former Commissioner Roberts-Smith in his opening remarks to the examinations conducted during December 2010, the genesis of the Commission investigation of alleged public sector misconduct in relation to the way in which Mr Spratt was dealt with by the Western Australian Police, WAPOL, was a Commission report resulting from a research project undertaken by the corruption prevention directorate on the use of Taser weapons by WAPOL that was tabled in the Parliament of Western Australia on 4 October 2010. Widespread public interest and media reporting followed, most particularly about the repeated use of Taser weapons on Mr Spratt in the Perth watch-house by police on 31 August 2008.

WAPOL notified the commission of that incident on 16 September 2008 in accord with their obligations pursuant to the CCC Act. WAPOL instituted an internal investigation on 23 September 2008 and forwarded the investigation report to the commission for review on 10 November 2009 with a notice of the final outcome of that report being received by the commission on 16 December 2009. The commission decided not to finalise its review of the WAPOL investigation undertaken by the internal affairs unit until the commission research project on the use of Taser weapons by WAPOL was finalised so that the investigation review could be informed by whatever findings came out of the research project.

Following tabling of its report on 4 October 2010 the Commission moved to finalise its review of the WAPOL internal affairs unit investigation. That, however, as explained by former Commissioner Roberts-Smith, was overtaken by events.

The commissioner of police gave numerous radio and television interviews. On 18 October 2010 there was a WAPOL media conference at which a time-line said to show Mr Spratt's criminal history and his interaction with police was publicly presented. The public debate that followed led to the revelation of other incidents in which Taser weapons were said to have been used on Mr Spratt by police and Department of Corrective Services personnel. Other serious allegations were made about

police treatment of Mr Spratt. As a consequence the commissioner of police announced that he had sought further advice from the director of public prosecutions on whether or not charges should be laid against police officers involved in the 31 August 2008 incident and that he had initiated a further internal investigation into the other instances of police interaction with Mr Spratt which had been put into the public arena.

Former Commissioner Roberts-Smith decided that in those circumstances the commission should conduct a comprehensive investigation of all of the matters excepting only the issue which had been referred to the director of public prosecutions for advice. In broad terms, the Commission investigation has been divided into three phases: phase 1, WAPOL interaction with Mr Spratt between 30 August and 6 September 2008; phase 2, actions of the Department of Corrective Services in relation to Mr Spratt in the Perth watch-house on 6 September 2008, and phase 3, a review of the WAPOL internal investigation relating to police contact with Mr Spratt between 30 August and 6 September 2008 and the outcomes of that internal investigation.

The examinations which commence today and are planned to continue until Wednesday 20 April are further to the examinations which were held in December 2010 as a part of the ongoing Commission investigation of alleged public sector misconduct by employees of WAPOL and the director of corrective services in relation to dealings with Mr Spratt.

Primarily they will examine (1) actions of the Department of Corrective Services in relation to the treatment of Mr Spratt during his extraction from his cell at the Perth watch-house on 6 September 2008 and Mr Spratt's subsequent treatment by medical staff both at Casuarina Prison and Royal Perth Hospital with Mr Spratt being admitted to Royal Perth Hospital on Sunday, 7 September 2008; (2) polices and procedures in relation to the review of incidents involving Taser weapons by the Department of Corrective Services.(3) Compliance with polices and procedures in relation to the use of Taser weapons by members of the Department of Corrective Services emergency support group; 4) the training provided by the Department of Corrective Services in relation to the use of Taser weapons; (5) matters relating to the investigation conducted by the WAPOL internal affairs unit into the incident at Perth watch-house on 31 August 2008, focussing on the thoroughness and integrity of the investigation including the decision-making process which results in disciplinary action being taken against the WAPOL officers involved in the incident.(6) Matters relating to the preparation and release of the timeline by the commissioner of police and the deputy commissioner to assembled media outlets on 18 October 2010 which purported to outline the interaction between WAPOL officers and Mr Spratt and Mr Spratt's criminal history, and (7)

as foreshadowed by the broadened general scope and purpose, compliance with policies and procedures in relation to the extraction of a prisoner from his cell at Hakea Prison on 2 August 2010 by members of the Department of Corrective Services emergency support group and matters relating to the internal reporting and review of the cell extraction by the Department of Corrective Services.

Pursuant to section 3 of the CCC Act, the term "public officer" is defined by reference to section 1 of the Criminal Code. The term "public officer" covers about 137,000 Western Australians which, in addition to public service officers or employees within the meaning of the Public Sector Management Act 1994, includes any of the following: a police officer, a minister of the crown, a member of either house of parliament, a person exercising authority under written law, a person who holds a permit to do high-level security work as defined in the Court Security and Custodial Services Act 1999 or in the Prisons Act 1981, a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established under a written law or any other persons holding office under or employed by the State of Western Australia, whether for remuneration or not.

Pursuant to section 28 of the CCC Act, the principal officer of a notifying authority by which a public officer is employed must notify the Commission in writing of any matter which that person suspects on reasonable grounds concerns or may concern misconduct and which is of relevance or concern to that person in his or her official capacity. In addition to section 28 the commissioner of police is required to notify the Commission of matters concerning, or that may concern, reviewable police action pursuant to section 21A of the CCC Act. In effect WAPOL is subject to a high level of scrutiny by the Commission and other public authorities.

As I am about to conduct a number of public examinations, it is important that I make reference to section 139 of the CCC Act which requires that an examination must be held in private unless otherwise ordered; that is to say, that the default position under the CCC Act is that examinations will be in private.

However, under section 140 of the CCC Act the Commission may open an examination to the public if having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements it considers that it is in the public interest to do so.

I note that even if the commission decides to open an examination to the public it may close part of it for a particular purpose. It is significant to note that during the period 1 June 2007 to 31 January 2011 the Commission has conducted public examinations in relation to six matters and private examinations in relation to 33 matters; in other words, 85 per cent of Commission examinations have been private examinations.

In deciding to conduct these further examinations in public I have reviewed and had regard to the matters considered by former Commissioner Roberts-Smith when deciding to conduct the initial examinations in public and have also considered afresh the balancing factors that I am required to take into account in accordance with section 140 of the CCC Act. I am satisfied that the specific considerations outlined by former Commissioner Roberts-Smith in his opening remarks to the December 2010 examinations in relation to weighing the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements in respect of each person to be examined remain relevant. These specific considerations are as follows: in relation to whether the examinations in this instance should be public, the factors include, firstly, in relation to the benefits of public exposure and public awareness (1) there has been widespread media exposure of the particular events and issues concerning Mr Spratt and the use of Tasers which has generated serious public concern. There is considerable community disquiet. There is a need for these matters to be seen to be dealt with objectively and fairly and in a transparent way. (2) there is no doubt the incidents in which Tasers were used on Mr Spratt occurred in fact. The pertinent issues will have to do with the justification or otherwise for that, the policies or protocols which did or did not apply and whether or not there was compliance with the applicable policies and protocols. (3) that the allegations of misconduct are serious and at the highest they effectively include allegations of serious assaults by public officers and that a false statement of facts has been put before a court. (4) ongoing public attention can lead to the revelation of additional relevant matters or information. Public examinations are likely to result in individuals coming forward with further information or material which will advance the Commission's investigation. (5) public exposure of the circumstances of the incidents in relation to Mr Spratt and how they came to occur has afforded, and will continue to afford, immediate and pertinent knowledge to police officers throughout the state about Taser use.(6) It will also enable WAPOL and the Department of Corrective Services to consider and rectify in a timely way any systematic weaknesses or issues which may be identified in relation to the use of Tasers and the conduct of internal investigations or otherwise as the investigation progresses; (7)

dealing with these issues before the broader community in a transparent way will serve to maintain public confidence that they are being dealt with properly.8) The public exposure of the extent to which force by public officers is authorised and the constraints to which it is subject will increase community awareness of these matters.

Secondly, considerations which the Commission has taken into account in relation to the potential for prejudice or privacy infringements include:

(i) potential prejudice to the fair hearing of any criminal disciplinary offences which may be laid against public officers. At this stage it is not known whether any such charges are likely. Some disciplinary action has been taken against some police officers.

Even where disciplinary charges to be laid against other officers they are not likely to be prejudiced by these public examinations. Although evidence given before the Commission, whether publicly or in private, can be relied upon in disciplinary proceedings. The disciplinary body would make an independent assessment based on all relevant information available and take into account any mitigating factors or circumstances. Should criminal charges be laid, these public examinations would not prejudice any trial before a magistrate or a judge alone. Any trial before a judge and jury would not be likely for many months, if not a year or longer, and if prejudice or privacy issues were to arise they could be dealt with then by appropriate orders or directions.

ii) As to privacy, no doubt individuals involved in these incidents would prefer not to be publicly identified. That is something properly to be taken into account. On the other hand, the only conduct of theirs which will be subject to scrutiny is their conduct in the performance of their roles as public officers. Mr Spratt is in a different position in that regard.

Since the occurrence of the December 2010 examinations there have been several developments which have added considerable weight to the decision to conduct further examinations in public at this time. They are

1) comments made in the parliament of Western Australia on 17 February this year by a member of the legislative assembly in relation to the commissioner of police, the deputy commissioner of police, the release of public information pertaining to Mr Spratt referred to as a litany of lies in the legislative assembly by the member, and police treatment of Mr Spratt which sparked considerable further public debate, and

(2) on 24 February this year the Supreme Court in Spratt v Fowler 2011 WASC 52 ordered that the conviction recorded on 30 January 2009 against Mr Spratt for the offence of obstructing a public officer be set aside and that a verdict of not guilty be substituted as Mr Spratt's plea of guilty was induced by the false allegations made by the prosecution and there was no proper basis for the obstruction charge resulting in a miscarriage of justice.

The general scope and purpose of the Commission investigation has been broadened to include matters emanating from these developments.

Although, as I have earlier remarked, I have in deciding to hold these examinations in public considered and weighed the potential for prejudice or privacy infringement of each person to be called as a witness during the examinations. I will review the position of each witness before they are called to give evidence as to whether I remain of the view it is in the public interest for them to be examined in public or whether to close the public examination.

Pursuant to section 14 of the CCC Act I was appointed by the governor to act in the office of Commission early this year. As an Acting Commissioner I am required to undertake the function of the Commission under the CCC Act and any other written law with all of the powers and responsibilities of a Commissioner during circumstances where (a) the office of Commissioner is vacant, (b) when the person holding the office of Commissioner is unable to perform the functions of that office or is absent from the state or (c) in relation to any matter in respect of which the person holding the office of Commissioner has declared himself or herself unable to act.

In this regard I am undertaking the function of the Commissioner as the office of Commissioner is vacant.

In relation to the conduct of public examinations by the Commission generally it is I think necessary to state the obvious.

Witnesses may be called for examination before the Commission for all sorts of reasons. Many witnesses are called whose own conduct is not in question. They may be called because they can assist the Commission by giving information about events, circumstances, systems, procedures or the activities of other persons.

It is important to also stress that the examination of a person before the Commission is but one part of an investigative

process, the purpose of which is to get to the truth of a matter.

These examinations are not a court process but an investigative process into subject matter, widespread public interest and importance.

As a consequence of its investigative function, the Commission is not bound by the rules of evidence and can exercise its functions with as little formality and technicality as possible.

It will conduct its examinations as an investigative inquiry and not as an adversarial contest such as applies in the judicial process and may inform itself on any matter in such manner as it thinks fit. An examination in the context of an investigative inquiry is an open-ended and very often unpredictable process and is essentially one that is intended to be instrumental in discovering facts which, once assessed by the Commission in conjunction with other material available to it, forms the basis for its subsequent opinions concerning misconduct and any recommendations it might make.

Accordingly the Commission's approach will be that persons who are adversely affected by evidence given in public examinations will be afforded an opportunity to respond to that evidence or make submissions regarding it at some time in due course. It will not, however, generally be the practice to give advanced notice that such evidence may possibly be given.

This is because in some cases, advanced notice may adversely affect the investigation and in others, the Commission may not necessarily know that a particular name, for example, is going to be mentioned.

In the conduct of its examinations, the Commission may also choose to make an order excluding witnesses who are to be called for examination before the Commission from being present in the hearing room during the examination of other witnesses and preventing anyone from discussing the evidence which has been given with a witness who is yet to be examined and to give evidence.

The Commission is obliged to conduct its investigations in accordance with the powers granted under the CCC Act and is confirmed in case law.

In stating this I, as Acting Commissioner, am keenly aware that it is essential to conduct investigations of this nature with scrupulous care in order to avoid any prejudice to the investigation itself and avoid unnecessary prejudice to the reputations of those affected.

Further, because of the importance of the matters being dealt with, the public interest requires that the investigation of serious allegations such as those about to examined be thorough.

It is also important to ensure that any activity that might harm the integrity of justice and law enforcement authorities in this state, at whatever levels, is quickly addressed. It is therefore important that the media be given access to the Commission's examinations. To facilitate this, the Commission has provided a media room for the use of the media and will provide, where appropriate, public exhibits to the media. However, at no time is any person other than a Commission officer to be present in the media room or intrude into it unless they are an accredited member of the media, and that is by order issued by the Commission dated 23 December 2010.

I further order that the door to the media room remain closed while examinations are in progress.

To ensure that these proceedings are not disrupted, members of the public and media must turn off mobile phones at all times in the hearing room and observe the etiquette which would normally apply in a court hearing. Also, these proceedings are not to be recorded in any way by persons unauthorised to do so.

Transcripts of the evidence will be placed on the Commission's website at www.ccc.wa.gov.au as soon as practicable. In general, this will occur twice daily but may vary for operational reasons.

For reasons of fairness to witnesses as well as the safety of those in this part of the building, the media will not be permitted to use cameras or to conduct interviews in the precincts of the hearing room. To assist in the accurate reporting of the proceedings, copies of these opening remarks will be provided to the media prior to the commencement of the examinations.

The Commission may make non-disclosure or suppression orders from time to time. Compliance with them is essential in maintaining the integrity of the Commission's work. The Commission will view any contravention of these orders by the media or anyone else as extremely prejudicial. The Commission will take whatever action is at its disposal to ensure that nonpublication orders are complied with.

I should say something about legal representation. Witnesses who are summonsed to appear before the Commission at a private or public examination are entitled to be represented by a lawyer. If the Commission has noticed that a witness will not have a

lawyer at an examination, the Commission may, if it considers that it would be in the public interest to do so, arrange legal representation for the witness.

The CCC Act authorises the Commission to allow the lawyer for a person to represent that person during evidence given by another witness if there are special circumstances.

The lawyer representing a witness in a Commission examination may examine that witness so far as the Commission thinks fit on any matter the Commission considers relevant.

The Western Australian government has established a fund to provide legal assistance for serving and former public officers called as witnesses or served with notices or summonses by the Commission. To qualify for such legal assistance the Commission must have requested the person to attend an interview, served a notice to provide a statement of information, served a notice to provide documents or other things or served a summons to appear to give evidence, and that person must be a former or serving public officer. The grant of legal assistance under this arrangements is not subject to a means test.

A present or former public officer may choose a Legal Aid WA lawyer or their own lawyer from private practice provided that lawyer accepts the standard applicable fees or alternatively a lawyer in private practice chosen from a panel set up for this purpose by Legal Aid WA.

Finally I note that these proceedings are being recorded electronically in their entirety using audio and video equipment.

I will now invite senior counsel assisting Mr Quinlan to make his opening remarks. Yes, Mr Quinlan?

ANNEXURE 4

Acting Commissioner's Opening Remarks - Inquiry into Curtin University/IELTS

21 March 2011

THE ACTING COMMISSIONER: The Commission is about to conduct a number of examinations for the purposes of an investigation under the Corruption and Crime Commission Act 2003. I will refer to that as the CCC Act. I have appointed Mr Peter Quinlan SC, Ms Michelle Harries and Ms Nadia Pantano as counsel assisting the Commission for these examinations.

The general scope and purpose as amended on 15 March 2011 of the investigation is to determine (1) if any public officer or former public officer employed by Curtin University of Technology has engaged in misconduct in connection with the conduct of the international English testing system; (2) whether the policies, practices and operating environment of the Curtin English language centre were sufficient to detect misconduct in a timely manner, and (3) whether the international English language testing system has been compromised at testing centres operated by any other public authorities.

In the amended scope and purpose the term "public sector agencies" has been replaced by the term "public authorities" in accord with the CCC Act, and the full titles Curtin University of Technology and international English language testing system replace the abbreviated titles used in the original scope and purpose. Other amendments to the scope and purpose are of an editorial nature.

The international English language testing system is commonly referred to by its acronym IELTS.

One of the two purposes of the CCC Act is to improve continuously the integrity of and to reduce the incidence of misconduct in the public sector. The Commission focuses its attention particularly on the investigation of alleged misconduct in two ways. First, it conducts investigations to form an opinion whether individuals have engaged in misconduct and to initiate action or make recommendations whether consideration should or should not be given to criminal charges being laid or disciplinary action being taken and secondly, and perhaps more importantly, the Commission seeks to identify faults and weaknesses in and to recommend improvements to systems, processes, policies and procedures in order to assist and prevent future misconduct in the public sector.

In this way the Commission is not focused merely on criminal conduct or breaches of discipline by public officers, rather it is required to consider how to improve the integrity of the public sector as a whole. In this regard the Commission has worked closely with numerous public authorities in the past 12 months, including WA Health, West Australian Police, City of Stirling, Department of Transport, Department of Planning, University of Western Australia, Department of Corrective

Services, Public Transport Authority, Department of Education and Curtin University of Technology.

The matters which are to be examined by the Commission in relation to the conduct of the international English language testing system at Curtin University of Technology were brought to the attention of the Commission by Prof Jeanette Hacket, vice chancellor, via a section 28 notification whereby the principal officer of a notifying authority must notify the Commission in writing of any matter which that person suspects on reasonable grounds concerns or may concern misconduct, and which is of relevance or concern to that person in his or her official capacity. It is timely to remind all officers obliged to notify the Commission of misconduct pursuant to section 28 of the CCC Act of their responsibilities to do so as is reasonably practical after he or she becomes aware of the matter.

Also, it is important that I acknowledge the prompt and positive response by Curtin University of Technology to recommendations arising from Commission investigations in relation to the prevention, detection, reporting and management of misconduct within the university. In its interaction with Curtin University of Technology, the Commissioner has observed a genuine and strong commitment from the vice chancellor and the university administration to develop and strengthen the notice of integrity as a core part of the university's culture.

In the Commission's view, the ongoing positive response and commitment to integrity displayed by Curtin University of Technology has significant potential to enhance the reputation of the university as an ethical and professional place to work and study. The Commission looks forward to an ongoing relationship with Curtin University of Technology and will continue to assist it to create a misconduct-resistant culture which ultimately will determine the extent to which an institution can detect and manage misconduct and protect and maintain integrity.

Pursuant to section 3 of the CCC Act, the term "public officer" is defined by reference to section 1 of the Criminal Code. The term "public officer" covers about 137,000 West Australians which, in addition to public service officers or employees within the meaning of the Public Sector Management Act 1994, includes any of the following: a police officer, a minister of the crown, a member of either house of Parliament, a person exercising authority under written law, a person who holds a permit to do high-level security work as defined in the Court Security and Custodial Services Act 1999 or in the Prisons Act 1981, a member, officer or employee of any authority, board, corporation, commission, local government, council of a local government, council or committee or similar body established

under a written law or any other person holding office under or employed by the state of Western Australia, whether for remuneration or not.

I must emphasise that when I earlier referred to one of the two main purposes of the CCC Act as being "to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector" I was not only referring to public service officers or employees within the meaning of the Public Sector Management Act 1994, but to all those public officers defined within section 3 of the CCC Act by reference to section 1 of the Criminal Code, as listed earlier, and public authorities encompassed by the definition in section 3 of the CCC Act, that is: (a) a notifying authority; (b) a body mentioned in Schedule V Part 3 to the Constitution Acts Amendment Act 1899; (c) an authority, board, corporation, commission, council, committee, local government, regional local government or similar body established under a written law; (d) a body that is the governing authority of a body referred to in paragraph (b) or (c); or (e) a contractor or subcontractor.

The Western Australian Institute of Technology Act 1966 established the Western Australian Institute of Technology, taking effect in 1967. The Western Australian Institute of Technology Amendment Act 1986 changed the status of the Institute of Technology to a university of technology. Curtin University of Technology commenced operation on 1 January 1987.

The Curtin University of Technology Amendment Act 1998 enabled Curtin University of Technology to carry out its functions and exercise its powers, including the power to enter into business arrangements, within or outside the state. The act was assented to by the governor on 5 November 1998, allowing Curtin University of Technology to establish branches overseas.

Employees of Curtin University of Technology, as employees of an authority established under a written law, that is, the Curtin University of Technology Act 1966, are public officers for the purposes of the CCC Act. Also, Curtin University of Technology is a public authority within subparagraph (c) of the definition of "public authority" referred to in section 3 of the CCC Act.

Section 139 of the CCC Act requires that an examination must be held in private unless otherwise ordered; that is to say, the default provision under the CCC Act is that examinations will be in private.

However, under section 140 of the CCC Act, the Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers

that it is in the public interest to do so. I note that even if the Commission decides to open an examination to the public, it may close part of it for a particular purpose.

As there appears to be some misapprehension about the proportion of public examinations conducted by the Commission when compared to private examinations, I should point out for the public record that the fact is that between 1 June 2007 to 31 December 2011 the Commission has conducted public examinations in relation to only six matters and private examinations in relation to 33 matters; in other words, 85 per cent of Commission examinations have been conducted in private.

In the present case, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements in respect of each person to be considered, I consider that it is in the public interest to conduct these examinations in public.

Specific considerations to which the Commission has had regard in relation to whether the examinations in this instance should be public include; first, in relation to the benefits of public exposure and public awareness: (1) the conduct to be investigated involves the alleged bribery of a public officer to falsify or furnish false records to enable certain individuals to circumvent the accredited International English Language Testing System which is used to substantiate competency in the English language for many purposes including permanent residency, work and student visas; (2) to show the seriousness of the alleged conduct and the deliberate actions of the people involved; (3) the likelihood that public exposure may generate further reports of similar conduct, there being 34 IELTS test centres in Australia including four in Western Australia; (4) the need to increase public awareness of these issues and encourage members of the public to provide the Commission with information about the public officer or others involved in similar activities; (5) public exposure will highlight systematic issues giving rise to particular misconduct risks within the university sector in a timely way enabling public authorities to take appropriate action at this stage; (6) to prevent further misconduct by public officers who are yet to be identified. Public exposure will operate not only as a specific deterrent but also as a general deterrent across the public sector; (7) the need to educate the public and service providers to public authorities about proper processes; (8) to assist in ensuring that weaknesses identified in systems and processes are promptly and properly dealt with in the university sector and elsewhere and (9) public examinations will give necessary and appropriate transparency to the Commission's work and processes.

Secondly, considerations which the Commission has taken into account in relation to the potential for prejudice or privacy infringements include: (1) there is evidence that disciplinary or criminal offences may have been committed. At their highest the allegations on which the evidence is based may constitute criminal offences of bribery, corruption and the falsification of records; (2) the evidence to be adduced is substantial direct evidence of persons who are involved in the events about which they will be examined, is not likely to be speculative, will be directed towards identifying any relevant pattern of conduct and will be largely based on contemporaneous documents; (3) such prejudice as may or will flow to the reputations of individuals would be the consequences of exposure of those individuals own conduct of which the Commission already has some evidence; (4) the conduct to be investigated appears at this stage, and subject to further evidence, to have been deliberate, serious and sustained and to demonstrate at least a clear disregard of applicable policies and procedures, with serious consequences and on the face of it the conduct is not likely to have been merely mistaken or inadvertent; (5) the potential for prejudice or privacy infringements appears to be limited to those persons who are apparently actively involved in the conduct being investigated and (6) no-one has yet been charged with any criminal offence in relation to the matters which are to be examined and should any person or persons be charged at some later time, those charges would not be likely to get to trial for many months, if not a year or more, and if prejudice or privacy issues then arise, appropriate orders or other arrangements could be made.

Although, as I have earlier remarked, I have in deciding to hold these examinations in public considered and weighed the potential for prejudice or privacy infringements of each person to be called as a witness during the examinations, I will review the position of each witness before they are called to give evidence as to whether I remain of the view that it is in the public interest for them to be examined in public or whether to close the public examination.

Pursuant to section 14 of the CCC Act I was appointed by the governor to act in the office of Commissioner earlier this year and as an Acting Commissioner I am required to undertake the functions of the Commission under the CCC Act and any other written law with all of the powers and responsibilities of the Commissioner during circumstances where (2) the office of Commissioner is vacant; (b) when the person holding the officer of Commissioner is unable to perform the functions of that office or is absent from the state, or (c) in relation to any matter in respect of which the person holding the office of Commissioner has declared himself or herself unable to act.

In relation to the conduct of public examinations by the Commission generally, it is I think necessary to state the obvious.

Witnesses may be called for examination before the Commission for all sorts of reasons. Many witnesses are called whose conduct is not in question. They may be called because they can assist the Commission by giving information about events, circumstances, systems, procedures or the activities of other persons.

It is important to also stress that the examination of a person before the Commission is but one part of an investigative process, the purpose of which is to get to the truth of the matter.

These examinations are not a court process but an investigative process into a subject matter of widespread public interest and importance.

As a consequence of its investigative function the Commission is not bound by the rules of evidence and can exercise its functions with as little formality and technicality as possible.

It will conduct its hearings as an investigative inquiry and not as an adversarial contest such as applies in the judicial process and may inform itself on any matter in such manner as it thinks fit.

The hearing in the context of an investigative inquiry is an open-ended and very often unpredictable process and is essentially one that is intended to be instrumental in discovering facts which, once assessed by the Commission in conjunction with other material available to it forms a basis for its subsequent opinions concerning misconduct and any recommendations it might make.

Accordingly, the Commission's approach will be that persons who are adversely affected by evidence given in public hearings will be afforded an opportunity to respond to that evidence or make submissions regarding it at some time in due course. It will not, however, generally be the practice to give advance notice that such evidence may possibly be given. This is because in some cases advance notice may adversely affect the investigation and in other the Commission may not necessarily know that a particular name, for example, is going to be mentioned.

The Commission is obliged to conduct its investigations in accordance with the powers grated under the CCC Act and is confirmed in case law. In stating this I, as Acting Commissioner, am keenly aware that it is essential to conduct

investigations of this nature with scrupulous care in order to avoid any prejudice to the investigation itself and avoid unnecessary prejudice to the reputations of those affected.

Further, because of the importance of the matters being dealt with, the public interest requires that the investigation of serious allegations such as those about to be examined be thorough.

It is also important to ensure that any activity that might harm the integrity of the state and/or federal government at whatever levels is quickly addressed. It is therefore important that the media be given access to the Commission's hearings. To facilitate this the Commission has provided a media room for the use of the media and will provide, where possible, public exhibits to the media. However, at no time is any person other than a Commission officer to be present in the media room or intrude into it unless they are an accredited member of the media, order issued by Commissioner 23 December 2010.

To ensure that these proceedings are not disrupted, members of the public and media must turn off mobile phones at all times in the hearing room and observe the etiquette which would normally apply in a court hearing.

Transcripts of the evidence will be placed on the Commission's website at www.ccc.wa.gov.au twice daily as soon as practicable.

For reasons of fairness to witnesses, as well as the safety of those in this part of the building, the media will not be permitted to use cameras or to conduct interviews in the precinct of the hearing room. To assist in the accurate reporting of the proceedings, copies of these opening remarks will be provided to the media prior to the commencement of the examinations.

The Commission may make nondisclosure or suppression orders from time to time. Compliance with them is essential in maintaining the integrity of the Commission's work. The Commission will view any contravention of these orders by the media or anyone else as extremely prejudicial. The Commission will take whatever action is at its disposal to ensure that nonpublication orders are complied with.

I should say something about legal representation. Witnesses who are summonsed to appear before the Commission at a private or public hearing are entitled to be represented by a lawyer. If the Commission has noticed that a witness will not have a lawyer at a hearing the Commission may, if it considers that it will be in the public interest to do so, arrange legal representation for the witness.

The CCC Act authorises the Commission to allow the lawyer for a person to represent that person during evidence given by another witness if there are special circumstances.

The lawyer representing a witness in a Commission hearing may examine that witness, so far as the Commission thinks fit, on any matter the Commission considers relevant.

The West Australian government has established a fund to provide legal assistance to serving and former public officers called as witnesses or served with notices or summonses by the Commission. To qualify for such legal assistance, the Commission must have requested the person to attend an interview, served a notice to provide a statement of information, served a notice to provide documents or other things or served a summons to appear to give evidence, and the person must be a former or serving public officer. The grant of legal assistance under this arrangement is not subject to a means test.

A present or former public officer may choose a Legal Aid WA lawyer or their own lawyer from private practice provided that lawyer accepts the standard applicable rates, or alternatively a lawyer in private practice chosen from a panel set up for this purpose by Legal Aid WA.

Finally, I note that these proceedings are being recorded electronically in their entirety using audio and video equipment. That completes my opening remarks.

I will now invite the counsel assisting, Mr Peter Quinlan, to make his opening remarks. Mr Quinlan?

ANNEXURE 5

Acting Commissioner's Closing Remarks - Inquiry into Mr K Spratt, WA Police and Department of Corrective Services

19 April 2011

THE ACTING COMMISSIONER: Thank you Mr Quinlan. I also propose to make some very brief remarks in closing these public examinations.

In my opening remarks at the commencement of these public examinations on Monday 11 April 2011 I referred to the fact that there is a balancing exercise that I am required to go through in determining whether examinations should be in private or should be in public, noting that the default provision is that examinations generally be in private, and I outlined a number of elements that I took into account when determining these examinations should be conducted in public.

I don't propose to repeat those factors that I took into account but one of the matters that I did refer to is the need to increase public awareness of these issues, and encourage members of the public to provide the Commission with information about the public officers or others involved in similar activities. I also noted that the public examinations will give necessary and appropriate transparency to the Commission's work and processes.

Commissioner Terrence Cole, QC, in his conduct of the Royal Commission into the Building and Construction Industry, in addressing the need to conduct hearings by Royal Commissions in public, stated: Public hearings are important in enhancing public confidence in a Commission as they allow the public to see the Commission at work.

They also enhance the ability of Commissions to obtain information from the public as they demonstrate to the public the types of matters with which the Commission is concerned and they allow potential witnesses to see that they would not be alone in giving evidence to a Commission. Summarising concerns of this type Justice Mason J emphasised in the Australian Building Construction Employees v Builders Labourers Federation case that in conducting Royal Commission hearings in private seriously undermines the value of the inquiry. It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and its report.

The Commission respectfully agrees with the comments made by Commissioner Cole and has taken those considerations into account in the conduct of these public examinations.

I also remind everybody of the Commission's practice with respect to matters relating to limiting or deferring cross-examination. These matters are set out in the Commission's Hearing Practice Directions at paragraph 10, pages 7 and 8. The

Hearing Practice Directions can be found on the Commission's Website at www.ccc.wa.gov.au.

I don't propose to read those practice directions. In appropriate circumstances, the Commission may limit or defer cross-examination in the following matter.

Persons other than counsel assisting will not be permitted to cross-examine a witness unless and until they have provided to counsel assisting a signed statement of evidence advancing material contrary to the evidence of that witness.

Any person providing such a statement will be called by counsel assisting and asked to adopt that statement and will be examined by counsel assisting, and counsel assisting the Commission and any person with a demonstrated sufficient interest to do so, and granted leave by the Commissioner, may cross-examine each witness.

Cross-examination will be limited to the matters in dispute and may otherwise be restricted by the Commissioner in accordance with the power conferred by section 143 of the CCC Act. This practice will enable the Commission to consider the respects in which conflicting evidence has been placed before the Commission to identify the areas of conflict and then to rule in advance of a person being recalled for cross-examination on the areas in which cross-examination would be permitted.

The principles which will generally guide the Commission will be: (a) if there is a disputed issue of fact relevant to a matter which is regarded as material to any issue, the Commission must determine the Commission will allow cross-examination upon it; (b) if a person gives evidence on oath of an adverse matter, which evidence is not denied, the Commission will not allow cross-examination. This is because no issue was raised regarding the evidence; (c) if the disputing evidence is a matter of comment as distinct from raising a factual conflict, the Commission will not allow cross-examination, and (d) if a person gives evidence on oath of a fact and the contestant states that he has no recollection of the alleged fact, the Commission will not allow cross-examination unless there are surrounding circumstances casting doubt upon the veracity of the evidence alleged. That is because there is no sensible basis upon which a cross-examiner could contest the evidence; (e) overriding all considerations, if there are grave allegations against a person which may be diminished or eliminated by an attack on the credit of the witness giving the evidence, the Commission may allow cross-examination.

To avoid unnecessary repeated cross-examination and acknowledging that affected persons may be unaware of the

totality of relevant evidence until the end of the examinations, the Commission may defer cross-examination until that time and then afford legal representatives the opportunity to apply for witnesses to be recalled for the purpose of cross-examination. Such an application should be supported by a written submission setting out the basis of the applications and the material contrary to the evidence of the witness or witnesses to be cross-examined. Where necessary the Commission will publish reasons when ruling on applications to cross-examine.

Those are all of the matters that I wish to touch upon in these closing remarks.

It remains for me to thank all counsel assisting for their assistance and all witnesses who have come forward to give evidence in assisting the Commission in the conduct of these investigations which, as I have noted, are continuing. I also thank all other Commission officers who have been involved in assisting in the conduct of these examinations. I now adjourn these public examinations.