Joint Standing Committee on the Corruption and Crime Commission

The use of Public Examinations by the Corruption and Crime Commission

Report No. 25
March 2012

Parliament of Western Australia

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Presented by

Hon Nick Goiran, MLC and John Hyde, MLA

Laid on the Table of the Legislative Council and Legislative Assembly on 27 March 2012

Chairman's Foreword

The ability of the Corruption and Crime Commission to open its examinations to the public has been a controversial aspect of the work and role of the CCC since its inception in 2004. Though the CCC's predecessor body, the Anti-Corruption Commission, was said to have been grossly undermined by the fact that it was statutorily bound to secrecy, the ability of the CCC to submit its examinations to the gaze of the citizens of Western Australia has not been without its own difficulties.

In the contemporary era, the fight against corruption has become one of the most significant challenges for governance, and in this effort we are often reminded of the famous quote by former US Supreme Court Justice Louis Brandeis that "sunlight" – that is, transparency in governance – "is the best disinfectant." Certainly it is true that transparency promotes accountability, and as such it is seemingly obvious that we would want our CCC – charged as it is with the task of promoting and maintaining high standards of integrity in the Western Australian Public Service – to allow as much of this "sunlight" to fall upon its work as possible. In theory, educating the citizens of Western Australia about the work and role of the CCC (and in turn about the societal threat posed by public sector misconduct) by opening its examinations to the public is an unequivocally good idea.

As with most things in governance, however, the reality is never quite as simple as the theory. In the course of this inquiry the Committee has formed the firm view that while opening CCC examinations to the public is important and desirable in the right circumstances, those circumstances ought to be exceedingly rare. Plainly, the CCC should not open an examination to the public for the purpose of exposing misconduct that they believe may be taking place – no matter how egregious that misconduct may potentially be. This is so because using an examination to "expose" a perceived wrongdoing amounts to punishing that perceived wrongdoing before guilt is established.

There are a range of factors that bear upon this reality, not the least of which is the vehicle by which CCC examinations are "opened" to the "public." Although CCC examinations are opened to the public in the literal sense, in reality the overwhelmingly vast majority of Western Australians view the opened examinations through the lens of the media. As the publicity – and, as a result, the popular comprehension – that flows from an open examination cannot be determined in advance, it is very difficult for the CCC Commissioner to adequately weigh the privacy and judicial rights of witnesses before opening an examination to the public, as is required by the *Corruption and Crime Commission Act 2003*.

This is far less of a problem if some facts of the incident being investigated are generally known, or if rumour and innuendo pertaining to the incident in question is rife. If such circumstances arise, the CCC is right to open an examination to the public, as transparent investigation in such circumstances builds confidence in governance in Western Australia.

Even in the right circumstances, however, the Committee has also formed the strong belief that there is much that could be done by the CCC to improve its public examination processes. In the past, the CCC has not done enough to preserve procedural fairness during public examinations, and this has been to the great detriment of many CCC witnesses – and indeed, to the reputation of the CCC itself. A transparent view upon a flawed process does little to engender community confidence, and in light of some of the problems that have flowed from past CCC public examinations, the Committee has been disappointed by the reluctance of the CCC to acknowledge these problems.

The Committee concurs with the Parliamentary Inspector's opinion that the CCC's discretion to open examinations to the public "has miscarried in the past," and regards this as a significant issue.

I take this opportunity to thank and indeed pay tribute to each of the persons who provided the Committee with a submission, and to those who also accepted the invitation to appear before a Committee hearing in aid of this inquiry. A wealth of thought-provoking material was provided to the Committee during this inquiry, and certainly the Committee was inspired by the fact that so many persons made themselves available to offer their perspective on this important matter.

As always, the assistance provided to the Committee by the Parliamentary Inspector, the Honourable Chris Steytler QC, and his assistant, Mr Murray Alder, has been of great value to the Committee. I would also like to offer my thanks to Acting CCC Commissioner Mark Herron and the newly-appointed CCC Commissioner, the Honourable Roger Macknay QC. The ongoing assistance of each of these persons aids the work of the Committee.

Hon Nick Goiran, MLC
Chairman

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Ministerial response

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, the Joint Standing Committee on the Corruption and Crime Commission directs that the Attorney General report to the Assembly as to the action, if any, proposed to be taken by the Government with respect to the recommendations of the Committee.

Findings and Recommendations

Finding 1

By default, CCC misconduct examinations are private.

Finding 2

In making a determination as to whether a particular CCC examination will be open to the public, the CCC Commissioner gives careful consideration to:

- the fact that the default position of the *Corruption and Crime Commission Act 2003* is that hearings are to be conducted in private;
- the CCC role ("to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector"), and particularly the CCC's education and prevention function;
- community and public sector awareness of misconduct, and the benefits of raising awareness about specific types of misconduct;
- the privacy and judicial rights of persons both directly under investigation by the CCC, and collaterally affected by CCC investigations;
- the most likely manner in which material divulged during a public hearing might be reported; and
- the circumstances of the day.

Finding 3

In accordance with the requirements of section 140(2) of the *Corruption and Crime Commission Act 2003*, it should be a very rare case in which the public interest is found to outweigh potential prejudice and privacy interests.

Finding 4

Suppression orders represent a mechanism by which the CCC may be able to confine reporting of public examinations to the misconduct being investigated, instead of the behaviour of specific individuals.

Recommendation 1

Section 140(2) of the *Corruption and Crime Commission Act 2003* should be amended so as to read:

The Commissioner 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, she or he is satisfied that it is in the public interest to do so.

Recommendation 2

A new subsection should be inserted into section 140 of the *Corruption and Crime Commission Act 2003* to read as follows:

In making a decision under s 140(2), the Commissioner must, without derogating from her or his obligation to take into account any relevant consideration, have regard for:

(i) the risk of unwarranted damage to the reputation of; and

(ii) any credible risk to the health and safety of

any person affected.

Recommendation 3

A new subsection should be inserted into section 140 of the *Corruption and Crime Commission Act 2003* to read as follows:

If a decision is made under s 140(2) to open an examination to the public, the Commissioner must prepare and sign a statement explaining why the public interest outweighs the potential for prejudice or privacy infringements arising from a public examination of that specific person. A copy of this statement must be provided to the person concerned prior to their examination, and that person is to be afforded the opportunity to make representations to the Commissioner as to why the statement may be incorrect.

Finding 5

The manner in which the CCC seeks to preserve procedural fairness during public examinations has to date, on occasion, been unsatisfactory.

Finding 6

The CCC is an investigative body; it is not a judicial body.

Recommendation 4

The *Corruption and Crime Commission Act 2003* should be amended to ensure that CCC examinations – and especially those that are open to the public – are, at the discretion of the Commissioner, conducted broadly in line with the "six cardinal principles" of fair procedure for public examinations devised by the Rt Hon Lord Justice Salmon in 1966. This should be done by way of amending sections 138(1) and 138(2) of the Act to read as follows:

138. Conduct of examinations

(1) The Commission is to conduct its examinations in line with the following principles:

(a) Before any person becomes involved in an inquiry, the Commissioner must be satisfied that there are circumstances affecting that person which the Commission proposes to investigate;

(b) Before any person who is involved in an inquiry is called as a witness, that person should be informed of any allegations made against them and the substance of the evidence in support of those allegations;

(c) Any person called before a Commission examination should be given an adequate opportunity to prepare their case and to be assisted by legal advisers;

(d) Any person called before a Commission examination should have the opportunity of being examined by their own counsel and of stating their case during the examination;

(e) Any material witnesses that a person called before a Commission examination wishes to call should, if reasonably practicable, be heard; and

(f) Any person called before a Commission examination should have the opportunity to test, by cross-examination conducted by their own counsel, any evidence which may affect them.

(2) The application of any of the principles outlined in subsection (1) remains at the discretion of the Commissioner.

Finding 7

In the right circumstances, CCC examinations should be opened to the public.

Finding 8

The discretion as to whether or not to open a particular hearing to the public should remain with the CCC Commissioner.

Recommendation 5

The CCC Act should retain a statutory discretion for the CCC Commissioner to determine that an examination be held in public.

Chapter 1

Background to the inquiry

There is no more higher profile aspect of the operation of the Corruption and Crime Commission than the public hearings it has held.

Mr Brian Burke, 2011

Public examinations

The *Corruption and Crime Commission Act 2003* requires that examinations conducted by the Corruption and Crime Commission CCC are to be private unless otherwise ordered.[1] With the exception of organised crime examinations, the CCC 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.*[2]

Prior to the establishment of the CCC, its predecessor, the Anti-Corruption Commission ACC, undertook all of its examinations in private.[3] In 2002, however, a parliamentary committee review found that, subject to certain criteria, scope existed for public examinations to form a part of the ACC's investigative process.[4] In recommending that the ability to convene public examinations be conferred upon the ACC, however, the Joint Standing Committee on the Anti-Corruption Commission stated that "the role of public hearings should be to expose systemic corruption, criminal conduct or serious improper conduct," and that they should "not substitute the penalty of public exposure where the investigating authority cannot satisfy the burden of proof of the courts or a disciplinary authority."[5] According to the review, there should be a presumption of closed investigations, and the decision to open an investigation to the public "should not be taken lightly."[6]

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1 Section 139(1) *Corruption and Crime Commission Act 2003*.

2 Section 140(2) *Corruption and Crime Commission Act 2003*.

3 Section 42(1) *Anti-Corruption Commission Act 1988* (repealed).

4 Joint Standing Committee on the Anti-Corruption Commission, *Integrity within the public sector - Review of the Anti-Corruption Commission*, Report No. 2 in the 36th Parliament, Legislative Assembly, Perth, 19 December 2002, p19.

5 *Ibid.*, p18.

6 *Ibid.*

The then state government's response to the Committee's recommendations pertaining to public examinations were influenced to a large extent by the *Interim Report of the Royal Commission into Whether there has been any Corrupt or Criminal Conduct by Western Australian Police*, which the government received in December 2002. The government accepted the recommendations of the Royal Commission, including that there be a new external oversight agency (the CCC) established to replace the ACC. In its response to the Committee's review, the government stated that, similar to the New South Wales Police Integrity Commission, the new agency would have the power to conduct examinations in public, and a similar discretion would exist as to whether examinations would be conducted in private or in public.[7]

In subsequent Parliamentary debate on the Bill to establish the Corruption and Crime Commission,[8] the inability of the ACC to conduct public hearings was often cited as unsatisfactory, as it was believed that this restriction had seen the ACC suffer from a loss of community confidence.[9] It was argued that empowering the CCC to conduct public hearings would enable greater public awareness of the work of the Commission, more openness, accountability and transparency, and would restore public confidence.[10] During debate, however, concerns were voiced that allowing the CCC to conduct public hearings could result in damage to reputations due to associations being made in public with allegations prior to any determination of guilt.[11] These opinions, among others, are still reflected in contemporary arguments for and against the CCC conducting public hearings.

In its consideration of the *Corruption and Crime Commission Bill*, the Legislative Council Standing Committee on Legislation examined the compromise between the greater openness afforded by the ability to open examinations to the public, and the potential harm to individual reputations that may occur as a result of any such practise. The Standing Committee concluded that "in relation to examinations concerning matters of misconduct ... sections 139 and 140 appropriately balance the public interest and the interests of persons the subject of allegations."[12]

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7 Government response to the Joint Standing Committee on the Anti-Corruption Commission, *Integrity within the Public Sector – Review of the Anti Corruption Commission*, Report No. 2 2002, 19 March 2003, pp1-3.

8 *Corruption and Crime Commission Bill 2003.*

9 Hon C.L. Edwardes, MLA, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 3 June 2003, p8061.

10 Hon J.A, McGinty, MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 June 2003, p8190.

11 Mr M.J. Birney, MLA, Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 June 2003, p8169.

12 Standing Committee on Legislation, *Report in relation to the Corruption and Crime Commission Act 2003 and the Corruption and Crime Commission Bill 2003*, Legislative Council, Perth, 9 December 2003, p174.

As such, with the passage of the legislation the CCC, established on 1 January 2004, acquired the ability to conduct public examinations and, mindful of the limitations experienced by its predecessor, in opening the inaugural public CCC examination in 2004, Commissioner Kevin Hammond emphasised the significant benefits anticipated from the new ability:

> *This is the first occasion upon which this Commission has conducted any public hearings. The ability or the potential to conduct public hearings was not an option that was available to our predecessor organisation, but it is open to this Commission. It is clear that it is desirable and essential that the Commission makes the public aware of its work, which, remembering that the Commission is charged with improving continuously the integrity of the Western Australian public sector and reducing the incidence of misconduct.*
>
> *It goes without saying that public accountability is a very important aspect of this Commission's work, and it is important that members of the public see that investigations have been performed thoroughly and the appropriate questions have been asked and issues aired.*[13]

In providing a submission to the Committee in aid of this inquiry on 26 August 2011, the CCC noted that, over the period since its establishment to 30 June 2011, it had initiated serious misconduct investigations in respect of 283 matters. In aid of these investigations, the Commission had conducted private examinations in respect of 49 matters and public examinations in respect of 15 matters; in the course of those 15 matters, a total of 314 persons had appeared before public CCC examinations.[14] It has been suggested to the Committee that "there is no more higher profile aspect of the operation of the Corruption and Crime Commission than the public hearings it has held."[15] This is most certainly true: in terms of publicising the work done by the CCC, the media attention paid to CCC public examinations is unparalleled, and in a great many circumstances these public examinations have functioned to enhance probity in governance in Western Australia. Unfortunately, however, the notoriety of public CCC examinations has not always been confined to the misconduct that these examinations have revealed, and the CCC has been criticised both for conducting public examinations in aid of certain investigations, and for the manner in which some of these public examinations have been conducted.

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13 Mr Kevin Hammond, Commissioner, Corruption and Crime Commission of Western Australia, *CCC Transcript*, 22 November 2004, pp1-2.

14 Corruption and Crime Commission of Western Australia, *Submission,* 26 August 2011, p V.

15 Brian Burke, *Transcript of evidence*, 2 November 2011, p 3.

In 2007, this controversy saw the previous iteration of the Committee commence an inquiry into the use of public examinations by the CCC with the following terms of reference:

> *That the Committee inquire into and make recommendations on the statutory discretion of the Corruption and Crime Commission to take oral evidence from persons in open or closed session, with particular regard to (a) the adequacy of criteria for opening or closing examinations under section 139 and 140 of the* Corruption and Crime Commission Act 2003*;*
>
> *(b) the opportunities for persons aggrieved by allegations made before the Commission, particularly during a public examination, to respond to those allegations; and*
>
> *(c) any other relevant issue.*

Though preliminary work had been undertaken and a number of submissions were received in its aid, this inquiry was halted by the prorogation and dissolution of Parliament in August 2008. When the Committee was re-established in November 2008, the matter of public hearings was not immediately revisited, with the Committee instead electing to focus on matters critical at the time, including recommended reforms to the Act, and the role of the CCC in relation to organised crime in Western Australia. Even while focussed on other matters, however, the matter of public CCC examinations remained a topic of significant interest to the Committee, and as a result in early 2010 the Committee decided that it would initiate its own inquiry into the use of public hearings by the CCC at the conclusion of the then-present inquiry into a possible organised crime role for the CCC.

Death of a witness

The Committee delivered its report to Parliament entitled *How the Corruption and Crime Commission can best work together with the Western Australian Police Force to combat organised crime*, recommending that the jurisdiction of the CCC not be expanded, on 9 September 2010. On that same day, the CCC had been scheduled to begin a series of hearings in aid of an inquiry into alleged theft and contract manipulation by former employees of the City of Stirling. On 8 September, however, the CCC announced that these examinations had been postponed, and on 10 September 2010 the then Commissioner of the Corruption and Crime Commission, the Honourable Len Roberts-Smith RFD QC, rang the Chairman of the Committee to advise of the death by apparent suicide of a witness who was to have been the subject of the public examinations.

On 15 September 2010 the Committee convened a closed hearing at which Commissioner Roberts-Smith and the Parliamentary Inspector, the Honourable Christopher Steytler QC, were present. Subsequent to that meeting the Committee, acting under section 195(2)(d) of the CCC Act, formally requested that the Parliamentary Inspector investigate the circumstances known to the CCC regarding the suicide of the witness.

The Parliamentary Inspector reported to the Committee on 22 November 2010[16] and on 24 November the Committee, having considered the report, the incomplete inquiry of the previous Committee and the overall importance of the topic, formally resolved to conduct an inquiry into the use of public examinations by the CCC.

The inquiry process

As was announced in the Legislative Assembly on Tuesday 15 February 2011, the Committee would inquire into and report on:

- *what factors the Commissioner of the Corruption and Crime Commission takes into account when deciding whether or not to conduct a public hearing;*
- *how the Corruption and Crime Commission preserves procedural fairness in conducting public hearings;*
- *how the Corruption and Crime Commission's practices in this regard compare to other jurisdictions;*
- *whether the Corruption and Crime Commission should maintain a statutory discretion to conduct public hearings in the exercise of its misconduct function; and*
- *if so, what statutory criteria should apply.*

As detailed, the inquiry was somewhat similar in scope to an inquiry embarked upon in 2007 by a previous iteration of the Committee, which was halted by the prorogation and dissolution of Parliament in August 2008.

As a number of persons had made submissions to the public hearings inquiry initiated by the previous Committee, the current Committee began this inquiry by inviting each of those persons to revise and/or resubmit their submissions; the Committee also called for new submissions via an advertisement in the *West Australian* on 27 April

[16] The Committee would then meet with the Parliamentary Inspector on a number of occasions between December 2010 and February 2011, when the Committee presented its own report to Parliament on the matter, entitled *Death of a Witness*, on 24 February 2011.

2011. By the 30 August 2011 closing date for submissions, permission for the Committee to consider an existing submission as current had been granted by six of the persons who had previously made submissions, with two of these people also electing to provide the Committee with new information. In addition, the Committee received a total of ten new submissions, making a total of sixteen submissions received (refer to Appendix Three).

In addition to these submissions, on 28 April 2011 the Committee received a letter from the Parliamentary Inspector, the Honourable Chris Steytler QC, advising of an inquiry conducted by the Acting Parliamentary Inspector, Mr Chris Zelestis QC. Although the Acting Parliamentary Inspector's inquiry focused on alleged misconduct of Commission investigators during the Smiths Beach Investigation, a number of the matters raised in the course of the inquiry had broader implications for the Commission's examination practice. This prompted the Committee to report to Parliament on the outcome of the Acting Parliamentary Inspector's inquiry, and to further consider these matters in the course of this inquiry.

A number of hearings were convened by the Committee for the purpose of gathering evidence in aid of the inquiry, beginning with a series of three public hearings in the first half of 2011: on 18 May 2011 the Committee heard from the Acting CCC Commissioner, Mr Mark Herron, and the Executive Director of the CCC, Mr Mike Silverstone; on 15 June 2011 the current Parliamentary Inspector, the Honourable Chris Steytler QC, and his Assistant, Mr Murray Alder, gave evidence; and on 22 June 2011 the former Parliamentary Inspector and now Governor of Western Australia, His Excellency Malcolm McCusker AC CVO QC, appeared before the Committee and offered his perspective on the topic of public CCC examinations.

In September 2011 the Committee considered the submissions that it had received, and resolved to invite a number of persons to appear before the Committee to expound upon their submissions in November 2011. Additionally, though electing not to make a written submission to the Committee; the widow of a man who committed suicide on the evening before he was due to give evidence before a public CCC examination accepted the Committee's invitation to appear before a closed hearing of the Committee on 28 September 2011.[17]

In October 2011, the Committee undertook investigative travel to Ottawa and Chicago where, among other topics, the Committee was briefed on the use of public examinations by representatives of the City of Chicago Independent Police Review

[17] The Committee had determined that it would be inappropriate to convene a public hearing in this instance for a range of reasons, including the fact that the name of the woman's deceased husband had been suppressed by the former CCC Commissioner, the Honourable Len Roberts-Smith RFD QC.

Authority, the Royal Canadian Mounted Police and the Commission for Pubic Complaints Against the Royal Canadian Mounted Police.

The series of public hearings with persons who had made submissions to the inquiry began on 2 November 2011 with the separate appearances of Mr Noel Crichton-Browne and Mr Brian Burke; Mr Kevin Merifield gave evidence before the Committee on 23 November 2011; and Mr Mike Allen and Mr Sam Salpietro attended separately before the Committee on 30 November 2011.

The evidence-gathering process continued in late February 2012, with three more public hearings: on 22 February 2012 the Honourable Chief Justice Wayne Martin QC offered his perspective on this important topic to the Committee; his appearance was followed immediately by that of Mr Julian Grill; and on 29 February 2012 the newly-appointed CCC Commissioner, the Honourable Roger Macknay QC, along with the Executive Director of the CCC, Mr Mike Silverstone, and the CCC Director Legal Services, Mr Paul O'Connor, appeared before the Committee for what was the final public hearing in aid of this inquiry.

The hearing process was brought to a conclusion the following week, when the Parliamentary Inspector appeared before a closed hearing of the Committee. Though the attendance of the Parliamentary Inspector on 7 March 2012 had been sought in aid of an unrelated matter, the Committee took the opportunity afforded by his attendance to seek the view of the Parliamentary Inspector on the evidence given in aid of this inquiry by other witnesses.

Terminology in this report

CCC examinations are sometimes colloquially referred to as "hearings," and indeed this inquiry was originally to have been entitled *The use of public hearings by the Corruption and Crime Commission*. Upon reflection, however, the Committee has come to believe that referring to CCC examinations as "hearings" is unhelpful, as this description equates CCC investigations with proceedings in a court of law. Plainly, and for a myriad of reasons, this notion is incorrect; as such, the Committee makes exclusive use of the term "examinations" throughout this report.

Chapter 2

Public CCC examinations

Some of [my] decisions [as CCC Commissioner] have been difficult – none perhaps more so than that to determine whether or not to conduct a public hearing as a part of an investigation.

Inaugural CCC Commissioner Mr Kevin Hammond AO, 2007

CCC examinations

The ability of the CCC to conduct examinations in aid of investigations and the way that those examinations should be conducted is detailed in Part 7 of the CCC Act.[18] Section 137 empowers the CCC to conduct examinations, and section 138(3) states that:

> *Except as otherwise stated in this Act, the Commission may regulate the conduct of examinations as the Commission sees fit.*[19]

Importantly, section 139 specifies that a CCC examination is "to be private unless ordered." Section 140 provides a mechanism by which a particular examination in aid of a misconduct investigation[20] can be opened to the public, but the CCC Act clearly establishes that the default position for CCC examinations is that they be conducted in private.

Finding 1

By default, CCC misconduct examinations are private.

According to section 140(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.*

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18 Specifically, sections 137 through 147.

19 The terminology "as the Commission sees fit" should be read to mean 'at the determination of the CCC Commissioner,' by virtue of section 9 of the Act. The Committee regards the CCC Act as being poorly drafted in this regard, and believes that the CCC Act could be improved by better specifying that certain decisions – such as whether or not to open an examination – rest specifically with the Commissioner.

20 By section 140(1) of the CCC Act, organised crime examinations cannot be opened to the public.

Unfortunately the succinctness of this passage totally belies its complexity: weighing "the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements," involves a series of very complex calculations, and it is no doubt for this reason that section 16(1) of the CCC Act specifies that, in order to be qualified for appointment as the Commissioner, a person must have served or be qualified for appointment as a judge of the Supreme Court of Western Australia or another State or Territory, the High Court of Australia or the Federal Court of Australia. The complexity of this decision was perhaps best expressed by the inaugural CCC Commissioner Kevin Hammond who, in addressing the Institute of Public Administration Australia in 2007, said 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.***[21]

In drafting Terms of Reference for this inquiry, the Committee determined that it should from the outset unpack section 140(2), so as to establish "what factors the Commissioner of the Corruption and Crime Commission takes into account when deciding whether or not to conduct a public hearing."

What factors the CCC Commissioner takes into account when deciding whether or not to open an examination to the public

In his appearance before the Committee on 18 May 2011, Acting Commissioner Herron explained that he – like the Committee – regarded "the default position" as being that CCC examinations should be conducted in private. The Acting Commissioner then explained to the Committee the "weighing" process, which he had recently undertaken in determining that two series of examinations (convened in March[22] and in April[23] 2011) would be open to the public:

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[21] Kevin Hammond, "Corruption, Integrity and the Public Sector," speech given to the Institute of Public Administration Australia, 20 March 2007 (emphasis added). A transcript of this speech was appended to the submission of the CCC to the Committee in aid of this inquiry: CCC, *Submission to the Joint Standing Committee on the Corruption and Crime Commission*, 26 August 2011, p60.

[22] From 21-28 March 2011 public examinations in support of an investigation into the administration of international English language testing at Curtin University of Technology were convened.

[23] From 11-19 April 2011 further public examinations in support of an investigation into whether any member of the Western Australian Police or the Department of Corrective Services had engaged

> *I as Acting Commissioner am required to weigh the benefits of public exposure and public awareness against the potential for prejudice or privacy infringement. In deciding whether to hold a public hearing as distinct from a private hearing it is necessary to weigh up all of those factors. The prejudice that is referred to is not just prejudice to individuals, it can be prejudice to reputations, prejudice to safety of people; it can be prejudice perhaps to a fair trial, but it can also be prejudice to the Commission's investigation.*

The Acting Commissioner detailed some of the factors that would favour opening a particular examination to the public:

> *I suppose the more certain you are of your grounds and that you have got reasonable grounds for the facts to be found, that would lean in favour of a decision to hold a public hearing. Also a very important factor—one of our overriding principles—is to improve continuously the integrity within the public sector. Part of that is to increase public awareness, to educate the public sector about what is and is not an acceptable standard of behaviour and conduct.*

Acting Commissioner Herron also gave an example of a specific benefit associated with opening a hearing to the public:

> *It is also to encourage other people to come forward if they have issues or complaints about behaviour that may lead to misconduct. In my short experience it has been the case that the commission does receive information during the course of public hearings which assists as a part of the ongoing investigation.*[24]

On 26 August 2011 the Committee received a submission from the CCC in support of this inquiry, along with a covering letter from the Acting Commissioner. In his letter, Acting Commissioner Herron provided specific details about the process undertaken by the CCC Commissioner once a determination is made to open a particular hearing to the public:

> *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*

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in misconduct in connection with the arrest, detention and investigation of matters involving Mr Kevin Spratt were convened.

[24] Mr Mark Herron, Acting Commissioner, and Mike Silverstone, Executive Director, CCC, *Transcript of Evidence*, 18 May 2011, pp2-3.

> *examination has been subject to the weighing process required by section 140 and attendance by the witness is in the public interest.*[25]

The Acting Commissioner also explained that this "weighing" process is dynamic rather than discrete:

> *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.*[26]

Helpfully, the CCC also carefully described each of the factors that bear upon this "weighing" process in its submission to the Committee:

- *Firstly, 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.*

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25 Mr Mark Herron, Acting Commissioner, CCC, *Letter covering CCC submission*, 26 August 2011, p1.

26 *Ibid.*, p2.

- *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 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.*[27]

Accordingly, the Committee makes the following finding:

Finding 2

In making a determination as to whether a particular CCC examination will be open to the public, the CCC Commissioner gives careful consideration to:

- the fact that the default position of the *Corruption and Crime Commission Act 2003* is that hearings are to be conducted in private;
- the CCC role ("to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector"), and particularly the CCC's education and prevention function;
- community and public sector awareness of misconduct, and the benefits of raising awareness about specific types of misconduct;
- the privacy and judicial rights of persons both directly under investigation by the CCC, and collaterally affected by CCC investigations;

[27] CCC, *Submission*, 26 August 2011, pp 27-28.

- the most likely manner in which material divulged during a public hearing might be reported; and
- the circumstances of the day.

Improving the process

As stated by Acting Commissioner Herron in his letter covering the CCC's submission to this inquiry, the CCC's "internal processes are shaped by experience and have evolved," over the life of the CCC. This is to be expected, and indeed this point was further emphasised by the newly-appointed CCC Commissioner, the Honourable Roger Macknay QC, when he appeared before the Committee in aid of this inquiry on 29 February 2012. During that hearing, Commissioner Macknay informed the Committee that:

> *…the Commission is currently developing a protocol or template in which consideration is being given to an exhaustive list of possible criteria so that the question can be addressed just as exhaustively as it possibly can, in light of the, I think, well known principles, together with the command set out in the Act.*[28]

As has been noted, over the period since its establishment to 30 June 2011, the CCC has initiated serious misconduct investigations in respect of 283 matters and, in aid of these investigations, has conducted public examinations in respect of 15 matters, at which a total of 314 persons have appeared.[29] In the course of this inquiry, the Committee has heard evidence from a number of these people, who remain aggrieved – for a range of reasons – either at having been called to appear before a public CCC examination, at the manner in which the examination in question was conducted, or both.

At a superficial level, that persons who have appeared before public CCC examination remain aggrieved is hardly extraordinary: plainly, one may well expect such a response from those among the aforementioned 314 persons whose misconduct had been revealed during such an examination. Unfortunately, however, it is clear to the Committee that some of these persons are right to remain aggrieved because insufficient weight was given to their privacy and judicial rights during the weighing process demanded by section 140(2) of the CCC Act. It is doubtless for this reason that the CCC is now – in 2012 – "currently developing a… template [consisting of] an exhaustive list of possible criteria so that the question [as to whether or not to open a

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[28] The Honourable Roger Macknay QC, Commissioner, Mr Mike Silverstone, Executive Director, and Mr Paul O'Connor, Director Legal Services, Corruption and Crime Commission, *Transcript of Evidence*, 29 February 2012, p2.

[29] CCC, *Submission*, 26 August 2011, p V.

particular examination to the public] can be addressed just as exhaustively as it possibly can." The Committee regards this as a pleasing, albeit overdue, development.

In the CCC's submission to the Committee the meaning of "the public interest" is explored in significant detail. In the submission, the CCC argues that the legislation as it is currently constituted offers sufficient protection against the misuse of public examinations. This assertion is essentially based on the contention that:

> *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.*[30]

It would be fair to say, however, that this view is not universally accepted; indeed, that the Committee deemed this inquiry necessary is in and of itself evidence of perceived problems with the past use of public examinations by the CCC. The less-than-exemplary track record of the CCC in opening examinations to the public was best expressed to the Committee in the submission of the current Parliamentary Inspector, the Honourable Chris Steytler QC:

> *In my opinion, the Commission has not always had sufficient regard for the risk of unwarranted damage to reputation in exercising its discretion. That risk is always present in circumstances in which there is suspicion, rather than proof, of misconduct. Moreover, it is exacerbated by the more limited scope of procedural fairness accorded to a witness than would be the case in proceedings in a court. Witnesses are sometimes given short notice. Persons under investigation have only limited rights of cross-examination. The Commission has extraordinary powers that are not available to prosecutors or (ordinarily) police.*[31]

Supporting this assertion, the Parliamentary Inspector added:

> *In my opinion, recent events have also demonstrated that the Commission has not always paid sufficient regard to the health and*

[30] *Ibid.*, p23.

[31] The Honourable Chris Steytler QC, Parliamentary Inspector, *Submission*, 20 July 2012, p 3.

> *safety of persons affected by public hearings. A credible threat of self-harm should almost always be determinative against holding a hearing, or hearing the evidence of a particular person, in public, at least where the making of a suppression order will not be sufficient to avoid the risk.*[32]

Prior to making his submission to the Committee, the Parliamentary Inspector appeared before the Committee on 15 June 2011, where he explained that his "views on the topic of public hearings held by the Commission [had] undergone some change during [his] time as Parliamentary Inspector." The Parliamentary Inspector said:

> *I have always thought it wrong for any organisation to operate under too great a cloak of secrecy; openness and transparency are important aspects of accountability. Also, as we saw with the present Commissioner's predecessor body, secrecy breeds suspicion and mistrust. But these things have to be balanced against the harm that can come from publicity. The critical feature is, I think, that the Commission conducts its hearings as part of its investigative function. That is to say, it conducts its hearings—or at least it should conduct its hearings—at a time when suspicions have not yet crystallised into conclusive evidence of guilt. That means that there will inevitably be a considerable risk of damage to reputations that subsequently proves to have been unwarranted.*[33]

The Parliamentary Inspector went on to explain that while not enough weight had been given in the past to the rights of prospective witnesses, he also believed that too much weight had been given to the publicity that may flow from opening an examination to the public:

> *As this committee knows, the act requires that examinations be held in private, unless, having weighed the benefit of public awareness and public exposure against the potential for prejudice or privacy infringements, [the Commissioner] considers that it is in the public interest to hold them in public. Given that there are various means by which the Commission can, as it does, publicise its activities—including by way of publication of a report at the conclusion of its hearings—the need for publicity will seldom, if ever, be a sufficient reason in the case of an ordinary investigation into a question of whether a particular*

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32 *Ibid*.

33 The Honourable Chris Steytler QC, Parliamentary Inspector, and Mr Murray Alder, Assistant to the Parliamentary Inspector, *Transcript of Evidence*, 15 June 2011, p2.

> *person has or has not done something which, if proved, would amount to misconduct.*[34]

Summarising his view, the Parliamentary Inspector said to the Committee that, by the provisions of section 140(2) of the CCC Act:

> *…it should be a very rare case in which the public interest is found to outweigh potential prejudice and privacy interests.*

The Committee concurs and makes the following finding:

Finding 3

In accordance with the requirements of section 140(2) of the *Corruption and Crime Commission Act 2003*, it should be a very rare case in which the public interest is found to outweigh potential prejudice and privacy interests.

The media

Prevention of, and education about, public sector misconduct in Western Australia is one of the most important functions performed by the CCC. In giving due consideration to this fact, it is clear that the media in Western Australia plays an absolutely vital role in the discharge of this function, as it is through media reports of CCC activities – including public examinations – that the overwhelming majority of Western Australian citizens learn about the work and role of the CCC. As such, the role of the media must also be considered by the Commissioner when the weighing process is undertaken.

Yet this poses quite a challenge, as one of the greatest difficulties in the weighing process is the fact that the full ramifications of any decision to open an examination to the public cannot be known in advance. This is so because the examination is part of an investigation, and some facts that may be revealed cannot be known in advance and – worse – the Commissioner cannot be certain of the manner in which the facts of a public examination will be reported in the media. That is, the weighing process effectively requires the CCC Commissioner to be able to determine in advance:

- the level of publicity that a particular examination may attract;
- the focus and nature of the manner in which the facts (or otherwise) of the examination will be reported;
- whether or not this predicted reporting will increase public awareness about some particular occurrence of misconduct;

[34] *Ibid.*

- whether or not this predicted reporting will result in prejudice to a person and/or unduly infringe upon their privacy; and

- whether or not this predicted reporting will result in prejudice to any charges that may arise as a result of the investigation.

That the Commissioner must give due consideration to the publicity that may be generated by some particular CCC activity, along with the important role played by the media in effectively aiding the CCC to discharge one of its primary functions has – perhaps understandably – generated accusations that the CCC is motivated by the prospect of publicity. Indeed, during her appearance before a closed hearing of the Committee in aid of this inquiry, the widow of a man who committed suicide prior to his intended appearance before a public CCC examination said that:

> *The CCC apparently equates public interest to interest of the public. The simple truth of the matter is that [the CCC], knowing of the imminent prospect of my husband committing suicide, did not even give thought to my husband's possible death being more important than the CCC's need for publicity.*[35]

This led the witness to assert to the Committee that "the CCC should focus on investigation and education while an independent body unveils evidence." Though there may be some merit to this suggestion, insofar as the publicity that flows from public examinations most certainly does enhance the ability of the CCC to properly discharge its education and prevention function, the Committee believes that a better arrangement would be for the CCC to be more wary the fact that its work and role carries significant media interest

It is an unfortunate fact that Western Australian media outlets have consistently demonstrated an inability to show restraint in their coverage of CCC activities. Media reports of CCC examinations are oftentimes breathtaking in their simplification of what are often in fact very complex inquiries. This is, of course, not unexpected: the commercial realities faced by the media all through history have generally precluded space for nuance, and the ease with which possibly salacious material is woven into simplistic, attention-grabbing headlines is also an established phenomenon. In the current context, it must also be recognised that by the time media outlets are forced to print corrections to incorrect accounts of public CCC examinations, reputational damage has already been done.[36] As stated, the Committee believes that the CCC ought to demonstrate a better awareness of the limitations of the media – and at the very least this should demand that the privacy and judicial rights of witnesses are given

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35 Madam Witness, *Transcript of Evidence*, 28 September 2011, p2.

36 *The West Australian,* "Correction: Mike Allen," 2 June 2007, p6.

greater weight in the process of determining whether to open a CCC examination to the public than has so far been the case.

Perhaps for this reason, the CCC has demonstrated an increased inclination toward making suppression orders preventing the publication of names of witnesses appearing and third persons mentioned during public examinations in recent times. According to the Acting Commissioner Herron:

> *…the use of suppression orders has increased in recent times… with the Commission issuing 41 such orders in the period covering 2010 and 2011.*[37]

This figure – in relation to five matters that were the subject of public examinations – most certainly represents an increase in the use of suppression orders, as over the course of the previous four years, in which time 12 matters were the subject of public examinations, only 31 suppression orders were issued.

Though suppression orders are no guarantee against reputational damage, the Committee believes that the use of suppression orders does at least have the effect of constraining reporting to the facts of the misconduct that is being investigated, as opposed to the supposed mischievous deeds of some individual. It would therefore seem that the use of suppression orders could help to balance the rights of witnesses against the public interest benefit of highlighting the occurrence of some particular type of misconduct (and thereby curtailing its spread). The Committee sought the opinion of the Parliamentary Inspector on this point when the Chairman asked the Parliamentary Inspector if it were "a possibility, if the concern is about the reputation of individuals, that where a public hearing is enacted the use of an order for the suppression of names be made more frequent," to which the Parliamentary Inspector responded:

> *Yes, I think that is a valid comment, with respect, Mr Chair. I think that suppression orders could be made use of more frequently than they are. That would enable the media to be present, if they chose to be present, or anyone else who wanted to hear the evidence. They would simply be barred from publicising particular aspects of it.*[38]

This notion was also supported by the former Parliamentary Inspector and now Governor of Western Australia, His Excellency Malcolm McCusker AC CVO QC:

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37 CCC, *Submission*, 26 August 2011, p2.

38 The Honourable Chris Steytler QC, Parliamentary Inspector, and Mr Murray Alder, Assistant to the Parliamentary Inspector, *Transcript of Evidence*, 15 June 2011, p4.

> *One way of overcoming some of the prejudice that flows… is to suppress names, possibly, because there may be a public interest in having certain things exposed without it necessarily being in the public interest for the person concerned to be named at the public hearing.*[39]

Mr Burke, however, raised two valid points in disagreeing that an increased use of suppression orders would represent a mechanism by which the privacy and judicial rights of witnesses could be better protected:

> *Suppression orders are generally bad instruments that undermine the public confidence in any process. Once you place a suppression order on a particular evidence or identity, you immediately excite a whole new area of questioning that goes to the probity of the body and of the function. People start to ask: Why is the suppression order being placed into effect? Who is it there to protect? Why is it there to protect them? And, of course, you have a legitimate and ongoing, sometimes wrong-headed, view of the media that they should be able to publish whatever they like about anybody.*[40]

Though Mr Burke's assertion is not without merit, on balance the Committee agrees with the Parliamentary Inspector and Mr McCusker, and makes the following finding:

Finding 4

Suppression orders represent a mechanism by which the CCC may be able to confine reporting of public examinations to the misconduct being investigated, instead of the behaviour of specific individuals.

It is, of course, easy to apportion blame for unintended or unfair reputational damage to the media; of greater concern to the Committee is that the CCC has – at best – consistently demonstrated a general disregard for the manner in which the media functions. Nowhere is this better demonstrated than in the fact that past CCC Commissioners have at times allowed inappropriate questions to be put to witnesses by various counsels assisting the CCC.[41] Furthermore, that various counsels assisting the CCC have seen it fit – in the context of a public examination wherein the rights of witnesses are severely constrained – to use (to cite but one example) derogatory "throwaway" lines during questioning also reflects poorly upon some within the Western Australian legal fraternity.[42]

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39 His Excellency Malcolm McCusker AC CVO QC, *Transcript of Evidence*, 22 June 2011, p9.

40 Mr Brian Burke, *Transcript of Evidence*, 2 November 2011, p7.

41 *Ibid.*

42 CCC, *Report in the matter of an allegation of public sector misconduct concerning Mr John D'Orazio MLA*, 11 May 2006, p4.

CCC examinations aim to arrive at the truth of some matter, and in aid of this goal witnesses are compelled to answer any question deemed appropriate by the Commissioner. This is a significant departure from a regular court of law, and as such the Committee has long failed to understand why CCC witnesses – and particularly those who appear before public examinations – are so often treated with open hostility. Certainly it is understandable that in some quarters it is suggested that there seems to be an expectation within the CCC that every person called to be examined will attempt to obscure the truth in some way. Indeed, statements to this effect have even been made – contrary to the very Act of Parliament by which the CCC came into being – during public CCC examinations.[43]

This fact, and indeed the relationship between the media and the CCC during a public examination, came to be considered by the Acting Parliamentary Inspector, Mr Chris Zelestis QC, when he conducted an inquiry into alleged misconduct by CCC investigators through the course of 2010 and early 2011. Though the Acting Parliamentary Inspector concluded that no CCC officer had engaged in misconduct (and as such did not prepare a report as a result of his inquiry), the Committee was advised of the inquiry outcome and of several findings that were directly relevant to the use of public examinations by the CCC.[44]

In the course of his inquiry, Mr Zelestis considered a series of statements made by counsel assisting the CCC at the close of a particular series of public examinations:

> *Firstly, on evidence available to the Commission there is reason to believe that some witnesses who appeared to date have been less than completely frank and honest in their evidence.*
>
> *[…]*
>
> *If witnesses persist in deliberate untruthfulness they run the risk of committing further offences under the CCC Act.*

As these statements implied that some witnesses may have been "less than completely frank," in giving evidence to the CCC, Mr Zelestis turned his mind to a consideration of sections 22 and 23 of the CCC Act. Section 22 describes the assessments and opinions of misconduct that the CCC may make and form, while section 23 states:

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[43] Joint Standing Committee on the Corruption and Crime Commission*, Acting Parliamentary Inspector's Inquiry Concerning Examination Procedures by the Corruption and Crime Commission*, 1 September 2011, p7.

[44] The Committee duly reported these findings to Parliament in its 17th report, *Acting Parliamentary Inspector's inquiry concerning examination procedures by the Corruption and Crime Commission*, 1 September 2011.

> ***23. Commission must not publish opinion as to commission of offence***
>
> *(1) The Commission must not publish or report a finding or opinion that a particular person has committed, is committing or is about to commit a criminal offence or a disciplinary offence.*
>
> *(2) An opinion 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.*

According to Mr Zelestis, the statements made by counsel assisting – suggesting as they did that some witnesses had in effect lied to the CCC (which, by section 168 of the CCC Act, is a criminal offence) – amounted to the publication by the CCC of an offence, and were as such in contravention to section 23 of the Act. The CCC disagreed with this construction of the CCC Act, asserting that:

> *In the Commission's opinion, the word "finding or opinion" in the context of the CCC Act read as a whole must mean the formal expression (by the Commission as such) of a considered conclusion reached at the end of a deliberative process.*
>
> *What was said by Counsel Assisting in the course of the Commission's public hearings in an ongoing investigation cannot be so characterised.*
>
> *In the Commission's considered opinion, the legislative intent of section 23(1) is to prevent publication within the statutory reporting regime of the Commission of any concluded opinion or finding of the guilt of a particular individual, in respect of a criminal or disciplinary offence.*[45]

Mr Zelestis, however, disagreed:

> *Section 23 operates as an obvious qualification upon the power conferred in s.22. Not only is the Commission* not *given power to publish or report a finding or opinion that a person has committed an offence, but the Commission is expressly prohibited from publishing or reporting such a finding or opinion. However, there is much more to the prohibition in s.23 than this.*
>
> *The express terms of s.23 do not confine the prohibition to a formal expression of opinion at the end of a deliberative process. The nature*

[45] The Honourable Len Roberts-Smith RFD QC, CCC Commissioner, *Letter to the Acting Parliamentary Inspector*, 17 January 2011.

> *and purpose of the prohibition are much more fundamental than that. The purpose of s.23 is clear. Allegations that a person has committed an offence, etc (including an offence under s.168 of the Act of giving false evidence to the Commission) are to be made and determined in courts and tribunals of competent jurisdiction. No power at all is given to the Commission in that regard. It would be inconsistent with a person's right to a fair trial upon an allegation of commission of an offence to allow the Commission to make public statements about the commission of offences.*
>
> *Thus, the prohibition in s.23 is of fundamental importance in preserving the basic elements of the system of justice that prevails in Western Australia.*[46]

Mr Zelestis also observed that:

> *The Commission is a creature of statute, whose powers are confined to those given by the statute. Counsel assisting can only aid the Commission in the proper exercise of its powers. If the Commission is unable to do something, it cannot avoid the prohibition by causing its counsel assisting to do the thing. Nor can counsel assisting, of his or her own volition, do something which, if done by the Commission, would be beyond power.*[47]

The Committee concurs with Mr Zelestis. This is so because of three facts:

1. Statements made by counsel assisting the CCC or by the CCC Commissioner during a public examination are likely to be reported by the media. As such, the CCC should regard any such statements as being published by the CCC because, as the presence of the media is at the discretion of the CCC Commissioner, so too is the publication of these statements.

2. Insofar as the CCC is restricted or confined in any way by the CCC Act, so too is counsel assisting the CCC.

3. The role of the CCC is to improve the integrity of the Western Australian public sector; it is not the role of the CCC to determine whether or not a person has committed a criminal offence.

During his appearance before the Committee on 2 November 2011, Mr Brian Burke said to the Committee that "there is public disquiet," regarding the use of public

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[46] Mr Chris Zelestis QC, Acting Parliamentary Inspector, *Letter to the CCC Commissioner*, 9 February 2011.

[47] *Ibid.*

examinations by the CCC, "because the standard of behaviour of counsel assisting often leaves a great deal to be desired." Mr Burke continued:

> *In questioning one witness, counsel assisting embarked upon a florid and interesting line of question, to which another witness took exception and complained. The Parliamentary Inspector found that the level of performance, or that the questions asked, I should say, by the counsel assisting were offensive and gratuitous, but it went no further than that. So, a complaint was made to the legal profession complaints committee, and that committee found that the questions were offensive and gratuitous, but did not constitute unprofessional conduct and so were not worthy of whatever penalty—or did not entitle the committee to impose whatever penalty—was available to it.*[48]

Amendments to the CCC Act

Concluding his address to the Committee on 15 June 2011, the Parliamentary Inspector proposed two minor amendments to the CCC Act; he re-asserted this proposal in his submission to the Committee. According to the Parliamentary Inspector, the importance of the weighing process would be better emphasised if the word "considers" in section 140(2) were with "is satisfied." The passage would then read:

> *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***~~ ***is satisfied*** *that it is in the public interest to do so.*

Additionally, the Parliamentary Inspector proposed that:

> *there be a provision providing that, in making a decision under s 140(2), the Commission must, without derogating from its obligation to take into account any relevant consideration, have regard for: (i) the risk of unwarranted damage to the reputation of; and (ii) any credible risk to the health and safety of any person affected.*[49]

In making this suggestion, the current Parliamentary Inspector asserted that while "legally, the distinction may be one without a difference," such amendments would nonetheless "serve as a reminder that positive satisfaction is required."

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48 Mr Brian Burke, *Transcript of Evidence,* 2 November 2011, p4.

49 The Honourable Chris Steytler QC, *Submission*, 20 July 2012, p3.

The Committee concurs with the Parliamentary Inspector, and regards both of these proposed amendments as positive amendments to the CCC Act. It is the experience of the Committee that the CCC consistently demonstrates a proclivity toward only the most literal of interpretations of the CCC Act, and as such any amendment – even if without legal distinction – that would clarify the intent of Parliament within the CCC Act should most certainly be made. Furthermore, the Committee believes there would also be merit in specifying that a determination made under section 140(2) is made only by the Commissioner.

Accordingly, the Committee makes the following recommendations:

Recommendation 1

Section 140(2) of the *Corruption and Crime Commission Act 2003* should be amended so as to read:

The Commissioner 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, she or he is satisfied that it is in the public interest to do so.

Recommendation 2

A new subsection should be inserted into section 140 of the *Corruption and Crime Commission Act 2003* to read as follows:

In making a decision under s 140(2), the Commissioner must, without derogating from her or his obligation to take into account any relevant consideration, have regard for:

(i) the risk of unwarranted damage to the reputation of; and

(ii) any credible risk to the health and safety of

any person affected.

Mr McCusker appeared before the Committee in the week following the appearance of the current Parliamentary Inspector, having provided a detailed submission to the Committee in aid of the inquiry the previous day. In his submission, Mr McCusker stated:

> *I totally agree with the opening remarks made by Mr Steytler QC in his evidence given on the 15 June 2011. In particular, I agree with his view that "it would be a very rare case in which a public hearing could be justified in the public interest."*[50]

[50] His Excellency Malcolm McCusker AC CVO QC, *Submission*, 21 June 2011, p2.

Mr McCusker also voiced his endorsement of the amendment proposed by the Parliamentary Inspector:

> *No-one should be subjected to a public hearing unless the Commissioner is satisfied that there is a "public interest benefit" in publicly examining that person, outweighing the potential for prejudice to that person (or some other individual) by reason of the questions and the evidence to be given.*[51]

Notwithstanding his support for the proposed amendment, however, Mr McCusker voiced his concern that there exists no requirement that the weighing process required by section 140(2) be documented. As such, Mr McCusker proposed a further recommendation aimed at ensuring that public examinations would only be used in the right circumstances:

> *I would, however, suggest a further provision, requiring the Commissioner, before any public examination of any person is to be held, to prepare and sign a statement, justifying that decision, to explain why the public interest outweighs the potential for prejudice or privacy infringements arising from a public examination of that person. That statement should be more than a mere assertion of the conclusion reached, after the "weighing" exercise, but should give detailed reasons, in particular explaining what are the perceived "benefits of public exposure and public awareness". A copy of that statement should be provided to the Parliamentary Inspector, before the hearing, and also to the person proposed to be publicly examined, giving that person the opportunity to make submissions as to why that person should not be publicly examined.*[52]

Mr McCusker then further explained this proposal during his appearance before the Committee:

> *It is very easy simply to say, going through the motions, "We've weighed the public interest as against the damage to the individual, and we think that the public interest outweighs it, full stop"; that tells you nothing. What needs to be spelled out is why it is thought that the public interest outweighs the damage to the individual.*[53]

The Committee also endorses this recommendation, short of the requirement that the signed statement be also provided to the Parliamentary Inspector; the Committee

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51 *Ibid.*, p4.

52 *Ibid*., p7.

53 His Excellency Malcolm McCusker AC CVO QC, *Transcript of Evidence,* 22 June 2011, p8.

firmly believes that the Parliamentary Inspector's oversight of the CCC is best conducted in retrospect and functions best in the form of the prospect of review. This perspective is also shared by the Parliamentary Inspector, who informed the Committee that:

> *…I support the recommendation made by the former Parliamentary Inspector, Mr McCusker AO QC, that the Commissioner be required to prepare a signed memorandum of his reasons for holding a public hearing. While this would not affect the discretion conferred by the Act, it would be a significant accountability mechanism.*[54]

The Parliamentary Inspector added, however, that

> *I… have reservations concerning the appropriateness of the Commissioner being required to provide me with a copy of his reasons before holding a public hearing. My office should stand apart from the decision making processes of the Commission and it would be inappropriate for me to 'second-guess' the Commissioner. I appreciate that the suggestion made to the Committee in this respect was very probably not advanced with that in mind, but as an additional accountability mechanism. While there is merit in that suggestion, it seems to me that accountability is sufficiently achieved by my audit function, which would inevitably encompass the examination of reasons for holding hearings in public.*[55]

Over the course of this inquiry the Committee has heard evidence from a range of persons adversely affected by CCC public examinations, and is supportive of any credible measure aimed at preventing further problems in the future. Requiring that formal documentation explaining a decision to open an examination to the public be prepared and signed should not pose any great administrative burden upon the CCC Commissioner – especially not in light of the evidence that this is now in effect being done in any event[56] – and the benefits of this discipline would be significant.

Accordingly, the Committee makes the following recommendation:

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54 The Honourable Chris Steytler QC, *Letter re: Committee inquiry into the use of public examinations by the Corruption and Crime Commission*, 9 December 2011.

55 *Ibid.*

56 Mr Mark Herron, Acting CCC Commissioner, *Letter covering submission*, 26 August 2011, p1.

Recommendation 3

A new subsection should be inserted into section 140 of the *Corruption and Crime Commission Act 2003* to read as follows:

If a decision is made under s 140(2) to open an examination to the public, the Commissioner must prepare and sign a statement explaining why the public interest outweighs the potential for prejudice or privacy infringements arising from a public examination of that specific person. A copy of this statement must be provided to the person concerned prior to their examination, and that person is to be afforded the opportunity to make representations to the Commissioner as to why the statement may be incorrect.

Procedural fairness in CCC examinations

A consistent theme in the evidence of persons who, having previously been the subject of a public CCC examination, made submissions to and were invited to appear before the Committee in aid of this inquiry, was the lack of procedural fairness in CCC examinations. The present situation was summarised by the Parliamentary Inspector during his 15 June 2011 appearance:

> *The risk of unwarranted [reputational] damage is exacerbated by the more limited scope of procedural fairness afforded to witnesses appearing before the commission than would be the case in a court. Witnesses are sometimes given very short notice; they sometimes learn what is being inquired into only during the course of the examination; persons under investigation have limited rights of cross-examination; and the Commission has extraordinary powers that are not available to prosecutors or even to police.*

This was in direct contrast to the evidence of Acting Commissioner Herron on 18 May 2011, who said to the Committee that:

> *In addressing issues of procedural fairness, my personal view is that the act is sufficient in addressing all of those issues.*

The Acting Commissioner's belief was based upon the assertion that "in terms of how the hearings are conducted, it is important to understand that it is not an adversarial process, it is a part of an investigative process." As such, according to Acting Commissioner Herron:

> *You do not have a right to cross-examine witnesses. The witnesses are called by the commission and are compelled to answer questions. The commission conducts the examination of a particular witness. The*

> *witness has a right to be represented by a lawyer who needs to seek leave to appear. That lawyer is permitted, upon application, to ask their witness questions when counsel assisting has finished asking questions. It is constrained to certain issues because, as we often warn people, they often do not know all the information the commission has. Sometimes if you are acting for a person, it is better not to ask any questions because you are not quite sure what that might lead to.*[57]

While this may seem superficially unusual, none of it is particularly concerning in an investigative process: for the purposes of an investigation, difficult questions are often necessary and, when asked in private, are not damaging to reputations. It becomes problematic, however, when an investigation of this nature is open to the public – and as such, when the difficult questions are subsequently reported by the media. This problem was expressed to the Committee by Mr Kevin Merifield on 23 November 2011. A supporter of public CCC examinations, Mr Merifield said to the Committee that it was his belief that "open hearings played an important role in uncovering the revelations that occurred in the Smiths Beach [investigation]." Mr Merifield went on to explain, however, that:

> *If witnesses are honest and have nothing to hide, there is no reason why the hearings should not be open, providing—I put a big underline under "providing"—the media are responsible in their reporting.*[58]

These problems were also explained by the Parliamentary Inspector during his appearance before the Committee on 7 March 2012:

> *First but not most importantly, it is an anticorruption body, and for that reason its investigations carry with them a stain of corruption. Secondly, its processes when holding hearings are investigative; they are not akin to court proceedings whether of an adversarial or an inquisitorial kind in which there has already been found sufficient evidence to justify prosecution. So the risk to unjustified damage to reputations is much greater in the case of the commission than it is in the case of a court or even most royal commissions. Hearings in an investigatory phase may be more akin to police interviews than they are to court proceedings. In such cases, it might be as inappropriate to air what is said in the course of a hearing as it is to air what was said in the course of a police interview.*[59]

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57 Mr Mark Herron, *Transcript of Evidence*, 18 May 2011, pp4-5.

58 Mr Kevin Merifield, *Transcript of Evidence*, 23 November 2011, p1.

59 The Honourable Chris Steytler QC, Parliamentary Inspector, and Mr Murray Alder, Assistant to the Parliamentary Inspector, *Transcript of Evidence,* 7 March 2012, p9.

That the CCC permits lawyers to seek leave to appear in aid of witnesses offers little to guard against this problem, as Mr Julian Grill noted in his appearance before the Committee on 22 February 2012:

> *I was well represented at the various private hearings and public hearings, but I can say to you that my counsel there, although eminent counsel… never were able at any stage to make any substantial submission, or any submission at all, on my behalf, nor was I allowed to give evidence outside of the questions that were presented to me by the commission. I could not present evidence in my own right; I could not ask for witnesses to be called. We were not able to cross-examine, and I think worse than anything, witnesses were taken by surprise..*[60]

That witnesses are often "taken by surprise" was cited by multiple witnesses as being perhaps the most unsatisfactory aspect of the public examination process. In the words of Mr Burke:

> *Compounding the problems of the lack of procedural fairness is the acknowledged policy of the Commission not to give witnesses any notice or indication of the issues about which they are going to be questioned. In sworn evidence at the Magistrates Court, [a CCC investigator] said, "We try to provide as little evidence as possible, as little information as possible." When questioned, he agreed that this made it doubly difficult for people to be able to provide the information that they might have in their memory or in their files when they were not warned in any way about what they were to be questioned on.*[61]

It is of significant concern to the Committee that this established practice runs somewhat counter to the provisions of the CCC Act. That the CCC ought to provide information to witnesses in advance of their being examined is made clear by section 138(1) of the CCC Act, which reads:

> ***138. Conduct of examinations***
>
> *(1) Before the Commission conducts an examination for the purposes of an investigation under this Act, the Commission is to inform the witness of the general scope and purpose of the investigation.*

Though section 138(2) then states that "Subsection (1) does not apply if the Commission considers that in the circumstances it would be undesirable to so inform

[60] Mr Julian Grill, *Transcript of Evidence,* 22 February 2012, p2.

[61] Mr Brian Burke, *Transcript of Evidence*, 5 November 2011, pp3-4.

the witness," the Committee regards section 138(1) as a clear directive that witnesses should in the main be provided with information by the CCC regarding what it is that the CCC is seeking to examine.

Explaining the practice of the CCC during his appearance on 29 February 2012, Commissioner Macknay said to the Committee that:

> *The Commission will also adhere to section 138 and inform a witness of the general scope and purpose of an investigation before the witness gives evidence. Indeed, that evidence will be included on the face of the summons requiring the person to attend, and that summons is personally served.*
>
> *The Commission understands section 138 to absolve it from that requirement where to give notice would significantly detract from the efficacy of an investigation. That is, of course, when the investigation, as in all cases, is to uncover the truth, and to give notice would impede that truth discovery exercise. My involvement with the Commission is, of course, of short compass, but I am informed that, in the vast majority of cases involving the calling of a witness at a public hearing, the witness is told of the purpose for which he or she is being called.*[62]

Subsequent to this evidence, however, the Parliamentary Inspector made it clear to the Committee that he regarded the CCC practice of providing minimal information to witnesses as most concerning. The Parliamentary Inspector also challenged the evidence that witnesses were provided information "in the vast majority of cases," informing the Committee that:

> *I notice that Commissioner Macknay has said that section 138(1), which requires the Commission to inform a witness of the general scope and purpose of an investigation, does not apply to the Commission if it regards it as undesirable to so inform the witness. Commissioner Macknay also said that his understanding is that in the vast majority of cases notice is given. It my experience—and I may say this is contrary to the assumption made by the Commissioner; it is not based on examination of media reports but based on an examination of Commission files – my experience has been there have been number of instances in which notice has not been given at all or in which it has been given in terms which are so general as to make the notice meaningless. An example of a summons in which no notice under*

[62] The Honourable Roger Macknay QC, Commissioner, Mr Mike Silverstone, Executive Director, and Mr Paul O'Connor, Director Legal Services, Corruption and Crime Commission, *Transcript of Evidence*, 29 February 2012, p5.

> *section 138 (1) was given was the summons issued to Mr Sharp in the Brabazon inquiry, if I can call it that. He was a very senior officer at DEC in respect of whom, as far as I can tell, there was no evidence which should have created any suspicion of any kind. An example of a summons in which the notice was extremely broad is the summons which was served on Mark Brabazon, which described the scope and purpose of the Commission as being into whether any public servants had engaged in misconduct or whether anyone had procured or influenced them to do so in respect of but not limited to an application by Canal Rocks to develop land at Smiths Beach. While I do not have these to hand, my recollection of the summonses issued to Messrs Burke and Grill identified the investigation as one into whether any public servants had engaged in misconduct or whether any person had procured or influenced them to do so, without any other limitation. The failure to give notice, or to give meaningful notice, might occur for legitimate reasons, as the Commissioner has said, but it does affect the quality of the evidence given and, once again, that increases the risk of unjustified damage to reputations.*

All things considered, the Committee has formed the view that the manner in which the CCC conducts public examinations leaves a great deal to be desired:

Finding 5

The manner in which the CCC seeks to preserve procedural fairness during public examinations has to date, on occasion, been unsatisfactory.

The "section 86 process"

It was submitted by the CCC that:

> *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… is tabled.*

This second point is required under section 86 of the CCC Act, which states:

> ***86. Person subject to adverse report, entitlement of***
>
> *Before reporting any matters adverse to a person or body in a report under section 84 or 85, the Commission must give the person or body a reasonable opportunity to make representations to the Commission concerning those matters.*

Unfortunately, however, only the CCC regards the "section 86 process" as affording any level of procedural fairness. Multiple witnesses before the Committee criticised the process, with Mr Noel Crichton-Browne labelling it as "a nonsense [that] affords absolutely no protection," to CCC witnesses. When questioned further on this point, Mr Crichton-Browne said:

> *Section 86 is a nonsense and it has no effect… I wrote a Bible-length response to [a draft report with adverse findings], referring not only to the things I had said… but also pointing out factual errors. It fell on deaf ears. I say to you that there has to be a mechanism with respect to section 86 but as it presently applies it is ineffectual.*[63]

When asked if he believed the section 86 process was simply insufficient, or whether in fact it was totally pointless, Mr Crichton-Browne said:

> *the problem is that when section 86 is used, it has no impact on a predetermined view of the CCC and then the complainants go to the parliamentary inspector and the CCC says, "Well, that's your opinion and we're not moved by it." In other words, there is no proper check and balance.*[64]

The Parliamentary Inspector was similarly critical in his assessment of the procedure:

> *Experience shows that reputations are far more easily damaged than rehabilitated. It would be a triumph of optimism over experience to think that the section 86 process provides an adequate mechanism for the rehabilitation of reputation.*[65]

The Committee believes that section 86 of the CCC Act, and the "section 86 process" undertaken by the CCC prior to tabling a report in Parliament to be an important step in the reporting process. The Committee believes, however, that greater consideration should be given by the CCC to including –verbatim – representations made by persons in the course of that process. Indeed, the Committee has for some time now followed the practice of appending CCC representations to its own reports, as indeed it has done with this report.

Notwithstanding the above, however, it is clear that the "section 86 process" is inadequate as a measure of ensuring procedural fairness during public CCC examinations. Persons who are the subject of adverse questioning during examinations

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63 Mr Noel Crichton-Browne, *Transcript of Evidence*, 2 November 2011, p9.

64 *Ibid.*

65 The Honourable Chris Steytler QC, Parliamentary Inspector, and Mr Murray Alder, Assistant to the Parliamentary Inspector, *Transcript of Evidence*, 15 June 2011, p2.

at which the public are present ought to have the right to respond as they see fit during the examination, not several months later once a draft report has been drafted. Accordingly, the Committee believes that Parliament should give careful consideration to imposing a new model of procedural fairness upon the CCC by way of amendment to the CCC Act.

A new model

According to the Western Australian Ombudsman, procedural fairness:

> *is concerned with the procedures used by a decision-maker, rather than the actual outcome reached. It requires a fair and proper procedure be used when making a decision. The Ombudsman considers it highly likely that a decision-maker who follows a fair procedure will reach a fair and correct decision.*[66]

The Committee regards this as sound advice, and as such believes that there would be significant merit in devising a tangible model by which future CCC examinations might be conducted so as to ensure greater transparency in the manner in which these examinations are conducted.

On 30 November 2011 former CCC witness Mr Mike Allen appeared before the Committee and proposed a model by which procedural fairness might be better ensured during public CCC examinations in the future:

> *I believe the hearings should be conducted based on all of the Salmon principles of procedural fairness. The issue of procedural protections in public inquiries was considered in the United Kingdom by the Salmon Royal Commission on Tribunals of Inquiry in 1966. This produced six principles concerning procedural fairness, now commonly referred to as the Salmon principles and I understand these principles are generally used in public inquiries in Australia, including royal commissions. They have also been given statutory force in the Commissions of Inquiry Act in Tasmania. The conduct of the CCC's public hearings blatantly ignores these principles.*[67]

The "Salmon principles" were also referred to the Committee by the Honourable Chief Justice Wayne Martin QC during his appearance before the Committee on 22 February 2012. Subsequent to Mr Allen's appearance the Committee obtained and considered

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66 Ombudsman Western Australia, *Procedural fairness (natural justice)*, May 2009, available at <http:// http://www.ombudsman.wa.gov.au/Publications/Documents/guidelines/Procedural-fairness-guidelines.pdf> (accessed 16 March 2012)

67 Mr Mike Allen, *Transcript of Evidence*, 30 November 2011, p2.

the *Report of the Commission under the Chairmanship of the Rt. Hon. Lord Justice Salmon*, which was presented to the British House of Parliament in November 1966. In that report, various methods of conducting investigations into apparent lapses of public administration were considered and evaluated. Though almost fifty years have passed since the presentation of Lord Justice Salmon's report, this current inquiry has demonstrated that the report has scarcely waivered in its relevance, particularly in its assessment of the benefits of public examinations, and the dangers inherent to them.

The six "cardinal principles" of fair procedure devised by Lord Justice Salmon – principles that he asserted would largely remove "the difficulty and injustice with which persons involved in an inquiry may be faced" - are:

1. *Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the tribunal proposes to investigate.*

2. *Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations made against him and the substance of the evidence in support of them.*

3. *(a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.*

   (b) His legal expenses should normally be met out of public funds.

4. *He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.*

5. *Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.*

6. *He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.*[68]

It is the view of the Committee that there is significant merit in each of these six principles. Having formed the view that conducting public examinations in accordance with these six principles would significantly enhance the level of procedural fairness afforded to witnesses during those examination, the Committee sought the view of the Parliamentary Inspector:

[68] The Rt. Hon. Lord Cyril Barnet Salmon PC, *Royal Commission on Tribunals of Inquiry: Report on the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon*, November 1966, pp17-18.

***The CHAIRMAN**: …one thing I wanted to raise with you today is… the six cardinal principles of fair procedure under the Tribunals and Inquiries Act 1921 that were devised by Lord Justice Salmon. Now, the question I have is: would it be beneficial for any or all of those six principles to be set out in the [CCC] Act, in the sense that it would provide specific guidance from the Parliament to the Commission to say that in the event you do exercise your discretion and hold a public examination, you should do so with specific consideration of these six principles? Is that something that would be useful or is that something that is unnecessary?*

***Mr Steytler**: It is difficult because of the nature of the Commission. As I have said, it is not a court and it is not akin to many Royal Commissions. It can be investigating allegations which subsequently prove to be unfounded or it can be investigating allegations for which there is already a solid foundation in fact. Many of these principles are not applicable to a body like that as a matter of course; they may or may not be.*

Just looking at the principles in turn, the first one, I think, would necessarily be applicable: the tribunal would have to be satisfied that there are circumstances which affect the person who becomes involved in the inquiry, otherwise there would be no purpose behind having that person give evidence.

Proposition two is a proposition which seems to me should be followed as a matter of course, unless as the Commissioner has said there is a circumstance where informing a person of the allegations made against them and the substance of the evidence in support of them would lead to some form of dishonesty. That again is the difference between an investigation and a hearing. In a hearing you would have to satisfy that principle; in an investigation you may not—you would have to before you reached any conclusion, but you may not initially. But I would suggest that it should be the exception rather than the rule that that principle is not applicable.

The third one refers to an opportunity to prepare their case and of being assisted by legal advisers. Again, I think that that should already be the case.

The fourth one refers to them having the opportunity of being examined by their own solicitor or counsel and of stating their case in public at the inquiry. Again, in the kind of inquiry contemplated by Lord

Salmon that should always be the case. But in a case conducted by the Commission, I do not think it should necessarily be so. I notice that the Commissioner said in that respect that whether you allow the counsel to lead the witness or to cross-examine the witness does not seem to him to make much difference. That may or may not be so. Again, given the nature of the investigative process, it may be appropriate sometimes to have the Commission question the witness itself.

***The CHAIRMAN**: In relation to the fourth principle, is it the case that in the Corruption and Crime Commission's situation it should be able to ask questions? That principle says that in addition to that, the witness should also have the opportunity to have his solicitor ask questions.*

***Mr Steytler**: That should certainly be the case.*

***The CHAIRMAN**: I understand that that is not always the case.*

***Mr Steytler**: I think it should be. The fifth principle states that any material witnesses they wish to call should, if reasonably practical, be heard. I would have thought that should invariably be the case.*

***The CHAIRMAN**: Again, I understand that that is not always the case. The evidence from the Commissioner was to the effect that if someone has witnesses who they think are important, they should let the commission know and, of course, if they are important, the Commission would call them. The complaints have suggested otherwise. They would have like to have called other witnesses but there was no inclination on the part of the commission to do so.*

***Mr Steytler**: Again, I suggest that that should invariably be the position. The last proposition is they should have the opportunity of testing by cross-examination conducted by their own solicitor or counsel any evidence which may affect them. Again, it seems to me that that should plainly be the position.*

***The CHAIRMAN**: If the Committee was of the mind to make a recommendation that any amendment to the act—that the government should consider amending the act to reflect these principles, would you be supportive of that as a general premise?*

***Mr Steytler**: Subject only to this Mr Chairman: one has to bear in mind that the Commission is investigating rather than necessarily conducting a hearing as such. It may be a form of a hearing, but in truth it is an investigation in many circumstances. One of its powers is*

> *the power to compel people to give answers to questions, so instead of getting a witness who may refuse to talk to it, its only means of finding out what that witness has to say is to get the witness in on summons and to compel him or her to give evidence. It may not always be appropriate. For example, to apply the second proposition to a witness of that kind in the course of an investigation, although it would always be proper to do so before reaching any finding concerning the evidence given by that witness. That is the only proviso I have. It is for the same reasons that I suggest that the ordinary principles of private–public hearings are not necessarily applicable to the Commission and these principles would not necessarily apply to them all.*
>
> ***The CHAIRMAN**: Just as the act indicates the default position for the Commission should be private hearings—but it has the discretion to hold public hearings—could it then be said that the default position when holding a public hearing should be the use of these six principles while still allowing the discretion for the Commission to avoid that need if it were appropriate?*
>
> ***Mr Steytler**: Yes, I believe that would be an appropriate way of going.*[69]

Accordingly, the Committee makes the following finding and recommendation:

Finding 6

The CCC is an investigative body; it is not a judicial body.

[69] The Honourable Chris Steytler QC, Parliamentary Inspector, and Mr Murray Alder, Assistant to the Parliamentary Inspector, *Transcript of Evidence*, 7 March 2012, pp10-12.

Recommendation 4

The *Corruption and Crime Commission Act 2003* should be amended to ensure that CCC examinations – and especially those that are open to the public – are, at the discretion of the Commissioner, conducted broadly in line with the "six cardinal principles" of fair procedure for public examinations devised by the Rt Hon Lord Justice Salmon in 1966. This should be done by way of amending sections 138(1) and 138(2) of the Act to read as follows:

138. Conduct of examinations

(1) The Commission is to conduct its examinations in line with the following principles:

(a) Before any person becomes involved in an inquiry, the Commissioner must be satisfied that there are circumstances affecting that person which the Commission proposes to investigate;

(b) Before any person who is involved in an inquiry is called as a witness, that person should be informed of any allegations made against them and the substance of the evidence in support of those allegations;

(c) Any person called before a Commission examination should be given an adequate opportunity to prepare their case and to be assisted by legal advisers;

(d) Any person called before a Commission examination should have the opportunity of being examined by their own counsel and of stating their case during the examination;

(e) Any material witnesses that a person called before a Commission examination wishes to call should, if reasonably practicable, be heard; and

(f) Any person called before a Commission examination should have the opportunity to test, by cross-examination conducted by their own counsel, any evidence which may affect them.

(2) The application of any of the principles outlined in subsection (1) remains at the discretion of the Commissioner.

Public examinations at the discretion of the CCC Commissioner

While the Committee has formed the firm view that there is significant room for improvement in the way in which public CCC examinations are conducted, it is clear that in the right circumstances it is both useful and indeed desirable that certain CCC examinations be opened to the public. Indeed, one of the more recent series of public CCC examinations – those in aid of a misconduct investigation arising out of the arrest, detention and investigation of matters involving Mr Kevin Spratt by the Western

Australia Police and the Department of Corrective Services – is representative of a set of circumstances in which the transparency afforded by opening the examinations to the public brings with it a range of significant advantages over conducting the investigation in private. A number of these advantages are further considered by the Committee later in this report.

It is clear to the Committee that the CCC should – in the right circumstances – retain the ability to open an examination to the public. Furthermore, the Committee also believes that the Commissioner of the CCC should retain the discretion as to whether to open a particular examination to the public. Furthermore, the majority of witnesses who have appeared before the Committee in aid of this inquiry – even some of those who were sharply critical of the CCC – agreed that the CCC should be able to open certain investigations to the public, and that it should be the Commissioner who determines when the circumstances are right for this to occur.

There were, however, some witnesses who dissented from this view. In particular, when asked whether she thought the decision to open a public hearing should remain with the CCC Commissioner, the widow of the deceased CCC witness said:

> *No, I do not. I think they should have to go to a higher authority and somebody independent [should make] the decision whether a public hearing needs to be held or not.*[70]

With this suggestion in mind, the Committee wrote to both the CCC Commissioner and the Parliamentary Inspector in December 2011 to seek feedback on the proposal. Both asserted that implementing the proposal would be undermined by significant administrative difficulties. According to the Parliamentary Inspector:

> *It seems to me that the Commissioner of the Corruption and Crime Commission should retain the discretion to hold public examinations. The fact that (in my opinion at least) the discretion has miscarried in the past does not appear to me to justify its removal.*
>
> *There will be occasions upon which it is preferable to hold hearings in public and the Commissioner will ordinarily be in the best position to make that assessment.*[71]

The Parliamentary Inspector added that

> *it does not seem to me that it would be appropriate for me, or any other person, to be made an independent arbiter of a decision of this*

[70] Madam Witness, *Transcript of Evidence*, 28 September 2011, p 6.

[71] The Honourable Chris Steytler QC, *Letter re: Committee inquiry into the use of public examinations by the Corruption and Crime Commission*, 9 December 2011.

> *kind. As I have said, the Commissioner is best placed to exercise the discretion and should be trusted to do so appropriately, informed by past experience and subject to the applicable… accountability measures.*[72]

Again, the Committee finds itself in agreement with the Parliamentary Inspector, and makes the following findings and recommendation:

Finding 7

In the right circumstances, CCC examinations should be opened to the public.

Finding 8

The discretion as to whether or not to open a particular hearing to the public should remain with the CCC Commissioner.

Recommendation 5

The CCC Act should retain a statutory discretion for the CCC Commissioner to determine that an examination be held in public.

[72] *Ibid.*

Chapter 3

The use of public examinations by the CCC

As we have already indicated it is, in our view, of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth.

The Rt. Hon. Lord Cyril Barnet Salmon PC, 1966

Sunlight is said to be the best of disinfectants.

Justice Louis Brandeis, 1913

Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law: it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution.

Justice Louis Brandeis, 1928

Transparency

"Sunlight," wrote Louis Brandeis in 1913, "is said to be the best of disinfectants."[73] Today this quote is often cited to underscore the importance of transparency in governance, a phenomenon that has most certainly has become a paradigm of western democracies. As a mechanism by which public officials may be held to account by the citizenry that they serve, transparency is universally regarded as a key component in the prevention of public sector corruption.

[73] Louis Brandeis, *Other People's Money and How the Bankers Use It*, 1914, available at <http://www.law.louisville.edu/library/collections/brandeis/node/191> (accessed 19 March 2012).

In its report *How the Corruption and Crime Commission can best work together with the Western Australian Police Force to combat organised crime*, which was tabled in Parliament on 9 September 2010, the Committee observed that:

> *It is an unfortunate fact that the private interests of public servants sometimes override the goal of serving the public interest. In a broad sense, the phenomenon that is public sector corruption refers to any situation in which a public servant misuses the public powers available in order to affect, or to attempt to affect, personal or organisational gain. This troubling phenomenon strikes at the very heart of governance, and its existence poses a major challenge to societies worldwide.*[74]

A fundamental way in which governments worldwide take aim at this problem is by promoting transparency in governance. There exists a significant body of literature describing the benefits of this transparency; these benefits have been cited numerous times in various parliaments and courts, and global non-governmental organisations such as Transparency International exist to promote the practice as a fundamental mechanism of governmental accountability. As a concept, the benefit of transparency in governance underscores the United Nations Convention Against Corruption; for those countries that are signatory to the Convention, Article 10 requires that:

> *Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate.*[75]

In contemporary times, the most obvious result of the increased value placed upon transparency in governance has been the emergence of what has been labelled as the "fourth branch of government" – the integrity branch. The concept of this "fourth branch of government," and the vitality of the CCC in governance in Western Australia was articulated by the Honourable Chief Justice Wayne Martin QC during his appearance before the Committee on 22 February 2012:

> *I consider the CCC to be a vital component of what has come to be known as the integrity branch of government. What I mean by that is, of course, if you go back to traditional theories of government—to*

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74 Joint Standing Committee on the Corruption and Crime Commission, *How the Corruption and Crime Commission can best work together with the Western Australian Police Force to combat organised crime*, 9 September 2010, p218.

75 United Nations Convention Against Corruption (English), resolution 58/4 of 31 October 2003, available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed 9 March 2012).

> *Baron Montesquieu in the eighteenth century—those theories of government posit three branches: the legislative; the executive; and the judicial. It is a bit difficult to readily slot the CCC into that framework. Of course, the reason for creating three branches of government was to ensure that no branch of government had absolute power, because history tells us that absolute power tends to lead to despotism and tyranny, and of course each branch of government has the capacity to impose checks and balances on the other branches, which again reduces the risk of one branch of government maintaining absolute power. Again, experience has, I think, told us—it has come to be recognised in many liberal democracies such as ours—that merely separating the powers of government into separate branches does not provide completely adequate safeguards against maladministration and corruption, and so over the last 30 or 40 years or so in many jurisdictions, including ours, we have seen the development of agencies and procedures aimed at improving standards of administration and reducing the incidence of corruption. Together, those various agencies and procedures are often now referred to as the fourth branch of government and grouped under the head the "integrity branch". In Western Australia they include parliamentary committees such as this parliamentary committee, the Ombudsman, the Public Sector Standards Commissioner, the Auditor General, the processes for freedom of information, tribunals that review administrative decisions on their merits, such as the State Administrative Tribunal, royal commissions and other forms of public inquiry such as the inquiries under Public Sector Management Act—one of which is going on at the moment—courts, and of course the Corruption and Crime Commission.*[76]

During his appearance before the Committee Chief Justice Martin asserted that, as the CCC is charged with the responsibility of improving the integrity of the Western Australian public sector, the CCC ought to exemplify the behaviour that it seeks to promote – a notion that the Committee wholeheartedly subscribes to. As Chief Justice Martin put it, "transparency and openness has become a significant component of our democratic tradition," and, as a result, "the transparent operation of the various organs of government has become an accepted component of our liberal democracy."[77] Citing his experience with the justice system, his strong support of the statement of New South Wales Chief Justice Tom Bathurst that "the principle of open

[76] The Honourable Chief Justice Wayne Martin QC, *Transcript of Evidence*, 22 February 2012, p2.
[77] *Ibid*.

justice is one of the most fundamental aspects of the justice system in Australia,"[78] and his experience as Counsel Assisting the HIH Royal Commission,[79] Chief Justice Martin outlined eight reasons why he supported the use of – and indeed, would support an increase in the use of – public examinations by the CCC. These eight reasons are:

1. That transparency and openness in governance enhances democracy, and the expectation that the government in Western Australia will perform its duties in a transparent manner:

   …the net effect of [enhanced transparency in government] has been to develop a public expectation of transparency in the operation of all the agencies of government, including in particular an agency like the Commission. If that expectation is not fulfilled, it will inevitably breed suspicion and mistrust, and it will also, in my view, impede the important work of the commission in a number of respects to which I will now turn.

2. That transparency functions to enhance the integrity of the CCC:

   The CCC has been given very significant coercive powers. Those powers impinge upon a number of aspects of what we regard as traditional liberties and freedoms, including the so-called right to silence. The exercise of these important powers in public provides a significant constraint upon the potential for their abuse.

3. That the CCC is accountable to the public of Western Australia, and that this should be demonstrated:

   …ultimately the commission must be accountable to the public it serves, and in my view the best mechanism for ensuring public accountability is providing continuing public scrutiny. Unless the proceedings of the commission are conducted in public, the opportunity for public scrutiny is significantly reduced to the point where it may be only tokenistic.

4. That transparency enhances the reputation of the CCC, which is fundamental to the ability of the CCC to successfully discharge its functions:

   In order to effectively perform its functions, the Commission needs the respect and support of the public it serves. Unless the public perceives

[78] Rinehart v Welker [2011] NSWCA 403, quoted by the Honourable Chief Justice Wayne Martin QC, *Transcript of Evidence*, 22 February 2012.

[79] A Royal Commission set up in 2001 by Prime Minister John Howard into the circumstances surrounding the failure of the HIH Insurance Group.

the Commission to have integrity and to be competent and effective in the performance of its functions, complaints and the flow of information to the Commission will reduce, or perhaps ultimately dry up, and its function will be significantly impeded. The performance of functions of this kind in public, in my view, vitally assists the public perceptions of the integrity and efficacy of the commission.

5. That transparency aids in the investigative function of the CCC:

   In my view, there is little doubt that the publicity that attends public hearings of the Commission can be very useful to its investigative function by encouraging others who may have information relevant to the topic of inquiry to come forward

6. That the Western Australian public has a "right to know" about the work being performed by the CCC, which right is best satisfied by contemporaneous media coverage of CCC examinations:

   The public, I think, has a vital interest in standards of conduct within the public sector and in the elimination of corruption within that sector. I would regard that as creating a right of the public to know what is going on in the Commission and the matters it is investigating. I am of course aware that the Commission's investigations will usually result in a report, some or all of which will be made public. The publication of the report will generally occur a significant time after the events in question and after the inquiry has been conducted and will inevitably attract much less attention from the media than media reports of the public hearings of the Commission. That observation holds true for the royal commissions with which I have been involved. Media reporting of their subsequent reports is inevitably much less interesting and much less significant than the media reporting of the hearings that they conduct. Therefore, the report and the publication of it has much less impact on the public perception.

7. That transparency significantly enhances the ability of the CCC to successfully discharge its education function:

   [The CCC's education function] is, I think, a very important function and it involves increasing the public's awareness of the appropriate standards of public sector conduct. Techniques like the promulgation of reports, the conduct of training activities, the dissemination of written materials and other techniques of that kind are by their very nature unlikely to have anything like the impact of media reporting of

the public hearings of the Commission. The conduct of the public hearings and their reporting, in my view, is probably the most effective and powerful tool available to the Commission for the performance of its education function.

8. That transparency significantly enhances the ability of the CCC to successfully discharge its prevention function:

[The CCC's] investigative function occurs so that it can identify where misconduct or corrupt activity has taken place, but it is reasonable to assume that a great deal of misconduct and corrupt activity will inevitably not come to notice. If you take the most extreme example of corruption—a situation in which a bribe is given to a public official in return for a favour or benefit—both parties to that transaction have a very strong interest in making sure that it remains concealed. Inevitably, conduct of this kind will go undiscovered. Obviously the resources of government will never extend to having an investigative officer sitting in every office of every agency of government. It follows that the most enduring and significant benefit of the Commission's activities is likely to be in deterring others who might be minded to participate in activity of that kind by exposing those who have participated in such an activity in the past. The public reporting of the hearings of the commission is the best way I can think of providing that important deterrent message to the public sector and thereby enhancing and ensuring the maintenance of proper standards of behaviour within the public sector.[80]

Chief Justice Martin also referred the Committee to the *Report of the Commission under the Chairmanship of the Rt. Hon. Lord Justice Salmon*, as had Mr Mike Allen in his earlier appearance before the Committee. As has been noted, that report was presented to the British House of Parliament in November 1966, and represented the culmination of a Royal Commission conducted over the course of that year by Lord Salmon in which methods of conducting investigations into apparent lapses of public administration were considered and evaluated. Impressively, it remains both instructive and relevant in its assessment of the benefits of public examinations, and the dangers inherent to them to this day.

In considering the benefits of transparency in what were referred to as "Tribunals of Inquiry,"[81] Lord Salmon stated that:

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[80] The Honourable Chief Justice Wayne Martin QC, *Transcript of Evidence*, 22 February 2012, pp4-5.

[81] Lord Salmon's report was the culmination of a Royal Commission on Tribunals of Inquiry, which were investigative bodies set up under the provisions of the (now repealed) *Tribunals of Inquiry*

> *As we have already indicated it is, in our view, of the greatest importance that hearings before a Tribunal of Inquiry should be held in public. It is only when the public is present that the public will have complete confidence that everything possible has been done for the purpose of arriving at the truth.*[82]

Furthermore, Lord Salmon also asserted that:

> *When there is a crisis of public confidence about the alleged misconduct of persons in high places, the public naturally distrusts any investigation carried out behind closed doors. Investigations so conducted will always tend to promote the suspicion, however unjustified, that they are not being conducted sufficiently vigorously and thoroughly or that something is being hushed up.*[83]

From the above, the Committee laments the fact that the State Government of Western Australia apparently never consulted with Lord Salmon prior to 1988, when passage of the *Anti-Corruption Commission Act 1988* brought into existence the CCC's flawed precursor. As has been canvassed, the inability of the ACC to open any of its examinations to the public was a fundamental cause for that agency being plagued – fatally – by what Lord Salmon identified as "natural distrust." Governments and their agencies are entrusted with significant powers by their citizenry, and it is clear that in the contemporary era (and certainly in the Australian context) a significant degree of this trust is built upon transparency in the use of those powers. That is, the benefits of transparency mean that as a mechanism it is not simply a goal – it is an expectation.

Yet clearly – and indeed, appropriately – this expectation is somewhat tempered in relation to the role and work of the CCC. The CCC is able to draw upon extraordinary powers of investigation – including the ability to intercept telecommunications, to conduct physical and electronic surveillance, and to conduct controlled operations – all of which impinge upon the privacy of persons under investigation. As a result, Part 9 of the CCC Act deals with "disclosure, secrecy and protection of witnesses," and specifies significant penalties for any disclosure of sensitive information gathered by the CCC not expressly authorised by the Commissioner. Plainly, the citizens of Western Australia should not expect a transparent view of all CCC operations; indeed the vast majority of the CCC's work remains covert so as to protect the reputations of those against whom baseless accusations might be made.

(Evidence) Act 1921 (UK). In the Australian context, these Tribunals were very similar to Royal Commissions.

82 The Rt. Hon. Lord Cyril Barnet Salmon PC, *Royal Commission on Tribunals of Inquiry: Report on the Commission under the Chairmanship of The Rt. Hon. Lord Justice Salmon*, November 1966, p38.

83 *Ibid.*

When the word transparency is used in the context of governmental inquiries or investigations, it must be acknowledged that Royal Commissions and the like are set up to examine matters about which the public already has some knowledge. Plainly, when some facts about a particular incident are known publicly – and when rumour and innuendo is rife – opening the examination of this incident to the public is as much about reassuring citizens as to the probity of the investigation as it is to resolving the incident in question. It is rare, however, for the subject of any particular CCC investigation to be widely known while it is in train: indeed, in all but one of the fifteen investigations for which public hearings have been convened, the incident being investigated was totally unknown – at least to the vast majority of Western Australians – prior to the opening of the first examination.

It is therefore the case that while transparency represents an excellent reason for opening CCC examinations to the public, the fact is that public hearings offer only an extremely limited window upon the operations of the CCC. As such, while increased transparency is a positive externality of public CCC examinations, in considering why a determination to open a particular examination to the public might be made, it is better to consider the benefits of – and the problems with – exposure.

Exposure

In its submission to this inquiry, while the CCC refers to debate in Parliament that took place during the passage of the CCC Act in which the benefits of transparency were cited, the CCC itself makes only an oblique reference to transparency as being a benefit of opening its examinations to the public. Rather, the CCC makes much of the benefits of exposure, stating that:

> *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 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.*[84]

While there is clear merit in each of these notions, the first and last stated reasons are also somewhat problematic. At face value, the stated benefit of each seems clear: revealing incidents of misconduct to the public functions to curtail other similar forms of misconduct elsewhere. Implicit within this statement, however, is the inference that public examinations should function to expose behaviour that clearly amounts to misconduct. The Committee regards this assertion as troubling, as throughout this inquiry process the CCC have been at pains to point out that examinations – whether public or private – are convened as a component of an investigation.

Ordinarily, investigation becomes superfluous once the outcome is known. On the other hand, if the investigation is still pending, the notion that there is benefit in exposing the misconduct is paradoxical: if there only exists the suspicion of misconduct, and that suspicion is being investigated, it cannot then hold that the suspected misconduct should be exposed for all to see. It may well be the case that there is in fact no basis for the suspicion at all – yet by the time that conclusion is reached, the reputations of those examined may have been irreparably damaged.

Perception of punishment prior to guilt?

In its submission, the CCC asserts that strong evidence that misconduct has occurred – evidence so strong as to render further examination redundant – should not prevent the convening of a public examination. According to the CCC:

> *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.*

[84] CCC, *Submission*, 26 August 2011, pp27-28.

> *Instead that evidence should be passed on to the relevant prosecuting authority to be used in a criminal prosecution.*
>
> *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.*
>
> *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.*[85]

The CCC then cites the following example in support of this proposition:

> *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.*[86]

The Committee is not persuaded that the time that may elapse between public examinations in aid of an investigation and the tabling of a report pertaining to that investigation represents a sound reason for opening an examination to the public. Furthermore, the Committee expresses its grave concern at any perception that the opening of examinations to the public may represent a worthy method of punishing persons accused of misconduct. There would be a number of problems with engaging in a practice of this nature; a particular problem was expressed to the Committee by Mr Sam Salpietro on 30 November 2011. According to Mr Salpietro, when he was summonsed to appear before a public examination, his initial response was to attempt to contact the CCC "with a view to discussing the hearing and perhaps clearing up some of the issues that the CCC were pursuing." This opportunity was, however, not afforded to Mr Salpietro, much to his chagrin:

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85 *Ibid*., pp28-29.

86 *Ibid*., p29.

> *If we had met, I have absolutely no doubt that I could have given truthful and credible explanation for all the accusations and it would have been impossible for the CCC to throw the accusations at me during the hearing and they would have missed the opportunity of basking in the glow of sensational headlines. I believe that if the hearing had been private, I would have been allowed to meet with the CCC prior to the hearing and perhaps cleared up all the matters at that stage.*[87]

Whether Mr Salpietro is correct in his assertion or not, his experience is of concern to the Committee. This is so because a vital feature of governance in Western Australia (and indeed in most systems of government worldwide) is the doctrine of separation of powers, and within this system, it is important that executive and judicial powers are held separate. This does not occur if appearing before a public CCC examination is regarded as a punishment, and this problem is significantly exacerbated when the examination is investigative in nature.

It has been suggested to the Committee that CCC investigators have in the past cited the possibility that a person might be called before a public hearing as a strategy for motivating that person to provide information. Whether or not this is true, if the CCC harbours any perception that the discretion to open an examination to the public is a "power" or – worse – a tool by which the CCC might enact punishment unto persons however so strongly suspected of having engaged in misconduct, then this perception must be immediately rectified.

As mentioned, Mr Louis Brandeis is often cited as having encapsulated the entire anti-corruption movement in a single sentence. Mr Brandeis would become an Associate Justice of the Supreme Court of the United States in 1916, a position that he would serve until 1939, and in the course of his career he would have much to say about the importance of transparency and social justice. The Committee believes there to be significant merit in the sentiments he expressed in his dissenting judgement in *Olmstead v. U.S.*, 277 US at 485, in 1928:

> *Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law: it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit*

[87] Mr Sam Salpietro, *Transcript of Evidence*, 30 November 2011, p2.

> *crimes in order to secure the conviction of a private criminal - would bring terrible retribution.*[88]

The Committee believes strongly that the CCC most certainly ought to "teach" the public of Western Australia "by example," and indeed this is most certainly the case in the vast majority of work performed by the CCC. It is clear that the use of public examinations by the CCC over its duration have always attracted controversy. Unfortunately – notwithstanding the multitude of societal benefits that the practice can bring – this is unlikely to change.

A number of problems that have arisen out of past public CCC examinations are considered earlier in this report, including the manner in which questions have been put to witnesses by counsel assisting the CCC, the lack of procedural fairness afforded to witnesses during examinations, and the manner in which past public examinations have been reported upon in the media. The notion that opening a particular examination to the public is a sound method of punishing suspected misconduct is perhaps less obvious than some of these problems, but in the view of the Committee this is undoubtedly the most problematic of all aspects of public CCC examinations.

Notwithstanding any of this the Committee believes strongly that the discretion as to whether or not to open an examination to the public should remain with the CCC Commissioner. The benefits of the transparency afforded by this ability –when used in the right circumstances – are established and clear. The Committee, however, expresses concern that any particular hearing should be opened to the public so as to expose suspected misconduct. In instances where some facts regarding alleged misconduct are widely known, opening the associated examinations to the public brings a wealth of benefits and can in fact function to preserve reputations. If, however, the benefits of exposure are adjudged to be sufficient justification for opening an examination to the public then – as outlined earlier – the conduct of these examinations must change.

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88 Justice Louis Brandeis, *Olmstead v. U.S.*, 277 US at 485, (1928). Available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=277&invol=438> (accessed 19 March 2012).

Appendix One

Submission by the Parliamentary Inspector

On 20 July 2011 the Parliamentary Inspector, the Honourable Chris Steytler QC, provided the following submission to the Committee in aid of the inquiry.

PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

20 July 2011

The Hon Nick Goiran MLC
Chairman
Joint Standing Committee of the
Corruption and Crime Commission
Level 1, 11 Harvest Terrace
PERTH WA 6000

Dear Mr Chairman

INQUIRY INTO THE USE OF PUBLIC HEARINGS BY THE COMMISSION

Thank you for the invitation, extended in your letter to me dated 25 March 2011, to make a submission to the Committee in respect of its inquiry into the use of public hearings by the Corruption and Crime Commission (Commission).

The issue of whether or not Commission hearings should be held in private raises difficult questions to which there is no entirely satisfactory answer.

If public hearings take place there is the risk of serious (and often irremediable) damage to reputations in cases in which no finding adverse to the person affected is ultimately made. There is also the risk of self harm that arises as a consequence of associated publicity.

On the other hand, if all hearings are held in private that will inevitably give rise to mistrust, given what will be seen as the excessively secret processes adopted by the Commission. This was one of the problems faced by the Commission's predecessor body, the Anti-Corruption Commission. Also, private hearings result in the loss of the degree of accountability occasioned by public scrutiny of its processes.

As you know, s 139(1) of the *Corruption and Crime Commission Act 2003 (WA)* (Act) provides that, except as provided in s 140, an examination is not open to the public. 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.

Consequently, if the discretion entrusted to the Commission is appropriately exercised, public hearings will be the exception rather than the norm. That should be so for a number of reasons:

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1. The Act reflects a bias in favour of private hearings. The default position (that in which the Commission is not satisfied that the balancing process provided by s 140(2) falls in favour of a public hearing) is that hearings should not be open to the public.

2. The 'benefits of public exposure' will ordinarily be one or both of the following:

    (a) opening the Commission's processes up for public scrutiny;

    (b) enabling publication by the media, which, in turn:

        (i) has a deterrent effect on those who might be contemplating misconduct of the kind being enquired into; and

        (ii) might encourage additional witnesses to come forward.

3. The benefit in 2(a) will always be present and consequently cannot have been regarded by the legislature as being necessarily determinative.

4. The benefit in 2(b)(i) will be achieved in any event (albeit perhaps not to the same extent) by a report published by the Commission at the conclusion of a private hearing.

5. Ordinarily, the Commission will, by the time of a hearing, have identified those who will or might be able to give relevant evidence. As far as I am aware, it is unusual for a witness to come forward as a result of publication in circumstances in which he or she would not otherwise have been identified. Accordingly, the benefit in 2(b)(ii) will usually have little weight.

6. The benefits to which I have referred are consequently unlikely to be determinative in any case in which a public hearing will result in a serious infringement of privacy or other significant prejudice (bearing in mind that the formula in the Act is broadly expressed so as to require the Commission to take into account '*the potential for*' (my italics) 'prejudice' of any kind.

In circumstances in which the benefits of public exposure of the hearing process (as opposed to those following publication of a report) are small, and in which there is a genuine risk of self harm or of unnecessary damage to the reputation of those whose conduct is being enquired into or of witnesses appearing before the Commission, the discretion should always be exercised in favour of private hearings, or at least partially private hearings, given the statutory framework. Partially private hearings are plainly contemplated by the Act, which speaks in s 140(2) of opening 'an' examination to the public and, by s 140(4), provides that the Commission may close an otherwise open hearing 'for a particular purpose'. The Commission is required to separately consider the position of each prospective witness in this regard.

In my opinion, the Commission has not always had sufficient regard for the risk of unwarranted damage to reputation in exercising its discretion. That risk is always present in circumstances in which there is suspicion, rather than proof, of misconduct. Moreover, it is exacerbated by the more limited scope of procedural fairness accorded to a witness than would be the case in proceedings in a court. Witnesses are sometimes given short notice. Persons under investigation have only limited rights of cross-examination. The Commission has extraordinary powers that are not available to prosecutors or (ordinarily) police.

In my opinion, recent events have also demonstrated that the Commission has not always paid sufficient regard to the health and safety of persons affected by public hearings. A credible threat of self harm should almost always be determinative against holding a hearing, or hearing the evidence of a particular person, in public, at least where the making of a suppression order will not be sufficient to avoid the risk.

The fact that the discretion has previously miscarried seems to me to provide an insufficient justification for doing away with it. However, I suggest that consideration be given to two amendments to the Act, as follows:

(a) the words 'it considers', in the phrase 'it considers that it is in the public interest to do so' in s 140(2) of the Act, be deleted and replaced with the words 'it is satisfied that'; and

(b) there be a provision providing that, in making a decision under s 140(2), the Commission must, without derogating from its obligation to take into account any relevant consideration, have regard for:

(i) the risk of unwarranted damage to the reputation of; and

(ii) any credible risk to the health and safety of

any person affected.

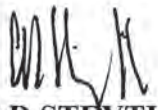
Those amendments might be thought not to effect any change of substance. However, they would emphasise the need for the Commission to be positively satisfied that it is in the public interest to hold a public hearing and serve to underline the importance of the considerations that are specifically mentioned.

Finally, so far as possible amendments are concerned, the Commission is precluded by s 23(1) of the Act from publishing or reporting a finding or opinion that a particular person has committed a criminal offence. As has been pointed out by the Acting Parliamentary Inspector, Mr Chris Zelestis QC, the prohibition extends to statements made by counsel with the authority of the Commission. Should the Commission maintain its opinion to the contrary (expressed by it to Mr Zelestis), the Act should be amended to put this beyond doubt.

I should perhaps add that the Commission should always be mindful of the responsibilities owed by counsel assisting it. It should, as far as possible, never allow counsel to make unnecessary or unfounded assertions reflecting adversely on the

reputation of any person or to put unnecessarily vexatious questions to those who are required to give evidence. These responsibilities (which are professional responsibilities that should be met even in private hearings) are especially important in public hearings when regard is had for the very great importance of reputation and its fragility, given that human nature is such that reputations are far more easily damaged than mended.

Yours faithfully,



C D STEYTLER QC
PARLIAMENTARY INSPECTOR

Appendix Two

Submission provided by the CCC

On 26 August 2011 the CCC provided the following submission, along with a covering letter by Acting CCC Commissioner Mark Herron, to the Committee in aid of the inquiry.

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.

[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].*

[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.

[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, p786Ib-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:

[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]

[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.

Appendix Three

Inquiry Terms of Reference

That the Committee inquire into and report on:

- *what factors the Commissioner of the Corruption and Crime Commission takes into account when deciding whether or not to conduct a public hearing;*
- *how the Corruption and Crime Commission preserves procedural fairness in conducting public hearings;*
- *how the Corruption and Crime Commission's practices in this regard compare to other jurisdictions;*
- *whether the Corruption and Crime Commission should maintain a statutory discretion to conduct public hearings in the exercise of its misconduct function; and*
- *if so, what statutory criteria should apply.*

Appendix Four

Submissions received

Name	Role	Organisation
Mr Kevin Merifield	Former CCC witness	
Mr Paul Dickinson	Interested citizen	
Mr Graham Pidco	Interested citizen	
Mr Allan Peachment	Interested citizen	
Mr Robert McKay	Interested citizen	
Michael Sinclair-Jones	WA Branch Secretary	Media, Entertainment and Arts Alliance
Mr Mike Allen	Former CCC witness	
His Excellency Malcolm McCusker AC CVO QC	Former Parliamentary Inspector	
The Honourable Chris Steytler QC	Parliamentary Inspector	
Mr Sam Salpietro	Former CCC witness	
Mr Brian Burke	Former CCC witness	
Mr Mark Herron	Acting Commissioner	CCC
Mr Noel Crichton-Browne	Former CCC witness	
Mr Julian Grill	Former CCC witness	
Professor Jeanette Hacket	Vice-Chancellor and President	Curtin University
Mr Anthony Fels	Interested citizen*	

* The originally tabled version of this report incorrectly referred to Mr Fels as a "former CCC witness." This was incorrect, as Mr Fels has never been a witness to any CCC examination, and has never been the subject of any CCC investigation.

Appendix Five

Hearings

Date	Name	Role	Organisation
18 May 2011	Mr Mark Herron	Acting Commissioner	CCC
	Mr Mike Silverstone	Executive Director	
15 June 2011	The Honourable Chris Steytler QC	Parliamentary Inspector	Office of the Parliamentary Inspector of the CCC
	Mr Murray Alder	Assistant to the Parliamentary Inspector	
22 June 2011	His Excellency Malcolm McCusker AC CVO QC	Former Parliamentary Inspector	
28 September 2011	Madam Witness		
2 November 2011	Mr Noel Crichton-Browne	Former CCC witness	
	Mr Brian Burke	Former CCC witness	
23 November 2011	Mr Kevin Merifield	Former CCC witness	
30 November 2011	Mr Mike Allen	Former CCC witness	
	Mr Sam Salpietro	Former CCC witness	
22 February 2012	The Honourable Wayne Martin QC	Chief Justice of Western Australia	
	Mr Julian Grill	Former CCC witness	
29 February 2012	The Honourable Roger Macknay QC	Commissioner	CCC
	Mr Mike Silverstone	Executive Director	
	Mr Paul O'Connor	Director Legal Services	
7 March 2012	The Honourable Chris Steytler QC	Parliamentary Inspector	Office of the Parliamentary Inspector of the CCC
	Mr Murray Alder	Assistant to the Parliamentary Inspector	

Appendix Six

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.