

**JOINT STANDING COMMITTEE
ON THE CORRUPTION AND CRIME COMMISSION**

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 1 AUGUST 2007**

SESSION TWO - OPEN SESSION

Members

**Hon Ken Travers (Chairman)
Mr J.H.D. Day (Deputy Chairman)
Hon Ray Halligan
Mrs Judy Hughes**

[The committee took evidence in open session]

Hearing commenced at 11.36 am.

ROBERTS-SMITH, MR LEN
SILVERSTONE, MR MICHAEL JOSEPH WILLIAM
ANTICICH, MR NICHOLAS ANDREW
CASHMAN, MR MICHAEL ANTHONY
FROYLAND, DR IRENE DAGMAR
GRANT, MS VANESSA ROBIN
GREEN, MR ALAN
UPTON-DAVIS, MR PETER

The CHAIRMAN: I guess one of the issues that I wanted to sort of just ask was in terms of, obviously, we have had for the first time a changeover of the commissioner and just whether or not that issue about the retirement and the appointment of yourself as the commissioner, whether there were any issues of business continuity that have arisen out of that, and whether that has caused any issues that we need to be looking at and considering?

Mr Roberts-Smith: Well, I think the pretty obvious ones have to do with the completion of ongoing inquiries and the preparation of reports in particular. Obviously, there was a lacuna there in terms of the inquiries which have been completed but in respect of which the reports have not yet been written, and that is the process we are going through now. The two principal reports are obviously the Operation Caroline one, which has to do with Mr Minniti and Mr D'Orazio; the other one is the Smith's Beach report. That process had been underway for quite some time. Commissioner Hammond, of course, did the public and the private hearings in relation to that. Acting Commissioner Shanahan is dealing with the Operation Caroline report and Acting Commissioner McKerracher is dealing with the Smith's Beach report. They have been underway doing that, of course, for some time prior to my appointment, and when I commenced at the commission I indicated to them that I did not intend to come in and ride over the top; that I would leave that with them, because even though they had not necessarily, each of them, had those respective inquiries all the way through themselves, clearly neither had I. I knew even less about them - and nothing about the evidence - and I thought that since they were doing it, they should keep with it, and that process is still being worked through. I did indicate to them that obviously - because I think these are the first reports where they have been really significant issues of the sort of thing that members of the committee will be aware of arising out of those inquiries - how these reports were to be approached and expressed, and including in part some of the things we have been discussing this morning would obviously have ramifications down the track for the future work of the commission and future reports. Therefore, I wanted them to keep me in the loop about how they were going with that, and, of course, I think they also found it of benefit to be able to discuss various aspects of the report with me in a general way. But it seems to me very important for anything which might have ramifications down the track to be brought to my attention so that at least in that respect I can have some input, and that is how it has been working, and I think satisfactorily so. But it is very much an evolutionary process again, because it is really the first time the commission has had to deal with a lot of these particular issues, which are big issues, and which need to have an underpinning, if you like, jurisprudential platform in relation to them, which would apply also to the future business of the commission.

There is another aspect though, in response to your question, Mr Chairman, and that has to do with the appointments of acting commissioners. Commissioner Shanahan's appointment is due to expire

shortly as an acting commissioner. I know the Chief Justice has initiated the process for replacement in accordance with the procedures of the act. There was an initial question, I think, as to whether the reappointment of a commissioner, an acting commissioner, would necessarily attract all of the procedural steps that the act currently prescribes for initial appointments. The Solicitor General's view is that it does do so and therefore all of those processes have to be gone through again, including advertising on a national basis and then, of course, waiting for responses and so on.

Mr J.H.D. DAY: Even if he is just continuing on to complete the matter that he has been working on for some time?

Mr Roberts-Smith: Well, that would be so, because the other aspect of that is that there is no provision in our act which would enable a commissioner or acting commissioner who retires or whose term expires to continue working on a report to conclusion. The obvious analogy is, for example, with a judicial officer, where there is provision in the relevant legislation, which says if the judge retires, he or she can continue to work on judgements outstanding and so forth and deliver them after retirement notwithstanding.

The CHAIRMAN: Do you really want that provision?

Mr Roberts-Smith: I do not, no. But it is one issue - I raise it because I do not necessarily want the provision and one can see why it is not there in the context of the act. It is simply because of the process that, in fact, happened when Commissioner Hammond retired. It is not like a judge doing a judgement; it is not a trial; it is an investigation and inquiry, and the head of the inquiry can be replaced from time to time and the matter can continue. So, that is the rationale for it and that is what happened here. But it can here potentially create a significant logistical problem one would think, if one assumes for instance that Commissioner Shanahan is not reappointed or not reappointed in the reasonably immediate future, because that report will then have to be started all over again, probably by me, without having heard any of the evidence or any of the submissions and basically having to read the whole thing and start again. So, there is a logistical problem potentially there, I think. The same problem will arise, of course, if Commissioner Shanahan is not reappointed. But if the department of the Premier and this committee resolve to appoint someone else, well then again, either that person or I will have to start again to do that report. So, these are practical problems which do flow from the actual experience of working with the act.

Mr J.H.D. DAY: Well, when does his term expire?

Mr Roberts-Smith: It is the end of this month, I think.

Mr Silverstone: 23 August.

Mr Roberts-Smith: The twenty-third, is it?

Mr Cashman: 22 August.

Mr Roberts-Smith: 22 August; well, that is this month.

Mr J.H.D. DAY: So, are you confident that the completion of the report he is working on will either happen by that time or there will be a practical outcome?

Mr Roberts-Smith: I do not think that I could say with any confidence that it will be completed by that time, because I know from my discussions with him that as a result of the parliamentary inspector's report and what was said about the matters with which Commissioner Shanahan is dealing, he considers himself to be in a very difficult position. My understanding is that effectively he has put that on hold until these issues with the parliamentary inspector are resolved because he does not quite know how to deal with them.

Mrs J. HUGHES: Mr Chairman, I do have to leave. I apologise. I have to leave; excuse my absence. But can I ask just one quick question before I go?

The CHAIRMAN: Yes.

Mrs J. HUGHES: In relation to some of the reports that are ongoing, we have local government elections looming in October. The report - is that likely to come down before people elect their new representatives or will it be after the election? I was just wondering.

Mr Roberts-Smith: When are the elections?

Mrs J. HUGHES: October of this year. I am just wondering about the impact of your report.

Mr Roberts-Smith: We are very anxious to get both of those reports tabled as soon as possible. We are going through the section 86 procedure still at the moment. When I say that, what is happening is that we are getting representations from the individuals' legal representatives. I think it is probably fair to say that in relation to some of those, they are using every possible argument to either stop the report completely or at least to keep their people out of it entirely. We have to deal with that in a properly considered way according to natural justice and complying with section 86. At the same time we do not see our obligation under that section as being to satisfy individuals or their legal representatives about the content of the reports. Obviously, if we adhere to adverse opinions, we will not satisfy them. That is an ongoing process and that is where we are at the moment. They do of course have other avenues available to them. We are still in closed session, I think.

The CHAIRMAN: No.

Mr Roberts-Smith: No we are not. All right; I will not develop the other avenues.

Mrs J. HUGHES: I just wondered, because it might be quite an issue down that way for people.

Mr Roberts-Smith: All I can say about that, through you, Mr Chairman, is that we are again acutely conscious that there is a lot hanging on these reports, and ramifications for the sector as a whole.

The CHAIRMAN: When you talk about Smiths Beach, because you had a whole range of hearings involved with that, does that include all the other matters or just the matters relating to the Busselton Shire Council?

Mr Roberts-Smith: Just the Busselton Shire Council.

The CHAIRMAN: Some of the other inquiries and public hearings you have held also relate to local government, so I suspect it is the same.

Mr Roberts-Smith: A lot of those things are matters that are still ongoing, which I mentioned earlier and which I will be taking over myself.

Mr J.H.D. DAY: Just to conclude on the Minniti investigation and Mr Shanahan, are you confident that there will be a logical or commonsense outcome in relation to reappointing him if necessary?

Mr Roberts-Smith: That is a matter for the Chief Justice's committee to begin with. He has got to recommend and put three names to the Premier. The Premier has to pick one and put it to this committee. That is the process.

The CHAIRMAN: The point is that there is no provision for an automatic extension in those circumstances.

Mr Roberts-Smith: No. That is one of the suggestions I made earlier, which we will be suggesting in our legislative review submission. There ought to be a much simpler provision for extending a commissioner's or acting commissioner's appointment.

Mr J.H.D. DAY: One would hope that the individuals involved in that process would take a commonsense approach.

Mr Roberts-Smith: Certainly. I understand that the Chief Justice has put some recommendations forward. I believe that to be so but I do not know any more than that.

Mr J.H.D. DAY: You mean there has been the advertising process already.

Mr Roberts-Smith: That has been done.

The CHAIRMAN: I understand the issues that you raise. I sit on another committee which has a similar issue: an executive officer appointment coming up and how to make sure that people comply with all the public sector requirements but continue to have that sense of continuity. It makes for interesting times. I think this has been raised previously, and we probably touched on it a little throughout today, but there has been the issue about protocols between public and private hearings. I was just wondering whether there has been any progress in the development of those protocols.

Mr Roberts-Smith: There are some developments internally within the commission, in the sense that it is an issue which I have addressed pretty much from the outset of my arrival there. I have required, through the executive director, that the matters that are set out in section 140 of the act as going to the decision as to whether a hearing will be a public hearing or not are to be addressed in a particular way, so that we can be certain, first of all, that we have complied with the requirements of the act and made that public interest assessment in accordance with the statutory factors and, secondly, that that process is adequately and properly documented, so that it stands up to scrutiny in terms of process as well. Beyond that, all one can say is, again, it is an issue that is clearly very sensitive and it is a determination that the commissioner or acting commissioner in the particular instance has to make with, again, a great deal of sensitivity and careful consideration, and we are very acutely conscious of that.

The CHAIRMAN: I guess flowing on from that, too, is the issue of the use of suppression orders. I do not know if this issue has been raised previously, but certainly one of the issues I have noticed in terms of looking at some of your transcripts is that you may suppress a name but still leave in a title or other ways in which someone could very easily identify the person who was being referred to in the question.

Mr Roberts-Smith: I am surprised that that is happening; obviously you are not. From my own past experience in different areas, one would expect a suppression order of that kind to be expressed in terms of prohibiting publication of the name or another matter likely to identify the individual.

The CHAIRMAN: It is certainly something I would encourage you to have a look at then, if that is the case, because I certainly found it almost comical at times that you would suppress a name but then, if you continue to read through the transcript, you can actually very quickly work out who it was. I think there was an issue there where also in some cases you suppressed the names of ministers but not members of Parliament, and I think that is always an interesting question as to how you define who and when to suppress.

Mr Roberts-Smith: Again, I think that is right, and I have an indication I think of the sort of example you might be contemplating, Mr Chairman, from the previous hearings towards the end of last year, but my understanding is that decisions again have to be made on the basis of a particular individual and particular circumstances of the evidence in relation to them. It may be that there would be different orders made in relation to different people depending on what the evidence was going to be, what their roles were and a whole raft of other considerations. So there might be apparently inconsistent results that are actually not inconsistent. Maybe the solution to that is a better expression of the reasons for making a decision either way. I do not know if I can usefully say any more than that, other than in relation to public and private hearings, we are, of course, putting a submission together in relation to the general question.

Mr J.H.D. DAY: There has been an industrial relations matter raised with us by a complaint to the committee. It is certainly not something that we see our role as getting involved in and certainly not to duplicate the role of the Industrial Relations Commission. Could you or one of your colleagues

give us an outline of how you are dealing with that issue? You are probably aware of the issue I am talking about.

Mr Roberts-Smith: Yes, I am.

Mr J.H.D. DAY: As I understand it, the IRC did say there was a minor breach -

Mr Roberts-Smith: The Industrial Magistrate did.

Mr J.H.D. DAY: - by the CCC in relation to the appropriate act of Parliament regarding employment. Can you comment on that?

Mr Roberts-Smith: I might get the executive director to do that, or would you like to do that?

Ms Grant: Yes, commissioner. Mr Chairman, the matter involves an officer who worked in our corruption prevention area. It was after about a six or an eight or maybe a nine-month restructuring process within that directorate. It was deemed that with the structure that was required we needed to move that officer to another level, which was a level 8 position. He was employed as a level 9. The matter that was decided in the Industrial Relations Magistrates Court the other day when we received a caution of a matter that we did not have timely conversations and discussions with the gentleman concerned. He received a letter on 16 January. He lodged a grievance with the commission on the seventeenth. We replied in writing within the next week, and then commenced discussions with the gentleman on 25 January. I think then there were two or three further meetings, mediation processes and a whole range of issues with the officer concerned, to the point where the commission actually offered to reinstate him to a level 9 position within a restructure, so going to three teams, he would be managing one of the teams there and he was to have input with the director of that particular area to develop the job description file. All those offers were declined by that officer.

Mr J.H.D. DAY: So this officer had left the employment of the commission.

Ms Grant: No, at that stage he proceeded on sick leave, I think in April or May - it may even have been at the end of March. He proceeded on sick leave and stayed on sick leave I think through until about the middle of August of that particular year. There was considerable effort in written documentation, in mediation and industrially, using the CSA, to try to resolve the issue. There were a couple of situations where we thought we were in agreement with the particular officer that he would come through. The particular officer lodged the case, the one that was resolved I think a fortnight ago. We also have a couple of issues down with the WA Industrial Relations Commission.

Mr J.H.D. DAY: Just to conclude on that case, he has since left the employment of the commission. Is that right? Just to clarify it, you did say that he was offered reinstatement at level 9.

Ms Grant: That is right, back in early 2005 as part of a number of discussions we had with him. The first instance when the commission gave him that letter was on 16 January 2005, so it proceeded over probably 15 to 18 months of trying to get the officer back to work. We are now waiting for a decision in the WA Industrial Relations Commission, which would also give the commission some guidance on how our staff will return to the public sector, and we have about 38 or 40 permanent officers, on what mechanism they will return to the public sector when they choose - not when we choose, but when they choose - and at what level. It is quite important, and very important for those 40 staff as well as for this particular officer. There is another range of issues - whether their contracts are fixed term or not.

The CHAIRMAN: Does that go to the act in terms of the way the act is structured? Are there issues there we need to look at?

Ms Grant: Yes, it does. I understand that we have notified, or are about to, Gail Archer, that when these decisions come down for the WA Industrial Relations Commission, we would like to make

another submission, so that we can tidy up that part of the act. It is very silent on a number issues, and it does not make it easier when you lay it on top of some of those set provisions. These matters coming down from the Industrial Relations Commission are very important for the commission staff as a whole, let alone that particular officer. We ceased that particular officer's employment with the commission on or about 1 September. The relationship, despite mediation and lots of meetings -

Mr J.H.D. DAY: That was 2005, was it?

Ms Grant: It was 2006. He then returned to premier and cabinet, and I understand at the moment he is on secondment to Edith Cowan University. I am unaware of in what role. We also have a workers' compensation matter with the officer, and, as late as this Friday, WorkCover in a conciliation and directions hearing. I would foresee it may go to arbitration.

Mr Silverstone: I think I would underline and just come back to the matter of the Magistrates Court. The caution was around a very technical application of a particular section of the act. My understanding is that if you make a decision that has a considerable effect on an individual, you are required to consult with them in a specific way in accordance with this section 41. Our failure was the failure not to consult, but to consult in a specific way around that matter. We have adjusted our procedures since.

Mr Roberts-Smith: Section 41 requires the parties to have discussions and indeed specifically the employer to initiate discussions with the employee as soon as possible after the decision is made and to discuss, and it then lists the various matters that have to be discussed. The magistrate held that it is not sufficient, as indeed the commission has done, to write to the employee, affording an opportunity to discuss things generally afterwards, but indeed really it had to write in terms of mentioning section 41 and providing more than an opportunity but ensuring there were discussions and that those discussions were about those particular matters that are set out in section 41. We can provide a copy of the reasons for the decision if that would assist the committee.

[12 noon]

The CHAIRMAN: From my point of view, we need to focus on whether there are problems with the act and its structure. I do not think it is the committee's role to overview or to look at what the Western Australian Industrial Relations Commission does. One of the things that I am keen for the committee to do is to set protocols for when people have complaints. When people have a complaint, there are other avenues, such as the Industrial Relations Commission. That is the appropriate place to go, not this committee. It is a matter for the committee to ensure that the commission is responding when it gets a caution and to adjust its business practices. If I am right in understanding, Mr Silverstone, he indicated that the commission has understood and acknowledged the decision and that it will be adjusting its practices in the future.

Mr Roberts-Smith: The executive director has already put measures in train to do that.

The CHAIRMAN: As far as this committee is concerned, that should be the extent of its role; we should not be providing a second or third review of the commission's actions. The Industrial Magistrates Court and the Western Australian Industrial Relations Commission are the appropriate bodies to deal with those matters.

Mr Roberts-Smith: In relation to your real question about the act itself and the terms, my own perception - I think it is the view that I am getting from those around the table - is that the statutory five-year term is a problem. One aspect of it is the public service approach to what our people are entitled to if they happen to be permanent public servants before coming to the commission for a five-year term. The public service takes the view that they are entitled to go back to the public service at the level at which they left. They may well have come to the commission on promotion and had another promotion at the commission, so they might be two or three levels above the level they were on when they left the public service. The public service will take them back only at the

level at which they left. That is an obvious problem from our employees' point of view. The other aspect is the uncertainty with five-year terms. That applies across the board. That is likely to become a more significant issue, because the commission will soon be entering its fourth year. That will start to bite. My impression is that there is an air of uncertainty in certain quarters of the commission about what will happen to a lot of people when their five-year term is up. We seek to reassure them, but there are the obvious problems such as what we should say to people like that, what sort of assurances can we give and whether the commission be reappointing those people now. There is a range of other issues.

The CHAIRMAN: In a tight labour market I imagine the fight to retain quality staff is even more difficult. If you cannot give them the security of ongoing employment, they will look for it elsewhere if it is offered.

Mr Roberts-Smith: We are having difficulty in that respect in that our staff across the board are generally regarded as being very professional and competent at what they do. There are a diverse range of activities within the commission and, as a consequence, many of our staff are being poached and offered positions elsewhere for more money and at higher levels. From one perspective that is good because it recognises the quality of our people; however, from an organisational point of view, it is a potential disaster because, for all the reasons the chairman expressed, it is very difficult to replace them.

Mr J.H.D. DAY: I have a question about corruption prevention. Have you considered any programs for elected officers; that is, local government councillors and members of Parliament?

Dr Froyland: Certainly all of the programs we have rolled out, we have rolled them out to local government elected people where they have asked for them. They have been invited to all our sessions. We have not presumed to offer them to state elected members, but we would be more than happy to do that. The conflict of interest program that we are handing over to the Department of the Premier and Cabinet was a workshop program, and every time we offered it, we tailored it to the particular audience we were meeting with. We would certainly have been glad to offer that to elected members of the state. We presented it to some ministers and their ministerial officers, but only when they asked. We have not presumed to design one particularly for elected members.

Mr Roberts-Smith: There have been discussions with Mr Mal Wauchope of DCP about this both with me and with the other members of the integrity coordinating group. He is quite keen as we are - it is fair to say collectively, although I cannot purport to speak for the others - to have some sort of educational program in place for members of Parliament, particularly ministers and chief executive officers to deal not least of all with the relationship between them which, apparently, is occasionally fraught for various reasons. He is quite keen for that to be done. Indeed, a suggestion was made at one stage that special meetings be arranged with people at that level to do this.

The CHAIRMAN: We need to consider what role this committee can provide as an access point work and we should work with the Presiding Officers and others to determine whether we can start to provide professional development for members of Parliament. It is something we may continue to have discussions about.

Mr J.H.D. DAY: A briefing on your activities generally, which state agencies do provide from time to time, for members of Parliament would probably be a desirable thing. Some members might not want to go along but, generally speaking, I think there would be a reasonable degree of interest in knowing more about the commission's overall role.

Mr Roberts-Smith: Maybe we could have that at a neutral venue.

The CHAIRMAN: That is something we may continue to discuss with you in the future. As new members of the committee, we are still trying to find our feet. Working with DCP and tailoring some of that would be useful. We will close the formal ongoing hearing and move to the issue of our inquiry in a private session.

[Conclusion of open session.]
