

12 November 1992

His Excellency the Honourable Sir Francis Burt, AC, KCMG, QC
Governor of the State of Western Australia
Government House
St George's Terrace
PERTH WA 6000

Your Excellency

In accordance with the Commission issued to us on 8 January 1991 and subsequently varied, we have the honour to present to you Part II of the report of our inquiry into the terms of reference set out therein.

This is our final report.

Yours faithfully

G A Kennedy
Chairman

R D Wilson
Commissioner

P F Brinsden
Commissioner

PART II

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LIST OF RECOMMENDATIONS

A list of the recommendations made by the Commission in this part of its report, appears below. The recommendations should be read in the context of the sections of the report in which they appear.

Chapter 2 Open Government

Recommendation 1

Freedom of Information legislation be enacted in this State as a matter of priority. (Paragraph 2.2.3)

Recommendation 2

The Freedom of Information Bill be amended, so that:

- (a) persons may require the correction of their personal records held by agencies;*
- (b) when an agency is not itself in possession of a document but either knows another agency holds the document or has reasonable grounds to believe it holds the document, the agency is obliged to transfer the request and to inform the applicant;*
- (c) where an agency is in possession of the only copy of a document which is not a document of the agency, it is obliged to transfer the FOI request in accordance with clause 15(2) of the Bill, together with a copy of the document and to inform the applicant; and*
- (d) the Information Commissioner is obliged to publish reasons for decision in an appropriate form so that the public is adequately informed of the basis of all decisions made under the legislation by the Information Commissioner. (Paragraph 2.2.5)*

Recommendation 3

An Administrative Decisions (Reasons) Act be enacted as a matter of urgency in accordance with the 1986 Report of the Law Reform Commission of Western Australia in Project No 26 Part II. (Paragraph 2.2.10)

Recommendation 4

The Commission on Government review the secrecy laws of this State, both statutory and common law, as they apply to information possessed by government, its officials and agencies. (Paragraph 2.3.9)

Recommendation 5

Section 58C of the Financial Administration and Audit Act 1985 be amended so that:

- (a) the minister is obliged to notify both the Parliament and the Auditor General in writing of any action that has been taken or obligation incurred to which section 58C is relevant, and the reasons why it is reasonable and appropriate that the provision of information to Parliament is to be prevented or inhibited to the extent that this is the case; and*
- (b) notwithstanding any secrecy undertaking or claim, the Auditor General is entitled, as of right, to access to that information to the extent that, in the opinion of the Auditor General, it is or could be relevant to the discharge of his or her audit responsibilities. (Paragraph 2.5.20)*

Recommendation 6

- (a) The recommendations of the Auditor General contained in the 1991 Report on the Management of Guarantees, Indemnities and Sureties be given urgent attention by the Government.*
- (b) Steps be taken to ensure that Treasury is informed by all agencies of government of the giving of any guarantees and indemnities pursuant to legislative powers as soon as possible after they have been given.*
- (c) The Treasurer should be responsible for the giving of all guarantees, indemnities and "sureties" responsibility for which, by law, is not vested in another public official.*
- (d) Guarantees, indemnities and "sureties" in respect of matters of significance should require Cabinet approval.*

- (e) *The Treasurer or other minister or public official responsible for the giving of any guarantee or indemnity, and the Treasurer in the case of a "surety", should notify Parliament and the Auditor General of its nature, full extent and purpose as soon as practicable following its being given. (Paragraph 2.6.8)*

Recommendation 7

The Commission on Government inquire into the organisation, role and functions of press secretaries and of the Government Media Office. (Paragraph 2.7.6)

Chapter 3 Accountability

Recommendation 8

The recommendations contained in the Reports of the Law Reform Commission of Western Australia in Project No 26, Part I and Part II, be implemented forthwith, subject to the observations in paragraph 3.5.2 of chapter 3 concerning the establishment of an Administrative Appeals Tribunal. (Paragraph 3.4.8)

Recommendation 9

All public sector bodies, programmes and activities involving any use of public resources, be the subject of audit by the Auditor General. (Paragraph 3.10.7)

Recommendation 10

- (a) *The office of the Auditor General be constituted by a separate Audit Act.*
- (b) *The Auditor General be appointed for a period of up to 10 years, rather than to the age of 65 as the Financial Administration and Audit Act 1985 currently provides.*
- (c) *The Auditor General report directly to Parliament.*
- (d) *A Joint Parliamentary Committee be responsible for the overseeing of the Auditor General.*
- (e) *The Parliament exercise a direct role in the selection of the person to be the Auditor General.*

(f) *The Parliament, with the advice of the Joint Parliamentary Committee, be responsible for recommending to the Treasurer the appropriate budget for the office. (Paragraph 3.10.12)*

Recommendation 11

The legislation governing the functions of the Auditor General provide the office with the power to call for such cabinet documents as may be necessary for the purpose of the exercise of the functions of the office of Auditor General. (Paragraph 3.10.15)

Recommendation 12

The legislation governing the functions of the Auditor General provide the office with all necessary powers to call for information and the production of documents, and to compel the appearance of persons, as may be necessary for the purpose of exercising all such functions. (Paragraph 3.10.17)

Recommendation 13

The legislation governing the functions of the Auditor General provide that no claim of legal professional privilege be maintainable against the Auditor General by the Government or by any public sector agency. (Paragraph 3.10.19)

Recommendation 14

The legislation governing the functions of the Auditor General provide that:

- (a) a person be required to answer any question put by the Auditor General and to produce any relevant documents, notwithstanding that the answer or the information may result in or tend towards self-incrimination; and*
- (b) evidence given by any person at a hearing before the Auditor General not be available for use against that person in any proceedings, save for the purposes of the investigation or hearing before the Auditor General and in respect of a prosecution for breach of the relevant legislation. (Paragraph 3.10.21)*

Recommendation 15

- (a) *Where a company is created or acquired by the Government or a statutory authority, the responsible minister table in Parliament a notification of this fact, the reasons for the creation or acquisition of the company and the business or other purposes to be pursued by the company.*
- (b) *A central register of all such companies be kept in the office of the Auditor General, the official or authority responsible for the creation or acquisition of a company being obliged to provide that office with the information required to be entered in that register.*
- (c) *On the creation or acquisition of a company by the Government or a statutory authority it thereby becomes subject to the State-owned Companies Act we are proposing.*
- (d) *The State Trading Concerns Act 1916, be repealed. (Paragraph 3.14.10)*

Recommendation 16

- (a) *If a statutory authority or State-owned company is to be given some level of independence of ministerial control, that autonomy must be conferred openly and explicitly by Parliament. It should not be left to inference.*
- (b) *A public servant should not be appointed to the board of a statutory authority or State-owned company while retaining a position in the Public Service in a department within any portfolio of the minister responsible for that body. (Paragraph 3.14.13)*

Recommendation 17

Legislation provide that:

- (a) *members of all boards of authorities and State-owned companies be required to conform to the same standards of probity and integrity as expected of persons occupying positions of trust; and*

- (b) *members of all boards of authorities and State-owned companies responsible for any business activity be required to exercise reasonable care and diligence in the exercise of their powers. (Paragraph 3.14.17)*

Recommendation 18

All existing and future State-owned or controlled bodies be subject both to the audit of the Auditor General and to the provisions of the Financial Administration and Audit Act 1985. (Paragraph 3.14.19)

Recommendation 19

A State-owned Companies Act be enacted which will apply to all companies currently owned, or subsequently created or acquired, by the government or a statutory authority except when, in the case of a particular company, specific legislation is enacted governing the conduct of its affairs and its accountability. (Paragraph 3.14.22)

Chapter 4 Integrity in Government

Recommendation 20

- (a) *A separate and independent archives authority be established, acting under its own legislation.*
- (b) *The Commission on Government inquire into the terms of the legislation. (Paragraph 4.3.6)*

Recommendation 21

The Government review the criminal law for the purpose of assessing its adequacy in proscribing conduct in public office for which criminal sanctions should be available. (Paragraph 4.5.5)

Recommendation 22

The Commission on Government review the standards of conduct expected of all public officials for the purposes of (a) their formulation in codes of conduct and (b) determining what associated measures should be taken to facilitate adherence to those standards. (Paragraph 4.6.15)

Recommendation 23

The Commission on Government review the legislative and other measures to be taken –

- (a) to facilitate the making and the investigation of whistleblowing complaints;*
- (b) to establish appropriate and effective protections for whistleblowers; and*
- (c) to accommodate any necessary protection for those against whom allegations are made. (Paragraph 4.7.18)*

Recommendation 24

The Commission on Government inquire into the registration of the pecuniary and other interests of members of Parliament, ministers, senior public servants, members and senior officers of statutory authorities and State-owned companies, and of such other officials for whom registration in some form may be appropriate, given their official responsibilities. (Paragraph 4.8.12)

Recommendation 25

The office of Commissioner for the Investigation of Corrupt and Improper Conduct be established in accordance with the requirements set out in Appendix 2. (Paragraph 4.9.11)

Chapter 5 The Parliament

Recommendation 26

The Commission on Government inquire into the most effective means of securing the financial independence of the Parliament so that, within clearly defined budgetary limits, the presiding officers and heads of parliamentary departments are able to manage the resources which enable the Parliament to undertake its business. (Paragraph 5.2.4)

Recommendation 27

The Legislative Council be acknowledged as having the review and scrutiny of the management and operations

of the public sector of the State as one of its primary responsibilities. (Paragraph 5.3.7)

Recommendation 28

The Commission on Government review the electoral system for representation in the Legislative Council. (Paragraph 5.3.11)

Recommendation 29

The Commission on Government review the electoral system for representation in the Legislative Assembly. (Paragraph 5.3.16)

Recommendation 30

The Commission on Government inquire into the means best suited to be adopted by the Parliament to bring the entire public sector under its scrutiny and review. In this, particular regard should be had –

- (a) to the use of parliamentary committees for the purpose;*
- (b) to question time; and*
- (c) to the manner in which the departments and agencies of government should be required to report to the Parliament. (Paragraph 5.4.4)*

Recommendation 31

- (a) The Auditor General, the Ombudsman, the Electoral Commissioner and the proposed Commissioner for Public Sector Standards and Commissioner for the Investigation of Corrupt and Improper Conduct be designated independent parliamentary agencies in the legislation establishing their respective offices.*
- (b) Appropriate legislative arrangements be made for the participation of the Parliament, ordinarily through its committee system, in the processes leading to the nomination of a person for appointment to each of these offices.*
- (c) Each of these officials be removable from office only on the address of both Houses of Parliament.*

- (d) *In the case of each office, a parliamentary committee be responsible for recommending to the Treasurer the appropriate budget for the office.*
- (e) *Each officer be required to report annually to the Parliament and, in addition, to report from time to time to the appropriate parliamentary committee. (Paragraph 5.5.6)*

Recommendation 32

The Commission on Government, as part of the review of parliamentary committees, consider the role of committees on legislation, including the accommodation of the right of the public to make representations on legislative measures referred to such committees. (Paragraph 5.7.8)

Recommendation 33

The Commission on Government examine the Parliamentary Privileges Act 1891 with a view to permitting proceedings in Parliament to be questioned in a court or like place while preserving the principle of free speech in Parliament. (Paragraph 5.8.8)

Recommendation 34

- (a) *If the Electoral Amendment (Political Finance) Bill is still before the Parliament, it be amended in the light of the Commission's detailed proposals set out in Appendix 3.*
- (b) *If the Parliament does not enact the Electoral Amendment (Political Finance) Bill, or enacts the Bill without taking into account the Commission's detailed proposals set out in Appendix 3, then the Commission on Government inquire into the disclosure of political donations and contributions.*
- (c) *In any event, the Commission on Government inquire into –*
 - (i) *the disclosure of electoral expenditure; and*
 - (ii) *such other measures relating to political finance as may enhance the integrity of the*

system of representative government.
(Paragraph 5.9.14)

Recommendation 35

All government instrumentalities, agencies and corporations, as part of their annual reports, be required to disclose all expenditure on -

- (a) advertising agencies;
- (b) market research organisations;
- (c) polling organisations;
- (d) direct mail organisations;
- (e) direct postal or other direct communications to electors or to householders;
- (f) public relations organisations; and
- (g) media advertising organisations,

and the persons or organisations to whom these amounts were paid. Disclosure should not be required if the aggregate expenditure of any relevant body does not exceed \$1,000. The Auditor General should monitor compliance with this requirement. (Paragraph 5.9.17)

Recommendation 36

The Commission on Government inquire into -

- (a) the desirability of regulating government advertising during an election period; and
- (b) the desirability of regulating travel by persons in or connected with the government during an election period. (Paragraph 5.9.22)

Chapter 6 The Administrative System

Recommendation 37

- (a) The Government give consideration to the introduction of a Public Sector Management Act.

- (b) *A Commissioner for Public Sector Standards be established whose jurisdiction extends to all the departments and agencies of government. (Paragraph 6.2.8)*

Recommendation 38

The Government review the Public Service Act 1978, whether as part of the Government's consideration of the enactment of a Public Sector Management Act, or, if that course is not to be pursued, on its own account. (Paragraph 6.3.11)

Recommendation 39

- (a) *The financial provision made for ministerial staff be the subject of separate parliamentary appropriation.*
- (b) *The employment arrangements for ministerial staff be the subject of special legislation and monitored by the Commissioner for Public Sector Standards (or the Public Service Commissioner, if the former office is not created).*
- (c) *The manner in which ministerial staff are to deal with the officers of departments and agencies, other than with the chief executive officer, be made the subject of clear and explicit procedures. (Paragraph 6.4.11)*

Chapter 7 Commission on Government

Recommendation 40

A Commission on Government be established in accordance with the requirements set out in paragraph 7.3.1 of chapter 7. (Paragraph 7.3.2)

* * *

PART II

PRELIMINARY OBSERVATIONS

The Commission's Task

The Commissioners are required by their Commission, as affected by the *Royal Commission into Commercial Activities of Government Act 1992*, to inquire and report whether there has been —

- (a) corruption;
- (b) illegal conduct; or
- (c) improper conduct,

by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations in respect of the matters set out in Schedule 1 and Schedule 2 of their Commission and to report whether —

- (d) any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings; or
- (e) changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest.

On 19 October 1992, the Commission presented an interim report, Part I, to the Administrator. This report, Part II, completes the Commission's task. It is our response to the direction to us contained in the terms of reference "to report whether ... (e) changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest".

As we recorded in our interim report, the Commission was required to report before 1 November 1992. However, we found it impossible to comply with that

requirement. The Premier was notified of our difficulty, and as a result the Honourable William Page Pidgeon, Deputy of the Lieutenant Governor and Administrator, with the advice and consent of the Executive Council, duly declared that our Commission was varied so as to require us to report before 14 November 1992.

It must be emphasised that Part II of the report is a product of the evidence the Commission has heard since February 1991. The relationship between the two reports is such that we have described our earlier report as "Part I" and this final report as "Part II". We understand our task now is to reflect on what we have learned and to propose measures which we conceive will protect the community from a return to the experience of the eighties. The highlights of that experience are to be found in the conclusion to Part I and in chapter 1 of this part.

Consultation with the public

From the commencement of the Commission, we were conscious of the importance of allowing for consultation with members of the public when considering questions of law reform and changes to administrative or decision making procedures. As soon, therefore, as the hearings had advanced sufficiently for the purpose, the Commission published an Issues Paper which explained the matters which appeared likely to reveal the need, in the public interest, for reform. The Issues Paper was distributed widely, together with an invitation to members of the public to assist the Commission with their submissions. We received some 130 submissions, many of them substantial. Included were submissions from the State Government, the Leader of the Opposition, political parties and certain State public officials. The Commission wishes to thank all those persons and organisations who took the opportunity presented by the Issues Paper to make submissions to the Commission. We have taken those submissions into consideration in preparing this final report. The Issues Paper, together with a brief comment on the content of the submissions received, is contained in Appendix 1 incorporated in this part of the report. Originally, it was our hope and expectation that the Commission would arrange for public seminars and a limited amount of evidence, in order to receive further input from the community. Unfortunately, however, the time available to the Commission was insufficient to allow those further initiatives to be pursued. We emphasise, at several places in the report, the importance of consultation with members of the public concurrently with the further consideration and implementation of our recommendations.

Certain matters raised in submissions received from Dr M Wood, the Public Service Commissioner, and Mr D Pearson, the Auditor General for Western Australia, were the subject of detailed discussions with those public officials. The Commission also received the benefit of the views of Mr John Taylor AO, Auditor General for Australia, in relation to matters touching on the functions of the office of Auditor General. We place on record our appreciation for the assistance so readily given by these officials.

Acknowledgement

In the preparation of this part of the report, the Commission has drawn guidance and advice from persons learned in the fields of government law and policy, and the practice of government, Parliament and the political process. We record our indebtedness, in particular, to Professor Paul Finn of the Division of Philosophy and Law of the Research School of Social Sciences, Australian National University, Canberra, without whose guidance the Commission would not, in the time available to it, have gained such a detailed appreciation of the manner in which the issues confronting this Commission have been dealt with elsewhere in Australia and in other Western democracies. His advice has been of inestimable value to our deliberations. We also acknowledge with appreciation the guidance we have received from Professor Hugh Collins, Professor of Government and Politics, School of Social Sciences and Professor Peter Boyce, Vice Chancellor, both of Murdoch University, Perth, in relation to the practical workings of government, the Parliament and the political process. The Commission has continued, of course, to appreciate the assistance of Counsel Assisting.

The views we have expressed in the light of the advice we have received are and must remain our own.

Matters arising in respect of Part I

Some matters relating to our interim report which have arisen since its publication are referred to in Appendix 4.

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CHAPTER 1

INTRODUCTION

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1.1 Introduction

1.1.1 The Commission has found conduct and practices on the part of certain persons involved in government in the period from 1983 to 1989 which were such as to place our governmental system at risk. Unfortunately, some of that conduct and some of those practices were peculiar to Western Australia; but there is no reason to believe that many of the fundamental questions raised by our inquiry were unique to this period or to this State. On the contrary, as detailed studies in other States and overseas clearly demonstrate, they have been raised elsewhere as a consequence of events similar to those which we have experienced.

1.1.2 Some ministers elevated personal or party advantage over their constitutional obligation to act in the public interest. The decision to lend Government support to the rescue of Rothwells in October 1987 was principally that of Mr Burke as Premier. Mr Burke's motives in supporting the rescue were not related solely to proper governmental concerns. They derived in part from his well-established relationship with Mr Connell, the chairman and major shareholder of Rothwells, and from his desire to preserve the standing of the Australian Labor Party in the eyes of those sections of the business community from which it had secured much financial support.

1.1.3 Subsequently, Mr Dowding, as Premier, presided over a disastrous series of decisions designed to support Rothwells when it was or should have been clear to him and to those ministers closely involved that Rothwells was no longer a viable financial institution. This culminated in the decision to involve the Government, through WAGH, in the Kwinana petrochemical project as a means of removing the Government's contingent liability for certain of the debts of Rothwells. Electoral advantage was preferred to the public interest.

1.1.4 Personal associations and the manner in which electoral contributions were obtained could only create the public perception that favour could be bought, that favour would be done. In chapter 26 of Part I, we highlighted the extensive and significant political donations made by a particular group of Western Australian businessmen to the Australian Labor Party in the period 1983 to early 1989. A number of these donations were deposited in accounts under the control of Premiers Burke and Dowding. An amount of \$100,000, part of a donation of \$300,000 from Mr Goldberg, was kept in cash in a safe in Mr Burke's office. The majority of it was applied to the purchase of stamps, which Mr Burke then held in his personal collection. Donation

funds were also used by Mr Burke to purchase gold. Whilst the existence of Mr Burke's "Leaders Funds" was known to the State Secretary of the Labor Party, those funds were outside his control. No full account of expenditure of those funds was ever made to him.

1.1.5 We have observed that the size of the donations was quite extraordinary, particularly when compared with the size of donations made before Mr Burke became Premier. In many instances there was an obvious temporal connection between donations and events in which the businessmen who made the donations were involved with Government.

1.1.6 In the lead-up to the general election held in February 1986, both Mr Burke and his brother, Mr Terry Burke, then Cabinet Secretary, were actively engaged in soliciting campaign donations from prospective corporate donors. In his approaches, the Premier was direct to the point at times of being forceful. He nominated the amounts he expected. They were far in excess of amounts previously donated in the course of campaign fundraising in this State.

1.1.7 In 1986, Mr Parker, a senior Minister in the Burke Government, secured a promise from Mr Goldberg to donate a total of \$250,000 to the Spare Parts Puppet Theatre, a theatre group in Mr Parker's electorate. He did so at a time when, on behalf of the Government, he was engaged in negotiations with Mr Goldberg concerning the Fremantle Gas Co. Of the promised donation, \$125,000 was paid. The stock market collapse intervened before the second instalment was due. Mr Goldberg left the country.

1.1.8 Members of statutory authorities with very significant funds subject to their control seemed to be unaware of, or else indifferent to, their legal and public duties. Immediately following the stock market collapse in October 1987, when the demise of Rothwells appeared imminent, SGIC made what was essentially a loan of \$30 million to Mr Connell in respect of his interest in the Midtown property development. The transaction was undertaken at Mr Connell's request and for the purpose of assisting him. It was not in pursuit of SGIC objectives.

1.1.9 In November 1987, SGIC purchased from interests associated with Mr Holmes a Court, 2.5% of BHP at a cost of \$285 million. The acquisition was proposed to SGIC by the Premier, Mr Burke, and Mr Parker. At least in part, the

acquisition was made for the purpose of obtaining a deposit of \$50 million from Mr Holmes a Court, for the ailing Rothwells. Mr Burke did not disclose those matters to Cabinet when it considered what it believed to be SGIC's proposal.

1.1.10 In December 1987, and again in January 1988, SGIC purchased commercial bills in Rothwells in order to provide it with liquidity support. In January 1988, GESB utilised \$50 million standing to its credit in Treasury to purchase commercial bills from Rothwells. The transactions were not in pursuit of SGIC and GESB objectives. Such risky investments were undertaken in pursuit of the Government's objective of supporting Rothwells. They would not have been made in normal circumstances.

1.1.11 In February 1988, SGIC deposited \$10 million with Spedley Securities Ltd with the intent it should be on-lent to Rothwells. The sole purpose of this transaction, undertaken at the request of the Government, was to assist Rothwells in a secretive manner. Obviously, it was not serving a purpose of SGIC.

1.1.12 In May 1988, SGIC purchased 19.9% of The Bell Group Ltd at a cost of \$162.1 million on the basis that the Government desired it to do so. Bond Corporation also purchased 19.9%. Those purchases were preceded by an understanding reached between Mr Dowding, as Premier, and Mr Bond, on behalf of Bond Corporation, concerning the future use of Bell Group funds to assist Rothwells. The understanding was contrary to the spirit of the *Takeovers Code*. In addition to purchasing the shares, SGIC also purchased \$140 million of Bell Group convertible bonds in order to ensure that the share sale proceeded.

1.1.13 In October 1988, the R & I Bank was requested to provide a loan of \$4.5 million to Rothwells. It did so following intervention by Mr Parker on behalf of Rothwells.

1.1.14 In April 1987, at a time when the Teachers' Credit Society was facing collapse as a result of serious mismanagement, financial accommodation was required to enable it to meet its statutory liquidity obligations. Mr Phillips, a Commissioner of the R & I Bank, following the intervention of Mr Lloyd, then an Assistant Under Treasurer, unilaterally reversed a decision of the bank's board made the previous day refusing to provide the accommodation.

1.1.15 Persons appointed to statutory authorities have not always been possessed of appropriate experience and qualifications. We found, for example, that Mr Brush should not have been appointed full-time Chairman of GESB. We also found that there was incompetence in GESB's acquisition and attempted development of the Anchorage site. Moreover, Mr Brush should never have agreed to accept a loan from Mr Robert Martin at a time when GESB and Mr Martin's company were engaged in commercial dealings.

1.1.16 In many instances, the capacity of statutory instrumentalities to act appropriately in the discharge of their statutory obligations was severely constrained by the presence on their boards of public servants who represented government. Mr Edwards and Mr Lloyd, in particular, used their membership of SGIC and GESB to guide the course of events in accordance with the wishes of their Minister, the Premier and Treasurer.

1.1.17 The appointment of ministerial advisers and favoured appointees to the Public Service resulted in the Public Service being denied an effective advisory role. The early days of the Burke Government saw significant changes in the organisation and role of the Public Service. In the course of the Government decision to acquire Northern Mining Corporation, senior Public Service advisers were deliberately kept distant from the decision-making process. Indeed, Mr Burke instructed one of his ministerial advisers to provide the Co-ordinator of the Department of Resources Development with erroneous information. This action typified an attitude of distrust held by the Government towards many in the Public Service.

1.1.18 Shortly after the election of the Burke Government, Mr Lloyd, a close friend of Mr Burke, was introduced into the Public Service. He was first the Director of the Policy Secretariat in the Department of Premier and Cabinet. In 1984 Mr Burke wanted Mr Lloyd to be appointed as Deputy Under Treasurer. Following the Under Treasurer's steadfast refusal to support the appointment of Mr Lloyd by reason of his inexperience, he was appointed as an Assistant Under Treasurer.

1.1.19 In 1984 Mr Edwards, a close friend of Mr Lloyd and a long-term colleague of Mr Burke's, was appointed Director of the Policy Secretariat following Mr Lloyd's appointment as an Assistant Under Treasurer. Mr Lloyd encouraged Mr Edwards to apply for the position after discussing the proposed appointment with Mr Burke. Notwithstanding their relationship, Mr Lloyd was a member of the selection

panel that recommended the appointment of Mr Edwards under the *Public Service Act 1978*. Although Mr Lloyd disclosed his interest, he should never have sat on the panel.

1.1.20 Mr Lloyd and Mr Edwards thereafter exercised extraordinary influence in many areas of government. In 1987, Mr Edwards was appointed to the board of SGIC and became its Deputy Chairman. Mr Lloyd sat on the board of GESB until the rescue of Rothwells in late 1987, at which time he was replaced by Mr Edwards. Together they were members of the highly influential Government Functional Review Committee. They sat on selection panels. By many, Mr Edwards was viewed as the *de facto* Premier. Mr Lloyd's influence was no less significant in the economic policy areas in which he worked, as shown by his involvement in the Government's rescue of Swan Building Society and Teachers' Credit Society during 1987.

1.1.21 Mr Brush was another friend of Mr Burke. He was appointed full-time Chairman of the Superannuation Board on the recommendation of a selection panel under the *Public Service Act 1978* which, at all material times, knew that Mr Brush was the candidate favoured by Mr Burke. Mr Brush's wife Brenda was Mr Burke's private secretary. Another candidate, formerly the Executive Director and a member of the Superannuation Board, was effectively moved sideways to a new public service position which did not serve or advance any legitimate aspect of public administration. These processes served only to undermine public confidence in appointments to senior Public Service positions.

1.1.22 The extent to which the Public Service was politicised by Mr Burke is illustrated by Mr Burke's request of Mr Metaxas, as the statutory officer responsible for the supervision of credit unions, to secure and supply confidential information to Mr Burke concerning the President of the State Liberal Party. Mr Metaxas complied with the request.

1.1.23 We have also noted the evidence of Mr Naylor that, coincidental with the execution by him during 1983 of an employment contract to act as a ministerial adviser to Mr Burke, he was approached by a senior official of the Australian Labor Party to donate 10% of his salary to the party. This he did for a number of years.

1.1.24 The apparent confusion of the proper role of public servants and the extent to which they should serve the Government's political interests was further emphasised by the willingness of the director of the Government Media Office,

Mr Taylor, to furnish to a journalist for overt party political reasons, information concerning Mr Laurance, then Deputy Leader of the Opposition, which had come to the Government in confidence. The important role of the Government Media Office and press secretaries was emphasised by Mr Edwards' observation that "generally, governments are run by press release".

1.1.25 Processes of decision-making were often shrouded in secrecy. The reasons for decision in many instances were not documented. The proper role and function of Cabinet itself was either poorly understood or deliberately abused by the Premier and senior ministers. In September 1983, during the first year of the Burke Government, the Premier hastily introduced a proposal to Cabinet, recommending the State acquire Northern Mining Corporation. Cabinet was given inadequate information and, in any event, inadequate time to study the proposal. Mr Burke also failed to supply Cabinet with crucial information concerning the relationship between L R Connell & Partners, the Government's advisers, and Bond Corporation, the vendor of Northern Mining. Cabinet supported the proposal, largely by reason of the Premier's personal enthusiasm for it.

1.1.26 There were other examples. In the course of the inquiry into the Burswood Casino, we observed that no record was made of an important Cabinet decision. A significant ministerial decision concerning the purchase of the Fremantle Gas Co by SECWA, requiring the borrowing of \$40 million, was made by a senior Minister, Mr Parker, without reference to Cabinet. When Mr Dowding was Premier he introduced, or caused to be introduced, to Cabinet, important proposals in relation to the acquisition by SGIC of shares in the Bell Group, and Government involvement through WAGH in the Kwinana petrochemical project, but failed to supply important details. These various events have highlighted a failure to observe procedures governing (a) the basis upon which matters should be referred to Cabinet by a minister; (b) the manner in which members of Cabinet are informed concerning matters of significance to the interests of the State; and (c) the recording of decisions by Cabinet.

1.1.27 Accurate records provide the first defence against concealment and deception. The absence of an effective public record has hindered the Commission in its inquiries. We have noted that on some occasions a deliberate process of interference with official records appears to have taken place. In connection with the Fremantle Gas Co, a significant number of documents were removed from SECWA files. Over several weeks before Mr Burke's retirement as Premier, four or five members of his personal

staff were engaged in removing material from departmental files and destroying it. The task was a major one, involving hundreds of files. When Mr Parker retired from office, he retained possession of official SECWA documents, including originals. He produced those documents to the Commission.

1.1.28 We have further observed the marked change in the Government's approach to business relationships, especially during the Burke years. The approach adopted by Mr Burke, in particular, was entrepreneurial and risk taking. In the case of the acquisition of Northern Mining Corporation, the advice Government received was from outside the public sector, to the virtual exclusion of traditional sources. The decision to buy all the shares in Northern Mining to secure a "window on the industry" was ill-conceived. It gave rise to a serious conflict of interest between the role of the Government as a joint venturer in a major mining project and as the taxing authority required to assess the royalties payable on the product from the venture.

1.1.29 In October 1987, the Government decided to provide support to the rescue of Rothwells through the provision of a \$150 million indemnity to National Australia Bank. That indemnity, given in the circumstances we have discussed, was not a matter in respect of which the Parliament was consulted. A significant decision affecting the finances of the State was made in haste without any opportunity for public scrutiny.

1.1.30 In the case of the Government's decision to involve itself, through WAGH, with Bond Corporation in the Kwinana petrochemical project, the Government acted completely outside the purview of public scrutiny. In the alleged interests of commercial confidentiality, it kept the full details of its involvement from the public. The value of the project was enhanced at least 10 times its proper value to a figure of \$400 million by the obligations undertaken by the Government, including the giving of a Treasurer's guarantee. Hence the cost of PICL to the Government was increased enormously by the Government's own actions in order to achieve a second rescue of Rothwells. Parliament had no role, at the relevant time, in scrutinising any aspect of this major State undertaking. Effective accountability was a casualty of the Government's entrepreneurial zeal.

1.1.31 Individually, the matters upon which we have reported reveal serious weaknesses and deficiencies in our system of government. Together, they disclose fundamental weaknesses in the present capacity of our institutions of government,

including the Parliament, to exact that degree of openness, accountability and integrity necessary to ensure that the Executive fulfils its basic responsibility to serve the public interest. This is not to deny the essential strengths of the concepts of representative democracy and responsible government which Western Australia has inherited. What is now necessary, however, is a systematic reappraisal of our institutions of government. In carrying out this task, individual recommendations for change to our system of government must be formulated with proper regard to the operation of the system as a whole. The interrelationship between the institutions of government demands a comprehensive approach. Recommendations for change, both specific and directional, must also respect the principles which underlie our system of government. Because of their signal importance to the process of change envisaged by our recommendations, we believe these principles should be stated at the outset.

1.2 Fundamental principles of government

1.2.1 Our system of government has evolved as one of representative democracy and responsible government. In practice this means, to use the language of the Chief Justice of Australia, "the sovereign power which resides in the people is exercised on their behalf by their representatives" and that:

"[T]he representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act." *Australian Capital Television Pty Ltd v Commonwealth of Australia (No 2)* (1992) 108 ALR 577 at 594.

1.2.2 In our view, the basic elements of this system, which the State has inherited in common with all other parts of the Australian federation, are capable of serving this State adequately for the future, provided appropriate changes and safeguards are introduced and observed. For these changes to be understood properly, we consider it necessary to make explicit the fundamental principles and assumptions upon which our representative and responsible government is based and which should guide continuing reform.

1.2.3 Two complementary principles express the values underlying our constitutional arrangements. The first, the democratic principle, is that:

It is for the people of the State to determine by whom they are to be represented and governed.

1.2.4 This principle carries with it certain consequences. The first institution of representative government, the Parliament, must be constituted in a way which fairly represents the interests and aspirations of the community itself. The electoral processes must be fair. Public participation in, and support for, candidates, parties and programmes is to be encouraged. However, electoral laws should aim to prevent sectional interests from purchasing political favour, and to prevent those seeking election from attracting support by improper means.

1.2.5 The second, the trust principle, expresses the condition upon which power is given to the institutions of government and to officials, elected and appointed alike. It is that:

The institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public.

1.2.6 This principle in turn carries its consequences. It provides the "architectural principle" of our institutions and a measure of judgment of their practices and procedures. It informs the standards of conduct to be expected of our public officials. And because it represents an ideal which fallible people will not, and perhaps cannot, fully meet, it justifies the imposition of safeguards against the misuse and abuse of official power and position.

1.2.7 Both principles, and the commitment which they assume to the rule of law and to respect for the rights and freedoms of individuals, need to be translated into practical goals if they are to provide the basis for government in this State.

1.2.8 Three goals can be identified as necessary to safeguard the credibility of our democracy and to provide an acceptable foundation for public trust and confidence in our system of government. These goals are:

- (a) government must be conducted openly;

- (b) public officials and agencies must be made accountable for their actions;
and
- (c) there must be integrity both in the processes of government and in the conduct to be expected of public officials.

1.2.9 Separate chapters of this part of the report will consider how each of these goals should be pursued in this State in the context of our present institutions of government.

1.2.10 In this part of the report we refer generally to "public officials" and "officials". We intend both those terms to apply to all the holders of public office, including members of Parliament, ministers and senior executives in government agencies, including the Public Service. Where we wish to distinguish a particular category, we describe it specifically.

1.3 Directions for change

1.3.1 As a result of its consideration of the matters raised in the evidence, reviewed in the context of the complementary principles identified as fundamental to our system of government, the Commission in the chapters that follow proposes a number of institutional and legislative changes. We here briefly outline those changes.

1.3.2 The accountability of government and of the administrative arms of government is at the heart of the matter. Our inherited system of representative democracy has traditionally given the Parliament the central role in securing the executive's accountability to the public. Yet, as we have seen, in its present form the Parliament does not adequately perform that role. The Commission's recommendations are designed to give the Parliament an enhanced role in representing the public, and a greater capacity to discharge its constitutional responsibility to scrutinise and review the executive.

1.3.3 The Commission believes that some degree of parliamentary reform is an imperative. The reforms we propose are an unequivocal affirmation of the constitutional idea of responsible government, namely, that those who participate in the government of this State are responsible and accountable through the Parliament to the

public they serve. Our recommendations require the modification of some elements in the present practice of parliamentary government.

1.3.4 Central to the Parliament's continued significance in our representative democracy is its capacity to manage its business with a greater degree of independence from executive control, although still within the constraints of public scrutiny. The Commission recommends that the financial independence of the Parliament should be increased.

1.3.5 The responsibility of Parliament for the scrutiny and review of governments has led the Commission to devote particular attention to the role of the Legislative Council in chapter 5 of this part of the report. We recommend that the Legislative Council be acknowledged as having the review and scrutiny of the management and operations of the public sector of the State as one of its primary responsibilities. Chapter 5 of this report provides the detailed assumptions underlying this view, as well as some of the implications it carries. We propose a clearer differentiation in the parliamentary work of the two chambers of our bicameral legislature. This in turn leads us to recommend a review of the electoral system for representation in each House. We do not believe the effectiveness of the proposals for accountability measures can be wholly secured without that review.

1.3.6 With a view to improving the performance of the Parliament in its scrutiny and review of government, the Commission also suggests a review of the principal means by which it exercises this function, namely, parliamentary committees and question time. Improved accountability to Parliament depends a great deal upon the effective operation of parliamentary committees. Even in a comparatively small legislature, a well-developed committee system is necessary to ensure the effective review of government and an enhanced parliamentary role for our elected representatives.

1.3.7 To aid the Parliament in securing public accountability, the Commission recommends both the modification and enlargement of a number of independent agencies which will subject the governmental system to investigation and review. To emphasise that the responsibility of these offices should be to the Parliament and not the Executive, we have described them as "independent parliamentary agencies". That designation is to be given practical effect in our recommendations by involving the Parliament directly in the appointments to these vital offices, in their funding, and in receiving their reports and recommendations.

1.3.8 The independent parliamentary agencies which the Commission proposes are five in number. They include the existing offices of the Auditor General, the Parliamentary Commissioner for Administrative Investigations ("the Ombudsman"), and the Electoral Commissioner. We recommend the creation of two new offices: a Commissioner for Public Sector Standards, an expansion of the role of the existing Public Service Commissioner; and a Commissioner for the Investigation of Corrupt and Improper Conduct, replacing the present Official Corruption Commission. In each case, we make recommendations concerning their purposes and powers. The recommended measures are intended also to ensure the independence of these offices. The linkage between them and the Parliament recognises that their powers are exercised for the public within the institutional framework of representative democracy.

1.3.9 In our system of government, the mainspring of the executive is the cabinet. Regardless of the particular form in which a cabinet shapes its collective deliberations and decisions, the integrity of its procedures is fundamental both to the government's conduct of the public's business and to its accountability for the performance of its public duty. The Commission recommends specific measures designed to foster integrity of conduct at this highest level of government. Foremost among these recommendations is the preparation and preservation of an adequate and accurate record of matters which have been the subject of cabinet decision.

1.3.10 In relation to ministers and their offices, the Commission has had occasion to note the deleterious consequences for public administration of interposing political advisers between the permanent public service and the responsible minister. We have also noted the proliferation of politically appointed advisers. We accept the need and the right of ministers to receive political advice and to draw upon expertise beyond as well as within their official departmental resources. Nevertheless, our recommendations make plain the need to identify the staff employed for these purposes, to define their proper relationship to the public service and to statutory authorities, and to disclose publicly the cost of these services.

1.3.11 The Commission has suggested a review of the organisation of the State's public sector. While it will be for the Government to consider this matter, we believe that, at least, a review of the *Public Service Act 1978* is necessary. Legislation must state the basic principles to be adhered to in public administration, human resources management and official conduct. It equally must enshrine the merit principle as the basis for making appointments to the Public Service at all levels. We make specific

recommendations as to the procedures to be followed in the appointment of the chief executive officers of public service departments and of government agencies.

1.3.12 The Commission offers practical measures designed both to promote integrity in official conduct and to monitor lapses from appropriate standards. The independent parliamentary agency, which we propose be called the Commissioner for Public Sector Standards, is a means of developing and safeguarding desirable standards of conduct in the public sector as a whole. This agency should be involved in the creation and application of more extensive codes of conduct among public officials. We indicate the standards of probity and competence to be expected of persons nominated to serve on public boards. We recommend a review of the registration of interests of members of Parliament and public officials. We make recommendations on "whistleblower" protection.

1.3.13 Part I of the report has revealed the information management practices by which some ministers and public servants, together with the Parliament and the public, were deceived and denied information. Within the operation of the Executive, an area of concern which arises out of the evidence is the role of ministerial press secretaries and of the Government Media Office. The Commission recommends a review of their functions. In so doing we recognise the importance of facilitating communication between a government, or for that matter a Parliament, and the public.

1.3.14 In view of the matters which led to the inquiry, the Commission has made special recommendations concerning the involvement of the State in commerce, whether through companies or statutory authorities. Consistent with the emphasis upon accountability through representative institutions, we suggest the Parliament should be informed of all such involvement.

1.3.15 We pay detailed attention to the office of Auditor General, as one of the independent parliamentary agencies. A series of specific recommendations is designed to strengthen this office and to secure its effectiveness as a vital and independent instrument of accountability. Of particular significance in this respect is the Commission's recommendation that all public sector bodies, programmes and activities involving any use of public resources be subject to the audit of the Auditor General.

1.3.16 A vital aspect of reform proposed by the Commission concerns political donations. We recommend that specific provision be made for the disclosure of

donations and electoral expenditure. We comment on the Bill presently before the Parliament. To monitor and report on these aspects of the electoral process, we recommend that enhanced powers and resources be granted to the Electoral Commissioner.

1.3.17 The Commission recommends several changes and additions to the State's laws covering a number of areas: freedom of information; the provision of reasons for administrative decisions and appeals from such decisions; financial administration and audit; state-owned companies; political finance; and public sector management. In one important area, the criminal law as it applies to public office, we recommend a public review. We suggest also a comprehensive review of the secrecy laws of this State. These laws presently constitute a significant obstacle to the practice of open government.

1.3.18 In formulating its recommendations, the Commission has sought to have regard to the continuing need for government to maintain tight controls over expenditure. We are satisfied that our proposals are modest. In any event, we believe the costs involved are a small price to pay in order to safeguard against a repeat of the losses of the eighties.

1.3.19 Our recommendations are wide-ranging. Nevertheless, there are some matters which we do not discuss. We note some of these here. First, there is the impact of the law of defamation on political discussion in this State. This body of law may attract reconsideration in the light of the decision of the High Court of Australia in the political advertising case, *Australian Capital Television Pty. Ltd. v Commonwealth of Australia (No 2)* (1992) 108 ALR 577. The present law may well have inhibited public investigation and media discussion of at least some aspects of the events into which we have inquired. But, given the national character of modern media practices, reform of this aspect of the law of defamation, if it is to be effective, requires a national approach.

1.3.20 Secondly, there is the question of the citizen-initiated referendum and the question of a constitutionally entrenched bill of rights. The Commission has not found it possible to accommodate these matters within its mandate, and has therefore refrained from any discussion of them. In any event, we do not believe that either question touches on the recommendations we have made.

1.3.21 To the extent that it is reasonable and appropriate for the Commission to do so, we make positive recommendations which we believe should be acted upon without delay. There is, however, a range of matters where, while we express our view as to the direction reform measures should take, full public consultation should occur. This requires emphasis. It is not simply a matter of extending a courtesy to the public. It is their right. We recommend an independent review body, the Commission on Government, be constituted to conduct the necessary further inquiries and to undertake the consultation which is required. The specific matters to be referred to this body are listed at paragraph 7.2.4 of chapter 7.

1.3.22 We propose that the Commission on Government be given a limit of two years within which to complete the work we have identified for it. Its role will be to consult extensively about the vital principles and elements of our system of government. The issues we have raised are not solely for parliamentarians and the Government to resolve. The Parliament, of course, will ultimately enact the laws that will bring in change. But on matters basic to the governmental organisation of this State, the community has the right to have its views heard. The processes we propose recognise and endorse that right.

* * *

CHAPTER 2

OPEN GOVERNMENT

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2.1 Openness

2.1.1 Unnecessary secrecy surrounded actions taken by the Government in some of the events into which the Commission has inquired. Apparently the Western Australian public were expected to accept that a Government can, at its whim, use "official secrecy" to keep the public uninformed. But more than that, if secrecy was not justified and could not be maintained, the Government acted as if it were entitled to make information available in a deceptive or misleading manner. Politics, as one witness put it, "is about illusion rather than reality". If this be the measure of this State's political standards and achievement, the public has much about which to be concerned.

2.1.2 Speaking of this country's common law, the present Chief Justice of Australia has commented pointedly that:

"It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice in that information is that it enables the public to discuss, review and criticise government action." *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 32 ALR 485 at 493.

The Commission wholeheartedly endorses this observation.

2.1.3 Both the democratic and the trust principles to which we referred in chapter 1, if they are to have real meaning in this State, demand that government be conducted openly. They require that the public be informed of the actions and purposes of government, not because the government considers it expedient for the public to know, but because the public has a *right to know*. Openness in government is the indispensable prerequisite to accountability to the public. It is a democratic imperative. The right to vote is without substance unless it is based on adequate information. If government is to be truly government for the people, if the public is to be able to participate in government and to experience its benefits, the public must be properly informed about government and its affairs.

2.1.4 The Commission does not suggest that open government can hold for all purposes and in all circumstances. There can be justifiable reasons for government keeping certain information confidential. Information about the personal affairs of citizens, about police intelligence and about much of cabinet business are obvious

examples. There are others. But we believe it is incontestable in this State, despite an increased awareness on the part of government of a need to keep the public better informed, that the balance between what is publicly revealed in an accurate and informative way by government and what is kept secret or else relatively uninformative, disproportionately favours government. To give a simple but telling example. Despite the extensive statutory powers government agencies have to affect the rights and interests of individual citizens in particular instances, the individual member of the public has no general right to be given reasons for a decision which affects his or her interests.

2.1.5 If secrecy has its place, the deliberate deception of Parliament and the public does not. The Commission notes that public deception will often involve the connivance of a government's media advisers. These advisers, as we will indicate, must bear some of the blame for the disinformation which was a significant feature in some of the events described in Part I of the report.

2.1.6 Westminster derived systems of government have been notoriously secretive. This is changing. In Canada, New Zealand and a majority of Australian jurisdictions, there is now Freedom of Information ("FOI") legislation. A Bill to this end is currently before this State's Parliament. We comment on that measure later in this chapter. However, we emphasise that FOI is only one step, although an important one, on the path to open government.

2.1.7 There are many ways in which the process of informing the public can be enhanced. We will refer to a number of them. But two vital matters need to be stressed at the outset. First, whatever procedures be established requiring the disclosure of, or enabling access to, information, the practice of open government requires the good faith commitment of the officials who are at the heart of the action. The public and the public's accountability agents, including the Parliament and the Auditor General, depend upon this commitment for information. To be a reality, open government must be a habit, a cast of mind. It is an attitude which must be encouraged at all times. Importantly, it requires a willingness to expose miscalculation and failure as well as to publicise innovation and achievement.

2.1.8 Secondly, the practice of open government requires a responsible approach to government on the part of the public and, particularly, on the part of members of Parliament. For its part, the public must acknowledge that no matter how

conscientious, officials, like all others, are fallible. Constant and intemperate criticism can only discourage official willingness to act openly. Equally, and here the Commission positively qualifies traditional understandings of the principle of individual ministerial responsibility, the public, and for that matter the Parliament, cannot reasonably expect ministers to be responsible and accountable for all failings of officers serving within their portfolio. We would go so far as to say that the principle itself provides a positive incentive to secrecy in government. We have more to say of it later in this report.

2.1.9 For their part, the responsibility asked of members of Parliament is of a different kind. The Commission recognises the "watchdog" role of an Opposition. It recognises, too, the legitimate and natural desire to use the Parliament to embarrass opponents and to obtain electoral advantage. It would be quite unrealistic to suggest that this desire should be suppressed. This said, Parliament is the primary instrument through which the public should be able to obtain much of its knowledge about the conduct of government in all of its manifestations. Many of our recommendations aim to enhance this role for the Parliament. But to be effective they will require a high degree of public responsibility from parliamentarians themselves. Parliamentary conduct cannot be allowed to subvert Parliament's proper role in the securing of full, fair and accurate information from the Government and from the officers and agencies of government. Its role includes the critical and responsible examination of that information on behalf of the public.

2.1.10 Information is the key to accountability. To fulfil its purpose, four information conditions must be satisfied:

- (a) Information of, or about, government must be made optimally available or accessible to the public. We emphasise "optimally" since, as we have said, official secrecy has its proper place in the conduct of government. Secrecy, however, should not be the norm, with openness the exception. Rather, the contrary must be the case.
- (b) Information must have integrity. It must give a proper picture of the matter to which it relates. It must not aim to mislead or to create half-truths.

- (c) Information must be capable of being understood, preferably by the public at large, but particularly by the accountability agent to whom it is supplied.
- (d) Information must be manageable by those expected to assimilate, examine and pass judgment on it. "Information overload", no less than secrecy and positive deception, can be the cause of ignorance, misunderstanding and confusion. Attention must be given to the manner and form in which information is supplied, to its suitability to the purpose of its supply and, particularly when supplied to Parliament, to the means best suited for its subsequent and intelligible communication to the public.

2.1.11 Against this background, we now turn to a variety of specific matters which arise out of the Commission's inquiry. They bear directly on the practice of open government and the supply of information to the public.

2.2 Open government: the citizen

2.2.1 The individual citizen in this State has no general legal right of access to information possessed by government, be this about its stewardship or about an individual's own affairs. Equally, Western Australians have no general legal right to be given the reasons for administrative decisions which affect them as individuals. This state of affairs is wholly unacceptable.

2.2.2 Although its enactment has been foreshadowed for some years, Western Australia still lacks the benefit of FOI legislation. A Bill is presently before the Parliament. The enjoyment of the right embodied in such legislation is long overdue. There is now a significant experience of FOI legislation elsewhere in Australia. That experience reflects some differences in approach and this leads the Commission to make some observations about the Bill. But before doing so, the Commission expresses its support for the objectives of the Bill, those objectives being to enable the public to participate more effectively in public affairs and to make the Government, local authorities and public officials more accountable to the public, in whose interest they act.

2.2.3 Accordingly, the Commission recommends that:

Freedom of Information legislation be enacted in this State as a matter of priority.

2.2.4 It is necessary, however, to make four specific observations about the Bill and its enactment:

- (a) Unlike similar legislation elsewhere in the country, the Bill includes no provision enabling a person to effect the correction of personal records held by government.
- (b) The provisions dealing with documents that an agency knows to exist, although they are not in its possession, require further consideration. By clause 15(1), the agency which receives an FOI request has a discretion as to whether or not it should transfer that request to another agency which it knows holds the document. In such circumstances it should be obliged to transfer the request and to inform the applicant.
- (c) Clause 22(1)(b), which enables an agency to refuse access to a document if it is not "a document of the agency", requires reconsideration. It is possible that access to such a document would be denied in circumstances where it is the only copy of the document in existence.
- (d) A decision of the Information Commissioner under clause 65 of the Bill, on a complaint against an agency's decision, must be in writing and a copy of it must be given to each party affected by it. The Commissioner is empowered to arrange to have his or her decision published in full or in an abbreviated, summary or note form, but is not obliged to do so. The Commissioner should be obliged to publish reasons for decision.

2.2.5 Accordingly, the Commission recommends that:

The Freedom of Information Bill be amended, so that:

- (a) ***persons may require the correction of their personal records held by agencies;***

- (b) when an agency is not itself in possession of a document but either knows another agency holds the document or has reasonable grounds to believe it holds the document, the agency is obliged to transfer the request and to inform the applicant;*
- (c) where an agency is in possession of the only copy of a document which is not a document of the agency, it is obliged to transfer the FOI request in accordance with clause 15(2) of the Bill, together with a copy of the document and to inform the applicant; and*
- (d) the Information Commissioner is obliged to publish reasons for decision in an appropriate form so that the public is adequately informed of the basis of all decisions made under the legislation by the Information Commissioner.*

2.2.6 While it is not a matter presently requiring amendment to the Bill, the Commission emphasises that, unless the cost to the ordinary citizen of gaining access to documents under the proposed legislation is kept to a reasonable sum, its effectiveness will be impaired.

2.2.7 We should finally observe that FOI legislation, although indispensable to open government, is by its nature limited in what it can achieve. It is an open question whether a number of documents of critical importance which have been adduced in evidence during our inquiry, would have been disclosed under the provisions of the FOI Bill had it been in force at relevant times. The range of exempt documents should be confined as much as is reasonably possible.

2.2.8 The Commission returns to the second statement contained in the opening paragraph to this section, referring to the absence of any general legal right in the individual citizen to be given reasons for any administrative decision which affects him or her personally.

2.2.9 More than six years ago, the Law Reform Commission of Western Australia recommended that administrative decision makers should, as a rule, be obliged to give reasons for decisions to persons sufficiently affected by those decisions. This

recommendation still has not been acted upon. The Commission can find no acceptable reason for the continued deprivation of the citizens of this State of what should be accepted as a basic right inherent in our system of government. There is no justification for any further inquiry or delay.

2.2.10 Accordingly, the Commission recommends that:

An Administrative Decisions (Reasons) Act be enacted as a matter of urgency in accordance with the 1986 Report of the Law Reform Commission of Western Australian in Project No 26 Part II.

2.3 Official secrecy

2.3.1 The official secrecy laws of this State are in urgent need of systematic review. They are found in numerous statutes scattered throughout the law of the State. In their scope, they go far beyond what is justifiable in protecting the legitimate interests of government and of those dealing with government. In this regard the Commission comments specifically in section 2.5 of this chapter on the claims made to "commercial confidentiality". Even if FOI legislation is enacted in this State, the ability of officials generally to promote open government will be impaired seriously by the unwarranted width of secrecy duties imposed upon them. For those who place their faith in FOI legislation as in itself a sufficient means of securing open government, we simply note that the form of legislation proposed in this State (as elsewhere in Australia) is compatible with the most illiberal of official secrecy regimes.

2.3.2 If public officials in Western Australia complied strictly with the secrecy obligations imposed on them by our statutes — and even the most scrupulous official would find this an almost impossible demand — the interests of the public would be gravely prejudiced. As we will illustrate, those obligations as a rule are not at all concerned with protecting from use or disclosure information which should be protected for legitimate reasons. Rather they control rigidly when and by whom official information can be made publicly available by officials. They encourage the practice of "information paternalism". They are quite opposed to any reasonable concept of open government.

2.3.3 Typical of the controls placed on officials are those imposed upon public servants by the *Public Service Act 1978*. Their key characteristics are first, the control they reserve to government over the public release of information and secondly, the high level of protection they give to the interests of government itself. Those interests, as the events into which we have inquired demonstrate, are not necessarily the same as the interests of the public.

2.3.4 The *Public Service Regulations 1988*, regulation 8 provides:

"An officer shall not —

- (a) publicly comment, either orally or in writing, on any administrative action, or upon the administration of any Department or organisation; or
- (b) use for any purpose, other than for the discharge of official duties as an officer, information gained by or conveyed to that officer through employment in the Public Service."

2.3.5 For its part, Administration Instruction 711 made under the *Public Service Act 1978* provides:

- "(a) An officer shall not, except in the course of the officer's official duty and with the express permission of the chief executive officer,
 - (i) give to any person any information relating to the business of the Public Service or other Crown business that has been furnished to the officer or obtained by the officer in the course of his/her official duty as an officer; or
 - (ii) disclose the contents of any official papers or documents that have been supplied to the officer or seen by the officer in the course of his/her official duty as an officer or otherwise."

2.3.6 These provisions had their origin in statutory regulations made in colonial Victoria in 1867. If they were tolerable then, they are no longer. Insofar as the individual public servant is concerned, they simply cast a blanket over all information concerning the conduct of government or which has been acquired in office as a public

servant. It does not matter that the information is already publicly available or could be required to be made publicly available under the proposed FOI legislation. It does not matter that the use or disclosure of the information would be publicly beneficial and that its use or disclosure would otherwise be unobjectionable. It does not matter that its revelation would enhance, rather than impede, the prosecution of governmental business or that it would assist the public in its dealings with government. If FOI legislation is enacted, it will produce the highly anomalous result that a public servant cannot voluntarily disclose to the public information which, as a member of the public, the officer has a right to have made available to him or her. Finally, as we will later indicate, these provisions create a very serious impediment to "whistleblowing" by public officials. In their tenor and purpose, they are quite opposed to what is required to foster an environment of open government.

2.3.7 The Commission has already indicated that for some purposes official secrecy has a necessary and proper place in the scheme of government. The exemption provisions of the proposed FOI legislation are indicative of the situations in which this can be so. What needs to be emphasised, however, is that it is only the protection of important public and private interests which can justify official secrecy. The administrative measures adopted to make that protection effective may require extended controls being placed upon officials who have access to information which *may* warrant protection. However, provisions imposing official secrecy in the very wide terms which are now commonplace in this State are not justifiable.

2.3.8 In its consideration of the Commonwealth FOI Bill, the Senate Standing Committee on Constitutional and Legal Affairs was of the view that, consistently with the purposes of that legislation, the official secrecy laws of the Commonwealth required review. We understand that such a review is now being undertaken in the Commonwealth. A like need exists in Western Australia, irrespective of whether FOI legislation is enacted.

2.3.9 Accordingly, the Commission recommends that:

The Commission on Government review the secrecy laws of this State, both statutory and common law, as they apply to information possessed by government, its officials and agencies.

2.3.10 In giving effect to this recommendation, particular attention should be given to the following matters:

- (a) Of great importance is the protection of the privacy interests of the public. With members of the public increasingly obliged to supply government with information about their personal affairs, the time has come when secrecy laws alone are insufficient to protect personal privacy. Although it does not relate directly to activities occurring in this State, the Report of the New South Wales Independent Commission Against Corruption ("ICAC") concerning unauthorised use of government information provides a stark reminder of how vulnerable the personal privacy of the citizen is to abuse by public officials. Consideration should be given to the enactment of information privacy legislation. The Commission does not suggest that the Commonwealth legislation necessarily provides an appropriate model for adoption in this State, although the information privacy principles on which it is based provide an appropriate framework for future legislation.
- (b) The protection given to the internal processes of government should be strictly confined and, where given, fully justified.
- (c) Secrecy laws should be cast in ways which make their purpose intelligible to the officials they bind. The prohibitions now commonly in use are arbitrary and artificial. Officials inevitably have some level of personal responsibility for identifying information in their hands which should not be disclosed because of official secrecy. Secrecy laws and guidelines should aim to inform, guide and control this individual discretion.

2.4 Open government: the Parliament

2.4.1 Notwithstanding the constitutional role of Parliament to monitor and review the actions of the officials and agencies of government, the events into which we have inquired were, in the main, kept out of the parliamentary arena. If responsible government is to have substance in this State, the constitutional role to which we refer must be discharged and be seen to be discharged. The processes of the Parliament must accommodate this need.

2.4.2 As the Commission has emphasised, accountability can only be exacted where those whose responsibility it is to call government to account are themselves possessed of, or are able to obtain, the information necessary to make considered judgments. Information is the key to accountability. Given Parliament's role as the primary accountability agent of the public, accurate information is its lifeblood. Without it, Parliament can be neutralised, the public left vulnerable.

2.4.3 Our concern must be to enhance Parliament's roles as the gatherer of information about government and as the public's informant. In the next chapter, we refer more specifically to the procedures available to it to exact accountability from the officers and agencies of government. Here, we confine ourselves to its information needs.

2.4.4 If it were ever so, it is no longer accepted that the individual minister provides the appropriate means alone for communicating information from the executive arm of government to the Parliament. Question time, parliamentary committees, annual reports, the reports of other accountability agents such as the Auditor General and the Ombudsman are of great importance in the means used by Parliament to inform itself. The information procedures currently used by Parliament in this State exhibit a random character and have obvious weaknesses and deficiencies. In this regard, we refer to the study on government agencies commissioned by the Legislative Council's Standing Committee on Government Agencies.

2.4.5 In its consideration of the question of openness in government, the Commission has not found it profitable to differentiate sharply between the two Houses of Parliament. There is a joint and several responsibility to serve, and to service the needs of, the people of this State. The matters to which we will draw attention are as relevant to the one House as to the other.

2.4.6 In chapter 5 of this part of the report, the Commission recommends that a systematic review be undertaken of the means which can and should be used by Parliament in informing itself of the conduct, actions and activities of all parts of the governmental system for the purpose of best discharging its constitutional responsibility. While it is inappropriate for the Commission to comment upon the detail of past and present parliamentary practice and procedure, we consider it desirable to indicate some of the matters which we believe should be considered in conducting the review.

2.4.7 The information conditions to which we referred at the beginning of this chapter are of fundamental importance to Parliament. First, Parliament should have optimal access to information of and about government. This requirement has a number of implications. It requires that both the obligations of the agencies of government and the machinery of Parliament itself be so tailored that information can be obtained in a comprehensive and systematic fashion and that information not be withheld without full justification.

2.4.8 The reforms introduced by the *Financial Administration and Audit Act 1985* have improved materially the information supplied to Parliament by way of annual reports from public service departments and statutory authorities. However, Parliament's own procedures, and in particular, question time and the committee system, are not constituted and practised in ways that bring the Executive fully under the scrutiny of Parliament.

2.4.9 Given the complexity and diversity of the operations of government, it is no longer adequate for Parliament to rely upon *ad hoc* measures when inquiring into the conduct of government. Steps have been taken in recent years to establish standing committees of Parliament to review aspects of executive activity. That system should be developed. If Parliament is to have any realistic prospect of bringing the Executive under adequate scrutiny, it must systematise its role. As government is now practised in this country and this State, committees are the most suitable means to achieve this purpose. In the aggregate of their responsibilities and roles, committees of the Parliament should be so constituted as to provide as full a coverage of governmental activity as is practicable. We have more to say of committees later in this report.

2.4.10 Secondly, if Parliament is to perform this role of scrutiny, it must know with relative certainty to whom it properly can turn to provide and/or hold responsible for the information it requires. Here again we come up against traditional understandings of the principle of individual ministerial responsibility. It is entirely appropriate that in question time a minister be asked to provide information on any matter within the reach of his or her portfolio responsibility. Often enough the minister, in responding, will be acting as a conduit for officials who themselves are responsible for the matter to which the information relates. The minister often will have no prior knowledge of, or involvement in, that matter and, furthermore, could not reasonably or realistically be expected to be responsible for it. The minister has a responsibility not knowingly to mislead Parliament in any response made, a responsibility often nullified

in practice by the "artful" reply. But as we have noted in paragraph 2.1.8 of this chapter, the minister, in many instances, will not have been responsible personally, and hence may not always be accountable to Parliament, for the matter. For this reason, the principle of ministerial responsibility, as traditionally understood, contains an element of fiction.

2.4.11 The Commission believes that it is of the first importance that a more realistic approach be taken to the obligation of the various arms of government to satisfy Parliament's information needs. Parliamentary committees in particular must be entitled as of right to exact, from responsible officers of government, information falling within their spheres of actual responsibility. The actual manner in which government is being conducted and the actual responsibilities discharged by officials, and not an inflexible principle of ministerial responsibility, should ordain who is the appropriate officer from whom information properly can be sought by Parliament and, importantly, what is the information that appropriately can be sought from that official. The performance management approach, now being pursued in the public sector, accentuates the importance of this principle.

2.4.12 Thirdly, the formal constitutional power of the Parliament and its committees extends, regardless of secrecy, to obtaining whatever information it requires from whomsoever it wants. We refer to the *Constitution Act 1889*, section 36 and the *Parliamentary Privileges Act 1891*, while acknowledging there are some uncertainties in these statutes. In practice, however, the power is necessarily a constrained one. The "appropriate officer" principle to which we have referred provides one form of constraint. Officials who do not have (or have not assumed) responsibilities in or for a matter are not, as a rule, appropriate persons to furnish information relating to it. More importantly, there is an uncertain range of governmental information which, as a matter of self-restraint, the Parliament and its committees will not require to be disclosed in the face of a claim of "public interest privilege". The limits of that privilege are set, on the one hand, by prudential restraint on Parliament's part, and by the good faith of ministers on the other. What requires strong emphasis is that, in the same manner as the public interest privilege is contracting in legal proceedings, so also should it be contracting in the parliamentary arena. It should be narrowly circumscribed and, if claimed, should be accompanied by a reasoned justification. We comment later in this chapter on section 58C of the *Financial Administration and Audit Act 1985* which, in its current form, would appear to provide a wholly unwarranted protection to

government against disclosure to Parliament of information which a minister, for reasons of secrecy, thinks reasonable and appropriate to withhold from the Parliament.

2.4.13 Fourthly, neither the Parliament nor the public is aided by Parliament being swamped with information through reports, inquiries, committee hearings and otherwise. We have earlier indicated the essential conditions to be satisfied when information is supplied to government. What needs strong emphasis here is that if Parliament is to discharge its constitutional responsibility it must be provided with the resources and facilities necessary to pursue the inquiries it is entitled to make; it must be provided with the support and research capacity to inform its inquiries and to examine and evaluate the information it obtains from whatever source; and it must have the capability effectively to communicate its views to the public. The Commission returns to this matter in section 3.9 of chapter 3.

2.5 Commercial confidentiality

2.5.1 One of the matters arising in the course of this Commission has been the issue of commercial confidentiality as a justification for concealing information from the public, notwithstanding a vital public interest in its being revealed. Because of the importance of this subject to the theme of openness, we will need to consider it at some length. We acknowledge that the 1989 report of the Commission on Accountability chaired by Sir Francis Burt ("the Burt Report"), has eased our task.

2.5.2 One class of case where claims to commercial secrecy are made against government, and government in turn is called upon to honour those claims, is where a person or business entity supplies commercial information to a governmental agency because it is obliged by law to do so, because disclosure is necessary for the provision of a service, or because it is seeking the advice or assistance of government in furthering its own private interests. This class of case, although itself raising important and difficult questions, is not of immediate concern to us. Here, to the extent that a claim to commercial secrecy is justifiable at all, it is limited to the protection of the legitimate interests of the supplier of the information. Where such a claim can properly be made against government, it is the responsibility of government to respect and uphold the supplier's interests. Of this class of case the Commission notes that it is characteristically addressed in the exemption provisions of FOI legislation. Furthermore, given its growing importance to business, we observe that it should be

made the subject of information handling guidelines and practices in government agencies which gather or receive commercial information.

2.5.3 Of direct interest to the Commission, however, are claims made by agencies of government for commercial secrecy in respect of their own activities, information and dealings, claims the object of which is to prevent the public being informed of those activities. We acknowledge that circumstances can exist when such a claim can properly, and should, be made. A major function of commercial secrecy is to protect the economic value of information which has value because it is kept secret. In other words, secrecy provides the means through which economic advantage can be created and maintained. It clearly is in the interests of the public of this State that it should not be deprived of the benefit of such "assets" simply because they are publicly owned.

2.5.4 The obvious difficulty such claims raise, however, is that secrecy is being asserted against the public ostensibly for reasons associated with the interests of the public. The two matters of real concern this creates relate to, first, the circumstances in which such a claim legitimately can be made and, secondly, the legitimacy of the claim when made. Both of these matters arise most sharply when government is involved in commercial activity either directly as a participant or indirectly as a utility supplier to, an investor in, or as a contractor with, business, or else as an agent facilitating particular business activity.

2.5.5 The legal structure through which government conducts commercial activity can take a variety of forms. It can be through the State itself, through a statutory corporation or through a registered company. Irrespective of the form adopted, the activity, as the Burt Report recognised, is being conducted for the public, its ultimate "shareholders", using and risking public resources. The activity cannot be treated, particularly for accountability purposes, in a manner identical to that expected of private sector businesses. It is affected with a public interest in a way in which private sector business activity is not. This is the case no matter how much a Government may wish to equate its commercial businesses with those of the private sector.

2.5.6 Public accountability, as the Burt Report concluded, is likely to require "greater access to information ... than is normally provided to shareholders" of companies. This bears directly on the first of the two matters we referred to above, namely, when can commercial secrecy legitimately be claimed? No simple rule can be

found to answer this question. It is not realistic to contend that the problem can be avoided by government being prohibited from any involvement in commercial activity. Involvement to some degree is inevitable. Procurement, funds management, the provision of utility services, facilitating economic activity and development, and more, are routine activities of all governments in this country. Opinions may differ as to the forms of commercial activity to which government should commit itself. But the inescapable question, given that commercial activity is inevitable, is the proper role secrecy can have in it.

2.5.7 Openness is a vital value. But it should not be insisted upon in a way that is economically damaging to a government's conduct of commercial activity. Where information has commercial value because it is secret, to insist upon openness and so destroy that value is a step that should not lightly be taken if adequate accountability can be secured by another, or by a combination of other, means.

2.5.8 The Commission holds the view that one can only determine what is the appropriate scope to be given commercial secrecy by considering the alternative accountability mechanisms that should be imposed to safeguard against abuse.

2.5.9 Commercial secrecy in the public arena can have only one or other of two related justifications. The first is to secure an economic advantage to the public. The second is to safeguard against economic prejudice to the public. Translating these justifications into principles which should guide the determination as to when secrecy legitimately can be claimed, the Commission considers that the propositions contained in the usual commercial and business information exemptions to FOI legislation provide an appropriate guide. These we express in the following way:

- (a) Proprietary information which is of such character as itself to constitute an economic asset (or trade secret as it is sometimes called) should be allowed secrecy protection for the reason that its value as a public asset depends upon the maintenance of secrecy. We do not envisage that a particularly significant body of government's commercial information would qualify for protection on this ground. Such information is ordinarily the product of research, innovation and creativity.
- (b) As a complement to (a), proprietary information supplied to and received by government in confidence from a third party in the course

of a business dealing with that third party, should likewise be entitled to secrecy protection for the benefit of that third party. The need for protection of this kind can arise in procurement contracts no less than in joint ventures.

- (c) Commercial information which is not already publicly available should be entitled, *prima facie*, to secrecy protection where —
 - (i) its public disclosure would reveal information that has commercial value; and
 - (ii) disclosure could reasonably be expected to diminish or destroy that commercial value.
- (d) A like protection in like circumstances should be given to a third party in respect of commercial information disclosed in or arising from a business dealing with government.

2.5.10 The Commission believes that these conditions are only acceptable provided other accountability conditions are satisfied. These are:

- (a) subject to preserving the secrecy in question, that the financial affairs of the agency involved in commercial activity, whatever its legal status, are subject to full review by Parliament;
- (b) that the agency is open to audit by or under the supervision of the Auditor General;
- (c) that the commercial activities in which the agency can engage are clearly set by law or by known government directions;
- (d) in the case of statutory corporations and registered companies, that a Statement of Corporate Intent is tabled annually in Parliament;
- (e) that the minister responsible for the agency in question has a right of access to all commercial information of the agency including that in respect of which secrecy is claimed;

- (f) that an annual report is made to Parliament; and
- (g) that any such agency is not exempt from the reach of the proposed FOI legislation unless for compelling reasons.

In addition to the above, it will or may be necessary to impose limitations or binding guidelines upon the activities in which an agency can engage. For example, the range and manner in which the agency invests public funds may require regulation. Prior ministerial or parliamentary approval may need to be obtained for particular expenditures. We have more to say of the accountability of statutory authorities and companies in chapter 3.

2.5.11 Although the principles we have stated have a relatively narrow economic focus, we are mindful they nevertheless provide scope for secrecy to be claimed in matters which marginally, if at all, fall within them. This raises the second of the two matters to which we referred earlier: the legitimacy of the secrecy claim made.

2.5.12 As the Commission emphasises at a number of places in this report, in the end the public is obliged to rely upon the good faith and integrity of those entrusted with public office. That trust, we equally emphasise, cannot be an unguarded trust. The accountability measures we referred to above will in all likelihood provide very positive disincentives to the abuse of secrecy claims. The possibility of abuse, however, cannot be eliminated entirely.

2.5.13 There often is no clear line to be drawn between economic activity and political activity. Where the Government itself is directing a particular commercial endeavour, political and electoral considerations can obviously bear sharply on a commercial decision taken. These extraneous factors may provide the very reason for a claim to commercial secrecy and yet be the very ones which may require openness. Some of the decisions into which the Commission has inquired were of this character.

2.5.14 If any agency is to be expected, because of its founding legislation or otherwise, to act in a commercial fashion, the desirability of a clear divorce between the commercial and the political should be recognised. Apparently commercial considerations should not be allowed to mask political ones.

2.5.15 The Commission has indicated the circumstances in which it considers the non-publication of commercial information can be justified on grounds of secrecy. But the grave concern must remain that secrecy may be claimed where these circumstances do not exist. The enactment of section 58C of the *Financial Administration and Audit Act 1985*, apparently in response to observations in the Burt Report and designed, so it would seem, to prevent secrecy obligations being incurred to third parties, in no way removes that concern.

2.5.16 The importance of the section, which is misleadingly headed "Secrecy of Operations Prohibited", requires it to be set out in full. It provides:

"58C. The Minister and the accountable officer of every department, and the Minister and the accountable authority of every statutory authority, shall ensure that —

- (a) no action is taken or omitted to be taken; and
- (b) no contractual or other obligation is entered into,

by or on behalf of the Minister, department or statutory authority that would prevent or inhibit the provision by the Minister to the Parliament of information concerning any conduct or operation of the department or statutory authority *in such a manner and to such an extent as the Minister thinks reasonable and appropriate.*"
[our emphasis]

2.5.17 Given the events into which the Commission has inquired and the use that was made of secrecy claims during those events, this legislation is most disturbing.

2.5.18 If an action is to be taken or an obligation is to be incurred in circumstances of confidentiality, it is appropriate that the minister and the accountable officer should be required to act as section 58C envisages. But that should not be the end of the matter. If the action is allowed to occur, or if the obligation is allowed to be entered into, which would result in the provision of that information to the Parliament being prevented or inhibited, then the Commission believes the following conditions should be satisfied:

- (a) The minister should notify both the Parliament and the Auditor General in writing that such action has been taken or obligation entered into and

the reasons why it is reasonable and appropriate that the provision of information to Parliament is to be prevented or inhibited to the extent that this is the case.

- (b) Notwithstanding any secrecy undertaking or claim, the Auditor General should be entitled as of right to access to that information to the extent that, in the opinion of the Auditor General, it is or could be relevant to the discharge of his or her audit responsibilities.

2.5.19 There is every reason to require ministers and accountable officers under the *Financial Administration and Audit Act 1985* to police their departments and agencies so as to prevent secrecy being attracted unjustifiably to their operations. But the Commission is unable to accept that Parliament may be statutorily denied access to information at the absolute discretion of a minister in the way now permitted by section 58C. This provision does not advance proper accountability.

2.5.20 Accordingly, the Commission recommends that:

Section 58C of the Financial Administration and Audit Act 1985 be amended so that:

- (a) the minister is obliged to notify both the Parliament and the Auditor General in writing of any action that has been taken or obligation incurred to which section 58C is relevant, and the reasons why it is reasonable and appropriate that the provision of information to Parliament is to be prevented or inhibited to the extent that this is the case; and***
- (b) notwithstanding any secrecy undertaking or claim, the Auditor General is entitled, as of right, to access to that information to the extent that, in the opinion of the Auditor General, it is or could be relevant to the discharge of his or her audit responsibilities.***

2.5.21 As the Commission has said, openness, while of great importance, is not an absolute value (see paragraph 2.5.7 above). Secrecy, and within it commercial

secrecy, has a proper place in the conduct of government. Provided adequate accountability measures are imposed where secrecy is allowed, the risk posed to the public should be kept to a minimum.

2.6 Guarantees, indemnities and sureties

2.6.1 In October 1987, the Premier and Treasurer, Mr Burke, agreed to indemnify the National Australia Bank in respect of one of the lines of credit provided by the bank to Rothwells, to the extent of \$150 million. The indemnity ultimately provided to the bank was in the form of a "gentlemen's agreement", there being no legislative authority for the granting of a guarantee or indemnity. The same approach was earlier taken by Mr Burke when he agreed to indemnify both the R & I Bank for any losses it might incur in relation to the Teachers' Credit Society and the Home Building Society for any losses it might incur as a result of taking over the loan portfolio of the Swan Building Society. In the case of the Rothwells and Teachers' Credit Society indemnities, the decisions of the Premier and Treasurer to grant the indemnities were ratified soon afterwards by Cabinet. In the case of the Swan Building Society indemnity, the decision to grant it was not referred to Cabinet.

2.6.2 The issue of such indemnities was aptly described by Mr Bowe, the Under Treasurer, as a "gentlemen's agreement" because such an agreement constitutes an expression of the Government's intention to honour an obligation if called upon to do so and, hence, an intention to appropriate the necessary funds. Any such appropriation would, of necessity, require the approval of both Houses of Parliament. There remains always in such cases, therefore, the legal possibility that funds might not be appropriated. Politically speaking, no Parliament in our system of government is likely to contemplate reneging on any undertaking given by the State Treasurer.

2.6.3 Mr Burke, therefore, in each of these cases was able effectively to commit Parliament to the appropriation of the funds necessary to meet a contingent liability incurred by the Government. In Rothwells' case, it was \$150 million. In the other cases it was open ended. The Teachers' Credit Society indemnity cost the taxpayer \$128.5 million, the Swan Building Society indemnity nearly \$18 million.

2.6.4 Unless Government has available to it the capacity to act urgently in appropriate cases, it might well be unable to avert problems requiring immediate solutions in the best interests of the State. The Government must be permitted to

exercise political judgment in these cases. However, in all matters of significance, that judgment should be based upon a decision taken by the Cabinet.

2.6.5 There remains the important question of accountability. The Commission believes that the Government must account to the Parliament and the people for the exercise of its political judgment.

2.6.6 In December 1991, the Auditor General presented to Parliament his "Report on the Management of Guarantees, Indemnities, and Sureties". In the context of the report, the reference to a "surety" apparently was intended to mean a contingent liability incurred without legislative authority and we use the term "surety" in the same sense in this section of the report. The Auditor General first raised an issue for Parliament to determine, namely, whether restrictions should be placed on the issuing of "sureties" in situations where no enabling legislation exists. The Auditor General recommended that:

- (a) Parliament should ensure that legislative powers providing for the issue of guarantees and indemnities have clearly defined limitations on the extent of the contingent liabilities entered into, either within the Act or as regulations to the Act;
- (b) government agencies should be required to inform Treasury of all defined contingent liabilities so that these may be fully reported to Parliament;
- (c) Treasury should be required to report such contingent liabilities to Parliament at least once a year as part of the audited financial statements and consideration should be given to interim quarterly reporting to Parliament of the status of such contingent liabilities;
- (d) all government agencies should be required to maintain a formal and systematic register of government guarantees, indemnities and other forms of contingent liabilities required to be reported;
- (e) Treasury should review the format of reporting of payments arising from contingent liabilities entered into to determine whether Parliament could be better informed by a consolidated statement; and

- (f) each government agency administering guarantees, indemnities or "sureties" should establish, and have approved by the minister, criteria, procedures and guidelines for the assessment of an individual guarantee, indemnity or "surety" or guarantee or indemnity scheme.

The report contained further recommendations of a consequential and complementary nature.

2.6.7 The Treasurer is currently obliged by the *Financial Administration and Audit Act 1985* to report contingent liabilities to Parliament annually. The Auditor General's recommendations referred to above are designed to ensure Treasury is fully informed of all contingent liabilities, including liabilities with respect to guarantees, indemnities and "sureties", so that Parliament can be fully informed. It is obvious Treasury must play an important role in this process. It follows that the Treasurer should be responsible for giving all "sureties". In significant cases, it should be expected that the Treasurer would seek Cabinet approval for the giving of a "surety". It is imperative, having regard to the matters referred to, that Parliament be notified as soon as possible of any guarantee, indemnity or "surety" given by or on behalf of the State.

2.6.8 Accordingly, the Commission recommends that:

- (a) *The recommendations of the Auditor General contained in the 1991 Report on the Management of Guarantees, Indemnities and Sureties be given urgent attention by the Government.*
- (b) *Steps be taken to ensure that Treasury is informed by all agencies of government of the giving of any guarantees and indemnities pursuant to legislative powers as soon as possible after they have been given.*
- (c) *The Treasurer should be responsible for the giving of all guarantees, indemnities and "sureties" responsibility for which, by law, is not vested in another public official.*

- (d) *Guarantees, indemnities and "sureties" in respect of matters of significance should require Cabinet approval.*
- (e) *The Treasurer or other minister or public official responsible for the giving of any guarantee or indemnity, and the Treasurer in the case of a "surety", should notify Parliament and the Auditor General of its nature, full extent and purpose as soon as practicable following its being given.*

2.7 Government media units

2.7.1 Notwithstanding that the use by governments of press secretaries and media units to project the government to the public is now a characteristic feature of Australia's governmental and political landscape, it remains a troublesome practice.

2.7.2 No doubt, an effective system of links between the Government and the media is today an indispensable part of the process of informing the public of governmental affairs. Press secretaries and a Government Media Office appear to be an integral part of that system. Government and its agencies, no less than the Parliament, have a responsibility to communicate information to the public about the issues, affairs and practices of the day. Inevitably, there will be a political dimension in that communication. It would be naive to believe otherwise. There is no clear line between information and propaganda. Therefore, some constraints are necessary.

2.7.3 The Commission's concern has been with the scope for abuse, by way of deception, disinformation and positive political manipulation, that may attend a government's use of its own media officers. Although we have not inquired directly into this matter, it is one which, in a variety of guises, has presented itself to us as warranting critical attention. We have found that ministers, on occasion, were less than forthright with the public in their communications through media services and that media officers were necessarily involved in this activity.

2.7.4 The direct dissemination of information to the public is a practice to be encouraged. The media constitute a vital part in the dissemination process. But the public is entitled to be protected from information which is tainted at its source.

Government-employed media officers, in discharging their functions, must have an informed appreciation of their public responsibilities. We deliberately avoid the term "ethical" when referring to these responsibilities, because professional ethics are only a part of the matter.

2.7.5 The Commission is conscious that the role of a government media unit and the government's relationship with the media are problematic issues. At least from the seventies, governments in various parts of the country have addressed the question of the organisation, management and operations of media units. The Queensland Electoral and Administrative Review Commission ("EARC") is now preparing a report on this subject. It is our view that the issue is one which should be publicly ventilated and reported upon in this State. The personnel, budgets, organisation practices and procedures of governmental media services should be open to public scrutiny.

2.7.6 Accordingly, the Commission recommends that:

The Commission on Government inquire into the organisation, role and functions of press secretaries and of the Government Media Office.

2.7.7 Consideration should also be given to the question of the Parliament itself providing the public with a media service. There is a potential role for a parliamentary media unit, under the control of the presiding officers of both Houses, sifting out from the voluminous information which now comes to Parliament that about which the public should be informed. Presently, despite its often considerable importance, much of this information receives little public attention. In making this suggestion, the Commission does not believe such a unit should concern itself with publicising the proceedings of Parliament as such. We consider that Parliament, as the principal repository of publicly available information about government, has a positive responsibility to facilitate its effective communication to the public through the media.

* * *

CHAPTER 3

ACCOUNTABILITY

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3.1 Accountability

3.1.1 In a democratic society, effective accountability to the public is the indispensable check to be imposed on those entrusted with public power. Many of the submissions received by the Commission from members of the public in response to its Issues Paper demonstrated the strength with which this view is held by the public in this State. For its part, the Commission believes the accountability system which now exists in this State is deficient in many respects. The public sector, in important ways, remains an unaccountable public sector.

3.1.2 This State inherited a model of government which evolved in Britain during a period in which public officials were relatively few in number, in which ministers were involved actively in the affairs of their departments and in which, unlike in Australia, statutory authorities were limited to relatively unimportant areas of public administration. The exercise of state power and state responsibilities was small by modern standards. In that period, the accountability measures were based largely on the responsibility of ministries and of ministers to Parliament. Although our system of government today bears very little resemblance to the British model described above, the Commission's inquiry suggests that this State has continued to pay lip service to that model's accountability measures. They provide no firm foundation for the accountability measures to which the Western Australian public is entitled.

3.1.3 The Commission's principal concern is to ensure that public officials and agencies are so regulated as to render them answerable for their actions to the public. We believe the appropriate machinery is lacking.

3.1.4 Before considering particular accountability measures, it is necessary to identify a number of principles and general considerations which have guided us in our approach to this matter.

3.1.5 First, it is not the purpose of accountability measures to prevent a government from governing. If the measures had that effect, they would defeat the very purpose for which, under the Constitution, power is given to governments, public officials and governmental agencies. The purpose of such measures is to hold governments, public officials and agencies to account for the manner of their stewardship. Government is constitutionally obliged to act in the public interest. To the

extent that it is given power to do so, it must be allowed to do so. Such is its trust. Accountability provides the test and measure of its trusteeship.

3.1.6 Secondly, accountability to the public is the obligation of all who hold office or employment, in whatever capacity, in our governmental system. Although the means by which the obligation is discharged vary, it must be regarded as a condition of public service.

3.1.7 Thirdly, having entrusted governments, public officials and agencies with public power, the public reasonably is entitled to entertain a variety of expectations of those institutions and officials in their management and use of that power. These expectations cannot be fully enumerated and they vary over time. Some, for example, relate to basic norms which must be adhered to: compliance with the law and the Constitution; adherence to appropriate standards of official conduct; and loyalty in public service. Some result from the expectations created by government itself, from its policies and programmes. Some reflect the desired manner in which the public business itself should be conducted, its efficiency, its economy, its effectiveness, its equity. In their aggregate, these expectations inform the criteria of accountability. In general terms, public accountability provides the means for gauging the extent to which the government's institutions and officials comply with the expectations the public is entitled to have of them.

3.1.8 Fourthly, there are three principal avenues through which public accountability can be rendered:

- (a) The first is to the members of the public directly, both in their individual capacities and as a community. The Commission believes that, in a sense, this most fundamental form of accountability, parliamentary elections apart, is the weakest form of accountability practised in this State. We will suggest some remedial measures.
- (b) The second is accountability to what, for convenience, we will call accountability agencies who act, or should act, for and on behalf of the public. The obvious examples of such agencies are the Ombudsman, the Auditor General and the Parliament when exercising its role of scrutiny. Again, the Commission believes that public accountability through this means suffers from some notable deficiencies.

- (c) The third is the accountability of officers to their superiors and peers who are themselves accountable, directly or indirectly, to accountability agencies. This is the form of accountability traditionally favoured in "Westminster" style systems and it is embodied, for example, in the principle of individual ministerial responsibility.

Given the complexity of modern governmental arrangements, all three forms are essential. But insofar as it is practicable and without impairing the effective conduct of public government itself, the first two of these three forms should play the major role in ensuring an adequate measure of accountability. They, much more so than the third, bring government back to the people of this State.

3.1.9 Fifthly, no single measure alone can secure effective public accountability. A variety of measures is necessary. Both how these complement each other and their aggregate effect are important.

3.1.10 It should be noted that the Commission does not address one significant dimension of government which gives rise to distinctive accountability issues, namely, inter-governmental relations in a federal system. There are many reasons why, in Australia's federal system, particular initiatives are pursued on a national basis and through a variety of inter-governmental arrangements. While it is inappropriate that we concern ourselves in the various forms these arrangements take, it is necessary to highlight that they do or can exaggerate the difficulties that both the Parliament of a State and other accountability agencies can experience in exercising effective scrutiny over the actions of the executive when participating in such arrangements. This is a matter to which continuing attention needs to be given. We note in this regard the Report on Parliamentary Procedures for Uniform Legislation Agreements tabled in the Legislative Assembly in 1992. We also note that if several of the measures we are proposing in this report are to be fully effective in achieving their purposes, co-operative national arrangements are desirable. We refer here particularly to our recommendations relating to political finance and to the investigation of corrupt and improper conduct.

3.1.11 As we have said, there is no single path to be followed to achieve a satisfactory level of public accountability. Accountability, for example, can require the obligation to provide information. It can require direct and periodic intrusion into the affairs of government for the purposes of scrutiny, investigation and review. It can require the provision of the opportunity to challenge official decisions. It can require

complaint based investigations. It can require the adoption of procedures which themselves prescribe how officials or agencies can or must act. It can require the formulation of standards by reference to which official conduct and action can be judged. It can require effective systems of judgment or censure. It can require the establishment and policing of safeguards against the negligent or intentional misuse of official power, position and resources. This list is by no means exhaustive.

3.1.12 The Commission has indicated earlier in this chapter the three principal avenues through which public accountability can be exacted: through the public directly, through accountability agencies, and, indirectly, through peers and superiors. We consider that these provide an appropriate framework for the consideration of particular accountability measures. We note that matters discussed in other chapters of this report have a direct bearing on accountability. These will be mentioned in the course of discussion without traversing them again in any detail. We emphasise the interrelationship of the various chapters of this report.

3.2 Direct accountability to the public at large

3.2.1 The three fundamental forms that direct accountability to the public at large should take are first, through free, fair and open parliamentary elections; secondly, through the optimal provision of information to the public about the conduct, processes and practices of government; and thirdly, through the criminal law.

3.2.2 The first of these is now reasonably well established in this State, although we will make some recommendations later in our report on the electoral system.

3.2.3 The second has been discussed at length in the previous chapter.

3.2.4 The third, the criminal law, provides the means historically adopted for rendering an official answerable to the public for certain conduct in office. As the actions of officials which should be made the subject of criminal offences bears directly upon the standards of conduct to be expected of officials, we defer consideration of the criminal law to the next chapter which deals directly with official integrity.

3.3 Accountability to the individual citizen

3.3.1 It is in the exercise of statutory powers, and in the day-to-day conduct of public administration, that the individual citizen is often most vulnerable to the actions of government. Notwithstanding the existence of the appeal bodies referred to in paragraph 3.4.1 of this chapter and apart from the Ombudsman, the citizens of this State have very limited avenues open to them to call the officials and agencies of government to account where their decisions are adverse to them individually.

3.3.2 If citizens are to have any realistic prospect of scrutinising and challenging government action that particularly affects them, it is essential that they have access to information in the hands of government concerning their personal affairs, and that they are given a reasoned explanation of official decisions affecting their interests. The Commission has already recommended that FOI legislation be enacted and that a person sufficiently affected by an administrative decision be given a general statutory right to be provided with reasons for that decision.

3.3.3 The provision of information to the citizen is, however, only the first step in making the officers and agencies of government accountable for their administrative decisions and actions. No matter how well intentioned, officials are fallible. It is unacceptable that the individual citizen should have to bear the burden of that fallibility where means of correction and redress can be made readily available.

3.3.4 The courts, historically, have played a constitutionally important role in safeguarding the citizen against improper and erroneous governmental action. The Commission does not wish in any way to diminish that role. Indeed, we will suggest that it can be improved significantly. However, it is clear to us that the courts cannot realistically constitute the first and sole point of recourse available to a person aggrieved by an official decision. Two decades ago, this was recognised in the creation of the office of Ombudsman.

3.4 Administrative decisions

3.4.1 In January 1982, the Law Reform Commission of Western Australia reported to the then Attorney General on the defects in existing administrative appeals arrangements in Western Australia. At that time there were approximately 257 different categories of administrative decision subject to a statutory right of appeal on the merits to more than 43 appeal bodies. The Law Reform Commission suggested that these

arrangements were the result of *ad hoc* legislation over a long period of time without an overall plan.

3.4.2 The Law Reform Commission recommended that an administrative appeals system should be developed to consist of the Full Court of the Supreme Court, an administrative law division of the Supreme Court, an administrative law division of the Local Court and a limited number of specialist appellate bodies. It identified a range of decisions which should be within the administrative appeal jurisdiction of the Supreme Court and further proposed that the Supreme Court determine appeals on points of law from the administrative law division of the Local Court. It further identified a range of decisions which should be within the administrative appeal jurisdiction of the Local Court. It also proposed that the Full Court of the Supreme Court should be the final arbiter of points of law raised in the Supreme Court.

3.4.3 The Law Reform Commission recommended that such bodies as the Land Valuation Tribunal, Licensing Court, and Town Planning Appeals Tribunal should be retained as specialist appeal tribunals and not incorporated within the new administrative appeals system.

3.4.4 In 1986, the Law Reform Commission further reported to the Attorney General in respect of the procedures for obtaining judicial review of administrative decisions in the Supreme Court (that is, review on legal grounds) and whether reasons for administrative decisions should be furnished to persons affected by them. At common law, an administrative decision-maker is under no obligation to provide reasons for his or her decisions. The Law Reform Commission recommended that existing procedures for obtaining prerogative writs and other remedies to challenge administrative decisions should be replaced by one in which remedies could be obtained by an order in a civil action ordinarily heard by a single judge of the Supreme Court, rather than by the Full Court. It also recommended that any person with a sufficient interest in a decision made in the exercise of a public function should be entitled to obtain a statement from the decision-maker setting out reasons for the decision which should form part of the record of the decision-maker. The Law Reform Commission explicitly deferred further consideration of (a) the grounds upon which judicial review should occur (as distinct from the procedure for obtaining review), (b) the rules of standing whereby a person affected by a decision may approach a court to seek review, and (c) the statutory exclusion of judicial remedies. Some of these matters were then being considered by the Commonwealth Administrative Review Council. It also noted

that, elsewhere, only in relation to Commonwealth decision-making had procedural reform been accompanied by reform of the substantive law.

3.4.5 The present State Government has accepted "in principle" the recommendations contained in these two Law Reform Commission reports. This was confirmed in a media statement issued by the Attorney General on 5 March 1992. He there noted that a majority of the recommendations were being pursued by the Government, including the key recommendation to establish a single, simplified procedure for review of all administrative decisions. By that, it is understood the Attorney was referring to the need to establish a comprehensive administrative appeals system to enable a reconsideration of administrative decisions on their merits.

3.4.6 The Attorney, in his media statement, expressed reservations, however, concerning the recommendation that affected persons should be entitled to reasons for decisions. He said that experience in other jurisdictions suggested the additional work load and the cost of implementing the recommendation would be out of proportion to the benefit and that reasons might currently be sought through the minister, the Ombudsman and, to an extent, through existing judicial review procedures. The Commission believes that the right to reasons should be regarded as basic in a democratic society. For the individual citizen it is the most direct and important accountability measure where an administrative decision affects his or her own interests. We consider that the determinations of all public officials authorised by law to make decisions affecting the rights of citizens, should be supported by reasons furnished, when required, to affected persons. We have made a recommendation to this effect in paragraph 2.2.10 of chapter 2.

3.4.7 Unfortunately, as yet there has been little public evidence of any progress in the implementation of these recommendations. Indeed, the Attorney in his media statement observed that a Bill dealing with administrative appeals would not be dealt with in the 1992 legislative programme. We endorse the substance of the reforms recommended to the system of administrative appeals and judicial review contained in the two reports of the Law Reform Commission.

3.4.8 Accordingly, the Commission recommends that:

The recommendations contained in the Reports of the Law Reform Commission of Western Australia in Project No 26, Part

I and Part II, be implemented forthwith, subject to the observations in paragraph 3.5.2 of chapter 3 concerning the establishment of an Administrative Appeals Tribunal.

3.5 Administrative Appeals Tribunal

3.5.1 The Law Reform Commission recommended the administrative appeals system should be located within the Supreme Court and Local Court and should involve judges and magistrates in appeal adjudication, although allowing for non-lawyer participation. In essence, this would result in members of the judiciary engaging in a review of the merits of various administrative decisions made by public officials, including ministers. Such decisions will often involve a close consideration of discrete areas of commercial and economic activity and of relevant government policy, a responsibility going beyond the traditional function of the judiciary. There is a danger in such a process that the constitutional values inherent in a separation of judicial and executive power could be compromised. At the very least, the performance by the judiciary of such functions is not a traditional one for which it is uniquely qualified.

3.5.2 Since the Law Reform Commission first gave consideration to the matters here under consideration, both the Commonwealth and, more recently, the State of Victoria have had extensive experience with a system of administrative appeals conducted by an Administrative Appeals Tribunal which operates quite separately from the judiciary. In the Commonwealth, this separation is required by reason of a constitutional embargo on the merging of judicial and administrative functions embodied in the Commonwealth Constitution. The values reflected in the principle of separation of powers are also reflected in the administrative appeal system adopted in Victoria. The Commission believes this principle to be of importance to the maintenance of a strong and independent judiciary. In consequence, we invite consideration to the adoption of the separate structure for administrative appeals. We believe an Administrative Appeals Tribunal should be established to meet the needs identified in the Law Reform Commission's report.

3.6 Judicial review of administrative action

3.6.1 Judicial review of administrative action on legal grounds is possible where a public official has exceeded his or her power or jurisdiction or acted unfairly,

for example, in breach of the rules of natural justice. In the 1986 report of the Law Reform Commission to which we have referred, recommendations were made to reform the procedure for making applications to the Supreme Court for judicial review. The present procedure involves the use of ancient prerogative writs and other means, which some would describe as "museum pieces". It necessarily requires a technical consideration of the scope of the remedy sought and the standing of the applicant to seek a remedy in Court. The Commission earlier in this chapter has endorsed the recommendations for procedural reform made by the Law Reform Commission.

3.6.2 If the Law Reform Commission's recommendations are implemented, we do not believe there is any need to introduce statutory grounds for judicial review of administrative action such as those set out in the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*, additional to the existing common law grounds of review. The common law has now developed to the point where we consider it well reflects the statutory grounds of judicial review contained in the Act, with the possible exception of error of law on the face of the record. The enactment of an *Administrative Decisions (Reasons) Act* in the recommended form will, however, ensure that any error of law will of necessity form part of the record of the decision-maker. Thus, we do not consider it is necessary to provide a separate statutory ground of review in relation to error of law on the face of the record. In any event, we have some apprehension that a statutory enumeration of grounds of review could affect adversely the flexibility, and the scope for development, of the common law itself. This would be an unacceptable price to pay when there is no demonstrable need for legislation. We, therefore, do not propose the enactment of statutory grounds for judicial review of administrative action.

3.6.3 We noted earlier that the Law Reform Commission in its 1986 report deferred consideration of the rules of standing which govern the entitlement of a person to seek judicial review of administrative action. The common law standing rules currently entitle any person with a "special interest" in the subject matter to seek judicial review. The Commission believes this test has proved sufficiently flexible to support judicial scrutiny of unlawful executive and administrative action.

3.6.4 In the course of the inquiry, however, the Commission has noted the expenditure, by or on behalf of government or its agencies, of large sums, the lawfulness of which may have been questionable at the time. In such cases, under the current standing rules, no member of the public may be able to establish, to the satisfaction of a Court, a special interest in seeking judicial review of such expenditure. The Attorney

General, in his or her capacity as the guardian of the public interest, automatically has standing to seek judicial review in such cases. However, this right in the Attorney General harkens from former times when the role of the Attorney General was more that of an independent officer of Parliament than of a minister of the government of the day. Today, an Attorney General is no longer perceived as a minister who stands apart from the government of the day, free from its direction. A conflict of interest is inevitable. The consequence is that the Attorney General should not be expected to institute legal proceedings which may have the consequence of invalidating administrative or executive action at the request of a member of the public concerned to ensure that government acts in accordance with the rule of law, especially where the expenditure of funds by government is concerned.

3.6.5 Having said that, we are not convinced that statutory alteration to the standing rules to permit a member of the public to challenge the lawfulness of government expenditure would necessarily be desirable. Because so many actions of government are accompanied by the expenditure of money, we can readily imagine an unwarranted increase in the number of applications for judicial review of administrative action if such a test were introduced. Given the role of the Auditor General, whose obligation it is to report such exceptional matters to Parliament, and the role of the proposed Commissioner for the Investigation of Corrupt and Improper Conduct, there appears no compelling reason to enlarge the scope for judicial review of such actions. We must emphasise, however, that the matter is not an unimportant one, having regard to our terms of reference. Significant sums were either committed or expended by or on behalf of government in circumstances which led us to comment on the propriety of the actions which gave rise to such commitments or expenditure. It is also a matter upon which the further considered views of the Law Reform Commission would be valuable after the general reforms recommended have had time to take effect.

3.7 Accountability agencies of the public

3.7.1 What the public cannot do itself, it can do through agencies acting for and on its behalf. These agencies must be given a central role in exacting accountability from the administrative system. The Commission believes it is imperative that the bodies available to protect the interests of the public be strengthened and supplemented.

3.7.2 The first of these agencies, both in power and responsibility, is the Parliament. Constitutionally, it is obliged to review and exercise control over the

governmental system. Notwithstanding the power currently exercisable in and over the Parliament by the executive, the Commission considers that the Parliament's faithful discharge of that obligation remains a vital component of the armoury supporting accountability. Our recommendations here and in chapter 5 are founded on this view.

3.7.3 Beyond the Parliament are the Auditor General and the Ombudsman. These agencies, as the Commission recommends, ought to be independent agencies responsible directly to the Parliament. They should not be tied to the executive whose conduct they review. Furthermore, they should be complemented by two additional agencies we recommend in later chapters. These are the Commissioner for Public Sector Standards, expanding the role of the present Public Service Commissioner, and the Commissioner for the Investigation of Corrupt and Improper Conduct, an agency to replace the present Official Corruption Commission.

3.7.4 If accountability to the agencies acting for the public is to be anything more than accountability in name only, these agencies together must bring the entire governmental system under scrutiny and they must share between them three broad powers. These powers are:

- (a) to require and receive information about the conduct, processes and practices of the executive and administrative arms of government;
- (b) to undertake investigations of specific governmental decisions and actions on the complaint of the individual citizen or at the request of Parliament; and
- (c) to conduct their own independent inquiries and examination of governmental activity.

3.7.5 Agencies which have an independent right to intrude directly into the affairs of the departments and agencies of government, for the purposes of scrutiny, examination and judgment, provide the best check available to the public on the actions and activities of those departments and agencies. Because the Parliament and the Auditor General presently have this capacity, the Commission's recommendations here are directed, in the main, towards broadening and strengthening their exercise of that right. We foreshadow that in chapter 4 we recommend a similar right be given to the proposed Commissioner for the Investigation of Corrupt and Improper Conduct.

3.8 Parliament: question time

3.8.1 In contrast with many other "Westminster" parliaments both in this country and overseas, the Parliament of this State has done relatively little to provide the public with the protection its constitutional review responsibility is there to secure. While steps have been taken in recent years, primarily in the Legislative Council, to redress this failure, a wholesale reappraisal of its practices and procedures, with this responsibility in mind, is called for. The scrutiny of public finances apart, the initiatives taken (particularly through the establishment of standing committees) to bring the administrative system under the systematic review of the Parliament, have been limited and selective. Much of the burden of review still falls on that most traditional and random of measures, question time.

3.8.2 Traditional accounts of ministerial responsibility and of Parliament's oversight of the executive emphasise the role that the parliamentary question has in calling a minister to account for his or her administration. Whatever else can be said of question time, it today provides the crudest form of accountability exacted by the Parliament. The manner of its conduct, the apparent acceptance of evasion and equivocation in providing answers, and the governmental manipulation of it for its own purposes, can leave the public with little reassurance that it presently serves the accountability purpose the traditional view attributes to it in anything other than a fortuitous way. We need only refer to the evidence given by Mr M Naylor in the Northern Mining Corporation term of reference. When asked about the basis upon which he had prepared a draft answer, he said:

A: ... I spent the better part of six years drafting parliamentary questions and as well receiving and evaluating the answers or rather the non-answers to those questions, so my approach to answers to parliamentary questions was conditioned by what I had seen in answers to questions that the opposition had asked over the previous six years. There was some degree of anticipation that applied to answering parliamentary questions. That anticipation would extend to, if you like, issues that weren't addressed in the questions themselves. In short, those answers — or particular questions were answered in a way that were more an art form than an exact science.

Q: Does that mean that you accept that the answer was inaccurate as drafted by you.

A: Yes, I accept that.

We do not overlook the fact that question time has purposes other than exacting accountability.

3.8.3 Because the Commission believes question time can be made to serve a useful, if necessarily limited, purpose for the public, we foreshadow that a review of it forms part of our general recommendations for the Parliament in chapter 5.

3.8.4 We have observed that the review purpose question time can serve is limited. The principal cause of this lies in its very nature. Parliamentary questions are so instance specific in character, limited in the inquiry they allow, and dependent for what they reveal upon the answer given, as to provide little more than a symbolic expression of Parliament's discharge of its review obligation. Parliament's procedures must allow for a more comprehensive, informed and searching examination of governmental activity. As has been recognised increasingly in "Westminster" parliaments over 30 years and more, it is through parliamentary committees that this is to be achieved.

3.9 Parliament: parliamentary committees

3.9.1 The standing committees we now have are six in number. They are located predominantly in the Legislative Council and are, for the most part, very recent creations.

3.9.2 The review of the processes, practice and conduct of government is only one of the purposes for which committees can be used. But in a parliamentary democracy that purpose should be the cardinal one. In the exercise of its law-making power, the Parliament has greatly enlarged the power and authority of the executive and the administrative arms of government. These now have a pervasive effect on the daily life and well-being of the Western Australian community. The Commission urges the Parliament to bend its efforts to the fulfilment of its review obligation as a matter of urgency. The rational and systematic use of standing committees for this purpose should be a priority.

3.9.3 It is inappropriate for the Commission to indicate in any precise manner how a committee system should be configured so as to bring the governmental system under the comprehensive scrutiny of the Parliament. However, there are a number of observations which we make.

3.9.4 First, considerations of practicality impose real constraints upon what is possible for a committee system. The number of members in both of the Houses of Parliament is not large and can in no way be compared with the national Parliaments of this country, Britain and Canada in the capacity they have to establish and staff committees. Given the limited human resources available, we cannot realistically expect an elaborate committee system. Nevertheless, we recognise that, of this State's two Houses, it is the Legislative Council which has the greater capacity to utilise its members for committee purposes. In chapter 5, we make recommendations intended to make governmental review a very positive responsibility of the Legislative Council.

3.9.5 Secondly, if parliamentary committees are to be able to realise their purpose, several conditions require to be satisfied.

- (a) Their mandate must not be cast in ways which curtail, in any arbitrary or protective way, the matters into which they can inquire.
- (b) Their powers must be ample.
- (c) They must be provided with the support staff, resources and facilities necessary to enable research, investigation and reporting to be fully and effectively undertaken.

We particularly emphasise the last of these. An unsupported committee is a wounded committee.

3.9.6 Thirdly, in a later part of this chapter, the Commission considers the relationship which it believes should exist between the Parliament (especially its committees) and those independent accountability agencies to which we have referred and which we believe should be responsible directly to the Parliament. Once appropriately related to the Parliament, the investigative and reporting powers of these agencies should provide some committees at least with much valuable assistance in the conduct of their own inquiries.

3.9.7 Fourthly, the Commission believes there is no compelling reason why committees in either House should be chaired necessarily by a member of the Government of the day or, in the case of the Legislative Council, by a member of the majority party in the House. Consideration should be given to the practice of the House of Commons where the appointment of chairs is a matter of negotiation and sharing between parties.

3.9.8 Fifthly, if the use of committees for review and accountability purposes is not to be haphazard, attention has to be given to their co-ordination and integration. While the achievement of this must take into account local considerations, there is now guidance which can be derived from other parts of the country on this matter.

3.9.9 Sixthly, given both the size and complexity of the governmental system, it seems particularly desirable that a standing committee be constituted with responsibility for the oversight of the organisation and operation of the public sector as a whole. Both the Commonwealth and Victoria, for example, have such a committee and we note that this State has already gone some distance, although not fully, down this path with the now ten years old Government Agencies Committee of the Legislative Council. Such a committee would, in our view, be the appropriate one to which our later proposed Commissioner for Public Sector Standards should report and be accountable.

3.9.10 Seventhly, while it is for the Parliament itself to determine the matters into which its committees can appropriately inquire, the Commission considers it necessary to refer to one matter in particular. Committee review of governmental action commonly focuses upon the process used in administration. We wish to emphasise that the investigative role of committees extends to the review of the efficiency, the effectiveness and the appropriateness of administrative action. These are matters of vital public interest demanding parliamentary review.

3.9.11 Finally, and to repeat what we have said in chapter 2, the principle of individual ministerial responsibility should not be allowed to deflect a committee's examination of an official where, given the matter being inquired into and that official's actual responsibilities in relation to it, he or she is an appropriate person to be examined on it.

3.10 The Auditor General

3.10.1 The office of the Auditor General provides a critical link in the accountability chain between the public sector, and the Parliament and the community. It alone subjects the practical conduct and operations of the public sector as a whole to regular, independent investigation and review. This function must be fully guaranteed and its discharge facilitated. The Auditor General is the Parliament's principal informant on the performance of the administrative system. The Parliament therefore has a special responsibility to ensure both that the independence and the effective resourcing of the Auditor General are secured, and that its own investigative procedures (particularly through committees) are such that it fully utilises the information about government supplied to it in the Auditor General's reports. The Commission's recommendations have this responsibility particularly in mind.

3.10.2 The Commission acknowledges that the *Financial Administration and Audit Act 1985*, and later amendments made to it largely in response to the Burt Report go some distance in enlarging the powers and responsibility of the Auditor General. However, the Commission believes that more needs to be done if the public is to obtain the benefit and the protection this office is capable of providing.

3.10.3 The Auditor General is no mere scrutineer of the financial affairs of the departments and agencies of government, notwithstanding the importance of this responsibility. The Auditor General's role must now be accepted as multi-purposed. The *Financial Administration and Audit Act 1985* itself acknowledges as much. In auditing the accounts of an agency, the Auditor General is expected to address not merely the financial integrity of the agency's activities but also such matters as the agency's compliance with the law and the legislation and directions under which it acts and the controls it has to secure that compliance; the probity of official conduct in its financial affairs; the appropriateness of performance indicators; and, of no little importance, given our inquiries, the adequacy of the records on which its management is based and carried into effect. As well, the Auditor General has an expanding and more far reaching responsibility, one which relates directly to protecting the public purse.

3.10.4 It is not the role of the Auditor General to question government policy. But it is the role of that office to examine the efficiency and effectiveness with which policy and, for that matter, legislative and other programmes, are put into effect. It equally is that office's role to examine the efficiency and effectiveness of governmental agencies themselves. Put colloquially, the Auditor General has the proper and

developing function of conducting "value for money" audits of government programmes and agencies. These responsibilities are of great importance. Their discharge must be facilitated in every way. They constitute a vital check on waste, mismanagement and the subversion of government's policies and programmes.

3.10.5 The above description is not intended to be a comprehensive statement of the Auditor General's function. It serves merely to illustrate why the Commission attributes to it the importance it does and why it considers the office itself to be one that must be safeguarded and enhanced. Although in the end only a reporting agency to Parliament, it can properly be described as the public's first check and best window on the conduct of government.

3.10.6 No activity of government fails to involve some use or commitment of public resources. No activity of government can, in consequence, be allowed to be removed from the Auditor General's scrutiny. It is reassuring to note that the *Financial Administration and Audit Act 1985* was amended in 1989 to ensure that subsidiary companies remained subject to the jurisdiction of the Auditor General. What we wish to emphasise is that for so long as an agency owns, or uses, or risks, public property in its operations, there can be no acceptable reason for its not being subjected to the full scrutiny of the Auditor General.

3.10.7 Accordingly, the Commission recommends that:

All public sector bodies, programmes and activities involving any use of public resources, be the subject of audit by the Auditor General.

3.10.8 It should be unnecessary to add, but, in the light of the provisions of section 58C of the *Financial Administration and Audit Act 1985* to which we referred in chapter 2 of this part of the report, we observe that the Auditor General should be entitled as of right to any and all information in the hands of government relevant to the proper conduct of his or her inquiries. Claims of confidentiality and, in particular, of commercial confidentiality, can have no place whatever in impeding the audit process. The Auditor General must be relied on to protect that confidentiality.

3.10.9 The Commission now turns to the steps it considers necessary to ensure the independence and effectiveness of this office. It makes its recommendations in the

light of the consideration that there is every prospect that an effective Auditor General is likely to incur, at least periodically, the hostility of a government and/or of government departments and agencies. It is imperative that, while the Auditor General be accountable for his or her actions — and the Parliament is the appropriate agency to exact this — the executive arm of government be denied the practical capacity to impair the full and effective discharge of the responsibilities of the office. We make this observation, not because it has been prompted by any conduct of the Government in this State noted in the course of our inquiries, but because, as recent experience elsewhere in this country demonstrates, the very role of this office makes it vulnerable to the adverse action of those it is obliged to examine and on whom it reports.

3.10.10 In May 1991, a Policy Advisory Committee to the Auditor General made 13 specific recommendations on the office. We understand the Government has sought advice on these recommendations. Of these, the following six might be considered core recommendations:

- (a) the Parliament have a wider role in the selection of the Auditor General;
- (b) the Auditor General be appointed for a contract term of five years, rather than to the age of 65 as the *Financial Administration and Audit Act 1985* currently provides;
- (c) the Auditor General have the power to dispense with the audit of a department or statutory authority, having regard to its materiality in the context of the totality of the government's financial and economic operations;
- (d) the office of the Auditor General and its functions be made the subject of a separate Act;
- (e) the office of the Auditor General should not be constituted as a department of the Public Service; and
- (f) the Parliament must appropriate resources for the Auditor General to audit as he or she thinks fit and must take the initiative in determining the budget for the office independently of the Executive Government.

3.10.11 For the reasons we have explained earlier in this section, the Commission endorses, with some modifications and additions, the recommendations contained in the report of the Policy Advisory Committee to the Auditor General.

3.10.12 Accordingly, the Commission recommends that:

- (a) *The office of the Auditor General be constituted by a separate Audit Act.*
- (b) *The Auditor General be appointed for a period of up to 10 years, rather than to the age of 65 as the Financial Administration and Audit Act 1985 currently provides.*
- (c) *The Auditor General report directly to Parliament.*
- (d) *A Joint Parliamentary Committee be responsible for the overseeing of the Auditor General.*
- (e) *The Parliament exercise a direct role in the selection of the person to be the Auditor General.*
- (f) *The Parliament, with the advice of the Joint Parliamentary Committee, be responsible for recommending to the Treasurer the appropriate budget for the office.*

The last three recommendations are intended to secure the relationship of the office to Parliament.

3.10.13 In relation to the appointment of the Auditor General, the Commission notes the recommendation of the majority report of the Public Accounts and Expenditure Review Committee of the Legislative Assembly tabled in May 1992, that this Committee alone exercise this role. The Commission believes both Houses of the Parliament should be associated with the appointment, especially in the light of the responsibility of the Auditor General to report to the Parliament as a whole. The Commission proposes that the Joint Parliamentary Committee should be capable of receiving advice from appropriate sources but in particular from the Ombudsman, the proposed Public Sector Standards Commissioner and the proposed Commissioner for

the Investigation of Corrupt and Improper Conduct in order to recommend a short list of suitable applicants to the Premier. The Premier should then make a nomination from the short list to the Governor in Council.

3.10.14 It is essential that the Auditor General, in performing his or her functions, has a right of access to all relevant information. Despite the apparently ample powers given by the *Financial Administration and Audit Act 1985* there may still be doubt as to whether access can be had as of right to cabinet decisions and submissions. Access to these for the purpose of the exercise of the functions of the office must be guaranteed.

3.10.15 Accordingly, the Commission recommends that:

The legislation governing the functions of the Auditor General provide the office with the power to call for such cabinet documents as may be necessary for the purpose of the exercise of the functions of the office of Auditor General.

3.10.16 It is also unclear under the *Financial Administration and Audit Act 1985* whether the Auditor General, in conducting an investigation, as distinct from an audit, may compel the production of information and documents and the attendance of persons before him. We consider this matter should be put beyond doubt.

3.10.17 Accordingly, the Commission recommends that:

The legislation governing the functions of the Auditor General provide the office with all necessary powers to call for information and the production of documents, and to compel the appearance of persons, as may be necessary for the purpose of exercising all such functions.

3.10.18 Another possible cause for uncertainty in the reach of the Auditor General's powers should also be clarified. It results from the possible impact on those powers of a claim to legal professional privilege. It is reasonable to allow such a claim to be made by any private person or body who is being examined, or asked to produce documents, by the Auditor General. But neither the Government nor any public sector agency should be permitted to obstruct inquiry into its actions by such a claim.

3.10.19 Accordingly, the Commission recommends that:

The legislation governing the functions of the Auditor General provide that no claim of legal professional privilege be maintainable against the Auditor General by the Government or by any public sector agency.

3.10.20 A similar uncertainty is raised by the privilege against self-incrimination. It is necessary to balance the interests of the person making the claim against the public interest in full and effective auditing.

3.10.21 Accordingly, the Commission recommends that:

The legislation governing the functions of the Auditor General provide that:

- (a) a person be required to answer any question put by the Auditor General and to produce any relevant documents, notwithstanding that the answer or the information may result in or tend towards self-incrimination; and*
- (b) evidence given by any person at a hearing before the Auditor General not be available for use against that person in any proceedings, save for the purposes of the investigation or hearing before the Auditor General and in respect of a prosecution for breach of the relevant legislation.*

3.11 Independent parliamentary agencies

3.11.1 There are a number of agencies, either presently established or the subject of the Commission's recommendations, which act or will act on behalf of the public under parliamentary authority, as accountability agencies. These agencies are:

- (a) the Auditor General;

- (b) the Ombudsman; and
- (c) the Electoral Commissioner;

and as we propose:

- (d) the Commissioner for Public Sector Standards; and
- (e) the Commissioner for the Investigation of Corrupt and Improper Conduct.

3.11.2 In chapter 5 of this report, the Commission indicates the steps that it believes should be taken to secure the independence and the proper constitutional standing of these agencies. All have important responsibilities. We have referred already to those of the Auditor General. The role of the Ombudsman is not considered in this report, although we consider his well-defined function continues to be an important one. We refer to the Electoral Commissioner in chapter 5. Our proposals for the Commissioner for the Investigation of Corrupt and Improper Conduct and the Commissioner for Public Sector Standards are to be found in chapters 4 and 6 respectively.

3.12 Indirect accountability to superiors/peers

3.12.1 Viewed from the public's perspective, the internal accountability measures established within the various arms and agencies of government will be attended with some scepticism, and reasonably so, if they are not complemented by, and made subordinate to, effective external measures. In saying this, the Commission rejects categorically the suggestion, behind which officials so often take refuge, that the "Westminster" derived principle of individual ministerial responsibility is a sufficient and effective external accountability measure. We will have more to say of that principle in chapter 4.

3.12.2 Our concern so far has been with external measures. And these, the Commission reiterates, are of the first importance if the public is to be reassured that the trust it is asked to repose in government is being honoured. Nevertheless, it recognises the vital role that internal measures can and should play in protecting the public trust. We do not address these measures at any length, especially as we recommend that the

Government undertake a comprehensive review of the organisation and management of the public sector of this State.

3.12.3 The Commission acknowledges the important steps being taken under the *Financial Administration and Audit Act 1985* to render public sector agencies subject to internal audit. It acknowledges the emphasis being given to performance appraisal of officials, to the development of fraud prevention safeguards, and to the commitment being made to formulate for officials the standards of conduct by which their actions in office will be judged.

3.12.4 The cautionary note the Commission sounds about internal measures is this. Each and every agency of government needs to be reminded constantly that it exists, not for its own benefit, or merely for the benefit of a minister, but for the benefit of the public. The conduct it expects of its officers, the performance it demands, the favour and disfavour it shows, must be governed by this consideration.

3.12.5 The vice to which some forms of internal accountability are prone is that the criteria against which judgment is made can relate more to the interests and fashions of an agency itself or to the pursuit of administratively, or, for that matter, politically ordained goals, in disregard of the obligation to serve the public interest which provides the very reason for the trusteeship of public officers and agencies.

3.12.6 Because of the reliance officials, particularly public servants, place upon the principle of individual ministerial responsibility as defining their accountability obligation, the Commission considers it necessary to make the following observations. The object of that principle was to bring the conduct of the executive under the review and control of the Parliament. It cannot now be relied upon for this. To the extent that it today expresses a principle of accountability to superiors within administrative hierarchies, it serves a valuable and well recognised purpose, but one no different from that to be found in any hierarchical organisation in either the public or the private sector. It provides no justification for immunising the actions of officers and agencies from the scrutiny and review of the public's first forum, the Parliament, or from agencies acting under the mandate of the Parliament.

3.13 Government in commerce

3.13.1 The events which led to the creation of this Commission arose out of the manner in which the Government participated in commercial activities. Our findings in Part I of the report questioned both the competence and the commitment to the public interest that were displayed in some of its actions. Despite the great financial cost to the State that this activity has occasioned, we reiterate the view we expressed in chapter 2 of this part of the report that it is impossible to contend that government should be prohibited from engaging in any commercial activity. As we indicated there, whatever the political philosophy of a particular Government, governmental involvement to some degree in commercial activity is inevitable. More importantly, in our view, to seek to prohibit some forms of commercial activity would be to offend the democratic principle which we have identified as basic to our system of government. It is for the community of this State through the electoral process to determine the manner in which it wishes the government of the State to be conducted. It would be quite improper for this Commission to seek to pre-empt that judgment. But this is far from the end of the matter.

3.13.2 The vital issue is not the activities in which government engages, but the conditions under which it engages in them. The public is entitled to insist that government be conducted openly and that it be, and be seen to be, accountable for its actions. Nowhere is the need for this more apparent than when it undertakes initiatives which put public funds and resources at risk. As we have said, there can be limited circumstances which justify some level of secrecy being given to particular aspects of commercial activity. But there can be no lessening in accountability on this account. Rather the contrary is the case. The greater the risk to public funds, the more exacting must be the scrutiny to which government is subjected on behalf of the public. It is with this in mind that the Commission has designed recommendations to improve the effectiveness of the accountability measures imposed upon government.

3.13.3 Although we have sought to bring governmental activity generally under critical review by the Parliament and by other agencies, some of our recommendations have been made with commercial activity particularly in mind. We have made recommendations in relation to:

- (a) claims to commercial secrecy and to the giving of guarantees, indemnities and "sureties";
- (b) the regulation of statutory authorities and State-owned companies;

- (c) the level of competence to be required of, and the personal liability to be imposed on, persons responsible for the conduct of business activities;
- (d) the scrutiny role of the Auditor General and of Parliament and its committees; and
- (e) a variety of integrity and anti-corruption measures.

All these have government involvement in commercial activity as a particular focus. When adopted, these should reduce the risk of a repetition of the impropriety, incompetence and secretiveness evidenced in Part I of the report.

3.13.4 This Commission does not underestimate the understandable objection in the community to a government being permitted to hazard the future prosperity of this State in such a manner as our inquiries have revealed. Consistently with the view we have taken in the report of the nature of our system of government as one of representative democracy and of responsible government, the Commission considers that provided adequate and effective accountability measures are in place and that the community is properly informed about the actions of government — and the realisation of both of these goals is the object of many of our recommendations — any judgment to be passed on the actions of a government, whether in relation to commercial activity or otherwise, should be made by the community itself through the electoral processes.

3.14 Statutory authorities and State-owned companies

3.14.1 The recommendations the Commission has made in this and in the preceding chapter are highly relevant to statutory authorities and State-owned companies. Because of the significance these bodies have had in the events into which the Commission has inquired, we believe it to be essential, at the risk of some repetition, to set out explicitly the accountability obligations which must be exacted from them. In doing this, it will be necessary to comment more generally on the use made of these types of body by government.

3.14.2 Clearly, it is within the constitutional power of the Parliament to determine the activities in which the public sector is to engage and also the appropriate legal form, whether it be ministerial department, statutory authority or company which

is to provide the vehicle for any particular activity. The activities in which the Government can engage without parliamentary approval are limited by reason of the provisions of the *State Trading Concerns Act 1916*. Although the apparent aims of this Act might be thought to reflect the political controversies of a by-gone era, it imposes an enduring fetter upon the power of the Government to establish or carry on a "trading concern", a term defined in the Act to include any "concern carried on with the view to making profits or producing revenue".

3.14.3 Before the Government can establish or carry on such a concern, it requires the express authorisation of the Parliament. If the Government wishes to conduct that concern through a statutory authority it will, in any event, require express legislation for this purpose so that the *State Trading Concerns Act 1916* is, for practical purposes, of no significance in this context. If, however, a trading concern is to be conducted through a ministerial department or a company, parliamentary approval under the Act is required. The giving of that approval does not of itself make the trading concern subject to the provisions of the Act. If this is to occur, Parliament must also declare the concern "to be subject to this Act". The practical significance of this becomes most apparent in relation to the use of a company for the conduct of a trading concern. While that use itself must be approved by Parliament, it would be quite impracticable for the company to be made subject to the Act, for the Act itself presupposes that a trading concern to which its remaining provisions apply will be conducted by a minister acting as a body corporate.

3.14.4 The curious features of the legislation may be identified:

- (a) While containing detailed accountability measures, they only apply where Parliament declares a trading concern to be subject to the Act. As noted above, companies cannot, because of the structure of the Act itself, be brought within its accountability provisions.
- (b) As we have said, the Act, for practical purposes, is irrelevant to statutory authorities and this for the reason that each authority's enabling legislation will delineate its powers and responsibilities. Furthermore, that legislation commonly authorises the authority to form "subsidiary" companies, so denying the *State Trading Concerns Act 1916* any role in the formation of subsidiaries for trading purposes.

- (c) Insofar as government-owned companies are concerned, the Act requires parliamentary approval for their use for the conduct of a trading concern, but not for any other use. And for the reasons given in (a) above, this really is the sole effect of the Act on such companies. It is an approval mechanism and no more.
- (d) A public body which is not so constituted as to be equated with "the Government of the State" is quite outside the scope of the Act.

3.14.5 The Commission will return below to the general question whether parliamentary approval should be required whenever any public body or agency acquires or creates a company. The point to be made here is that, even within the sphere of "trading concerns", once a statutory authority or company has been created, the *State Trading Concerns Act 1916* does not impose accountability measures on it. Whatever value there may be in the Act's approval requirement, its effect otherwise on authorities and companies is negligible. Because of the importance we attribute to accountability, we will be recommending the repeal of the Act and its replacement.

3.14.6 The Commission believes that full and effective accountability should be required of every activity in the public sector, regardless of its legal form. The evidence showed that it was possible to use the limited accountability of a public sector agency, WAGH, to protect from disclosure to the Parliament and the public a commitment of public funds. Furthermore, in that particular case, the exercise of governmental influence was not disclosed.

3.14.7 Before one can speak realistically of actual accountability, the public and its accountability agents must be aware both that a particular activity is being engaged in and by whom. The area in which this can be an issue of real concern is the use made of registered companies either by statutory authorities or by Government. As the Commission is recommending the repeal of the *State Trading Concerns Act 1916*, we consider it necessary to state our views briefly on this matter.

3.14.8 It would be quite contrary to the public interest to prevent the Government and statutory authorities from using registered companies. Their use, however, should be regulated. We do not consider that the *State Trading Concerns Act 1916* in its present form provides an effective or appropriate form of regulation. We recommend the enactment of a *State-owned Companies Act* which will apply to all

companies created or owned by the Government or by a statutory authority save where in a specific instance a special Act applies to a particular company.

3.14.9 It is quite impractical to require parliamentary approval before a registered company is created or acquired by the Government or by a statutory authority. In any event the Commission can see no good reason for requiring such an approval. Where legislation is not otherwise required to enable the Government or a statutory authority to engage in a particular activity, the Commission sees no reason why parliamentary approval should be required merely because the vehicle to be used is a registered company. What we do suggest, however, is that if a company is to be used to conduct an activity for the Government or a statutory authority, the Parliament should be informed and the company subjected to adequate and appropriate accountability measures.

3.14.10 Accordingly, the Commission recommends that:

- (a) *Where a company is created or acquired by the Government or a statutory authority, the responsible minister table in Parliament a notification of this fact, the reasons for the creation or acquisition of the company and the business or other purposes to be pursued by the company.*
- (b) *A central register of all such companies be kept in the office of the Auditor General, the official or authority responsible for the creation or acquisition of a company being obliged to provide that office with the information required to be entered in that register.*
- (c) *On the creation or acquisition of a company by the Government or a statutory authority it thereby becomes subject to the State-owned Companies Act we are proposing.*
- (d) *The State Trading Concerns Act 1916 be repealed.*

3.14.11 A further matter in respect of the creation of statutory authorities and of State-owned companies requires consideration. It is the relationship they are to have

to the minister administering the portfolio under which they fall and, within this, the degree of independence they are to enjoy from direct ministerial control. There may well be good reason, in particular instances, for some measure of autonomy to be given to such bodies. But autonomy does not authorise any lessening in accountability. Rather the contrary is the case. This must be insisted upon.

3.14.12 A number of comments must be made on the relationship of ministers to statutory authorities and companies and on their responsibility in respect of them.

- (a) Both the public and the Parliament should know who is responsible for the conduct of the affairs of an authority or company. And if that responsibility is a divided or overlapping one, the public and the Parliament should be able to ascertain who is responsible for any particular decision, whether the minister, the board of a statutory authority or a company or an officer of the board, as the case may be. The appearance of independence should not be allowed to obscure the actual exercise of power by the minister. Where the minister either directs the board of an authority or company to act in a particular way or in a given matter, or communicates with the board in a way that could reasonably be interpreted by it as a direction, the minister must notify the Parliament promptly of this in writing and the authority or company must note in its annual report the direction given or the circumstances interpreted as a direction. Certainty in this matter is important for the directors of companies because of the personal liabilities to which they are exposed for their own actions under corporations legislation.
- (b) No less so than in relation to his or her own department, the Commission believes a minister should be taken as having the right to control and direct every authority or company within his or her portfolio:
 - (i) in the case of a statutory authority, save to the extent that its founding legislation expressly excludes such right or regulates the manner of its exercise; and

- (ii) in the case of companies, save to the extent that legislation applying to a company expressly excludes such right or regulates the manner of its exercise.
- (c) If an authority or company is to be given some level of autonomy (or independence) from ministerial control, that autonomy must be conferred openly and explicitly by Parliament. It should not be left to inference.
- (d) If a measure of independence is so given, it is wholly inappropriate that a public servant be appointed to the board of that body while retaining his or her position in the Public Service in a department within any portfolio of the minister responsible for that body. It probably is the case at the moment, although few seem to appreciate it, that acceptance by a public servant of such an appointment operates at common law as a removal from the Public Service position. Be this as it may, it is quite improper for public servants to be put in a position where they are to be expected to serve two masters, no matter how honest and well-intentioned the individuals concerned may be. The inevitable conflicts created by such appointments discredit the autonomy the body is intended to have.
- (e) In relation to State-owned companies, whether owned by the State directly (through ministers) or by a statutory authority, it is inappropriate that their boards be allowed the legal autonomy ordinarily possessed by boards of directors, without specific legislative approval. Equally, the use of the corporate form should not be allowed to minimise in any significant way the accountability which would otherwise be exacted if the activity in question were not being conducted by a company. To ensure that this does not occur, it is essential that:
 - (i) either through general or specific legislation applying to the company in question, the control to be exercised over its board by its minister, or by its parent statutory authority, be declared specifically; and

- (ii) the public accountability measures with which it must comply over and above those imposed by corporations legislation, be fully stated.

The Commission emphasises that the use of a private sector business form to conduct an activity using resources owned by the public, no matter how "commercially" the company is to be expected to conduct its affairs, does not in any way remove or diminish the public's interest in the conduct and affairs of that company. For so long as it remains publicly owned and/or its operation involves the use of public resources its actions are a public and not a private matter. We would add that these comments are applicable equally to statutory authorities expected to conduct their affairs on a commercial basis or in a commercially prudent fashion.

3.14.13 The Commission recommends that:

- (a) *If a statutory authority or State-owned company is to be given some level of independence of ministerial control, that autonomy must be conferred openly and explicitly by Parliament. It should not be left to inference.*
- (b) *A public servant should not be appointed to the board of a statutory authority or State-owned company while retaining a position in the Public Service in a department within any portfolio of the minister responsible for that body.*

3.14.14 There is the matter of the expertise and experience of persons appointed to the boards of statutory authorities and companies. Evidence to the Commission revealed that on occasions the control of public funds was placed in the hands of persons with no apparent qualification to exercise the responsibilities entrusted to them. The power of appointment to such bodies should be exercised with a full appreciation of the qualifications and experience required for the office.

3.14.15 With authorities and companies differing greatly in character and purpose, it is impossible to prescribe the necessary qualities which appointees must

possess. But the status they will have as public trustees and the duties they will discharge on behalf of the public ordain certain minimum qualifications:

- (a) The members of a board should be required to meet the same standards of probity and integrity that are expected of persons occupying positions of trust. Quite apart from the provisions of the *Criminal Code* governing official corruption, and because of their fiduciary status in the particular corporation to which they have been appointed, all must be subjected at least to the same fiduciary related standards, the same conflict of interest and other regulation, and the same civil and criminal liabilities for fiduciary wrongdoing as are imposed on directors by the common law and by corporations legislation. Insofar as directors of State-owned companies are concerned, this should be made explicit in the proposed *State-owned Companies Act*. In the case of members of statutory authorities, it should be provided for expressly either in the legislation creating the authority or in a general statute applicable to all statutory authorities.
- (b) All board members of authorities and companies responsible for business activities of any variety must be expected to exercise reasonable care and diligence in the exercise of their powers. Entrusted with the management of public property they cannot be permitted to put that property at risk without being held to the same standard of care and diligence required of directors in the private sector in their management of privately owned property. Their potential liability in this will necessarily be qualified where they are acting under the lawful directions of their minister or in accordance with such obligation as they have to put governmental policies into effect. But there can be no place today in the management of public property for board members who do not have the level of competence appropriate to discharge the responsibilities entrusted to them.

3.14.16 The second of these two matters, the requirement of care and diligence, and the imposition of personal liability where it is not demonstrated, obliges governments to make competence a prerequisite for any appointment made and exposes the government itself to censure where it is not. Furthermore, it will necessitate appropriate levels of remuneration commensurate with the responsibilities of the office.

3.14.17 Accordingly, the Commission recommends that:

Legislation provide that:

(a) members of all boards of authorities and State-owned companies be required to conform to the same standards of probity and integrity as expected of persons occupying positions of trust; and

(b) members of all boards of authorities and State-owned companies responsible for any business activity be required to exercise reasonable care and diligence in the exercise of their powers.

3.14.18 As the Commission has indicated elsewhere, all State-owned or controlled bodies must be subject both to the audit of the Auditor General and to the provisions of the *Financial Administration and Audit Act 1985*. In the case of bodies subject to corporations legislation, we endorse the view of both the Burt Report and of the report of the Senate Standing Committee on Finance and Public Administration entitled "Government Companies and their Reporting Requirements", that the public accountability of these bodies requires such additional scrutiny. The Commission considers it necessary to add that an increased reliance upon ministerial control over the affairs of a corporation and upon accountability to ministers, in no way justifies any dilution in the examination the Auditor General should be entitled to make of a corporation. We note that section 78A of the *Financial Administration and Audit Act 1985* already goes some distance in acknowledging this. However, there may be a need to ensure that companies limited by guarantee and associations incorporated under the *Associations Incorporation Act 1987* are not beyond the Auditor General's reach. We should also add, although we are not in a position to make a positive recommendation on the matter, that consideration should be given to the requirement that all corporations discharging commercial functions be obliged to form audit committees.

3.14.19 Accordingly, the Commission recommends that:

All existing and future State-owned or controlled bodies be subject both to the audit of the Auditor General and to the provisions of the Financial Administration and Audit Act 1985.

3.14.20 It is essential that all registered companies created or acquired by the Government or by a statutory authority be brought under the provisions of a *State-owned Companies Act*, except where a particular company is itself made the subject of specific legislation governing the conduct of its affairs and its accountability. The Commission envisages this statute having the following general purposes:

- (a) establishing in the office of the Auditor General a central register of State-owned associations, including subsidiary companies, companies limited by guarantee and associations incorporated under the *Associations Incorporation Act 1987*, and prescribing the information to be recorded;
- (b) requiring the notification to Parliament with reasons of the creation, acquisition or disposal of a company and of the purpose for which the company was created or acquired;
- (c) regulating the memorandum and articles of association of the company to ensure they are consistent with the rights, powers and duties created and imposed by the Act or which are otherwise necessary to ensure the proper management of the company;
- (d) in the case of a company created or acquired by a statutory authority, prohibiting that company from engaging in activities which are beyond the lawful powers and capacity of the statutory authority itself;
- (e) requiring parliamentary notification of the objectives of a company and of its Statement of Corporate Intent;
- (f) defining the control which the responsible minister (whether as shareholder or otherwise), or which the board of a statutory authority, is entitled to exercise over the board of directors of the company;
- (g) authorising the minister or the board of a parent statutory authority to have a full right of access to the information possessed by the company save where, for reasons of personal privacy, access to information

relating to the personal affairs of persons dealing with the company should be limited;

- (h) affirming that the directors and officers of a company are subject to the duties and liabilities of directors and officers imposed by corporations legislation and the general law;
- (i) providing for the financial management of, and the dividend procedures to be followed by, the company, and for such responsibility as the State or a parent statutory authority is to have in respect of the assets and liabilities of the company;
- (j) requiring that the audit of the company be under the control of the Auditor General and that the *Financial Administration and Audit Act 1985* apply to it;
- (k) defining the reporting obligations to Parliament and, in the case of the subsidiary of a statutory authority, to that authority;
- (l) regulating the circumstances in which a company can create or acquire a subsidiary and the application to the subsidiary of the *State-owned Companies Act*;
- (m) subjecting the company to the provisions of the proposed FOI legislation and to the jurisdiction of the Ombudsman and of the proposed Commissioner for the Investigation of Corrupt and Improper Conduct unless reasonable grounds exist for specific exemption under and in accordance with the applicable legislation; and
- (n) defining the manner in which the Act will apply to companies limited by guarantee and associations incorporated under the *Associations Incorporation Act 1987*.

3.14.21 We recognise that the detail of this legislation will require careful consideration and that appropriate adaptations will have to be made to the manner of the Act's application where a company is not wholly owned by the State or by a statutory authority. Our intention is not to impede the proper, effective and responsible use of

companies for the benefit of the public. It is to ensure their proper management for, and accountability to, the public. We do not believe that consideration of this legislation should be made the subject of further independent inquiry. It is a matter for which the Government itself can take immediate responsibility.

3.14.22 Accordingly, the Commission recommends that:

A State-owned Companies Act be enacted, which will apply to all companies currently owned, or subsequently created or acquired, by the government or a statutory authority except when, in the case of a particular company, specific legislation

is enacted governing the conduct of its affairs and its accountability.

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CHAPTER 4

INTEGRITY IN GOVERNMENT

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4.1 Introduction

4.1.1 In relation to the matters investigated by the Commission, it has been given cause for grave concern with respect to levels of integrity in some areas of government. Some officials appear to have had little understanding of their legal and public responsibilities. Favouritism and partiality in the use of official power have at times been evident. Personal associations when coupled with financial dealings (usually for electoral purposes) have created the appearance that favour could be bought. Public monies have been expended, the public credit pledged, with little regard to the interests of the public. Important decisions involving the finances of the State were taken, not only behind a veil of secrecy, but in ways which left little or no record of the reasons for those decisions. Appointments were made to statutory authorities and to the public service of persons who could be expected to do the bidding of their political masters.

4.1.2 If the trust owed to the public by our institutions and officials is to be a practised reality, and if the public is to be able to place its confidence in those institutions and officials, reassurance beyond mere words is an imperative. There must be, and be seen to be, integrity in the processes and practices of government. Many of the recommendations we have made elsewhere in this report aim to secure this. Equally, there must be, and be seen to be, integrity in the conduct of public officials. This chapter addresses, first, the integrity of the cabinet process of government, and, secondly and at greater length, integrity in official conduct.

4.2 Cabinet and cabinet procedures

4.2.1 Cabinet is a distinctive institution in our system of responsible government. It is the organ which embodies the will of a government, yet it remains essentially an informal body, not even mentioned in the State's Constitution. Its role and procedures are matters of convention rather than law. Yet the conventions and practices sustaining cabinet government have a fluidity in practice which makes categorical statements about them both difficult and potentially misleading. Very much depends upon the procedures a particular government finds appropriate. Such procedures, including those affecting the composition of the cabinet, have varied markedly from one government to the next, and between the several States and the Commonwealth. Very much depends also upon the political circumstances in which a government is placed, which explains the malleability of these conventions in political debate.

4.2.2 The conventions which have attracted most attention in discussions of the relationship between cabinet and Parliament are those relating to individual ministerial responsibility and, as well, those affecting the collective responsibility of the cabinet. In each case, parliamentary practice and scholarly interpretation alike reveal a diversity of views extending to fundamental disagreement.

4.2.3 Individual ministerial responsibility has at times been understood to hold a minister to account for all actions by officers of his or her department. Yet, as we noted at paragraphs 2.4.10 and 2.4.11 in chapter 2 of this part of the report, in contemporary practice a minister will often effectively and not unreasonably be removed from actual responsibility for a particular matter. In such circumstances, the Parliament should look to the appropriate officers to be answerable for matters clearly within their spheres of discretion or decision. Such an accommodation of the convention of individual ministerial responsibility to the realities of administrative practice still leaves a minister accountable for all matters with which he or she has been directly involved, or for which, by reason of their importance, the Parliament believes a minister should have had direct knowledge and involvement. Here, as also in cases where ministers have resigned on grounds of personal impropriety, the ambit of individual responsibility and the severity of the sanction imposed have been essentially for the Parliament to define and the electorate to judge.

4.2.4 Collective responsibility is generally understood to require that all ministers should support in public the policies agreed to in cabinet. From this convention flow such practical consequences as the coordination of matters requiring the approval of the cabinet, and the confidentiality attaching to cabinet submissions and cabinet discussions. The convenience of these practices for the conduct of cabinet business is apparent. Nevertheless, the interpretation of the underlying convention and of its implications can be seen to vary. Whether the penalty for individual disagreement with a collective decision is resignation or merely public silence is a matter of some debate. How far ministers may pursue contrary policy positions before a resolution by cabinet, and which issues are required to be referred to the cabinet, will be very much for a cabinet to determine always in the light of the acceptability of its procedures to the Parliament.

4.2.5 The interplay of these two conventions has also been noted by commentators. Ministers have on occasion resigned on grounds of individual responsibility to enable a government to avoid accepting collective responsibility for a

particular decision or policy. At other times, cabinets have maintained a parliamentary solidarity in the name of collective responsibility in order to shield an individual minister from the full force of parliamentary disapproval. Whether considered separately or in their combined effect, the significance of these conventions of ministerial responsibility in Australian experience can be seen to rely not upon an abstract principle, but upon the essentially political interaction of Parliament and the Executive, within the overall constraints of the Constitution and the electoral process.

4.2.6 The Commission has therefore not considered it profitable to attempt to define the effects to be attributed to these conventions and practices. Any consequences which should flow from alleged departures from such conventions as individual and collective ministerial responsibility are essentially matters for the Parliament and the electorate to determine. The allocation of ministerial responsibility, both individually and collectively, is for the Parliament to exact and for the electorate to judge, not for this Commission to pronounce upon. Care must be taken not to confuse the operation of the convention of collective responsibility with the entirely different question of improper conduct. Our task has been to inquire into and report cases of impropriety. Part I of this report has documented clear findings of improper conduct, including impropriety on the part of particular ministers. It is the Commission's view that, whatever its parliamentary and electoral effect in limiting or extending the scope of political responsibility, a convention of collective ministerial responsibility cannot legitimately be used, without more, to infer the collective impropriety of a cabinet from a finding of impropriety in the case of a particular minister in that cabinet.

4.2.7 It is obviously not appropriate for the Commission to prescribe the precise role cabinet should play in our system of government. What we do wish to emphasise is the central place that cabinet has in our system of responsible government. It is clear from our inquiries that in the period of the Burke and Dowding Governments, Cabinet became a diminished institution. To Mr Burke it was really only a sub-committee of Caucus. To Mr Dowding, the Government was not to be "hidebound by the sort of formalities" that one would reasonably expect of a cabinet in its deliberative and decision-making role. The effects of these cavalier attitudes to Cabinet and its proceedings are apparent in our findings in Part I. There was a disturbing trend towards the denial of any collective consideration on an informed basis of some major decisions. For example, in 1988 the Premier introduced to Cabinet important proposals in relation to the acquisition by SGIC of shares in Bell Group, and government involvement

through WAGH in PICL, but Cabinet was not given full details of the proposals. Equally, as in the Fremantle Gas Co acquisition, individual ministers presumed to take important decisions in matters where Cabinet should have been informed and the collective decision of the Government should have been sought. Pervading all of this period was a clear disregard of the formal cabinet procedures to which both the Burke and Dowding Governments were ostensibly committed. Nowhere was this more apparent than in the attitude taken to record keeping. In some crucial meetings of Cabinet in late 1987 and 1988, for example, no record ever appears to have come into existence, no agenda, no submissions, no recorded decisions.

4.2.8 The most remarkable feature in all of this is that at the very time Cabinet and its procedures were being neglected, the Department of Premier and Cabinet had issued and reissued detailed guidelines "to assist ministers" and others in such matters as (a) cabinet conventions; (b) the matters which should be referred to cabinet; (c) the required contents of cabinet submissions; (d) the cabinet timetable; (e) the recording and distribution of cabinet decisions; (f) cabinet confidentiality and so on. Matters which the guidelines proposed should be referred to Cabinet included major and/or politically sensitive financially significant policy issues; those which had a significant impact on public or private sector employment; those which crossed the boundaries of ministerial responsibility not resolved outside Cabinet; authority to draft and print legislation; actions in respect of parliamentary committees, caucus committees, cabinet taskforces or cabinet committee reports; and those matters having a considerable impact on relations with Commonwealth and State Governments, unions, employers, significant lobby groups, the Australian Labor Party and the community. In a very real sense, these documents represent the illusion belied by the reality we have had revealed to us.

4.2.9 It can be said of the guidelines, first, that if they had been followed the abuse of Cabinet to which we have referred in all probability would not have occurred; and, secondly, that the guidelines themselves reflect a proper understanding both of the purposes of Cabinet and the procedures which should be adhered to so as to ensure not only the efficiency and effectiveness but also the integrity of cabinet operations.

4.2.10 Having regard to the alarming conduct we have found, we urge that the guidelines be respected as an educative tool and honoured in their observance. The Premier, as the person who chairs cabinet meetings, should be expected to bear ultimate responsibility for ensuring the effective operation of the system.

4.2.11 In relation to the all important matter of cabinet records, however, we can, and do, go further. We have commented already upon how cabinet practice in record keeping departed from the requirements of the guidelines. Several of our recommendations will go some distance towards ensuring that appropriate standards in record keeping are adhered to. First, we have previously recommended that the *Financial Administration and Audit Act 1985* be amended to confer upon the Auditor General access as of right to cabinet records for the purpose of the exercise of the functions of his or her office. Secondly, more importantly, in section 4.3 of this chapter we recommend the establishment of an independent archives authority. One of the responsibilities of that body will be to monitor compliance with standards set for record creation, maintenance and retention. That responsibility should extend to cabinet records. The monitoring process should be exercised in consultation with the Parliamentary Secretary of the Cabinet. We envisage that revealed deficiencies in the keeping of proper cabinet records would be a matter of report to Parliament either by the Auditor General or by the proposed archives authority, although necessarily in a way which would respect cabinet confidentiality.

4.3 Record keeping by government

4.3.1 Official records bear silent testimony to the administration of a government. In Part I of our report, we noted instances both where official papers were lost, deliberately destroyed or removed by officials, and where a record of major decisions was not made. Such practices strike at the roots of responsible government. Whether intended or not, the result is a false or incomplete account of the stewardship of the Government. Proper record keeping and effective record security are essential to good public administration.

4.3.2 Proper record keeping serves two purposes. First, it is a prerequisite to effective accountability. Without it, the end purpose of FOI legislation can be thwarted. Without it, critical scrutiny by the Parliament, the Auditor General and the Ombudsman can be blunted. Secondly, records themselves form an integral part of the historical memory of the State itself. A record keeping regime which does not address both of these requirements is inadequate. However, our particular concern is with the first of these purposes.

4.3.3 The record creation, maintenance and retention practices of government and its agencies are matters for which ministers and chief executive officers bear a

particular responsibility. These matters, doubtless, are ones for which those officials are to be held accountable in their management of their portfolios, departments and agencies. But overall responsibility for records cannot be left with these officials. A separate body should be entrusted with the general oversight of public records, equipped with powers adequate to the purpose.

4.3.4 Experience elsewhere suggests that this vital responsibility should be given to a separate and independent archives authority acting under its own legislation. If the recommendations of the "Report on Review of Archives Legislation" of the Queensland Electoral and Administrative Review Commission ("EARC") are acted upon in that State, Western Australia alone in Australia will lack such an authority. The importance of records to accountability emphasises the need.

4.3.5 The Commission is not in a position to provide the detail of legislation constituting an archives authority. This must be a matter for the Commission on Government to examine. Nevertheless, we consider that such legislation should include at least the following features, these reflecting the particular concerns brought to light by our inquiry:

- (a) It should contain a broad definition of a public record and one which can accommodate the technological innovations which have a bearing upon modern record keeping.
- (b) It should affirm the public ownership of public records.
- (c) It should require the archives authority to set standards in record creation, maintenance and retention. We would emphasise record creation in this.
- (d) It should empower the authority to inspect the records of every agency of government for the purpose of monitoring compliance with those standards.
- (e) It should establish disciplinary offences for officials who fail to comply with those standards. We refer to criminal sanctions elsewhere in this report.

- (f) It should establish, whether through an advisory body or otherwise, a consultative process between the authority and the Auditor General, the Ombudsman, a representative of the Supreme Court and the Information Commissioner (an office proposed in the projected Freedom of Information Act), these agencies having functions in which the examination of records has a prominent part.

4.3.6 Accordingly, the Commission recommends that:

- (a) *A separate and independent archives authority be established, acting under its own legislation.*
- (b) *The Commission on Government inquire into the terms of the legislation.*

4.3.7 There is one additional matter to which we must refer, given the findings we have made in Part I. The evidence before the Commission revealed that on one occasion a minister, on vacating office, retained in his possession a quantity of official documents. It appears not to have been appreciated that all the records in a minister's office, other than personal or purely political records, are public property. They belong to the State. They should remain with the State. We recognise that there may well be legitimate reasons why an ex-minister may wish later to obtain access to official records formerly held in his or her office. Protocols must be established which define the conditions on which such access is to be permitted. These, we suggest, should be settled by the Government in consultation with the parliamentary leaders of the other political parties.

4.4 Integrity in conduct

4.4.1 Unchecked, corruption will debilitate any system of government. But conduct falling short of actual corruption can be no less pernicious. Once the suspicion may reasonably be entertained that official power and position are being used for self-interested or partisan purposes — or even, for that matter, are being used wastefully, negligently or with indifference to the people affected by their use — public confidence in officials can be put at risk. No system of regulation can eliminate the possibility of corruption and self-interested action. For so long as the public is obliged to entrust others with power that possibility is an inevitable and an ineradicable one. But therein

lies no reason for failing to take steps (a) to make plain what are the standards of conduct to be expected of public officials; (b) to ensure insofar as can appropriately be done, that procedures are in place which buttress those standards; and (c) to censure their violation with a severity appropriate to the circumstances. Our laws and procedures are defective or deficient on all three scores.

4.4.2 The standards to which the Commission will be referring are, for the most part, founded in the trust principle to which we referred in chapter 1 of this part of the report. Although addressed to State officials in the United States, the following observations are equally pertinent to our own. They express what public trusteeship means for public officials and for the standards of conduct we should be entitled to expect of them.

"[Public officers] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve ... As fiduciaries and trustees of the public weal they are under an obligation to serve the public with the highest fidelity. In discharging the duties of their office, they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity ... They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves ... their actions are inimical to and inconsistent with the public interest.

These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect ... The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people." *Driscoll v Burlington Bristol Bridge Co.* 86 A 2d 201, at 222-223 (1952).

4.4.3 In a majority of jurisdictions in this country, considerable attention is being given by parliamentary committees, commissions of inquiry, independent agencies, such as EARC and the Criminal Justice Commission ("CJC") in Queensland and the Independent Commission against Corruption ("ICAC") in New South Wales, and by government departments, to a range of matters touching integrity in the public sphere; to the criminal laws which should apply to officials; to the manner in which standards of official conduct should be formulated and enforced; to the devices, and particularly "whistleblowing", which can lead to the detection of official misconduct;

and to protective measures which can assist officials in meeting their obligations to the public or which can protect the processes of government from misuse and abuse by officials. These last-mentioned measures range from anti-fraud and internal audit procedures to positive prohibitions on activities which could give rise to conflicts of interest, bribery and other undesirable consequences. The Commission, while having regard to what is being done elsewhere in Australia, considers it important that it indicate its own views on these matters in the light of the laws and practices of this State and of the activities that have been revealed in our inquiries.

4.5 Criminal law

4.5.1 The Commission has had obvious reason to consider the possible application of this State's criminal laws to activities which have been revealed in the inquiry. For over 700 years in the common law system, the criminal law has had an indispensable place in proscribing serious misconduct in public office. This is entirely appropriate. Conduct which departs significantly from the standards of probity to be expected of officials, conduct which demonstrates a conscious use of official power or position for private, partisan or oppressive ends, is so contrary to the very purposes for which power and position are entrusted to officials as to warrant public condemnation in a criminal prosecution. Our concern here is with the adequacy of our criminal law and in particular with the provisions of the Criminal Code.

4.5.2 The Code is generally a close copy of that prepared for Queensland by Sir Samuel Griffith in the 1890s. Despite its virtues, it was markedly deficient in the manner in which it dealt with misconduct by public officials. This deficiency persisted in this State until 1988 when amendments were made to the Code to enlarge the scope and application of its corruption offences. We refer specifically to sections 82 and 83 of the Code. Whatever may have been intended by these amendments, the Commission doubts whether they will be found adequate to apply to conduct which, on any view, should be caught by provisions of their general type. We give an example. Section 83 makes it an offence where an official "acts corruptly in the performance or discharge of the functions of his office or employment" so as to gain a benefit. But there are many ways in which official position can be misused for gain which do not involve "any act in the performance or discharge of the functions" of that official's office. Influence peddling and some forms of extortion are obvious examples. This deficiency does not exist in most other Australian jurisdictions. It allows considerable scope for ministers or senior appointed officials to use their positions and influence in quite egregious ways.

4.5.3 More generally, the overall adequacy of our criminal laws as they apply to misconduct in public office is a matter of concern. In Queensland, for example, it was fortuitous that a general offence, not designed for public officials, could be used to base prosecutions for misuse of ministerial expense accounts. Equally, and while we express no concluded view on the matter, we question whether it is desirable that the criminal law should permit in any circumstances the positive solicitation of campaign contributions by members of a government, from companies and persons who are, at the time of the solicitation, actively engaged in financially significant negotiations or

dealings with government. The opportunity for official extortion is ever present in such circumstances.

4.5.4 The criminal law is the last bulwark against serious misconduct in office. Its adequacy must be placed beyond doubt.

4.5.5 Accordingly, the Commission recommends that:

The Government review the criminal law for the purpose of assessing its adequacy in proscribing conduct in public office for which criminal sanctions should be available.

4.5.6 In the light of concerns raised in Part I of the report, we consider it necessary to emphasise that this review consider the adequacy of section 85 of the Code, the provision which deals, amongst other things, with the destruction of records. As with other offences in chapter XIII of the Code, we are of the view that the use of the word "corruptly" in section 85 unduly limits its scope in practice. The deliberate destruction of public records without lawful authority, whether or not it is tainted with corruption, cannot be tolerated.

4.6 Standards of conduct for public officials

4.6.1 The Commission considers it necessary that all public officials have available to them in documentary form a statement or code which clearly states and explains the standards to which the community expects them to adhere. As we have indicated on a number of occasions, some officials who appeared before us seemed to have very little appreciation of those standards.

4.6.2 As with the criminal law, the formulation of codes of conduct is attracting considerable attention throughout Australia. The Commission notes specifically the report, "The Review of Codes of Conduct for Public Officials", released earlier this year by EARC. For some years Western Australia has had a code for public servants and the present Public Service Commissioner has acted to strengthen its provisions. The subject of standards of conduct is, however, one that requires further consideration in this State.

4.6.3 The criminal law provides no more than the base level below which officials must not fall. It does not address the standards to which they should aspire even if these must, to some degree, always remain an ideal or counsel of perfection. Nor does it address standards, the breach of which should attract disciplinary action. The required standards can be formulated in the following general terms. Public Officials:

- must act under and in accordance with the law;

- must exercise their offices honestly, impartially and disinterestedly and be seen to do so;
- must act fairly and with due regard to the rights and interests of the members of the public and of other public officials with whom they deal;
- must exercise their offices conscientiously and with due care and skill;
- must be scrupulous in their use of their position and of public property and of information to which they have access; and
- must be prudent in their management of public resources.

4.6.4 In sum, they must act so as to maintain public confidence in the institutions, the processes and the personnel of government itself.

4.6.5 These general standards produce a web of more specific and detailed prescriptions governing different facets of official behaviour, for example, conflict of interest, the receipt of gifts, the use and disclosure of information acquired in office, "moonlighting" (spare time employment), the "revolving door" (the movement from public office to private employment), and due process obligations. Furthermore, their effectiveness may justify the imposition of prohibitions, restrictions and positive obligations on officials.

4.6.6 These matters are complex and require detailed and sensitive consideration. It is therefore desirable that their full examination be left to the Commission on Government. There are, nevertheless, a number of matters on which we consider it appropriate to comment.

4.6.7 First, it needs to be recognised that no system of standards can of itself ensure official integrity. In the last analysis, and despite the obvious failings of particular officials we have identified in Part I of the report, the community's final, if imperfect, safeguard lies in its officials themselves and in their understanding of, and commitment to, the public trust they discharge. The pursuit of integrity in government depends substantially upon their professional dedication. Codes and associated measures are a necessity. But in the end, more important are example, training and the inculcation of a sense of professional responsibility. The first aim should be to create an environment in government in which ethical behaviour is the understood and accepted order. The senior officers in all arms of Government bear a particular

responsibility in this, as will the Commissioner for Public Sector Standards, a new office we recommend later in this report.

4.6.8 Secondly, as we have said, it is imperative that public officials of all types have available to them a statement or code which addresses these matters. The Commission recognises that there are varying views on how this should be done so as to achieve greatest practical effectiveness. What is clear is that officials must be provided with practical guidance in solving the ethical and other dilemmas which are likely to confront them given the particular type of official function they have, or the particular area of governmental responsibility in which they find themselves. This, perhaps, is best left to supplementary guidelines prepared to meet the particular circumstances of types and classes of officials. All codes of conduct should be publicly available documents.

4.6.9 Thirdly, all public officials should be bound by a code. To avoid any misunderstanding, we expressly include within this members of Parliament and ministers. In saying this in relation to members of Parliament, the Commission differs from the recommendation on this matter put forward in this State in 1989 in the report of the Parliamentary Standards Committee (the Beazley Report). In that report, a code of a minimalist variety was suggested for members and this primarily for "educational purposes". We endorse without reserve the need for the education of members in their roles and responsibilities. However, that code, which addresses merely the behaviour of members in the House, overlooks the important legal and ethical responsibilities of members which result from their public trusteeship. These responsibilities above all must be known by, and required of, members. The manner in which they use their position and their influence, their use of public resources and facilities, their private business dealings, their treatment of confidential information and their use and abuse of free speech as it affects the individual citizen, are matters in which there is a vital public interest requiring not only education but also unswerving adherence to acceptable standards. The Commission is fortified in its view by that taken in the EARC Report to which we have referred. We should add that our recommendations, designed to enhance Parliament's scrutiny of the executive, emphasise the need for members to have a full understanding of their role and responsibilities.

4.6.10 The Commission's inquiries make it necessary for it to comment specifically on the guidance required for four types of official.

- (a) Ministers — A comprehensive code of conduct for ministers is a necessity. They have the greatest power and the greatest responsibility. The code presently operative in this State is inadequate. It does not indicate the general standards which must inform ministerial conduct in office. Although it refers in detail to three important matters, it is deficient in its overall coverage of subjects on which guidance or regulation is required. It contrasts sharply, for example, with the New South Wales Code of Conduct for Ministers of the Crown and with EARC's proposals for ministers in Queensland.

- (b) Members of statutory authorities — A troubling conclusion we have reached is that some members of the statutory authorities with which we have been concerned appeared to have little understanding of their proper role and responsibilities. This, we are aware, is not a problem unique to Western Australia. Recommendations we make elsewhere in this report, particularly on the relationship of ministers to statutory authorities, should help to clarify some of the causes of misunderstanding. To be emphasised here is that a code of conduct for members of such authorities must make plain what their role and responsibilities require of them. It most likely is the case that guidance in matters of detail will have to be given on an authority by authority basis.

- (c) Press secretaries/media officers — The Commission has recommended that a review be undertaken of the proper role and responsibility of these officers. It is essential, given the part they play as an information bridge between government and the public, that they have a clear understanding of what is and is not appropriate behaviour on their part in discharging this function.

- (d) Ministerial staff — The Commission comments directly on ministerial staff in chapter 6 of this part of the report. While they, no less than public servants, should be regulated in the ordinary way on grounds of conflict of interest, secrecy and the like, it is of the first importance that they have available in documentary form a clear statement prescribing how they properly can act on behalf of their minister in dealing with officials serving in that minister's portfolio.

4.6.11 Fourthly, necessary adjuncts to any formal statement of standards are those measures which are designed both to avoid circumstances arising which can create integrity concerns and to assist in the resolution of difficulties as and when they arise. These most commonly, but not exclusively, are directed at the avoidance and resolution of what are commonly described as conflicts of interest. The report of the Commonwealth Bowen Committee on "Public Duty and Private Interest" (1979) canvassed some of these measures. We do not feel it necessary here to survey these and other possibilities. That will be a task for the Commission on Government. We do, however, consider it to be essential to discuss in some detail two matters: first, "whistleblowing" and, secondly, registers of pecuniary and other interests. Each of these will be considered in the following sections of this chapter.

4.6.12 Fifthly, in accepting public office a person becomes entitled to the benefits that position confers. But there are burdens. By becoming a trustee, an official necessarily has to accept that conduct, activities and relationships which are permissible to ordinary members of the community may have to be avoided or curtailed because they could, or could appear to the public to, put at risk the honest, impartial and disinterested exercise of public office. Such restrictions involve no imputation against the personal integrity of any given official. They are risk avoidance measures designed for the most part to allay such public suspicion as appearances can create. For example, ministers should not be on the boards of public companies; officers may have to divest themselves of certain assets because of the inevitable conflicts they will create; participation in a particular interest group may be inappropriate because of the nature of the official's duties. Such restrictions serve a purpose of some importance.

4.6.13 Restrictions are justified and justifiable. We think it desirable, however, to indicate that some sensitivity should be shown in formally imposing them upon officials. Public officers are not second class citizens. While they may have to accept some limitation upon the enjoyment of ordinary rights of citizenship open to other members of the community, that curtailment should be no greater than is necessary. It is appropriate to refer to this matter for cautionary purposes. The justifiable indignation that the public may feel at the conduct revealed in Part I of the report should not be allowed to lead to the imposition of unreasonable and undue restrictions on public officials.

4.6.14 The Commission appreciates that it has not addressed many important matters raised by this general topic; for example, what legal force should a code have,

what sanctions should be available for its breach, and should an Ethics Commission be established? These are issues for the Commission on Government to explore.

4.6.15 In the light of the matters discussed in this section, the Commission recommends that:

The Commission on Government review the standards of conduct expected of all public officials for the purposes of (a) their formulation in codes of conduct and (b) determining what associated measures should be taken to facilitate adherence to those standards.

4.7 "Whistleblowing"

4.7.1 The Queensland Fitzgerald Report (1989) made the observation that "[h]onest public officials are the major potential source of the information needed to reduce public maladministration and corruption. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced." The Commission endorses both statements. Even where appropriate systems are in place, one cannot be certain that maladministration and misconduct will be revealed. What is certain in this State is that appropriate systems are not in place to facilitate such revelation, nor to provide reassurance to officials and private individuals that if they make such revelations they will not be subjected to harassment, discrimination and legal proceedings. Significantly, we have reason to believe that in one of the matters into which we have inquired, a disclosure could have been made which might have avoided the loss of many millions of dollars, save that the individual concerned was advised that secrecy obligations imposed by his contract prevented that disclosure being made.

4.7.2 Systems for the reporting of maladministration and misconduct, and for the protection of persons who take advantage of them, are the subject of legislative proposals or are under active consideration in a majority of Australian jurisdictions. It may well be the case that whistleblowing legislation will become the norm for this country. Whether this will be so or not, the Commission believes that its enactment in this State is desirable. It is not a measure that government and senior officers have hastened to embrace; it can create embarrassment and difficulties. But in our view the desirability remains.

4.7.3 Australia has developed, over a short period, a significant official literature discussing whistleblowing and the legislative measures that should be taken in aid of it. Of particular note are the final report of the Gibbs Committee, "Review of the Commonwealth Criminal Law (1991)" and the EARC "Report on Protection of Whistleblowers (1991)". And there is an extensive North American experience from which we can profit.

4.7.4 As with several of the reform measures we are proposing, the development of a whistleblowing scheme must be left to the Commission on Government. The task will require public consultation. The measures adopted must be suited to the governmental arrangements of this State. Nevertheless, it is desirable that we make some comment both on the general characteristics any such scheme should possess and, particularly in view of our inquiries, on matters to which consideration should be given.

4.7.5 The vital prerequisites for a whistleblowing scheme are:

- (a) that it be credible so that officials and others not only feel that they can use it with confidence but also can expect that their disclosures will receive proper consideration and investigation;
- (b) that it is purposive in the sense that the procedures it establishes will facilitate the correction of maladministration and misconduct where found to exist; and
- (c) that it provides reassurance both to the public and to the persons who use it. Consistently with the preservation of confidentiality in relation to operational matters, there should be appropriate reporting to Parliament. The public is entitled to know that where allegations have been made, they have been properly investigated and, if substantiated, remedial action taken. Persons using it are entitled to expect that they will be protected from reprisal.

4.7.6 With these considerations in mind, the Commission believes that all agencies in the public sector, including statutory authorities and State-owned companies should establish confidential procedures which will allow for reporting of maladministration and misconduct to be made within the organisation itself. The

Commission also believes that a complainant should have the clear option to make his or her report instead to the appropriate independent public agency which is authorised to receive such complaints and to ensure their adequate investigation. We contemplate that this would normally be the Commissioner for the Investigation of Corrupt and Improper Conduct.

4.7.7 There are two further aspects of whistleblowing which require consideration. The first is whether whistleblowers should be allowed to "go public" in the first instance. This has been the subject of some disagreement between EARC and the Gibbs Committee in their respective recommendations. Although there may need to be some constraint on the freedom of a person to disregard alternative procedures and go public directly, we are of the view that a whistleblowing scheme should not prevent this course being taken. It is already permitted in a range of circumstances by the common law of this State. That common law right should not be removed, although access to the protective measures we propose may need to be restricted when that right is exercised unreasonably. The second form of disclosure which requires consideration is reporting to members of Parliament and to parliamentary committees. Given the recommendations we later make, in relation to parliamentary committees in particular, this is a matter which will require close attention.

4.7.8 Secrecy in the conduct of government and public administration provides the veil behind which waste and impropriety can occur. The Commission's earlier recommendations aimed at producing greater openness in government will help to deter wrongdoing. However, a significant impediment to the disclosure of misconduct and maladministration is created by the secrecy obligations imposed on public officials by statute and regulation. We recall the extreme width of the obligation imposed on public servants by the *Public Service Regulations 1988*, regulation 8, mentioned in section 2.3 of chapter 2 of this part of the report. To be effective at all, whistleblowing legislation must override the secrecy laws currently imposed on officials. The Commission has recommended a review of those laws.

4.7.9 One of the more contentious questions to be answered in settling upon a scheme suited to this State, is the identification of the types of actions, activities and concerns which may be made the subject of a whistleblowing disclosure. This is not a matter on which a uniform approach has been adopted elsewhere, although there is a common core of matters which are now widely accepted, including illegality and dangers to public health and safety. In the light of the Commission's inquiries, one

matter in particular will require careful consideration. That relates to the management and waste of public funds. While officers should not be able to complain of every use of public funds with which they disagree, it is abundantly clear that there is a vital public interest involved in the protection of public funds from waste, mismanagement and improper use. Whistleblowing provides one means for the protection of that public interest.

4.7.10 The Commission has referred so far only to maladministration and misconduct in government. It is necessary that we make several observations concerning the private sector. The first is that it is not only officers in the public sector who may become aware of wrongdoing. In their dealings with government or otherwise, members of the public may have reasonable grounds for suspecting improper conduct. They, no less than officials, should be entitled to resort to, and to receive the protection of, whistleblowing legislation. Secondly, while the primary purpose of our proposal is to protect our system of government from the actions of public officials, this inquiry has revealed that it can be the actions of persons in the private sector that put public funds and government itself at risk. For this reason, while the Commission does not now positively recommend that its proposed whistleblowing legislation be extended generally to the private sector, a step which has been taken in the United States of America and which in modified form has been recommended by EARC in Queensland, it is essential at least that it extend to allow disclosures about companies and persons dealing with government where those dealings could result in fraud upon, or the misleading of, government. While it may be said that such an extension would erode the loyalty that companies expect of their employees and advisers, loyalty must give way to the prevention of the commission of wrongs upon the government.

4.7.11 The Commission is conscious of the fact that in several of the matters into which we have inquired professional advisers from the private sector had some roles to play in transactions that have resulted in cost to the State. The legal and ethical responsibilities of professionals are not a matter into which we should inquire here. Whether or not those responsibilities should extend to a whistleblowing function is a matter for the professional bodies to consider. The Commission notes the comment made by a United States judge in a case involving the Savings and Loan collapse in that country:

"What is difficult to understand is that with all the professional talent involved (both accounting and legal), why at least one professional would not have blown the whistle ..." *Lincoln*

Savings and Loan Association v Wall 743 F.Supp. 901, at 920 (1990).

4.7.12 Of central importance in whistleblowing legislation are the measures to protect the whistleblower from reprisal, whether it be from harassment, intimidation and discrimination in the workplace or otherwise, from civil actions for breach of confidence or defamation, or from criminal and disciplinary proceedings. It is essential that a whistleblower, not only should have avenues through which to make the disclosure, but should also be able to turn to an appropriate agency for counsel and for protection against reprisal. It is inappropriate that a whistleblower be given rights against reprisal but then be expected to rely upon self-help for their vindication. We would add by way of qualification that a person should not be entitled to protection if a complaint is made which is known to be false, or which is not made on reasonable grounds.

4.7.13 Having emphasised the need for effective protective measures for whistleblowers, the Commission considers it necessary also to indicate that whistleblowing procedures should be designed so as to give reasonable protection to persons against whom allegations are made at least until a prima facie case has been made out. Allegations, although properly made, may prove to be unfounded. Unfair stigmatisation needs to be avoided. This may require a constraint on publicity during any investigation.

4.7.14 The Commission notes that the 1992 Report of the Select Committee on the *Official Corruption Commission Act*, contains two recommendations that go some way toward providing whistleblower protection: first, that certain public officials, including chief executive officers of government departments and agencies, should be obliged to report to the existing Official Corruption Commission ("OCC") suspected corrupt conduct and that informers be afforded legislative protection, as in Queensland; secondly, that any person may give the OCC information in good faith, "notwithstanding the provision of any other law". These recommendations have now been carried forward in the recently tabled report of the Select Committee of the Legislative Assembly in relation to these recommendations, and the draft Bill attached to it.

4.7.15 The Commission is bound to comment that the recommendations of the Select Committee now carried forward into the draft Bill do not encompass the breadth of circumstances in which whistleblowers may need protection. Most importantly, they are limited to those occasions on which the OCC has jurisdiction to investigate a complaint. These are, by definition, limited to matters of corruption and other unlawful

conduct under the *Criminal Code*. Thus not all matters of improper conduct or conduct which may imperil the public interest, would be affected by the recommendations of the Select Committee. Furthermore, they may not extend to protect a private sector whistleblower who may, in making a complaint, act in breach of employment or fiduciary obligations. They also fail to provide an internal whistleblowing mechanism.

4.7.16 The Commission recommends the creation of a Commissioner for the Investigation of Corrupt and Improper Conduct with a wider jurisdiction than that of the existing OCC. The recommendations of the Select Committee should be considered necessary provisions in the setting up of the office we propose. The implementation of our recommendation that such an office be established will, however, leave for further consideration the wider whistleblowing issues posed by us.

4.7.17 There are many other matters to which reference could be made on this subject. They are best left to be considered when it is fully examined by the Commission on Government. However, it should be emphasised that whistleblower legislation is only one means to the end of safeguarding and correcting against illegal and improper behaviour in public office. It should be seen only as a part, albeit an important part, of the desirable reforms to be made in this State.

4.7.18 Accordingly, the Commission recommends that:

The Commission on Government review the legislative and other measures to be taken —

- (a) to facilitate the making and the investigation of whistleblowing complaints;*
- (b) to establish appropriate and effective protections for whistleblowers; and*
- (c) to accommodate any necessary protection for those against whom allegations are made.*

4.8 Register of interests

4.8.1 One of the axioms of our system of government is that public officials should subordinate to the interests of the public their own personal interests and those of their associates. Few things are more subversive of public confidence in government than the appearance that officials might not be doing so. Where, because of their responsibilities, public officials are in a position to favour their own personal interests or those of an associate, they have what is commonly referred to as a conflict of interest. It may well be the case that when taking a decision in such circumstances, they act with perfect propriety and as their duty to the public requires. But given the appearance that is likely to be created by their acting in the matter, the public is entitled to be reassured that its interests have not been sacrificed to other interests.

4.8.2 There are a number of measures now in use both in Australia and elsewhere which are designed to provide that reassurance. The first and perhaps the most obvious is to prevent an official from getting into a position of conflict. This can be achieved in a variety of ways, the most common of which are:

- (a) by not assigning to an official duties which will give rise to conflicts, given his or her known personal and other interests; and
- (b) by prohibiting an official from having, and by requiring the divestment of, personal interests, and particularly pecuniary interests, which will give rise to foreseeable conflicts, given the duties of the office.

4.8.3 These particular measures are not always available in particular cases. In any event, they are suited only to those situations where particular conflicts are predictable. Other measures include those which facilitate the proper resolution of conflicts when they occur. These are:

- (a) the appropriate disclosure of the fact that the official has a personal interest in a matter; and
- (b) if necessary, the disqualification of the official from participation in that matter.

4.8.4 Measures of this latter kind have now been established for the Public Service of this State in provisions added to the Public Service's code of conduct in 1991.

4.8.5 For members of Parliament and public officials whose positions carry significant levels of public responsibility and discretion, including ministers, members and senior executive officers of statutory authorities and senior public servants, it is being recognised in many parts of the world as well as in this country that an important step to enable any of the measures we have noted above to be put into effect is to oblige such officials to make a declaration in writing of at least their pecuniary interests. In the case of members of Parliament, that declaration is generally publicly available. In other cases, it is an "in-house" matter. The additional and salutary purpose of registers is to sensitise officials to the importance both of avoiding, and, where they are inescapable, of disclosing, conflicts or potential conflicts of interest.

4.8.6 This State has not as yet committed itself systematically to registers of interest of either a public or an "in-house" variety. Registers naturally raise questions of some sensitivity. The nature of the interests that should be disclosed, their extension beyond officials to spousal interests, the weight to be given privacy concerns are matters upon which opinions can differ. Many of these matters were canvassed in the Bowen Committee "Report on Public Duty and Private Interest (1981)" and in EARC's "Report on Review of Guidelines for the Declaration of Registrable Interests of Elected Representatives of the Parliament of Queensland".

4.8.7 Although the issue of registers arises only indirectly from the Commission's inquiries, it is nevertheless of sufficient importance to our overall concern to advance integrity in government to lead us to make a recommendation on the matter.

4.8.8 At the very least, a ministerial code of conduct should oblige ministers to disclose in writing to the Premier and to the Auditor General a full statement both of their pecuniary interests and of other interests of relevance to their portfolio responsibilities. The ministerial code now in use in this State goes some distance in this direction. It is, however, notably defective in not empowering the Premier to require a minister to divest himself or herself of any interests which could create the impression of conflict with the responsibilities implicit in the minister's portfolio.

4.8.9 Equally, the "in-house" declaration of those interests which may have some potential for conflict with their duties of office should, in the Commission's view, be a condition of appointment to senior offices in the Public Service and to positions which have significant responsibilities in relation to government contracts. It should

apply also to members and senior executives of statutory authorities and of State-owned companies. In any consideration of this matter, we invite attention to the form of declaration of interests required of federal employees in Canada by the "Conflict of Interest and Post-Employment Code for the Public Service (1985)" and also to EARC's proposals in its "Report on the Review of Codes of Conduct for Public Officials".

4.8.10 Finally, the Commission refers to the *Members of Parliament (Financial Interests) Bill* which was introduced into the Parliament in 1989. The registration systems for members in Australia conform in general terms to two patterns, the differentiating features of the two being:

- (a) the range of the interests for which disclosure is required; and
- (b) the extension of the disclosure requirement beyond the interests of members to those of their spouses and dependants.

4.8.11 The 1989 Bill in both of these matters accords more closely with the less onerous pattern. We do not consider it appropriate to express any concluded view on the Bill and its scope. Although a system of registration is already a characteristic feature of almost all Australian Parliaments, the Commission believes that the need for, and the scope of, a register are matters upon which the public is entitled to express its own views, particularly as a register of members' interests has public reassurance as one of its primary purposes. The one matter to which we would draw specific attention is that of the registration of spousal and dependants' interests. Compelling arguments can be raised in favour of such registration on integrity grounds and against it on privacy grounds. If registration is to occur, consideration should be given to the compromise procedure of non-public registration of these interests. This approach, we understand, has been taken in Queensland.

4.8.12 Accordingly, the Commission recommends that:

The Commission on Government inquire into the registration of the pecuniary and other interests of members of Parliament, ministers, senior public servants, members and senior officers of statutory authorities and State-owned companies, and of such other officials for whom registration in some form may be appropriate, given their official responsibilities.

4.9 Investigation of corrupt and improper conduct

4.9.1 In Part I of this report we noted that there had been comparatively little evidence of illegal or corrupt conduct. However, several matters raised were capable of giving rise to suspicion. It is unsatisfactory that there should be public speculation and innuendo without the means of effective resolution. Often, matters such as these are not suited to parliamentary investigation. Nor are they amenable to complete or thorough investigation by existing accountability and law enforcement agencies. Existing accountability agencies such as the offices of the Ombudsman, the Auditor General and the Public Service Commissioner and existing law enforcement agencies such as the Commissioner of Police and the recently established Director of Public Prosecutions are able to some extent to investigate matters of official corruption and improper conduct of public officials. However, none of those agencies has the single and comprehensive function of investigating and reporting on such matters. The Official Corruption Commission was established in 1988 to receive and refer certain specific allegations of official corruption. It has been described, in some of the submissions received from members of the public as a "post box" for official corruption complaints. It has very limited powers of its own.

4.9.2 The Commission believes it to be of the utmost importance that this State should establish, without delay, a body with the discrete function to investigate and report, in a timely manner, upon complaints of official corruption and improper conduct by public officials. The new body we recommend, the Commissioner for the Investigation of Corrupt and Improper Conduct, should replace the OCC and be complementary to the other existing accountability and law enforcement agencies, notwithstanding that at times there necessarily may be some overlap in their various functions. Unlike a Royal Commission, it should be able to investigate issues whilst the recollections of witnesses are relatively fresh, and relevant documents still exist.

4.9.3 The current means of exposing any corruption by public officials in this State is limited. Corruption is, by its very nature, covert. The Commission's investigations have led us to the view that those involved in corruption will often employ sophisticated commercial and financial techniques extending beyond this State to other parts of Australia and overseas in order to disguise the true nature of those transactions. Investigation of official corruption necessarily requires a combination of

the skills of lawyers, accountants, computer analysts, fraud investigators, as well as traditional police investigators. The traditional powers of investigation alone are inadequate for matters of this kind. The proposed Commissioner should be empowered to require the attendance of witnesses and the production of documents. This Commission's limited capacity to investigate payments or transactions overseas, or to compel the attendance of witnesses or the production of documents from overseas also highlights the need to integrate the functions of various agencies in this State, with those in other States and Territories, and in the Commonwealth arena, to ensure more effective investigation. It further highlights the need for bilateral agreements between Australia and foreign states for the same reason.

4.9.4 Similarly, the means of investigating and reporting in respect of complaints of improper conduct by public officials is limited. The conduct of ministers and public officers which the Commission has found to be improper is not, in the main, the subject of criminal sanctions and may not amount to a disciplinary offence. It is conduct which should not remain undetected. The public are entitled to know when the trust they have invested in public officials has been breached and by whom. The proposed Commissioner should be empowered to investigate not only corrupt or illegal conduct but conduct which, whilst not corrupt or contrary to law, nevertheless breaches the public trust. Such improper conduct by public officials may be reported in a number of ways: to the public at large; to the Parliament; by referral to other departments or agencies of government which have the capacity to take further action whether of a disciplinary or other nature. In that way, the body we propose is complementary to existing accountability and law enforcement agencies.

4.9.5 Furthermore, the proposed Commissioner should not be limited to investigating specific complaints of official corruption or improper conduct by public officials, but should also have a primary obligation to recommend means by which such behaviour may be prevented. Such recommendations may arise from the investigation of particular complaints. But they may also arise from a systematic analysis of those government decision making procedures which are more likely than others to provide opportunities for public officials to be corrupted or to act improperly. The proposed Commissioner, therefore, should be concerned both to effect systemic change in the public sector so that the opportunities for corrupt or improper conduct are reduced, and to identify, in relation to particular matters, those public officials who have acted without integrity.

4.9.6 In order to achieve these dual objectives, the proposed Commissioner must be and be seen to be authoritative and independent, but not autonomous. As an instrument intended to advance the public interest in protecting the integrity of government, the office must itself be fully accountable to the public. The proposed Commissioner should therefore account to Parliament, in respect of non-operational matters, through a Joint Committee of the Houses of Parliament. Together with the Auditor General and the Ombudsman, the proposed Commissioner will be an important independent parliamentary agency. The establishment of the office will not only complete a process whereby the integrity of government may be fully audited, but will ensure that the process by which that is done is conducted as openly as possible with direct accountability to and supervision by the Parliament. Whilst the agency should conduct its operations as openly as possible, it must necessarily, in relation to operational matters, act confidentially in order to protect, not only the integrity of its own investigations, but also the interests of those who might be directly or indirectly affected by its investigations. It would be incompatible with the protection of these interests for members of Parliament, including those serving on the Joint Parliamentary Committee, to become acquainted with operational matters.

4.9.7 The Commission is aware that, in March 1992, a Legislative Assembly Select Committee on the *Official Corruption Commission Act* made a number of recommendations designed to enhance the operation of the OCC but without effecting any substantive change to its primary purpose or function. On 24 September 1992, a further Select Committee of the Legislative Assembly, identical in membership to the earlier one, presented a draft Bill designed to implement the earlier recommendations. As the Select Committee noted in its report, the function of the OCC is limited to receiving complaints of "official corruption" as defined, narrowly, in the Act. Furthermore, secrecy provisions (in the absence of any whistleblower's legislation) currently prevents public servants from disclosing information which may form the basis of a complaint to the OCC. In other respects, the powers of the OCC to initiate or pursue an investigation are limited by the part-time nature of its members and its lack of an administrative or investigative staff.

4.9.8 The draft Bill presented by the Select Committee in its September 1992 report would seek, but only in a limited way, to ameliorate these problems. The functions of the OCC would remain defined by relevant provisions of the Criminal Code. The OCC would receive some preliminary investigation powers which would enable it to request the supply of information to it. However, because there would not

appear to be any penalty for failing to comply with such a request, this power would not be coercive. The draft Bill would require certain senior public sector employees to refer relevant information to the OCC, but only if they had grounds to suspect corrupt conduct of the type to which the Criminal Code relates. The draft Bill would not provide general whistleblower protection to persons outside the public sector, a matter discussed in paragraph 4.7.10 of this chapter.

4.9.9 The draft Bill is narrow in its scope and effect. Whilst it may be considered a step in the right direction, it is but a very tentative one. As we have said, the proposed Commissioner should possess wider powers, enabling him or her to deal not only with narrowly defined official corruption, but also with improper conduct by public officials. The proposed Commissioner should also be concerned with preventive and educative measures designed to combat corrupt and improper conduct. In other words, the body we propose has a significantly broader function than the existing OCC. The office should become one of the primary independent parliamentary agencies in the State. More detailed proposals are contained in Appendix 2 to this part of the report.

4.9.10 In making its recommendations, the Commission is conscious of the need for fiscal responsibility. We believe that, although the proposed Commissioner should be equipped with the necessary resources, the operation should nevertheless begin in a modest way, responding thereafter to the demands placed upon the office.

4.9.11 Accordingly, the Commission recommends that:

The office of Commissioner for the Investigation of Corrupt and Improper Conduct be established in accordance with the requirements set out in Appendix 2.

4.9.12 It should be within the authority of the proposed Commissioner to investigate complaints concerning police corruption and misconduct. We anticipate, however, that the Commissioner, in his or her discretion, would only investigate matters which justify the attention of the Commissioner, referring lesser complaints to the Commissioner of Police and other relevant officers within the police force, for inquiry and subsequent action as necessary.

* * *

CHAPTER 5

THE PARLIAMENT

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5.1 The democratic principle and the Parliament

5.1.1 At the centre of many of our proposals is the Parliament. It is entirely appropriate that this be so. In our constitutional system, it is the public's representative forum and it derives its ultimate legitimacy from the public on whose behalf it acts.

5.1.2 Much of the focus of the Commission in this part of the report has been on the steps that might be taken to restore and maintain public trust and confidence in the integrity, the processes and the practices of the executive and administrative arms of government. The Parliament is central to our proposals. Above all else, if there is to be government for the people, there must be public trust and confidence in the processes and practices of Parliament and in the role it performs in advancing and in safeguarding the interests of the public. If the Parliament is to be the public's guardian against government abuses, it must be so constituted that the public will place its trust in it.

5.1.3 The Commission's recommendations in relation to the Parliament are so vital to the scheme and purpose of our report that we consider it desirable to state at the outset the considerations which have led us to make them.

5.1.4 The Parliament has the first responsibility to promote the realisation of the three goals of openness, accountability and integrity upon which our system of government depends. Because it is the principal institution which carries responsible government into effect on behalf of the public, its role as an accountability agency for the public is one which has particular importance. The Commission's recommendations arise out of this consideration. Many of the proposals we have made already in this report aim to exact a full and effective accountability from the Government and the public sector. As we have noted, most of these proposals have the Parliament as their point of convergence. The concern in our recommendations here is to maximise the capacity the Parliament has to exercise its accountability role but in ways which give full effect to the dual character of our system of government. That character, as we indicated in the introduction to this part of the report, is one of representative democracy and of responsible government.

5.1.5 The bicameral nature of the Parliament itself provides a very practical way in which this accountability role can and should be put into effect. As we will indicate later in this chapter, the Legislative Assembly is, and is properly regarded as,

the House of Government. That role, and the place of the Government in the House, limits what realistically can be expected of it in subjecting the Government and the public sector as a whole to measured and comprehensive review. It is otherwise with the Legislative Council. Many of the recommendations thus far have been made with the Council in mind. The Commission recommends that the Council be openly acknowledged as a House of Review and that its composition and its procedures reflect this purpose. We do not regard this change as merely one which would differentiate the two Houses. Unless the Legislative Council assumes the explicit role of a House of Review, then it is unlikely that the Parliament itself will be able to exact that level of accountability which is necessary to avoid a repetition of events similar in their effects to those into which we have inquired. It is also unlikely that it will be able to give representative and responsible government true meaning in this State.

5.1.6 To be constituted a House of Review both the role of the Legislative Council and the basis of its representative character require some alteration. The Commission makes a number of recommendations which will arm the Council with the practical capacity to review in an effective and systematic fashion the conduct and operations of the governmental system. However, its representative character must also be addressed. If it is to act as scrutineer for the public it must be truly representative of the varying interests of the public insofar as this can be achieved in a practicable way. To this end, we recommend a review of the electoral system for representation in the Legislative Council.

5.1.7 This electoral review is central and of vital importance to the recommendations of the Commission. Through our committee proposals, through the inquisitorial powers we consider the Parliament should have, but, most importantly, through the independent parliamentary agencies, the Commission's recommendations, if implemented, would arm the Parliament, and particularly the Council, with formidable powers of inquiry and scrutiny and with access to wide-ranging information about the conduct and operations of government. The significant responsibilities we recommend for the independent agencies are responsibilities conceived so as to serve a vital public interest. *Their capacity to serve that role will depend substantially on a Parliament so structured and motivated as to be able to share their objectives and fully support them in their respective tasks.* The Commission emphasises the importance of this observation.

5.1.8 The reform we recommend for the Legislative Council necessitates consequential changes both in the constitutional relationship between the two Houses and in the representational basis of the Legislative Assembly. As the House of Government, and this is the role it should retain in our parliamentary system, the Assembly must be constituted in a way which is truly democratic in character, but which facilitates the election of a party or coalition of parties likely to form a stable and effective Government. With these considerations in mind we recommend a corresponding review of the electoral franchise of the Legislative Assembly.

5.1.9 In the end, our recommendations envisage different but complementary roles for the two Houses of Parliament. Reformed as we propose, the Houses together will better reflect the Parliament's character as the embodiment of representative democracy and responsible government.

5.2 The independence of the Parliament

5.2.1 The causes of a decline in the effectiveness and reputation of the legislature in Westminster systems are well understood. They lie chiefly in the dominance of the party machines in the work of elected representatives. When a Government commands a majority in both Houses of a bicameral legislature, neither chamber is likely to provide a stringent check upon the executive's activities. When an Opposition controls the Upper House, there will be a tendency for review to degenerate into mere obstruction. Neither situation nurtures the accountability which parliamentary government should properly guarantee. Both result in concealment : the former through complacency; the latter through evasion.

5.2.2 Members of Parliament have inescapable party duties and affiliations. However, if the Parliament is to fulfil its broad responsibility to act in the public interest, its members' role and responsibility to serve that public interest must be reinforced. That parliamentary role must rest solidly upon the independence of the Parliament as an institution.

5.2.3 A government, of necessity, will exercise a considerable influence over the affairs of the Parliament. However, it should not be allowed, through its control of the State's budgetary processes, to blunt the capacity of the Parliament to review the government itself. For so long as the Parliament is financially subservient to the Executive, the effective discharge of its responsibilities is at the mercy of the Executive.

The Parliament and the Executive are politically linked through the Government. Responsible government ensures this. But what it does not require is the form of financial tie which now exists. The Parliament must be given financial independence. Within clearly defined budgetary limits, it should be for the presiding officers and heads of the parliamentary departments to manage the resources which enable the Parliament to undertake its business. The Parliament must in turn be accountable for its financial management. It should fully publicise its own accounts. It should be subject to the audit and public report of the Auditor General. Whether the most effective means for securing the necessary degree of financial independence should be the model of the House of Commons Commission or some other method is not for us to determine. The immediate need is to ensure that the Parliament will be properly equipped to fulfil its responsibilities in a manner consistent with its constitutional independence. In making its recommendation, the Commission is not expressing any view on the present arrangements by which the salaries of parliamentary members are determined. That question is far removed from the present discussion.

5.2.4 Accordingly, the Commission recommends that:

The Commission on Government inquire into the most effective means of securing the financial independence of the Parliament so that, within clearly defined budgetary limits, the presiding officers and heads of parliamentary departments are able to manage the resources which enable the Parliament to undertake its business.

5.3 The roles and electoral systems of the Houses of Parliament

5.3.1 Our two Houses of Parliament are not, and are not intended to be, mirror images of each other. Each makes, and should make, a distinctive contribution to the process of government. The Commission believes measures can be adopted to enable a more effective service of the public interest. In saying this, we have the role of the Legislative Council particularly in mind.

5.3.2 The Legislative Assembly is ordinarily controlled by the elected Government. This follows from the basic precept of our system which makes this House the seat of government. It is from there that provision for public expenditure (in

the form of money Bills) originates. It is in this House that ordinarily the Government's major legislative and policy initiatives are brought forward. It is in this House that an Opposition holds itself forth as an alternative government. The Opposition, and for that matter independent members, have every incentive to subject both the Government and the administrative system in general, to the critical but responsible review we ask for in this report and which our recommendations are designed to facilitate. This said, it would be unrealistic not to recognise that the life, the programme and the "theatre", as also the party and constituency responsibilities of the members of the Legislative Assembly, blunt considerably what reasonably can be expected even of an Opposition in the systematic review of the conduct of the Executive.

5.3.3 In common with the Commonwealth and State Parliaments, with the exception of Queensland, this State has an Upper House — the Legislative Council. It is not the House of Government. It is not the House in which government is won or lost. Yet, in our view, it is, or at least should be, a House of vital importance to the public.

5.3.4 The roles performed by Upper Houses in Westminster systems have been quite various. They have ranged from being the crude instruments for the protection of property interests, through unelected "Houses of Review" (as is the case with the Senate in Canada and the House of Lords in Britain), to popularly elected chambers whose members, elected on a basis different from that of the Lower House, can be expected to be attentive to different concerns from those elected to the Lower House.

5.3.5 It is, in our view, of the utmost importance that the role, or roles, of the Legislative Council in this State be clearly identified. Its role as a House of Review is of vital concern to the Commission. If it is not the Council which discharges this role, then we are compelled to accept that the protection given by the Parliament against the abuse and misuse of official power will, for the future, as in the period into which we have inquired, be gravely compromised.

5.3.6 Because of the great importance we attribute to the recommendation we are to make in relation to the Legislative Council — it goes directly to the constitutional arrangements of this State — we consider it necessary to make the following observations.

- (a) The Legislative Council, whatever the criticisms that can be made of its present role, whatever the questions that can be raised as to its current legitimacy given its present electoral system, has a vital, if unrealised, place in our constitutional fabric.
- (b) Despite the predominant role that political parties have in it, the House itself is not so tied to the making and unmaking of Governments as to make it unrealistic to expect that with appropriate representational and procedural arrangements, it could serve as the House primarily responsible for the systematic oversight and review of the public sector as a whole. This is a primary role we envisage for it.
- (c) However desirable in principle, we consider it most probably impractical to prevent Council members from holding ministerial office. In saying this we, nevertheless, believe that such a prohibition could have a considerable effect on the approach the members of all parties would take to the discharge of their responsibilities as Councillors and it would indicate more sharply than is now the case that it is the Legislative Assembly which is the House of Government.
- (d) Without immediate constituency concerns — and the significance of these to members of the Legislative Assembly cannot be underestimated — and with less direct involvement in the struggle for political supremacy than is the case with Assembly members, this House, much more so than the Legislative Assembly, carries the greater capacity to exploit its procedures and committees, and so to regulate its sittings, as to accommodate the role we propose.
- (e) As the diverse recommendations we have made in this report indicate, we do not for one moment consider that the Legislative Council should be the public's sole guardian. We do, however, consider that a Council committed to the role we propose and armed with the procedures and powers we suggest in this report, would give ministers, public officials and statutory authorities alike considerable reason for pause before even contemplating embarking on actions similar in character to those into which we have inquired.

- (f) In concentrating our attention upon the Council as the Parliament's primary review agency of the public sector, we would not wish to be interpreted as suggesting that the exertions of the Legislative Assembly in this regard should be diminished or curtailed. Far from it. Indeed, we are of the view that, at least in those fields where it can reasonably be achieved, the two Houses should strive to complement each other's review activities and, where appropriate, to conduct them jointly.
- (g) In assigning this primary review role to the Council, we are not in any way proposing that it be denied its traditional legislative function. We comment further on this below.

5.3.7 Accordingly, the Commission recommends that:

The Legislative Council be acknowledged as having the review and scrutiny of the management and operations of the public sector of the State as one of its primary responsibilities.

5.3.8 Because the role we have just identified is one to be exercised on behalf of the public, and because there is not the same constitutional imperative as there is in the Assembly to produce a government, the justification for the Council having an electoral system which precludes the representation of minority interests having significant support is difficult to sustain.

5.3.9 This State has given a regional emphasis to the electoral system for the Council. There are democratic arguments which are compelling, which suggest that while a majoritarian approach should prevail in the Legislative Assembly, minority interests with significant popular support should have popular representation in the Council. The argument here for proportional representation is difficult to deny, the more so given the pluralist character of our society.

5.3.10 In saying this, we do not suggest that the regional emphasis could not have some reflection in the Council's electoral system. Rather, we are suggesting that regional interests represent only one variety of the community interests which should be able to secure representation in the Council. We acknowledge that proportional representation now provides one element in the electoral system for the Legislative Council. We consider, however, that the effect on it of the present regional division of

the State strongly inhibits the possibility of significant minority interests obtaining representation in the House, representation which we believe should be promoted on democratic grounds.

5.3.11 Accordingly, the Commission recommends that:

The Commission on Government review the electoral system for representation in the Legislative Council.

5.3.12 In the light of the two recommendations we have so far made in relation to the Legislative Council, we believe it necessary to make this additional observation. If the Council is to be constituted as a House of Review elected on the basis of proportional representation which allows for significant minority interest representation, it would be quite inappropriate that it retain the power to block Supply. In such circumstances, that power should be denied in the Constitution.

5.3.13 The majoritarian character of the Legislative Assembly is reflected in the electoral system by which its members are selected. The division of the State into single-member electorates reflects a duality in members' roles, namely, to express the party political preferences of a majority of electors within a particular locality and to provide constituency services to that locality. The democratic principle by which the majority of votes in the Assembly determines the formation of the government is generally and properly understood to require as close to equal value in the votes of electors as is practicable. The application of this principle in a State such as ours, which includes a number of geographically remote communities, is not free from difficulty. However, claims for recognition of some level of regional weighting in the electoral system should not cause the assumption upon which the democratic principle is based to be compromised unduly.

5.3.14 Whether the present electoral system for the Assembly is one which properly reflects the democratic basis on which a House of Government should be elected is a matter which warrants examination. Our recommendations for the Council and for the electoral system which should reflect the role we envisage for the Council, makes it entirely appropriate that the electoral system for the Assembly be reconsidered in their light. Together the two Houses should, by the best means possible, express the principles of responsible government and of representative democracy. The accountability role we propose for the Council would give it special responsibility in

putting responsible government into effect. The role of the Assembly as a House of Government must in turn give it a particular responsibility for the manner in which that House puts representative democracy into effect.

5.3.15 This is a matter central to the democratic principle and parliament. The Commission believes it warrants further examination and review.

5.3.16 Accordingly, the Commission recommends that:

The Commission on Government review the electoral system for representation in the Legislative Assembly.

5.4 Parliament as an accountability agency

5.4.1 In earlier parts of this report the Commission referred to the constitutional obligation of the Parliament to scrutinise and review the actions of the officials and agencies of government. It is for the Parliament to make responsible government a practised reality. It has a crucial role to play in acquiring and in publicly disseminating information about the actions and activities of the executive and administrative arms of government. In the success it has in gaining access to information, the Parliament itself should play a central role in securing open government in this State. In chapter 2 of this part of the report, the Commission made a number of suggestions which would enhance this role of the Parliament. They need not be repeated here.

5.4.2 Hitherto, the Parliament has not attempted in a systematic way to bring the conduct of the entire public sector under its control. In chapter 3 of this part of the report, we suggested the establishment of a comprehensive committee system. Furthermore, as we have recommended in the preceding section of this chapter, the Legislative Council should be acknowledged as having the scrutiny and review of the public sector as a primary responsibility of that chamber. In addition, the Commission proposes a comprehensive review of the practices and procedures of the Parliament as they relate to the discharge of its duty to hold the public sector to account. Lest the Commission be misunderstood in this, we emphasise that we are not recommending a review of the practices and procedures of Parliament as such, but only of those which relate to its role as an accountability agency for the public.

5.4.3 Because this is a matter of fundamental importance to the public itself, and because it is one which affects the Parliament, it is not a review which should be undertaken by the Parliament. It is one in relation to which wide public consultation should occur.

5.4.4 Accordingly, the Commission recommends that:

The Commission on Government inquire into the means best suited to be adopted by the Parliament to bring the entire public sector under its scrutiny and review. In this, particular regard should be had —

(a) to the use of parliamentary committees for the purpose;

(b) to question time; and

(c) to the manner in which the departments and agencies of government should be required to report to the Parliament.

5.5 Parliament and the independent parliamentary agencies

5.5.1 At various points in this report, the Commission has referred to what are described as independent parliamentary agencies. By these we mean the Auditor General, the Ombudsman, the Electoral Commissioner and the proposed Commissioner for Public Sector Standards and Commissioner for the Investigation of Corrupt and Improper Conduct. Each of these agencies, in its own way, should exist to serve important public interests. Each, in performing its function, should be free from undue governmental influence and, we would add, of the politically partisan activities of members of Parliament.

5.5.2 Because of the importance the Commission attributes to each of these agencies in promoting fair, accountable, principled and responsive government in this State, we consider it necessary to ensure that the independence and institutional integrity of these agencies be secured.

5.5.3 As we have said, the Commission believes that these agencies must be distanced from the Executive. The responsibility of most of them relates to the conduct of the executive and administrative arms of government. It would be inappropriate, therefore, for the executive to have a significant capacity to manipulate or diminish their role. This consideration has direct implications both for the procedures governing the appointment and removal of these officials and for the financing of their offices.

5.5.4 As important as the independence and integrity of the offices themselves is the reassurance that should be provided to the public that the significant functions they perform are being discharged fully and effectively and, to the extent that those functions involve the scrutiny and review of the activities of government, their reports and recommendations are heeded. The appropriate body to provide that reassurance, as also to secure the independence we consider so vital, is the Parliament itself. The protection of the public interest requires an open, deliberate and visible commitment to the support of these agencies. In our view, it is the Parliament which should make that commitment.

5.5.5 Consistent with the view put in this chapter that all officials and agencies of our governmental system should themselves be accountable, we consider it entirely appropriate that these agencies in turn be accountable to the Parliament, the body to which they should report and from which they derive their statutory mandate.

5.5.6 Accordingly, the Commission recommends that:

- (a) *The Auditor General, the Ombudsman, the Electoral Commissioner and the proposed Commissioner for Public Sector Standards and Commissioner for the Investigation of Corrupt and Improper Conduct be designated independent parliamentary agencies in the legislation establishing their respective offices.*
- (b) *Appropriate legislative arrangements be made for the participation of the Parliament, ordinarily through its committee system, in the processes leading to the nomination of a person for appointment to each of these offices.*

- (c) *Each of these officials be removable from office only on the address of both Houses of Parliament.*
- (d) *In the case of each office, a parliamentary committee be responsible for recommending to the Treasurer the appropriate budget for the office.*
- (e) *Each officer be required to report annually to the Parliament and, in addition, to report from time to time to the appropriate parliamentary committee.*

We note here that elsewhere in this report we have made recommendations regarding the appointment procedures for the Auditor General and the Commissioner for the Investigation of Corrupt and Improper Conduct.

5.6 Parliament and public education

5.6.1 We have observed that our system of government rests upon two principles, which we have described as the democratic principle and the trust principle. The first affirms the people's right to determine their representatives, and hence their government. The second establishes the public interest as the touchstone of public power. A fundamental premise for each is the public's capacity to make informed choices and to reach considered judgments. Knowledge of our constitutional and administrative arrangements is a pre-requisite for effective action within our democracy.

5.6.2 In common with most developed forms of representative democracy in societies open to change, our system of government is complex and dynamic. An understanding of the principles and practices on which it is based is unlikely to emerge from merely casual encounters with its forms and functions. Explicit attention to the right of the public to information about the system of government is necessary in order to ensure that the community is politically informed.

5.6.3 No single agency or measure alone can ensure a society sufficiently informed about its civic institutions. It is in the character of a democratic community that many should be expected to contribute to this task. There are roles for our schools, universities and professional and public interest groups, to say nothing of the critical responsibility of the media. Yet the Parliament also should have an important part to

play in this educative process. It can do much to ensure the availability of basic information about our institutions of representative and responsible government. It can equip its members to fulfil their representative responsibilities. In conjunction with the work of the proposed Commissioner for Public Sector Standards, it could assist officials across the public sector to appreciate the parliamentary aspects of their work. We do not prescribe how the Parliament might address these issues. But we draw attention to them here as a significant aspect of the functions of the legislature which, with the enhanced means for fulfilling its responsibilities which we have recommended, its presiding officers and their administration should be encouraged to promote.

5.7 The legislative process and the public

5.7.1 Of course, the legislative role of the Parliament is central to its existence. It is inappropriate that the Commission venture too far into matters relating to the law making power of the Parliament or into the ability of an elected government to seek parliamentary consideration and approval of its legislative proposals. However, we suggest that consideration be given to one matter affecting the legislative process which would enhance the consideration given to the actual detail of Bills and more fully inform the Parliament of the possible effects on the public a Bill is likely to have.

5.7.2 The Commission has recommended that there be a review of the committee system of Parliament. Our earlier comments on committees were directed primarily at those committees the role of which is to review public finances, expenditure and the conduct of public administration. In addition, it would be advantageous to consider also committees on legislation.

5.7.3 The Commission notes that such a committee was established in the Legislative Council in 1989. The use of legislation committees to provide for a more effective examination of Bills than is possible by Houses of Parliament sitting as such, is a growing phenomenon in "Westminster" democracies. We refer here to the useful comparative study of this and other matters contained in the Electoral and Administrative Review Commission Issues Paper No 17, "Review of Parliamentary Committees".

5.7.4 The legislative responsibility of the Parliament is an onerous responsibility. The community has entrusted members with the capacity to interfere with the rights, liberty and livelihood of citizens. That capacity should only be

exercised after Parliament has given the best consideration of which it is capable to a legislative proposal. The use of committees on legislation is an important means through which such consideration can be given. The Parliament is not, and should not be allowed to become, the rubber stamp of measures put before it.

5.7.5 It is not the role of such committees to prevent a Government from having its legislative proposals brought before the Houses of Parliament for endorsement or otherwise. The procedures adopted by the Commonwealth Senate for its committees on legislation, procedures which warrant close attention in this State, demonstrate that this is a contingency which can be avoided.

5.7.6 The value of committees on legislation, and it is one which inures to the benefit of the public, is that they can enhance consideration both of the detail of Bills and of their possible effect.

5.7.7 In the review suggested by the Commission, attention must be given to procedures which will allow for public participation in the examination of legislation through public hearings and submissions. Consistent with the democratic principle to which we have referred, it is entirely appropriate that where a Bill is sent to a committee on legislation for examination, those affected by it, those who can contribute to its consideration, should be given the opportunity so to do. In saying this, we would again emphasise as the Chief Justice of the High Court has recently done that the representatives of the public "have a responsibility to take account of the views of the public on whose behalf they act" *Australian Capital Television Pty Ltd v The Commonwealth (No 2)*.

5.7.8 Accordingly, the Commission recommends that:

The Commission on Government, as part of the review of parliamentary committees, consider the role of committees on legislation, including the accommodation of the right of the public to make representations on legislative measures referred to such committees.

5.7.9 The least visible law making activity undertaken in this State is that by which statutory rules are made. These have a pervasive effect upon the lives and livelihood of the community. The Joint Standing Committee on Delegated Legislation

and the *Interpretation Act 1984* constitute significant checks in the processes through which rules are given legal effect. The Commonwealth Administrative Review Council in its Report No 35, "Rule Making by Commonwealth Agencies", has given extensive consideration to rule making procedures. We understand that the Joint Standing Committee had initiated consideration of this issue prior to that report and is currently pursuing the matter. Public participation in rule making is a goal which should be pursued in this State.

5.8 Parliament, parliamentarians and free speech

5.8.1 The vitality of a democratic society depends on the freedom of the public to discuss political and public affairs openly and without undue restraint. The public of this State doubtless accepts this freedom as part of a wider right of free speech, a right the enjoyment of which is simply assumed, although its legal recognition has always been ambiguous. Recently, however, the High Court of Australia has held that the freedom of communication, at least in relation to public affairs and political discussion pertaining to the Commonwealth, is guaranteed by the Commonwealth Constitution; it is said to be an implied right.

5.8.2 The decision of the High Court is historic and may be far reaching. It is historic because, for the first time in this country, freedom of communication between citizens and between citizens and government has been legally recognised as a distinct political right. Whether it is a political right recognised only in the Commonwealth Constitution for the purposes of Commonwealth action, or may extend to State action, is not clear. Whether a similar political right may now be said to exist under our State Constitution, a Constitution which reflects the same concepts of responsible government and representative democracy which a majority of the High Court has found gives rise to the Commonwealth constitutional freedom, is equally uncertain.

5.8.3 These questions or issues do not fall to the Commission for determination. But the decision of the High Court underlines the relationship between government and Parliament on the one hand, and the people on the other. Whatever the legal uncertainties, there can be no doubt that government must be conducted on the basis that each citizen has a right to freedom of communication in relation to public affairs and political discussion. The right of the people to subject the actions of those engaged in public affairs to critical scrutiny has important implications for the legal principles which currently govern both media activity in this country, and the

relationship between the Parliament, the people and the judiciary. As to the first implication, we have commented in chapter 1 of this part of the report that any appropriate reform to this aspect of the law of defamation requires a national approach.

5.8.4 As to the second implication, in the introduction to Part I of the report, the Commission drew attention to the restrictions imposed upon the inquiry by Article 9 of the Bill of Rights 1689. That provision, which guarantees freedom of speech in Parliament by providing that a statement made in Parliament ought not be "impeached or questioned in any Court or place out of Parliament", is incorporated into the law of this State by section 1 of the Parliamentary Privileges Act 1899.

5.8.5 Article 9 has no application to public discussion of what has been said in Parliament. What it prevents is the impeachment or questioning in a court or like place, such as a Royal Commission, of what has been said in Parliament by members of Parliament or of witnesses before Parliament or its committees. Why a distinction should be drawn between the questioning of what is said in Parliament in a court, and the questioning of the same conduct outside a court is puzzling. For example, the media is free to report, compare or question anything that is said in Parliament. We have discussed the historical context of the provision in Part I. The conventional and historical view appears to be that to attach any legal consequence to what is said in Parliament, or in its Committees, would result in an impairment of freedom of speech in Parliament. Witnesses, it is sometimes argued, are unlikely in evidence to a parliamentary committee, to give to that committee the assistance which they otherwise would or should if they were aware that they may be cross-examined in later proceedings in a court on the truth of that evidence. The Commission rejects such a proposition. Witnesses are more likely to tell the truth to a parliamentary committee if they know there is a prospect that what they say may later be challenged elsewhere, than if they know they are protected from such a challenge. The same may be said of members of Parliament.

5.8.6 This brings us to the heart of the matter. Whilst members of Parliament must be free to speak their minds in Parliament, as must witnesses called before the Parliament or its committees, and while neither should be liable for comments made in such proceedings which would be actionable if made outside Parliament because of their defamatory nature or otherwise, what they have said should not be treated, for purposes associated with court and like proceedings, as if it were never said. To provide such an immunity or privilege to such persons is, indeed, likely to encourage, or at least

facilitate, a disregard for the truth by those to whom the protection is given. We have no doubt that if it is understood by members of Parliament or persons appearing before a parliamentary committee, that they may be called to account for their parliamentary statements at a later time, they are more likely than not to speak honestly, although no less freely. To suggest otherwise is to equate the right to speak freely in Parliament with the right to be disingenuous. Such a proposition is fundamentally inconsistent with the right of all citizens to be governed in an open and accountable manner.

5.8.7 Lest we be misunderstood, the Commission makes it quite clear that it accepts that members of Parliament and those appearing before it, and its committees, should be entitled to freedom of speech, and that what is said in Parliament by them should not itself be actionable at law. Subject to that important protection, however, the Commission believes it to be desirable that proceedings in Parliament be open to question in a court or like proceedings. Indeed, we are of the view that the present construction of that portion of Article 9 of the Bill of Rights is fundamentally inconsistent with the right of all citizens to subject their parliamentary representatives to scrutiny, and to be governed in an open and accountable manner.

5.8.8 Accordingly, the Commission recommends that:

The Commission on Government examine the Parliamentary Privileges Act 1891 with a view to permitting proceedings in Parliament to be questioned in a court or like place while preserving the principle of free speech in Parliament.

5.9 Political finance

5.9.1 The Parliamentary system will malfunction if it allows for significant, but undisclosed, political donations.

5.9.2 The need for substantial donations is due in no small part to the ever-escalating expenditure in mounting political and election campaigns. This phenomenon has led inexorably to an increased involvement of politicians, including Premiers and ministers, in fundraising activities. In some countries, the concerns associated with this phenomenon have resulted in limits being imposed on expenditure for political purposes. In the United States of America and in some Canadian provinces, the right

to donate to political parties has been limited to electors. Corporations are therefore unable to make donations to parties, although in the United States, they can, and do, make donations to affiliated organisations known as "political action committees". In some jurisdictions, limits have been placed on the amount any one elector may donate. Elsewhere, there has been a move to the public funding of political parties. This now occurs, in some measure, in relation to elections in the Commonwealth and New South Wales. The immediate objective of these measures is to protect parties, candidates and members of Parliament from the compromise to which significant political donations can lead.

5.9.3 The Electoral Amendment (Political Finance) Bill has been introduced into the State Parliament. The Bill would require some level of disclosure of financial donations for political purposes. Before making detailed comment on that measure, the Commission considers it necessary to make a number of general observations on this subject. First, our inquiries have convinced us that a wide ranging disclosure Act is essential if the integrity of our governmental system is to be secured. The secret purchase of political influence cannot be tolerated. Nor can we have the situation where those who are dealing with government are pressured by political leaders to make donations far in excess of amounts which they would contemplate if accorded freedom of choice.

5.9.4 Secondly, and paralleling the disclosure of donations, we believe the public is entitled to be informed as to how those donations are spent for electoral purposes. This form of disclosure is itself a significant means of verifying the disclosure of donations. Equally, it provides some check upon malpractice and deception in the electoral process. Above all, the electoral process itself must be open. The public's knowledge of how monies are expended to solicit their votes is central to an open system.

5.9.5 Thirdly, as we noted above, there are measures quite distinct from disclosure of donations and of expenditure which are being taken in other countries and in other parts of Australia. These measures aim to limit both donations and expenditure and, through some level of public funding, to reduce reliance upon private donations. Although we express no concluded view on any of these measures, they warrant close examination in this State.

5.9.6 The Electoral Amendment (Political Finance) Bill deals to some degree only with the first of the three matters to which we have referred, namely, disclosure of political donations. For reasons explained below, the Commission believes the Bill requires to be improved in a number of respects to ensure its effectiveness.

5.9.7 Before turning to the Bill and our recommendations, the Commission considers it appropriate to state the general principles which should be reflected in an adequate donations disclosure law:

- (a) disclosure should generally be required of all donations;
- (b) disclosure should be made in a timely fashion;
- (c) disclosure obligations should apply to all relevant participants in the political process, including political parties, candidates, members of Parliament and other interested persons and organisations engaging in expenditure for political purposes ("interested persons and organisations");
- (d) anonymous donations should not be accepted;
- (e) the law must be comprehensive and avoidance opportunities eliminated; and
- (f) clear powers must be conferred upon the official responsible for the administration of the legislation to ensure its effectiveness.

5.9.8 These considerations have led the Commission to conclude that:

- (a) all donations to political parties of \$1000 or more should be disclosed;
- (b) all donations to candidates, members of Parliament and interested persons and organisations of \$200 or more should be disclosed;
- (c) no anonymous donations of \$200 or more should be accepted;

- (d) the concept of "donations" should be construed widely so as to include membership subscriptions and any kind of contributions made otherwise than for value;
- (e) candidates and members of Parliament should be obliged to disclose all donations above the threshold sum regardless of their intended application;
- (f) candidates and members of Parliament should disclose their own contributions to election campaigns;
- (g) interested persons and organisations should be obliged to disclose all donations above the threshold sum which have been made for electoral purposes;
- (h) in that regard, the concept of "electoral purposes" should be given a wide meaning;
- (i) all recipients of donations should be under a positive obligation to take reasonable steps to ascertain their true source;
- (j) where a trust makes a donation, the names of the beneficiaries of the trust should be disclosed;
- (k) political parties, members of Parliament and interested persons and organisations and, where appropriate, candidates, should make annual disclosure of donations; and
- (l) the Electoral Commissioner, the official responsible for enforcing the law, should have wide powers to ensure compliance with the law, including the power to conduct "spot audits".

5.9.9 The Commission has considered the desirability of recommending a maximum limit on the size of donations. It considers that such a limit could, in practice, be difficult to enforce and relatively easy to avoid. In principle, such a limit might also offend the freedom to engage in political discussion. No Australian legislation imposes such a limit. In any event, choosing an appropriate maximum contribution would be no

easy task. For these reasons, the Commission has refrained from recommending a maximum limit on the size of donations. Rather, what it considers to be of the utmost importance, is the timely and regular disclosure of donations and expenditure by all participants in the political process.

5.9.10 The Commission observes that it is obviously undesirable for persons such as the Premier and ministers of the Crown to be engaged in the solicitation and receipt of political donations. The undesirability of the practice should be noted in a ministerial code of conduct. Furthermore, political parties need to consider the ethical rules governing their own fund raising activities in this regard.

5.9.11 The Commission also notes that national initiatives may be necessary to ensure the disclosure of the sources of payments made from this State to another jurisdiction and later repatriated to this State.

5.9.12 In the light of these matters, the Commission considers the Political Finance Bill as presently drawn requires strengthening in three important respects:

- (a) it is unlikely to result in the comprehensive disclosure of donations by all persons engaged in political finance activities;
- (b) it is unlikely to secure the timely disclosure of financial information; and
- (c) it makes inadequate provision for its proper administration.

5.9.13 This said, the Commission believes that if the Bill were amended to take account of the matters we have set out in relation to the disclosure of donations, upon which we comment in detail in Appendix 3, it would constitute a significant step towards securing an open and honest electoral system. The Commission's recommendations take account of this.

5.9.14 Accordingly, the Commission recommends that:

- (a) ***If the Electoral Amendment (Political Finance) Bill is still before the Parliament, it be amended in the light of the Commission's detailed proposals set out in Appendix 3.***

- (b) *If the Parliament does not enact the Electoral Amendment (Political Finance) Bill, or enacts the Bill without taking into account the Commission's detailed proposals set out in Appendix 3, then the Commission on Government inquire into the disclosure of political donations and contributions.*
- (c) *In any event, the Commission on Government inquire into —*

 - (i) *the disclosure of electoral expenditure; and*
 - (ii) *such other measures relating to political finance as may enhance the integrity of the system of representative government.*

5.9.15 In these recommendations we have indicated that the Commission on Government should inquire into the disclosure of electoral expenditure. There is, however, one form of expenditure made by government which can amount to electoral, or at least party political expenditure, which we would exempt from that recommendation and make the subject of specific recommendation.

5.9.16 A Government and its agencies have the full resources of the State at their disposal. These should be used only for proper governmental purposes and in the public interest. One activity in which those resources are being used increasingly is what might be called "government advertising". This is a contentious phenomenon. It can have not only legitimate but also highly beneficial purposes. But it is vulnerable to illegitimate and partisan political use. In a given instance different views can be taken of which of these purposes is, or appears to be, the operative one. No set of rules can be relied upon to guarantee the proper use of government advertising and prevent its improper use. We are, however, of the view that because such advertising involves the use of public resources, any government agency which adopts this practice must in so doing act in an open and accountable way. It must be required to disclose annually its expenditure on publicity and related matters.

5.9.17 Accordingly, the Commission recommends that:

All government instrumentalities, agencies and corporations, as part of their annual reports, be required to disclose all expenditure on -

- (a) advertising agencies;*
- (b) market research organisations;*
- (c) polling organisations;*
- (d) direct mail organisations;*
- (e) direct postal or other direct communications to electors or to householders;*
- (f) public relations organisations; and*
- (g) media advertising organisations,*

and the persons or organisations to whom these amounts were paid. Disclosure should not be required if the aggregate expenditure of any relevant body does not exceed \$1,000. The Auditor General should monitor compliance with this requirement.

5.9.18 In formulating this recommendation, the Commission has chosen not to make any specific recommendation prohibiting government advertising during an election period.

5.9.19 It has also refrained from making any specific recommendations concerning a related problem, namely, the use of public funds to facilitate travel by persons in or connected with the Government during an election period when that travel is undertaken for political purposes.

5.9.20 The issues raised by these two matters are not capable of easy resolution. The Commission notes that each is, however, the subject of proposed amendments to the Political Finance Bill.

5.9.21 Whether or not the Bill is amended to deal with them, the Commission considers both matters should be the subject of inquiry by the Commission on Government.

5.9.22 Accordingly, the Commission recommends that:

The Commission on Government inquire into —

- (a) the desirability of regulating government advertising during an election period; and*
- (b) the desirability of regulating travel by persons in or connected with the government during an election period.*

* * *

CHAPTER 6

THE ADMINISTRATIVE SYSTEM

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6.1 Reform of the administrative system

6.1.1 Two factors unquestionably facilitated the actions and events leading to the Commission's inquiry. The first was the state of the administrative system itself. It was notable for its complexity, fragmentation, gaps in effective lines of accountability, lack of standardisation and susceptibility to the corrosive effects of political influence and manipulation. The second was the imposition upon that system of changes in the style and practice of administrative government, changes which were by no means unique to this State, but which were not matched with safeguards which could protect the system itself from debilitation. Both of these matters require to be addressed.

6.1.2 First, with regard to the state of the administrative system itself, a complete review of its structure and organisation is required. It has grown in the fashion of a coral reef, the new simply being added to the old. Some rationalisation has occurred. But much which has passed for reform has been designed more to further the managerial objectives of government than to give organisational integrity to the system itself. The 1987 amendments to the *Public Service Act 1978* can properly be seen in this light. We acknowledge that both parliamentary and governmental committees have subjected the organisation of the administrative system to some level of critical review. We consider that this now needs to be pursued systematically.

6.1.3 This Commission is not an appropriate body to undertake this review. It is the responsibility of the Government. A review, of necessity, will concern itself in matters managerial, industrial and otherwise which are well beyond our capacity. But in this chapter we will indicate some of the principles and constraints which should inform that review.

6.1.4 Secondly, the changes in the style and practice of administrative government require to be addressed. The 1986 White Paper, "Managing Change in the Public Sector", expressed much of the tenor of this. Its rhetoric, which is found elsewhere in Australia, is that of devolved management, public service "responsiveness" to government, ministerial staff complementing public service officials in policy formulation, results-oriented approaches, performance agreements, a senior executive service and "term of government" appointments. It is not appropriate that we comment upon the efficacy or otherwise of the new approach to public sector management. It is, however, necessary that we comment directly on the steps which must be taken to

ensure the institutional integrity of the public sector in the light of the change that has occurred. Part I of our report can only lead us to the conclusion that the manner in which the administrative system is presently structured, managed and regulated, puts the public and at least parts of the system itself at risk. The Commission's recommendations are aimed at minimising those risks. They can never be eliminated entirely.

6.1.5 We would add, as a necessary interim measure, that a central register of governmental agencies, of whatever kind, should be created without delay. This should contain appropriate details of the nature, functions and responsibilities of each agency, its relationships with other agencies, and its accountable officer. The public should have access to the register as of right. If the public sector is to be rendered fully accountable, the public and the Parliament alike must at least have the means to ascertain the detail of its structure. At the moment, and despite the pioneering work of the Legislative Council's Standing Committee on Government Agencies, it would be foolhardy to believe that such is now the case.

6.2 Public sector standards

6.2.1 Public administration in the late twentieth century in this State is being conducted under what, in essence, is a late nineteenth century legislative framework. The *Financial Administration and Audit Act 1985* apart, no attempt has been made to bring the conduct and operations of the administrative system within a comprehensive statutory framework. While the Commission does not consider it appropriate to express a view on the form it should take, we do propose that consideration be given to the enactment of a Public Sector Management Act so as to bring greater integration, standardisation and community of purpose to the public sector. We recommend that consideration take into account the modernising steps, by no means uniform, which have been taken in this direction in most other States.

6.2.2 One deficiency in the present system is of immediate concern to us. Its effects have been apparent in our inquiries. No single independent agency is responsible for the general oversight and supervision of the administrative system, let alone for ensuring compliance with those standards in public administration, personnel management and official conduct upon which the system should rest. There is no body which can properly be regarded as the protector and the custodian of the values which should inform the conduct and operations of the whole of the State's public sector. The office of the Public Service Commissioner, as it is presently constituted under the *Public*

Service Act 1978, does not fulfil this purpose. This deficiency must be eliminated. For the reasons stated in the next paragraph, the Commission makes this recommendation, notwithstanding that in recent times governments across the country have diminished the significance of such agencies.

6.2.3 It is the right of a government to determine how the public business is to be managed. As we have noted above, marked changes have occurred in this sphere in the last decade. The Commission's concern is to maintain the integrity of the fundamental principles, values and standards within which that management takes place. The clear message of this State's recent experience is that the "managers" themselves, that is, those in the highest echelons of the public sector, cannot have this responsibility left to them alone. We believe that only an appropriately resourced and empowered independent agency can be relied upon to maintain proper standards.

6.2.4 The Commission proposes the creation of the office of Commissioner for Public Sector Standards. That official should act under the authority of a statute which states the basic principles to be adhered to in public administration, human resources management and official conduct. South Australia's *Government Management and Employment Act 1985*, sections 5, 6 and 7 provide one example of this. There are others. In the light of those principles, the Commissioner should:

- (a) be charged with keeping the overall organisation, management and operations of the public sector under scrutiny and review;
- (b) be responsible for ensuring compliance with the basic principles and, to that end, be empowered to establish standards for public sector agencies by regulation or administrative instruction and to audit agencies to ensure that these principles and standards are being adhered to; and
- (c) report to Parliament on all matters falling within his or her jurisdiction.

6.2.5 The Commission envisages that, under these general headings, the Commissioner would have a particular responsibility for:

- (a) monitoring ethical training in agencies and for advising in the development of agency specific codes of conduct;

- (b) reviewing and reporting on general management practices; and
- (c) ensuring compliance with standards in recruitment, promotion, discipline and the like, and for monitoring the related legislative and administrative arrangements.

We attribute particular importance to the last of these responsibilities. It should go some distance in preventing the political manipulation of appointments in the public sector.

6.2.6 Two matters we wish to stress are, first, the Commissioner's jurisdiction should extend to all departments and agencies of government, whatever legal form they may take; and, secondly, in common with the other independent agencies to which we have referred in this report, the office should be constituted as an independent parliamentary agency. The Commissioner must be required both to report to the Parliament and to be accountable to such committee of the Parliament as is concerned with the organisation and operations of the public sector.

6.2.7 We recognise that in constituting an agency with the supervisory role we believe essential, careful attention will need to be given to the precise relationship such a body should have to the Government, given that questions of governmental policy and of management objectives can impact on some of the matters we have identified as being within the jurisdiction of the proposed office. We should add that our recommendation will largely negate the need to maintain the office of the Public Service Commissioner.

6.2.8 Accordingly, the Commission recommends that:

- (a) *The Government give consideration to the introduction of a Public Sector Management Act.*
- (b) *A Commissioner for Public Sector Standards be established whose jurisdiction extends to all the departments and agencies of government.*

6.3 The Public Service

6.3.1 The Public Service was affected adversely by actions taken in the period into which we have inquired. There are substantial reasons for believing that the merit principle was put in jeopardy. Some people were "parachuted" into the Public Service from positions of contract employment. Ministerial staff dealt with officials in matters relating to programme management in ways which affected the organisational integrity of departments. Some chief executive officers had their access to the ministers they served seriously curtailed.

6.3.2 The Commission has concluded that the Public Service itself was devalued by what has occurred. Perhaps it is inevitable that there be some distrust shown by ministers of a body of officials who are constitutionally obliged not to be politically partisan, but who nevertheless are required to serve those holding government for the time being. But it is impermissible for a government to encourage allegiance by making the Public Service partisan at points of strategic significance.

6.3.3 The constitutional integrity of the Public Service must be secured. The Commission makes a number of recommendations with this in mind.

6.3.4 The first, and perhaps the most obvious matter to be mentioned, relates to the *Public Service Act 1978* itself. In substance, it is an antiquated piece of legislation despite the 1987 amendments. If it is not to be merged into a more wide-ranging *Public Sector Management Act*, the Act should be modernised. It should enshrine and reinforce the principles upon which the Public Service is based. Again, we refer as a possible model to South Australia's *Government Management and Employment Act 1985*, sections 5, 6 and 7, as also to Queensland's *Public Service Management and Employment Act 1988*, sections 6 and 7. Equally, if the office of Public Service Commissioner is retained, the functions of that office under section 14 of the *Public Service Act* should be recast in a fashion which highlights the responsibility the Commissioner should carry for ensuring those principles are honoured.

6.3.5 Secondly, the merit principle in public service appointments at all levels, including that of chief executive officer, must be observed. It should now be given explicit recognition as a governing principle in the *Public Service Act 1978*, as in the case of the South Australian and Queensland legislation to which we have referred. Section 42F of the *Public Service Act 1978*, while commendable as far as it goes, is only of limited application to appointments in the Public Service. If appointments are to be

made to positions which are to have partisan political/policy purposes, this should be done openly and in the light of the recommendations we make in the next section of this chapter. We refer below to the appointment of chief executive officers.

6.3.6 Thirdly, and of direct relevance to the chief executive officers of public service departments, their managerial responsibilities for their departments, vis-a-vis the Public Service Commissioner (if that office is to be retained), must be clarified. Consistent both with the views we put in earlier chapters on the need to equate accountability with actual responsibilities, and with the prevailing emphasis upon managerial responsibility, we consider that, as a matter of legal responsibility and accountability, particularly to the Parliament and its committees, the chief executive officers of departments should be responsible for their department's management (non-financial as well as financial) to the exclusion of the Public Service Commissioner. As government publications themselves acknowledge, there is the potential for conflict in roles between chief executive officer and the Commissioner under existing legislation.

6.3.7 Fourthly, while we do not consider it necessary to repeat here what was said earlier in this chapter, it is imperative that an independent parliamentary agency exist to secure and maintain the standards of the Public Service. The proposed Commissioner for Public Sector Standards would have this responsibility.

6.3.8 Fifthly, it is necessary that we refer more directly to the appointment of chief executive officers in the Public Service. The power to appoint to those offices is not, and cannot be allowed by covert means to become, a "spoil" in the gift of a government. We acknowledge that the minister/chief executive officer relationship is a distinctive one and that the minister's expectations of the qualities and qualifications of his or her chief executive officer should be taken into account if their working relationship is to be an effective one. But this said, chief executive officers are part of the Public Service, and they represent both to the Government and to their departmental subordinates alike, the purposes and values of the Public Service itself. Their appointment procedures must reflect this and must be so structured as to ensure integrity in the procedures themselves. In balancing the legitimate interest a minister has in the appointment of a chief executive officer, with the public service interests which must be safeguarded, the Commission considers that the appointment procedures for chief executive officers should embody the following features:

- (a) the Commissioner for Public Sector Standards (or the Public Service Commissioner, if the former office is not created) should be responsible for nominating a proposed appointee to the minister;
- (b) before taking steps to make a nomination, the Commissioner should invite the relevant minister to indicate any matters the minister wishes to be taken into account in making the appointment; and
- (c) if the nomination is not accepted, the Governor in Council should be able to appoint another person to the position, but if it does so, the responsible minister must notify the Parliament that the person appointed is not the person nominated by the Commissioner.

6.3.9 In relation to all appointments to the Public Service, the provisions of section 55 of the *Public Service Act 1978* must be accepted as expressing an inflexible rule. That section provides:

"No member of Parliament shall interview or communicate with the Commissioner or any officer of the Commissioner regarding the appointment of any person to a position in the Public Service."

Members of Parliament must not intrude into appointments, save to the very limited extent we have described above in relation to ministers and the appointment of chief executive officers. The code of conduct for members must address not only the proper manner in which they should deal with the Public Service generally but also the specific prohibition cast on them by section 55. We would add that consideration needs to be given to extending the reach of section 55. It should, for example, apply to ministerial staff as well as to ministers. This is a matter which should be taken up in the review of the *Public Service Act 1978* we propose.

6.3.10 Sixthly, and we return to this below, the proper relationship of ministerial staff to their minister's department must be clarified and maintained.

6.3.11 Accordingly, the Commission recommends that:

The Government review the Public Service Act 1978, whether as part of the Government's consideration of the enactment of a

Public Sector Management Act, or, if that course is not to be pursued, on its own account.

6.4 Ministerial staff and political appointments

6.4.1 The practice and procedure of making appointments to the personal staff of ministers occasioned considerable concern to the Commission because of the effect upon the principles which underlie the public service system. This practice developed in a significant way during the period of the Burke Government.

6.4.2 Staff in a minister's offices fall into four categories:

- (a) permanent officers appointed under the *Public Service Act 1978* to substantive positions in the minister's office;
- (b) permanent officers seconded to the minister's office from positions in the Public Service;
- (c) those employed as "other" officers under the *Public Service Act 1978* for a specific term or the "term of the Government" or "term of the Minister"; and
- (d) those engaged by contract under section 74 of the *Constitution Act 1889*.

These officers are often appointed at the instance of the minister and are answerable to the minister. Some perform relatively orthodox public service functions albeit in the minister's office. Others render what can only be described as party political services, at least as to some part of their responsibilities. It is this second role which is of immediate concern to the Commission.

6.4.3 There is a very real question whether the public purse should be called upon to pay for the services of non-elected officials serving the party political purposes of their minister and, indirectly, of his or her party. This question has been decided by default in favour of the practice. Although the phenomenon of ministerial staff is problematic, it is probably inescapable, given both the complexity of government and the demands made on ministers. If this is so, it must be regulated, and seen to be so.

For so long as the salaries of such staff are paid from the public purse, their position and roles, no less than those of any other public official, must be made clear. Their employment cannot be a private matter between themselves and their minister.

6.4.4 The ministerial staff phenomenon has grown considerably since its invigoration during the early days of the Burke Government in 1983. The number of such staff presently engaged in this State, we are informed, exceeds 230 "full-time equivalents", with an average of 13.8 for each ministerial office. There are about 15 staff in the Opposition parliamentary offices. The role and responsibilities of such staff are, for the most part, not those of the public servant.

6.4.5 If it is for a government to determine how far it is prepared to go in utilising public resources in this way, the public is entitled to know how much of its resources are being so used. A condition of the practice should be that the financial resources to be committed to ministerial staff and to their support should be the subject of separate parliamentary appropriation and in a form which reveals both the overall sum to be appropriated by the Government for this purpose, and the amount to be allocated to each minister. Open government requires no less.

6.4.6 Even if it be said that essentially personal services are to be rendered by some ministerial staff for and on behalf of their minister, their appointment and employment arrangements are not private matters. Their remuneration, as noted above, comes from public sources. Their involvement in the practical workings of government, an implication expressly acknowledged in paragraph 8.2.3 of the Government's recently published Paper, "Managing for Balance", gives a governmental character to part at least of what they do. For these reasons, the procedures governing their employment arrangements are a matter of public interest.

6.4.7 The Commission can see no justification whatever for these procedures not being placed on an open and statutory basis, with safeguards both for the public and for the individual staff member, particularly a seconded public servant who is the subject of these arrangements. The Commonwealth's *Members of Parliament (Staff) Act 1984* provides one example of such legislation. The statutory procedures should be settled in consultation with the Commissioner for Public Sector Standards (or the Public Service Commissioner, if that office be retained) who should monitor their operation. The procedures should be sufficiently wide in their coverage as to encompass the appointment of all persons who presently are appointed either to ministerial staff or to

what are, in effect, public service positions, under the provisions of section 74 of the *Constitution Act 1889*. The use which has been made of that provision of recent times to provide employment at public expense but without proper statutory safeguards in the appointment procedures, is a practice which should be resisted. There is an unacceptable lack of openness in section 74 appointments.

6.4.8 To the extent that the responsibilities of a minister's staff relate to the departments and agencies within that minister's portfolio, clear and open procedures should regulate relationships between the staff and the officers of those departments and agencies. The evidence placed before the Commission has made clear to us that the dealings of ministerial staff with the Public Service and statutory authorities can have a corrosive effect on the functioning of those bodies. The Commission believes the potential for the abuse and manipulation of the governmental system which exists, and which on occasion has been realised, must be recognised and steps taken to guard against such consequences.

6.4.9 While it is not for the Commission to prescribe how these relationships should be regulated, the following principles are deserving of consideration:

- (a) the manner in which, and circumstances in which, dealings are to be had and communications made with officers of a department or agency other than its chief executive officer, should be the subject of explicit agreement between the minister and the chief executive officer; and
- (b) where any proposed communication from ministerial staff to a departmental or agency official relates to the manner in which that official is to perform the duties of his or her office, that communication must be made through the chief executive officer. Ministerial staff must be prevented from acting in ways which, unwittingly or otherwise, could undermine the authority of a chief executive officer in his or her department or agency.

6.4.10 Primarily, ministerial staff will be accountable to the minister concerned. But in exceptional circumstances the engagement may have other dimensions. To the extent that a member of a minister's staff assumes a positive role in the conduct of the affairs of a department or agency in the exercise of its functions, whether or not on his or her own initiative, that person is exercising public power. There is every reason in

principle why that person's official conduct should be open, like that of any officer, to examination and review by the Parliament through its committees. There can be no retreat from the principle that those who assume to exercise public power, whether through command, the exertion of influence or otherwise, be held accountable to the public for their actions.

6.4.11 Accordingly, the Commission recommends that:

- (a) *The financial provision made for ministerial staff be the subject of separate parliamentary appropriation.*
- (b) *The employment arrangements for ministerial staff be the subject of special legislation and monitored by the Commissioner for Public Sector Standards (or the Public Service Commissioner, if the former office is not created).*
- (c) *The manner in which ministerial staff are to deal with the officers of departments and agencies, other than with the chief executive officer, be made the subject of clear and explicit procedures.*

6.4.12 The Commission cannot leave the subject of "political service" to ministers without making a further comment. We have focussed on the staff of the individual minister. This may be too narrow a focus having regard to the way in which the current Department of the Cabinet has evolved. We accept that it is for a government itself to determine the manner in which it will organise and co-ordinate its activities for the purpose of giving effect to Cabinet government. In Western Australia, over the past decade, the Department of the Cabinet has gained a powerful role which pervades every ministerial portfolio.

6.4.13 Probably it is inevitable that some officers in this department, in working to and for the cabinet, will be implicated to some degree in the provision of what to all appearances are party political services. While the Commission does not consider it appropriate to enter further into this matter, we stress that it is a constitutional imperative that the department should not be responsible for the provision of such services.

* * *

CHAPTER 7

COMMISSION ON GOVERNMENT

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7.1 Introduction

7.1.1 In the course of this part of its report, the Commission has made a number of recommendations which it believes may be acted upon without further detailed consideration. However, there are other important recommendations the Commission has made where it has indicated the appropriate directions for change, but in respect of which extensive public consultation is required before detailed recommendations should be presented to Parliament. They are, in each case, matters in respect of which the public has a right to be consulted. To ensure the proper conduct and completion of this task, the Commission proposes the establishment of a special purpose Commission.

7.2 Nature of Commission on Government

7.2.1 The Commission should be established by legislation, and be known as the Commission on Government. Modelled, in large measure, on the Electoral and Administrative Review Commission of Queensland ("EARC"), the function of the Commission should be to conduct inquiries into the matters we have identified and to report its recommendations for change to Parliament. The conduct of this process of inquiry should involve extensive public consultation.

7.2.2 The Commission should:

- (a) be comprised of a full-time chairperson and appropriate part-time members;
- (b) operate with the assistance of appropriate full-time research and support staff; and
- (c) have the capacity to engage consultants as necessary to expedite the exercise of its functions.

7.2.3 The life of the Commission should be limited to two years from the date of the appointment of the members of the Commission and should be extended only for good cause.

7.2.4 The Commission, in accordance with recommendations set out in this report, would inquire into a number of matters. We note them here in short form.

- (a) Secrecy laws — paragraph 2.3.9;
- (b) Press secretaries and the Government Media Office — paragraph 2.7.6;
- (c) State Archives Authority — paragraph 4.3.6;
- (d) Standards of conduct for public officials — paragraph 4.6.15;
- (e) Whistleblower protection — paragraph 4.7.18;
- (f) Registers of pecuniary and other interests — paragraph 4.8.12;
- (g) Financial independence of Parliament — paragraph 5.2.4;
- (h) Electoral system for the Legislative Council — paragraph 5.3.11;
- (i) Electoral system for the Legislative Assembly — paragraph 5.3.16;
- (j) Scrutiny and review procedures of Parliament — paragraph 5.4.4;
- (k) Parliamentary privilege and freedom of speech in Parliament — paragraph 5.8.8; and
- (l) Political finance — paragraphs 5.9.14, 5.9.17 and 5.9.22.

7.2.5 By reason of the detailed work which has already been carried out elsewhere in relation to many of these matters, especially by EARC, we are confident that the cost of the Commission over its life can be kept to reasonably modest proportions.

7.3 Detailed recommendations

7.3.1 The Commission should be established, by legislation, without delay according to the following requirements:

- (a) The Commission must have the human and other resources necessary to complete the task we have recommended for it within two years.
- (b) Each of the members of the Commission should have relevant knowledge and experience in the major subject areas of inquiry. The chairperson should be the sole full-time member and ideally hold qualifications in constitutional and administrative law. The part-time members should be appointed by reason of the qualifications and experience relative to the tasks at hand. We envisage no more than four part-time members may need to be appointed.
- (c) The members of the Commission should be appointed by the Governor in Council, on the recommendation of the Premier, following consultation with the Leader of the Opposition in the Legislative Assembly. Following the establishment of the Joint Parliamentary Committee (see paragraph (e) below) any changes to the membership of the Commission should be made after consultation with the Joint Parliamentary Committee and with the chairperson of the Commission.
- (d) The Commission should have the function of investigating and reporting to Parliament in relation to those matters identified in summary form in paragraph 7.2.4.
- (e) A Joint Parliamentary Committee should be established in accordance with the rules of the Houses of Parliament governing the establishment of such committees with the function of receiving reports from the Commission and monitoring and reviewing the discharge of the Commission's functions.
- (f) The Commission should have the power to engage appropriate research staff, support staff, and consultants.
- (g) The Commission should be bound to conduct itself in as open a manner as possible to enable informed public participation in its processes, unless to do so would be contrary to the public interest or otherwise unfair.

- (h) The Commission in its reports should include recommendations with respect to relevant subject matter and an objective summary and comment with respect to all considerations of which it is aware that support or oppose or otherwise are pertinent to its recommendations.
- (i) The Commission should complete its investigations and submit its reports to Parliament no later than 2 years after the appointment of its initial members. Its life should be extended by Parliament only for good cause.

7.3.2 Accordingly, the Commission recommends that:

A Commission on Government be established in accordance with the requirements set out in paragraph 7.3.1 of chapter 7.

* * *

CONSULTATION WITH THE PUBLIC

The Commission in its Preliminary Observations referred to the Issues Paper published by the Commission together with an invitation to members of the public to furnish submissions. In order that the process of consultation can be understood, we reproduce that Issues Paper here:

"ROYAL COMMISSION INQUIRY INTO COMMERCIAL ACTIVITIES OF GOVERNMENT AND OTHER MATTERS

Introduction

From the commencement of the public hearings of the Commission, we have been directing our attention almost exclusively to an investigation of the specific factual matters raised in its Terms of Reference. The Commission is, however, also required to "report whether changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest". It is with this requirement in mind, and having regard to the time constraints under which we are placed, that we feel it appropriate at this stage to draw attention to some more general matters which could be said to arise out of our investigations to date and upon which public discussion and submissions would be welcomed.

It is not our task to undertake a general review of the structure and operations of government in this State. Some of the matters which our Terms of Reference require us to consider, however, do raise important general issues about aspects of the way in which government is practised in Western Australia and about the accountability of the Executive Government to Parliament.

Before referring to those general issues, of which there are five, we consider it appropriate to identify certain objectives which should inform any discussion of those issues. These objectives acknowledge that government, and the officers and agencies of government, discharge important public trusts, and that their powers and positions exist, in the

end, for the benefit of the community they serve. Equally, these objectives bear directly upon how, consistently with our present constitutional arrangements, government could or should be structured and practised.

For present purposes, we would simply state the objectives in terms of three needs to be borne in mind and pursued in any possible reformation of the law and of administrative practices and procedures now employed in this State. They are -

- (i) the need to maintain public confidence in the integrity of our system of government and of its officers and agencies;*
- (ii) the need to ensure the accountability of the Executive Government and its agencies to the Parliament and to the people of Western Australia; and*
- (iii) the need to allow a government to govern effectively, but in accordance with its constitutional obligation to act in the public interest.*

At this stage, we have not formed any concluded views on how well these needs are presently realised in this State.

It is appropriate to indicate some of the matters to which attention will need to be given. It must be emphasised that the matters to which we now refer are illustrative rather than exhaustive of those which, in the light of the evidence we have received, may arise. Our purpose is to give some prominence, at this stage in our inquiry, to this very important part of the Commission's task.

The Five General Issues

(1) Open Government

The apparent control exercised by government in making information available both to the Parliament and to the public, raises directly the question whether, consistent with the democratic principles which inform our system of government, the interests of the public would better be served by a more explicit commitment to principles favouring open government. In particular, it is necessary to ask -

- (a) whether it is now appropriate for this State to enact Freedom of Information legislation, noting that a majority of Australian*

jurisdictions have done so;

(b) whether the machinery of the Parliament, and, in particular, committees of the Parliament, could not be used more effectively to secure the disclosure to the Parliament, and hence to the public, of information relating to the conduct of Executive Government; and

(c) whether the procedures under the Financial Administration and Audit Act 1985 for reporting to Parliament by public service departments, statutory authorities and State owned companies are adequate to ensure that a timely, informative and accessible account of their affairs is made available to the Parliament for critical scrutiny.

To some extent associated with these questions are two other questions -

(d) whether the present procedures for recording the proceedings of Cabinet and its decisions are adequate, having regard to the role of Cabinet in government; and

(e) whether it is necessary to formulate guidelines designed to preserve the integrity of departmental records, including records in close relation to a particular Minister.

(2) Accountability

The proper accountability of the Executive to the Parliament is a linchpin in our system of responsible government; but the means and measure of that accountability are the matters of real importance. There seems reason to question whether ministerial statements, Question Time, the making of annual reports and the present committee system of Parliament provide that level of accountability which is adequate to allow Parliament in turn to discharge its constitutional obligation of review. As the Fitzgerald Report in Queensland indicated - "If Parliament is to perform this vital role, procedures which allow it to obtain and analyse information are essential".

Accountability has a variety of dimensions. Historically, in our system, considerable importance has been placed upon the role of the Auditor-General in securing financial accountability. While acknowledging that this important office has been the subject of governmental attention of recent times, further consideration may need to be given to public sector auditing. We would note in passing that the role and responsibility of Auditors-General have been the subjects of

discussion in some number of Australian jurisdictions, and that the Electoral and Administrative Review Commission in Queensland has recently released a wide ranging report on public sector auditing.

(3) Integrity in Government

The public is entitled to expect that the officers and agencies of government will act honestly, impartially and disinterestedly in the discharge of their functions. But if public confidence is to be maintained in the integrity of government, it is of the first importance, not only that our public officials in fact act with propriety in their offices, but also that they be seen to do so. The appearance of impropriety can be as subversive of public confidence as actual impropriety.

Virtually all governments in this country are now pursuing measures designed to promote integrity (or "ethics") in government. This is not a distinctively Australian concern. It exists in many Western democracies. Although this subject raises a considerable variety of issues, we will only refer to some matters which appear to be of immediate relevance to our inquiries.

First, the standards of conduct to be expected of our officials grow out of the roles and responsibility they have in our system of government. There is a need for consideration to be given to the development of Codes of Conduct for all of our public officials, including Ministers, so as to clarify for officials what is to be expected of them, and to provide some reassurance to the public that appropriate standards have been set. We would note that a Code of Conduct has already been adopted for this State's public servants; but consideration might be given to the development of Codes for individual agencies which are suited to their particular circumstances.

Secondly, there is the issue of how appropriately to regulate what is commonly described as "conflict of interest". This description can encompass quite diverse situations, some of which we merely exemplify here: the receipt of benefits by officials from those who have had, are having, or may have, dealings with government; the employment of officials following their term in office, involving responsibilities related to those performed by them while in office (the "revolving door"); private and business relationships which, in appearances, could be said to compromise impartiality; having personal interests (direct or indirect) in a matter in which the person concerned has official responsibilities; and the holding of several offices, the duties of which can conflict - a problem of some moment for a public servant who, concurrently, has a position on

the board of a statutory authority or corporation.

Some forms of conflict of interest are clearly so reprehensible in character as to warrant condemnation through the criminal law. The Criminal Code had its "Corruption and abuse of office" offences reformed in 1988; but the Commission may have to give some attention to the present adequacy of the criminal law in this respect.

Many forms of conflict of interest may require to be regulated, not because they involve conduct which actually is improper, but because they can create the appearance of, or could tend to, impropriety. This can be the case with some of the examples of conflicts we gave earlier. The appropriate regulatory responses to be made in these cases can be quite varied and we would note, by way of example, that the Commission may have to consider the appropriateness of devices such as registers of interests for at least certain officials, approval procedures to be complied with before particular officials may take up certain types of employment following their term in office, and limitations which might be placed on the involvement of public servants in apparently "independent" statutory authorities.

Thirdly, there is the difficult question of the appropriate responses which should be made on electoral matters, and particularly on fundraising by, and contributions to, candidates and parties. As public funding of elections is not presently an accepted feature of our democratic processes, reliance upon private contribution for the moment is a necessary part of our political landscape. What is important is that that reliance does not create or appear to create compromising relationships with donors. Equally, it is important that the solicitation and receipt of donations does not create the opportunity for actual corruption. Should electoral donations be publicly declared and registered? Is it desirable and feasible to put monetary limits on individual donations or on campaign expenditure? Should each candidate and party be obliged to have an "electoral agent" who is responsible and accountable for all financial aspects of a campaign? What provision, if any, should be made for the subsequent use of the unexpended campaign contributions received by individual candidates? These are merely illustrative of the questions that may require consideration.

Fourthly, there is the question of the proper relationship of ministers both to the public service and to statutory authorities. This is a matter of perennial concern in many jurisdictions and is usually evidenced in allegations of "political" appointments to senior public offices; of untoward or covert ministerial involvement in the affairs of statutory

authorities; and of obstruction by the public service of government policies. The role of Ministerial Advisers and their relationship to the public service and, in particular, to heads of departments who are responsible to their Ministers, also arises in this context. We simply note here that while many commissions and committees have addressed these issues in the past, we may also be called upon to do so by our Terms of Reference.

(4) Ethical Supervision of the Public Sector

A variety of public officers and bodies have roles in this State both in ensuring that acceptable standards of conduct are adhered to by officials, and in receiving and investigating complaints of misconduct and maladministration. Notable amongst these are, on the one hand, the Public Service Commissioner and, on the other, the comparatively recently established Official Corruption Commission. It needs to be asked whether we have gone as far as we could or should in ensuring that both of the roles we have mentioned are effectively discharged in Western Australia today. In asking this, we note that both New South Wales (in its Independent Commission Against Corruption) and Queensland (in its Criminal Justice Commission) have constituted bodies with explicit mandates to address misconduct and maladministration in the public sector. Importantly, Queensland's Electoral and Administrative Review Commission has proposed an even greater responsibility for the Criminal Justice Commission in these matters in its report on "whistleblowing" which it has recently released.

Without wishing in any way to diminish the supervisory responsibility of the Public Service Commissioner and of senior officers in the Public Service, it is appropriate to consider whether, in the interests of securing probity and due administration in this State's public sector, the present role and functions of the Official Corruption Commission should be brought more into line with that of its counterparts in New South Wales and Queensland.

Independently of this, and for reasons to which we alluded earlier, it may be necessary to consider whether the time has not come to consider the enactment of "whistleblower" protection legislation in this State. Although no Australian jurisdiction has enacted comprehensive "whistleblower" legislation, it is the commonplace in the United States, its enactment has been recommended in Queensland, and it is the subject of active consideration by the Commonwealth and New South Wales Governments.

(5) Government in Commerce

We recognise that it is for a government to determine when and to what extent the public sector should be involved in commercial activity. It is also clear, however, that any such involvement should be accompanied by adequate measures designed to secure accountability to the Parliament and to the public. We have already referred to public sector auditing; but beyond this there are other matters worthy of attention. Are our present procedures for financial reporting to Parliament by statutory bodies and State owned companies as effective as they should be? If government, or a statutory authority, is to conduct operations through a registered company, is it desirable that, over and above such obligations as are imposed on those managing the company by Corporations legislation, additional reporting obligations to Parliament be imposed consistently with the preservation of essential commercial confidentiality so as to protect and inform the public, which ultimately has the real interest in the matter?

Conclusion

It is necessary to state in conclusion that we have in this paper alluded to a range of matters. Important as the various possibilities are, so also are the appropriate mix and balance of any steps that may be taken in the future. Constraints of time imposed upon this Commission may not allow it adequately to examine all of the significant issues to which we have referred. Many of them have already been the subject of long and careful consideration in other States and overseas. There may be little advantage to be gained merely in traversing the same ground; but it is important to appreciate that, although problems may be similar in other jurisdictions, the appropriate remedies may not necessarily be the same, having regard to differences in the established conventions and structures of government.

In the end, we come back to the three objectives which we identified at the outset: maintaining public confidence, ensuring accountability and enabling government to govern. Any recommendations which, in the end, the Commission may make, will of necessity be sensitive to all three needs.

The Commission would welcome written submissions from interested bodies and members of the public upon the issues raised in this statement and upon related issues. It would be appreciated if all

*submissions could be forwarded to the Commission on or before
31 January 1992.*

18 November 1991"

As we have said, about 130 submissions were received, many of them substantial. For the most part, they were confined broadly to matters outlined in the paper. However, a number advocated more fundamental constitutional change. There was considerable support for the revision of our constitutional documents, with a view to their enactment in a consolidated form. A number also advocated a form of increased public participation in the legislative process through the means which is commonly referred to as citizen-initiated referenda. Again, a number of submissions pressed the desirability of some form of constitutional entrenchment of individual rights. The Commission has not found it possible to accommodate these matters within its mandate, and has therefore refrained from any discussion of them.

* * *

**DETAILED PROPOSALS CONCERNING THE ESTABLISHMENT
OF THE OFFICE OF THE COMMISSIONER FOR THE INVESTIGATION
OF CORRUPT AND IMPROPER CONDUCT**

The Commissioner for the Investigation of Corrupt and Improper Conduct should be established by legislation according to the following requirements:

- (a) The Commissioner should be legally qualified.
- (b) The first Commissioner should be appointed by the Governor on the recommendation of a committee comprising the Chief Justice, the Chief Judge of the District Court and the Commissioner of Police, who currently recommend appointments to the Official Corruption Commission ("OCC"). Thereafter, Parliament should exercise a significant role in the selection of the person to be the Commissioner. The proposed Joint Parliamentary Committee should receive advice from the Auditor General, the Ombudsman and the Director of Public Prosecutions ("DPP") before submitting a short list of suitable applicants to the Premier. From the short list the Premier should make a recommendation to the Governor in Council.
- (c) The Commissioner should be liable to vacate the office on a resolution by both Houses of Parliament.
- (d) The Commissioner should be remunerated at the level for the time being of a puisne Judge of the Supreme Court. Unless an appropriate level of remuneration is offered, it is unlikely that a person possessing suitable qualities of independence, ability, experience and integrity will be attracted to the position.
- (e) The Commissioner should be appointed for a period not exceeding five years and not less than two years. The appointment may be renewed but so as not to exceed, in the aggregate, a maximum period of five years.
- (f) In the event that it may become necessary, there should be a power to

appoint one or more Associate Commissioners on the recommendation of the Commissioner.

- (g) The principal function of the Commissioner should be to investigate allegations or complaints of corrupt or improper conduct.
- (h) "Corrupt conduct" should be defined to include conduct of any person that may contravene sections 60 and 61 of the *Criminal Code* or any provision of Chapters XIII, XX, XXXVI, XXXVII, XL, XLII, XLVII, LV and LVIII of the Code and that is in some way associated with a person's official duties. This proposal is in accordance with the concept of "official corruption" recommended by the Select Committee in its recent report.
- (i) "Improper conduct" should be defined as —
 - (i) any conduct of any person (whether or not a public official) that adversely affects, or could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority;
 - (ii) any conduct of a public official or former public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions;
 - (iii) any conduct of a public official or former public official that constitutes or involves a gross departure from the standards of administration which the public is entitled to expect; or
 - (iv) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her own benefit or for the benefit of any other person.

In formulating the definitions of corrupt conduct and improper conduct, we have had regard to the terms of the *Independent Commission Against*

Corruption Act 1988 ("the ICAC Act") of New South Wales, the *Criminal Justice Act 1989* ("the CJC Act") of Queensland and the decision of the New South Wales Court of Appeal in *Greiner v Independent Commission Against Corruption* (the Greiner case) (Unreported; 21 August 1992). We have deliberately drawn a distinction between "corrupt conduct" and "improper conduct" so that there is no confusion on the part of complainants or the public generally as to what it is the Commissioner is dealing with on relevant occasions. We have also, in our recommendations, deliberately not empowered the Commissioner to make any findings that any person has acted "corruptly" or, indeed, "improperly". We consider it to be unnecessary for the Commissioner to make findings that persons have acted corruptly, or indeed that they have acted improperly. Any such finding should only be made by those other authorities ("responsible authorities") which are charged with the responsibility of administering government or overseeing it, including Parliament, or by the Courts which are charged with the responsibility of administering the criminal justice system. The proper role of the proposed Commissioner, as this Commission envisages it, is to find facts in relation to possible corrupt and improper conduct, and to report those facts to the relevant authorities. Thus, in the further recommendations we make, we seek to avoid the difficulties we have perceived with the operation of the ICAC Act in New South Wales, and the CJC Act in Queensland.

- (j) A "public official" should be defined widely to include the holders of all public offices and all persons employed within the public sector, including ministers of the Crown, members of Parliament, and persons involved in or employed within local government and the police force, but excluding the Governor and members of the judiciary. Under current laws, practices and procedures, misconduct by members of the judiciary is a matter for Parliament.
- (k) The Commissioner should have the function of investigating and reporting to Parliament on any matter referred by both Houses of Parliament.
- (l) The Commissioner should have the function of investigating any matters referred by the Electoral Commissioner.

- (m) The Commissioner should have the function of recommending corruption and improper conduct preventive measures and educating public officials and the community generally on strategies to combat such conduct.
- (n) The Commissioner should be able to act not only on a complaint or allegation made to the office of the Commissioner, but also on his or her own initiative. The Commissioner should be able to decide, having regard to the available resources, what matters should be investigated. The Commissioner should have the power to refer complaints received to other responsible authorities, including the Commissioner of Police, as appropriate.
- (o) Chief executive officers, and other accountable officers as defined in the *Finance Administration and Audit Act 1985*, should be obliged to report to the Commissioner any matter which they suspect on reasonable grounds to concern or which may concern corrupt or improper conduct by a public official.
- (p) The Commissioner should have the power to conduct hearings in public or in private. A hearing should be held in public unless the Commissioner directs it be held in private, on being satisfied that it is desirable to do so in the public interest for reasons connected with the subject matter of the investigation or the nature of the evidence to be given. Such a standard should ensure that the Commissioner will normally operate in public and so maintain the confidence of the public.
- (q) The Commissioner should have the powers to:
 - (i) compel the production of documents by any person;
 - (ii) obtain a search warrant, in the same manner as provided in the *Royal Commissions Act 1968*;
 - (iii) compel the production of a statement of information from any person within the public sector, as a means of facilitating the provision of preliminary information in relation to any investigation;

and

- (iv) compel the attendance of any person to give evidence at a hearing before the Commissioner and, in that connection, to administer oaths.
- (r) In relation to evidence given to the Commissioner:
- (i) evidence given by any person at a hearing before the Commissioner or in a statement of information should not be available for use in any proceedings against that person (save for the purposes of the investigation or hearing before the Commission and in respect of a prosecution for breach of legislation setting up the Commission);
 - (ii) legal professional privilege should not be maintainable by any public official, or government department or agency in relation to the performance or purported performance of a statutory power or function.
- (s) Where evidence has been taken in public in the course of an investigation, the Commissioner should, as soon as practicable once the investigation is complete, compile a written report in respect of the investigation ("the public report"). If any evidence has been taken in private which should remain confidential, the Commissioner may compile a separate confidential report concerning those matters.
- (t) In the public report, the Commissioner should make findings and recommendations as follows:
- (i) make a finding as to the facts of the matter the subject of investigation;
 - (ii) where, having regard to the findings of fact, the Commissioner is of the opinion that a person may have engaged in corrupt conduct or have committed an offence, the Commissioner may express a view whether a responsible authority, such as the DPP, should give

consideration to the institution of any relevant proceedings against that person; and

- (iii) where, having regard to the findings of fact, the Commissioner is of the opinion that a public official may have engaged in, be engaging in, or be about to engage in, improper conduct, the Commissioner may express a view whether a responsible authority should give consideration to taking any further action that may be open to it.
- (u) The Commissioner shall publish the public report as soon as possible after it has been compiled, and shall deliver a copy of it to the Parliament, the Joint Parliamentary Committee, each responsible authority, and each person in respect of whom the view has been expressed that proceedings or further action should be considered. Publication of the report should be the subject of appropriate legal protection.
- (v) The Commissioner should provide, as soon as possible after it has been compiled, on a confidential basis, a copy of any private report to the Joint Parliamentary Committee, each responsible authority, and each person in respect of whom the view has been expressed (either in the public or the private report) that proceedings or further action should be considered, but only to the extent that the private report affects the interests, or deals with the conduct, of that person. Responsible authorities and members of the Joint Parliamentary Committee should be the subject of strict secrecy obligations in respect of information contained in a private report.
- (w) The Commissioner should be obliged to report further to the Parliament and other relevant authorities within two months of the publication of the public report, on what changes, if any, may be considered necessary to official decision making or other procedures to avoid any recurrence as a result of the report.
- (x) The Commissioner should also be obliged to report annually to Parliament in respect of the conduct of the office save in respect of operational matters.

- (y) A Joint Parliamentary Committee should be responsible for monitoring the performance of the Commissioner and to consider and report to Parliament on issues affecting the prevention and detection of official corruption and improper conduct in the public sector. The Joint Parliamentary Committee should be established in accordance with the standing orders of the Parliament governing the establishment of such committees.

- (z) Although the Commissioner should not be exempt from judicial review by the Supreme Court exercising its supervisory jurisdiction over administrative bodies, the Commissioner should not be subject to any legislation requiring the provision to any person of reasons for decisions, or to freedom of information legislation. Nor should the Commissioner be affected by the powers of the Parliamentary Commissioner for Administrative Investigations (the Ombudsman). The office should, however, be subject to the *Financial Administration and Audit Act 1985*.

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**COMMENTS ON THE ELECTORAL AMENDMENT
(POLITICAL FINANCE) BILL 1992**

Introduction

Under the Political Finance Bill, political parties must, through an agent, lodge an annual return by 30 September of each year, setting out receipt of gifts and income, regardless of intended application or actual use, for the year ending 30 June. Annual disclosure of such information is appropriate, although the efficacy of the requirement depends on precisely what gifts and income must be disclosed.

Membership subscriptions

In this respect, the definition of a "gift" in the Bill does not include an annual subscription paid by a person to a political party or to a division of a political party in respect of the person's membership of the party or division. A means for evasion of disclosure has been created as a subscription to a political party or division may be so structured as to enable the payment of a substantial sum under the guise of a subscription.

Accordingly, the Commission proposes that:

The Political Finance Bill be amended so that an annual subscription or subscriptions made by a person to a political party or division of a political party in respect of a person's membership of the party or division which exceeds or, in aggregate, exceed \$200 is considered a gift for the purposes of the Act.

Such a recommendation is in conformity with the New South Wales *Electoral Funding Act* and the recommendations contained in the recently published Report of the

Queensland Electoral and Administrative Review Commission (EARC) in relation to political donations and related issues.

Disclosure obligations on candidates and members of Parliament

The Bill imposes disclosure obligations on candidates which differ materially from those applying to political parties. Candidates (and groups of candidates) in an election are obliged, within 15 weeks of the polling day, to lodge a return setting out the gifts received during the disclosure period for the election. The disclosure period is of the utmost importance to the effective operation of the legislation. For a candidate who was not a candidate at an election held within the previous five years of the polling day of the current election, it commences one year before the day of the nomination of the person as a candidate in the current election and ends 30 days after the polling day. For a person who was a candidate in an election held within the previous five years of the polling day of the current election, it commences at the end of 30 days after the last election and ends 30 days after the polling day for the current election. These obligations bind candidates, whether or not they are successful at elections and become members of Parliament. There are no obligations imposed on members of Parliament except as candidates.

Because of these provisions, a sitting member of Parliament is not subject to annual or other periodic disclosure requirements. Indeed, it is possible in the case of a sitting member of Parliament who is successful at successive elections, for information concerning a gift made at the beginning of the disclosure period (30 days after the last election) not to become public for nearly four and a half years (15 weeks after the most recent election).

Unlike a political party, a candidate is not obliged to disclose all gifts received, only those made for a "purpose related to an election" (an expression not defined in the Bill) or where the candidate has used or will use the gift "solely or substantially for a purpose related to an election". As a result, a candidate is effectively left with the discretion to determine whether a gift should be the subject of disclosure. A candidate may adopt the view, for example, that a gift made for "administrative purposes" may be distinguished from one given for electoral purposes. Such a distinction is illusory. Substantial donations given to a candidate are equally capable

of influencing the recipient whether they are given for one stated purpose or the other. The public are entitled to know what donations have been made to politicians regardless of their stated purpose. Furthermore, if politicians are subject to disclosure obligations which materially differ from those imposed on political parties, there will remain a real likelihood that donations and expenditure will be channelled through politicians to avoid or minimise the obligations imposed on parties by the Bill. In this respect, we can see no reason to differentiate between gifts made to candidates and members of Parliament, on the one hand, and political parties, on the other hand. All gifts, regardless of their stated purpose, made to a political party under the Bill must be disclosed. The same rule should apply in respect of members of Parliament and candidates.

It is equally the case that a contribution made by candidates or members of Parliament to their own election campaign, need not be disclosed because there would be no gift of money involved in the contribution. Nevertheless, the extent of funding of a particular campaign is information to which the public is entitled. It may, apart from anything else, raise further questions about the financing arrangements entered into by a candidate or member of Parliament, and who is responsible for the person's financial support.

Accordingly, the Commission proposes that:

The obligations imposed by the Political Finance Bill on candidates and members of Parliament be amended so that -

- (a) Members of Parliament, including those who cease to be members during the course of a relevant year, be obliged to make annual disclosure of all gifts which exceed the threshold sum, regardless of their intended application.***
- (b) Candidates who are not successful at an election, be obliged to disclose all gifts received during the disclosure period which exceed the threshold figure, regardless of their intended purpose.***
- (c) In making such disclosure, members of Parliament and candidates be obliged to disclose their own contributions used to incur expenditure for electoral purposes, as defined***

below, or to reimburse a person for incurring expenditure for electoral purposes.

Disclosure obligations on interested persons and organisations

The Bill imposes disclosure obligations on persons, other than political parties and candidates, who expend money for political purposes. Gifts received by such persons (who we will refer to here as "interested persons or organisations") during a period commencing 30 days after the polling day of the last election and ending 30 days after the polling day of the current election, must be disclosed within 15 weeks of the polling day of the current election. This obligation only applies to interested persons or organisations who "incur expenditure for a political purpose", an expression which is defined in the Bill. In part the definition depends on the meaning of the expression "electoral matter" which is further defined in the Bill to mean any matter that is intended, calculated or likely to affect voting in an election. It is a definition limited in scope.

The Bill specifically provides that interested persons or organisations need not disclose a gift in a return unless the whole or a part of it was used to incur expenditure for a political purpose or to reimburse it for incurring expenditure for a political purpose. Thus, only gifts of this description received by interested persons or organisations need be disclosed and not all gifts. As in the case of candidates, this provision leaves interested persons or organisations with a considerable discretion to decide whether a gift should be disclosed, and to draw a distinction between a gift used for "administrative purposes" and one used to incur expenditure for a political purpose, as defined. Additionally, it may prove impossible to establish which individual donations were used wholly or in part for a political purpose once they have been deposited in a common fund.

There are obvious difficulties in providing for adequate disclosure by interested persons or organisations in a disclosure law. What, ultimately, is important, is that the public official responsible for administering the legislation, is legally able to ensure that all persons to whom the law applies, comply with it. It would be possible to draft a law which required all persons who engage in expenditure for electoral purposes to disclose all donations received by them, regardless of the purpose of the

gift. Such a law would, however, fail to discriminate between those organisations which have a party-political objective and those which represent sectional interests in the community and, from time to time, seek to influence political outcomes. Whilst organisations falling into the latter category may well have political objectives in the general sense, we believe that to require them to disclose all donations received by them would not only be unduly burdensome but would also not be in furtherance of the real objects of the disclosure law. While such organisations should, along with other more directly political organisations, be the subject of a disclosure law, only those donations they receive which are intended for expenditure for electoral purposes or which are used or intended to be used for electoral purposes, as the Bill currently requires, should be the subject of disclosure.

For the purpose of identifying those gifts which should be disclosed, the expression, "electoral purpose", should, however, be more clearly and broadly defined in the Bill than the current expression "expenditure for political purposes", to include the expenditure of money for the purpose of promoting or opposing, directly or indirectly, a candidate or candidates, prospective candidate or candidates, or member of members of Parliament. It should also include the types of expenditure currently referred to in clause 175Q(5) of the Bill. Expenditure for so-called "administrative purposes" of political parties, candidates and members of Parliament should be included in the definition.

Interested persons or organisations, as our investigations have illustrated, have the capacity to solicit and manage political finance for or on behalf of political parties, candidates and members of Parliament. We have little doubt that unless such persons and organisations are treated, for the purposes of a disclosure law, as the *alter ego* of politicians and parties, significant political finance activities will be transferred to them in order to avoid or minimise the obligations imposed on such persons and parties by the Bill.

Accordingly, the Commission proposes that:

The Political Finance Bill be amended in respect of interested persons and organisations so that -

- (a) *All persons or organisations who engage in expenditure for electoral purposes, be obliged to make annual disclosure of all donations which exceed the threshold figure and which were made for electoral purposes, or used in whole or in part for expenditure for electoral purposes.*
- (b) *The expression "expenditure for electoral purposes" be defined to mean -*
 - (i) *expenditure for or in connection with promoting or opposing, directly or indirectly, a party or member of Parliament, or the election of a candidate or candidates, or for the purpose of influencing, directly or indirectly, the voting at an election;*
 - (ii) *it should include expenditure for purposes currently referred to in clause 175Q(5) of the Bill; and*
 - (iii) *it should also include expenditure for the so-called "administrative purposes" of a political party, candidate or member of Parliament.*

Timely disclosure

Disclosure should be made at a time as close as possible to the polling day, having regard to the date upon which general elections have historically been held.

Accordingly, the Commission proposes that:

The Political Finance Bill be amended so that the disclosure date for all returns filed under the legislation by political parties, candidates, members of Parliament and other persons and organisations to whom the Bill applies, is 1 April (rather than 30

July) and so that returns are filed no later than 1 July (rather than 30 September).

Threshold disclosure level

The Bill does not, in relation to political parties, candidates or interested persons or organisations, require the disclosure of a gift less than \$1,500. It makes it unlawful for donations of \$1,500 or more to be received unless the name and address of the person making the gift are known or given to the recipient. It does not, however, impose a positive obligation on the recipient to ascertain the true source of the donation. Thus if a contributor gives his, her or its name and address, there would appear to be no reason why a recipient should make any further inquiry as to the source of the donation. A gift may, therefore, easily be split between a number of contributors, or by the same contributor, without the true source ever being disclosed. This provision depends for its efficacy on the intermediate contributors making voluntary disclosure to a recipient of the true source of the funds.

Accordingly, the Commission proposes that:

All persons to whom the Political Finance Bill applies be required to take reasonable steps to ensure that the true source of each donation is recorded.

In any event, the \$1,500 threshold disclosure sum is too high and will inevitably result in the relatively easy avoidance of the objects of the Bill. For example, it would enable a person who desires to contribute the sum of \$24,000 to a political party, more or less at one time, to do so in a manner which would not result in disclosure under the legislation. Such an outcome might be produced in the following manner. Eight companies controlled by a single person might each make a payment to a political party of \$1,499 on 30 June. Each might then make a further payment of \$1,499 on 1 July. As none of these payments exceeds the threshold sum, none would need to be disclosed under the Bill. No single contributor has made a donation greater than the threshold sum in the year of disclosure which ends on 30 June. By reason of the 16 payments made each of \$1,499, the intended contribution of \$24,000 fell \$16

short. The individual who activated the corporate contributions might then personally contribute cash in the sum of \$16, again without having to provide his or her name under the terms of the legislation.

Furthermore, the capacity to make a donation of less than \$1,500 anonymously makes redundant the provision which requires donations made by a person during the disclosure period to be aggregated, for there will be no way of knowing when an individual donor has, in aggregate, exceeded the limit. Indeed, this deficiency would enable the splitting by an individual of a large donation into smaller donations less than \$1,500 without any disclosure being required under the Bill (a practice common in the United States and known as "smurfing") and without going through the slightly more complex commercial arrangements illustrated in the preceding paragraph. This follows because it is not unlawful under the Bill for a person to receive an anonymous gift of less than \$1,500. For the Bill to have any meaningful application, therefore, the threshold figures must be significantly reduced.

Accordingly, the Commission proposes that:

The Political Finance Bill be amended, so that -

- (a) it is unlawful for any political party, candidate, member of Parliament or interested person or organisation to accept a relevant donation made anonymously in excess of \$200;***
- (b) any relevant donation made anonymously and received by a political party, candidate, member of Parliament or interested person in excess of \$200 be paid to the Consolidated Revenue Fund of the State;***
- (c) political parties are obliged to disclose all gifts of \$1,000 or more, as well as the total amount and number of all gifts less than \$1,000; and***
- (d) members of Parliament, candidates and interested persons or organisations are obliged to disclose all relevant gifts of***

\$200 or more; as well as the total amount and number of all gifts less than \$200.

"Blind" and other trusts

Where a donation in excess of the threshold figure is made by a corporation which has been set up in a manner which has the effect of obscuring any obvious association with the individual who, in fact, controls it, further difficulties in ensuring proper disclosure arise, as they do also in the case of contributions made by other entities such as trusts and foundations. Under the Bill, the names and addresses of members of the Executive Committee of unincorporated associations making donations must be disclosed, as must the names and addresses of trustees of funds or foundations. In the case of the "blind trust" in which the names of trustees do not assist in identifying the person or persons who control the fund, the identification of the beneficiaries of the trust may provide more relevant information under a disclosure law.

Accordingly, the Commission proposes that:

The Political Finance Bill provide for the trustee of any trust making a donation to disclose the names and addresses of the beneficiaries of the trust.

Administration

The public official to be responsible for the administration of the legislation is the Electoral Commissioner. Returns as to gifts and income must be lodged with the Electoral Commissioner who has some, though limited, powers to obtain further information in relation to returns. Regulations may also be made prescribing all matters that are required or permitted to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of the legislation and, in particular, requiring the "making, keeping and auditing of records of" gifts and other income and "requiring and otherwise providing for the production, examination and

copying of those records". In relation to enforcement of the legislation, an application may be made by a police officer to a judge for a search warrant which the judge may issue if satisfied that there are reasonable grounds for doing so.

Apart from these enabling provisions, the Electoral Commissioner does not appear to have any special powers to call for or verify information set out in returns. Nor does the Electoral Commissioner have the power to examine any person in connection with the administration of the proposed legislation. We doubt that the power to make regulations is capable of supporting such an enforcement or scrutiny procedure. That the Electoral Commissioner should be properly empowered and resourced to enforce the legislation, is an unexceptional, but important, proposition.

Accordingly, the Commission proposes:

- (a) The Political Finance Bill provide the Electoral Commissioner with the power —***
 - (i) to enter upon any premises to examine records pertaining to political finance matters;***
 - (ii) to conduct "spot audits";***
 - (iii) to require the production of all records relevant to the enforcement of the Act;***
 - (iv) to examine any person in connection with the administration and enforcement of the Act; and***
 - (v) to refer any matter requiring investigation to the Commissioner for the Investigation of Corrupt and Improper Conduct.***

- (b) The office of the Electoral Commissioner be adequately resourced for the purpose of exercising the extra demands to be placed upon it by the requirements of the Political Finance Bill.***

* * *

MATTERS ARISING FROM PART I OF THE REPORT

1 Following the publication of Part I of the report representations were made to the Commission by three persons in respect of whom findings of improper conduct were made in the report. They were Mr Tony Lloyd, Mr Frank Michell and Mr Aleco Vrisakis. Each complained about a particular finding and asserted that the Commission had not given proper notice of it, thereby failing to observe the rules of natural justice.

2 We invited each of the persons concerned to provide written submissions so that we might give the respective matters further consideration and in this part of the report make such reference to them as might be appropriate. We deal with each in turn.

3 **Mr Lloyd**

3.1 Mr Lloyd complained about the finding made in respect of SGIC's indirect funding of Rothwells on 29 February 1988. SGIC deposited \$10 million with Spedley Securities Ltd ("Spedleys") which immediately deposited that amount with Rothwells. At paragraph 16.12.16 of chapter 16 of Part I of the report we said:

"In our view, Mr Edwards, Mr Rees and Mr Lloyd acted improperly in procuring the transaction with Spedleys without any regard for SGIC's needs or requirements. The sole purpose was to assist Rothwells. That was a purpose outside the scope of SGIC's Act."

3.2 Mr Lloyd complained that he was given no notice of the finding and that he was accordingly denied the opportunity of adducing additional material, examining and re-examining witnesses and making submissions. He said that in any event, the finding was unsustainable because at the material time he was the managing director of Rothwells and had formally relinquished all involvement with SGIC. In those circumstances, it was submitted to us, Mr Lloyd had:

"(a) a duty to act in the best interests of Rothwells;

- (b) no responsibility to ensure that SGIC was acting within the scope of SGIC's Act; and
- (c) no duty to have regard to the needs or requirements of SGIC."

3.3 Although Mr Lloyd was given notice of a number of potential adverse findings we accept that he was not given notice of this particular finding.

3.4 In order to make the finding, it was necessary for the Commission to resolve a conflict of evidence, principally between Mr Lloyd and Mr Edwards on the one hand and Mr Dowding on the other, as to whether a meeting took place on 29 February 1988 at which Mr Dowding approved the proposal for the indirect funding of Rothwells via Spedleys. This matter was explored with all of those said to have been present. Mr Lloyd had every opportunity to examine and re-examine witnesses concerning the meeting and the discussions which took place, in order to elicit evidence which would have supported or corroborated his testimony.

3.5 As appears from paragraph 16.12.9 of chapter 16 of the report, the Commission came to the conclusion that Mr Dowding had not given his prior approval. The Commission went on to find that:

"... the arrangements which were made between SGIC, Spedleys and Rothwells were made by Mr Lloyd, Mr Rees and Mr Edwards without any ministerial approval."

It must have been obvious to Mr Lloyd and those representing him as the evidence unfolded that the conflict existed and that there was a risk that his evidence might not be accepted. It has been made plain during the hearings of the Commission that a distinction must be drawn between an adverse finding and a finding of fact upon which there has been conflicting evidence. This is addressed in paragraph 1.6.32 of chapter 1 of Part I of the report.

3.6 In communicating with the Commission since Part I of the report was published, Mr Lloyd made no attempt to name any witnesses who, given the opportunity, he would have wished to call or recall. Nor did he indicate what additional information might have been placed before the Commission. As we have noted, all the persons said to have been present on the particular occasion were called to give evidence. Mr Lloyd and his representatives had every opportunity to question them.

The Commission is satisfied that there is no additional evidence available which could lead to a variation of the finding we have made.

3.7 Returning to the second limb of Mr Lloyd's submission, the Commission, of course, appreciated that at the material time Mr Lloyd was the managing director of Rothwells and no longer an SGIC Commissioner. He was, however, the Government representative in Rothwells in addition to being its managing director. The Commission was critical of him because, as the Government representative, and being known to be such by SGIC, he ought not to have encouraged it to enter into the transaction, particularly having regard to his knowledge of the nature and extent of the problems then facing Rothwells. The Commission found that SGIC deposited funds with Spedleys only because Mr Rees believed that the Government wanted it to do so. It was in those circumstances, and for that reason, the Commission found Mr Lloyd to have acted improperly. Having taken account of his further submission, the Commission does not wish to withdraw or vary the finding. In all the circumstances, the Commission is satisfied that the failure to give formal notice to Mr Lloyd of the risk of an adverse finding in this report was at most a technical one. Nevertheless, the Commission regrets the failure.

4 **Mr Michell**

4.1 The Commission accepts that Mr Michell, who was, and is, the managing director of SGIC, was not given notice personally about the finding made against him in relation to the 16 November 1987 variation to the transactions entered into on 23 October 1987 whereby SGIC effectively loaned \$30 million to Mr Connell.

4.2 One feature of the variation was the deposit of \$12 million in Rothwells by Mr Connell, to be held to SGIC's account. SGIC was given notice, in the course of closing submissions by counsel assisting, that it was an improper use of the \$12 million on the part of SGIC to have those funds deposited in Rothwells, knowing of its problems. It was clear from the submission that Mr Michell knew Rothwells to be an organisation from which it was difficult to extract money. Given that Mr Michell, as SGIC's managing director, had been involved closely with its legal representatives in relation to the Rothwells-related terms of reference, the Commission was of the view that the risk of an adverse finding was sufficiently plain to him. No response was made in SGIC's closing submissions to the intimation of a potential adverse finding.

4.3 In Part I of the report, paragraph 13.12.4 of chapter 13, the Commission said:

"In our view it was inappropriate for SGIC to remove its \$12 million in Parker & Parker's trust account and deposit the funds in Rothwells to assist its liquidity, when SGIC knew Rothwells was in financial difficulties. Even if that difficulty was believed to arise from liquidity problems only, the deposit clearly involved a risk for SGIC to which it should not have been exposed. We consider that Mr Rees and Mr Michell acted improperly in relation to this transaction."

It was submitted on behalf of Mr Michell that the finding was in direct conflict and totally inconsistent with the finding set out in Part I, paragraph 22.21.3 of chapter 22. The Commission there stated:

"Part of the proceeds from these two transactions (Midtown and the sale of a Falcon jet) totalling \$12,040,983.50, was paid into the trust account of Parker & Parker, Solicitors of Perth (on 23 October 1987) and placed by them on a short term deposit over the coming weekend. Parker & Parker were acting for Bond Corporation and Mr Connell in these transactions."

4.4 The Commission went on in paragraph 22.21.4 to find that on 27 October 1987 the amount of \$12,040,983.50 was withdrawn from Parker & Parker's trust account and, at the direction of Mr Connell's attorney, endorsed over to Bond Corporation. The funds remained on deposit with Bond Corporation until 16 November 1987 when, pursuant to the Deed of Variation of that date, Mr Connell agreed to deposit them in Rothwells and then to assign the deposit to SGIC. In the circumstances the summary of the transaction in paragraph 13.12.4 of chapter 13 of Part I of the report was inaccurate.

4.5 It is now submitted to the Commission that the only role which Mr Michell played with regard to the \$12 million was to execute the Deed of Variation as one of SGIC's authorised signatories. It was submitted that he was not involved with the negotiations leading up to the execution of that document and was not instrumental in effecting the transaction.

4.6 The entire transaction was extremely complex and ill considered: see the description of it in sections 22.21 and 22.22 of chapter 22 of Part I of the report. In his evidence to the Commission Mr Michell said it was done for the purpose of assisting Rothwells with its liquidity. Nevertheless, having reconsidered the matter, the Commission accepts Mr Michell's assurance that he was not involved in the negotiations. The Commission withdraws the finding of impropriety made against him and apologises for the error.

4.7 The Commission has not received any further submission from Mr Rees. The evidence is unclear as to the extent of his involvement in the negotiations. He certainly executed the Deed of Variation and reported on it to SGIC, as we noted in paragraph 13.12.5 of chapter 13 of Part I of the report. However, in all the circumstances, the Commission is prepared to allow Mr Rees the benefit of the doubt and to withdraw the finding of impropriety against him also.

4.8 We therefore delete paragraph 13.12.4 of chapter 13 and the final sentence of paragraph 21.1.18 of chapter 21 of Part I of the report.

4.9 Mr Michell has made a further complaint, to the effect that he was denied permission to be legally represented at the hearing. The Commission can only conclude that he misunderstood the position. He was without representation when he gave evidence in the Northern Mining term of reference in which he was not personally involved. He made no application to be represented when he gave evidence subsequently in relation to the Rothwells terms of reference. Had he made such application it would have been granted without hesitation, as was the Commission's invariable practice.

5 **Mr Vrisakis**

5.1 Mr Vrisakis has complained about the findings set out in Part I of the report, at paragraph 16.1.19 of chapter 16 and paragraphs 21.1.41 and 21.1.42 of chapter 21. These findings related to Mr Vrisakis' conduct in acting as Rothwells' solicitor in negotiations between it and the NCSC in October-November 1987. It was those negotiations which led to the NCSC agreeing not to continue its investigations into Rothwells and not take any action in respect of events prior to 27 November 1987.

5.2 In paragraphs 21.1.41 and 21.1.42 we said:

"Although the NCSC appreciated that Mr Vrisakis was acting for Rothwells, it regarded him as an honest broker who was safeguarding the NCSC's interests as well as those of his client. Mr Vrisakis was aware of the NCSC's perception of him but did not enlighten the NCSC to the fact that his clients' primary objective was to stifle the NCSC's investigation. Neither did Mr Vrisakis inform the NCSC about Rothwells' continuing liquidity problems. He was aware of those problems when he prepared the business plan, and yet it gave the impression that the rescue of Rothwells had succeeded.

We have found that Mr Vrisakis acted improperly by conducting himself as he did."

5.3 In paragraph 16.1.19 we said:

"Despite what we believe to have been Mr Vrisakis' knowledge that Rothwells' liquidity problems were continuing and that its final position was quite different from that envisaged during the rescue weekend, he disclosed none of those matters to the NCSC. Given his awareness that the NCSC perceived his role to be that of an honest broker, he acted improperly, in our view, in keeping these matters to himself."

5.4 Mr Vrisakis was given notice of a potential adverse finding in the course of closing submissions made by counsel assisting. Counsel said:

"The Commission might come to the view, in my submission, that in effect Mr Vrisakis had a conflict of interest in that situation because there would be a question on the one hand of what he could properly tell the NCSC as he learned things about Rothwells and on the other hand what he could properly withhold from the NCSC having regard to their interest in getting into Rothwells and investigating it."

5.5 Mr Vrisakis lodged a written submission with the Commission to deal with that potential adverse finding, namely, that he had a conflict of interest or duty in

preserving Rothwells' confidentiality on the one hand and his alleged duty to reveal information to the NCSC, on the other hand. The substance of the submission was that:

"Mr Vrisakis, as the NCSC well knew, was the solicitor for Rothwells (with authority also to speak for Mr Connell on relevant matters which affected him personally); that in those circumstances his professional duty was to Rothwells and not to the NCSC and the NCSC must have known that; and that however much the NCSC might have respected Mr Vrisakis it could not properly rely upon him having any duty to it, nor expect him to divulge information to it contrary to his professional obligation to his client. In those circumstances, there was no "conflict of interest" as put by Mr Templeman QC, nor (as was perhaps intended) any conflict of duty."

That submission was taken into account by the Commission in making the findings complained of.

5.6 In recent submissions made by Mr Vrisakis and on his behalf, including a submission received on 10 November 1992, it is said that Mr Vrisakis made it abundantly clear to the NCSC throughout his dealings with them from October 1987 until the adoption of the business plan, that the primary objective was to avoid any NCSC investigation of Rothwells as that would jeopardise the rescue. It is also said that the evidence Mr Vrisakis gave at his trial established that at the time of the adoption of the business plan he believed the rescue of Rothwells had succeeded even though it may have had liquidity problems.

5.7 Mr Vrisakis complains that he was given no notice of the finding that he acted improperly in keeping to himself his knowledge about the affairs of Rothwells which resulted in its financial position being quite different from that envisaged during the rescue weekend.

5.8 The Commission is unable to accept that Mr Vrisakis had no notice of the potential finding. He was informed in the terms set out in paragraph 5.4 above which clearly encompasses the issue of what he told, or should have told, the NCSC. Furthermore, it is clear that Mr Vrisakis understood the submission in that way. His response to the potential adverse finding contained the statement:

"While there are occasional references in the NCSC's notes to the effect that they accepted Mr Vrisakis' bona fides, judgment and integrity, there is nothing to suggest that he was in any way to act for or on behalf of the NCSC, or that he was under any obligation to act contrary to his professional duty to his client, Rothwells. *In any event, there is no evidence that there was any relevant information known to Mr Vrisakis which was withheld from the NCSC.*" (our emphasis)

The sentence which we have emphasised conveyed the impression that Mr Vrisakis was alert to the possibility of a finding that he had withheld information from the NCSC.

5.9 We accept that if Mr Vrisakis had been no more than Rothwells' solicitor he would have been obliged not to disclose to the NCSC the matters of which he was aware, concerning Rothwells' financial position. In his submissions, Mr Vrisakis makes much of the fact that even if the NCSC was a Court, which it was not, it would have been improper for him to have disclosed those matters. However, Mr Vrisakis was not just Rothwells' solicitor. He was, as we pointed out in paragraph 16.1.18 of chapter 16 of Part I of the report, a member of the Attorney General's Advisory Committee on Companies and Securities. He had a high profile and reputation in his professional field and, as he appreciated, the NCSC justifiably regarded him as an honest broker. If, in those circumstances, he considered himself unable to make full and truthful disclosure to the NCSC, then he was placing himself in an impossible position of conflict.

5.10 In the submissions made on behalf of Mr Vrisakis, reference is made to an internal NCSC document dated 30 November 1987 from which it appears that the NCSC appreciated he had not been "fully forthright" in some of the information he had provided to it. On that basis, it was submitted the NCSC did not, in fact, repose trust in Mr Vrisakis. However, even if that was the case, Mr Vrisakis was clearly unaware of it at the time. Further, the document tends to support our finding that Mr Vrisakis had misled the NCSC in his dealings with it.

5.11 We have reviewed our report in the light of the evidence and Mr Vrisakis' further submissions. As a result, we believe paragraph 16.1.19 of chapter 16 of Part I should be expanded by the addition of the words:

"If he took the view that he could not provide a frank appraisal of Rothwells' position, he should have ceased to act."

We do not propose to vary the finding set out in paragraph 21.1.41 of chapter 21, that the business plan prepared by Mr Vrisakis gave the impression that the rescue of Rothwells had succeeded. That finding must be read in the light of paragraphs 16.1.18 and 16.1.19 of chapter 16, of which it is a summary.

5.12 We are not prepared to amend the finding that Mr Vrisakis did not enlighten the NCSC to the fact that his clients' primary objective was to stifle the NCSC's investigation. It is not to the point that the NCSC knew Mr Vrisakis' object was to bring the investigation to a close. It is that his lack of frankness misled the NCSC in its appreciation of his true objective.

6 **Other matters**

6.1 We wish to correct an apparent inconsistency between paragraphs 17.2.5 and 17.7.2 in chapter 17 of Part I of the report relating to a meeting between Mr Berinson, Mr Mitchell and Mr Edwards on Anzac Day, Monday 25 April 1988. At the meeting there was a discussion between Mr Berinson and Mr Mitchell about the value of assets of The Bell Group Ltd. In paragraph 17.2.5 we made reference to the evidence given about the meeting by Mr Edwards at the NCSC inquiry. In paragraph 17.7.2 we referred to the fact that at the NCSC inquiry, Mr Edwards made no mention of the meeting between Mr Berinson and Mr Mitchell.

6.2 The inconsistency is explained by the fact that Mr Edwards gave evidence to the NCSC on two occasions, the first on 25 May 1988 and the second on 30 May 1988. On the first occasion Mr Edwards was not questioned about the Anzac Day meeting, nor did he volunteer any evidence about it. Mr Mitchell told the NCSC about the meeting after Mr Edwards had given his evidence. When Mr Edwards was recalled, he was questioned about the meeting.

6.3 In addition to these matters, there are a number of errors, mainly typographical, which we wish to correct. We set them out below.

7 **Corrigenda and errata to Part I of the report**

Page 1-13, paragraph 1.6.2, delete first line on page.

Page 1-17, paragraph 1.6.14, substitute "On subsequent examination" for "Subsequent examination" in line 13.

Page 1-23, paragraph 1.6.32, insert "to" after "notification" and after "given" in line 5.

Page 3-55, paragraph 3.12.32, delete line 3 and substitute:

"the evidence of Mr Miller that the probable additional cost was approximately \$12.5 million, to which should be added an allowance for the fact that Mr Miller started his calculation from Fluor Maunsell's pre-tender estimates for the cost of the pipeline construction contracts. Those estimates were high, for the reason that they contained, as Mr Miller said, "a little extra ... to cover all contingencies". Mr Miller has"

Page 3-56, paragraph 3.12.34, insert "slightly in excess of" after "cost of" in line 5; delete "to \$16 million" in lines 5 and 6; insert "even" after "proceed" in line 11.

Page 3-58, paragraph 3.14.1, insert "following ICC's" after "good faith" in line 13.

Page 3-60, paragraph 3.16.7, substitute "slightly in excess of" for "between" and delete "and \$15.5 million" in line 4.

Page 4-2, paragraph 4.2.1, insert "." after "Development" in line 7.

Page 7-5, paragraph 7.3.3, substitute "programme" for "program" in line 24.

Page 7-16, paragraph 7.7.1, substitute "too" for "to" first appearing in line 8.

Page 7-35, paragraph 7.8.51, substitute ". Section" for "as section" in lines 2 and 3; insert ", by reason of the fact that it was never declared to be subject to the Act: section 4(1)(b)" after "applied" in line 9.

Page 7-58, paragraph 7.13.6, delete "that was" in line 3.

Page 7-90, paragraph 7.23.2, delete "also" secondly appearing in line 6.

Page 8-27, paragraph 8.7.13, delete "the" in line 11.

Page 8-46, paragraph 8.12.3, insert "at" after "options" in line 6.

Page 8-58, paragraph 8.16.19, substitute "nor" for "or" in line 3.

Page 11-6, paragraph 11.3.2, insert ")" after "16" in line 3.

Page 11-16, paragraph 11.5.5, substitute "Dieren" for "Dieran" in line 1.

Page 12-68, paragraph 12.13.27, delete "the" first appearing in line 1.

Page 12-70, paragraph 12.13.35, insert "million" after "20" and "\$" before "25" in line 11.

Page 13-14, paragraph 13.2.24, delete "of" in line 17.

Page 13-17, paragraph 13.4.2, delete "said" secondly appearing in line 12.

Page 13-22, paragraph 13.6.3, substitute "It" for "it" in line 2.

Page 13-23, paragraph 13.7.2, substitute "business" for "businesses" in line 6.

Page 13-30, paragraph 13.9.2, substitute "subsection" for "subparagraph" in line 19; substitute "provision" for "clause" and substitute "6(1)" for "61" in line 21; insert "13" before "(2)" in line 22.

Page 13-36, paragraph 13.11.2, substitute "It" for "it" in line 6.

Page 13-39, paragraph 13.11.9, insert "ministerial" before the words "services officer" in line 12.

Page 13-42, paragraph 13.12.4, delete the paragraph.

Page 15-11, paragraph 15.2.2, substitute "of" for "or" secondly appearing in line 4; substitute "or" for "of" at end of line 4.

Page 16-10, paragraph 16.1.19, add the following:

If he took the view that he could not provide a frank appraisal of Rothwells' position, he should have ceased to act.

Page 16-17, paragraph 16.2.5, insert "during" after "that" in line 3.

Page 16-19, paragraph 16.2.10, substitute "Hurley" for "Hurley's" in line 2.

Page 16-38, paragraph 16.8.12, substitute "1988" for "1989" in line 2.

Page 16-50, paragraph 16.12.8, insert "the" after "but" in line 2.

Page 16-54, paragraph 16.13.1, substitute "KMG Hungerford" for "Peat Marwick Mitchell" in line 21.

Page 16-65, paragraph 16.14.15, substitute "Government's" for "Government" in line 6.

Page 16-66, paragraph 16.14.20, delete "also" secondly appearing in line 8.

Page 16-73, paragraph 16.15.14, substitute "wish" for "wise" in line 11.

Page 17-30, paragraph 17.5.17, substitute "," for "." at end of line 3.

Page 17-31, paragraph 17.5.18, delete "and" in line 10.

Page 17-39, paragraph 17.8.1, insert "." after "("Adsteam")" in line 10.

Page 17-44, paragraph 17.8.14, delete "without his consent" in line 14.

Page 18-5, paragraph 18.1.12, substitute "Coordinator" for "Co-Ordinator" in line 2.

Page 18-25, paragraph 18.2.8, insert "dated" after "memorandum" in line 2; insert "its holding in" after "of" in line 9.

Page 18-26, paragraph 18.2.11, substitute "were" for "wee" in line 4; insert "to the" after "prior" in line 8.

Page 18-42, paragraph 18.3.11, insert "portfolio" after "loan" in line 8.

Page 18-64, paragraph 18.4.18, substitute "he" for "it" in line 5.

Page 18-65, paragraph 18.4.23, delete "of" first appearing in line 13.

Page 18-74, paragraph 18.4.58, substitute "Self" for "Selfe" in line 10.

Page 18-76, paragraph 18.5.3, insert "an" after "retain" in line 6.

Page 18-78, paragraph 18.6.2, insert "the" after "of" secondly appearing in line 6.

Page 19-5, paragraph 19.3.2, delete "by" in line 9.

Page 19-9, paragraph 19.3.17, delete "gold" in line 4.

Page 19-10, paragraph 19.3.21, substitute "shares" for "sharers" in line 8.

Page 19-11, paragraph 19.4.1, insert "risk/returns" after "of the" in line 19.

Page 19-96, paragraph 19.16.6, substitute "Self" for "Selfe" in line 5.

Page 20-76, paragraph 20.7.7, substitute "1989" for "1988" in lines 4 and 8.

Page 21-1, paragraph 21.1.1, insert "it" after "accounts," in line 3.

Page 21-6, paragraph 21.1.18, delete the final sentence.

Page 21-30, paragraph 21.1.111, substitute "million" for "Million" in line 5.

Page 22-10, paragraph 22.4.3, substitute "Fundscorp. The" for "Fundscorp the" in line 3.

Page 22-16, paragraph 22.8.2, delete "the" first appearing in line 8.

Page 22-17, paragraph 22.8.5, substitute "31" for "31st" in line 4; insert "." after "project" in line 28.

Page 22-81, paragraph 22.34.9, delete "." after "Corporation"" in line 6.

Page 22-113, paragraph 22.42.2, substitute "the" for "The" in line 2 and in line 4.

Page 22-117, paragraph 22.42.33, insert "which" after "chapter" in line 6; substitute "in the" for "inthe" and insert "of the State" after "law" in line 7.

Page 23-32, paragraph 23.11.9, substitute "Laurance" for "Lawrence" in line 10.

Page 23-34, paragraph 23.11.9, insert "in" after "on" in line 2.

Page 24-11, paragraph 24.8.4, substitute "Lawrence (sic)" for "Lawrence sic" in line 2.

Page 26-3, paragraph 26.2.1, substitute "216,000" for "366,000" in line 4; substitute "950,000" for "950,00" in line 12.

Page 26-11, paragraph 26.4.8, delete "the" in line 4; delete "was" secondly appearing in line 12.

Page app2(a)-15, substitute "Australian" for "australian" in line 25.

Page app2(b)-2, substitute "Bogue" for "Bouge" in line 49.

Page app2(b)-8, substitute "Ms C J McLure" for "Mr C J McLure" in line 18; substitute "Ms M C L Tan" for "Mr M C L Tan" in line 24.

Page app3-7, insert "of" after "Bank" in line 11.

Page app3-9, delete "and" in line 18.

Page app3-11, delete "and" in line 31.

Page app4-5, substitute "Ors" for "Orse" in line 10.

Page app4-10, paragraph 26, substitute "National" for "Natural" in line 8.

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