JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

ACTING PARLIAMENTARY INSPECTOR'S INQUIRY CONCERNING EXAMINATION PROCEDURES BY THE CORRUPTION AND CRIME COMMISSION

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Joint Standing Committee on the Corruption and Crime Commission

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Report No. 17

Presented by:
Hon Nick Goiran, MLC and John Hyde, MLA
Laid on the Table of the Legislative Council and Legislative Assembly
on 1 September 2011

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TABLE OF CONTENTS

Committee Members i
Committee Staff i
Committee Address i
Committee's Functions and Powers v
Chairman's Foreward vii
Findings ix

CHAPTER 1 INTRODUCTION 1
Background 1
Report purpose 1

CHAPTER 2 ACTING PARLIAMENTARY INSPECTOR'S REPORT CONCERNING EXAMINATION PROCEDURES BY THE CCC 5
The Acting Parliamentary Inspector's conclusions 5
Summary 8

APPENDIX ONE: CCC REPRESENTATIONS IN RESPONSE TO THIS REPORT 11

COMMITTEE'S FUNCTIONS AND POWERS

On 25 November 2008 the Legislative Council concurred with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

(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 and 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 and Crime Commission Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.

CHAIRMAN'S FOREWORD

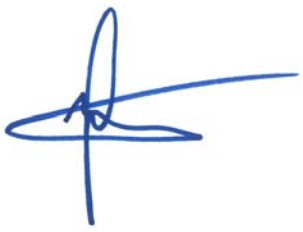
This report reproduces opinions and findings expressed by the Acting Parliamentary Inspector in an inquiry which looked into the examination procedures of the Corruption and Crime Commission.

Although the Acting Parliamentary Inspector's position was that the outcomes of the inquiry should not be published, the Committee has determined that the inquiry has uncovered several important general matters that ought to be brought to the attention of the Parliament and the public of Western Australia.

On 28 April 2011 the Parliamentary Inspector of the CCC, Honourable Chris Steytler QC advised the Committee of an inquiry conducted by the Acting Parliamentary Inspector, Christopher Zelestis QC. Although the Acting Parliamentary Inspector's inquiry focused on alleged misconduct of Commission investigators during the Smiths Beach Investigation, many of the opinions expressed have broader implications for the Commission's examination practice. This has prompted the Committee to report to Parliament on those outcomes of the Acting Parliamentary Inspector's inquiry which it considers to be relevant in this regard and therefore in the public interest.

It is evident from the Acting Parliamentary Inspector's inquiry that the Commission must give full and objective consideration to the criteria identified in section 140(2) of the CCC Act when determining whether to open an examination to the public. This is particularly crucial when there are grounds for suspicion but no firm evidence of misconduct. The Acting Parliamentary Inspector also found that the Commission does not have the power to publish or report a finding or opinion that a person has given false evidence before the Commission as this contravenes the CCC Act.

This report does not include a complete analysis of the Acting Parliamentary Inspector's conclusions. These and other matters will be considered in more detail as part of the Committee's inquiry into the use of public examinations by the CCC which is currently underway.



HON NICK GOIRAN, MLC
CHAIRMAN

FINDINGS

Finding 1 *(page 6)*

The CCC does not have the power to publish or report a finding or opinion that a person has knowingly given false evidence before the CCC due to the prohibition expressed by section 23 of the *Corruption and Crime Commission Act 2003*.

Finding 2 *(page 6)*

The CCC has implemented a policy to ensure that witnesses are given reasonable notice of the requirement to attend before CCC examinations. This policy addresses a prior deficiency that was identified by the Acting Parliamentary Inspector.

CHAPTER 1 INTRODUCTION

Background

1 On 28 April 2011, the Parliamentary Inspector of the Corruption and Crime Commission, the Honourable Chris Steytler QC, wrote to the Committee regarding the outcome of an inquiry conducted by Acting Parliamentary Inspector, Christopher Zelestis QC. The Acting Parliamentary Inspector's inquiry concerned alleged misconduct of Corruption and Crime Commission investigators during the Smiths Beach Investigation and was launched under section 197(1) of the *Corruption and Crime Commission Act 2003* in November 2009 in response to complaints received by the Parliamentary Inspector.

2 The inquiry conducted by the Acting Parliamentary Inspector was broad in scope and thorough in its consideration of CCC procedures. At the conclusion of the inquiry, the Acting Parliamentary Inspector identified problems with only two aspects of the CCC's examination procedures. The first was the power of the CCC under Section 140 of the CCC Act to conduct a public hearing and the requirement for specific criteria to be considered and applied to each prospective witness in the exercise of this power. The second was a limit on the power of the CCC to make public statements concerning the integrity of evidence given before the Commission.

3 More broadly, the inquiry also looked at 'the effectiveness and appropriateness of the procedures used by the CCC in issuing and serving summonses to witnesses to attend public and private examinations'.[1]

4 The Parliamentary Inspector had referred the inquiry to Acting Parliamentary Inspector Zelestis under section 193(1)(c) of the CCC Act because earlier in the year he had made a determination in favour of one of the complainants regarding a separate matter. The methodology and outcomes of the Acting Parliamentary Inspector's inquiry were advised to the Committee in writing for the purpose of apprising the Committee of the Acting Parliamentary Inspector's inquiry. Reflecting the position of the Acting Parliamentary Inspector, the Parliamentary Inspector did not intend to publish the material.[2]

Report purpose

5 Following consideration of the Parliamentary Inspector's letter, the Committee formed the view that certain opinions and findings expressed by the Acting Parliamentary Inspector are in the public interest given their significance, and potential lessons for CCC procedures. Furthermore,

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1 The Honourable Chris Steytler QC, Parliamentary Inspector of the Corruption and Crime Commission, letter, 28 April 2011.

2 Mr Murray Alder, Assistant to the Parliamentary Inspector, email, 29 April 2011.

given that the Acting Parliamentary Inspector's inquiry focuses on the CCC's examination procedures, findings are particularly relevant to the Committee's current Inquiry into the use of public examinations by the CCC.

6 A closed hearing was conducted with the Parliamentary Inspector on 25 May 2011. The Committee put to the Parliamentary Inspector the excerpts from the Acting Parliamentary Inspector's inquiry report which it considered to be in the public interest. The Parliamentary Inspector did not offer an opinion on whether the excerpts should be published but conceded that the Committee was not bound by any preference on the part of the Acting Parliamentary Inspector for the inquiry not to be made public. The Parliamentary Inspector indicated that an option may be for the sections discussed during the hearing (as opposed to the report in its entirety) to be made public.[3]

7 The Committee resolved on 25 May 2011 to report to Parliament on those outcomes of the Acting Parliamentary Inspector's inquiry which are general in nature and which it considers to be in the public interest. These include, but are not limited to, the excerpts reviewed during the closed hearing with the Parliamentary Inspector and are reproduced in Chapter 2.

8 A draft copy of this report was provided to the Acting Parliamentary Inspector, the Parliamentary Inspector and the CCC, and comments as to the intention of the Committee to table this report and the content of the report were sought. As a consequence of this process, some amendments were made to the draft report to more accurately reflect the contemporary circumstances.

9 This report, and the decision by the Committee to bring these matters to the attention of the Parliament, is supported by the Parliamentary Inspector.

10 In responding to the draft report, the Acting CCC Commissioner, Mr Mark Herron, said that:

> *…the report refers to events that occurred in October and November 2006… and asserts that a report on some aspects of the Acting Parliamentary Inspector's Inquiry ('the inquiry') is in the public interest. The inquiry and the Committee's report deal with events connected with the Smiths Beach investigation and subsequent October 2007 report to Parliament. It is a source of some frustration to the Commission that that investigation has received almost continuous attention since, when the Commission has tabled a further 10 reports in connection with the lobbying, only one of which was subject to substantiative criticism by the former Parliamentary Inspector, Mr McCusker QC, whose views were not accepted by the Commission.*[4]

11 While noting the frustration expressed by the CCC, the Committee considers there to be considerable public interest in bringing attention to the Acting Parliamentary Inspector's analysis of the *Corruption and Crime Commission Act 2003*.

---

3 The Honourable Chris Steytler QC, Parliamentary Inspector, *Transcript of Evidence*, 25 May 2011, p4.

4 Mr Mark Herron, Acting CCC Commissioner, letter, 5 August 2011.

12 In providing the CCC's representations pertaining to the draft report, the Acting CCC Commissioner requested that the Committee consider including these representations within the final report. Accordingly, the CCC's representations are reproduced at Appendix One to this report.[5]

[5] Within these representations were some requests regarding the inclusion of additional content within the body of the report. Having amended the report in accordance with these requests, the Committee has accordingly removed these requests from the CCC's representations for clarity.

CHAPTER 2 ACTING PARLIAMENTARY INSPECTOR'S REPORT CONCERNING EXAMINATION PROCEDURES BY THE CCC

The Acting Parliamentary Inspector's conclusions

13 Relevant excerpts from the Acting Parliamentary Inspector's inquiry report are reproduced below. Numbers reflect the paragraph numbering in the Acting Parliamentary Inspector's report. Excerpts do not convey the names of the complainants or the particulars of the complaints under inquiry since the Committee respects the Acting Parliamentary Inspector's intention that those details not be published.

> *[C]are should be taken in planning the course of investigations to ensure that, wherever practicable, senior public servants and other witnesses are afforded reasonable notice of requirements to attend the Commission.*
>
> *[…]*
>
> *The lesson to be drawn from these events is that caution and restraint need to be exercised by investigators in circumstances where there are grounds for suspicion, but no evidence of misconduct.*
>
> *I have no reason to question the efficacy of the Commission's standard procedures, as they applied in November 2006, in relation to interviewing witnesses who were suffering any adverse mental condition.*
>
> *[…]*
>
> *In the course of conducting this inquiry, it was necessary to receive some evidence as to the Commission's decision to hold the public hearings and the conduct of them. In the course of considering those matters, two issues emerged.*
>
> *The first concerns the Commission's power, under s.l40 of the Act, to hold a public examination. I do not doubt the potential utility of this power, when used properly. I accept that it will often be difficult to predict the outcome which an investigation, including public hearings, will produce. My concern does not relate so much to a question of procedural fairness (which was the topic considered in Independent Commission against Corruption v ChafJey (1992) 30 NSWLR 21, to which my attention was directed) but relates to the constraints which exist on the power conferred by s.140 and the need to apply s.140 with precise regard to the known circumstances relating to each prospective witness.*
>
> *[…]*

Section 140(2) provides that:

> *"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."*

The reference to "potential for prejudice", appearing as it does alongside the reference to "the potential for….privacy infringements", plainly extends to prejudice to persons who are called as witnesses at a public examination and to other persons about whom evidence may be given at such an examination. The reference to "the potential for prejudice" may also include prejudice to the Commission's investigation.

The potential for prejudice to witnesses and others, from a public hearing, is obvious. The content of questions asked at a public hearing and the manner in which they are put may be such as to convey allegations or raise suspicions, which may attract considerable publicity. In consequence, the reputations of witnesses and others may be adversely affected, in a serious, indeed permanent, way.

There is a particular danger of such harm occurring where public hearings are held in circumstances where there are grounds for suspicion about the activities of public servants, but no real evidence of misconduct. The anxiety caused to persons may be significant and the damage to reputations may be irreparable, even when no direct evidence of misconduct eventually emerges…

The Commission's practice with respect to considering whether to hold a public examination includes the preparation of a support statement which summarises the reasons for the decision. It is important that this exercise does not become a ritual which focuses upon the preparation of the support statement. It is important that full and objective consideration is given to each of the criteria identified in s.140(2) in the circumstances pertaining to the relevant investigation.

In making these observations, I do not mean to imply that such did not occur here.

[…]

As s.140(4) makes clear, a matter under investigation by the Commission may be the subject of both open and closed examinations. The powers conferred by s.140 require the Commission to consider separately the position of each prospective witness. The potential for prejudice can only properly be assessed by considering the circumstances which relate to each prospective witness.

[I]t will often be the case that a decision whether or not to hold a public hearing or to call a particular witness at a public hearing will be made in circumstances where the Commission has obtained evidence from a variety of sources, including telephone interceptions, and has had its investigators interview prospective witnesses. Where such inquiries have revealed grounds for suspicion in relation to a prospective witness, but no direct evidence of misconduct and no evidence from which misconduct can reasonably be

inferred, the application of s.140(2), in relation to each particular witness, will require careful consideration. In such circumstances, it may be difficult to properly conclude that the public interest requires a public examination of a particular witness. That may be so because, if all that exists is suspicion, there may be no proper basis for concluding that the potential for prejudice to the prospective witness is outweighed by the public interest.

[…]

The Commission is empowered to make assessments and form opinions as regards the occurrence of misconduct: s.22 of the Act. However, the Commission is expressly prohibited from publishing or reporting a finding or opinion that a particular person has committed a criminal offence: s.23. The giving of false evidence to the Commission is a criminal offence: s.168. Accordingly, the Commission is not empowered to publish or report a finding or opinion that someone has given false evidence before the Commission…

The prohibition expressed in s.23(1) expressly relates to publishing or reporting a finding or opinion. This prohibition is plainly not confined to findings or opinions expressed in a report made by the Commission. When the decisions to which I was referred (Balog v Independent Commission Against Corruption (1990) 169 CLR 265; Parker v Miller, unreported BC 9801957, 8 May 1998; Parker and Others v Anti-Corruption Commission, unreported BC 9901400, 31 March 1999) are considered in the context of the legislative provisions to which they related, they provide no support for a conclusion that s.23(1) manifests an intention to confine the prohibition to the exercise of the Commission's reporting power. Such a confinement is inconsistent with the ordinary meaning of the express words of the provision and would seriously impair the protection afforded by s.23(1). In my opinion, the construction attributed to s.23(1) by the Commission is incorrect. There is no occasion to read down the broad scope of the prohibition.

[…]

In my opinion, the power to conduct a public hearing, which is conferred by s.140, does not itself confer a power to make a potentially damaging statement about the honesty with which a witness has given evidence…

At a public hearing, the Commission may be assisted by a legal practitioner: ss. 142, 143. No specific powers are conferred on such a person which add to or exceed the powers conferred on the Commission itself..[1]

14 The Acting Parliamentary Inspector also pointed out that the prohibition expressed in s.23(1) applies to the Commission and to any person who publishes or reports a finding or opinion on behalf of the Commission (ie, purportedly with the authority of the Commission). Thus, the Commission may not authorise another person to publish or report a finding or opinion to the effect that a witness has given false evidence before the Commission.

[1] Excerpts taken from Mr Christopher Zelestis, QC, Acting Parliamentary Inspector of the Corruption and Crime Commission, copy of inquiry report, 19 November 2010. *Attachment* to Hon. Chris Steytler, QC, Parliamentary Inspector of the Corruption and Crime Commission, letter, 28 April 2011.

Summary

15 The main conclusions that can be drawn from the Acting Parliamentary Inspector's inquiry with respect to examination procedures by the CCC can be summarised as follows:

- When making a determination to open an examination to the public, the CCC must give full and objective consideration to the criteria identified in section 140(2) of the CCC Act as it relates to each prospective witness;
- This is particularly important when there are grounds for suspicion but no firm evidence of misconduct as there is a greater risk of harm to reputations in these circumstances;
- The CCC does not have the power to publish or report a finding or opinion that a person has given false evidence before the CCC due to the prohibition expressed by section 23 of the CCC Act;
- Senior public servants and other witnesses should be given reasonable notice of the requirement to attend before the CCC.

16 Having considered these conclusions and engaged further with the Acting Parliamentary Inspector, the Parliamentary Inspector and the Acting CCC Commissioner in the process of drafting this report, the Committee makes the following finding:

Finding 1

The CCC does not have the power to publish or report a finding or opinion that a person has knowingly given false evidence before the CCC due to the prohibition expressed by section 23 of the *Corruption and Crime Commission Act 2003*.

17 In the process of drafting this report, the Committee also originally made the following finding:

> ***Finding 2***
>
> *Senior public servants and other witnesses should be given reasonable notice of the requirement to attend before the CCC.*

18 In making representations to the Committee after considering the draft report,[2] the Acting CCC Commissioner made the following observation:

> *The Commission agrees with this finding. Since its inception the Commission has routinely changed its private and public examination schedules to fit the availability of witnesses.*

[2] These representations are reproduced at Appendix One to this report.

The Commission's practices, which predate both this finding and the October/November 2006 examinations, reflect the finding's intentions.[3]

19 Accordingly, the Committee has amended its original finding to reflect this fact:

Finding 2

The CCC has implemented a policy to ensure that witnesses are given reasonable notice of the requirement to attend before CCC examinations. This policy addresses a prior deficiency that was identified by the Acting Parliamentary Inspector.

20 The remaining matters identified by the Acting Parliamentary Inspector will be considered in more detail as part of the Committee's current inquiry into the use of public examinations by the CCC.

HON NICK GOIRAN, MLC
CHAIRMAN

[3] Mr Mark Herron, Acting CCC Commissioner, *Corruption and Crime Commission representations to the Committee report regarding an inquiry concerning examination procedures by the Corruption and Crime Commission*, 5 August 2011, p2.

APPENDIX ONE

CORRUPTION AND CRIME COMMISSION REPRESENTATIONS TO THE COMMITTEE REPORT REGARDING AN INQUIRY CONCERNING EXAMINATION PROCEDURES BY THE CORRUPTION AND CRIME COMMISSION

The Committee's report ("the report") has as its basis the decision to publish some of the outcomes of an Acting Parliamentary Inspector's Inquiry ("the inquiry") as being in the public interest.

In publishing some of the Acting Parliamentary Inspector's considerations and findings the report fails to identify the subject matter of the inquiry, as determined by the amended terms of reference, and when the events subject of the inquiry occurred.

Contrary to the first paragraph in the Chairman's Foreword the Acting Parliamentary Inspector's Inquiry was concerned with the Commission's procedures and practices for interviewing and questioning people, including potential witnesses, and the procedures for serving witness summons upon public officers. The inquiry's terms of reference were not directed to looking into the Commission's examination procedure. Further, it was only as an additional aspect of the inquiry that the Acting Parliamentary Inspector commented upon and made two recommendations regarding the Commission's examination procedures, which recommendations the Commission accepts.

The Commission believes that for the public interest to be served the report needs to record that the inquiry was into matters that arose during the Commission's investigation into alleged public sector misconduct linked to the Smiths Beach Development at Yallingup in October and November 2006, almost five years ago.

[…]

The Acting Parliamentary Inspector's Inquiry and the report makes two findings.

The first finding, which the Commission has accepted, concerns closing remarks at the public examinations made by Counsel Assisting in November 2006. That form of words has not been used in similar circumstances since. The finding concerns a single event which occurred some five years ago.

The second finding records a general, cautionary concern that arose in the course of the Acting Parliamentary Inspector's Inquiry. There is no suggestion by him that his finding is based on the actual conduct of the Commission or its officers some five years ago. Rather, the Acting Parliamentary Inspector was cautioning the Commission about the need to provide reasonable notice to the witnesses attending the Commission's examinations. The Commission agrees with the finding. Since its inception the Commission has routinely changed its private and public

examination schedules to fit the availability of witnesses. The Commission's practices, which predate both this finding and the October/November 2006 examinations, reflect the finding's intentions.

The Committee's report makes much of the Acting Parliamentary Inspector Inquiry's commentary in regard to section 140 of the *Corruption and Crime Commission Act 2003* ("the CCC Act"). Once again this commentary derives from his consideration of the Commission's public examinations of October/November 2006. The then Commissioner, Mr Kevin Hammond, in reflecting on those examinations in a speech to IPAA on 20 March 2007 said that:

> *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 [in those public hearings] the public interest in identifying the matters raised during these hearings that go to the heart of good and effective governance in this State.*

These remarks are an explicit acknowledgment of the attention he gave to section 140 of the CCC Act in conducting those 2006 examinations.

A full extract of the speech, which refers to the Commission's weighing process in deciding whether to hold a public hearing and which acknowledges the difficulties in reaching a decision to hold a public examination, is [available at the CCC's website[1]].

The Commission has always been and remains aware of the importance of section 140. Its internal formal processes have evolved to the extent that the Commissioner, having undertaken the weighing of considerations required by section 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.

[1] The speech can be found by navigating to <http://www.ccc.wa.gov.au> → "Publications and News" → "Speeches" → "2007" → "Speech by Commissioner Kevin Hammond - to IPAA", or directly by navigating to <http://www.ccc.wa.gov.au/Publications/Reports/Speeches/Speech%20by%20Commissioner%20Kevin%20Hammond%20%E2%80%93%20to%20IPAA.pdf>

Given:

a. the age of the matters dealt with by the inquiry;

b. the fact that the first finding refers to a single event five years ago that has not been repeated;

c. the fact that the second finding is merely cautionary with no basis in the actual events the subject of the inquiry; and

d. the Commission has previously, since then and continues to give scrupulous attention to section 140 of the CCC Act;

it is not clear why the decision to table the report on this matter is in the public interest especially when these issues may, in the Commission's respectful view, be better dealt with in the context of the Joint Standing Committee's current inquiry into the Commission's public examination process.

Mark Herron
ACTING COMMISSIONER

5 August 2011