Dear Mr Burton

Thank you for your email of 16 June, enclosing a letter from the Honourable Nick Goiran MLC, Chairman of the JSCCCC, and copies of the material referred to in Mr Goiran's letter. I appreciate the Committee's action in providing me with the uncorrected proof of the transcript of the evidence given by the current Parliamentary Inspector, Mr Steytler QC.

In advance of my attendance before the JSCCCC, at 10:15am tomorrow, 22 June 2011 (Mr Goiran's letter refers to the date as 25 June) I thought it may be helpful for the Committee if I were to provide the following notes of my views regarding the use of public hearings by the CCC.

1. At TS5 of the evidence given by the Acting Commissioner, Mr Herron, he correctly stated that the conduct of the hearings is not part of an adversarial process but of an investigative process. The police, when a possible offence is brought to their notice, also conduct an investigative process. But there are two marked differences. First, unlike the CCC, the police do not have the power to compel any person, whether he or she be a suspect or merely a possible witness, to answer questions. Secondly, and of particular relevance, the police do not have the power to ask questions, whether of a suspect or other persons, in a "*public hearing*".

2. I do not contend that the CCC should not have the power to compel persons, suspects or otherwise, to answer legitimate questions relevant to an investigation being conducted by the CCC on matters within its jurisdiction. That is a special power, which may assist the CCC's investigation; and the safeguard, for the purpose of procedural fairness, is that answers given to such questions under compulsion cannot be used in evidence against that person (other than in a prosecution of that person for giving a false or misleading answer).

3. However, one must question why it is thought necessary, for the purpose of an investigation, that a "hearing" be held in public, for all the world to see and hear, and the media to report. As noted, police investigations are <u>not</u> conducted by

"*public hearings*". Nor, in my opinion, should they be. The mere fact of being "*publicly examined*" is likley to cause distress, embarrassment, and damage to reputation.

4. I totally agree with the opening remarks made by Mr Steytler QC in his evidence given on the 15 June 2011, TS2. In particular, I agree with his view that "*it would be a very rare case in which a public hearing could be justified in the public interest*".

5. As both the Acting Commissioner and Mr Steytler have pointed out, section 139 of the Act is the starting point. The heading is "Examination to be private unless otherwise ordered". Section 39(1) states "*except as provided in section 140, an examination is not open to the public*".

6. Section 140 is under the heading, "*Public examination, when allowed*". Section 140(2) provides "*the Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so*".

7. There are several possible scenarios in which the question of whether there should be a public hearing may arise.

8. First, the Commission may have reached the point in its investigation, where it has concluded that there is evidence to support a prima facie case of "misconduct". If that point is reached it would obviously be wrong, and prejudicial to a fair trial, to publicly examine the putative accused. Instead, the proper course would be to send the papers to the DPP (in the case of a criminal offence) or the Public Service Commission (to carry out disciplinary proceedings).

9. Secondly, the Commission may have a suspicion – nothing more – that there has been misconduct, sufficient to warrant an investigation. In such a case there is clearly a "*potential for prejudice or privacy infringements*", in particular, damage to the reputation of an individual, which may be caused in several ways.

10. The damage to an individual may result from unproven and untested allegations or assertions made against that individual by a witness, or put to the individual, which are defamatory of the individual, who has no right to bring an action for defamation, has very limited right to cross-examine (and may in any event not even be aware that the witness is to give such evidence), and no right to call any witnesses in rebuttal. And the allegation may be "*sprung*" on him or her without prior warning.

11. It may well be that at the end of its investigation the CCC concludes that there is no misconduct by the individual, but that may be some considerable time later, and in the interim serious and irreparable damage may have been done to the individual's reputation and career.

12. In the last paragraph at TS2 of the acting commissioner's evidence he referred to the value of public hearings, to increase "*public awareness, and to educate the public sector about what is and is not an acceptable standard of behaviour and conduct*".

13. I have difficulty in understanding how untested defamatory allegations against an individual, made in a public hearing and in the course of an investigation of possible misconduct, could be said to "*educate the public sector (etc)*". I would have thought that that particular purpose is to be achieved under the "*education function*" of the Commission (section 17 of the Act). As for achieving "*public awareness*" by a public hearing, where there are no more than suspicions and untested allegations, all that the public would be "aware" of would be that it was being alleged that an individual was guilty of some impropriety. Unfortunately, many would leap to the conclusion that the individual is actually guilty. The old saying, "*mud sticks*", is apt. Even if the individual concerned is not made the subject of an "adverse report", his or her reputation may have been seriously damaged. And I would think that the publication of a full report, at the end of an investigation, is the better way of educating the public and "increasing public awareness".

14. I agree with Mr Steytler's opinion, expressed at TS4.5. It is only where there is clear and undisputed evidence of particular conduct having occurred, and the only question is the proper characterisation of that conduct, or the best means of putting a stop to it in future, that the benefit of public exposure may outweigh

the private detriment. I also agree that suppression orders could be used more frequently, where there are public hearings. There have been several instances where, in the course of public hearings, entire private telephone communications between individuals have been played, although only a comparatively small part could conceivably have had any true relevance to the investigation. In particular, such recordings have included (and faithfully reproduced) foul language, reflecting very badly on the user whose conversation has been intercepted, or slanderous or derogatory remarks. Such intercepted conversations have been reproduced, replete with profanities, by the media (and in any event are accessible by the public electronically). I fail to see how material of that nature, titillating though it may be to the media and the general public, could be said to be a "*benefit*" to be put in the balance against the potential for prejudice or privacy infringements.

15. There has also been (for example, in the lengthy Smiths Beach investigation) a tendency to have every person called as a witness (even though not suspected of any wrongdoing) to be summonsed to a public hearing. No-one should be subjected to a public hearing unless the Commissioner is satisfied that there is a "*public interest benefit*" in publicly examining that person, outweighing the potential for prejudice to that person (or some other individual) by reason of the questions and the evidence to be given.

16. I am aware, in some detail, of a particular example of what in my opinion is, on the face of it, an abuse of the power to conduct a public examination.

17. In 2007 the CCC was conducting an investigation into certain matters concerning the City of Wanneroo, and possible impropriety (never established) by Messrs Brian Burke and Julian Grill. A solicitor's client (TD) was asked to provide information said to be relevant to that investigation. He said that he was happy to produce the entirety of his files and to answer any questions at a private examination. The solicitor has provided me with the following information:

    - In the course of a telephone conversation between the solicitor and a CCC officer, the solicitor was told that TD had a prospect of avoiding being called to a public hearing if he could provide evidence implicating Mr Burke in some impropriety.

- Subsequently, during the course of an interview of TD by officers of the CCC, he provided all of the information that he had, which could conceivably be relevant to the investigation. He made it clear that he was anxious to avoid a public hearing. He had already seen the damage done to individuals who were called before the Commission to be publicly examined, albeit they had not been guilty of any wrongdoing. There seemed to be a general public perception that anyone called before the Commission for a public examination must be guilty of some impropriety. TD was told by the investigators, in the presence of his solicitor, that he was to be publicly examined, although that might be avoided if he were able to supply any evidence implicating Mr Burke in some impropriety. TD said that if he knew of any impropriety by Mr Burke he would tell the investigators, but he had no such knowledge.

- A further interview took place on 30 January 2007. Again TD, in the presence of his solicitor, said that he knew of no evidence of any impropriety by Mr Burke, but if he had any such information he was willing to disclose it to the CCC. He repeated that he was happy to cooperate in any way that he could, because he wished to avoid a public examination.

18. On 8 February 2007 TD's solicitors wrote to the Commissioner, expressing concern that the client was being subjected to a public examination, with the consequential likelihood of damage to his reputation and his company, because of the inevitable adverse publicity which accompanied the appearance of any person before the Commission at a public hearing.

19. TD was nevertheless subjected to a public examination on 12 February 2007. It was never alleged that he was guilty of any impropriety. He had provided all his files to the Commission; and no adverse finding was made against him in the CCC's ultimate report, a considerable time later. However, the mere fact of his appearance as a witness before the Commission in a public hearing caused him considerable distress, and he was subjected to questions by various acquaintances, implying that he must be guilty of some form of wrongdoing. His photograph appeared in the West Australian, the morning following his appearance before the Commission as a witness, alongside the photographs of

Messrs Burke and Grill, and of equal size. By this time, Messrs Burke and Grill were to say the least, "in odium", and for anyone to appear in a matter in which they were being investigated was likely to result in a conclusion of "*guilt by association*".

20. These matters have since been the subject of a complaint made on TD's behalf by his solicitors, initially to the CCC, and subsequently to the Parliamentary Inspector. The Parliamentary Inspector carried out an investigation of the complaint, and provided a detailed report to TD's solicitors. The Parliamentary Inspector concluded

> "*there is insufficient in the available evidence for me to conclude that there was any impropriety in the decision taken by the Commissioner to hold the hearing in public. Nor is there sufficient in the evidence to support the proposition that there was any impropriety attaching to (the decision of counsel assisting the commission) to call (TD) as a witness in the course of that public hearing. It consequently seems to me that I can take this issue no further*".

21. However, no-one from the CCC has ever explained to the solicitor or TD, just how it could be said that the "*benefits of public exposure and public awareness*" outweighed the "*potential*" (which was very real) "*for prejudice or privacy infringements*" in TD's case. In my opinion, that was not a view which could reasonably have been held, prospectively, or justified retrospectively.

22. TD (I shall not state his full name, as he has had more than his fill of public exposure) is convinced that the threat of a public examination was used in an attempt to induce him to give evidence of impropriety against Mr Burke. He had no such evidence to give.

23. In his evidence (TS5-6) to the Committee on 15 June 2011, when it was put to him that since its establishment in 2004 the CCC had conducted 49 private examinations and 15 public examinations, Mr Steytler said that "*I would have thought that the ratio ordinarily should have been significantly less public hearings than have been held*". With respect, I fully agree. There was no conceivable justification for the public examination which I have referred to above, in terms of "public interest". It should be only a rare case where a public

hearing is justified. It is, I think, unlikely that all 15 of the public examinations would have met the criteria, if properly and strictly applied, of Section 140(1) of the Act.

24. I also agree with the suggestion by Mr Steytler (TS3) that consideration be given to replacing the words "*it considers*", in the phrase "*it considers that it is in the public interest to do so*", by the expression "*it is satisfied that*". I also agree with his suggestion that the Act include specifically, as considerations to be stressed, the risk of damage to the reputation and/or safety, of any person.

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

26. At TS8 of the evidence of Mr Steytler, the Chairman brought to Mr Steytler's attention the suggestion that I had made, when Parliamentary Inspector, of an alternative approach that could have been taken to the public examinations of Messrs Frewer and Allen. I am pleased to see that Mr Steytler considered that there was "*a lot of sense in that suggestion*" although he opined that the Commission would perhaps say that it has not got as much faith in departmental inquiries as I had.

27. In the cases of Messrs Frewer and Allen, I concluded that the CCC's investigation and reports were seriously flawed. In each case, the Commission made an "*adverse report*", and recommended that consideration be given to disciplinary action being taken against Mr Frewer and Mr Allen. In accordance with that recommendation, and the statutory requirements relating to the public service, the Public Service Commissioner appointed a very competent and experienced senior member of the Public Service (independent of Messrs

Frewer and Allen) to conduct a full investigation. The conclusion of that investigator, Mrs Petrice Judge, expressed in a very thorough and detailed report, after a full investigation, was that no basis existed for disciplinary action. Neither, she said, had a "case to answer". Her conclusions were, essentially, the same as the conclusions that I reached, independently of her. And she reached those conclusions wihtout knowing mine, or my reasons.

28. I do not know whether the Commission does "*lack faith*" in departmental investigations of alleged misconduct, but I am unaware, if it does, of any basis for it. Indeed, the very thorough investigation conducted by Ms Judge, independently and objectively, was in my opinion far superior in quality to the investigation conducted by the CCC, which resulted in its "adverse report", so damaging to Messrs Frewer and Allen that it destroyed their careers and traumatised their families.

29. In any event, the Commission, being an investigative body, has neither the power to make a finding of misconduct, nor the power to take "*disciplinary action*". It can only make "*recommendations*". The body ultimately responsible for making a finding of misconduct, and in that event taking "*disciplinary action*" is the Public Service Commissioner.

I hope that these comments may be of assistance to the Committee in its important task.

Malcolm McCusker AO QC