JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

THE USE OF PUBLIC HEARINGS BY THE CORRUPTION AND CRIME COMMISSION

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 22 FEBRUARY 2012

SESSION ONE

Members

Hon Nick Goiran (Chairman)
Mr John Hyde (Deputy Chairman)
Mr Frank Alban
Hon Matt Benson-Lidholm

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Hearing commenced at 10.14 am.

MARTIN, CHIEF JUSTICE WAYNE, examined:

The CHAIRMAN: On behalf of the Joint Standing Committee on the Corruption and Crime Commission, I would like to thank you for your appearance before us today. The purpose of this hearing is for the committee to speak with Hon Wayne Martin, QC, Chief Justice of Western Australia, for the purpose of gathering evidence in aid of the committee's inquiry into the use of public examinations by the Corruption and Crime Commission. Chief Justice Martin gave a keynote speech at the Australian Public Sector Anti-Corruption Conference on 16 November last year, where he commented on the use of public hearings by anti-corruption agencies like the CCC. I would like to take this opportunity to introduce myself as the Chair of the committee, and to my left is the Deputy Chair, Mr John Hyde, MLA, the member for Perth, and to his left is Hon Matt Benson-Lidholm, MLC, member for the Agricultural Region. To my right is Mr Frank Alban, MLA, the member for Swan Hills.

The Joint Standing Committee of the Corruption and Crime Commission is a committee of the Parliament of Western Australia. This hearing is a formal procedure of the Parliament and therefore commands the same respect given to proceedings in the houses themselves. Even though the committee is not asking witnesses to provide evidence on oath or affirmation, it is important that you understand that any deliberate misleading of the committee may be regarded as a contempt of Parliament. This is a public hearing and Hansard will be making a transcript of the proceedings. If you refer to any documents during your evidence it would assist Hansard if you could provide the full title for the record. Before we proceed to the questions that we have for you today, I need to ask you a series of preliminary ones. Firstly, have you completed the "Details of Witness" form?

Chief Justice Martin: Yes, I have,

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

Chief Justice Martin: Yes, I do

The CHAIRMAN: Did you receive and read the "Information for Witnesses" briefing sheet provided in advance of today's hearing?

Chief Justice Martin: Yes, I did.

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

Chief Justice Martin: No, I do not, thank you.

The CHAIRMAN: Would you please state your full name?

Chief Justice Martin: Wayne Stewart Martin.

The CHAIRMAN: Chief Justice, we have a series of questions to ask you today, but I understand that you have an opening statement, so I would ask you make that.

Chief Justice Martin: Yes, Mr Chairman, I will make a rather longer opening statement because I think it will cover many of the areas that might be the subject of questioning, and, through that way, reduce the need for questions.

First, can I thank the committee for giving me this opportunity to give evidence in its current inquiry in relation to the use of public hearings by the Corruption and Crime Commission. It is important, I think, for me to emphasise at the outset that the views I express this morning are my

personal views and should not be taken to represent the views of the Supreme Court or of any other member of that court.

I would like to start with some general observations about the role of the CCC, and perhaps make the observation that I consider the CCC to be a vital component of what has come to be known as the integrity branch of government. What I mean by that is, of course, if you go back to traditional theories of government—to Baron Montesquieu in the eighteenth century—those theories of government posit three branches: the legislative; the executive; and the judicial. It is a bit difficult to readily slot the CCC into that framework. Of course, the reason for creating three branches of government was to ensure that no branch of government had absolute power, because history tells us that absolute power tends to lead to despotism and tyranny, and of course each branch of government has the capacity to impose checks and balances on the other branches, which again reduces the risk of one branch of government maintaining absolute power. Again, experience has, I think, told us—it has come to be recognised in many liberal democracies such as ours—that merely separating the powers of government into separate branches does not provide completely adequate safeguards against maladministration and corruption, and so over the last 30 or 40 years or so in many jurisdictions, including ours, we have seen the development of agencies and procedures aimed at improving standards of administration and reducing the incidence of corruption. Together, those various agencies and procedures are often now referred to as the fourth branch of government and grouped under the head the "integrity branch". In Western Australia they include parliamentary committees such as this parliamentary committee, the Ombudsman, the Public Sector Standards Commissioner, the Auditor General, the processes for freedom of information, tribunals that review administrative decisions on their merits, such as the State Administrative Tribunal, royal commissions and other forms of public inquiry such as the inquiries under Public Sector Management Act—one of which is going on at the moment—courts, and of course the Corruption and Crime Commission. The importance, I think, of creating a body like the Corruption and Crime Commission to address maladministration, misconduct and corrupt activity has been recognised in all Australian states that have either created or are in the process of creating such a body.

The point I am trying to make—perhaps overlong or at too great a length—is that I start from the proposition that the commission has an important role to play in the fabric of government in Western Australia, and that really the topic of this inquiry is aimed at looking at ways in which that role might be enhanced so as to better serve the public of Western Australia. I would also like to say at the outset that I am excluding from my remarks this morning any reference to the organised crime function. Section 140 of the commission act, I think, makes clear that there is no capacity for the commission to hold public hearings in the exercise of that function. The reasons for that are fairly obvious. I do not understand there to be any suggestion that that provision should be changed, and I certainly would not support it.

Turning now to the specific focus of these hearings, which concerns the commission's use of public hearings, what I would like to do is try to summarise what I take to be the arguments for and against the use of public hearings, starting with the arguments in favour of public hearings. The first, I think, is that transparency and openness has become a significant component of our democratic tradition. The transparent operation of the various organs of government has become an accepted component of our liberal democracy. The Parliament and the courts have, since the colonisation of Australia and for hundreds of years before that in the United Kingdom, operated on the fundamental premise that their business is done in public and that they are subjected to continual public scrutiny. Parliamentary question time has also been a means of exposing the executive branch of government to public scrutiny, and more recently there are other means by which the executive branch has been exposed to greater scrutiny, including freedom of information, the Ombudsman, and merits review tribunals like the State Administrative Tribunal.

Of course, my working life has been spent in the courts, where, to quote from the recent decision of the Court of Appeal of New South Wales in Rinehart v Welker [2011] NSWCA 403 —

> The principle of open justice is one of the most fundamental aspects of the justice system in Australia.

The High Court has said on a number of occasions, including twice last year in cases like Moti and Hogan v Hinch, that the significance of open justice is that it ensures public confidence in the administration of justice. In the legal system—the courts—the principles are often traced back to a famous judgment of Lord Atkinson in a case called Scott v Scott more than 100 years ago, in which he said —

> In public trial is [to be] found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means of winning for it public confidence and respect.

More recently, in 2004, the Victorian Court of Appeal said —

> The principle of open justice is deeply entrenched in our law. It rests upon a legitimate concern that, if the operations of the courts are not in public view as far as possible, the administration of justice may be corrupted.

Of course, our Parliaments operate under a similar tradition for similar reasons. Of course, I appreciate that the commission is neither a Parliament nor a court, but in the performance of its investigative functions it is, I think, most analogous to a royal commission, and the commission has sometimes been described as a kind of a standing royal commission.

The importance of conducting the hearings of royal commissions in public is also very well established. I expect the committee will have already been referred to the Salmon principles, which were enunciated by Lord Salmon during the ‘60s following an inquiry into royal commissions and the conduct of public inquiries. Those principles emphasise the importance of public hearings for royal commissions.

A similar approach has been taken in Australia consistently, and is embodied, for example, in the decision of the High Court in the case of Victoria v BLF, a decision of the early ‘80s. In that case, the Federal Court had imposed an order restraining the publication of part of the proceedings of a royal commission into the BLF, and the question of whether the order should be maintained went to the High Court. Sir Anthony Mason referred to the virtue of publicity that attended the proceedings of royal commissions and the beneficial purpose served by publicity in terms of enlightening the public and the government in relation to the issues under scrutiny. In his view, the restraint that had been imposed by the Federal Court—I quote—“seriously undermined the value of the inquiry”. In Sir Anthony’s characteristic way, he put the point succinctly in the following passage that I will read, if you do not mind. Sir Anthony said, referring to the restraint —

> It shrouds the proceedings with a cloak of secrecy, denying to them the public character which to my mind is an essential element in public acceptance of an inquiry of this kind and of its report. An atmosphere of secrecy readily breeds the suspicion that the inquiry is unfair or oppressive. Especially is this so when the inquiry has power to compel attendance and testimony.
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> The denial of public proceedings immediately brings in its train other detriments. Potential witnesses and others having relevant documents and information in their possession, lacking knowledge of the course of proceedings, are less likely to come forward. And the public, kept in ignorance of developments which it has a legitimate interest in knowing, is left to speculate on the course of events.

In his judgment, Sir Anthony also referred to the overriding importance of freedom of discussion and speech, and to the importance of the public having access to information it has a legitimate interest in knowing.

That approach has been specifically applied to a body that is analogous to the commission in this state—that is, ICAC in New South Wales—in a case called ICAC v Chaffey (1993) 30 NSWLR 21, and I think there are some very useful observations in the judgment of the court in that case, particularly the views of the majority, Chief Justice Gleeson and Justice Mahoney, but also the dissenting views of President Kirby, who also covers this topic at some length.

To summarise in relation to the first point—the assumption of transparency—the net effect of all of these developments has been to develop a public expectation of transparency in the operation of all the agencies of government, including in particular an agency like the commission. If that expectation is not fulfilled, it will inevitably breed suspicion and mistrust, and it will also, in my view, impede the important work of the commission in a number of respects to which I will now turn.

The next argument, I think, in favour of public hearings is the maintenance of the integrity of the CCC. The CCC has been given very significant coercive powers. Those powers impinge upon a number of aspects of what we regard as traditional liberties and freedoms, including the so-called right to silence. The exercise of these important powers in public provides a significant constraint upon the potential for their abuse. My experience in our courts tells me that continued public scrutiny and criticism is perhaps the most important safeguard against departure from standards of procedural fairness and propriety.

The next argument in favour of public hearings concerns public accountability. I am of course aware that there are a number of accountability mechanisms for the CCC, including the parliamentary inspector and this committee. But ultimately the commission must be accountable to the public it serves, and in my view the best mechanism for ensuring public accountability is by providing continuing public scrutiny. Unless the proceedings of the commission are conducted in public, the opportunity for public scrutiny is significantly reduced to the point where it may be only tokenistic.

The next argument I would like to address concerns the public perception of the commission. In order to effectively perform its functions, the commission needs the respect and support of the public it serves. Unless the public perceives the commission to have integrity and to be competent and effective in the performance of its functions, complaints and the flow of information to the commission will reduce, or perhaps ultimately dry up, and its function will be significantly impeded. The performance of functions of this kind in public, in my view, vitally assists the public perceptions of the integrity and efficacy of the commission. Frank Costigan, QC, who is a very experienced royal commissioner, once observed —

> Once you start investigating allegations of public corruption privately, you add the smell of a cover up.

In this state we have practical experience of the operation of a body like the commission that conducted all its work in private, and I am referring of course to the Anti-Corruption Commission, which preceded the creation of the CCC. As members of the committee would be aware, at the time of the debates relating to the creation of the CCC it was, I think, generally acknowledged by the various speakers that the fact that the ACC conducted all its work in private had significantly impeded public acceptance of its function and promoted public suspicion and mistrust.

The next argument in favour of public hearings concerns assistance with the investigative function. In my view, there is little doubt that the publicity that attends public hearings of the commission can be very useful to its investigative function by encouraging others who may have information relevant to the topic of inquiry to come forward. I have seen this firsthand when I was senior counsel assisting the royal commission into the collapse of the HIH group. There were a number of occasions upon which people came forward with very valuable information only as a result of hearing or reading about topics we were pursuing through the public hearings of that commission. I have also seen it firsthand in court proceedings. A case comes to mind in which I was appearing for

the prosecution in a committal hearing involving allegations of commercial crime against a prominent Western Australian businessman.

[10.30 am]

I opened the case to the court on the basis that although the accused had control of the company, we had no direct evidence of his knowledge of the relevant transactions and we would be relying on the drawing of an inference from circumstantial evidence. That opening remark was widely reported and, as a result, a reporter for a TV station made contact with those who were instructing me and said, "I interviewed this man on national television and he admitted to me that he knew about the transactions." So we tracked down that recording, tendered it in evidence and ultimately the man pleaded guilty. So this is not fanciful; it is a very real phenomenon that information does come forward if you conduct hearings in public.

The next issue I will address is what I call the public's right to know, touched upon by Sir Anthony Mason in the quote to which I referred. The public, I think, has a vital interest in standards of conduct within the public sector and in the elimination of corruption within that sector. I would regard that as creating a right of the public to know what is going on in the commission and the matters it is investigating. I am of course aware that the commission's investigations will usually result in a report, some or all of which will be made public. The publication of the report will generally occur a significant time after the events in question and after the inquiry has been conducted and will inevitably attract much less attention from the media than media reports of the public hearings of the commission. That observation holds true for the royal commissions with which I have been involved. Media reporting of their subsequent reports is inevitably much less interesting and much less significant than the media reporting of the hearings that they conduct. Therefore, the report and the publication of it has much less impact on the public perception.

The next issue I would like to address is the education function, which, of course, the act imposes on the commission. It is, I think, a very important function and it involves increasing the public's awareness of the appropriate standards of public sector conduct. Techniques like the promulgation of reports, the conduct of training activities, the dissemination of written materials and other techniques of that kind are by their very nature unlikely to have anything like the impact of media reporting of the public hearings of the commission. The conduct of public hearings and their reporting, in my view, is probably the most effective and powerful tool available to the commission for the performance of its education function.

The last argument I would like to mention is the prevention function, which is also specifically imposed on the commission by the act. Its investigative function occurs so that it can identify where misconduct or corrupt activity has taken place, but it is reasonable to assume that a great deal of misconduct and corrupt activity will inevitably not come to notice. If you take the most extreme example of corruption—a situation in which a bribe is given to a public official in return for a favour or benefit—both parties to that transaction have a very strong interest in making sure that it remains concealed. Inevitably, conduct of this kind will go undiscovered. Obviously the resources of government will never extend to having an investigative officer sitting in every office of every agency of government. It follows that the most enduring and significant benefit of the commission's activities is likely to be in deterring others who might be minded to participate in activity of that kind by exposing those who have participated in such an activity in the past. The public reporting of the hearings of the commission is the best way I can think of providing that important deterrent message to the public sector and thereby enhancing and ensuring the maintenance of proper standards of behaviour within the public sector.

Turning now to the arguments against public hearings, the first, of course, is the risk of damage to reputation and privacy, and in particular the risk of unjustified damage to reputation and privacy. I do not think there is any doubt that conduct of public hearings can cause damage of that kind to individuals who either give evidence or who are the subject of evidence given in the course of the

hearings. There are a number of points that are usefully made in relation to this aspect of the argument against the conduct of holding hearings in public.

The first point is that the prospect of unjustified damage to the reputation or privacy or individuals is not peculiar to the conduct of hearings by the commission. It is an ever-present feature of court proceedings and proceedings in the Parliament. The importance of public access to what happens in both courts and the Parliament is reflected in the privilege that attaches to what is said in the proceedings of both and to fair reports of what happens in both. Although both the courts and Parliaments have developed techniques that minimise the risk of unjustified damage to individual reputation and privacy, there are inevitably limits to the efficacy of those techniques, with the result that from time to time unjustified damage to the reputation of an individual will occur in the course of proceedings in either a court or a Parliament. However, as far as I am aware it has never been accepted that that risk provides a sufficient justification to establish a default position whereby the proceedings of either a court or a Parliament are conducted in private. To the contrary, it has long been recognised in both institutions that the risk of damage to the reputation of individuals and the risk of intrusion into privacy is simply the price that one must pay for the greater good of open and transparent proceedings.

The second point I would make is that a distinction needs to be drawn between unjustified damage to reputation as the result of public hearings on the one hand and damage to reputation which properly flows from the exposure of misconduct or corruption on the other.

The third point I would like to make in this area is that there are techniques and processes that can be utilised to minimise the risk of unjustified damage to reputation. They are commonly employed in royal commissions with which I have been involved and in other bodies like the commission. One such technique involves utilising a mix of private and public hearings so that you could proceed first by holding private hearings to ensure that there is a sound evidentiary base for any allegations that are aired in a public hearing. I understand that that technique is commonly used by ICAC in New South Wales. That way you can avoid the prospect of setting hares running that had no real basis in fact. Relevant also to this topic is the general issue of procedural fairness, which I will come to later because I know that it is specifically within the committee's terms of reference.

Another argument against public hearings is the threat that they might pose to the health of an individual who might be affected by them. There is, I think, no doubt that members of our community rightly place significant value upon reputation and upon the maintenance of privacy, and where unjustified damage occurs to those values there is, of course, a risk to health, just as there is when court proceedings are conducted or allegations are made in Parliament. Hopefully those cases are rare and, hopefully again, the risks of unjustified damage of this kind can be reduced by the adoption of techniques like the one I have mentioned and some of the aspects of procedural fairness to which I will come.

The next argument against public hearings is the risk of prejudice to the investigative function. There are two ways in which public hearings might prejudice the investigative function. The first is by discouraging prospective witnesses from coming forward because of the risk that they will be caught in the glare and spotlight of publicity. The second is the prospect that prospective targets might be alerted to a line of inquiry by the public reporting of the examination of witnesses previously called. The second aspect can, I think, be diminished by the use of techniques of the kind to which I have already referred; namely, a mixed use of private and public hearings so that where you have identified a subject of inquiry—a prospective target—and before you conduct public hearings you run private hearings so that that person's position is committed to before any public hearings commence and, through that means, any change of position as a result of the public hearings can be readily detected and identified.

Another argument that is sometimes advanced against public hearings is the risk of possible prejudice to a fair trial. The risk of prejudice is only likely to be of significance if the trial is a jury

trial. If there is to be a jury trial arising from events that are the subject of an inquiry, because of the procedures that precede a jury trial, it will usually be many months—usually often a year or perhaps even some years—after the reporting of the public hearings in the commission. The first protection against that is the inevitability of delay. In addition, there are a number of techniques that we can use in the court to minimise the risk of that sort of pre-trial prejudice. One is by pre-empanelment directions to prospective jurors, and sometimes even extending to questioning the jurors, and the other is by directions given by the trial judge to the jury about the material that they are to take into account and repeatedly reminding them to exclude from consideration anything other than the evidence that has been presented to them in the court.

It also has been suggested that there is no need for public hearings because the reports of the commission and any trials that follow from the inquiries of the commission provide sufficient information to the public. It will be apparent from what I have already said that the level of public awareness created by the reports of the commission and by subsequent legal proceedings is much less and therefore much less significant and much less beneficial than the level of public awareness that is created by the reporting of the public hearings of the commission.

That completes my attempt to review the various arguments for and against. It will be apparent from what I have said that it is my view that the arguments in favour of the general use of public hearings significantly outweigh the arguments against the general use of public hearings both in number and in force. It is important that I emphasise that I have been addressing all these issues generically in the abstract without regard to the particular circumstances of the case. The particular circumstances of the issue under inquiry may result in greater weight being given to one or more of the factors to which I have referred and may in the circumstances lead to a conclusion that in the context of that particular inquiry it is in the public interest for all or for part of that inquiry to be conducted in private rather than in public.

I would like to turn now to the desirable legislative structure that would fit with the views that I have expressed. It will be apparent from what I have said that it is my view that the most desirable legislative structure would be one that gives to the commissioner who is to conduct the hearings the opportunity to weigh and evaluate the competing interests and considerations in the context of the particular circumstances of that inquiry and to come to a view about the balance of competing public interest factors and arrive at a conclusion. In my view, it is undesirable for the legislature to express a default position, as the act currently does. In my view, it would be preferable for the legislature to avoid any indication of a default position and to leave it to the commissioner to make an assessment based on all the relevant facts and circumstances.

I am aware that contrary views have been expressed to this committee and I am aware of the evidence that has been given by the current parliamentary inspector and by his predecessor, both of whom are very experienced lawyers and both of whom are held by me and many others in very high esteem. But on this occasion I must respectfully disagree with their views. I note also that the present parliamentary inspector has recommended some amendments to the act that would undoubtedly strengthen the default position that currently exists in the act. For the reasons that I have given, I would not support his suggestion in relation to those amendments.

It also has been suggested that it would be desirable for the legislation to exhaustively list the relevant factors to be considered by the commissioner in determining whether or not to conduct hearings in public. I would not support that approach, for a number of reasons. First, the range of circumstances in which the commission will be conducting its hearings is infinitely variable and unpredictable. It would, I think, be impossible to exhaustively list all the circumstances. It would therefore be necessary to accompany any such list with a sweeper clause like “and any other factor that the commissioner may think relevant or appropriate”. However, as soon as you have done that, you have diminished the significance of providing a list.

The second reason I would not support providing a list of factors is that it carries with it a significant danger of encouraging litigation and challenging decisions that are made with respect to public hearings. As soon as you provide a list of relevant factors, it is open to a person whose interests are affected by the decision to go to a court and say that insufficient weight has been given to a particular factor or that account has not been taken of this factor or weight has been given to another factor that is not on the list and which is an irrelevant consideration or, when you weigh all the relevant factors appropriately, the decision of the commissioner is so unreasonable that no reasonable decision maker could make it—what we lawyers call Wednesbury unreasonableness—and they challenge the decision. It might be difficult to make out a case, but the mere bringing of the case would have the capacity to significantly disrupt the hearings of the commission and there will often be occasions on which prospective witnesses before the commission and respective targets of an inquiry will see a virtue in delay. Providing an opportunity for litigation is contrary to the best interests of the commission and I think prescribing a list of relevant factors to be considered would significantly expand the opportunities for litigious challenges of decisions of the commission.

For the same reason, I am also opposed to the suggestion that there should be a requirement that the commissioner provide a statement of reasons for his or her decision about whether or not to conduct a public hearing. The provision of such a statement would, I think, significantly increase the risk of litigation of the kind to which I have just referred. There is a risk that the provision of a statement of reasons might require the commissioner to tip his or her hand by indicating the strength of the case against a prospective witness. I think also that the provision of a statement of reasons to the parliamentary inspector would be undesirable, particularly if that occurred prior to the conduct of a hearing. This committee will be aware that there is an unresolved tension between the roles of the commission and the roles of the parliamentary inspector and, in particular, a tension as to the capacity of the parliamentary inspector to act as a mechanism for a review of the decisions of the commission.

[10.45 am]

Unless and until that tension is resolved, I think it would be highly undesirable to provide an environment in which a parliamentary inspector might feel obliged to intervene with a decision made by the commission as to the running of a current inquiry, again motivated perhaps by people who may see a very strong interest in delaying or frustrating the conduct of that inquiry. Those are my views in relation to the particular legislation.

Turning now to the specific topic of procedural fairness, which I have seen on the committee's terms of reference, I think it is important to distinguish procedural fairness from open and public hearings. They are two distinct but related issues. In ICAC v Chaffey, which I have referred to earlier, the Court of Appeal of New South Wales rejected the proposition that the right to procedural fairness includes a right to avoidance of damage to reputation. I have said they are quite distinct issues, and I think that has to be right. But of course they are related issues, because the more procedural fairness is provided, the less the risk of unjustified damage to reputation.

I would like now to address ways in which the commission might preserve procedural fairness but do so in a context in which the courts have long recognised that the precise content of procedural fairness in any case varies significantly from case to case. It is sometimes described as the variable content of the rules of procedural fairness, because so much depends upon the circumstances. To give a specific example, generally procedural fairness will best be served by giving a prospective witness notice of the topics that are to be pursued in evidence through the course of questioning. But sometimes the element of surprise is a sufficiently important and legitimate forensic strategy to depart from that general procedural requirement.

Nothing that I am about to say should be taken as being prescriptive to every case but rather indicative of the sorts of things that might be done generally but subject to particular cases. The

Salmon principles, to which I have already referred, identify a number of ways of preserving procedural fairness through the conduct of royal commissions and public inquiries. I have already mentioned some. They include the utilisation of a mix of public and private hearings to set an evidentiary base before you go into public hearings so that you are certain that you have a sound basis for any allegations that are put publicly. But there are a number of other steps that can be taken. One I have already mentioned is the giving notice to witnesses in advance of the lines of questions that are to be pursued. Others include the provision of an opportunity for the witness to be questioned through their own counsel and for their counsel to be given leave to cross-examine other witnesses whose evidence is relevant to the interests of the person who counsel is representing. Others include the opportunity for witnesses to nominate other persons who might appropriately be called by the commission. Those techniques have all been used in royal commissions with which I have been associated, subject to departure in particular circumstances for appropriate reasons. Whether or not any of those techniques is followed in an individual case must be a matter for the commission to assess in the light of all the information before it, but it seems to me that there would be nothing to stop the commission adopting a general practice, subject to departure in individual circumstances, which would include the provision of notice to witnesses in respect of the issues that are to be pursued through lines of questioning, the provision of an opportunity for the witness to give evidence under questioning by their own counsel, the provision of an opportunity for the cross-examination of other witnesses by counsel representing an interested party with the leave of the commission and the provision of an opportunity to nominate to the commission other witnesses who might be appropriately called. In my view, those procedures would enhance procedural fairness but without necessarily having any detrimental impact on the efficacy of the commission's investigative functions.

Mr Chairman and members of the committee, that is all I wanted to say by way of what I am afraid has been an overly long opening statement, but it has I think covered a lot of the ground that you may wish to cover through questions. I hope by that way I have avoided duplication.

The CHAIRMAN: Thank you, Chief Justice, and thank you for the comprehensive opening statement, which certainly covers all of the terms of reference that are of interest to the committee. Of particular interest to the committee is the fact that you have taken a contrary view to that of the current parliamentary inspector and the former parliamentary inspector, who both in essence hold the view that it should be an exceptionally rare case in which a public hearing could be justified. Do you think it would be fair to say that for those who hold that view, like the parliamentary inspector and the former PI, the key driver for them is what is perceived to be the lack of procedural fairness in the current regime?

Chief Justice Martin: I cannot speak for what has motivated their views. I would not want to put words in the mouths of people as eminent as Chris Steytler and His Excellency the Governor, but I think, as I said, there is plainly a relationship between procedural fairness or the lack of procedural fairness and criticism of public hearings. If somebody feels aggrieved by reason of departure from appropriate standards of procedural fairness, that sense of grievance will be significantly exaggerated if the proceedings are conducted in public, because they will say "Not only have you denied me procedural fairness, but you have used that denial of procedural fairness to destroy my reputation." You can understand the sense of grievance that would emerge in that situation.

I think, where inquiries are conducted in public, it behoves the inquirer to do everything that can be done to preserve procedural fairness without damaging the efficacy of then inquiry. Certainly in the royal commissions with which I have been involved, that has been our guiding principle. We have done everything we possibly can to preserve procedural fairness without damaging the inquiry. In some of those royal commissions there have been occasions upon which it has been clear to us that tipping our hand in advance of the witness giving evidence would be destructive of our inquiry by providing the witness with an opportunity to, as it were, build their case before they come to give evidence. So there are circumstances in which it is legitimate to keep cards up your sleeve, to use

the metaphor, but those circumstances would be rare, and certainly in the royal commissions that I have been in, they have been rare. They will exist. You cannot say as a general rule, "Everything has to be on the table"; there will be occasions when it is appropriate for issues to be reserved. But generally speaking, the more you afford procedural fairness, the less there is legitimate scope for criticism of public hearings.

The CHAIRMAN: Chief Justice, do you think it is fair to say that in Western Australia the legal profession is very—I do not want to use that word " brainwashed", because I do not think it is a fair word to use, but at least it will give you the sense of what I am intending—fixated on an adversarial system in the sense that legal practitioners in Western Australia know of no other system. They are not familiar with an inquisitorial system. Is that one of the key drivers that blocks people's ability to appreciate a body like the CCC having public hearings?

Chief Justice Martin: I would not use words like brainwash, but I think the reality is that most legal practitioners, including myself, have much more experience of the adversarial system than they do of an investigative function. I do not like "inquisitorial" because it has some connotations involving Spaniards and so forth that are not entirely salutary.

When I took on the role as senior counsel assisting HIH, it was, if you like, a quiet revolution in my approach to the way in which I conducted that inquiry, because instead of, as I have always previously done, representing a particular interest or a particular viewpoint and promoting a particular position, my only interest was in getting to the truth, and I did not care what the truth was so long as I found out what had actually happened. So I think it is important for those who are responsible for conducting these inquiries to bear steadfastly in mind that they do not have a case to prove. They do not have a proposition to establish; all they have is the objective of establishing the truth. Sometimes that will mean you will pursue a line of inquiry and realise that one hypothesis that you are pursuing does not stack up. Once you realise that, you discontinue that line of inquiry and openly concede that the evidence does not sustain the proposition. Because of our training and background in the adversarial process, it is sometimes hard for people to make that adjustment, but in short I agree with your observation.

The CHAIRMAN: Can I then just ask, Chief Justice, it seems to me then that when I consider what you have said this morning in comparison to the various witnesses that this committee has had to date, the paradigm in which this issue has been looked at to date has been either a retention of the discretion to have public hearings but with severe restrictions attached to it, or alternatively no ability to have the discretion to hold public hearings. It seems to me what you are advocating this morning is a different paradigm, which is an increase in public hearings but with a significant increase in procedural fairness. Is that a reasonable summary?

Chief Justice Martin: Yes, that is a reasonable summary, Mr Chairman. Because of my background in the courts, I think public hearings have a lot to recommend them for various arguments that I have recommended. As soon as you go into private hearings, problems emerge in terms of public mistrust, public suspicion, and you impede the efficacy of the function.

Mr J.N. HYDE: If we have been looking at outcomes, would your position be that royal commissions in Western Australia have been much more effective because procedural fairness is inherent in the public side of their hearings than what the CCC has been with its use of public hearings?

Chief Justice Martin: I do not know that I would not say the CCC has been ineffective or less effective than royal commissions in its public hearings. I think of course there are avenues for criticism, but I think there have been a number of very beneficial effects of the public hearings that have been conducted by the commission in this state, including bringing the awareness of the public and employees in the public sector to the sort of problems that can arise in individual circumstances, but I certainly agree with the proposition that procedural fairness is an essential component of either a CCC hearing or a royal commission or an inquiry under the Public Sector

Management Act or a court hearing or a tribunal hearing. It has to be a given. As I say, there is a variable content to the particular rules, though, depending on the particular circumstances of the case. But what I describe as the given ought to be the objective of providing as much procedural fairness as can be provided without impeding the efficacy of the investigation.

The CHAIRMAN: Are there any further questions? In which case, Chief Justice, I might just conclude with one final question, which is: in terms of mechanisms of procedural fairness, would the use of suppression orders fit that category? If so, are you able to indicate in your experience whether suppression orders are effective in mitigating the damage to privacy and reputation?

Chief Justice Martin: I would not put suppression orders within the rubric of procedural fairness. Really they are a means of avoiding some of the adverse consequences to which I have referred of publicity, unjustified damage to reputation or privacy or alerting people to courses of inquiry. Of course in Western Australia we have a number of legislative provisions which effectively provide automatic suppression orders for a lot of our court proceedings, so it is illegal to publish the name of a child involved in Children's Court proceedings. It is illegal to publish anything that would enable the victim of a sexual assault to be identified. So there are, if you like, automatic suppression orders that the media are well aware of. They generally work very well. They work effectively. From time to time, once every couple of years one media outlet steps over the line and they get rapped over the knuckles, but generally they do work very effectively. The media are well aware of them, there are well-established mechanisms for making the media aware of their existence, and they seldom get infringed.

The CHAIRMAN: In which case, Chief Justice, I regret that we have to close at this time. Thank you for your evidence before the committee today. A transcript of this hearing will be forwarded to you correction of minor errors. Any corrections must be made and the transcript returned within 10 days from the date of the letter attached to the transcript. If the transcript is not returned within this period, it will deemed to be correct. New material cannot be added via these corrections and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on particular points, please include a supplementary submission for the committee's consideration when you return your corrected transcript of evidence.

Chief Justice Martin: Thank you, Mr Chairman. I will leave my notes. Good morning.

Hearing concluded at 10.59 am