JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

PUBLIC HEARING WITH THE COMMISSIONER OF THE CORRUPTION AND CRIME COMMISSION

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
MONDAY, 16 FEBRUARY 2009

Members

Hon Ray Halligan (Chairman)
Mr J.N. Hyde (Deputy Chairman)
Mr F. Alban
Hon Ken Travers

Hearing commenced at 10.00 am

ROBERTS-SMITH, HON LEONARD WILLIAM
Commissioner, Corruption and Crime Commission,
examined:

The CHAIRMAN: We now commence the public hearing. Commissioner, on behalf of the Joint Standing Committee on the Corruption and Crime Commission I would like to thank you for your appearance before us today. This hearing is part of the committee's ongoing oversight function. I would like to introduce myself. My name is Ray Halligan and I am the Chairman of the committee and this is John Hyde, the Deputy Chairman of the committee. The other members of the committee apologise because they are away on urgent parliamentary business. The Joint Standing Committee on the Corruption and Crime Commission is a committee of the Parliament of Western Australia. This hearing is a formal procedure of the Parliament and therefore commands the same respect given to proceedings in the houses themselves. Even though the committee is not asking witnesses to provide evidence on oath or affirmation, it is important that you understand that any deliberate misleading of the committee may be regarded as a contempt of Parliament.

This is a public hearing and Hansard will be making a transcript of the proceedings for the public record. If you refer to any document during your evidence, it would assist Hansard if you could provide the full title for the record. Before we proceed to the questions we have for you today, I need to ask you a series of questions. Have you completed the "Details of Witness" form?

Mr Roberts-Smith: I have.

The CHAIRMAN: Do you understand the notes at the bottom of the form about giving evidence to a Parliamentary committee?

Mr Roberts-Smith: I do.

The CHAIRMAN: Did you receive and read the information for witnesses briefing sheet provide with the "Details of Witnesses" form today?

Mr Roberts-Smith: I did.

The CHAIRMAN: Do you have any questions in relation to being a witness at today's hearing?

Mr Roberts-Smith: I do not.

The CHAIRMAN: Would you please state the capacity in which you appear before the committee today?

Mr Roberts-Smith: I appear in the capacity as Commissioner of the Corruption and Crime Commission.

The CHAIRMAN: Thank you. We have a number of questions to ask of you today. Do you wish to provide the committee with an opening statement to this hearing?

Mr Roberts-Smith: Yes, thank you, Mr Chairman.

The CHAIRMAN: Please do so.

Mr Roberts-Smith: The commission has been operating now for five years and, with the Parliament about to consider changes to the Corruption and Crime Commission Act, now is an important time for the future of the commission. With the extensive publicity the commission has generated over the past five years, it is easy to lose sight of the broader picture. As the then Leader

of the Opposition, the now Premier, Mr Colin Barnett said in the second reading of the Corruption and Crime Commission Bill —

> The issue of corruption is one of great importance. Corruption, whether it occurs within the Police Service or the public service, cannot be tolerated. This Parliament has a responsibility to make sure that the law and the funding is in place to ensure that we have a strong and consistent stand against corruption. The public is entitled to expect the highest level of integrity from those responsible for enforcing laws and those entrusted with a range of public functions within the public sector. Any corruption that occurs within the public sector has an ability to undermine our justice system, the rights of individuals and the ability to protect members of the community. We are all, in a sense, either directly or indirectly threatened by any corruption or criminal conduct within either the Police Service or the public sector at large.

Since its inception the commission has done much to help the state take a strong stand against corruption and misconduct. Over the past five years the commission has tabled 28 reports in the Parliament and held 92 days of public hearings involving 157 witnesses and 111 private hearings over 167 days. It has conducted 19 integrity testing programs and received and assessed more than 12 000 complaints and notifications of misconduct. That is almost 50 a week. Twenty-three per cent of the allegations investigated were substantiated. The commission has monitored 7 300 investigations by agencies and departments into allegations of misconduct. It has reviewed the outcome of 8 500 completed investigations into alleged misconduct by agencies and departments. It has charged 58 people, including 34 public officers, with 458 criminal offences and, of those charges, had a conviction rate of more than 88 per cent. It has delivered more than 380 corruption, prevention and education sessions and 450 consultations involving 13 500 people for a range of Western Australian public authorities in metropolitan and regional areas. It has recently launched the misconduct resistance framework, an Australian first, which assists agencies to assess their particular misconduct risks and appropriately deal with them.

It has been working closely with the state's other oversight agencies as part of the integrity coordinating group to improve and streamline oversight, and has been an integral member of the Australian Public Sector Anti-corruption Conference along with New South Wales Independent Commission against Corruption and Queensland's Crime and Misconduct Commission. These conferences help increase the knowledge around corruption issues and improve cooperation between agencies. This shows the extent to which the commission has been fulfilling one of its main purposes under the act, which is to improve continuously the integrity of, and reduce the incidence of misconduct in, the public sector.

Since the commission started five years ago, the list of charges and convictions include corruption, bribery, stealing and receiving, disclosing official information, drug offences and unlawful use of computers. They are serious offences that need to be acted on. The public hearings the commission is holding this week into the inspection, licensing and registration of motor vehicles involve allegations that could endanger lives on our roads. But below the level of criminality is a layer of behaviour that corrodes the integrity of the public sector and with which only an anti-corruption agency can effectively deal and help implement the appropriate changes to policies and procedures. Most of our work never hits the front page. It is quietly working with agencies and public officers to improve processes to lessen the risk of misconduct.

[10.10 am]

The main purposes of the Corruption and Crime Commission Act are to combat and reduce the incidence of organised crime, and to continuously improve the integrity of and reduce the incidence of misconduct in the public sector. As the committee knows, the word "misconduct" in the CCC act covers a number of things. It includes corruption, the commission of criminal offences by public officers, conduct that involves breach of trust or that is dishonest, acting out of personal interest

rather than in the public interest, and misusing or disclosing confidential information, amongst other things. The CCC act says that its purposes are to be achieved primarily by establishing the Corruption and Crime Commission as a permanent commission. So far as misconduct is concerned, the CCC act says that the commission is to help public authorities deal effectively and appropriately with misconduct by increasing their capacity to do so while retaining power to itself investigate cases of misconduct, particularly serious misconduct. This is important because it means that the emphasis is always on enabling individual departments or agencies to themselves deal with misconduct. In fact, the vast majority of allegations are referred back to the department or agency to investigate, with the commission monitoring the conduct of the investigation and reviewing it when it is concluded. I shall give the committee more details about this later in this opening statement.

I mentioned the primary way in which the act's purposes are to be achieved is by the establishment of the CCC as a permanent commission. Given some of the recent public commentary about the commission and its reports, it is worth reflecting for a moment on what that actually means. The CCC is, in effect, a standing or permanent royal commission of inquiry. Royal or other commissions of inquiry were so-called because they were originally established on an ad hoc basis by royal prerogative. In Australia they are now generally established under statute, such as the Royal Commission Act 1955 of Western Australia. Royal commissions of inquiry are advisory bodies appointed under the royal prerogative or by governments to inquire into particular matters, make assessments of information they obtain and report their findings or opinions. They cease to exist once they make their report. Because their opinions, findings or recommendations have no legal consequence, the degree to which their reports will gain public, government or parliamentary acceptance depends on public confidence in their processes and, most importantly, on the standing and reputation of the royal commissioner. That is why, for the most important or most political inquiries, one hears calls for the establishment of a judicial royal commission or a judicial inquiry. Of course, a judicial inquiry is a contradiction in terms because an administrative inquiry of that kind is not an exercise of judicial power. What the call is really for is an inquiry conducted by someone in whom the community has confidence to run it fairly and effectively and whose opinions and report will be respected. It is an attempt to give the standing, confidence and respect given to judicial office to an administrative inquiry. Unlike a court, whose decisions do determine legal rights and obligations, because a royal commission can only express an opinion or a finding of fact, which has no legal effect, a commission of inquiry will serve the public purpose only to the extent that it has the confidence of the community. That is why there is no appeal against the opinions, findings or reports of a royal commission or commission of inquiry. It is because they do not determine legal rights or obligations and their opinions only carry weight to the extent they enjoy the confidence of the community.

The fact that the CCC is, in effect, a permanent royal commission of inquiry and the conduct of public hearings in particular have been difficult for many to understand, including some members of the legal profession. Public hearings are not a court; they do not determine guilt or innocence. Public hearings are part of an investigation. They are part of an exercise in uncovering and exposing facts, expressing opinions and making recommendations. It is important to be able to hold hearings in public where appropriate to avoid the perceptions of secrecy and lack of transparency that caused our predecessor, the Anti-Corruption Commission, to lose the confidence of the public.

I turn now to address a number of issues that have been ventilated in the media in recent times. I begin with the criticism that commission investigations or public hearings and reports are taking a long time. When I took up my appointment as commissioner on 5 June 2007, the commission was still in the course of a number of long-running investigations, some of which had been inherited from the Anti-Corruption Commission. There were some reports in the course of preparation and there were several others on which reports had yet to be done. During the period following Commissioner Hammond's resignation in March and the commencement of my term in June 2007, then Acting Commissioner McKerracher QC, now Hon Justice McKerracher of the Federal Court,

assumed responsibility for writing the commission's report on the Smiths Beach investigation and Acting Commissioner Shanahan SC assumed responsibility for writing the report into the investigation of public officers' dealings with Mr Minniti. That situation continued after I commenced as commissioner.

Since September 2007 the commission has tabled 12 reports on investigations plus two annual reports. Seven parliamentary reports on commission investigations were tabled in the last six months of 2008. Reports that may still be tabled out of the investigations concerning public officer responses to lobbyists are those relating to: Broome Pearling; Wanneroo Council; Yeelirrie; and Mr John Halden. The commission does not propose to present a report on Broome airport. Criminal charges have been laid arising out of that investigation, and they are presently before the courts. The commission considers that those will adequately ventilate the issues. The commission currently has a number of operations or investigations in progress but, apart from those mentioned, none concern lobbyists. I make the point, and it is an important one, that the investigation into the dealings of public officers with certain lobbyists was quite an exceptional investigation. Early in its life the commission became aware of allegations of misconduct involving the influence of lobbyists around a proposed development at Smiths Beach near Yallingup. The allegations concerned influence at the highest level of government. The commission was aware that in exposing the activities of powerful people, it would itself come under enormous pressure and attack from numerous sources. That prediction has proved to be true. However, an integrity agency doing its job has no choice; it has to investigate the allegations of misconduct without fear or favour, and that is what the commission has done. The subsequent public hearings and reports to date have shaken political life in this state to its core. While the commission's investigation into Smiths Beach was well advanced when the first of the public hearings was held in October 2006, the investigations into the subsequent issues around lobbying had only just begun. However, the allegations were so serious that it was imperative to expose the alleged behaviour so government could consider the implications and take whatever action it considered necessary.

I recently looked again at the report of the WA Inc royal commission and was struck by how similar the practices it exposed are to those considered by this commission. It is as if little has changed over the past 20 years, despite changes to legislation and the creation of new agencies to deal with integrity issues.

[10.20 am]

If nothing else, this shows the importance of having a standing royal commission. The public hearings that were conducted around these matters were held, as I have said, at a very early stage of what developed into a very long, complex and multi-facetted investigation of a kind we are unlikely to see again. Commissioner Hammond decided that it was in the public interest to hold those hearings in public, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, as the CCC act required him to do. The decision to hold those hearings in publics was made by Commissioner Hammond in large part because of a concern that misconduct was then occurring that needed to be exposed so that appropriate steps could be taken to stop or prevent it, given that the investigation would likely not be completed and reports tabled for many months, and to encourage people with relevant information to come forward. As counsel assisting said in his opening address on 12 February 2007 the commission's purpose in part was to enable —

> …other bodies [to] take immediate action to ensure good governance is not compromised. Public hearings may enable those bodies to take such action as they think fit and in an expeditious way.

Although since June 2007 I have conducted hearings over some 43 days—including organised crime hearings—in relation to a range of matters, until the last few weeks I had not held any hearings in public. That appears to have met with the approval of the former parliamentary

inspector, who has pointed out that the default position under the Corruption and Crime Commission Act is that hearings are to be in private. However, my decision in those cases to date was primarily for operational reasons; that is, because the particular investigations were still covert. That was not so with the public hearings held recently in relation to vehicle examiners of the DPI. That investigation had by then moved into its overt stage. Further public hearings in that matter have been scheduled for tomorrow and the rest of this week.

I should put on record my own view with respect to public hearings. I acknowledge that the default position under the CCC act is that hearings are to be conducted in private. They may, however, be conducted in public if it is in the public interest to do so after weighing the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements. I am conscious that the commission's predecessor, the Anti-Corruption Commission, which could not hold hearings in public, suffered largely in the public mind because of a perception that it was secretive and lacked transparency. I am mindful that public hearings are important in enhancing public confidence in the commission, as they allow the public to see it at work. They can also encourage potential witnesses to come forward and they can allow governments or agencies to take early action to prevent ongoing misconduct. But considerations such as these must always be balanced against the potential for prejudice or reputational damage to individuals or organisations.

In a public hearing of this committee on 27 February 2008 I reported that I had directed priority be given to the completion of particular inquiries that had arisen out of the lobbying investigation. I explained then some of the measures I had taken to progress them and the reports relating to them. I am concerned that there are still possibly three particular reports coming out of that investigation that are not complete. That is because the inquiries themselves were or are still continuing. I am determined that those remaining reports be completed as soon as possible. In the meantime, reports on investigations commenced or conducted during my period as commissioner have been quicker. By way of example, allegations of possible misconduct by Messrs McGrath, Quigley and Wyatt were referred to the Procedure and Privileges Committee on 28 August 2007. The committee resolved to conduct an inquiry and referred that to the commission on 21 September 2007. The investigation was conducted and the report was tabled on 10 June 2008.

Arising out of events in March 2007, allegations of misconduct by Dr Neale Fong were received by the commission on 22 June 2007. The commission conducted an investigation between June and December 2007 and tabled its report on 25 January 2008.

The commission conducted an investigation into alleged misconduct by officers of the Department of Fisheries from March 2007 to September 2008. The commission report incorrectly gives this latter date at paragraph 36 as September 2007. The commission tabled its report on 30 October 2008. Allegations of possible misconduct by Mr John Bowler arose out of events between February and December 2006, and they were referred to the Speaker of the Legislative Assembly on 26 May 2008. On 18 June 2008 the privileges committee resolved to conduct an inquiry and referred that to the commission. The commission report was tabled on 6 November that year.

I turn to investigations briefly and can inform the committee that the commission conducted 66 active investigations of its own during 2008. Many are still in progress. I am unable to say more about them now for obvious operational reasons, so I come to misconduct allegations against commission officers. Mr Burke recently claimed to the media that the former parliamentary inspector, Mr Malcolm McCusker, QC, had counselled the commission to investigate the role and actions of a senior investigator with a view to charging him with misconduct. Mr Burke said the commission held no investigation and the senior officer continues to perform his role. This claim also involved allegations that the commission in some way improperly obtained warrants for telecommunications intercepts. In fact, there was an investigation. It was initiated by the then parliamentary inspector, Mr McCusker, QC, and referred by him to the acting parliamentary inspector, Mr Ken Martin, QC, in June 2008. Mr Martin conducted a full investigation, including

the examination of a number of commission officers in private hearing, and presented a confidential report to the parliamentary inspector and the commission on 4 November 2008. It is not the commission's report and it is not for the commission to edit or release selected parts of it. However, the acting parliamentary inspector has authorised me to provide the following information, and I note he has written to the committee in similar terms and that the committee issued a media release about that last Friday. There were seven terms of reference. They included the allegation of misconduct by the senior investigator referred to. The acting parliamentary inspector found there was no misconduct. Mr Martin said that the terms of reference that were of dominant significance to his report were three that concerned, in the context of the commission's Smith beach investigation, the procedures used by the commission in its applications for and the obtaining of telecommunications interception and surveillance device warrants. Those three terms of reference required the acting parliamentary inspector to examine —

> (5) The Commission procedures used in the application and obtaining of warrants under the Telecommunication (Interception and Access) Act 1979 and the Surveillance Devices Act 1998 in the Smith's Beach investigation.
>
> (6) The evidence contained in the affidavits in support of the applications for those warrants.
>
> (7) Whether information obtained by virtue of those warrants issued under the Telecommunication (Interception and Access) Act 1979 and the Surveillance Devices Act 1998 in the Smith's Beach investigation was used by the commission for any purpose other than the Smith's Beach investigation.

There have been media reports implying that the commission has refused to give material used to obtain telephone intercept warrants to the parliamentary inspector so as to avoid oversight. That is untrue. The commission would be in breach of commonwealth law if it gave that material no anyone not authorised to receive it. I should make the point here that the only circumstance in which the commonwealth legislation authorises the parliamentary inspector to access the commission's telecommunications warrants, applications and affidavits is when conducting a formal inquiry under section 197 of the CCC act, which gives him all the powers of a royal commission for that purpose.

[10.30 am]

As he was doing that, the commission accordingly gave Mr Martin complete access to materials of that kind required by him for his inquiry. As to these matters, Mr Martin found that the telephone intercept applications were properly and honestly founded in law and supported by the evidentiary material available. He did recommend supporting affidavits in future be more clearly expressed, especially as to whether the reasonable suspicion was that an offence had been committed or would be committed in the future. In fact, the commission had already made improvements in its processes to that end. Mr Martin wrote —

> As to Term of Reference 7, regarding the use of information obtained by virtue of warrants for a purpose or purposes other than the Smiths Beach investigation, the course of this inquiry did not, in my assessment, reveal any credible evidence sustaining a concern in that quarter. Nor did I apprehend counsel assisting the inquiry to be submitting in his concluding written submissions that any matter had emerged in the course of the inquiry, sustaining such a concern.

Mr Martin stated his overall position in these words —

> I find myself, at conclusion of my inquiry, in a position where I did not see it appropriate to suggest any adverse findings of misconduct as against the CCC, or its officers. I do propose however to make some observations bearing upon the "appropriateness" of the content of the affidavits as used by the CCC, to obtain the compulsive warrants referred to. My

> observations are however only in the nature of recommendations by me to the CCC, directed towards hopefully improving for the future, an overall "appropriateness" of its procedures—in the CCC going about the obtaining of such compulsive warrants. I emphasise that my observations are made by way of intended assistance only, and they carry no pejorative connotations against the CCC, or any of its officers. Moreover, I could not and do not seek to bind the CCC to implementing any of my recommendations. Obviously, the CCC will determine these matters for itself. Nevertheless, it is my intention that the CCC receive my report in the aim of this statutory office providing potential assistance, as to the CCC's procedures.

I reiterate that the commission has accepted Mr Martin's recommendations in that spirit and has implemented them.

I turn now to the proposition that the commission has not had a single success. There has, in fact, been only one occasion on which criticisms of a commission investigation and report, such as those made by the former parliamentary inspector, have gone before a court. That was the application by Dr Wally Cox, which went to the Court of Appeal in May last year. He was seeking to have the court quash those parts of the commission's Smiths Beach report that expressed adverse opinion about him. He put forward seven grounds, most of which argued the same or similar criticisms that Mr McCusker had made of the same report in so far as it had concerned other public officers. These included that the commission —

(1) had not correctly identified an applicable norm of conduct;

(2) had failed to accord procedural fairness because the wording of its opinion of misconduct in the final report was not the same as that in a letter under section 86 advising him of a possible adverse opinion;

(3) erred in finding Dr Cox was acting in the performance of his functions when he went to a private lunch with Mr Burke and Mr Grill;

(4) failed to properly deal with the question whether Dr Cox's conduct could provide reasonable grounds for termination;

(5) failed to apply an objective standard to whether or not there had been misconduct;

(6) failed to take a material consideration into account; and

(7) took a flawed and unfair approach to fact finding.

The court considered each of those grounds and unanimously rejected all of them. One commentator has been reported as saying that the court did not deal with the issues. Even a cursory reading of the judgment shows that that is incorrect. Indeed, at paragraph 118 of his judgment, the then president of the Court of Appeal, Hon Justice Steytler, said —

> Not surprisingly, the legislature has placed emphasis on the need for integrity and impartiality in public servants: s.9(b) of the PSM Act and the Code. Dr Cox must have known that he was invited to lunch only because of his position. He knew that Messrs Burke and Grill intended to discuss the Smiths Beach development. He knew that this would be done at a private lunch with no-one else present. It was him who tried to avoid a perception of a conflict of interest by asking Mr Grill to shift the proposed location for the lunch to somewhere more discreet. It was undoubtedly up to the CCC to form the opinion that this lack of impartiality, on the part of a very senior public servant in a position of substantial influence, was serious misconduct of a kind that could constitute a disciplinary offence providing reasonable grounds for the termination of a person's office or employment as a public service officer under the PSM Act.

I move to charges of criminal offences. Although the commission's operational focus is on investigating whether or not misconduct has occurred or is occurring, which, as I have emphasised

is not necessarily concerned with possible criminal offences, the commission will recommend consideration of, or lay charges and prosecute them, when necessary and appropriate. In fact, during 2008 the commission laid a total 97 charges of criminal offences, not including alternative charges against particular individuals, against 22 people. Of those 97 charges, 39 convictions were recorded as a result of guilty pleas. The remaining charges laid by the commission during 2008 are still pending.

Some examples of the 2008 charges, as well as some from previous years which were resolved in 2008, include, by way of example, a TAFE lecturer who lost hundreds of thousands of dollars of his students' money gambling on high-risk stocks and paying his personal expenses was charged by the commission with 37 counts of stealing and three counts of fraud. He was convicted of all but one of the charges after a three-week trial and is presently awaiting sentence. The commission charged a senior officer of the Department of Health with 50 counts of forgery and 50 counts of uttering. These concerned fabricated invoices and receipts for work-related expenses. After trial before a magistrate, he was found not guilty because the magistrate was not satisfied the prosecution had proved an intent to defraud. The commission has appealed to the Supreme Court. The appeal was heard in December and judgment was reserved.

A commission investigation into allegations of misconduct by employees of the Fremantle Port Authority resulted in criminal charges against six people. Offences ranged from stealing as a servant, receiving stolen property, cultivating or possessing cannabis and several minor drug charges. Five of the six persons pleaded guilty. One pleaded not guilty and his trial is still to be heard. All the staff involved were dismissed by the Fremantle Port Authority.

In June 2007 Landgate notified the commission of possible misconduct by some of its officers. Following a commission investigation, which included the use of telephone intercepts, surveillance devices, the calling of 10 witnesses over four days of private hearings and an integrity testing operation, the commission charged three public officers and another person with serious criminal offences. A developer pleaded guilty to bribing a public officer and was fined $10 000 in the District Court in September 2008. One public officer pleaded guilty to three charges of accepting bribes. In October 2007 the District Court imposed fines of $10 000 for each of the first two charges and a 12-month community-based order on the third. A second public officer also pleaded guilty to three offences of accepting bribes. In the District Court in October last year he was fined $10 000 on the first, $15 000 on the second and sentenced to 16 months' imprisonment, suspended for two years, on the third. The cash bribes were given so that the Landgate employees would expedite the approval of multimillion-dollar development applications. The remaining officer pleaded not guilty to two counts of accepting bribes and his trial in the District Court is pending.

The commission held an investigation and a series of private hearings into allegations of unlawful release of information and inappropriate association by a police detective sergeant. The commission subsequently charged the detective sergeant with one count of corruption—or in the alternative, disclosing official secrets—22 counts of unlawful use of a police computer, two offences of playing a restricted police interview to an unauthorised person, two offences of making a visual recording of a private sexual activity and two offences of communicating a record of a private sexual activity.

[10.40 am]

These matters are presently proceeding through the court.

The commission conducted investigations into allegations that a prisoner, Chuck Sun Lau, who escaped from the police Central Law Courts detention area, had been assisted to do so by Western Australia Police officers. The inquiry concluded that there had been no misconduct by Western Australian police. The most likely explanation for the escape was inadequate physical security arrangements in the detention area at the time.

A senior officer of the Department for Planning and Infrastructure was found guilty of giving false evidence to the commission.

A registered nurse at Hakea prison has recently been sentenced to eight months jail for five offences of giving false evidence to the commission.

Similar charges against another prison officer and her de facto partner are pending.

A different investigation into allegations that a prison officer at Casuarina Prison had agreed to traffic a quantity of amphetamines to a serving prisoner resulted in charges by the commission against that officer.

A prisoner arranged for his de facto to supply the prison officer with an eight-ball—3.5 grams of amphetamine—to smuggle into the prison. The officer, who was himself an amphetamine user, was to get half the drug for himself as payment for taking the other half into the prison. He was charged with possessing amphetamine with intent to sell or supply, possessing a prohibited drug, using a prohibited drug, and possessing a smoking implement. He was convicted and given a global penalty of a $5 000 fine.

I move now to the assertions recently made that the CCC is out of control and seeking to place itself above Parliament. Some people have repeatedly attacked the commission by claiming that it is an organisation that is "out of control" and which "wants to place itself above Parliament".

Prior to accepting the appointment as commissioner I had been a Supreme Court Judge for some six and a half years, Judge Advocate General of the Australian Defence Force for almost as long and a lawyer for some 40 years. My whole life has been based on the rule of law and respect for the supremacy of Parliament. I would hardly be likely to jettison that and to suddenly act in a way that would be completely contrary to all of that. But the falsity of this particular criticism is, in any event, demonstrated by not only what the commission has consistently said publicly under both Commissioner Hammond and me, but also by the commission's consistent responsiveness both to this committee and to the parliamentary inspector. By way of example of the former, the commission's view of the importance of the role of the parliamentary inspector has consistently been that expressed at page 2 of its "Report on an Administrative Matter Relating to the Functions of the Commission" tabled on 14 March 2008. It reads —

> The Commission believes the Parliamentary Inspector has a very important role that is absolutely necessary and critical to the effective operation of the CCC Act. The external and independent monitoring performed by the parliamentary inspector to ensure that the Commission's operations are conducted in accordance with the CCC Act and the other laws and that its procedures are effective and appropriate, gives the Parliament, the community and the Commission itself the confidence that the exercise of the Commission's extensive powers is appropriately subject to parliamentary scrutiny and legislative control.

That this is no mere platitude is apparent from the commission's response to the scrutiny of the parliamentary inspector over the past 12 months. Most of the auditing work of the former parliamentary inspector has been done by his principal legal officer, Mr Murray Alder. During the past 12 months Mr Alder completed audits of all surveillance device warrants, assumed identity authorisations and controlled operation authorisations dating back to the establishment of the commission in January 2004. He identified no issues with any of those audits. The commission notes Mr Alder will continue to audit those areas quarterly.

In November 2008, Mr Alder commenced general audits of particular commission operations or investigations selected by him. Over the past two months of 2008, he audited nine commission operations by accessing and examining the individual investigation records. He identified no issue arising out of them.

In response to complaints made to the parliamentary inspector by persons dissatisfied with the way the commission dealt with their matters, Mr Alder called for and examined 49 files from the

investigations review and complaints assessment branch over the year. They were all dealt with to his and the parliamentary inspector's satisfaction.

In addition, there were other matters about which the former parliamentary inspector himself wrote to the commission. It is my understanding none of those resulted in any significant disagreement, although correspondence from Mr McCusker on or just before 31 December 2008 to complainants, which suggests otherwise, has been coming to the commission's attention—mostly through the media—in recent weeks.

Over the past 12 months, commission officers have spent some 2 550 hours responding to the parliamentary inspector, or otherwise dealing with parliamentary inspector matters. That equates to 340 working days. It is noteworthy that the only significant issue on which there has been a difference of view between the commission and the former parliamentary inspector concerns the way in which he has undertaken reviews and presented reports on the outcome of commission investigations and reports resulting in Parliament and the public being presented with conflicting opinions or views about those matters. That is a matter with which the committee has been dealing for some time and the current position is as reflected in the public statement made about it by this committee following a private hearing of 4 February 2009. I refer to that public statement and say no more about it except to advise the committee that, in accordance with it, the commission discontinued the Supreme Court proceedings referred to on 6 February 2009.

I move to the investigations review and complaints assessment area, or IRCA. Notifications or complaints of misconduct made to the commission come first to the investigations review and complaints assessment branch. In 2008 IRCA, received 2 752 notifications containing 3 128 allegations. They assessed 2 692 complaints. Over the same period, the branch monitored 1 830 ongoing investigations being conducted by other agencies, and reviewed 1 989 investigations completed by other agencies. Of those completed investigations, the agencies had found the allegations sustained in 25 per cent of the cases.

Police: The commission's police audit team has conducted many audits of how police have dealt with complaints against police throughout 2008 involving visits to the following districts and other units: Peel, Northam, Joondalup, Fremantle, south west, central metropolitan, east metropolitan, south east metropolitan, Kimberley, west metropolitan, the internal affairs unit, the traffic and operations support unit and the specialist crime unit. The overall outcome from completed audits has been positive, resulting in greater communication between commission case officers and police internal investigators in order to try to resolve particular cases.

Health: The organisational review team continued its misconduct management review of WA health, which began in 2007. The reviews have taken a staged approach, focussing on a particular hospital or health service or misconduct theme. A working paper is then provided to WA health at the completion of each stage for comment and discussion.

Reviews have been conducted on Royal Perth Hospital, Princess Margaret Hospital and the Kimberley Rural Health Network.

[10.50 am]

A thematic review has been conducted on the managing and handling of schedule 8 and schedule 4 drugs within WA health. Drugs in hospitals are considered to be a high misconduct risk. In all, a commission team visited 10 hospital sites, including varied metropolitan and country hospitals and a central department division. A total of 126 interviews were conducted with a range of managers and executives with responsibility for drug management. The commission has completed a draft working paper which has been presented to the Department of Health for comment. The commission would like to commend the assistance of the department and of WA health staff at the sites in assisting the commission to undertake these reviews. The commission looks forward to working with the Department of Health in order to improve how misconduct is managed within the

public health sector. As part of the commission's usual consultancy with WA health and as part of the review process, meetings continue to occur between various commission officers, corruption prevention senior consultants, the manager of IRCA and the director of operations, and relevant staff of the department. I have had several meetings with the director general, Dr Peter Flett, who has worked with the commission on this review and generally.

Corrective Services has implemented a new process whereby lower level investigations are being conducted locally at each prison by trained prison officers. Concerns about the adequacy of some of these investigations prompted the commission to liaise more closely with departmental investigators to streamline the notification process. Again, this is consistent with the commission's legislative obligation to help public authorities deal effectively and appropriately with misconduct. In July 2008 two commission officers attended the Corrective Services Training Academy and delivered a presentation to the inaugural local investigators course on the minimum standard required for section 33 referred investigations conducted locally within prisons and reviewed by the commission. Feedback from corrective services trainers indicated that the presence of commission officers was well received and endorsed the importance of the local investigation's process.

The commission completed a detailed examination of several incidents that arose over the Australia Day 2008 weekend. The review of each incident is now to be the subject of an overall summary and analysis. The final discussion paper is intended to be discussed with the chief executive officer of the Public Transport Authority, Mr Reece Waldock, in the early part of 2009. The commission records its appreciation for the cooperation and assistance that it has received from Mr Waldock and his staff. Issues relating to the Railway Employees Agreement 2006, which prevent the PTA from pursuing disciplinary proceedings, were identified in 2008. These restrictions impinged negatively on accountability and transparency with respect to discipline in the PTA. It is understood that the PTA intends to review the agreement in order to resolve these issues.

Regular liaison meetings between IRCA officers and the Department of Education and Training are continuing. Use of force regulations have been clarified and resolved.

The commission is currently conducting a review of the Department for Planning and Infrastructure's approach to preventing and managing misconduct. This review is being conducted under the commission's prevention and education function, with the full cooperation of DPI. The commission particularly appreciates the support and assistance of the director general, Mr Eric Lumsden. The purpose of the review is to assist DPI in developing and improving its systems and processes for preventing misconduct and thereby building its capacity to prevent, detect and manage misconduct. A discussion paper concluding phase 1 of the review, DPI's operations division and strategic corporate support division is currently being finalised.

The commission is working on a project to conduct research in collaboration with the Office of the Public Sector Standards Commissioner and the Department of the Premier and Cabinet on disciplinary provisions in the Public Sector Management Act 1994 with a view to making appropriate recommendations to Parliament and establishing misconduct investigation references for agencies. The project commenced in November 2008 and the initial phase is to scope resource issues, level of collaboration required by the participants and develop an action plan.

In November and December 2008 a group of specialist officers from across the commission and I conducted three regional outreach visits to Broome, Kununurra and Kalgoorlie. Officers from the operations directorate and corruption prevention, education and research directorate conducted presentations and provided specialist services and advice to public servants and members of the regional and rural community. At each site I hosted an event with community leaders and took part in presentations to senior public officers. In total, 238 people attended 17 workshops or presentations on topics including conflict of interest, the commission's new misconduct resistance package and an overview of the workings of the commission. Fifteen individual agencies were visited by CCC officers to provide information and advice on matters relating to misconduct and

how the CCC can help them. A number of confidential interviews were conducted by investigators at the request of community members or public servants.

The commission works closely with the Queensland Crime and Misconduct Commission, the Independent Commission Against Corruption and the Police Integrity Commission in New South Wales and the Office of Police Integrity in Victoria. The commission is working closely with the Corruption and Crime Commission in Queensland and the Independent Commission Against Corruption in New South Wales in the planning of the next Australian Public Sector Anti-Corruption Conference, which is to be held in Brisbane in the last week of July 2009. APSACC09 is supported by the Premiers of all three states. The commission has also established and maintains close relationships with other anti-corruption agencies in the South-East Asian region, particularly the Independent Commission against Corruption in Hong Kong and the Corrupt Practices Investigation Bureau in Singapore.

In June 2008 the commission released the framework "Misconduct Resistance: An Integrated Governance Approach to Protecting Agency Integrity" to assist public officers to more effectively manage their misconduct risks. In October 2008 a statewide education program aimed at promoting uptake of the framework was launched by His Excellency the Governor Dr Ken Michael AC with a breakfast forum for public sector leaders. The forum was attended by over 180 leaders, directors general, chief executive officers, mayors, presidents and other senior government officials from across the public sector, representing both country and metropolitan areas and the full spectrum of public authorities; that is, departments, boards, universities, public utilities and local government councils. Also in November 2008 the first of an ongoing series of quarterly metropolitan practitioner forums was hosted by the commission and attended by 130 public officers from 58 different agencies. Two regional practitioner forums were also held as part of the commission's regional outreach program in Broome and Kalgoorlie.

Educational products and materials being developed by the commission to support uptake and implementation of the misconduct resistance framework will be available on the commission's website. Both the leader forum and practitioner forums were recorded in anticipation of being used in the development of an educational DVD about the framework and are available to be viewed online in the short term. All the commission's misconduct resistance materials are available online. The commission continues to publish a regular newsletter as part of its corruption prevention and education function. Topics covered in the newsletter include misconduct issues, corruption prevention activities and examples of organisations taking positive steps toward corruption prevention and trends.

At their request, I appeared and gave evidence at a public hearing of the commonwealth Parliamentary Joint Committee on the Australian Crime Commission in Perth on 4 July 2008. That committee was inquiring into legislative arrangements to outlaw serious and organised crime groups. On 17 November 2008, at the request of the Joint Committee on the Australian Commission for Law Enforcement Integrity, I also appeared before a public hearing of that committee.

[11.00 am]

The transcripts of these hearings are available on the commonwealth Parliament web site. This committee will know that, contrary to reports at the time, I, in fact, supported the establishment of a parliamentary inspector for ACLEI with a role broadly similar to that which the CCC act gives the parliamentary inspector of this state.

ICG Forum: The commission worked collaboratively with the Ombudsman of Western Australia, the Office the Auditor General and the Office of the Public Sector Standards Commissioner to coordinate and present the ICG Forum at Government House ballroom on 30 October 2008 in front of 170 attendees. The forum was entitled "Taking Action on Integrity Issues" and was facilitated by former ABC news presented Peter Holland targeting high-level public sector employees.

In conclusion, Mr Chairman, may I say that, overall, the commission has had an exceptionally busy time over the past 12 months and all the indications are that that will continue to be the case for the foreseeable future. Thank you.

The CHAIRMAN: Thank you very much, commissioner. That was a comprehensive statement. During it you made mention of a scoping paper between the commission, the public sector standards commissioner and the Department of the Premier and Cabinet regarding reforms to the Public Sector Management Act. Would it be possible for the committee to receive a copy of that scoping paper?

Mr Roberts-Smith: Yes, I am sure that would be fine.

The CHAIRMAN: That would be much appreciated.

The committee is concerned—I think that is the correct word—that there have been complaints recently ventilated from a number of quarters, and certainly made known by the media, that all the commission does is concern itself with allegations of misconduct by public officers, particularly in connection with the activities of lobbyists, and that it has not conducted a single investigation into organised crime in Western Australia. Would you care to respond to that?

Mr Roberts-Smith: Yes. The first point to be made in response to this is that the CCC act requires the commission to investigate allegations of misconduct by public officers. It is legally obliged to assess and investigate them in accordance with the act. The second point is that the claim implies misconduct by public officers is trivial and that the commission should not be wasting its time. That implication is quite misconceived. The Western Australian community expects public officers to act with integrity in the public interest and not to the advantage of their own or other private interests. This is no trivial expectation. Misconduct by public officers, ranging from corruption to serious breaches of integrity or their public duty, potentially strikes at the very heart of good governance of the state. This has also been recognised in reports by the Crime and Misconduct Commission in Queensland and the Independent Commission Against Corruption in New South Wales.

The third and most important point is that the CCC act does not allow the commission to itself investigate organised crime. Section 7A of the CCC act says that —

> The main purposes of this Act are —
>
> (a) to combat and reduce the incidence of organised crime; and
>
> (b) to improve continuously the integrity of, and to reduce the incidence of misconduct in, the public sector.

So how does the CCC act, as it stands, say the commission is to combat and reduce the incidence of organised crime? The answer to that question is to be found in section 7B of the act which says that —

> The Commission is to be able to authorise the use of investigative powers not ordinarily available to the police service to effectively investigate particular cases of organised crime.

I repeat: the central features of how the act's purpose of combating organised crime is to be achieved are by the commission authorising the police to use investigative powers under the CCC act that the police would not otherwise have and for the purpose of investigating particular cases of organised crime. These powers, which the commission may authorise the police to use in investigating organised crime, are contained in part 4 of the CCC act. If the commission does authorise the police to use those powers, the role of the commission under the CCC act is then confined to monitoring the police use of those powers, not itself taking any active part in the investigation. The powers that the commission may authorise the police to use in respect of organised crime in which they would not otherwise have, include summonsing persons to compulsorily attend before the commission to give evidence in private hearing; entering and searching places without a warrant; stopping, detaining and searching persons without a warrant;

authorising a police officer to use an assumed identity; authorising police officers to conduct a controlled operation; that is to say, to do things for the purpose of investigating organised crime, which would otherwise amount to participation in a criminal offence; and issuing a fortification warning notice upon which the police may subsequently act to remove fortifications of premises used for the purpose of organised crime. It is of course important to understand that the CCC act imposes strict requirements on the police to report to the commission each time these powers are exercised and on the commission itself to monitor the use of these powers by the police.

To return to the point of criticism, there is presently nothing in the CCC act that allows the commission itself to actively investigate organised crime unless of course that is an aspect of alleged misconduct by a public officer.

All of that having been said, Commissioner of Police Karl O'Callaghan and I have been determined to give effect to part 4, the police exceptional powers, of the CCC act as best as may be done. I am pleased to report to the committee that since July 2008 the Commissioner of Police has made three applications for the use of exceptional powers in relation to organised crime under part 4 of the act, and I have approved each of them. For operational reasons, I cannot say any more about them other than that those investigations have included, among other things, the use of compulsory examinations of persons before the commission in relation to organised crime. In light of some complaints in the media that no organised crime figures have been called to appear before public hearings of the commission, it is necessary to point out that the CCC act requires that organised crime hearings be held in private. The act does not allow them to be held in public.

Mr J.N. HYDE: Even though they are required to be held in private, there is still the ability, and I think in the interests of transparency, for some reporting or acknowledgement of their involvement in private hearings as long as it is not something that is ongoing and operational?

Mr Roberts-Smith: As I indicated, the commission is required to monitor the use of the police powers and also of course to report on its own activities. I envisage that in its annual report, for example, the commission will make brief reference to the making of any exceptional powers findings which may be made in the course of a year and giving very, very broad details about that. However, I must emphasise that these are not commission investigations, of course; they are police investigations and it is not for the commission to publicly disclose any operational issue coming out of any such investigation. That is entirely a matter for the police. But I would report, for example, as I have done just now, at the end of any period perhaps that private hearings had been conducted and obviously report in general terms on the results of the commission's monitoring of the police use of the powers, and if there were any concerns about that it may well be that a confidential report would need to be presented to the committee in private hearings, for example.

Mr J.N. HYDE: The intent of the legislation was clearly that involvement of organised crime with public servants would be an issue that the CCC would be proactive in. You were talking about divesting powers to the police. Surely the area of public servant involvement with organised crime—or if we are so successful in WA that there are no public servants involved in organised crime—is something we should know about. What we are trying to drill down to is how much emphasis is being placed on organised crime with the powers you do have to directly tackle it.

[11.10 am]

Mr Roberts-Smith: I repeat that we do not have any power to directly tackle organised crime, although, as I said, if a public officer were found to be engaged in dealings with organised crime, we can investigate the public officer and whether or not the public officer has been engaged in misconduct. As with any other of our investigations, if, in the course of that investigation, we were to come across offences that had been committed by people who were not public officers, we would have the same options to deal with them as we have ordinarily; that is to say, in appropriate cases we could refer them to the police or to the DPP or somewhere else to either continue further investigations or consider charges or in some instances where it is appropriate, charge them and

prosecute them ourselves. I must emphasise that we do not have any power to investigate organised crime as such. We only have the power as the act stands to investigate allegations of misconduct against public officers.

Mr J.N. HYDE: Through you, Mr Chairman —

The CHAIRMAN: I do not want to continue down that particular path at this point in time. I would prefer to go through some of the questions that I have before me. I take your point, and it is something that we will explore at a later stage.

Commissioner, quite apart from the minimal organised crime function that you have already mentioned and the expectation in the minds of the public that the commission should have broader powers in some instances, there still appears to be this public confusion or uncertainty about just what the powers of the commission are. Would you be good enough to explore that for me.

Mr Roberts-Smith: I do agree that there does appear to be some misunderstanding about the powers that the CCC act gives to the commission. The commission is able to approve the use of exceptional powers by the WA Police under part 4 of the act. I have just been talking about that. The powers that the CCC act gives the commission itself are, first, to require a public officer or authority to provide a statement giving particular information. We can compel any person to produce documents or things. We can summons people to attend before the commission and produce records or other things and be examined. In those examinations, the privilege of self-incrimination does not apply but there is also a protection to the people concerned in that whatever they do say in evidence before the commission cannot be used against them in a prosecution for any criminal offence other than an offence under the CCC act itself. Authorised officers of the commission may without warrant enter and inspect premises occupied or used by a public authority or public officer and inspect things. Officers of the commission may apply to the Supreme Court for a search warrant to search for and seize documents or things relevant to the commission's investigation of suspected serious misconduct. The commissioner may approve the use of assumed identities by officers of the commission. The commissioner may grant authority to conduct a controlled operation or an integrity testing program; that is, to take part in conduct that would otherwise be a criminal offence for the purpose of obtaining evidence of misconduct and to conduct a program to test the integrity of any public officer or class of public officer respectively.

What is noteworthy about the powers given to the commission by the CCC act is that they do not include the power to intercept telecommunications or use surveillance devices. Those powers are generally made available to police, law enforcement and other approved agencies by other legislation. The commission is an approved agency under those laws. They are therefore powers that are available generally to police and other agencies, including the commission. Telecommunication interception is done under the commonwealth Telecommunications (Interception and Access) Act 1979. Surveillance devices may be used in accordance with the Surveillance Devices Act 1998 of Western Australia, although there is also a commonwealth Surveillance Devices Act but the commission has very rarely needed to use that.

The CHAIRMAN: Commissioner, are you in a position to clarify the commission's power to charge individuals for criminal offences and the ability, if any, to prosecute through criminal proceedings?

Mr Roberts-Smith: The commissioner is ex officio an authorised person under the CCC act and may also appoint other officers of the commission to be authorised persons under the CCC act. That carries with it a number of consequences not only in relation to the CCC act but also in relation to other legislation such as the Criminal Investigation Act 2006 of Western Australia and various other pieces of legislation. The answer to the question is reasonably complex. The powers that accrue to authorised officers under the commission regime include, for example, a range of police powers—powers held by WA Police. They include powers to charge and prosecute for offences as well as a range of other things. In addition, all our investigators are actually special constables appointed by

the Commissioner of Police, although those appointments do not make the officers subject to the Commissioner of Police. There is a specific proviso that they remain responsible to the commissioner of the CCC, but they do have the powers of special constables under the Police Act. It is a reasonably complex answer and one needs to look at a range of legislative provisions.

Mr J.N. HYDE: Is there a situation where you would be laying charges and then getting the DPP to undertake the prosecution, or would your own resources be carrying that through?

Mr Roberts-Smith: Because we are essentially acting in the same way as police do in laying charges and prosecuting initially, or in relation to summary matters before a magistrate, we essentially do the same thing. Just as police may charge somebody with an indictable offence that will ultimately have to go to the District or Supreme Court, we may do that. The case may be clear enough that we do not need, as they would not need in similar circumstances, to get further advice from the DPP, for example. There may be other cases—again, the situation is the same with the police—where if the case is particularly complex or there is some uncertainty about it or for some appropriate reason, we would consider it appropriate to seek the advice of the DPP on the prospects of success or what the offence charge should be or whatever. If the advice comes back from the DPP that they consider not only that there is a reasonable prospect of conviction but the prosecution is in the public interest—and we are talking about an indictable offence—they would normally deal with it from the Magistrates Court onwards into the trial before a judge and jury. Again, like the police, if we are dealing with summary matters that are going to be dealt with in a Magistrates Court, we would ordinarily prosecute those, as would the police, unless there is a particular reason for asking the DPP to do so. We have in place a protocol with the DPP's office, which is essentially the same as the protocol it has in place with the police in terms of the prosecution of charges and which ones the DPP will do and which ones the agency will do.

[11.20 am]

The CHAIRMAN: Commissioner, from what I have read in the newspapers, there appear to be concerns from a number of individuals, and possibly more generally throughout the community, that the commission is not subject to any controls over its use of telephone interception and surveillance devices and that it is not accountable for nor subject to any external oversight of its use of these powers. Are those concerns justified?

Mr Roberts-Smith: No, they are not. There are in fact very strict controls on telecommunications interception. The only way the commission can listen to a person's telephone conversations is by applying to a commonwealth judicial officer for the issue of a warrant under what I will call the "TI act". The TI act sets out in detail what information and application for a warrant must include and what a judicial officer must be satisfied about before they have the authority to issue the warrant. That includes that it must be for the investigation of a serious offence, generally meaning one punishable by seven or more years' imprisonment. Once the commission or other agency is granted the warrant, strict rules are again set out in the legislation that apply to the commission's record keeping and reporting of its use of the intercept of telecommunications.

The commission's use of TI material, or "product" as it is referred to, is strictly controlled by the TI act. Generally speaking, the commission could only use telephone intercept material in an "exempt proceeding" or for a "permitted purpose". Both those terms are defined in the legislation. This allows the commission, however, to use telephone intercept product for prosecutions, provided the maximum penalty for the offence is at least three years' imprisonment, and in its misconduct hearings and reports. That is specifically allowed for in the legislation itself. Intercepted telecommunications can be played in commission hearings only if they are relevant to the scope and purpose of the particular investigation. A TI warrant is granted for only a specific period, which cannot be more than 90 days. If further interception is thought necessary, another application for a warrant must be made in the same way to the judicial officer.

Acting as agent for the commonwealth Ombudsman, the state Ombudsman is required to inspect the commission's TI warrants and its holdings regularly. This includes checking compliance with the limits on how the TI can be used and requires that copies of warrant documentation and reporting of the use of telephone intercepts be provided to the state Attorney General who must pass it to the commonwealth Attorney General. TI material cannot be held for ever. I think one suggestion recently made conjured up the notion of commission officers sitting around listening to TI material or watching surveillance devices and so forth for ever and a day. That is simply not possible. The legislation stipulates that TI material must be destroyed once the commission is satisfied that the information is not likely to be required for a permitted purpose—in other words, a commission investigation, a report on such an investigation, or a prosecution for a prescribed offence. Destruction is also audited by the Ombudsman.

There are also very strict controls on the use of surveillance devices. Subject to limited exceptions, such devices can only be used under authority of a warrant issued by a judge of the Supreme Court. The Surveillance Devices Act details the information about which the judge must be satisfied before the judge can issue the warrant. Once again, the warrant lasts for a maximum of 90 days and, if continuing surveillance is required, an application for an extension of the warrant must be made to the judge every 90 days. The judge must be satisfied of a number of criteria set out in the Surveillance Devices Act, including that the device is needed for the investigation of a suspected criminal offence or suspected misconduct within the meaning of the CCC act. The surveillance devices act permits the commission to use SD product for any legal proceedings, including prosecutions and commission hearings and reports. The SD act requires the commission to keep specific records and to provide the Attorney General with an annual report setting out certain information relating to the commission's surveillance device activities.

Unlike the telephone interception act, the Surveillance Devices Act does not establish a scheme for the inspection and audit of SD records and activities, but, as it is a state law, the parliamentary inspector has full access to and may audit all the commission's SD records. As I indicated earlier, Mr Murray Alder from the parliamentary inspector's office, has audited every SD warrant application dating back to the commencement of the commission in January 2004 and has found no issue with any of them.

The Surveillance Devices Act requires the commission to destroy any SD records and product once satisfied that it is not likely to be required for the investigation of the offence or misconduct for which the warrant was issued or another offence or the decision whether to prosecute for any offence or the prosecution of an offence. I remind committee members that "an offence" in this context includes misconduct within the meaning of the CCC act.

Mr J.N. HYDE: Further to that, you correctly mentioned that there must be the potential for a likely conviction of the seven year or three-year threshold for an offence.

Mr Roberts-Smith: Not a likely conviction; we are talking about a reasonable suspicion that an offence of a particular kind may have been committed or may be committed.

Mr J.N. HYDE: Okay, well it is not a fishing expedition.

Mr Roberts-Smith: No. One of the things that the legislation makes quite clear is that the judicial officer—under the Surveillance Devices Act a Supreme Court judge—must be satisfied of all the factual material, the results of the investigation to date, for example, which give rise to the reasonable suspicion of the particular offence, so that if the judicial officer is not satisfied of that, he refuses the warrant. The judicial officer does, of course, have the option of saying, "I am not satisfied with that, go away and give me more information". It is done by sworn affidavit. I also make the point again, as I did in my earlier remarks, that the criticism that the commission has obtained telecommunications interception warrants either for improper purposes or based on an inadequate factual background was itself very much the dominant theme of the inquiry conducted by Acting Parliamentary Inspector Mr Ken Martin in relation to Smith's Beach. Having conducted

that inquiry, he found the commission had acted entirely correctly and properly and the material reasonably supported the application for the warrant.

Mr J.N. HYDE: You mentioned earlier the 80 per cent conviction rate with prosecutions arising from CCC investigations. Has that been drilled down? I am happy to get this on notice if you do not have it. Is the figure or prosecutions involving TI or SD material comparable to the 80 per cent, much higher or lower?

Mr Roberts-Smith: I am not sure I quite understand the question. If it is whether all, most or many of those prosecutions involved TI or surveillance device material, the answer would be that a significant proportion would have done, which no doubt accounts for the high rate of guilty pleas. It is a bit difficult to plead not guilty if you are recorded handing over the money as a bribe, for example.

Mr J.N. HYDE: Would it be possible at a later stage to get that information?

Mr Roberts-Smith: I can take it on notice to provide that.

The CHAIRMAN: There appears to have been some concern about people attending public or private hearings and whether, when called upon to give evidence, they are allowed to have their own legal representation. Can you explain what the situation is?

Mr Roberts-Smith: The suggestion has been made that people appearing before the commission have not been allowed to have lawyers represent them. That is not and has never been the case. The fact is that witnesses who are summonsed to appear before the commission at a private or public hearing are legally entitled to be represented by a lawyer. If the commission has notice that a witness will not have a lawyer at a hearing, the commission may, if it considers that it would be in the public interest to do so, arrange legal representation for the witness. We have in fact done that.

[11.30 am]

The Corruption and Crime Commission Act authorises the commission to allow the lawyer for a person to represent that person during evidence given by another witness if there are special circumstances. A lawyer representing a witness in a commission hearing may examine that witness so far as the commission thinks fit on any matter the commission considers relevant. I should point out and remind committee members that we are not talking here about either a civil or a criminal trial of an adversarial nature between competing parties; we are talking about the conduct of an investigation and inquiry. That makes a significant difference.

So far as public officers are concerned, the Western Australian government has established a fund to provide legal assistance for serving and former public officers called as witnesses or served with notices or summonses by the commission. To qualify for such legal assistance, the commission must have requested the person to attend an interview, served a notice to provide a statement of information, served a notice to provide documents or other things or served a summons to appear to give evidence and the person must be a former or serving public officer. I emphasise that the grant of legal assistance under this arrangement is not subject to a means test. A present or former public officer may choose a Legal Aid WA lawyer or their own lawyer from private practice provided that lawyer accepts the standard applicable rates or, in private practice, is chosen from a panel set up for this purpose by Legal Aid WA. Finally, a person who is summonsed to appear at a commission hearing is also given a document that explains in detail what I have just said about legal representation.

The CHAIRMAN: Commissioner, thank you for your evidence before the committee today. 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 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.

Hearing concluded at 11.32 am