JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 27 FEBRUARY 2008

SESSION ONE

Members

Hon Ken Travers (Chairman)
Mr John Day (Deputy Chairman)
Hon Ray Halligan
Mrs Judy Hughes

<001> H/4

Hearing commenced at 9.17 am

ROBERTS-SMITH, MR LEN
Commissioner, Corruption and Crime Commission, examined:

SILVERSTONE, MR MICHAEL JOSEPH
Executive Director, Corruption and Crime Commission, examined:

FROYLAND, DR IRENE DAGMAR
Director, Corruption Prevention, Corruption and Crime Commission, examined:

ANTICICH, MR NICHOLAS ANDREW
Director, Operations, Corruption and Crime Commission, examined:

CASHMAN, MR MICHAEL ANTHONY
Director, Legal Services, Corruption and Crime Commission, examined:

GRANT, MS VANESSA ROBIN
Director, Business Services, Corruption and Crime Commission, examined:

The CHAIRMAN: This committee hearing is a proceeding of Parliament and warrants the same respect that proceedings in the house itself deserve. Even though you are not required to give evidence on oath, any deliberate misleading of the committee may be regarded as a contempt of Parliament. Have each of the witnesses received and read the "Information for Witnesses" briefing sheet regarding giving evidence before parliamentary committees?

The Witnesses: Yes, we have received and read that information.

The CHAIRMAN: Thank you. I remind everyone that this is a public hearing. However, if there are any matters that you believe should be taken in private, please indicate that to us at the time. The committee will go into private session at the end of the public hearing if there are matters that people believe should be heard in private for operational or confidentiality reasons. I invite you to make any comments.

Mr Roberts-Smith: I thank you, Mr Chairman, and members of the committee. The commission welcomes this opportunity to meet with you today to discuss issues affecting it with you. Since we last met, there has been much to occupy the commission. I would like to begin today by highlighting some of the issues with which the commission has been involved. Since we last met, the commission has tabled three reports—on 5 October last year, a report by Acting Commissioner Neil McKerracher, QC, on the Smiths Beach investigation, which was based on earlier work by former Commissioner Hammond; on 21 December 2007, a report by Acting Commissioner Shanahan, SC, on the investigation of inappropriate associations between Western Australia police officers and Mr Minniti, which was based principally on earlier work by Commissioner Hammond; and on 25 January 2008, a report by me on the investigation of alleged misconduct concerning Dr Neale Fong, the Director General of the Department of Health. I understand that you may have questions about each of these reports, and I look forward to responding to those this morning.

The commission is working on reports on the public hearings on lobbying and public sector misconduct held last year. As part of that process, the commission referred allegations in respect of several members of the Legislative Assembly to the Speaker of the Legislative Assembly under section 27A of the act on 28 August 2007. In accordance with section 27B of the act, the Speaker referred the matter to the privilege committee, which subsequently resolved to carry out its own inquiry. Under that section of the act, if the privilege committee resolves to carry out its own inquiry, it must do so by directing the commission to act on its behalf. The committee so directed the commission on 21 September 2007. In conducting such an inquiry, the commission has all the powers, privileges, rights and immunities of a committee under the Parliamentary Privileges Act 1891 and may be assisted by parliamentary and commission officers. The commission is required to present its report to the Presiding Officer and to the privilege committee. The commission has conducted its inquiry on this reference and will be presenting its report in the near future.

The commission's investigations in respect of matters related to lobbying and public sector misconduct continue, and the commission is in the process of drafting the reports for tabling in Parliament in respect of those matters. I have directed that these are to be given priority, and administrative arrangements have been made to that end. Another major issue before the commission is the review of matters concerned with the arrest of Mr Dante Arthurs in 2003. That review is underway. Additionally, commission reports on alleged misconduct in relation to the trial of Mr Joe McDonald and in relation to the City of Bayswater council will be tabled once the section 86—the procedural fairness processes—are complete. I note that Acting Commissioner Dunford is drafting the report on the inquiry into the police investigation into the murder of Pamela Lawrence.

The commission has continued to conduct a number of serious misconduct investigations covering a range of public sector areas, but its capacity to work on these has been limited by two factors: first, the need to finalise its investigations in the matters awaiting reports to which I have referred; and, secondly, since early January, the Parliamentary Inspector has been especially active, focused mainly on, but not limited to, matters arising from the Smiths Beach report. I can inform the committee that more than 723 staff hours have been spent since 1 January in providing responses to the Parliamentary Inspector. Of that figure, over 86 hours have been my own time. As you will appreciate, Acting Commission McKerracher was responsible for finalising the report but was appointed a Justice of the Federal Court shortly after the Smiths Beach report was tabled. The Parliamentary Inspector's questions have necessitated me working through the commission's Smiths Beach files in order to form my own view in responding to the Parliamentary Inspector's questions. This has created its own challenges. It is not only that I had to deal with the material possessed by the commission, but also I have had to have regard to what may or may not have been in Acting Commissioner McKerracher's mind in forming his opinions. This is problematical and is one reason that even the superior courts avoid evidentiary reviews when dealing with judicial review of administrative inquiries.

I wish to emphasise that the commission believes that the Parliamentary Inspector has a very important role that is absolutely necessary and critical to the effective operation of the Corruption and Crime Commission Act. The external and independent monitoring performed by the Parliamentary Inspector to ensure that the commission's operations are conducted in accordance with the Corruption and Crime Commission Act and 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. While the commission has generally enjoyed a very effective relationship with the Parliamentary Inspector, there is disagreement over the interpretation of some of the powers of the Parliamentary Inspector in respect of his role.

Three important issues arise as a result of the response to the Smiths Beach report. First, the commission believes that the Parliamentary Inspector is acting beyond his authority as provided for under the Corruption and Crime Commission Act. The Parliamentary Inspector disagrees. Secondly,

the commission disagrees with the Parliamentary Inspector's analysis and report in respect to the commission concerning Mr Paul Frewer. It would not be proper for the commission and the commission would be failing to act with integrity if it were to withdraw its opinion and recommendation in relation to Mr Frewer when it does not believe them to have been wrong. The third matter is one that the commission foreshadowed in a letter to the committee yesterday, which the commission would ask be dealt with in closed session.

One issue that has arisen as a result of the commission's reports is confusion about the commission's opinions. Section 22(1) of the Corruption and Crime Commission Act is explicit. It states -

> . . . the Commission may make assessments and form opinions as to whether misconduct —
>
> (a) has or may have occurred;
>
> (b) is or may be occurring;
>
> (c) is or may be about to occur*;* or
>
> (d) is likely to occur.

The act further states that an opinion in respect to misconduct is not to be taken as a finding or opinion that a particular person has committed or is committing or is about to commit a criminal offence or disciplinary offence. This restriction under the act is an important one. The commission is an investigative body akin to a royal commission. Its function is to gather information, assess it in order to determine the facts, and then form opinions about misconduct while providing procedural fairness to the persons adversely affected. It may then make recommendations with regard to improvements to systems, policies and processes. Under section 43 of the act, it may also recommend that consideration be given to the prosecution of particular persons or the taking of disciplinary action against particular persons. I emphasise the form of words in the act that "consideration be given" to prosecution or disciplinary action. It is implicit in section 43 of the act that a recommendation that consideration be given to charging a person with a criminal offence or taking disciplinary proceedings against that person may or may not be accepted by the person to whom it is made. On the other hand, it may be accepted and consideration may be given to prosecution for a criminal offence or disciplinary proceeding. The body or person may decide not to prosecute or institute such prosecution or proceedings, or the recommendation may be accepted and the criminal prosecution is or disciplinary proceedings are taken, in which case, as in the ordinary course of events, that prosecution may either fail or succeed. The act implicitly recognises, therefore, that whatever the outcome of action taken subsequent to a commission opinion of misconduct and a consequent recommendation, that outcome does not affect the validity of the commission's reported assessment, opinion or recommendation.
[9.30 am]

It is that statutory framework and context which answers any questions about the standing of the commission's assessments, opinions and recommendations in respect of, for example, Mr Frewer, Mr Allen and Dr Cox. Notwithstanding the outcome of any departmental disciplinary or other proceedings against them I say that, noting, in passing that Dr Cox was apparently subject to some form of extra-regulatory process and not one by the Department of Agriculture and Food under the Public Sector Management Act 1994. As I have suggested, on occasion disciplinary or criminal processes by agencies outside the commission undertaken as a result of commission recommendations may produce different outcomes to opinions formed by the commission. That can occur for a number of reasons. The commission does not exercise judicial power. It does not make determinations that persons have committed criminal offences or disciplinary offences. Like any royal commission or equivalent body exercising the sort of powers the commission has, its opinions are only opinions albeit importantly expressed under the authority of the act in accordance with the Corruption and Crime Commission Act. The evidence which it may receive and act upon to inform

its opinions or make its assessments may be inadmissible in a court of law or not available to a disciplinary investigator. It may form its opinions or make its assessments on the basis not only of statements of witnesses or evidence from witnesses in hearings, but on the basis of consultations and investigations and other actions. The standard of proof which applies to the commission—like any royal commission—is on the balance of probabilities not beyond reasonable doubt as would be the case in criminal proceedings before a court. Further, those conducting investigations under the Public Sector Management Act may receive large and complex legal arguments in reply to allegations from the lawyers of those being investigated. Analysing these arguments to determine their merit requires considerable forensic investigative skill, legal ability and a detailed knowledge of all the available evidence.

The focus of the commission is misconduct in the public sector and, importantly, how this is managed by agencies, departments and public organisations. The commission is charged with helping public authorities to deal effectively and appropriately with misconduct by increasing their capacity to do so. Section 7B: in fulfilling this purpose the commission engages the sector through its investigations, review and assessment process and its corruption prevention arm. The commission can and does itself retain the power to investigate cases of misconduct, particularly serious misconduct. By definition in section 4 serious misconduct can involve criminal acts of corruption and criminal offences punishable by two or more years in prison. Notwithstanding the statutory emphasis on misconduct, I note that the commission has had considerable success in pursuing criminal charges. In the commission's short history 24 people have been charged and their proceedings completed. Of those, 21 have been convicted of at least one criminal offence; a conviction rate of 87.5 per cent. Once again, of the concluded proceedings 116 charges had been laid and of those 92 resulted in convictions, 23 were withdrawn—six as a result of plea negotiations—and one charge resulted in an acquittal after trial. Thus 79.3 percent of all charges laid have resulted in a conviction.

In addition to hearings in relation to the privileges committee reference and Dr Fong, to which I have referred, I have personally conducted a number of private hearings in relation to other matters since my appointment in June last year. They have been conducted privately because the investigations are covert and to have the hearings in public would compromise those investigations.

Let me mention allegations and complaints assessment. From July of 2007 to date, the commission has received 1 694 allegations. It has completed 1 332 assessments and reviewed 1 119 completed investigations from other agencies. This represents, broadly speaking, a similar trend to last year. The commission's task in respect of complaints assessment continues to be resource intensive and takes considerable effort and staff resources. In order to assist these processes, the commission introduced a new case management system and has back captured all allegation files dating back to 1 July 2006 into that system. As to the audit of complaints about police, the commission has introduced a new police audit and review process for dealing with complaints about police. It involves the establishment of a team within the complaints assessment area to audit the police investigation of less serious complaints against police in police districts in place of the system of reviewing all police complaint files. The first audit will start in about April this year. To date, commission officers have had meetings with the Western Australia Police, the Western Australia Police Union and the Aboriginal Legal Service of Western Australia in respect of the audit proposal. There appears to be a broad support from these stakeholders, and the commission is confident that it will lead to a more effective capacity to review the more important and serious matters in connection with complaints regarding police.

The first Australian public sector anti-corruption conference was conducted in Sydney in October of last year. It was attended by some 600 delegates from around Australia and some international delegates. This was arranged as a cooperative effort between this commission, the Independent Commission Against Corruption in New South Wales and the Crime and Misconduct Commission in Queensland. The conference was a considerable success and plans are underway to conduct the

next APSEC conference in Brisbane in July 2009 with the conference to occur here in Perth in 2011.

Let me speak of reviews. In terms of its corruption and prevention activities, the commission is currently undertaking reviews of the misconduct management mechanisms in the Department of Planning and Infrastructure and the Department of Health. These are long-running projects in which the commission looks at the way the requirements to deal with misconduct are dealt with within departments. The commission has previously conducted similar reviews in the Departments of Local Government and Regional Development, Education and Training, Consumer and Employment, Protection, Justice—now Corrective Services—and the government employees housing agency.

I move to perhaps a more prosaic topic for the moment and it is to do with the revision of documentation and templates within the commission. Shortly after my appointment commenced on 5 June last year I came to the view that the decision-making processes in the commission could be enhanced and the audit of them facilitated by changes to the documentation of those processes. I accordingly instituted a review of commission documentation of that time and as a result of which improvements have been made to documents setting out proposals to the commissioner for the conduct of investigations or operations; documents recording decisions made by the commissioner, including whether to conduct public or private hearings and the reasons for those decisions; and the wording of notices to persons requiring them to attend for examination or to produce documents and other similar documents, to simplify them and put them in more readily understandable English.

I come now to the question of a protocol in respect with holders of judicial office. Like many other apparently simple terms the expression "holder of a judicial office" has a particular defined meaning in the Corruption and Crime Commission Act. For convenience, I will for the moment refer simply to judicial officers. The commission can investigate allegations against judicial officers if those allegations concern judicial corruption under section 121 of the Criminal Code for conduct which is of a kind that, if established, would constitute grounds for removal from judicial office. In subsection 4 of section 27 of the act, when performing its functions in relation to the conduct of a judicial officer, the commission must proceed having proper regard for preserving the independence of judicial officers. Importantly, section 27(5) stipulates that when investigating a judicial officer, the commission must act in accordance with conditions and procedures formulated in continuing consultation with the Chief Justice.

[9.40 am]

My understanding of subsection (5) is that it contemplates a document setting out conditions and procedures of that kind in accordance with which individual investigations would be conducted; that is, it requires more than the commission formulating conditions and procedures in consultation with the Chief Justice on an ad hoc basis for each particular investigation of a judicial officer.

Accordingly, I initiated discussions with the Chief Justice to that end, and I am pleased to be able to report to the committee that yesterday the Chief Justice and I signed a protocol to give effect to section 27(5). With the concurrence of the Chief Justice, and with the leave of the committee, I seek to table the document titled "Protocol for the Investigation of Allegations Against Judicial Officers".

The CHAIRMAN: Thank you. Are you happy for that to be made a public document?

Mr Roberts-Smith: Yes, certainly.

The CHAIRMAN: That is something the committee will have to consider in due course.

Mr Roberts-Smith: The Chief Justice proposes to put it on the Supreme Court website and we will be putting it on the commission website.

The CHAIRMAN: Yes. So, it is already a public document?

Mr Roberts-Smith: It is not yet, but it will be shortly.

The CHAIRMAN: Yes.

Mr Roberts-Smith: I thought we would wait until we had presented it to the committee first.

The CHAIRMAN: Thank you!

Mr Roberts-Smith: In other areas the commission continues to meet regularly with the Ombudsman, the Auditor General and the Commissioner for Public Sector Standards, through the Integrity Coordinating Group, in order to coordinate the activities of these independent oversight bodies. This coordination is focused on the avoidance of unnecessary overlap of activity, whilst acknowledging that each body has its own statutory obligations. The commission assumes chairmanship of the group in May of this year. In addition, the commission continues to formally meet with Western Australia Police, the Department of Education and Training and the Department of Corrective Services. In addition, it has a formal information-sharing arrangement with the Department of Local Government and Regional Development.

I turn to education and corruption prevention. Major areas of education and prevention activities for the commission have been the continued development and presentation of workshops and educational events around conflicts of interest. The demand for these has been overwhelming and, consequently, the commission has sought assistance from the Department of the Premier and Cabinet, which has assumed overall responsibility for conflict of interest education and programs within the public sector. The Department of Local Government and Regional Development has also taken over responsibility for conducting workshops on that topic in its sector. The commission still conducts special conflicts of interest presentations on an as-required basis. On 30 October 2007 I gave an address at Edith Cowan University entitled, "Misconduct - Is That All There Is!" and on 22 February 2008 I addressed the Western Australian Local Government Association on the topic "What does the Corruption and Crime Commission actually do?" Both speeches are on the commission website.

The commission recently engaged a private research agency to conduct a pilot public perceptions survey to measure the perceptions and attitudes of the Western Australian public towards the commission and the Western Australian public sector. That report has just become available and I seek leave to table it for the information of the committee. We envisage that would also be a public document, Mr Chair.

The CHAIRMAN: Thank you.

Mr Roberts-Smith: Another major area of activity for the commission is the development of a whole-of-agency misconduct management mechanism conceptual framework. The intention here is for the commission to provide guidance for agencies on a whole-of-agency approach to dealing with misconduct. It is proposed to launch this framework in the middle of the year, accompanied by a range of educational materials and presentations. In June 2007 the commission published its first new misconduct newsletter, and the second was published in November. We propose publishing a third newsletter before June.

Legislative review: since we last met the commission has made extensive submissions to Ms Gail Archer, SC, for her review of the Corruption and Crime Commission Act. I understand that Ms Archer has provided her report to the Attorney General, who will table the report in Parliament shortly. I am aware that the committee has a number of questions on other matters, so I will conclude my opening remarks in order to respond to them.

The CHAIRMAN: Thank you for that very comprehensive outline of your activities. It has obviously been a very busy time.

You mentioned that you had set in place some templates for setting out proposals and reporting the decisions of the commission, particularly regarding the issue of public interest, as required under

section 140 about public versus private hearings. Are you able to explain that in a bit more detail? I think you are now saying that you have a policy in place about determining the guidelines for the criteria.

Mr Roberts-Smith: The policy has always been in place.

The CHAIRMAN: Yes.

Mr Roberts-Smith: The guidelines are more than that. The guidelines are indeed mandatory statutory criteria in section 140 of the act. However, perhaps I can explain it in this context because it has arisen, as the committee is well aware, in the media, at least, in the context of the private hearings in respect of Dr Neale Fong.

I can inform the committee that during 2007 and more recently, the commission came under much criticism for its decision to hold a number of public hearings about the Smiths Beach investigation. Those criticisms came particularly from persons who had been called as witnesses in the public hearings and were in fact the subject of adverse comment. During his term of office, Commissioner Hammond emphasised that the commission was very conscious of the potential for damage to the personal reputation or privacy infringements of individuals from requiring them to be examined in public hearings. He further emphasised that the commission is particularly mindful that section 139 of the Corruption and Crime Commission Act dictates that—except as provided for in section 140—hearings are to be conducted in private. Under section 140, the commission may conduct a hearing in public only if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so. That is what the legislation says. Commissioner Hammond also noted that even after a decision has been made to conduct a public hearing in relation to a particular investigation, the commission constantly bears those statutory criteria in mind and made decide to hear the evidence of individual witnesses in private or to adopt other measures to safeguard their privacy or protect their reputations, such as the making of orders prohibiting publication of their names or of evidence relating to them or the use of codenames, amongst others. Given the loudly voiced criticism from some quarters that the commission conducted public hearings in its Smiths Beach investigation, it is ironic that when the commission recently conducted private hearings in its investigation of allegations against Dr Neale Fong, the Director General of the Department of Health, it was subjected to media and other criticism for not conducting those hearings publicly. The decision to conduct those hearings in private was made having regard to, necessarily, the same statutory provisions; namely sections 139 and 140 of the act. The reasons were briefly explained at paragraph 2.7, page 19 of the commission's report into the investigation of Dr Fong, and I quote —

> In this case, there was no immediate benefit to be gained from public exposure of the Commission's investigation; there was no need for the public to be made aware of the evidence being obtained (for example, so that steps could be taken to stop some ongoing conduct). As the media had reported extensively on Dr Fong and his role as Director General of the DOH there was obviously substantial potential for prejudice to his reputation prior to the Commission evaluating the evidence and expressing any opinion in its report to Parliament. Having weighed those considerations the Commission could not conclude it would have been in the public interest to conduct public examinations.

If I might briefly elaborate, there were no benefits of public exposure and awareness which were necessary to put a stop to any continuing conduct or activity in the public sector. That is a significant point of difference between that inquiry and, for example, the Smiths Beach inquiry, either in relation to Dr Fong or any other public officer.

[9.50 am]

The commission understood there was considerable public and media interest in Dr Fong and his minister, Mr McGinty, because of their seniority and high profiles in the public sector and

government generally and because of the importance of their roles in public health. But interest of that kind would not have justified daily reporting of evidence given in a public hearing about the issues the subject of the commission's investigation. The benefit of public exposure and public awareness of the nature and extent of the communications between Dr Fong and Mr Burke and what Dr Fong told Mr McGinty about that, was to be obtained from its publication in the commission's report as, indeed, eventuated. As to the potential for prejudice or privacy infringements, the media had previously reported extensively on Dr Fong in his role as Director General of the Department of Health. There had been extensive publicity about the very issue being investigated. There could have been no doubt the media would have reported the evidence being given, the allegations being put and the content of emails and telephone conversations in which numerous other people were mentioned day-by-day and before the commission had an opportunity to make a considered assessment of their cogency and/or real relevance or to form any opinion on whether there had been misconduct. Bearing in mind that the commission was aware at the outset that it held emails between Dr Fong and Mr Burke over the relevant period, it was reasonable to anticipate the media would present evidence about that dramatically and to the substantial prejudice of Dr Fong's reputation well before the commission could form any opinion whether there had actually been any misconduct. Given that the Corruption and Crime Commission Act requires the commission to conduct an examination in private unless, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements it considers it to be in the public interest to hold the examination in public, the commission was unable to be satisfied that it would have been in the public interest to have had public hearings in that case.

Finally, I note the report in *The West Australian* on 2 February 2008 in which the parliamentary inspector is reported as saying —

> "I intend to raise with the commission the reasons for holding public hearings for a lot of individuals last year and a private hearing (into Dr Fong) and how they differentiate the two,"

I think I have just answered that question, but in so far as it might be taken to suggest that the fact that the commission has held public hearings in relation to one investigation and witnesses involved in that, it should therefore hold its hearings in another investigation involving different witnesses publicly; that suggestion is entirely fallacious. The fact that the commission has held hearings in public or in private in one matter is simply irrelevant to the statutory decision to hold them publicly or privately in another. A reason like that would, indeed, be completely outside the statutory criteria in section 140 of the act. It would be a failure to properly apply the statutory discretion in section 140 and would for that reason be quite wrong.

The CHAIRMAN: I appreciate that explanation of the differentiation between the different hearings. I guess the question still arises as to whether there is a requirement for a change in practice to ensure that the explanation you have just given here today to explain how you arrived at the decision and why it was different to others is out there in the public domain when you do report. I appreciate you did make some comments in your report, but, obviously, you have given a more extensive explanation today. I think you have indicated that you now have the policies in place to ensure that you record accurately in the commission how you arrived at the decision. How do we ensure that the public has confidence in the process by which you arrived at that decision?

Mr Roberts-Smith: There were processes in place. We would not want to be taken as suggesting that Commissioner Hammond did not have regard to the statutory criteria and, indeed, quite the contrary I think it was apparent —

The CHAIRMAN: But it is about the recording of that.

Mr Roberts-Smith: It is about how one documents these processes and, as I said at the outset, it seemed to me that there was scope for enhancing the process of documentation to identify the exercise of each statutory discretion or decision, which the act requires from time to time, so that

there would be a precise record of what decision was made, on what grounds and when and, obviously, for what reasons in each instance rather than, for example, having to look through, maybe, a set of memoranda to distil the reasons quite properly nonetheless. Rather than having to look through a range of documentation it is clearly, in my view, much better to simply have, if you like, decisions recorded as decisions so that they can be tracked and therefore audited. I think that goes to your question, Mr Chairman—audited appropriately and that would, I imagine, facilitate the parliamentary inspector's role in auditing decisions of that kind under our act because the documentation will be all there.

The CHAIRMAN: I guess my question is in terms of the public having confidence in that process. Obviously, I am assuming you are not intending to make your decisions public—they would still be internal documents and that record would be an internal document of the commission, not a public document.

Mr Roberts-Smith: It would be an internal document but as you will see in my report in relation to Dr Fong, I did make some observations about why that was a private hearing. It would probably be the case in relation to all reports that I produce in future that I would make some observation about that because I think it is something, clearly, that the community, the committee and the media are interested in. There may well be some reasons that we would not wish to disclose going to the very issues of confidentiality of witnesses or witness protection or things of that kind, but at least some general explanation of why hearings were conducted in public or not, as the case may be, would probably be useful.

Mr J.H.D. DAY: Thanks for that explanation, commissioner. Are you saying, in effect, that if the Smiths Beach inquiry were to be undertaken now, that either most of it or all of it, perhaps, would not be in a public hearing or are you satisfied that there were important reasons why that should have been undertaken through public hearings at the time?

Mr Roberts-Smith: I am not saying I would have made a different decision to Commissioner Hammond in relation to that. Obviously, I have not revisited his decision in relation to that matter and there is no occasion for me to do so. However, what I can say is—I think I indicated at the outset—that I do know from the documentation that I have reviewed, for various reasons in relation to the Smiths Beach investigation, that those considerations were very much in the forefront of his mind. And indeed, it would be fair to say that he agonised over them, not just at the outset in terms of whether to have public hearings or not, but at each step of the way in terms of which witnesses were going to be called on which particular day and so on. That is the very clear impression and understanding that I have and I, certainly, would not suggest for one moment that there would necessarily have been any different decision taken had I been commissioner at the time.

Mr J.H.D. DAY: If you are able to comment, was there the issue of preventing ongoing corruption or something to that effect as a factor in relation to the Smiths Beach hearings being held publicly?

Mr Roberts-Smith: My understanding is that that was a very significant factor. There were other reasons as well. A lot of information comes to the commission from the public exposure of activities of that kind, which would not otherwise have come. That was certainly very much the case in relation to Smiths Beach and that enhanced the investigation and assisted its development. There was also a certain immediacy about the exposure of the conduct of individuals, which is still ongoing or at least recent, and there are significant educational benefits—these are the public awareness issues that the act requires the commission to have regard to—public awareness and exposure. There are very significant benefits to be gained from exposing evidence of that kind in certain circumstances to enable the community itself to see and hear what has been going on and to make their own judgements about that. That is a very significant educational process as well for the commission. So, there is a whole range of factors, which go around those issues.

[10.00 am]

The CHAIRMAN: Just out of interest, in terms of within an inquiry would you envisage there would be times where you may have got public and private hearings with the one inquiry?

Mr Roberts-Smith: Well, certainly and I think I mentioned that, and I know Commissioner Hammond referred to that at various times during the conduct of his Smiths Beach inquiry itself. I made the point, I think, that having made a decision that a particular hearing or a set of examinations would be in public is not the end of the matter. That decision is reviewed constantly all the way through the conduct of the investigation and it may be that an otherwise public hearing, for example, there may be a witness who is an informant whose identity, for example, needs to be protected. Well, the commission would move into private hearing to deal with that or alternatively, if it were possible to satisfactorily deal with it by using devices such as code names or the like and otherwise suppressing that witness's evidence, then those measures can be adopted as well. So that process is ongoing all the way through and it is not a question of the decision having been made and that it is an inevitable process from then on. We would take these other measures, reviewing the investigation constantly. That is actually the process that happens in an ongoing investigation of that kind, particularly which involves hearings. The commissioner conducting the hearings actually meets each day with the counsel assisting him with investigations and reviews what is going to be happening in that day and onwards so that the commission—commissioner rather—is in a position to anticipate what other decisions around that might need to be made.

Mr J.H.D. DAY: Just one other question relating to the Smiths Beach inquiry. It would appear not to be exactly an ideal situation where it was commenced under Commissioner Hammond and then taken over by Acting Commissioner McKerracher and now you as current commissioner have to deal with the ongoing matters. Is Mr McKerracher able to be involved at all in responding to the issues which are being made?

Mr Roberts-Smith: No.

Mr J.H.D. DAY: Not at all?

Mr Roberts-Smith: No, he was appointed a Justice of the Federal Court shortly after he tabled the report and I did discuss that with him as soon as I received correspondence from the parliamentary inspector about it and of course that draft report in relation to Mr Frewer. He consulted, I think, with the Chief Justice of the Federal Court and the view was that it would be inappropriate for him in his judicial role to be any further involved in that, and I respect that decision. That has, therefore, of course as you point out, Mr Day, created something of a difficulty for me in that I am deprived of the opportunity of actually asking him why he thought certain things and did certain things and have to try and work it out for myself, but c'est la vie.

Mr J.H.D. DAY: Presumably it is a situation that would be best prevented in the future if possible —

Mr Roberts-Smith: Absolutely. Yes.

Mr J.H.D. DAY: — I mean with everything started and conducted under one commissioner.

Mr Roberts-Smith: I think that point has been well registered now. But again it is saying that one cannot guarantee these things will not happen because a number of these investigations, as this committee well knows, have quite a long life. They run for one or two years and even then there is the process of writing reports and then the section 86 process dealing with people who may be adversely affected by it, and that can all drag on.

Hon RAY HALLIGAN: Commissioner, if I may on the issue of public and private hearings. I think there are three aspects that certainly I as a member of the committee would like you to respond to.

Mr Roberts-Smith: Yes!

Hon RAY HALLIGAN: You mentioned you have changed the documentation —

Mr Roberts-Smith: Yes.

Hon RAY HALLIGAN: — associated with the decisions made as to whether something is going to be private or public, and that documentation will be available to the parliamentary inspector should he so wish to review it.

Mr Roberts-Smith: Yes.

Hon RAY HALLIGAN: I think more importantly in the minds of myself and possibly the public of Western Australia is the consistency of application.

Mr Roberts-Smith: Yes.

Hon RAY HALLIGAN: Can you assure us that there will be that consistency of application?

Mr Roberts-Smith: I certainly hope so. That certainly is my intention. The consistency of application depends upon a consistent application of the statutory criteria in section 140. All one can say about that is the commission will always rigorously abide by those criteria. I am not sure if there is anything in that question about whether there would be other reasons for making a decision, but there certainly would not be—I can assure the committee about that. One must have regard for the statutory criteria. They will be applied and they will be applied consistently, which does not of course mean that the results will be the same. There will be a different outcome because the whole point of that is that the decision whether to hold a public or private hearing has to be made in respect of the facts and circumstances of that particular investigation. So when they change, then those decisions will change.

Hon RAY HALLIGAN: And that I accept.

Mr Roberts-Smith: Yes!

Hon RAY HALLIGAN: All I am saying is that, having gone through that process, you will document it —

Mr Roberts-Smith: Yes.

Hon RAY HALLIGAN: — and then that documentation is available to the parliamentary inspector to come to the same conclusion I have no doubt that you have come to; there is that reason one way or another.

Mr Roberts-Smith: Well, I can see a possibility that anybody else looking at it may not come to the same conclusion. I do not think one can put consistency of application in terms of necessarily everybody looking at the same things exercising a discretion in the same way. Some people may give more weight to one thing than another. That is not an unusual thing; that happens all the time, particularly in the exercise of judicial discretions, for example. The question is not so much—and the same thing applies to judicial discretions—the question on a review of an exercise of that kind discretion is not so much, "Would I have come to the same decision?" The question is, "Has the decision maker had proper regard to the statutory criteria and applied them?" And if the answer to that is yes, it does not matter whether I would have come to the same conclusion or not if I am doing the review. Hopefully, more often than not there would be agreement, but it will by no means be inevitable.

The CHAIRMAN: I guess that leads to the question under section 140(2). Do you see that there would be any benefit in a more specific enunciation of the criteria there should be applied? I mean at the moment it is a fairly broad definition and obviously it leads that issue of discretion that we just talked about. Is there any—could you see any benefit in more specifically enunciating the criteria to be used?

Mr Roberts-Smith: I would not have thought so for myself, Mr Chair. The criteria is clear enough, I think, and one can add to them of course. But the same principle would remain. Someone else—

two people looking at the same criteria may give different weight to different aspects of it and may come to different conclusions. It does not mean either of them is wrong.

The CHAIRMAN: No.

Mr Roberts-Smith: But you can add to the criteria; you are still not going to avoid that unless you become totally prescriptive and say what the outcome will be in certain circumstances and that, I think, would be an unfortunate thing.

The CHAIRMAN: I guess the difficulty is that, I mean one of the things is obviously about maintaining the public's confidence —

Mr Roberts-Smith: Yes.

The CHAIRMAN: — to the commission is that when you have those differences and also, I mean, as we have seen we can change the commissioner to acting commissioner and back to commissioner. It does leave that ability for the public to lose confidence. I guess that is the issue that would be of greatest concern to me is trying to ensure that the public has confidence.

Mr Roberts-Smith: Yes.

The CHAIRMAN: Confidence in that process.

Mr Roberts-Smith: Well, I think if the commission's reasons are expressed, at least in broad terms, then the community and the public can make up their own minds as to whether at least the proper criteria were applied, and hopefully, in most cases would agree with the outcome. I might also add that in terms of community perceptions with respect to public versus private hearings that the responses to the survey which I tabled earlier this morning, and indeed responses to a survey conducted by the commission following workshops getting to public offices, both indicated enormously high level of support for having public hearings rather than private hearings.

[10.10 am]

The CHAIRMAN: Any other questions on public versus private? I might move on, and I guess you raised in your introductory remarks the comment that you had spent a significant amount of hours on responding to the issues raised by the PI and also that you are now providing focus to get a number of reports completed. I guess one of the questions I have is that the time taken between what would appear to be the conclusion of the hearings or the process and the finalisation of reports—and I realise there is, obviously, under section 86, a number of statutory requirements you have got to go through and the like. Is there sufficient resources in the commission to be managing the workload at the moment or is that an issue for the commission in terms of trying to adequately deal with everything that is occurring?

Mr Roberts-Smith: Well, it is an issue at the moment because of the fact that I mentioned of the substantial work that has been required to attend to the requirements of the parliamentary inspector since 1 January, and that 725 hours-plus is, obviously, 725 hours that people could have been spending writing reports or doing whatever else the commission needs to do. That, as I said, includes my own time and part of the difficulty with that is it is 85 hours or so of my time and I will have to actually write all these reports in the end. Now, I have got people assisting me with that—I have allocated them—but, of course, in the end it is the commissioner's report and that will mean that I am going to have to get across all the evidence and all those hearings that were conducted. I am going to have to get across the results of the investigations and I am in the process of doing that—I might add, the process is well underway—but that is the nature of the process, as I shall explain to the committee. Because in the end, when I sign off on a report, then, obviously, I have to be satisfied that I have got it right; that the commission has got it right. Now, in relation to the Fong report, there was not a particularly long lead time and I was able to deal with that because it was a relatively short investigation—one which I sat on myself and was therefore able to fairly promptly get the report out—which is why that one was done before the others, because I could do it; it was

just a matter of prioritisation. But, there are those that are outstanding; the commission is very conscious of that, I am very conscious of that, which is why I have put these measures in place to try and expedite the process—we are giving it priority—and, of course, in the meantime, we are also conducting ongoing investigations, which require my attention, including time spent sitting in hearings.

The CHAIRMAN: No, no; that is why I wonder, I mean, obviously, and—I will move onto it about the issues regarding, obviously, some of the areas where there has been—and I think you made the comment about the powers of the PI and whether or not they are acting beyond its authority or not, but I see that as partly teething problems but once that—if we are able to move through that; resolve those issues—are you confident you still have sufficient resources to be able to conduct all of the —

Mr Roberts-Smith: I think, in those circumstances, yes. I should also make the point it is not just a matter of those lobbying and other related investigations having been completed and just sitting there waiting for reports. In some of them that is the case, but in a number of those, those investigations are, in fact, still ongoing. So, we cannot actually write reports on those yet, because we do not know—we do not know—where the investigation will eventually lead.

The CHAIRMAN: All right; any more questions on that? Otherwise, I think I will move to some of the issues regarding the issues between yourself and the PI.

Mr Roberts-Smith: Yes.

The CHAIRMAN: I am just trying to think of the best way of proceeding with this, whether to get you to sort of maybe talk about how—I mean, I guess from the committee's point of view, it would be fair to say that I think what—rather than having—I mean, we are not here to be an appellat or a referee or play any role like that but, obviously, one of the things that we are there to do is to ensure that if the legislation is not fulfilling the intent as we view that Parliament intended, whether or not that means that the legislation needs to be amended to ensure that the intent—the original intent of Parliament—was being achieved in terms of the role of the PI and the role of the commission. So, I do not know whether it is easier to talk about that or whether to maybe ask you some specific questions about how you are responding to some of the issues that were raised by the commissioner—the parliamentary inspector—in respect to, say, the matters dealing with the investigation into Paul Frewer.

Mr Roberts-Smith: Yes, well, perhaps, I could start with that; that might be a useful starting point.

The report of the parliamentary inspector in relation to that, Mr Chair, was tabled on Friday, 8 February this year. In that report, you will recall the parliamentary inspector expressed the opinion that there was no justification for the commission's findings that Mr Frewer engaged in misconduct, nor for recommending that a relevant authority consider taking disciplinary action against him. He noted that in a draft report he recommended that the commission publicly acknowledge that its opinion that Mr Frewer failed to act impartially and with integrity was in error, but that the commission had rejected that recommendation. He did not explain why the commission had rejected it. Notwithstanding the commission's view that the parliamentary inspector's report was outside the scope of his statutory authority, in fact, the commission has reassessed its Smiths Beach report in light of it and the correspondence between the commission and the parliamentary inspector leading up to it. Having done so, the commission believes the opinion and recommendation it expressed in respect of Mr Frewer in its Smiths Beach report were well founded and correct. That being so, the commission could not state publicly nor otherwise that there was no justification for its opinion or recommendation. Were it to do so, the commission would itself be failing to act with honesty and integrity.

It would be impossible, in the space of a few minutes, for the commission to set out the evidence and the reasoning which leads it to disagree with the opinion of the parliamentary inspector that the

commission's report was wrong about Mr Frewer. That would, of course, require a detailed explanation. I can tell the committee the commission will be providing that. However, in the meantime, I can inform the committee, briefly, that in the commission's views, first, its findings are not at all inconsistent with the audio recording of the discussion at the south west development committee meeting on 19 May 2006. Secondly, that contrary to the parliamentary inspector's assertion, as reported, the commission never —

> . . . mistakenly assumed that if a public officer had been lobbied, and subsequently voted in a way that coincided with the wishes of the lobbyist, it followed that the public officer had acted at the request of the lobbyist and not with integrity or impartiality.

Rather, the commission's position was as follows: that on 18 May 2006, the night before the committee meeting, Mr Burke rang Mr Frewer and made it known to him that his client Canal Rocks Pty Ltd wanted consideration of amendment 92 deferred. Mr Frewer went to the committee meeting the following day intending to deliver that outcome for Mr Burke. At the meeting he did not declare that he had been lobbied by Mr Burke, nor on whose behalf, nor for what purpose. At the meeting, he supported the argument for deferral. That is what happened; that was the outcome. Three days later, on 23 May 2006, Mr Frewer telephoned Mr Burke claiming credit for achieving the deferral, saying, in effect, that he had not had to do much. The commission's opinion was that in failing to declare the approach to him in those circumstances, Mr Frewer failed to act with impartiality and integrity. Notwithstanding the opinion of the parliamentary inspector, the commission does not consider its assessment and opinion in respect of Mr Frewer was wrong and, therefore, cannot say that it was.

The parliamentary inspector has made it known that he intends to—make—present a similar report to the Parliament about the commission's opinion and recommendation with respect to Mr Michael Allen. Both of those matters arise out of the same commission report and are related. The commission proposes to respond to both of them at the same time once the parliamentary inspector presents his report in respect of Mr Allen. Even so, I am able to inform the committee that having reassessed the commission's Smiths Beach report in so far as it related to Mr Allen, and for reasons which it will detail in its response, the commission accepts that the word "appoint", in its opinion, may have conveyed a meaning of formality, which it did not intend, and accordingly—as I have indicated to the parliamentary inspector—the commission will withdraw that part of its opinion at paragraph 7.21 of the Smiths Beach report, which says that —

> Mr Allen's conduct in August 2006, in agreeing to appoint the departmental officer preferred by Mr Burke . . .

And substitute instead for that the words "Mr Allen's conduct in August 2006, in agreeing to arrange for the involvement of the departmental officer preferred by Mr Burke". And the rest of the opinion stands.

[10.20 am]

Consistently with that, the commission would withdraw recommendation 3 at paragraph 7.6 of the Smiths Beach report —

> That consideration should be given to the taking of disciplinary action against Michael Allen by the Director General of the Department for Planning and Infrastructure for lack of integrity in relation to his complying with the wishes of Mr Burke and his client in regard to the appointment of a certain departmental officer to write a report.

And substitute instead the words, relevantly, "in regard to him agreeing to arrange the involvement of a certain departmental officer".

In substituting this recommendation to stand in place of recommendation 3 in the Smiths Beach report, the commission acknowledges that disciplinary proceedings against Mr Allen were taken by the Director General of the Department for Planning and Infrastructure, and the charge based on the

former recommendation was found not to be made out. On the commission's reading of the departmental investigator's reasons, the same outcome would have resulted had the charge of the disciplinary offence been cast in the terms of the commission's substituted recommendation.

So far as the matter relating to Dr Wally Cox is concerned, the commission notes that the "investigation" reportedly done by the Department of Agriculture and Food, was not conducted under the authority of the Public Sector Management Act, and nor was any of the material held by the commission sought by the department. Consequently, the commission's view is that the report is of no standing, and is, for all intents and purposes, meaningless. The commission notes that the matters arising with respect to Dr Cox in its own report are sub judice, and will not comment further in relation to that.

I think, Mr Chair, you did raise the question of the hiatus created in relation to the functions of the parliamentary inspector. I do not know whether you wish me to address the commission's view in relation to that?

The CHAIRMAN: Yes, I think we might just follow up on a couple of questions about that —

Mr Roberts-Smith: Certainly.

The CHAIRMAN: — and then we will come back to the issues of the powers of the PI. Certainly, I was just going through your report—and, again, it is not for us to make judgements on your findings or your report—but it would appear to me that even some of the information you have provided this morning were not matters that were contained the report. The subsequent, follow-up call; just quickly going back through the report, I do not seem to identify that being in the original report. Is that —

Mr Roberts-Smith: Yes, it is. The call of 23 May is referred to in the report.

Mr J.H.D. DAY: That was the call back to Burke, three days later.

Mr Roberts-Smith: Back to Mr Burke three days later, yes.

The CHAIRMAN: The details of that are in the report on page 75. It says —

> On 23 May 2006, Mr Frewer called Mr Burke and Mr Burke thanked him. Mr Frewer then gave an account of what occurred . . .

Mr Roberts-Smith: Yes. That is the call.

The CHAIRMAN: Yes. I guess you have obviously provided more detail to us today of what was said in that call —

Mr Roberts-Smith: Exactly.

The CHAIRMAN: — which obviously is what has formed your opinion. I guess the problem and the concern I have in this matter is that the parliamentary inspector has placed out there that there were—some of the original issues that were raised in your report, on his further investigation he found further information that may have altered your opinion. It does not necessarily mean it would, but it would certainly be enough to say, "Well, that was not considered at the original time; it certainly needs to be reconsidered before you reach a conclusion." From what you have indicated today, you have obviously done that. I think the concern I have is how, as members of the public or members of Parliament, do we be satisfied that that is occurring. I appreciate that you have mentioned to us today that you intend to put out a further report that outlines why you hold the view—still hold the view that you do in respect to Mr Frewer —

Mr Roberts-Smith: Yes.

The CHAIRMAN: — but it is a question of, there has been some considerable time now between the parliamentary inspector's report being released, and there is obviously still going to be some time before that further report is tabled. In the meantime, there is that period where people sit there

and say, "Looking at the parliamentary inspector's report, it would seem—I cannot understand why they are still holding that opinion." How do we resolve that issue? How do we make sure that the public have that ability to understand why you are still holding your views, which would appear, on the face of it, to be in conflict with what the parliamentary inspector thinks?

Mr Roberts-Smith: I think this is one of the difficulties which arises out of the exercise which the parliamentary inspector has conducted here. If the commission's view of his powers is correct, he would not be able to undertake the sort of evidentiary review which, in the commission's view, he had undertaken here. That sort of process, in a sense, could almost go on forever. There would be no finality to it. It is not—because one could always take a different view on evidence. Again, it is like the exercise of a discretion. No doubt, once certain opinions or views are put out into the public arena, then people will respond to them, again perhaps putting up additional information or different arguments, different legal submissions; a whole range of things. That process can just go on and on. I think the integrity of the commission's investigations and reports, in the end, has to be seen on the basis of the reports that the commission presents, and how they stand in the context of their own explanations, for example, and the evidence before them. I know that in relation to this report, for example, Acting Commissioner McKerracher was endeavouring to distill an enormous amount of information, and that investigation went on for months, as you know, many months. There was an enormous amount of information. There will always be some material there that someone may want to say means something else, or was not taken account of, or whatever. That is, again, the nature of the process. All the commission can do, as any commission, or royal commission, can do, is exhaustively work through the evidence, exercise the statutory functions and powers that it has, and express its opinions, as it is required to do, on the basis of the evidence before it. That is its role.

Mrs J. HUGHES: I wanted to raise the issue that was raised in the parliamentary inspector's report regarding the use of evidence during the public inquiry and the public questioning in the hearings, where they primarily rely on minutes and so forth, on the basis of the questions that were put to the witness at the time.

Mr Roberts-Smith: Yes.

Mrs J. HUGHES: Then, later on in the report, where the PI then talks about the fact that the minutes that they were using for the questioning did not necessarily relate to the other evidence that they had that was on the tape or the audio. Although you have used, now, the subsequent telephone call to cement the misconduct finding, my question is, when we were going into public hearings, should there not have been more balanced pieces of evidence in relation to how we—because it is so public at the time, should there not have been the audio and the minutes actually correlating with the questions that were being put?

Mr Roberts-Smith: Well, the minutes were minutes of a meeting taken by a councillor present at the meeting. The audio was a recording which was taken at the time. At the very beginning of the meeting—and, again, the committee will appreciate I am speaking now from the knowledge I have gleaned from going through the material. At the very beginning of the meeting there was an agenda item, "Declaration of Interest". Under that, the committee members were required not really to actually disclose interests as such—financial interests or conflict of interests—but whether or not they had been lobbied.

[10.30 am]

Mr Frewer's own evidence in the hearing before the commission demonstrated that he had a perfectly appropriate understanding of what that required. He said in his evidence that it required a disclosure of the name of the person who lobbied you, what they wanted and what it was about. That was his understanding of what the requirement was. When the meeting got to that point another councillor made a declaration that she had been lobbied. She said by whom she had been lobbied, what it was about and what the person wanted. That was recorded in the minutes as a declaration of the kind that was required. Mr Frewer said, and I am quoting now from the

parliamentary inspector's own report—there was a bit of jocularity around the table at that point and he said that —

> *"Someone rang me about the Smith Beach thing and they said they'd send me all this stuff but they didn't… Anyhow, nothing arrived and I didn't receive anything so if that's called lobbying that's fine"*.

You will recall that I explained earlier that it is the commission's view, based on all the evidence, that Mr Frewer had been phoned by Mr Burke the night before. Mr Burke did not expressly say what he wanted Mr Frewer to do, and Mr Frewer knew perfectly well what he wanted because of previous communications they had had. There is no doubt about that because it was confirmed in the conversation of 23 May in which Mr Frewer was reporting effectively back to say that he had achieved what Mr Burke wanted. Now, in those circumstances, the minute taker did not record what Mr Frewer said as a declaration of lobbying; it is hardly surprising. The minute taker obviously did not regard it as a declaration of lobbying and at the time, apparently, neither did anyone else, and it was not. It did not say by whom Mr Frewer had been contacted. It did not say what the person wanted. It did not say what it was about. In fact, it tended to diminish the contact. It acknowledged a contact but then said, "Well it didn't really mean anything."

Mr J.H.D. DAY: I think Mr Frewer argues that it was not actually lobbying, it was a phone call, and that if he had got the emails, maybe it would have been lobbying or whatever. What is your comment on that?

The CHAIRMAN: I do not think it is our role to try to get into that debate today about.

Mr Roberts-Smith: It does demonstrate the complexity of it.

The CHAIRMAN: I do not think it is our role today to get into a debate about what that means. I guess my issue would be to ensure that there is a process that obviously—as a result of that new evidence being identified by the parliamentary inspector and brought to the commission's attention—ensures that there is then a fair process so that—I mean, it is not for us to be having that argument with you about what that evidence meant —

Mr Roberts-Smith: Yes.

The CHAIRMAN: — but I certainly think that Mr Frewer has every right to be able to put his views to the commission as to why, as a result of that new evidence, the commission could or should reach a different conclusion in respect to the original finding the commission made in respect of Mr Frewer.

Mr Roberts-Smith: Yes.

The CHAIRMAN: My first question is: has that process occurred; and, if not, how do we ensure that when items like that are first raised by the parliamentary inspector with the commission there is a process in place which would allow Mr Frewer, based on that new evidence, to put his views to the commission and have them considered in terms of—you may or may not then reach a different opinion on it; that is obviously your role. It is not our role and it is not the parliamentary inspector's role. I accept that, but I do think it is the role of the commission to do that and to ensure that that is being done so that people like Mr Frewer, or whoever it is, are given fairness under the act in light of the arrival of new evidence held by the commission but not considered at the time the original decision was made.

Mr Roberts-Smith: It was not new evidence. It was considered; that evidence was considered —

The CHAIRMAN: The tape recording was.

Mr Roberts-Smith: The tape recording was held by the commission and the investigators were aware of it. The investigators listened to it and they were looking for a declaration of lobbying. They were of the view that it was not a declaration of lobbying and that, indeed, was the commission's view. Having looked at that material since, I agree with that assessment. I certainly

agree that it would have been appropriate for them to have informed counsel assisting of the existence of the recording; however, as with all of these inquiries there is, as I have said before, an enormous amount of material and some judgement calls have to be made. It would be physically impossible for counsel assisting or indeed the commissioner to be across every aspect of every investigation. It would be physically impossible and so there is a need for conferences and consultations, and for discussions and briefings and so forth, so that what is relevant and what is helpful, either to the parties concerned in the hearing or to the commission investigation, is identified and dealt with. That was a judgement call that was made here. In the end, in my view, it would have made no difference but, my own view is that it ought to have been bought to the attention of counsel who would then have dealt with it —

Mrs J. HUGHES: In perhaps a different manner.

Mr Roberts-Smith: Well, at least put it to Mr Frewer in the hearing.

Mrs J. HUGHES: In a different way.

Mr Roberts-Smith: I am satisfied from my review of the material that it would actually not have made any difference to the outcome, but I accept that it ought to have been done.

The CHAIRMAN: Sorry, but if you accepted it probably ought to have been put to Mr Frewer in the hearing, then, does that not imply that obviously Mr Frewer may be able to, with that knowledge, interpret that and that may or may not change your opinion? I am not saying whether it will or will not, and has Mr Frewer ever been given that opportunity to put that view to the commission?

Mr Roberts-Smith: Yes. Well—I think and I will go back in part to the question you asked a moment ago Mr Chairman and it is this: it is the question of the opportunity to deal with these issues. Counsel—in hearings of this kind people concerned are ordinarily represented by counsel. Counsel obviously will raise with the commission, on behalf of his or her client, any matters which they consider need to be raised which the commission might be unaware of, and that process is encouraged. That is a necessary part of the process. Finally, once a draft report is prepared or almost prepared, then notification is given under section 86 and there is another opportunity, and a significant one, for people in Mr Frewer's position to put to the commission any additional evidence that they wish to have, put any further submissions they wish to make, any answers to anything which might be thought to be potentially adverse to them. Now, one would have thought that at the time of the hearing Mr Frewer would have at least realised that he had said something about lobbying at the meeting, but, even if that were not the case, as it happens, this matter has been considered by the commission again—now I am coming to the second part of your question Mr Chair—of course we have looked at that. Obviously, as I said a moment ago, we have looked at the issue of what effect, if any, that audio—what was said on the audio—and what has been put since by Mr Frewer to the commission and through the parliamentary inspector to the commission about it, would have made any difference; and the commission's view is that it does not make any difference.

Mr J.H.D. DAY: The PI expressed the view very clearly that it was a material omission not to include the reference to the tape recording but from what you have said you clearly reject that.

Mr Roberts-Smith: It think it was an omission but it was not a significant omission in the scheme of things because in the commission's view—looking at it now, having regard to what has been put in relation to it—it would not have made any difference and, indeed, tends to make his position worse.

Mr J.H.D. DAY: If I could just ask one other question in relation to the parliamentary inspector's comments: you mention the section 86 process and I think that the PI expressed the view that the subject of the potential adverse findings against Mr Frewer changed from when he was originally

notified under the section 86 process compared to when the commission's final report came out. Can you make a response to that aspect, if possible?
[10.40 am]

Mr Roberts-Smith: The commission does not accept that there was a deficiency in the section 86 process in that way and that, too, is something which I can say will be addressed in our response in due course.

Mr J.H.D. DAY: The final question from me, I think, on this particular issue: Commissioner, you mentioned in your opening comments on this subject—without wanting to get into too much of the detail, but I think it should be on the record seeing you have raised it—something to the effect that Mr Frewer went to the committee meeting intending to deliver the outcome that Mr Burke wanted.

Mr Roberts-Smith: Yes.

Mr J.H.D. DAY: Was the evidence for that comment included in the original report? Was it included in the response to the PI? I would imagine it would have been.

Mr Roberts-Smith: It has been included in the response to the PI.

Mr J.H.D. DAY: Was it in the original report?

Mr Roberts-Smith: In the original report the commission did not go through every item of evidence step by step, clearly. I think what Commissioner McKerracher was seeking to do was to give an outline of the sorts of considerations—the areas of evidence that he was looking at—to draw out the opinions and recommendations that he made. I might write a report quite differently from him and any member of the committee might write a report differently from me. These are fairly idiosyncratic exercises to some extent and it is always, again, a question of judgement to what extent of detail you descend in setting out findings of an administrative inquiry like this.

Mr J.H.D. DAY: Presumably in your next report on this issue, or response to the PI's views, you will elaborate more information and more evidence to support that statement.

Mr Roberts-Smith: Indeed, yes.

The CHAIRMAN: So, you expect your response will respond to each of the points that are raised. It is obviously his final recommendations, but throughout the report there are a number of issues where he raises—such as at page 4, 5(c), failing to ascertain precisely what were the terms of the SWRPC's resolution to record lobbying. You will make a comment in respect to that?

Mr Roberts-Smith: Yes.

The CHAIRMAN: When do you envisage that that report will be available?

Mr Roberts-Smith: As I have said, it is sensible to deal with both Mr Fewer and Mr Allen together. That is what we will do. It will be as soon as possible—very quickly I should think, after we know what the parliamentary inspector will be saying about Mr Allen. I can say no more than that.

The CHAIRMAN: Is there a better process that we could come up with? I guess that is the other issue for the committee that we have to look at—whether or not the current process works. I do think there is a real problem out there. As you said today, there is obviously other information or more detail to the information that is only referred to in this report, as you have elaborated today, and that information or detail is the basis on which you have arrived at your opinion, although we have a parliamentary inspector's report out there that highlights issues with the previous report and we do not have your response there. It still may be days before we get that, or weeks?

Mr Roberts-Smith: One of the difficulties is that what we have here in the evidence is one of the reasons the commission says this is not actually part of the scope of the parliamentary inspector's functions. It is because the commission has gone through an investigative process. It has received evidence in all sorts of forms over a long period. It has then formed opinions and made

recommendations on the basis of that evaluation and assessment of the evidence. The parliamentary inspector has looked at some of the evidence and has taken a different view of what the evidence means—what can be inferred from the evidence—and for that reason has come to different opinions. That, in the commission's submission, demonstrates one reason that an appellant's sort of evidentiary review is actually not part of the parliamentary inspector's functions, because that situation would conceivably arise in virtually every report or investigation the commission did. It is always possible to take a different view of evidence, to look at different aspects of the evidence. That is why judges are always subject to review and one finds different outcomes all the way to the High Court, for example.

The CHAIRMAN: And even then they can have a different opinion.

Mr Roberts-Smith: Exactly. So, in terms of the mechanism there is one point perhaps I might come to. I know the committee raised with me in its letter the question whether there are any options for dispute resolution mechanisms between the commissioner and parliamentary inspector, specifically about the scope of respective powers. The commission has noted the option raised or referred to by the committee in the December 2003 report of the Standing Committee on Legislation; namely that the commission and parliamentary inspector seek advice from the Solicitor-General as to the statutory functions and powers of the parliamentary inspector. I can inform the committee that, in fact, the commission has arranged through the Solicitor-General for an eminent interstate constitutional and administrative senior counsel, Mr Peter Hanks, QC, to provide an opinion in relation to this current issue. He will be assisted by Mr Peter Quinlan, a junior counsel at the Western Australian Bar. For its part, the commission would see an arrangement of that kind, whether as a matter of agreement between the parliamentary inspector, the commission and the Solicitor-General or by legislative provision, to be a sensible and practicable way to resolve issues of this kind should they arise in the future.

Mr J.H.D. DAY: I have one other question relating to legislative establishment. You are confined to making comments and making observations about the conduct of public officers as defined. It would seem pretty clear from a lot of the unfortunate events that have been exposed over the last year or two that some individuals in the community of normally high standing, such as former Premier Brian Burke and others who have been members of Parliament, do subject public servants and others to pretty enormous pressure in various ways. Do you think it would be desirable to be able to make comment on people such as those who are not currently public officers but who obviously are major players in all that we have seen exposed in the last year or two?

Mr Roberts-Smith: The commission, under the act, cannot, of course, express any opinion or make a recommendation in relation to a non-public officer to the effect that that person has engaged in misconduct, as defined in our act. That is restricted to public officers. The commission does take the view, however, and again there is some degree of contention about this, that it can make comment or express opinions about the conduct of non-public officers where that conduct is related to, induces or may result in the misconduct of public officers. Again, as I say, it would be, I think, useful if the act were to make it clear that the commission could do that expressly, because in most cases where a public officer has engaged in misconduct there would usually be someone else who has been involved with it, prompted it or induced it, or whatever the case may be. Clearly, it makes it extraordinarily difficult to properly report on that if the commission cannot express a view about the conduct of the non-public officer. We take the position at the moment where there is that degree of relationship between the alleged misconduct and the non-public officer.

Mr J.H.D. DAY: But it seems you would regard it desirable if the legislation was made clearer.

Mr Roberts-Smith: Yes.

Mr J.H.D. DAY: Or enabled you more easily to make comments about non-public officers.

Mr Roberts-Smith: Yes.

Mr J.H.D. DAY: It is something we should take on board, I think. I will ask one other question, Mr Chairman, about a more general issue related to all investigations, I guess. Warrants for telephone interception need to be advised to the commonwealth Attorney-General through the state Attorney General.

Mr Roberts-Smith: Yes.

Mr J.H.D. DAY: I think I am right in saying that, and I know the same system applies in relation to warrants obtained by the police. The Minister for Police needs to be advised and then pass that on to the commonwealth Attorney-General. Is there a potential problem if an Attorney General—I make no comment about the current one or anybody in particular of course—might need to be the subject of investigation? How would you get around that particular problem? It also relates, I guess, to the matter you raised—the protocol for judicial officers. You said things need to be agreed with the Chief Justice. What if, hypothetically, the Chief Justice needs to be subject to investigation? I think the two issues are related.
[10.50 am]

Mr Roberts-Smith: Well, I can deal with the last one first, because you will find that we have actually dealt with that in the protocol. It says that if the complaint or the allegation is against the Chief Justice, the commissioner will liaise and consult with the judge who would be Acting Chief Justice in the Chief Justice's absence. That is the way we have dealt with that.

In relation to your broader question about telephone interception, that, of course, is a matter for commonwealth legislation. The commonwealth legislation requires notification of the grant of telephone intercepts to the commonwealth Attorney-General through what it describes as the responsible state minister. As you have observed, Mr Day, the responsible state minister in the case of the police is the Minister for Police and in the case of the commission it is the Attorney General. I should emphasise that the state ministers have no role in the approvals of the telephone intercept warrants. That is dealt with by a federal judicial officer. It is when we have already got a telephone intercept warrant that we send that return to the Attorney for transmission to the commonwealth Attorney.

To come directly to your question—obviously it is entirely hypothetical—but if there were an investigation into a serving Attorney General, then I would imagine the appropriate course would be to give the notification, for example, to the Premier, and have the Premier pass it on to the commonwealth Attorney. I am sure it would be resolved in that sort of way. I mean, clearly we would not compromise the investigation.

Mr J.H.D. DAY: So there is a way around it if, hypothetically, that occurred.

Mr Roberts-Smith: Yes, there would be a way around it.

Mrs J. HUGHES: Just on the intercepts, we notice that there were 22 warrants in 2005 and 123 in 2007. There is clearly an increase happening in warrants for interception. Is that because there are more inquiries, or is this because they are becoming more in-depth inquiries, or are they renewals? Are they new warrants? How are we sitting with those?

Mr Roberts-Smith: Maybe I should give someone else a chance to respond to that. Mr Anticich, perhaps.

Mr Anticich: I think it would be appropriate to say that that figure incorporates renewals and effectively I would say it is a reflection of what have been longer running jobs. In essence—correct me if I am wrong, Mr Cashman—but I understand that they would be—they can run for a maximum of 90 days, so if you could imagine over a period of so many months you would have effectively three warrants on that one line. I think that is much more of a reflection of those statistics, as well as obviously an increase in operational activity for us over the reporting period.

Mr Cashman: Under the Telecommunications (Interception and Access) Act, a warrant is not extended. There is a further warrant issued rather than extending it.

The CHAIRMAN: I guess the other side of that is the assumed identity, which I note in 2005 you had 66 and now you are down to 17. Is that as a part of the initial setting up of the operation you approved a number of assumed identities and we are now down to what will be the normal sort of flow?

Mr Anticich: That is correct. That is a correct depiction of the case. Essentially what you see there is predominantly renewals—in some operational instances the need to replace and in some operational instances the need to create. That is more likely to be the normal flow.

The CHAIRMAN: Is there a fixed time line on those or do you internally review them?

Mr Anticich: I would have to take that on notice. I believe that there is, but I would have to check. Just to explain, there are different applications for them. Many of our operatives have these as longstanding identities used in their operational work and then there are others where, in fact, they might be used for a very short period of time for an operational purpose. I will take that on notice.

Mr Cashman: This is the review of assumed identities? There is a requirement for those identities issued under the CCC act that they are reviewed every six months.

The CHAIRMAN: You can continue rather than issuing a new authority for an assumed identity.

Mr Cashman: That is correct.

The CHAIRMAN: Your audit role of the police investigations. You were saying you have set up a new process. Can you give us a little bit of detail about how you see that operating in terms of the audit functions?

Mr Anticich: Perhaps some background into the reasons behind it and perhaps some comparative analysis. In essence, it arises out of some concerns from one particular part of the sector and perhaps a perceptional belief that police policing police puts them in an awkward position and perhaps is not the most appropriate way that police complaints are dealt with. You may be aware of a submission made, I think, through the Aboriginal Legal Service of WA that went to Parliament about that particular issue. That was a principal motivator for the commission as well as what were seen to be an increase in complaints coming from that organisation. What occurred was this: we had officers from our investigation review complaints assessment area who travelled to the eastern seaboard, met with, I believe, our counterparts—the CMC and ICAC—and had a look at some of their preferred models. The intention of this is to actually put resources into specific areas of the police to actually look at the process of complaint investigation from beginning to end, rather than our current system which sees us review 100 per cent of police complaints, but often it is at the end of the process or during the process. So this will enable us to effectively target, perhaps, high risk areas or areas where we think we have a concern or an emerging problem by going in and actually seeing the entire process. The intention is, I think, to move away from that—I think we have reasonable confidence over the last three and a half years that the police actually do a reasonably good job in dealing with—or have a reasonably refined complaints management system. Us reviewing effectively every one of these is perhaps not the best way that we can use our resources. We sort of risk-manage that and perhaps put our resources into better use.

Mr Roberts-Smith: The emphasis, I think, is to identify those matters where the police process has actually gone astray or the outcome is clearly an inappropriate outcome in terms of an investigation. We have identified a number of those from time to time. It is clearly much better to be able to do that than to devote the bulk of the commission's review resources to conducting what are more often than not purely methodical but relatively minor reviews of investigations which do not ordinarily turn up very much at all.

The CHAIRMAN: So it is going to a risk management approach.

Mr Roberts-Smith: Yes.

Mr J.H.D. DAY: Commissioner, the issue of audit raises the role of parliamentary inspector auditing the CCC's roles. There has been some discussions and views expressed about what should occur in that respect and what the word "audit" means, and so on. Maybe it will be something that will be addressed in Gail Archer's review. I am not sure about that. Would you like to make any comment or just get something on the record about your views of what audit involves in that respect?

Mr Roberts-Smith: I think the commission's position about that is first of all an acknowledgement that the commission does not seek to avoid scrutiny by the parliamentary inspector. I did indicate earlier the importance which the commission places on the role of the parliamentary inspector and we welcome that scrutiny. The functions of the parliamentary inspector are set out by Parliament in section 195 of the act and his powers are set out in section 196. In the commission's opinion, those powers can only be used in the performance of his statutory functions. They are not uncontrolled powers.

[11.00 am]

The commission accepts without reservation that the parliamentary inspector's functions and powers include investigating and reporting on the manner in which a commission investigation has been conducted, insofar as that goes to determine whether that was done in accordance with the Corruption and Crime Commission Act and other state laws, and that the commission's procedures were effective and appropriate. That, I think, goes to the issue of understanding what "audit" means. Those are the purposes which are identified in section 195. As will be apparent, where the commission does part company with the parliamentary inspector's position is his apparent view that his power to examine extends to "including any factual errors or inadequacy of evidence relied upon to support damaging findings in the Corruption and Crime Commission's report of the investigation." I say that because whether something is a factual error will almost invariably turn on an assessment of evidence and inferences or conclusions to be drawn from the evidence leading to certain opinions about whether or not this conduct is established. That will certainly be the case where it is suggested there has been an inadequacy of evidence. The commission is of the firm view that it is not part of the statutory functions of the parliamentary inspector to express his own opinion and make any recommendation on whether the commission ought to have assessed the evidence in a particular way. That would effectively be the exercise of an appellant type of jurisdiction. The commission does not say for one moment that it can carry out an investigation and produce a report without that opinion, including its report, being subject to "methodical review"—which is his term for the meaning of the word "audit"—followed by a recommendation from the parliamentary inspector. The commission has never taken that position. The commission has no doubt that the parliamentary inspector can subject any of its investigations, including its reports, to methodical review for this purpose—to determine whether the investigation was done in accordance with the Corruption and Crime Commission Act and any other laws of the state, and that its procedures were effective and appropriate. Those are the purposes in section 195, and in the commission's opinion none of that would allow of a report and recommendation such as the parliamentary inspector has made in respect of Mr Frewer, and as he apparently intends to make in respect of Mr Allen. If the commission's view about that were right, then clearly the difficulty arising out of a difference of opinion as to the outcomes of the investigation between the parliamentary inspector and the commission could not arise.

Mr J.H.D. DAY: How do you see the different interpretations of the role being resolved ultimately?

Mr Roberts-Smith: Well, as I have said, through the Solicitor General. Advice is being sought on that. The commission will abide by whatever that advice is, whichever way it goes.

Mrs J. HUGHES: So, if the parliamentary inspector believes there were deficiencies in process or reporting or so forth—to have that couched perhaps in a different manner to perhaps as he has presented it in this way. Do you have comment that perhaps there were some deficiencies or some omissions in the reporting that could have made it perhaps clearer, so that something like a report that the parliamentary inspector has now put forward may have been averted? Is there a lesson to be learnt through this process?

Mr Roberts-Smith: I am quite sure that there are many aspects of any commission investigation or report upon which the parliamentary inspector might write to the commission and express a point of view about whether we got the process right or whether it fell outside lawful authority or outside our act, or whether it did not properly comply with our act, or whether our procedures were not appropriate and effective, and we would regard those as entirely within the scope of his functions and we would deal with them accordingly.

Mrs J. HUGHES: Obviously the report has gone into quite some detail, into a particular person or witness whom you have had and made findings on. My question to you is whether in essence what he has done has just perhaps made it too personalised rather than actually creating a report overarching some of the issues that he sees as a problem?

Mr Roberts-Smith: I think the fundamental difficulty is that what the parliamentary inspector has done has been to undertake an evidentiary review, to look at some of the evidence before the commission in the course of the investigation, take a different view of that evidence than was taken by the commission and on the basis of that different view said that the commission got it wrong. We only got it wrong if you take that view of the evidence, and we do not.

The CHAIRMAN: Maybe I will talk to my colleagues about it, but I would maybe need to pursue it a bit further with you because obviously I think what you are saying is that there are elements of what the parliamentary inspector has reported on that you fully accept, but there are some conclusions that he reached where you disagree. I think we probably need to maybe tease that out a bit further at some point so that we as a committee can decide whether or not that is reaching the role of the parliamentary inspector as we would envisage it; whether that has been achieved or whether we need to actually amend the legislation so that we make it very clear and explicit as to how far we want the parliamentary inspector to go. If you are interested in providing more detail about that, I would be more than happy to receive that from you, as to how far you think the role of the parliamentary inspector should go, using a bit more detail, and using maybe the report into the Frewer matter as a case study as to where you think the parliamentary inspector should have arrived with his recommendations. A bit more detail would be useful.

Mr Roberts-Smith: Yes, I will be able to deal with that in our response.

The CHAIRMAN: All right. One last question that I have revolves around—I know you have had in previous inquiries this issue raised and a number of matters dealt with, and I think Commissioner Hammond made comment—the issue of cabinet confidentiality, where, in a report you actually potentially disclose those confidential cabinet discussions, and obviously in the Fong matter that is still an issue. Whether it was or it was not is a question mark itself.

Mr Roberts-Smith: We did not answer that question, deliberately.

The CHAIRMAN: In terms of those issues, when they arise, how does the commission handle that issue, because obviously yourselves you do not necessarily want to be divulging confidential cabinet discussions?

Mr Roberts-Smith: No, that is right, and again I keep saying, this morning, it is a matter of judgement, but there are enormous areas where we exercise judgement around a lot of these issues. Clearly the commission does not want to be breaching cabinet confidentiality, and would seek to avoid doing so, but if in a particular investigation a critical aspect of the investigation turned on whether somebody had or had not breached cabinet confidentiality, for example, then—it has not

arisen in my context yet—I imagine an appropriate course might well be to confer with the Department of the Premier and Cabinet and the Premier himself if necessary. That would be to ascertain whether or not, first of all, they had any objection to the material being disclosed, and/or, in any event, whether they were prepared to confirm whether or not what we understood to have been discussed was, in fact confidential cabinet information. But it has not arisen yet, in my experience, so far as I have had to deal with, and that would be the sort of approach I think I would be considering. In relation to the Neale Fong report, there was an account in there of how Mr Burke claimed to have revealed confidential cabinet information to Dr Fong. Because of the view that the commission took about that, whether it was or was not confidential cabinet information, the approach still should have been reported to his minister; it did not matter whether it was or was not, and therefore I did not have to go into that. That is how it was dealt with there, so it was not an issue.
[11.10 am]

The CHAIRMAN: Do you have any other comments? Otherwise, we may quickly go into the private session to deal with the third matter you raised. We also have the parliamentary inspector on our agenda. There are a whole lot of other issues we could have discussed this morning. We may hold a further hearing on that, but that is something we will discuss as a committee. Do you still wish to go into private session briefly, or do you have any final comments?

Mr J.H.D. DAY: Or could that be held over to another meeting in, say, a couple of weeks' time?

Mr Roberts-Smith: It can be held over, if it suits the convenience of the committee.

The CHAIRMAN: I think we might do that. Thank you very much for your time this morning. I will close this part of the hearing and deal with the parliamentary inspector shortly.

Hearing concluded at 11.10 am