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THE SPEAKER

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Hon. Barry House MLC
President of the Legislative Council
Parliament House
Perth WA 6000

Hon. Grant Woodhams MLA
Speaker of the Legislative Assembly
Parliament House
Perth WA 6000

Dear Mr President and Mr Speaker

**JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION:
REPORT 25 – THE USE OF PUBLIC EXAMINATIONS BY THE CORRUPTION AND
CRIME COMMISSION**

I refer to the above Report ("the Report") of the Joint Standing Committee on the Corruption and Crime Commission ("the Committee"), and note the Report's findings and recommendations.

In responding to the Report, I note that the *Corruption and Crime Commission Act 2003* was introduced with the intention and expectation that the Corruption and Crime Commission ("CCC") would have a capacity to conduct public examinations. This was in line with the broad intention expressed in the second reading speech for the *Corruption and Crime Commission Bill 2003*, that there be 'less secrecy surrounding the CCC generally'¹ and in response to the specific concerns regarding the Anti-Corruption Commission's inability to conduct public examinations.

As the Report identifies, there are several reasons why this capacity is desirable. It is not only a question of ensuring public awareness of the work of the CCC and confidence in its work; where possible it is desirable as an internal accountability mechanism that a body such as the CCC exercise its extraordinary powers openly and in the public view. To be weighed against these factors in favour of public examinations is the obvious prejudice and loss of reputation a person facing a public examination may suffer.

As the Report identifies, when it considered the relevant provision of the *Corruption and Crime Commission Bill* in 2003, the Legislative Council Standing Committee on Legislation expressed the view that sections 139-140 appropriately balance the relevant factors the CCC should have regard to in determining whether to conduct a public examination. I note also that, in its submission to the Committee, the CCC considers the present iteration of these sections is appropriate.

These sections have remained unchanged since the passage of the *Corruption and Crime Commission Act 2003*. The *Corruption and Crime Commission Amendment Bill 2012*, which was drafted parallel to the preparation of the Report, will amend section 140(1) to clarify that it will still not apply to either organised crime examinations or examinations arising out of 'criminal activity' summons, but does not otherwise alter these sections.

¹Hansard Thursday 15 May 2003 p7861b-7876a

Consequently, at this time the Government is fundamentally in agreement with Recommendation 5 of the Report; that it is appropriate that the CCC Commissioner should retain a discretion to determine that an examination should be held in public. One desirable effect of the Government's proposed reorientation of the role of the CCC will be to limit the CCC's capacity to enquire into, and therefore conduct public examinations in respect of, minor misconduct matters with the public service.

Once the fundamental proposition that the CCC should retain a discretion to determine that an examination should be held in public is accepted, the next matter to be considered is whether the sections of the Act which presently govern the CCC's exercise of this discretion are adequate and appropriate.

Fundamental to the appropriate exercise of the CCC's powers to decide whether to conduct a public examination is that these decisions be made by, or with the oversight of, a highly qualified and respected judicial officer occupying the position of Corruption and Crime Commissioner. This is because the exercise of discretion is reliant on an experienced judicial officer undertaking due consideration to ensure it is appropriately utilised. As is the case with many of the powers set out in the *Corruption and Crime Commission Act 2003*, the most effective and indeed most necessary means of preventing any form of abuse is for successive governments to ensure appropriate appointments as Commissioner.

No legislative change can replace this underlying reliance on appropriate decision making and interpretation of the operative provisions of the Act; however, it is accepted that there are arguments in favour of (in essence) codifying this decision making process and, where necessary, clarifying the approach the CCC has developed to interpreting sections 139-140.

Turning to the specific recommendations of the Report concerning section 140 of the *Corruption and Crime Commission Act 2003*, the Government notes Recommendations 1-2 of the Report, which read together, would give effect to the following changes to section 140:

- Replace references in section 140 to 'the Commission' with reference to the 'Commissioner.'
- Require that when deciding whether to open an examination to the public pursuant to section 140 of the *Corruption and Crime Commission Act 2003* the Commission(er) must be 'satisfied that it is in the public interest to do so' rather than, as the section presently states, when they 'consider it is in the public interest to do so.'
- Require that when making a decision whether to open an examination to the public pursuant to section 140, the Commission(er) must specifically have regard to the risks of damage to reputation of persons affected, and any credible risks to the health and safety of persons affected.

The intent of the above three proposals is articulated on pages 24-25 of the Report. The first proposal relates to the Committee's view that it would be desirable to clarify that decisions made under section 140 are to be made only by the Commissioner rather than the Commission. The remaining two proposals were made by the former Parliamentary Inspector to better emphasise the importance of the evaluation process the CCC undertakes when electing to undertake a public examination. In respect of these proposals, the report comments:

*In making this suggestion the current Parliamentary Inspector asserted that while 'legally, the distinction may be one without a difference,' such amendments would nonetheless "serve as a reminder that positive satisfaction is required."*²

In respect of the former Parliamentary Inspector's suggested changes, there may well be some merit in providing a greater degree of clarity regarding the weighing up process the CCC should undertake in determining whether to conduct a public examination. It is also plainly the case that the Commission should and (as is apparent from the CCC's submission to the JSCCCC's inquiry concerning this matter) presently does conduct a weighing up process pursuant to section 140. I note that in making decisions whether to hold public examinations pursuant to section 140 the CCC identifies that:

*Due and proper attention to the potential for prejudice or privacy infringements is also demanded in determining whether it is in the public interest to open an examination to the public.*³

In this regard, it is clear that the intent of the Parliamentary Inspector's suggested changes reflects the CCC's own stated assessment of its role under section 140. It is also clear that the Parliamentary Inspector's evidence did not unequivocally rule out the prospect these changes 'may' have some legal effect, which effect the Report does not seek to identify. To the extent that these recommendations will codify what is present practice, and in doing so emphasise the need for the Commission to be positively satisfied that it is in the public interest to hold a hearing, and to give proper consideration to the factors the Parliamentary Inspector identifies, they are not objectionable.

However, prior to considering amendments of this nature, it will plainly be necessary to seek to determine whether these changes will have any unintended legal effects or, as appears to be the intention, merely serve as guidance to future Commissioners as to the appropriate process being adopted by the present CCC.

Similar comments could be said to apply in respect of the proposed amended references to the Commissioner rather than the Commission, noting that throughout the *Corruption and Crime Commission Act 2003* the latter terminology is generally preferred. Again, if the intent of this amendment is to clarify the central role the Commissioner should play in such decisions, then that intent is supported; however, it is not clear whether a legislative amendment will produce any unintended legal consequences.

Accordingly, the Government will give further consideration to the desirability and practicability of the above proposed changes.

Recommendation 3 of the Report proposes a further change to section 140 to:

- Require that when decisions are made to open or not to open an examination to the public, the Commissioner must prepare a signed statement explaining why the public interest outweighs the potential for prejudice or privacy infringements arising from a public examination of that specific person, make such statement available to affected persons prior to their examination, and provide affected persons with an opportunity to make representations to the Commissioner as to why the statement may be incorrect.

² Report p 24

³ Commission Response p 31

This proposal, which is discussed on pages 26-27 of the Report, arises out of the evidence of a former Parliamentary Inspector of the CCC, his Excellency Malcolm McCusker AC CVO QC. Noting, as the Report does, that the above proposal is unlikely to present any significant administrative burden on the CCC given the very limited number of public examinations presently conducted, I am willing to give further consideration to the above proposal following consultation with the CCC. Plainly one issue which will need to be resolved is the extent, if any, to which a person who is the subject of such a statement will have any recourse if they do consider the Commissioner has not adequately considered their representations. Mr McCusker's comments at pages 40-41 of the Report would appear to vitiate against such a prospect.

Recommendation 4 of the Report proposes that CCC examinations should be conducted 'broadly in line' with the six cardinal principles of fair procedure for public examination devised by Lord Justice Salmon PC. The application of any of these principles in a CCC is however at the Commissioner's discretion. These principles are set on page 35 of the Report as follows:

1. *Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the tribunal proposes to investigate.*
2. *Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations made against him and the substance of the evidence in support of them.*
3. (a) *He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.*

(b) *His legal expenses should normally be met out of public funds.*
4. *He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.*
5. *Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.*
6. *He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.*


To this end, I note the comments of the Parliamentary Inspector, Hon Chris Steytler QC, regarding the abovementioned principles on pages 36-38 of the Report which are, in essence, consistent with Recommendation 4.

The Report therefore proposes an amendment to section 138 of the *Corruption and Crime Commission Act 2003*, which should have the effect of requiring that the CCC should conduct its examinations in line with the above principles, (although it does not appear to suggest that the State should meet legal expenses of persons before enquiries) subject to a general discretion as to whether to apply these principles on the part of the Commissioner.

I acknowledge there may be merit in a proposal similar to the above in respect of public examinations concerning misconduct, subject to the Commission retaining ultimate control of its processes. Consequently, further consultation will occur with the CCC regarding the appropriateness of such a proposal, and how such a set of principles might best give effect to the Report's intent.

I would like to take this opportunity to express the Government's thanks for the Committee's work in respect of the Report.

Yours sincerely

A handwritten signature in black ink, appearing to read "Michael Mischin". The signature is fluid and cursive, with a large initial "M" and "M".

Hon. Michael Mischin MLC
ATTORNEY GENERAL

11. SEP 2012