JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

PUBLIC HEARING WITH THE CORRUPTION AND CRIME COMMISSION ON 21 MARCH 2007

Report No. 22
in the 37th Parliament

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Joint Standing Committee on the Corruption and Crime Commission

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JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

PUBLIC HEARING WITH THE CORRUPTION AND CRIME COMMISSION ON 21 MARCH 2007

Report No. 22

Presented by:
Mr John Hyde, MLA and Hon. Ray Halligan, MLC
Laid on the Table of the Legislative Assembly and Legislative Council
on 5 April 2007

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COMMITTEE'S FUNCTIONS AND POWERS

On 31 May 2005 the Legislative Council concurred with a resolution of the Legislative Assembly to establish the Joint Standing Committee on the Corruption and Crime Commission.

The Joint Standing Committee's functions and powers are defined in the Legislative Assembly's Standing Orders 289-293 and other Assembly Standing Orders relating to standing and select committees, as far as they can be applied. Certain standing orders of the Legislative Council also apply.

It is the function of the Joint Standing Committee to -

(a) monitor and report to Parliament on the exercise of the functions of the Corruption and Crime Commission and the Parliamentary Inspector of the Corruption and Crime Commission;

(b) inquire into, and report to Parliament on the means by which corruption prevention practices may be enhanced within the public sector; and

(c) carry out any other functions conferred on the Committee under the *Corruption and Crime Commission Act 2003*.

The Committee consists of four members, two from the Legislative Assembly and two from the Legislative Council.

CHAIRMAN'S FOREWORD

This quarterly hearing with the Corruption and Crime Commission attracted considerable media attention, principally because it followed shortly after the Commission's issue of a press release on 20 March 2007 informing that it had suspended its 'investigation into whether any public officers engaged in misconduct' regarding the Legislative Council's Parliamentary Standing Committee on Estimates and Financial Operations' proposal to inquire into the State's iron ore policy. The Corruption and Crime Commission had cited that this was as a consequence of the President of the Legislative Council, the Hon. Nick Griffiths, MLC's refusal to allow access to associated Committee documentation and staff, on grounds of infringement of Parliamentary Privilege.

Although the Corruption and Crime Commission had issued a clarifying press release effectively acknowledging its misinterpretation of the President's comments and iterating that the issue of provision of documentation is one that remains before the Legislative Council, the matter highlights the difficulties associated with the conduct of investigations by the Corruption and Crime Commission or Commissions in general, involving Parliamentary Privilege. This report outlines the circumstances under which the stated misinterpretation arose, the perceived limitations of related legislative provisions of the *Corruption and Crime Commission Act 2003,* and the need for the Parliament and the Corruption and Crime Commission to continue to work cooperatively to resolve investigative matters involving Parliamentary Privilege.

Another focus of the report is the notion of 'public interest' in determining the conduct of public hearings. 'Public interest' is a regularly cited consideration in relation to the actions of the Corruption and Crime Commission under the *Corruption and Crime Commission Act 2003,* including decisions on whether or not a public hearing is warranted. Given the recent increase in public hearings in relation to misconduct allegations against public officers and debate associated with the potential damage to the reputations of persons not subject to misconduct allegations, further focus has been given to this issue. The JSCCCC has conducted some preliminary examination of the concept of 'public interest' in the context of another inquiry regarding the requirement for a Public Interest Monitor for Western Australia to represent the 'public interest' in Surveillance Device and covert search warrants. It notes that the term appears to be poorly defined in legislation and fairly subjective in application. This report briefly discusses the difficult balance between the 'public interest' requirement and managing collateral damage to the reputations of people not subject to misconduct allegations.

Importantly, the report also explores in brief, processes for the disposal of records under the *Surveillance Devices Act 1998* (Western Australia) and the *Telecommunications (Interception and Access) Act 1979.* There was some concern cited by the former Joint Standing Committee on the Anti-Corruption Commission regarding whether such records were being duly destroyed.

MR JOHN HYDE, MLA
CHAIRMAN

ABBREVIATIONS AND ACRONYMS

"ACC"	Anti-Corruption Commission
"CCC Act"	*Corruption and Crime Commission Act 2003*
"CCC"	Corruption and Crime Commission
"JSCCCC"	Joint Standing Committee on the Corruption and Crime Commission
"PIM"	Public Interest Monitor
"PPC"	Procedure and Privileges Committee
"WA"	Western Australia

CHAPTER 1 INTRODUCTION

1.1 Background

The report relates to a scheduled quarterly hearing of the Joint Standing Committee on the Corruption and Crime Commission (JSCCCC) with Mr Kevin Hammond, Commissioner, Mr Mike Silverstone, Executive Director and other Directors of the key business units of the Corruption and Crime Commission (CCC). The majority of the evidence was given in open session, although the JSCCCC resolved to close the hearing to examine confidential matters not considered appropriate for public examination.

Witnesses to the hearing are noted at Appendix One. The transcript of open session evidence is attached at Appendix Two.

The Committee notes that this is the final hearing of evidence with Mr Kevin Hammond given his impending retirement. The JSCCCC commended Mr Hammond on his work with the CCC in the report of the previous quarterly hearing with the Commission on 22 November 2006.

1.2 Misconduct investigations involving Parliamentary Privilege

On 20 March 2007 the CCC issued a press release[1] informing that the Commission had suspended its 'investigation into whether any public officers engaged in misconduct' regarding the Legislative Council's Parliamentary Standing Committee on Estimates and Financial Operations' proposal to inquire into the State's iron ore policy. The CCC detailed that the Commission's actions were as a consequence of the President of the Legislative Council, the Hon. Nick Griffiths, MLC's, refusal to allow the CCC access to the Committee's minutes, records of proceedings and deliberations and relevant members and staff, on claim of infringement of Parliamentary Privilege. The CCC noted that it had sought independent legal advice on aspects of the investigation affected by Parliamentary Privilege and that the Commission was working cooperatively with Parliament to resolve the matter.[2]

The CCC issued a further press release on that same date clarifying the President's written comments to the CCC regarding the requested documentation and the implications for Parliamentary Privilege. This included that:

- Parliamentary Privilege is a collective privilege of the Houses of Parliament, hence an individual Member or Officer of Parliament is not entitled to make a decision affecting its application;

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1 Corruption and Crime Commission, "Commission investigation suspended due to Parliamentary Privilege", *Media Release*, 20/03/2007.

2 Corruption and Crime Commission, Available at: http://www.ccc.wa.gov.au/media_statements.php?id=105 Accessed on 23 March 2007.

- the matter would be brought to the attention of the Legislative Council via the tabling of the CCC's request for information on 20 March 2007 and that the House had the option of referring the matter to the Legislative Council Procedure and Privilege's Committee for consideration; and

- it is not a decision of the House by its own resolution to waive its privileges or immunities to enable the CCC or another statutory authority to deal with material inconsistently with Article 9 of the *Bill of Rights.*

The CCC concluded that the matter of provision of documentation was therefore a matter before the Legislative Council.[3]

In evidence to the JSCCCC on 21 March 2007 Mr Hammond acknowledged and apologised to the Legislative Council in relation to the above detailed misinterpretation by the CCC, providing the following explanation as to how the error occurred:

> *The commission, in analysing the situation with regard to this matter conflated the advice of the chair of the affected committee who was, on 12 February 2007, not prepared to respond at that time to the commission's questions in relation to this matter due to issues of parliamentary privilege … with the President of the Council's advice to this commission by letter of 13 March 2007 that he intended bringing the commission's questions to the attention of the Council, noting his final observation in that letter that it is not open to the house by its own resolution to waive its privileges or immunities so as to enable the commission or any other authority to deal with material inconsistently with article 9 of the Bill of Rights*.[4]

Mr Hammond noted the complexities inherent in the conduct of investigations by the CCC involving issues of Parliamentary Privilege, again reiterating that time was required to settle these issues. In elaborating on this point, Mr Hammond detailed that although Section 27A of the *Corruption and Crime Commission Act 2003* (CCC Act) dealt clearly with 'simple misconduct matters' affected by Parliamentary Privilege, it was silent with regard to serious misconduct. He contended that Section 3 (2) of the CCC Act which reads as follows and preserves Parliamentary Privilege is an impediment to the conduct of serious misconduct matters involving Parliamentary Privilege:

> *Nothing in this Act affects, or is intended to affect, the operation of the Parliamentary Privileges Act 1891 or the Parliamentary Papers Act 1891 and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable exclusively by a House of Parliament, unless that House so resolves.*[5]

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3 Ibid.

4 Mr Kevin Hammond, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 21 March 2007, p2-3.

5 Ibid,.p3.

Mr Hammond stated that although the CCC view that Parliamentary debate on the *Corruption and Crime Commission Bill 2003* relating to current Section 27A and 27B intended that the provisions cover serious misconduct matters, the CCC view that they do not.[6] Mr Silverstone noted therefore that Section 27A is 'not available as a recourse' in dealing with the current matters under investigation because they constitute serious misconduct. Resolution as to how they are addressed therefore lies with the Parliament.[7]

Mr Silverstone detailed that although the Legislative Assembly's Procedure and Privileges Committee (PPC) has commenced an inquiry (PPC Inquiry into the actions of the Member for Murchison-Eyre in the early release of Committee documents), he cited that the CCC had 'not been consulted' about the nature of that Inquiry, nor had the 'opportunity to identify to the Assembly those issues that …[the CCC] believe may be considered by a proper investigation.'[8] Mr Silverstone informed that he intended to bring this issue to the attention of the Legislative Assembly.

This is not the first time the issue of Parliamentary Privilege has arisen in association with inquisitorial inquiries by commissions. Mr Hammond cited that issues of privilege were considered in the course of investigations by the WA Inc Royal Commission (1990). Although discussed in the associated report, they were never resolved at that time. He detailed that to date there has been no attempt to establish a protocol between the investigating agency and Parliament, although contended that this may be required. Mr Hammond reiterated the CCC's intention to seek independent legal advice on the impact of Parliamentary Privilege on the CCC's investigations.[9]

1.3 Report on Past Misconduct Inquiry

Mr Hammond advised that the CCC is currently concluding its report as requested by the JSCCCC in regard to matters surrounding protected witness Andrew Petrelis and (pursuant to Section 86 of the CCC Act) is advising persons who may be adversely affected by its content. The report will be tabled with the JSCCCC and in Parliament on completion.[10]

The Report includes an investigation by the Anti-Corruption Commission (ACC) of Western Australia (predecessor to the CCC) and further assessment [under Section 22 of the CCC Act] by the CCC in relation to any related misconduct by Western Australian police officer(s). The Report has not been released publicly to date, although the JSCCCC has had discussions with the CCC about releasing it on grounds of 'public interest'.

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6 Ibid,. p5.

7 Mr Mike Silverstone, Executive Director, Corruption and Crime Commission, *Transcript of Evidence*, 21 March 2007, p5.

8 Ibid,.p6.

9 Mr Kevin Hammond, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 21 March 2007, p4.

10 Ibid,.p3.

1.4 'Public Interest' and Public Hearings

The notion of 'public interest' has arisen in the course of a number of inquiries by the JSCCCC. Under its current *Inquiry into Legislative Amendments to the Corruption and Crime Commission Act 2003* the Committee is giving due consideration to the requirement for a Public Interest Monitor (PIM) for Western Australia (WA). The position of PIM is currently provided for under Queensland legislation and is tasked with providing a level of review through representing the public interest in relation to surveillance devices, covert warrants and other matters when presented at Court for approval by the Judiciary. In fact, under Section 13 (2) (f) of the *Surveillance Devices Act 1998* (WA) the 'public interest' is one criteria that the Judiciary must give due regard to in approvals for Surveillance Device Warrants. It is noted that the concept of a PIM for this State is also a matter that the Attorney General of Western Australia as the responsible Minister for the CCC must give due regard to under Section 226 of the CCC Act in his impending review of that legislation.

Further, the 'public interest' is a regularly cited consideration in relation to actions of the CCC under the CCC Act. However, the recent increase in public hearings by the CCC regarding misconduct allegations against public officers has provided further focus on this issue, particularly with respect to collateral damage to the reputations of persons not subject to a misconduct allegation. Section 140 (2) of the CCC Act cites the following:

> *The Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so.*

Although the 'public interest' may be inferred from this provision, it is not defined within the interpretations section of the legislation. In fact, in recent research conducted by the JSCCCC in relation to the inquiries cited above, the 'public interest' is often subjective in interpretation and not prescriptive in legislation. Whether it is in fact possible to definitively define 'public interest' so that it is generically applicable or establish situational specific guidelines requires further examination. This sentiment is captured in the following comment of the Queensland PIM in evidence tendered to the New South Wales Committee on the Office of the Ombudsman and Police Integrity Committee's *Inquiry into Scrutiny of New South Wales Police Counter-Terrorism and Other Powers*:

> *I just mentioned the interests that I represent. It is defined nefariously as "the public interest". I challenge any of you in this room to tell me in 10 words or less what that is.*[11]

The New South Wales Law Reform Commission has also reviewed this matter in the context of an examination of covert surveillance and the 'public interest':

> *It is generally accepted that the "public interest" is and* [sic] *amorphous concept being most meaningful in the subjective rather than the objective sense.*[12]

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11 Mr Colin Forest, Public Interest Monitor, Queensland, *Transcript of Evidence*, Committee on the Office of the Ombudsman and the Police Integrity Commission, Inquiry into Scrutiny of New South Wales Police Counter-Terrorism and Other Powers 24/08/2006, p34.

Although this is an issue that the JSCCCC intends to explore in greater detail in current and impending inquiries, the issue has been discussed on several occasions with the CCC and raised in formal correspondence with the Commission dated 14 March 2007.

Mr Hammond responded at hearing with the following statement which in essence is reflective of that of the New South Wales Law Reform Commission:

> *The issue of public interest has been raised in recent times by not only this committee but also commentators and the like. "The public interest" has been defined as something being of concern to the public at large or to a significant portion of the public, which may or may not involve the personal proprietary rights of individual people. I believe it is generally accepted that the public interest is a fluid concept and that what constitutes the public interest at any time will depend upon the particular context and perspective involved. Having been alerted to this matter and having thought about it overnight and whatever, I believe that when I look at the context of public interest, I am particularly impressed or influenced by the number of people who can be potentially involved… I note that the Surveillance Devices Act contains a rare attempt at actually defining "public interest," which includes the interests of national security, public safety, the economic wellbeing of Australia, the protection of public health and morals, and the protection of the rights and freedoms of citizens.*[13]

Mr Hammond noted the benefits of public hearings as public transparency in Commission processes and issues addressed by the CCC, education of public officers of the circumstances under which serious misconduct can occur and opportunity for Government agency Chief Executive Officers to undertake early remedial action. Mr Hammond detailed an increase in the number of matters or reports of misconduct prior to and immediately following the commencement of public examinations.[14]

Mr Hammond cited the importance of 'openness' in public hearings reflecting on the erosion of public confidence in the ACC as a consequence of the secrecy provisions of *Anti-Corruption Commission Act (1988)* which prevented public examinations occurring. Mr Hammond detailed that there has been an 'overwhelming' public interest requirement to examine those matters raised at public hearing because they go to the heart of governance in this State. He acknowledged that public examinations come at a cost to individuals and their families with respect to issues like privacy and prejudice, however implied that the public interest requirement outweighed these concerns.[15]

In saying the latter however, Mr Hammond cited the following:

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12 Law Reform Commission of New South Wales, 'Report 98 - Surveillance: an interim report', 2001, paragraph 6.4

13 Mr Kevin Hammond, Commissioner, Corruption and Crime Commission, *Transcript of Evidence,* 21 March 2007,pp.3-4.

14 Ibid,.p3.

15 Ibid,.p4.

> *We are also prepared to look at specific complaints when they are raised about a concatenation of factors that have led to extra publicity that was not warranted. I do say that we are looking to develop a more sophisticated - I can say it safely here - way of dealing with that situation, which has really only become prominent during the recent public hearings.*[16]

The JSCCCC queried whether persons subject to surveillance should be notified by the CCC prior to the conduct of a public hearing. Mr Hammond although acknowledging the concerns raised by the Committee, did not view that this would be within the scope of the Commission's operations. Mr Hammond elaborated however on the notion of informing people mentioned in a hearing that 'the commission has no interest in that person and there have been no adverse findings.'[17] Such a process was initiated in relation to specified hearings of the CCC in December 2006 whereby persons received letters citing that the CCC were unlikely to find misconduct opinions against them. At that time the process also extended to corresponding with people who may have had misconduct opinions formed about them, providing them the opportunity to respond.[18] It was clarified that just because there is no 'adverse opinion' with regard to misconduct within the meaning of the CCC Act does not mean that a person will not be adversely mentioned in respect to their actions. Mr Mike Silverstone comments on some of the complexities inherent in informing people that misconduct findings will not be made against them:

> *In terms of advancing the procedural fairness for public officers who may have been subject to misconduct findings, we made a rod for our own back. Some people have suggested that they received some sort of letter saying that they are in the clear when, in fact, the only letter they may have received advised them that they were unlikely to be subject to misconduct findings.*[19]

In the context of communicating with people in circumstances where adverse findings have not been made, Mr Hammond noted that the CCC needed to formalise related procedures.[20]

On a peripheral issue, Mr Hammond detailed that concerns had been expressed by media and legal representatives that witnesses were not treated fairly by virtue of the CCC failing to provide available evidence prior to the commencement of hearings. Mr Hammond essentially cited that the process is inquisitorial and that hearing procedures are not unique to the CCC. Given that this investigative process is not part of the overall main administration of justice, such processes are not applicable. That said, he detailed that the CCC accept submissions from, and apply procedural fairness to, persons affected by hearings.[21]

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16 Ibid,.p10.

17 Ibid,.p8.

18 Mr Mike Silverstone, Chief Executive Officer, Corruption and Crime Commission, *Transcript of Evidence*, 21 March 2007, p9.

19 Ibid,.p.9.

20 Mr Kevin Hammond, Commissioner, Corruption and Crime Commission, *Transcript of Evidence*, 21 March 2007,p9.

21 Ibid,.p4.

Mr Hammond also detailed that the Commission applies Suppression Orders where appropriate to 'avoid the publication of …gratuitous and derogatory references to persons who are only marginally or collaterally involved, if at all.'[22] The CCC has applied 17 Suppression Orders during the course of the past two series of public hearings, 15 on the CCC's own initiative and two on application.

In light of the latter comment, the JSCCCC queried why in determining the 'public interest' and given the availability of Suppression Orders, telecommunication interception material containing prejudicial and derogatory language towards a specific ethnic group had been played at a CCC hearing. Mr Hammond responded as follows:

> *I suppose with all of one's efforts to, as you say, do the right thing in this connection, occasionally we will not satisfy every concern or complaint. During the course of those hearings I was particularly alive to the issues when off-the-cuff derogatory comments are made about people, and sometimes they are really quite off. I take the point. I did not see the particular comment, not that we are talking about any particular comment. I did not see that particular comment to be one that would have alerted me to cut it out. If I am wrong in that respect, I am sorry about it. It did not ring a bell, and it may have had some relevance to what was being talked about.*[23]

Mr Hammond also detailed that the Commonwealth *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 1998* (Surveillance Devices Act) also place significant constraints on the Commission's use of these covert warrants. He elaborates as follows:

> *We do not have the power to use those devices as and when we feel they may be useful or to provide interesting information. Of the material that is gathered, we are particularly conscious of ensuring that only material that is relevant to the hearing's scope and purpose is used. The commission sees no benefit to the public interest or indeed to its own reputation in disclosing matters that are not relevant, particularly if it involves only gossip or matters that are outside the scope of the investigation, or if it could result in unfair damage to the reputation of the individuals or organisations concerned. However, for all that, the recent revelations at the public hearings of the commission would have been impossible without our telephone interception and surveillance device powers.*[24]

The JSCCCC will examine the adequacy of accountability measures for covert warrants in its report on the requirement for a PIM in this State.

1.5 Dealing with records under the *Surveillance Devices Act 1998* and *Telecommunications (Interception and Access) Act 1979* (Cth)

An issue raised in correspondence with the Commission on 14 March 2007 was the absence of stipulated time-frames for retaining records under the Surveillance Devices Act. The JSCCCC in

22 Ibid.

23 Ibid,.p7.

24 Ibid.

elaborating on the latter made historical reference to concerns of the former Joint Standing Committee on the ACC regarding the then ACC and the WA Police not destroying intercept material under the *Telecommunications (Interception and Access) Act 1979.* The CCC as a separate entity to both the ACC and the WA Police were unable to provide comment on the actions of those agencies, however Mr Cashman, Director Legal, did elaborate on the records provisions of the Surveillance Devices Act as follows:

> *…The Surveillance Devices Act appropriately provides for destruction of records, in section 41(b), but, practically speaking, an appropriate time frame cannot be specified. Section 41 (b) in particular indicates that the agency must destroy any record or report coming out of the use of surveillance devices if satisfied that it is not likely to be required in connection with the investigation, the making of a decision on whether to prosecute or in relation to the actual prosecution of offences. The time frame, practically speaking, cannot be specified. Really it is dependent on the circumstances of each investigation.*[25]

Mr Cashman also noted that retention and disposal of records obtained pursuant to the Surveillance Devices Act were also provided for in the CCC's record keeping plan approved by the State Records Commission. He commented as follows:

> *The policy there, so to speak, is that those surveillance devices records are to be destroyed upon authorisations by the operations division of the commission after conclusion of case and appeal and after all authorisations to destroy have been obtained. So, in that respect, time frames are specified, but it is difficult practically speaking, as I said, to be prescriptive about those. We interpret "likely to be required or not" to mean having a degree of probability greater than merely possible. It is a bit rubbery, but those prescriptions are in place.*[26]

The CCC further advised that records of telecommunications interception material are destroyed on direction of the Operations division of the CCC and following required inspection by the Parliamentary Commissioner for Administrative Investigations (Ombudsman) under the *Telecommunications (Interception) Western Australia Act 1996.*[27]

The JSCCCC iterated that they were principally concerned about the fact that records that were no longer required for operational reasons were destroyed.

The CCC informed that they would take this question on notice to ensure accurate provision of information in relation to the destruction of records by the Commission.

In correspondence received on 2 April 2007 the CCC confirmed that it had destroyed an amount of telecommunications interception documentation in line with the requirements of the relevant Act. The Commission further advised that they were in the pre-destruction phase regarding a

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25 Mr Michael Cashman, Director Legal Services, Corruption and Crime Commission, *Transcript of Evidence*, 21 March 2007, p6.

26 Ibid,.p7.

27 Ms Vanessa Grant, Director Business Services, Corruption and Crime Commission, *Transcript of Evidence*, 21 March 2007, p6.

number of other CCC initiated operations involving telecommunications interception material in line with finalisation of associated Judicial processes. Destruction processes regarding three operations of the ACC involving both telecommunications interceptions and Surveillance Device material are in train.[28]

1.6 Department of Education and Training

In Report No. 18 the JSCCCC committed to reviewing the CCC's response to the following recommendation of the *Department of Education and Training Select Committee* of the Legislative Council:

> *Recommendation 4: The Committee recommends that the Government clarify, through legal advice and/or legislative amendment, the anti-disclosure provisions of the Corruption and Crime Commission Act 2003 so as to enable public sector chief executive officers to be able to freely discuss with their Ministers all matters relevant to the Minister's portfolio.*[29]

In brief, the above related to debate which arose following the CCC's tabling of a report entitled *Sexual Contact with Children by Persons in Authority in the Department of Education and Training of Western Australia* in October 2006 regarding whether the responsible Minister had been informed of the CCC's investigations and whether this had been undertaken appropriately. Although the Select Committee found that the Director General of the Department did not brief the Minister in writing about the matter and considered a verbal briefing to be insufficient, it noted that information provided to the Department of Education and Training by the CCC prior tabling of the Report was unclear and confusing.

The CCC provided the following response to the Committee's query at hearing on 21 March 2007:

> *I met with the Director General of the Department of the Premier and Cabinet and with the senior directors general of government departments to reiterate the commission's view that the relationship between CEOs and ministers is very important and that the flow of information from CEOs to ministers is an important function that should continue. We have noted that in certain limited exceptional circumstances there may be reasons why a CEO would be unable to advise a minister of a matter to do with an issue that the commission was looking at. It was noted that that is a possibility. We suggested to CEOs that in most cases if they had a concern, they should contact the commission first and talk to us about it to resolve the matter. I note that that advice, which was made to the Corruption and Crime Commission, is in the form of disclosure and misconduct reports. The document was issued in May last year and was sent to ministers and CEOs. We have*

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28 Email from Mr Alan Green, Manager Corporate Governance and Reporting, Corruption and Crime Commission, 2 April 2007, p1.

29 Western Australia, Legislative Council, The Department of Education and Training Select Committee, *Report of the Select Committee into the Department of Education and Training*, December 2006, p96.

> *again drawn the attention of CEOs to that document, and that document is on our website.*[30]

Although the JSCCCC notes the CCC's response to the recommendation, some of the information provided was also tendered before the above Select Committee[31] who in turn recommended that clarification of the anti-disclosure provisions of the Corruption and Crime Commission Act 2003 be sought by Government either through legal advice and/or legislative amendment. The Committee intends to consider this matter further in its *Inquiry into Proposed Legislative Amendments to the Corruption and Crime Commission Act 2003*.

30 Mr Mike Silverstone, Executive Director, Corruption and Crime Commission, *Transcript of Evidence,* 21 March 2007, p11.

31 Western Australia, Legislative Council, The Department of Education and Training Select Committee, *Report of the Select Committee into the Department of Education and Training,* December 2006, pp 92/94.

APPENDIX ONE

HEARINGS HELD

Date	Name	Position	Organisation
21 March 2006	Kevin Hammond	Commissioner	Corruption and Crime Commission
21 March 2006	Mike Silverstone	Executive Director	Corruption and Crime Commission
21 March 2006	Nick Anticich	Director, Operations	Corruption and Crime Commission
21 March 2006	Michael Cashman	Director, Legal Services	Corruption and Crime Commission
21 March 2006	Irene Froyland	Director, Corruption Prevention	Corruption and Crime Commission
21 March 2006	Vanessa Grant	Director, Business Services	Corruption and Crime Commission

APPENDIX TWO

TRANSCRIPT OF PUBLIC HEARING WITH THE CORRUPTION AND CRIME COMMISSION ON 21 MARCH 2007

JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 21 MARCH 2007

OPEN SESSION

Members

Mr John Hyde (Chairman)
Hon Ray Halligan (Deputy Chairman)
Mrs Judy Hughes
Hon Margaret Rowe

Hearing commenced at 10.30 am

HAMMOND, MR KEVIN JAMES
Commissioner, Corruption and Crime Commission, examined:

SILVERSTONE, MR MICHAEL JOSEPH WILLIAM
Executive Director, 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:

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

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

The CHAIRMAN: The committee hearing is a proceeding of Parliament and warrants the same respect that proceedings in the house itself demand. Even though you are not required to give evidence on oath, any deliberate misleading of the committee may be regarded as contempt of Parliament. Have you completed the "Details of Witness" form.

Mr Hammond: Yes, I have. Kevin James Hammond has completed the details and understands the conditions.

Mr Silverstone: Michael Silverstone - the same regard.

Mr Anticich: Nicholas Anticich, and I have.

Mr Cashman: Michael Anthony Cashman, yes.

Dr Froyland: Irene Dagmar Froyland, yes.

Ms Grant: Vanessa Robin Grant, yes, I do.

The CHAIRMAN: You have stated your full names, could you state your addresses and capacity in which you appear before the committee?

Mr Hammond: My personal address is Box 7667, Cloisters Square, Perth, or, alternatively, 186 St Georges Terrace, Perth. I appear as Commissioner of the Corruption and Crime Commission of Western Australia.

Mr Silverstone: I have the same address. I am the Executive Director of the Corruption and Crime Commission.

Mr Anticich: I am the Director, Operations of the Corruption and Crime Commission at the same address.

Mr Cashman: I am at the same address and am the Director, Legal Services, Corruption and Crime Commission.

Dr Froyland: I am the Director of Corruption Prevention, Education and Research of the Corruption and Crime Commission.

Ms Grant: I am the Director, Business Services at the same address.

The CHAIRMAN: I thank the members of the commission for attending. This has been a prearranged meeting and has been in our diaries for a couple of months. The committee has resolved that a pool camera be in attendance for the first 20 minutes or so.

Obviously, we have corresponded on a number of issues that we did intend to raise today. A couple of things may have happened yesterday that the commissioner may wish to comment upon. We will give him that opportunity. The committee members are mindful that they are privy to some issues of last year that are of an operational matter. Although that has nothing to do with yesterday or any of the public hearings currently being undertaken, there will be a need for the committee to go into closed session at about 11.30 am. Clearly, we are mindful that we may have been privy to other confidential documents. If you wish to pursue an issue or we are pursuing an issue that would be better considered behind closed doors, we are happy to consider resolving it in such a way.

Commissioner, would you like to make an opening statement on possibly your very last appearance in Parliament?

Mr Hammond: Yes, thank you very much, Mr Hyde. Mr Chairman and members of the committee, I would like to make an opening statement in two separate parts. It will not be particularly long, but the matters I do wish to cover are of significance. The first discrete part is this: following an announcement in the Legislative Council yesterday, the commission issued a media release which stated that -

> . . . the President of the Council, the Hon Nick Griffiths, had informed the Commission that information requested by the Commission to further its investigation would not be provided as to do so would involve an infringement of the privilege of Parliament.

That advice was incorrect. The President had, in fact, brought the matter to the attention of the house. Once aware of this error, the commission immediately issued a clarifying media statement directly quoting the President of the Council's written response to the commission and acknowledging that the issue of the provision of documents is still before the Legislative Council. Additionally, the commission phoned the major newsagencies - *The West Australian*, *The Australian*, the ABC and the AAP in order to bring the clarification to the attention of respective journalists. The commission regrets its error and apologises to the Legislative Council for misrepresenting its position.

The commission, in analysing the situation with regard to this matter conflated the advice of the chair of the affected committee who was, on 12 February 2007, not prepared to respond at that time to the commission's questions in relation to this matter due to issues of parliamentary privilege and conflated that with the President of the Council's advice to this commission by letter of 13 March 2007 that he intended bringing the commission's questions to the attention of the Council, noting his final observation in that letter that it is not open to the house by its own resolution to waive its privileges or immunities so as to enable the commission or any other authority to deal with material inconsistently with article 9 of the Bill of Rights.

With regard to its own investigation into whether any public officers engaged in misconduct in relation to a Legislative Council parliamentary committee's inquiry into the state's iron ore industry, the commission has suspended its investigation and is seeking separate legal advice on what aspects of the investigation are affected by parliamentary privilege. The conduct by the commission of investigations of matters that may touch on parliamentary privilege is a complex one. The commission notes that section 27A of the act is very clear in respect of dealing with simple misconduct matters affected by parliamentary privilege. It is silent with respect to serious misconduct. I observe that section 3(2) of the Corruption and Crime Commission Act provides that -

> Nothing in this Act affects, or is intended to affect, the operation of the *Parliamentary Privileges Act 1891* or the *Parliamentary Papers Act 1891* and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable exclusively by a House of Parliament, unless that House so resolves.

Essentially, this provision preserves parliamentary privilege and at this stage poses an apparent impediment to further progress in those commissions of serious misconduct investigations touched on by parliamentary privilege. Resolution of these difficult issues may take some time.

With regard to the commission's review of the Petrelis matter, the commission is concluding its report and is in the process of advising individuals who may be adversely affected by it. This may take a few more weeks. The commission notes the committee's desire for this report to be tabled in Parliament in connection with a meeting of this committee, and it will coordinate with your committee once the report is printed. That is the specific first part of the opening statement that deals with the issues of yesterday.

I will deal briefly, if I may, with some matters that have arisen in recent times. You will appreciate that we are not in a position to comment specifically on matters that were raised in recent public hearings, because those opinions and findings will be made public when the reports are tabled. The report on Smiths Beach is well advanced and will be tabled some time in the next couple of months. My retirement will not delay the completion of these reports, which ultimately will be the result of the efforts of a number of people.

The issue of public interest has been raised in recent times by not only this committee but also commentators and the like. "The public interest" has been defined as something being of concern to the public at large or to a significant portion of the public, which may or may not involve the personal proprietary rights of individual people. I believe it is generally accepted that the public interest is a fluid concept and that what constitutes the public interest at any time will depend upon the particular context and perspective involved. Having been alerted to this matter and having thought about it overnight and whatever, I believe that when I look at the context of public interest, I am particularly impressed or influenced by the number of people who can be potentially involved. I live in a strata-titled block of units, and we have very concerning issues with some of the other unit holders, but they concern only us; they are not of public interest to anybody else. If, however, something came up about the overall rights of unit holders in strata titles across the state of Western Australia, it would obviously be a different matter. That sounds a bit flippant, but I am trying to say that a number of people are involved. There is some public interest in broader issues such as freedom of expression, privacy and the like. I note that the Surveillance Devices Act contains a rare attempt at actually defining "public interest," which includes the interests of national security, public safety, the economic wellbeing of Australia, the protection of public health and morals, and the protection of the rights and freedoms of citizens.

When it comes to public hearings, as you are well aware, the act places the responsibility on the commissioner to weigh the benefits of public exposure and public awareness against the potential for prejudice or privacy arrangements, and to hold a public hearing if he comes to the conclusion that it is in the public interest to do so. Each case has to be separately addressed. Three main benefits arise from public hearings. Firstly, they let the public see what the commission is doing. Secondly, they enable the public to be aware of the range of issues that the commission does address. Experience has very clearly shown that the number of matters or reports of suspected misconduct that are brought to the commission's attention increases during and immediately after public hearings. Thirdly, of course, there is an educative benefit for public officers to see, by way of example, how serious misconduct can occur, and hopefully the publicity from the last set of hearings will enable chief executive officers to take early remedial action.

In terms of the importance of openness, it is worth remembering that our predecessor was forced to act in secrecy, which eroded the public's confidence in that commission. With regard to prejudice, privacy arrangements and the like, we acknowledge that public hearings can come at a cost to individuals and their families. It is not the commission's desire to cause this stress and discomfort, but there has been an overwhelming need to address the public interest in identifying the matters raised at those hearings that go to the heart of governance in this state.

On another small issue, there has been some media and other comment by lawyers and the like that their clients do not get a fair go and that the defence is not presented with all the available evidence prior to the commencement of hearings. I believe that those issues are very well addressed in our hearing procedures, as appear on the website. It is not part of the overall, main administration of justice; it is an investigative process. We allow people the chance to come back to us. We accept submissions, and we apply procedural fairness to persons affected by our hearings. I would like to say that the hearing room procedures are not unique to our commission; they are basically the same as those of similar commissions across Australia.

Suppression orders are used for a number of purposes. I, as commissioner, have been concerned to avoid the publication of what can be sometimes gratuitous and derogatory references to persons who are only marginally or collaterally involved, if at all. During the last two public hearings I made 17 suppression orders, of which 15 were made on my own initiative without waiting for an application. Many of these were to prevent the publication outside the hearing room of salacious and derogatory comments about others. You are aware, Mr Chairman, that telecommunications interception, surveillance devices and the use of those devices by the commission are subject to strict regulation and to applications to courts and the like. This is a matter that might come up later on, so I will say no more about it. I point out that both of those acts of Parliament - the commonwealth act for telephone interception and the state act for surveillance devices - place significant constraints on the commission's use of those measures. We do not have the power to use those devices as and when we feel they may be useful or to provide interesting information. Of the material that is gathered, we are particularly conscious of ensuring that only material that is relevant to the hearing's scope and purpose is used. The commission sees no benefit to the public interest or indeed to its own reputation in disclosing matters that are not relevant, particularly if it involves only gossip or matters that are outside the scope of the investigation, or if it could result in unfair damage to the reputation of the individuals or organisations concerned. However, for all that, the recent revelations at the public hearings of the commission would have been impossible without our telephone interception and surveillance device powers. Thank you, Mr Chairman.

The CHAIRMAN: Thank you very much, commissioner. Could we briefly touch on a couple of issues? I note your comment that there may be an impediment to the current inquiry as a result of yesterday's events. Has any attempt been made by the commission or the Parliament, either previously or currently, to establish a protocol on this issue?

Mr Hammond: Going back into history, the issue did cause great concern at the time of the WA Inc royal commission. There is a reference in volume 2, part 2 of the report of that commission to the difficulties that were caused. The difficulties were not resolved at that time. I think I am correct in saying that there has yet been no conscious attempt to establish a protocol, but I think we might be heading that way.

[10.50 am]

The CHAIRMAN: I did note your comment that this could take some time. I will query that a bit further. Are there two issues here and - perhaps playing devil's advocate - is there an issue of perhaps being engaged in a fishing expedition if there are requests for particular documents or a particular statement from a particular member? Are there two issues here?

Mr Hammond: I think there probably are, but you will remember that we are essentially being governed by the Glorious Revolution of 1688, and the Bill of Rights contained therein. It has been subsequently examined, and I am grateful to the officers of the Parliament for the information that they sent to us concerning the history of this and the current adoption of that Bill of Rights. They present a formidable hurdle. There is also an issue of whether Parliament can waive its privileges in that respect. I think I have seen two different opinions on that.

The CHAIRMAN: An awful lot of lawyers will become very rich giving alternating opinions.

Mr Hammond: I suppose it is an ill wind.

Hon RAY HALLIGAN: On that same subject, sections 27(a) and 27(b) have no doubt been reviewed by many over the past few days and the past few hours. I know you have intimated this, but is it your belief that going down that path of 27(a) and 27(b), knowing full well that your inquiry of the Parliament has gone to the Procedure and Privileges Committee and that committee has agreed that investigation should take place, 27(b) must place it back in your hands for investigation? Is that still an impediment?

Mr Hammond: I think the impediment is there - I might ask for assistance here - because of the fact that there is a strong view that neither section 27(a) nor 27(b) deals with issues of serious misconduct. If you look at the parliamentary debates at the time - remember they went on for some time in the standing committee - we believe that it was intended that it cover serious misconduct, but we do not think it does.

Mr Silverstone: The commissioner's opening statement indicated that it is clear with regard to simple misconduct, which is a level below serious misconduct. When you get into the realm of serious misconduct, the act appears to be silent in that regard, and this is one of the issues that, while having a real problem now, we are working through with the Parliament.

Hon RAY HALLIGAN: Is the suggestion, then, that serious misconduct is totally excluded? If you identify something as serious, does 27(a) not cover it?

Mr Silverstone: Our understanding is that 27(a) is silent in that regard, so therefore it is a matter for the Parliament. Our assumption is that it is a matter for the Parliament to resolve how it will deal with these matters. We would argue that the nature of the matters we are looking at fall on the side of serious misconduct, therefore it would appear that 27(a) is not available as a recourse in dealing with the matter. Therefore, the question is how this should matter be resolved.

The CHAIRMAN: In the same vein, can I raise the issue that we seem to have had no problem or hesitation in respecting the conventions or the privileges of the Coroner's Court or other courts, if we look at the Petrelis issue with the ACC, and the Mallard issue; there has been a deliberate intention to wait until other issues are being addressed. Again, playing the devil's advocate, there seems to be a healthy respect for the longevity of some legal court practices, but the issue of parliamentary privilege is being addressed in a more urgent way.

Mr Silverstone: The issue for us is that, because it is so unclear in the first instance as to what the process is, we are seeking to resolve a way forward in terms of the process, but also our concern is that we have not had the opportunity of a forum to raise our view on the issues before us about serious misconduct to the level of the Parliament at this stage. I might observe that we have not been consulted about the nature of the Legislative Assembly's Procedure and Privileges Committee inquiry, nor have we yet had the opportunity to identify to the Assembly those issues that we believe may be considered by a proper investigation. As of today we are contemplating how to bring that matter to the attention of the Legislative Assembly.

The CHAIRMAN: Particularly in that you have not handed down any findings.

Mr Silverstone: Equally, if we form the view that misconduct by public officers may have been assessed as being potentially serious misconduct, it is not clear how that matter might be handled.

We are currently having discussions within the commission to provide advice to the commissioner on how best to bring that to the attention of the Assembly.

The CHAIRMAN: Without pushing it too far, are we heading towards the Assembly being too presumptuous in undertaking such an inquiry before?

Mr Hammond: Let us not fight the Glorious Revolution again. There are difficult issues here; they will take some time to resolve. With goodwill on all sides, I think they can eventually be resolved. Because of the antiquity and importance of the issues it is just not easy.

The CHAIRMAN: Okay, can we move on? You addressed the issue of material from telecommunications intercepts under the commonwealth legislation, and surveillance devices under the state legislation. Again, we do not want to refer specifically to any current inquiry or hearing, but one of the issues the committee has been concerned with and on which we will be doing a separate report later on, is that the Ombudsman is required to report on TIs. One of the public reports from the ACC time said that none of the intercept material had been destroyed, and that there was a predisposition towards the police not destroying the material as is required under law. There is a catch-out for the police and you in that you may believe an investigation is ongoing, but for no material to have been destroyed -

Mr Hammond: Is this in ACC time?

The CHAIRMAN: Yes, I am deliberately trying not to refer to any CCC information that you might have.

Mr Hammond: Firstly, we are not the ACC, nor would I have the presumption to speak for the Western Australian police force - heaven forfend. Our director of legal services is happy to address this issue.

Mr Cashman: I think, Mr Chairman, your question is in relation to record keeping time frames. The Surveillance Devices Act appropriately provides for destruction of records, in section 41(b), but, practically speaking, an appropriate time frame cannot be specified. Section 41 (b) in particular indicates that the agency must destroy any record or report coming out of the use of surveillance devices if satisfied that it is not likely to be required in connection with the investigation, the making of a decision on whether to prosecute or in relation to the actual prosecution of offences. The time frame, practically speaking, cannot be specified. Really it is dependent on the circumstances of each investigation.

[11.00 am]

Mr J.N. HYDE: The CCC has been established for at least three years now. Has any material been destroyed?

Ms Grant: Telephone intercept material is under the guidance of the Ombudsman's office. They come in with our own senior staff in that area when we have received authorisation from the operations area to destroy it, meaning that all the legal processes are gone through. That would be destroyed under the guidance of the Ombudsman.

Mr J.N. HYDE: I know it would be, but the question is whether anything has been destroyed. Public information regarding the ACC material was not destroyed. The committee is interested in the fact that the onus of the legislation is that material must be destroyed unless it is required or needed for an ongoing investigation. It seems the codicil has taken precedence over the requirement to destroy.

Ms Grant: I will take that on notice. While I am sure that we have, I would like to be certain. I will go back and get the exact details.

Mr J.N. HYDE: Thanks very much.

Mr Hammond: The telephone intercept is subject to a different regime. We are inspected. I think we have received positive reports from the commonwealth Ombudsman in recent times. I can assure you that inspection is rigorous.

Mr Cashman: On that aspect, we should take into account that the State Records Act provides that government organisations, which include the commission, are required to have a record-keeping plan, which would include aspects of retention and disposal of those records. That record-keeping plan is to be approved by the State Records Commission. Those records would include records and reports obtained by the use of surveillance devices. In that respect the commission does have a retention and disposal schedule, and that is covered. The policy there, so to speak, is that those surveillance devices records are to be destroyed upon authorisations by the operations division of the commission after conclusion of case and appeal and after all authorisations to destroy have been obtained. So, in that respect, time frames are specified, but it is difficult practically speaking, as I said, to be prescriptive about those. We interpret "likely to be required or not" to mean having a degree of probability greater than merely possible. It is a bit rubbery, but those prescriptions are in place.

Mr J.N. HYDE: I want to refer to public hearings. You have made some excellent comments. The statement has been made before, and it is something I endorse, that in Western Australia we do not have a justice system, we have a legal system, and public hearings give us the opportunity to perhaps explore justice more fully. The public can see that justice is under way. You made a comment regarding public interest and your suppression orders. I think the committee is very supportive and very mindful of the difficulty there. One important issue has been raised. Without referring to a specific hearing, I refer to the use of prejudicial and derogatory language towards an ethnic group. There was a quote that was played and played again regarding people of Italian descent. Can you give us a bit of insight into why comments of a racist nature or other derogatory nature might be allowed?

Mr Hammond: I suppose with all of one's efforts to, as you say, do the right thing in this connection, occasionally we will not satisfy every concern or complaint. During the course of those hearings I was particularly alive to the issues when off-the-cuff derogatory comments are made about people, and sometimes they are really quite off. I take the point. I did not see the particular comment, not that we are talking about any particular comment. I did not see that particular comment to be one that would have alerted me to cut it out. If I am wrong in that respect, I am sorry about it. It did not ring a bell, and it may have had some relevance to what was being talked about.

Mrs J. HUGHES: There has been some discussion about getting a public interest monitor to come in and assist through the processes of TIs and those types of things in order to create a situation where conditions may be placed on some of them, and then to look after the public interest. Can you comment on that?

Mr Hammond: It has been the view of this commission from the start - I think I am correct in this; it has always been the view and I know it will come up for review in the course of this year - that while we have a parliamentary inspector and while we have this committee and while we have the necessity for these applications to go to judicial bodies, we do not see that there is a pressing necessity for a public interest monitor. We believe the procedures already in place are sufficient. Again, we do not get these telephone intercepts easily, nor do we get the surveillance device mechanism easily. They have to be justified before appropriate judicial officers, and, of course, the parliamentary inspector can come at any time. I think reasonable minds could differ on this but that has been certainly my feeling to date.

Mrs J. HUGHES: In regard to the CCC, we know we have the parliamentary inspector in place, but there are other organisations that are able to get TIs, such as the Western Australia Police and those types of people. Do you believe there could be some application in that regard?

Mr Hammond: I want to make my point before answering that, Mrs Hughes, and that is that the intercept powers we have are no greater than those possessed by WA Police. We read sometimes of the extraordinary powers possessed by the commission as if there was something unique about that. It is not unique. The powers we possess under a telephone intercept are the same as every other police force in Australia and also those commonwealth-designated organisations like us, the ACC, CMC etc. It is difficult speaking about how other people operate and how much work they put into their applications, but even when looking at these other bodies I really do not see the necessity, beyond going through the judicial process.

Mrs J. HUGHES: There was some discussion about people who have been under a TI, a warrant of some sort, and whether after the intercepts have taken place people should be notified after the fact that they have actually been of interest. Is there any thought, once an investigation has taken place, of informing people that they were of interest?

[11.10 am]

Mr Hammond: Of interest or not of interest?

Mrs J. HUGHES: Not of interest and even of interest, I suppose, to let people know that a surveillance had taken place after the fact. Of course, we would not want to limit the commission's capacity to conduct a decent investigation. Does the commission have a responsibility to let people know that they have been placed under surveillance or a TI?

Mr Hammond: I assume it goes on from that, Ms Hughes, and to be found not wanting. If a matter proceeds to the prosecution stage, that is a different issue. Are you asking: if a person has been through the mill and has been cleared, is there a responsibility to let that person know?

Mrs J. HUGHES: I do not even think necessarily that they have been cleared. Rather than a person turning up somewhere and finding that his name appears in all these transcripts, should the commission pay that person the courtesy of letting him know that he has been under surveillance, whether he is found to be innocent or whether charges are laid? I am not saying that the commission should alert the person to the fact beforehand.

Mr Hammond: Do you mean before the hearing?

Mrs J. HUGHES: Yes.

Mr Hammond: I do not think that that would be in our scope. I know what you mean. I understand the concerns that you and others express.

Mrs J. HUGHES: It is something to think about.

Mr Hammond: I will think about that. Yesterday when I gave a talk, a well-known public sector person approached me about letting people know that they are off the hook. I said to him - mind you, I have not conveyed this down the road here yet - that I believe that the commission should look at a process of letting somebody know that although he mentioned in the hearings on so and so, the commission has no interest in that person and there have been no adverse findings. We must develop a process in that respect.

The CHAIRMAN: I am glad you raised that, because a number of people - some members of Parliament - have waved around a piece of paper and stated that the commission has cleared them. I would be very interested to know about the lovely letter that the commission is sending to witnesses or non-witnesses allegedly clearing their names. It sounds very much, without being vulgar, like someone who has been to a hospital clinic and who tells his or her partner of the night that they are clear of something.

Mr Hammond: I will not go down that track! In one of the matters that we dealt with before Christmas, we undertook that we would let people know whether there was any prospect of adverse findings. Letters were sent to a number of people advising them that "the Commissioner announced

on such and such a day in December that you would be advised as to whether there had been any adverse findings. We wish to advise you that you have not been told so because we are not contemplating any adverse findings". I might not have that exactly correct.

Mr Silverstone: The gist of that is correct.

Mr Hammond: That is, I think, the letter that might have been shown around. I go back to what I said to Ms Hughes, that I think that the commission must develop - it has been highlighted by the most recent hearings - a process in that respect that is cleaner and clearer than the present one.

Mr Silverstone: The letters that were sent before Christmas were sent to those persons who may have had misconduct opinions formed about them to give them the opportunity to respond. I refer to misconduct in the particular meaning of the act. Other persons received letters saying that we were unlikely to find misconduct opinions against them.

The CHAIRMAN: But you could find criminal conduct.

Mr Silverstone: Yes, or indeed we could make adverse mention; that is, we could criticise the actions of individuals without finding that they engaged in misconduct. In terms of advancing the procedural fairness for public officers who may have been subject to misconduct findings, we made a rod for our own back. Some people have suggested that they received some sort of letter saying that they are in the clear when, in fact, the only letter they may have received advised them that they were unlikely to be subject to misconduct findings.

The CHAIRMAN: My original reading of the letter was that although a misconduct finding was not made, a criminal charge could be laid.

Mr Silverstone: I suggest that if we were likely to charge a public officer with a criminal charge, we would have almost certainly have determined that that person had been engaged in serious misconduct. You are correct, in that just because there is no adverse opinion with regard to misconduct, it does not mean that a person will not be adversely mentioned. Indeed, as we move through the process of preparing the report on Smiths Beach, one of the things that we are conscious of is identifying those people about whom we will make adverse comment - that is, being critical of some action they took - even if there is no opinion with regard to misconduct or no recommendation with regard to disciplinary action or criminal action. Although the actions of some people have not met the threshold for misconduct, their conduct could still be criticised. They are yet to be advised.

Mr Hammond: You could have a finding that the actions of X, Y and Z in doing so and so on that occasion were an error of judgment. That sort of comment could be made, which is short of misconduct and far short of criminal conduct. Those people have the opportunity to comment.

We are also prepared to look at specific complaints when they are raised about a concatenation of factors that have led to extra publicity that was not warranted. I do say that we are looking to develop a more sophisticated - I can say it safely here - way of dealing with that situation, which has really only become prominent during the recent public hearings.

The CHAIRMAN: Could I then extrapolate a bit further, because this is your last meeting. In three years we have had a few public hearings. Has the Minniti issue been finalised?

Mr Hammond: Operation Caroline? No, the final report has not been completed. A number of prosecutions have already taken place.

The CHAIRMAN: At the end of Operation Caroline, will other people have received a copy of your new-fangled clearance letter or a letter saying that criminal charges will not be laid?

Mr Silverstone: I think that that is a matter that the commission will have to take on in looking at the report as it is developed.

Mr Hammond: It is a bit hard to answer that one.

Hon RAY HALLIGAN: The committee is considering recommending the widening of the witness protection program to include serving prisoners. Currently, serving prisoners in Western Australia are excluded. They are included in the program in Victoria and, as a consequence, there have been major breakthroughs in organised-crime charges and convictions. Does the commission have a view on the reliability of such witnesses?

Mr Anticich: I will start by putting a caveat on these comments. We do believe that this is very much the province of the state police who have control and experience in these areas. Having regard for that, certainly we can make some comment. We do believe that serving prisoners can and do provide a valuable source of information as potential witnesses, especially as this relates to the nature of organised crime. By its very nature it often involves multiple offenders who operate across a range of criminal activities. It would appear likely that there are potential witnesses incarcerated in our prison system who would and could very well contribute to the solving of very serious crimes. That cooperation of witnesses could depend very much on their safety and personal security, which the witness protection program would offer them. It is our view that the broadening of that definition would be positive. Again, I caution that statement by saying it is a question best addressed to the Western Australia police.

[11.20 am]

The CHAIRMAN: As you are aware, the committee visited Melbourne two weeks ago and discussed this issue. Although I will not disclose any of the private discussions of the committee, clearly there was a huge media awareness of some of the big figures in organised crime who were confessing to committing crimes. In one case, a figure confessed to committing four murders. Finally a wedge was driven into organised crime because of the change in philosophy to allow prisoners to be subject to the joys, protections and other benefits of witness protection. Although the committee will produce a big report on that issue very soon, I am not asking you to comment on the police issue but on the issue of being able to get leverage over organised crime figures. The committee is looking at making amendments to that area. What is your opinion of that as a tool regarding organised crime?

Mr Anticich: Prisoners offer immeasurable information. I sense that the additional power would only enhance getting information on organised crime from that area.

Mr Hammond: The committee will appreciate the CCC's disappointment with regard to the organised crime function, which has been virtually untouched.

The CHAIRMAN: We are very aware of that. When the legislation is finally changed, we will invite you back for a celebration!

Hon RAY HALLIGAN: Under the national witness protection program, there is only a right of appeal to the Ombudsman on matters of administration. In the event that the committee determines that a recommendation should be made for an external and determinative right of appeal, would the CCC be the appropriate agency to assume that role?

Mr Anticich: The commission's position on this matter is that its province concerns matters of investigating serious misconduct. If a right of appeal were to touch on those aspects, it would be proper for the commission to consider it. With regard to a review of a quasi-judicial process, it is the commission's position that those matters should remain with a body such as the Ombudsman.

Mrs J. HUGHES: On 22 November 2006 the committee briefly discussed the issue of departments informing ministers of CCC inquiries.

The CHAIRMAN: Although that was a closed hearing, the committee has resolved to make public some issues from the hearing.

Mrs J. HUGHES: Has any work been done on that matter? Has there been any advancement on the issue?

Mr Silverstone: I met with the Director General of the Department of the Premier and Cabinet and with the senior directors general of government departments to reiterate the commission's view that the relationship between CEOs and ministers is very important and that the flow of information from CEOs to ministers is an important function that should continue. We have noted that in certain limited exceptional circumstances there may be reasons why a CEO would be unable to advise a minister of a matter to do with an issue that the commission was looking at. It was noted that that is a possibility. We suggested to CEOs that in most cases if they had a concern, they should contact the commission first and talk to us about it to resolve the matter. I note that that advice, which was made to the Corruption and Crime Commission, is in the form of disclosure and misconduct reports. The document was issued in May last year and was sent to ministers and CEOs. We have again drawn the attention of CEOs to that document, and that document is on our website.

Mrs J. HUGHES: Therefore, depending on the individual circumstances of the investigation, is it a matter of checking with the CCC?

Mr Silverstone: Yes. Our advice to directors general is to not hesitate to call us. We are happy to provide advice on any misconduct matter to help them deal with their responsibilities.

The CHAIRMAN: Committee members thank the commissioner for his frankness and appearances before the committee, and for his disclosure to the committee of a lot of sensitive and confidential information that has made our oversight role easier and which has sometimes made the process uncomfortable for Mr Hammond. His commitment to transparency should be lauded. We have obviously become addicted to that transparency and cooperation. When the commissioner steps down from the position and the CCC is in an interim phase, has one of the assistant commissioners been designated to oversee the administrative role of the CCC and the oversight of Mr Silverstone and the excellent team?

Mr Silverstone: As you are aware, Mr Chairman, the CCC has two acting commissioners whose chambers are side by side. They have come to an arrangement whereby they have identified the periods when they will be available, given that they have other commitments with regard to their practices. There will be broad periods when either one or the other will be the acting commissioner. It is useful to know that their chambers are together. They will facilitate in sharing information should a question arise about one having handled a matter in a particular way. That information will flow through to the other acting commissioner in that person's period as acting commissioner. The nature of their practice precludes one acting commissioner from taking up a matter for the whole time. Essentially, they will split the time that they spend working together. There will always be communication between the two.

The CHAIRMAN: The next time we hold a hearing, will both acting commissioners attend, or will it be the duty of one assistant commissioner to appear?

Mr Hammond: It will depend on the powers regarding when the new commissioner is appointed.

The CHAIRMAN: Or on whether we get a third assistant commissioner before the full commissioner.

Mr Silverstone: On one hand, that is a practical approach. However, we may find that from a legal point of view there will be an acting commissioner who is the commissioner for all intents and purposes of the act. Therefore, the commissioner of the day will certainly attend. From a legal point of view, it might not be appropriate to have both of them attend the committee's hearings, because there would be questions about who has authority to speak as the commissioner.

The CHAIRMAN: I was getting to the administrative powers such as who is the voice of the commission and who deals with staff matters. Legally, will whoever clocks on at 8.00 am be the commissioner for that day?

Mr Silverstone: The periods during which they will clock on will be longer than just a day. We are looking to ensure continuity. We have been conducting briefings for the acting commissioners across a range of matters. They are reasonably current, although they are not totally up to date. The interchange between the two acting commissioners includes formal discussions to hand over matters between the two.

Mr Hammond: They have been coming into the commission to be briefed and advised and so forth.

The CHAIRMAN: We must go into closed session to discuss a couple of issues that do not pertain to the events of yesterday or any current public hearings.

Mr Hammond: I will say one final thing.

The CHAIRMAN: I will give you the last word.

Mr Hammond: I have been very honoured to serve the commission as the inaugural commissioner. I publicly acknowledge all the work done by the commission staff, who come to us from academia, the armed forces and from the police services from all over Australia and overseas. They have combined to form a very effective organisation. Finally, I wish to thank the committee and members of this committee, both past and present, for the support given to the commission during my time as commissioner. As an aside, it has always been good to know that sooner or later I might end up answering questions here. It is similar to sentencing people; if I made a blue, someone in an appeal court would catch me out. It may seem strange to say this, but in some way that was a comfort. I thank the Chairman and members past and present for their courtesy and assistance.

[The committee took evidence in closed session]

Hearing concluded at 11.47 am