

JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

**AN INQUIRY INTO PUBLIC SECTOR PROCUREMENT OF GOODS AND SERVICES AND
ITS VULNERABILITY TO CORRUPT PRACTICE**



**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 10 OCTOBER 2018**

Members

**Ms M.M. Quirk, MLA (Chair)
Hon Jim Chown, MLC (Deputy Chair)
Mr M. Hughes, MLA
Hon Alison Xamon, MLC**

<001> G/2 [10:06:44 AM](#)

Hearing commenced at 10.06 am

Mr JOHN RODERICK McKECHNIE

Commissioner, Corruption and Crime Commission, examined:

Mr RAYMOND WARNES

Chief Executive, examined:

Ms KIRSTEN NELSON

Acting Director, Assessment and Strategy Development, examined:

The CHAIR: On behalf of the committee, I would like to thank you for agreeing to appear today. As you are aware, my name is Margaret Quirk and I am Chair on Joint Standing Committee on the Corruption and Crime Commission. Again, I do not need to introduce these people. On my left is the Deputy Chair, Hon Chown, MLC; and on his left is Hon Alison Xamon, MLC. Mr Hughes sends his apologies today.

It is important that you understand that any deliberate misleading of this committee may be regarded as a contempt of Parliament. Your evidence is protected by parliamentary privilege. However, this privilege does not apply to anything you might say outside of today's proceedings.

Thanks very much for attending today. Normally at this time of year, we would be talking about the annual report but because we are at a certain stage in our inquiry into procurement, we need to at least get you in for an interim discussion on those matters and we will deal with the annual report later on. If it becomes necessary, we can close the hearing but we will proceed as long as we can on the basis that it is public.

The Corruption and Crime Commission has obviously been involved in some inquiries about procurement. I do not know, commissioner, if you want to make some general statements about procurement before we proceed to specific questions.

Mr McKechnie: Not, I think, particularly, although Ms Nelson, who has also been counsel assisting on several major investigations, has prepared a sort of brief outline so I might get the sort of things that the reports have identified. So if that is convenient I might ask her to talk to that.

The CHAIR: Yes, thank you.

Ms Nelson: Thank you, commissioner; thank you, Chair. Just arising from the number of reports that we have published publicly over the last few years, I can highlight some themes. We have found that work has been awarded on the lowest quote normally in procurement contracts, but where there has been serious misconduct, the contractor has charged significantly more than what they have tended due to, you could say, on-the-fly contract variations, such as extensions to the contract scope, extensions to the contract period and, perhaps, unusual levies awarded on top of the contract price for unusual working conditions, such as working after-hours. We have also noted that where we have found there have been fictional quotes paid by a public department—and when I say “fictional”, I mean either in their entirety or in part—that has been possible when the public officer has controlled all aspects of the procurement cycle. So the public officer has been the one to decide the work needed to be done, to decide who did the work and to decide when they got paid and how they got paid. We have found that conflicts of interest are basically, in their simplest form,

undeclared relationships between public officers and contractors. This has always been the genesis of the procurement of serious misconduct that we have noticed.

The CHAIR: Can I just stop you there? Do you think tenderers understand or is enough attention paid to that conflict-of-interest provisions or the way that they need to declare them? I mean, are spaces in the forms sufficient to explain what needs to be put in there?

Mr McKechnie: No, I do not. I think that there is a lack of understanding by people who deal with government and I think there is a possibility that government can improve, as it were, the education of contractors as to what it means to contract with a government department.

The CHAIR: I was thinking about this the other night when I was ordering something online and, you know, the old thing comes up about what is your CVV number and you can click on a question mark and then it explains it. It seems to me that even a form can be designed for a tender that has that sort of information in it.

Mr McKechnie: The commonwealth fraud control does do that.

The CHAIR: Sorry to interrupt—go on.

Ms Nelson: We have found that there has often been by the public officer the use of a buffer to provide separation between him as the decision-maker and the contractors, and this has been done deliberately so either the public officer has used an incorporated entity, of which he has had some shadow control, or he has used a trusted contractor that he has brought in to be the one to do the face-to-face negotiations with the contractor that have led to the procurement fraud.

We have found that gifts that have been offered to public officers by suppliers or contractors have provided the opportunity for influence. The payback to the supplier can be as small as just some confidential information, perhaps as to a competitor's tender package that would be sufficient for that contractor to then tailor his tender to win. We have also found that any anomalies in the tender procurement process have also been the result of incompetence and ignorance, not always fraud. For example, in the Exmouth aquarium matter, which was Operation Sara, this was a perversion of the sole supplier exception to the procurement process. In Halls Creek, there was inexperience in how to assess tender applications. Also in regional local governments we have seen that public officers have divulged the fact that council is going to go into a procurement process to their preferred suppliers, which has given them an advantage. That was not always done with the foresight of giving them that advantage; that was the outcome that benefited them. In speaking of regional local governments, we have also found that routinely they have misapplied the regional pricing preference and, as I said, the sole supplier exception has been misapplied and they have not declared any conflict of interest that they have had with local suppliers who were also tender applicants. We found in local government across regional and metropolitan centres that there has been a lack of oversight by council members as to what the CEO is doing in the procurement process. Even though the council would have the final approval, in most major procurement decisions they have not gone into the foundations of the information that has been presented to them.

Hon ALISON XAMON: Do you attribute that reluctance to ignorance of the process? Is it that it is an overwhelmingly trusting environment? What would you attribute that lack of oversight to?

Mr McKechnie: If I can answer, I think in some councils it is a lack of knowledge. It is a lack of appreciation of when you are elected to council, you carry responsibility for financial responsibilities. But also what has been shown in the last four, five years is a misunderstanding. I think it is regulation 9 of the council regulations which says that a councillor should not be involved in the administration, which has—you can understand the reason for it, but that has been misunderstood or, in some cases, I suspect, deliberately misinterpreted by CEOs as saying, "Well,

that's administration; you can't go there". It places councillors in difficult position of oversight because they are ultimately, under section 13, responsible for the finances but either are or think they are prevented from making inquiries for fear of breaching the regulation.

Hon ALISON XAMON: Do you think that a solution is a change to the regulation or do you think that there is a role for WALGA to play, for example, to better educate councillors not only as to their rights but, indeed, to their responsibilities?

Mr McKechnie: I think there is a role for WALGA, and I think it is a very important role in education. As to the regulation, one can understand the intent of it, and I think the intent should be kept, but I think it could be better worded and better understood so that people know the council do have an absolute right to inquire into matters. But there is also the ignorance question—that may be too harsh a term. I have met with councillors from regional councils who themselves are very successful businesspeople. But often the successful business might be a farm or several farms that have a revenue of millions of dollars, but do not have the same governance requirements as local government. You cannot just say, "I'm very successful; therefore, I know what to do."

Hon JIM CHOWN: Commissioner, in that vein, I am just wondering—let me put it this way: you are the experts, you are the independent investigators in regard to corruption procurement—and we are talking about local government at this stage—you would be aware, along with Ms Nelson and Mr Warnes, of the loopholes in the process of procurement. Would you be prepared to put out a report as the commission in regard to how these loopholes should be addressed by local government —

The CHAIR: So a how-to guide?

Hon JIM CHOWN: Yes. And take a proactive role as opposed to the body role or the policeman role to give some indication from a CCC perspective on how local government should actually go about its procurement requirements and close the loopholes in regard to tender arrangements and, as we say, variations need to be looked at by an independent body to ensure, for example, that there is no collusion whatsoever. Local governments across the state do spend hundreds of millions of dollars on procurement. Would you be prepared to do something along those lines?

Mr McKechnie: Certainly we will give it consideration. The reason I am always hesitant is partly—we have a fine line as to what our present responsibilities are in corruption prevention and education, which —

Hon JIM CHOWN: I do not see the fine line, commissioner. Corruption and prevention—part of it should be, from your perspective, informing the appropriate bodies of how they should be doing their job.

Mr McKechnie: I agree, and we do have a function for identifying corruption risks and capacity building and of late we have been using that function somewhat more than we used to. But there was a report some years ago on misconduct risks—I think procurement misconduct risks—in five shires in the 2015 "Report on Misconduct Risk in Local Government Procurement 2015".

The CHAIR: WALGA took some exception to that, did it not, as I recall? So it has got its head in the sand.

Mr McKechnie: Yes.

Hon JIM CHOWN: A lot has happened since 2015 in this particular area.

Mr McKechnie: That is true, but on the other hand, it was a pretty good road map, and I can say that because it was not mine! It was a pretty good road map. The extent to which councillors have taken it on board is another question. I think the report that seems to have had the most immediate

impact is our latest one, Neil. That actually is getting people focused. I am not sure that our previous reports have.

Hon JIM CHOWN: So my question stands, commissioner.

Mr McKechnie: And my response stands! I will give it serious consideration.

Hon JIM CHOWN: Thank you for that!

The CHAIR: Ms Nelson; sorry, we have interrupted.

Ms Nelson: I just had one last one, which is where the fraud system goes undetected for a period of time, we have seen that the contractors have then replicated what they are doing with one government department in another government department. For example, with the north metro health situation, the contractors gave evidence that they colluded with each other on price. They call that cover-quote and they replicated that in other situations as well across the sector.

The CHAIR: Just to go back to the first comment that you made, one of the areas that has concerned me and where I think has the most capacity for improper conduct, is in relation to contract variations, period of contracts, the scope of the contract being changed and unusual levies. I think that has huge potential as an area where there is probably a fair bit of improper practice. That seems to be confirmed by your comments.

Mr McKechnie: If you look at the report some years ago by the Auditor General on health, I think it went from \$43 million to \$83 million. It had all the hallmarks, except that we thoroughly investigated and were satisfied there was no serious misconduct—no corrupt conduct—but it had all the other hallmarks: people's authority and discretion being exceeded with no brake on it, contract variations, contract variations suggested by the supplier, a lack of —

Hon ALISON XAMON: Sorry, commissioner, this is the IT one?

Mr McKechnie: Yes, the IT one. It is a good case study, as I say, except for the fact that there was no corruption, which was Ms Nelson's earlier point that sometimes it is just incompetence.

The CHAIR: But again that serves as a cover —

Mr McKechnie: Indeed.

The CHAIR: — for people to say, "It's incompetence, don't go any further."

Hon JIM CHOWN: Commissioner, I am sure one of you can answer this question. According to the notes here, of all allegations received by the commission, only three per cent deal with corruption in procurement. But can we put a number on that three per cent? How many allegations are made in regard to corruption in procurement and how many are dealt with by the commission?

Mr McKechnie: I will hand over to Mr Warnes.

Mr Warnes: I am not sure I have got those stats readily available. I thought we had them. Over the last three years, it is 42 per cent of all procurement allegations related to—that is related procurement in local government. I do not have the overall stats close.

Mr McKechnie: We can do it on local government.

Hon JIM CHOWN: Mr Warnes just said something; so 42 per cent of the allegations in regard to fraud in procurement deal with local government. Is that what you just said?

Mr Warnes: So 42 per cent of all procurement allegations received over the last three years related to procurement activity undertaken in local government.

Mr McKechnie: Over the last three years, we have received 269 allegations relating to serious misconduct in procurement. Most—this is in local government—two-thirds originated from a regional local government, one-third metropolitan. We can give this to someone.

Hon JIM CHOWN: Obviously, from a local government perspective this is a very large issue that needs to be addressed. It is costing ratepayers and taxpayers millions of dollars per annum, I guess, in graft and corruption.

Mr McKechnie: Well, the amount is unknown but the risk is high.

The CHAIR: One other follow-up question, Ms Nelson. You talked about collusion between contractors. Is there not some declaration that needs to be signed at the time the tenders are put in about collusion? It is my understanding they had to make some declaration to that effect.

Ms Nelson: The collusion I was referring to in relation to north metro health did not go to an open tender process so they were under the \$150 000 threshold, so they only needed to obtain three quotes, which they just put in on an A4 bit of paper, maybe a letter form. It was a very loose process.

The CHAIR: Are there any instances where the tender has been disaggregated so that it does fall within the open tender requirements? Is that a common practice or not?

Mr McKechnie: Yes. Mr Kenny of the City of Perth had a discretion of \$5 000.

Ms Nelson: Correct.

Mr McKechnie: Another one of Ms Nelson's cases. He consistently awarded contracts to the same contractor of slightly less than \$5 000, so you can multiply. It is easily done.

The CHAIR: You have just started this new unexplained wealth part of your responsibilities. Do you expect that procurement is still going to feature in looking at —

Mr McKechnie: Absolutely, and it may give rise to possibilities for unexplained wealth declarations as well, some of which we are exploring.

The CHAIR: In your annual report you have listed six investigations about suspected corruption and procurement—Auburn, Emerald, Fuze, Haddock, Long and Neil. Are you able to talk about any of those at this stage?

Mr McKechnie: I am the worst person to ask because I can never remember what operation the name is all about!

Ms Nelson: Neil is the north metro health matter; Long is Horizon Power. The others are all active.

Mr McKechnie: They are all open active investigations. I have remembered I have examinations—either had them or booked.

Hon JIM CHOWN: Now that you have got these extended powers regarding unexplained wealth, in previous hearings, commissioner, you have stated that you will not be receiving any more money to carry out your duties with these extended powers. How are you going to manage this within the scope of your budgetary requirements and your staffing requirements, because obviously there is an interaction, as the Chair has already explained, in regard to corruption procurement, unexplained wealth from drug lords or drug barons or whatever you want to call them? It is a very big task. It is a massive task to follow the money and then try to get somebody on the hook as such.

Mr McKechnie: We are reasonably confident, having talked a lot to other agencies —

Hon JIM CHOWN: That is less confident than you were last time I asked you that question.

Mr McKechnie: Yes, I know, but having talked a lot to other people, I am reasonably confident it will work.

Hon JIM CHOWN: Being who; other people being who? Other jurisdictions?

Mr McKechnie: Other jurisdictions with a similar unexplained wealth —

The CHAIR: You are being a bit Alan Jones; do not badger the commissioner.

Hon JIM CHOWN: Stop interrupting, Chair!

Mr McKechnie: I think I can handle myself.

The CHAIR: I am sure you can.

Mr McKechnie: But particularly New South Wales and Victoria, we have learnt quite a lot from them. My undertaking to do it within existing resources is limited to three years, to test and see how it goes. If it is successful, I would confidently expect we will be applying to government for funds for it. It does fit with corruption. Originally unexplained wealth was an anti-corruption measure. It has been expanded. In practical terms, it will mean we will probably do one or two less investigations a year. Well, we will not do less investigations; it will be one or two that will be investigations into unexplained wealth rather than investigations into corruption.

[10.30 am]

Hon JIM CHOWN: As a follow-up question in regard to this matter, are you going to wait for people to come and knock on your door or are seeking, actually going out and at looking at people whose unexplained wealth is reasonably apparent and investigating as to how they achieve this wealth as such?

Mr McKechnie: We have opened a portal for anybody to give us information. But we also have arrangements with other law enforcements agencies, both Western Australian and federal, for possible avenues of inquiry.

Hon JIM CHOWN: What is your interpretation of unexplained wealth?

Mr McKechnie: Unexplained wealth is actually a bad name for it. It can often be explained: “I got this money from drug dealing”! It is really wealth that you cannot lawfully account for.

The CHAIR: We have had discussions in private but I think it is worth canvassing this in terms of the procurement area in terms of identifying certain patterns of behaviour within the public service that should give managers further up the line an indication that improper practice might be going on in terms of procurement. Perhaps you can address that briefly in terms of the red flags. I think that is important about how we address what I see as quite a difficult situation to get a handle on.

Mr McKechnie: I will ask Mr Warnes to do that seeing he has the slides in front of him.

Mr Warnes: I guess if we talk about red flags for an organisation, they are not always accurate. It is sometimes the culmination and sometimes it is a repeat, but there are indicators that something might not be going right—either corruption or poor controls or ineptness. So, at an organisational level, some of those red flags would be just a poor tone at the top—you know, as simple as that—and what that means is pretty broad, but poor leadership, poor management. Low rates of disclosures of conflicts of interest is an indicator; unprofessional invoices getting through, so invoices that are a bit sloppy—they are not detailed in terms of where the time or the resource that is attributed to a particular dollar value on the invoice. Urgent payments are quite a frequent one, so people trying to rush through payments, causing some urgency—“We’ve got to pay; we’ve got pay”—and trying to remove some diligence in terms of looking at the detail of the invoice.

The CHAIR: That is a rationale for having a closed tender: “It’s urgent; we haven’t got time to go out to tender.”

Mr Warnes: Time limited money—"It's time limited, you know. We've got to get this through." Reluctance for outside scrutiny, a lack of transparency around what has been bid for, what has been tendered, and the transparency of the process.

Hon ALISON XAMON: Have you found and are you prepared to name any particular agencies that have demonstrated a reluctance to have that external scrutiny?

Mr Warnes: No particular agency comes to mind. In the bigger tendering projects, we all know there is lots of probity over that. There is lots of scrutiny. There are lots of other departments that are involved as independents in terms of tendering decisions.

Hon ALISON XAMON: And expertise, too, seems to be managing that.

Mr Warnes: That is exactly right.

Mr McKechnie: It might be useful for Ms Nelson in her acting capacity, because we were having a conversation on the way here, about your current liaisons with departments.

The CHAIR: We might just let Mr Warnes finish and then go to Ms Nelson. Thank you, commissioner.

Mr McKechnie: Right.

Mr Warnes: Recurring odd transaction patterns is another kind of telltale. Some of those things—you would expect finance departments who are signing off on invoices, they would see some of those things where the invoice looks odd. It is either odd against the payment schedule that might have been determined up-front or it is odd because it does not match a service description it was tendered for. Poor quality documentation, you know, all the way through the processes is another indicator that there is a vulnerability for misconduct or corruption occurring. As the Auditor General frequently reports on, weak internal controls—weak in the sense that there are not clear controls or gates where people have to get approval. As Ms Nelson said, it is all wrapped into one person. That creates a vulnerability for corruption to occur as opposed to having different authorities signing off along the way. At a public officer level, some of those red flags: poor financial literacy; a poor understanding of some of the complexities of what might come from a very competent tenderer in terms of finance, so they run rings around us; and very liberal accounting practices. Again, it goes back to that control that the Auditor General quite frequently comments on. Individuals living beyond their means makes them susceptible to being groomed by tenderers and getting used to that kind of high life of living in restaurants, trips away and things like that that we have seen. Unusual close associations with vendors, and those associations—the frequency of having coffee meetings. The frequency of using those particular vendors in an organisation without testing the merit in the marketplace would cause some concern.

Mr McKechnie: If I could interrupt on that, we have seen a number of matters where public servants have left the public service and been immediately employed by somebody who was formerly, or still is currently, a tenderer or a vendor to the public service, and vice versa—somebody comes in from a previous vendor. The first is beginning to get a bit disturbing because I have seen a number of matters—not all have led to investigations—where somebody has left perhaps after awarding, in an apparently open manner, a contract to X, and then suddenly three months later is employed by X.

Hon ALISON XAMON: Yes.

The CHAIR: I can think of a good federal example of that.

Hon ALISON XAMON: There are far too many examples.

Mr McKechnie: It is almost a recognised path in the US, it would seem, for retired admirals and generals. But in my three and a half years I have seen that quite a number of times, and I think it is exactly that point.

Mr Warnes: The other cluster of kind of characteristics that are red flags are around individual secrecy and holding information tightly; not going on leave. So the information is held, and others are not being exposed to what is going on.

The CHAIR: So they stick around so they have control over the information and the process; they do not take leave?

Mr Warnes: Yes. And when they are doing something underhanded, it is kept close. Whereas someone coming in—the commissioner frequently tells this story; maybe you can tell that story, commissioner—where it is not until someone goes away on leave that the deception that has been created in the tendering or the procurement process becomes known to everybody else.

The CHAIR: And the personality traits of the individuals? If someone queries, for example, as you say, an irregular-looking invoice, that person is sufficiently robust in their communication style that they can explain it away.

Mr Warnes: Yes, that is correct; either in a technical way—“This is a technical process”—and baffles the person looking in from the outside, or from an overbearing way in terms of almost bordering on bullying to be oppressing of the person that is raising an issue or perceived issue.

The CHAIR: So they are all general management issues. What steps have you taken to communicate that with the managers of various agencies?

Ms Nelson: As an organisation we have met with the directors general of the whole of the sector, and then with WA Health we have met with all the chief executives of the different boards and some members of the boards. Then as part of my role as the acting director of assessment and strategy development, we have ongoing liaison meetings with the integrity sectors of each government department that are effectively our big clients, so Department of Health, all the health boards, Department of Education and Department of Justice. We have sometimes monthly meetings with them in which we just talk about general trends in their reporting. They talk about any queries they have about specific matters. We might ask them about matters that we have in monitoring and oversight. We talk about the types of information they given us in their notifications when it first comes into our assessment area for triage. So those meetings, I have found in the last month that I have been in this role, have been very important to follow-up from the north metro health report. We have found that all the agencies we have met with have actively devoured that report and are putting strategies in place, or moving towards putting strategies in place, to try and do audits and to put misconduct frameworks in place in their agencies if they do not already have them. I think it has scared a lot of the sector.

Hon ALISON XAMON: Good.

[10.40 am]

Hon JIM CHOWN: But you have not met with the third tier of government, WALGA, or —

Ms Nelson: Correct; we have not.

Hon JIM CHOWN: —the head body in regard to local government procurement, which we have already identified is 48 per cent of your investigations or issues that are brought to you. When are you meeting with them, or are you meeting with them?

Mr Warnes: Not scheduled as yet.

Ms Nelson: No.

Mr Warnes: We have been inundated as a consequence of the Neil report, firstly through our presentations to the directors general, and then the follow-up presentations to the executive bodies.

The CHAIR: So if you were the director general of Health—anyone can answer this—and you were presented with this report, it would be overwhelming for a DG to work out even where to start. Can you maybe give us a bit of an idea about how you would go about addressing that? Just improving the guidelines obviously is not going to be enough.

Mr McKechnie: The policies were good.

Mr Warnes: I think that is what is generally being found. Again, our conversations with the Auditor General, in looking at local government, are that they find that the policies and the procedures are really well documented, but people's understanding of those is not at a competent level.

Hon JIM CHOWN: They are not being carried out?

Mr Warnes: That is right. So people are either making it up as they go, or they find ways around it because they do not know what the endorsed policy and procedure is. That is consistent not just with local government, as the Auditor General is finding, but what we have found in all the kind of investigations that we have done. So it is not a matter of having good policies and procedures; it is a matter of making sure that people responsible for procurement are aware of those.

Hon JIM CHOWN: It is an interesting comment, Mr Warnes, and I take it on board, because we have had departments in here and they show us their policies and wave it in front of us and say, "This is our process." But you are telling us here that those policies are quite sound, but they are not being adhered to appropriately?

Mr McKechnie: And that is consistent not just in Operation Neil, that is consistent —

Hon ALISON XAMON: Across the —

Mr McKechnie: The other difficulty for a director general is you have to trust someone. Not everybody is like me and trusts almost no-one; you have to run a place —

The CHAIR: And you cannot micromanage a department.

Mr McKechnie: And you cannot micromanage. But Neil showed that although the policies were well, they were not being implemented, there was not material coming up and there was not proper reporting. It went on for a long, long while and nobody picked it up.

Hon JIM CHOWN: But, commissioner, surely if you have a policy in place there should be some policing within —

Mr McKechnie: Yes.

Hon JIM CHOWN: —the relevant department to ensure on a regular basis those procurement policies are being adhered to, and if they find breaches—they should do if they are doing it properly—that the individual is brought to account —

The CHAIR: There do not seem to be any sanctions.

Hon JIM CHOWN: —and re-educated, or educated to the point where they actually say, "Why has this happened? There are consequences to not adhering to the policy." What I am hearing is, as Mr Warnes explained, that no policing is taking place to that level throughout the department.

Mr McKechnie: I would agree.

Hon JIM CHOWN: Or throughout the government procurement processes across this state, and you have just informed DGs, through Ms Nelson's interviews with them, or information —

Mr McKechnie: We had them all in.

Hon JIM CHOWN: —sessions that they need to undertake this. How do we ensure that the policing of these fairly sound procurement policies are going to be put in place?

Mr Warnes: Your question is how does a DG deal with it, and a DG in a government sense will have an audit process that they rely on, they will have a risk plan, they will have an audit process. Audit will come in and check the controls. But what research has found—if I could quote it to you—is that for detection of corruption, external audits account for eight per cent of detections. Management reviews the organisation and says, "We are not sure what's going. Let's have a review", and gets some consultants in or does an internal review. That accounts for about 10 per cent of detections. An internal audit would be about 16 per cent of detection of serious misconduct, corruption. But from the research, the biggest comes from tips; tips from individuals involved in the process, outside —

Hon JIM CHOWN: Whistleblowers.

Mr Warnes: Exactly right; outside the process. That accounts for around 47 per cent.

Hon ALISON XAMON: So the Department of Finance is the lead procurement agency. How often are they picking up on issues and referring it through to you as the CCC?

Hon JIM CHOWN: Not many.

Hon ALISON XAMON: Because surely they should be able to pick up —

Mr Warnes: I am not sure that that would be readily available to say how much we get from them.

Mr McKechnie: We have reporters and reporters. For example, the university sector is a low reporter. Whether that means that there are no problems—we have been trying for some time to come to grips with that. We have had meetings—the previous director—with universities, because universities have lots of procurement. That was a bit of a side issue. We do not get, I do not think, many from Finance, but we will check and let you know.

Hon ALISON XAMON: One of the questions we had, as well, was: in relation to north metro, did Finance pick up any irregularities with the lack of documentation around that, at any point?

The CHAIR: I suspect that it let them run their own show, because they are so big.

Mr McKechnie: Yes, I mean it is different policy. Years ago, everything was channelled through Finance or Treasury or its predecessors, but then it was pushed out to procurement officers with guidelines and Finance approval, so Finance no longer, I do not think, has oversight over this sort of procurement.

Hon ALISON XAMON: I suppose this gets back to my colleague Hon Jim Chown's point that it appears that we have lost those mechanisms, whether it is external oversight or internal, to actually ensure that our practices and policies are being followed. I am curious about your reflections on that. Is this expertise that we have now lost? Is this a function that we have seen diminished at all?

Mr McKechnie: I think it has. I think Finance has a specific role, but this is a role which has been pushed out to departments, and it depends in part on the culture of the department.

Hon JIM CHOWN: The last 10 minutes of this conversation is alarming me, commissioner. Are you alarmed as well?

Mr McKechnie: I have been alarmed for some time—since I took this job, actually.

Hon JIM CHOWN: I can understand that.

Mr McKechnie: I have been surprised at what actually has been found under the surface. We have no way of knowing whether corruption is rife, or in comparatively small pockets. I suspect the latter, but we have really no way of knowing. We are limited in the sense that we depend on allegations coming in. We assess them. We probably get the assessment wrong from time to time, and return things we should inspect, but we are in that sense, to an extent, a reactive agency. We also have what we call section 26 propositions—our own propositions—which we are developing to look at various things, some in the police, some in prisons, and hopefully some in procurement, but it depends on tips, and that is a bit sad really.

Hon JIM CHOWN: Absolutely; it is a very ad hoc sort of way of addressing corruption in procurement across the state. My next question is: what was the reaction from the relevant directors general when they had their information session that has taken place? Were they all there together, or was it individually done?

Mr Warnes: No, they were all together, bar one who could not make that time frame, but it was largely all of them.

Hon JIM CHOWN: What sort of feedback have you had a from those information sessions in regard to corruption in procurement?

Mr McKechnie: It was a very positive meeting.

The CHAIR: You got their attention.

Mr McKechnie: Very engaged.

Mr Warnes: The point we also made though is that we were not just getting them together because of the recent Health report—Neil. The context we painted to them was that we had 21 investigations, some of them ongoing, in the previous financial year, culminating in a number of reports that most recently touched on procurement corruption. It was not like it was just Health. You do not have to sit back as a DG and just think, “Well, that’s not my patch; I don’t have to worry about it.” I think the tone of the meeting was that everybody was certainly engaged and certainly concerned for what might be going on in their organisation. The subsequent follow-up meetings that we have had with DG’s and their executive—we still have a large number of rounds to go, at their invitation—is that they are all very engaged in wanting to know some of those red flags that they need to look for, and how they might better bolster their detection of what is going on in the organisation.

[10.50 am]

There are a couple of takeaways out of that meeting. I think, from a procurement point of view and a tendering point of view, the director general responsible for that was looking at, “What we need to strengthen from our tendering process and putting obligations back onto contractors to declare as well?” So the points you made earlier on this morning. And “How do we draw that out?”, which enables the department to say, “Well there’s a conflict here; my people haven’t declared that contract; we need to look at that a bit closer.” The other take was an interesting one from the director of health. From a cultural point of view, how do we, as directors general, do what has been done for occupational health and safety over a large number of years, where people would put a hand up and say, “I have got a problem here from a work health point of view”, either because of something technical or something psychological. How do we shift that into a procurement environment, where people are willing to put their hand up and say, “This is a problem; this seems to be an incorrect part of the process. I perceive an issue.”

Hon ALISON XAMON: We need unions for procurement.

Mr Warnes: But you know what I mean. It is changing the culture so that people feel more encouraged to put their hand up and be whistleblowers, if you like to use that word, or raise a concern about something that might be happening.

The CHAIR: This is the problem. If we are going to have to rely on whistleblowers, usually that is the end of the line with them—trying to go through processes, doing things by the book, meeting brick walls, being incredibly frustrated, probably sidelined professionally, or wrongly labelled as a leaker or whatever. Is there anything we need to do with the legislation to more directly assist whistleblowers, and, for example, is that something a DG should have an open door or whatever in terms of whistleblowers?

Mr McKechnie: Bigger agencies have confidential portals and so forth for staff to report anonymously. Anonymously is difficult, because when you want to try to track down some of it, it is very hard to follow up. Myself, I think our whistleblower legislation is good, but I have rarely seen it end well for a whistleblower.

The CHAIR: No, absolutely not.

Hon JIM CHOWN: Correct.

Hon ALISON XAMON: That raises the question: you are saying it is good, but if it is not having the outcome of ensuring that our whistleblowers are alternatively protected, then clearly there is still room to improve it.

Mr McKechnie: There is a lot of room; it is culture. Neil was an example of a mid-level whistleblower.

Hon ALISON XAMON: As I understand it, that person was aggrieved—is that correct—and that is why they raised it.

Mr McKechnie: Yes, that is often the case.

Hon ALISON XAMON: Indeed, but it means that people are not coming forward because they inherently abhor corruption, but because they have other grievances or issues that will enable them to raise the issue.

Mr McKechnie: As am sure you are all aware, that sometimes blurs what the actual issue is.

Hon ALISON XAMON: Sometimes it can result in quite unfair allegations being made as well. But, commissioner, I am curious to know what we could be doing, and what needs to be done, in order to have better outcomes for whistleblowers because, can I suggest that people see the way that whistleblowers are treated and what happens in their lives, and probably for good reason would be very reluctant to come forward. Who wants to invite that into their life?

Mr McKechnie: Yes, that is right. Who wants the trouble that will almost inevitably come? It is a cultural thing as well. What are our latest statistics for notifications to us from the public? I think they have gone up.

Mr Warnes: From memory they are around about 33 per cent.

Mr McKechnie: They are in the annual report.

Mr Warnes: Whereas a couple of years ago they were down in the mid-20s. They are in the annual report; I cannot recall the stats off the top of my head.

Hon JIM CHOWN: I would just like to get back to department heads and their responsibilities in regard to ensuring that their procurement processes are adhered to. We have already landed at a point where those processes are very good processes, as long as they are complied with. Would you

expect, as a commission, now that you have fully informed the relevant department heads of their responsibilities and the processes underway—I would assume that most if not all should go back and have a very good look at the chain of events that takes place in a procurement, and any breaches that may be perceived, real or unreal, are addressed—would you expect these department heads to actually come to you with some issues that they may be concerned about?

Mr McKechnie: Yes. Us or the Public Sector Commission.

Hon JIM CHOWN: Okay. And that has not happened, but you would expect to have that.

Mr McKechnie: I think it is early days. I think it will.

Hon JIM CHOWN: Yes, I understand that, commissioner.

Mr McKechnie: Because one of the things that they all got was the reputational damage of the procurement.

Hon JIM CHOWN: Correct—not on my watch.

Mr McKechnie: I mean, Operation Neil, when you look at the money involved, was not all that significant, but the reputational damage and the damage to the honest workers —

Hon ALISON XAMON: Enormous.

Mr McKechnie: One of my investigators told me that on the morning after the report, or the Saturday morning, they were shopping and somebody came up to them, because they knew they worked for the CCC, and said, “Look, I work at north metro. I’m a nurse. I’m absolutely ashamed to say that I work at north metro.” That is the damage, often. It is not just financial; it is the huge reputational damage.

Mr Warnes: It is very hard to repair that internal reputation and external reputation.

The CHAIR: But if people are on a waiting list for non-urgent surgery or something, it is the sort of thing that really has resonance. Just going back to health and the question of the Auditor General’s report, there were warning bells four years ago from the Auditor General. Following that, there was a chief procurement officer actually appointed. Did that make any impact? Did that mitigate the level of loss or impropriety? Were you able to make any observations about how effective that person was?

Ms Nelson: Are you referring to the chief procurement officer at north metro health?

The CHAIR: Yes.

Ms Nelson: Yes. So, when we initially referred the matter back to north metro, that office got involved and did a comprehensive report, but it only addressed the procedures and processes that they said were lacking. The audit report then did not effectively close out—it did not go back and determine what they were going to do in relation to the people who were involved. That operation there was about the public officers; the people who were involved in that poor process.

The CHAIR: So if down the track we recommend, for example, that other large agencies have a similar officer, are we just going to be recommending someone who is going to effectively tick and flick, or do they need a broader scope of a role?

Ms Nelson: In relation to north metro, the fraud was so horrific that really, to their credit, when we pointed out, “You haven’t addressed the people issue”, they then appointed an independent investigator, who very quickly came back to us and said, “This is too big for us to handle”, and we took it back.

The CHAIR: But surely, even if they addressed the money, not the people, and they found irregularity, why is it that the CCC still needs to step in? This is what I do not understand.

Ms Nelson: I think the Public Sector Commissioner is inquiring into that aspect.

Mr Warnes: It is not an uncommon thing we find, where an agency perceives something is not right and they will look at it from a process point of view or they will look at it from a staff welfare point of view and deal with it from those perspectives, but not look at the potential criminality that might have occurred. That is not the first thing they look at. Sometimes they will be along a path dealing with the welfare controls, and when we get a notification, we will raise the concerns. As Ms Nelson said: what about the criminality? What about the irregularities with the finances?

The CHAIR: Sorry, can I just get clarification on welfare: do you mean industrial relations? What do you mean by welfare?

Mr McKechnie: Well, that and welfare—particularly health—it is caring people. Not everybody is as nasty as we are. We look at something and we look for potential criminality and so forth. Most people, to their credit, do not. So it is hard for them to say that this trusted individual—because the statistics are that they are trusted, usually male, or they are the trusted support—has in fact been doing the wrong thing. It is hard, I think, for people to get their head around that, so they delay, perhaps, forming a reasonable suspicion, which is the threshold to report to us. We look at it and say, “Well, there is clearly a reasonable suspicion.”

[11.00 am]

Hon JIM CHOWN: Commissioner, there have been a number of reports in regard to corruption in procurement in the last couple of years—ones to do with the health system, of course. I am a firm believer that example is a great motivator to do the right thing as opposed to the wrong thing. You address this by public utterances and tabling reports in Parliament on the matter, and it is up to the DPP or the police to actually exercise charges and charge these people and put them through the legal process. Your relationship with the police, I imagine, is reasonably good. There is a separate process that takes place in regard to where you have landed in regard to corruption and where the police go in regard to fraud and corruption. What sort of delay is normally put in place before the police take up these cases that you have reported on, and how often? What would you expect —

The CHAIR: Is there a question there?

Hon JIM CHOWN: Yes. What would you expect, as a commissioner —

The CHAIR: I just heard six!

Hon JIM CHOWN: Be quiet. What would you expect as the commissioner in regard to, say, the current set of circumstances and charges being laid at some stage in the future by the police department?

Mr McKechnie: First, I have to say I do not think we have handled our relationship with the police as well as it could be. I am not talking about our police misconduct function, but this particular function. Both the Commissioner of Police, Chris Dawson, and I have spoken about it. We are developing a much better way in relation to it. In relation to Operation Neil, the police have commenced their investigations in relation to it. We are giving them access to all our information. We actually have a group of them stationed within the commission while they gather the material and the evidence. In relation to Horizon Power, it was a joint investigation. To me, one of the most difficult questions as commissioner is: which way to go? As I think I have said before, being a former prosecutor, my first instinct is always to go to court. A report has the undoubted potential to prejudice a trial, although there are matters to be taken into account. As against that, there is always

going to be a delay in prosecutions, even if they work with us. From the beginning, there will be a delay. So what I weigh up is the public interest in knowing about it sooner rather than later, notwithstanding the undoubted potential for prejudice, which in many cases can be cured. If there is a plea of guilty, as we have had following several of our reports, that takes care of the prejudice. So it is a constant issue. To return to your original point, we have not done it as well as we should and we are trying to make sure that it is much more synchronised in the future.

Hon JIM CHOWN: Okay.

The CHAIR: Just a bit of a segue to that, say you have a case where no serious misconduct has been found but there is minor misconduct, so it is effectively sent off to the Public Sector Commission. That finding that there is no serious misconduct is sometimes regarded as misleading, I think, because there is still misconduct there.

Mr McKechnie: Yes, or there may be misconduct.

The CHAIR: Yes. Do you think there is maybe a need to amend the act in relation to those sorts of definitions?

Mr McKechnie: I have said before that I wish for Father Christmas to give me a completely new act that I can actually follow! The definitions are all right, I think. My own view is that I query whether minor misconduct should go to anybody. It is mainly HR performance and so forth. It probably should be dealt with by directors general and CEOs. Serious misconduct is a different thing; that effects the revenue of the state.

The CHAIR: Commissioner, you will not have the figures on hand probably, but can we get some figures on how often a procurement investigation gets transferred from yourselves over to the Public Sector Commission?

Ms Nelson: We do have those figures on hand. In the 2015–16 reporting period, we referred to the appropriate authority, three back to local government and another three to another government agency. I am just talking about procurement allegations. Then in 2016–17, we sent 17 matters back to local government for outcome or review and 12 back to another government agency. You can see there is a bit of a jump there in those two reporting periods. We think maybe that was because we did Operation Sara at the Ningaloo Centre—public examinations at the end of that first reporting period, which raised public awareness. Then in the 2017–18 reporting period, we sent back nine allegations to local government and 18 to another government agency in relation to procurement.

The CHAIR: When we have had this discussion before, there are some agencies mentioned by you, which I do not need to canvas publicly now but, if you like, the usual suspects. Do you think there is maybe some merit in the idea of doing random audits on certain transactions within those departments just to raise the level of consciousness, or is there any other way that we could maybe lift their games?

Mr McKechnie: It is a good idea. We do not have the resources to do it or probably that particular expertise.

The CHAIR: No, but in terms of a DG or someone.

Mr McKechnie: A DG—it is one of the things we recommended at the meeting with them, at the round table, that they should be doing random audits.

The CHAIR: Do you think the other problem in terms of Health is just the size of the budget, so if there is \$5 000 here or \$15 000 here, and you are literally talking about billions of dollars, that has inculcated a kind of level of complacency?

Mr McKechnie: My own feeling is that it is. As Mr Warnes said, we do not see it in the big contracts; it is these smaller ones. The difficulty with it, though—in one sense, you might say it is a minor level corruption; does it matter? It matters in terms of service because you do not know whether you are actually getting valuable service, whether the people supplying are actually giving the state value for money, albeit that that might be a bit more money. So the contracts might be decent contractors but they might not be, so the state is not getting what it should be getting and putting people at risk.

The CHAIR: Did you encounter in your investigations any difficulties in terms of—for example, the use of subcontractors or different contractual names within a large contract—you having to chase a rabbit down a few holes with different corporate structures or anything like that? Was that an issue?

Ms Nelson: Yes, with Operation Neil, that was an issue. We saw with the health invoicing service—it is called a HSS—that they were lax around the contractors' names. So, for example, if you had XY Pty Ltd, sometimes they might call it XYZ Pty Ltd in the invoicing that they did. It was hard for us to follow certain contractors over a number of years when they had been in the health system for a while.

The CHAIR: In terms of follow-up—I think you mentioned it just then, commissioner—was the service delivered as contracted and any follow-up of that nature? Does that appear not to occur?

Mr McKechnie: I do not think that has occurred. All the contractors that we had were at pains to tell Ms Nelson, who was asking, that they actually gave good value for money. Who knows?

[11.10 am]

Ms Nelson: Just on your previous question, Chair, there were also occasions when we saw there were shadow directorships of some contracting companies. When it looked like they were competing against two other companies that they had nothing to do with, in fact, they were competing against themselves.

The CHAIR: In terms of ASIC legislation or any federal legislation, are there any amendments that need to be made there to make inquiries a bit easier?

Mr McKechnie: I do not think that would do it but what I do think would help is for procurement officers to undertake more rigorous ASIC searches of the contractors who are dealing with them. That will not show up, of course, everyone, if you are using a generic name trust as the shareholder, but it will show up some. I have not seen sort of general practice of checking to see whether XYZ Pty Ltd, who owns it, how long has it been involved? In the Exmouth matter, for instance, the company that was contracted to install a million-dollar fish tank was incorporated for that purpose, with, I think, a paid-out capital of \$100—no directors' guarantees or anything. I am not saying anything about the company; they did a proper commercial risk evaluation. But had anything been properly checked, it would have exposed the fact that this was a company incorporated a month before the contract, with no assets, and that could have been taken into account as to whether you would let the contract to such an organisation.

The CHAIR: One of the public expectations—this will certainly occur with Neil and, commissioner, I think your and my inclination is to end up in criminal charges and prosecutions. There seems to be a bit of a gap between your findings of improper processes or conduct and the expectation that that will inevitably result in criminal charges. Can you tell me how difficult it is in terms of evidence why there is this gap between being able to make the findings that the commission makes and then ultimately being able to conduct a successful prosecution?

Mr McKechnie: Yes. There are two principal reasons for the dichotomy. The first is the standard of proof. The commission, which is effectively me, or the acting commissioner, we do not lightly form opinions of serious misconduct. We form those opinions having regard to a well-known test of *Briginshaw v Briginshaw*, but having regard to the seriousness of the damage to the reputation of the person and so forth. I will be cautious while I am commissioner in forming an opinion of serious misconduct. Having said that, I do not apply the standard of beyond reasonable doubt, which is the criminal standard which a prosecutor must reach, so there is immediate difference between the standards of proof between prosecution and the commission. The second major difference is that as a matter of public policy—the drafters of the legislation were alive to this problem—it is a fundamental principle, known as the companion principle in criminal law, that a person is not obliged to convict themselves, to incriminate themselves, to give evidence against themselves. That fundamental principle can be, and has been, altered by statute so that witnesses before the commission are obliged to answer questions and cannot refuse to answer on the grounds that the question may incriminate them. The balance that the legislature has struck with that is that anything said in a commission is not admissible in evidence against a person. It is in one matter, which is not material here. So it is not admissible. So that, and this is the case in several of our recent investigations, we have been able to form our opinions and give our report on what the witnesses themselves have said, what they have admitted to. A police investigation or prosecution does not have the ability to use that in evidence. A witness who may have admitted to Ms Nelson's questionings of material wrongdoing is quite entitled to say no when the police come, saying, "Would you like to repeat that?" Those are the two essential differences—the standard of proof and the admissibility of confessional evidence, which makes prosecutions always—and I speak having prosecuted after three or four royal commissions; I forget which—difficult for a prosecutor.

The CHAIR: I just want to ask a couple of questions. In relation to, for example, conflict of interest registers, are they useful for the CCC, do they need to be more comprehensive, or are they honoured in the breach?

Mr McKechnie: It varies.

Mr Warnes: I think they are useful for the commission to validate that someone has declared something even though they might be involved in a process, but they are not useless if someone has not declared a conflict, which is a vulnerability that the DG has. They are only as good as someone's declaration.

The CHAIR: Are there agencies that you have come across that you believe do not have adequate registers?

Mr McKechnie: We have reminded them that they could. Former Public Sector Commissioner Mal Wauchope used to say, "A conflict is not a problem; it is how you manage the conflict." Some conflicts, it is there, but it is easily managed. For other conflicts, I cannot be a part of it. People declare the conflict—I have seen this in several things—and think, "Well, that's the end of it. I've declared this conflict; I'll now go ahead and do what I was going to do" rather than thinking, "Well, that's just the first step; now I've got to work out how to manage it." That, particularly with local government in mind, is what is not often understood—it is the second stage of managing the conflict.

Hon ALISON XAMON: It is very, very poorly understood in my experience.

The CHAIR: My final question relates to the Department of Transport. They have a certain cap exemption under which they do not have to do the normal processes. It has been there historically. I do not know whether it is just because of the amount of red tape and paperwork that would be created if you had to fill in a pothole, or whether there are other reasons, but I do not think there is

any justification for the cap being there. Have you formed any view about that or, in your investigations, have you formed any view about the management structure and their level of accountability?

Mr McKechnie: We have had allegations from Transport, which we have assessed, but I do not think that the cap has ever been an issue one way or the other.

The CHAIR: Thank you. Thank you very much for your time, again, as usual. We will see you shortly in relation to the annual report. A transcript of this hearing will be forwarded to you for correction of minor errors. Any such corrections must be made and the transcript returned within 10 days from the date of the letter attached to the transcript. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be added via these corrections and the sense of your evidence cannot be altered. Should you wish to provide any additional information or elaborate on particular points, please include a supplementary submission for the committee's consideration when you return your corrected transcript of evidence. Thank you very much.

Mr McKechnie: Could I just note that I shall be away from 12 to 26 November in terms of a hearing on the annual report.

The CHAIR: Okay, fine.

Mr Warnes: We are allowing him to have some annual leave; we think he has almost earned it!

The CHAIR: I was just going to ask about that.

Hon ALISON XAMON: We like people taking annual leave. I think we have determined that.

Mr McKechnie: Thank you for your time.

Hearing concluded at 11.20 am
