PARLIAMENTARY INSPECTOR
OF THE CORRUPTION AND CRIME COMMISSION
OF WESTERN AUSTRALIA

20 July 2011

The Hon Nick Goiran MLC
Chairman
Joint Standing Committee of the
Corruption and Crime Commission
Level 1, 11 Harvest Terrace
PERTH WA 6000

Dear Mr Chairman

INQUIRY INTO THE USE OF PUBLIC HEARINGS BY THE COMMISSION

Thank you for the invitation, extended in your letter to me dated 25 March 2011, to make a submission to the Committee in respect of its inquiry into the use of public hearings by the Corruption and Crime Commission (Commission).

The issue of whether or not Commission hearings should be held in private raises difficult questions to which there is no entirely satisfactory answer.

If public hearings take place there is the risk of serious (and often irremediable) damage to reputations in cases in which no finding adverse to the person affected is ultimately made. There is also the risk of self harm that arises as a consequence of associated publicity.

On the other hand, if all hearings are held in private that will inevitably give rise to mistrust, given what will be seen as the excessively secret processes adopted by the Commission. This was one of the problems faced by the Commission's predecessor body, the Anti-Corruption Commission. Also, private hearings result in the loss of the degree of accountability occasioned by public scrutiny of its processes.

As you know, s 139(1) of the *Corruption and Crime Commission Act 2003 (WA)* (Act) provides that, except as provided in s 140, an examination is not open to the public. Section 140(2) provides that 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.

Consequently, if the discretion entrusted to the Commission is appropriately exercised, public hearings will be the exception rather than the norm. That should be so for a number of reasons:

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1. The Act reflects a bias in favour of private hearings. The default position (that in which the Commission is not satisfied that the balancing process provided by s 140(2) falls in favour of a public hearing) is that hearings should not be open to the public.

2. The 'benefits of public exposure' will ordinarily be one or both of the following:

    (a) opening the Commission's processes up for public scrutiny;

    (b) enabling publication by the media, which, in turn:

        (i) has a deterrent effect on those who might be contemplating misconduct of the kind being enquired into; and

        (ii) might encourage additional witnesses to come forward.

3. The benefit in 2(a) will always be present and consequently cannot have been regarded by the legislature as being necessarily determinative.

4. The benefit in 2(b)(i) will be achieved in any event (albeit perhaps not to the same extent) by a report published by the Commission at the conclusion of a private hearing.

5. Ordinarily, the Commission will, by the time of a hearing, have identified those who will or might be able to give relevant evidence. As far as I am aware, it is unusual for a witness to come forward as a result of publication in circumstances in which he or she would not otherwise have been identified. Accordingly, the benefit in 2(b)(ii) will usually have little weight.

6. The benefits to which I have referred are consequently unlikely to be determinative in any case in which a public hearing will result in a serious infringement of privacy or other significant prejudice (bearing in mind that the formula in the Act is broadly expressed so as to require the Commission to take into account '*the potential for*' (my italics) 'prejudice' of any kind.

In circumstances in which the benefits of public exposure of the hearing process (as opposed to those following publication of a report) are small, and in which there is a genuine risk of self harm or of unnecessary damage to the reputation of those whose conduct is being enquired into or of witnesses appearing before the Commission, the discretion should always be exercised in favour of private hearings, or at least partially private hearings, given the statutory framework. Partially private hearings are plainly contemplated by the Act, which speaks in s 140(2) of opening 'an' examination to the public and, by s 140(4), provides that the Commission may close an otherwise open hearing 'for a particular purpose'. The Commission is required to separately consider the position of each prospective witness in this regard.

In my opinion, the Commission has not always had sufficient regard for the risk of unwarranted damage to reputation in exercising its discretion. That risk is always present in circumstances in which there is suspicion, rather than proof, of misconduct. Moreover, it is exacerbated by the more limited scope of procedural fairness accorded to a witness than would be the case in proceedings in a court. Witnesses are sometimes given short notice. Persons under investigation have only limited rights of cross-examination. The Commission has extraordinary powers that are not available to prosecutors or (ordinarily) police.

In my opinion, recent events have also demonstrated that the Commission has not always paid sufficient regard to the health and safety of persons affected by public hearings. A credible threat of self harm should almost always be determinative against holding a hearing, or hearing the evidence of a particular person, in public, at least where the making of a suppression order will not be sufficient to avoid the risk.

The fact that the discretion has previously miscarried seems to me to provide an insufficient justification for doing away with it. However, I suggest that consideration be given to two amendments to the Act, as follows:

(a) the words 'it considers', in the phrase 'it considers that it is in the public interest to do so' in s 140(2) of the Act, be deleted and replaced with the words 'it is satisfied that'; and

(b) there be a provision providing that, in making a decision under s 140(2), the Commission must, without derogating from its obligation to take into account any relevant consideration, have regard for:

(i) the risk of unwarranted damage to the reputation of; and

(ii) any credible risk to the health and safety of

any person affected.

Those amendments might be thought not to effect any change of substance. However, they would emphasise the need for the Commission to be positively satisfied that it is in the public interest to hold a public hearing and serve to underline the importance of the considerations that are specifically mentioned.

Finally, so far as possible amendments are concerned, the Commission is precluded by s 23(1) of the Act from publishing or reporting a finding or opinion that a particular person has committed a criminal offence. As has been pointed out by the Acting Parliamentary Inspector, Mr Chris Zelestis QC, the prohibition extends to statements made by counsel with the authority of the Commission. Should the Commission maintain its opinion to the contrary (expressed by it to Mr Zelestis), the Act should be amended to put this beyond doubt.

I should perhaps add that the Commission should always be mindful of the responsibilities owed by counsel assisting it. It should, as far as possible, never allow counsel to make unnecessary or unfounded assertions reflecting adversely on the

reputation of any person or to put unnecessarily vexatious questions to those who are required to give evidence. These responsibilities (which are professional responsibilities that should be met even in private hearings) are especially important in public hearings when regard is had for the very great importance of reputation and its fragility, given that human nature is such that reputations are far more easily damaged than mended.

Yours faithfully,

C D STEYTLER QC
PARLIAMENTARY INSPECTOR