JOINT STANDING COMMITTEE ON THE CORRUPTION AND CRIME COMMISSION

THE USE OF PUBLIC HEARINGS BY THE CORRUPTION AND CRIME COMMISSION

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 22 JUNE 2011

Members

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

Hearing commenced at 10.18 am

McCUSKER, MR MALCOLM JAMES
Queen's Counsel, examined:

The CHAIRMAN: Mr McCusker, on behalf of the Joint Standing Committee on the Corruption and Crime Commission, I would like to thank you for your appearance before us today. The purpose of this hearing is for the committee to speak with you, as, of course, you served as the inaugural Parliamentary Inspector of the Corruption and Crime Commission from 2004 through until the end of 2008. I am sure everyone is aware that Mr McCusker will succeed Dr Ken Michael and become the thirty-third Governor of Western Australia on 1 July. With what is no doubt a very busy schedule, the fact that you have accepted the invitation to speak to the committee this morning in aid of the committee's inquiry into the use of public examinations by the Corruption and Crime Commission speaks volumes for the importance of this topic, and we are very grateful for this opportunity.

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

Mr McCusker, have you completed the "Details of Witness" form?

Mr McCusker: I have, sir.

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

Mr McCusker: Yes.

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

Mr McCusker: I did; thank you.

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

Mr McCusker: No, thanks.

The CHAIRMAN: Would you please state the capacity in which you appear before the committee today?

Mr McCusker: I appear here, I think, as the former parliamentary inspector and currently a Queen's Counsel. I think my title is Governor-designate. That gives a full range.

The CHAIRMAN: Thank you, Mr McCusker. We do have a series of questions for you today. We have also received from you a written submission in advance of today's hearing.

Mr McCusker: Yes.

The CHAIRMAN: Certainly, you can take that as read, and there will be questions arising out of that. Before I proceed to those questions, do you wish to make any opening remarks?

Mr McCusker: Fairly briefly I will summarise it, because I have conveyed to the committee in advance by an email sent yesterday my views, broadly speaking, on this very important question of public hearings. In my view, public hearings should be very rarely used and, in that respect, I see that I am in accord with the current parliamentary inspector, Mr Steytler. In order to ensure that their use is only rare and that the criteria laid down in the act are properly observed, not just in form but in substance, I think it would be desirable, as Mr Steytler has suggested, that the provision—I think it is section 140—that relates to when public hearings may be held and balancing the public interest against the prejudice to individuals and privacy matters be firmed up a little more by stating, first, that the commissioner must be satisfied with the matters, rather than the present words, which, I think, are "having regard to", and, also, to add specifically some matters concerning damage to reputation. But they are all set out in my written statement. I have gone further than Mr Steytler. I did, in fact, raise this in the course of my position as parliamentary inspector with the then commissioner that there should be some written record of the basis of the decision to hold a public hearing so that it is clear and not simply a matter, as it were, of going through the motions, and setting out in some detail the reason why it is thought that the interests of the public outweigh those of the private individual and the damage to privacy and reputation.

The CHAIRMAN: Mr McCusker, what I might do is just highlight some particular portions of the written submission that you have provided and seek some clarification and confirmation of those points.

Mr McCusker: Sure.

The CHAIRMAN: Firstly, I note that you have made the statement that you do not contend that the CCC should not have the power to compel persons, suspects or otherwise to answer legitimate questions relevant to an investigation being conducted by the CCC on matters within its jurisdiction. I take it, then, that you do hold the view that the CCC should be able to hold coercive hearings in certain circumstances.

Mr McCusker: Yes, but I was addressing that, of course, to private hearings as well as public hearings but with the qualification that public hearings should be rare. Of course, the protection with regard to the coercive power to the individual is that that individual cannot have his or her answers used in evidence against him or her later.

The CHAIRMAN: That is right. You go on in your submission to make the point that you totally agree with the opening remarks made by Mr Steytler, QC, in his evidence given last week and, in particular, you agree with his view that it would be a very rare case in which a public hearing could be justified in the public interest.

Mr McCusker: Yes.

The CHAIRMAN: That is a matter that I would like to unpack a little further this morning. I take it from that statement that, at the very least, you agree that the CCC should have a discretion to hold public hearings.

Mr McCusker: I am not entirely sure that I agree even with that. Because it should be in only a very rare case, I question the need for a public hearing. I appreciate that the predecessor of the CCC, the ACC, was criticised because of, it was said, the secret nature of its hearings. I can see some force in that, but, on the other hand, the way in which public hearings are conducted—perhaps it is more a matter of the practice than the concept—at least in the past, seems to have the danger of damage to the individuals being questioned and damage to individuals who are not being questioned but are the subject of evidence by another witness. Let me put it this way: I am not strongly in favour of public hearings at all, but I think that there may be circumstances, but they should be very rare, in which public hearings may be of some benefit—I would think if there is no doubt as to the

commission of a particular act or omission. So, the public hearing is being held not for that purpose but, really, just to make it clear that this has happened and to characterise what that amounts to; for example, it might be said that if this is going on, this is misconduct and it should not happen in the future. There might be a widespread practice whereby a public hearing at an early stage might be of benefit in making it clear to the public that this is not going to be countenanced. Having said that, I do not see why that should not be adequately dealt with under the education function of the commission, which could extend to a publication of some sort saying that these are the sorts of things that are happening, without necessarily exposing a particular individual to, I suppose you could say, the possibility of extreme prejudice.

The CHAIRMAN: Yes. I have to clarify that, because in your submission you gave examples of some scenarios in which the question of whether there should be a public hearing might arise. One of the scenarios you listed was when the commission may have reached the point in its investigation at which it has concluded that there is evidence to support a prima facie case of misconduct. If that point is reached, it would obviously be wrong and prejudicial to a fair trial to publicly examine the putative accused. Instead, the proper course would be to send the papers to the DPP in the case of a criminal offence or to the Public Sector Commission to carry out disciplinary proceedings. I want to seek your clarification on that. From what I am hearing this morning, you are saying that it would be a very rare case for there to be a public hearing.

Mr McCusker: Yes.

The CHAIRMAN: I do not take issue with that. I then draw the conclusion that, therefore, the CCC ought to have a discretion in some limited circumstances to hold a public hearing, but you have cautioned against that. You have indicated that there may be some circumstances in which "the evidence is obvious", which I think is the phrase you may have used. If the evidence is obvious that there is misconduct, you then say that we should not have a public hearing because it should go to the DPP or the PSC. So I would just like your clarification on those points.

Mr McCusker: Certainly. What I am referring to there is that there may be circumstances—they would be very rare—in which, although the evidence does not support a finding of misconduct, much less a criminal offence, the evidence that is undisputed gives rise to that possibility or concern. It may be arguable—I would not support it—that, in those circumstances, there is a public interest in throwing it open and saying that this is the kind of conduct that has been going on and it could verge on misconduct and so on. The CCC does not have the power to actually make a finding of guilt, and that has been made very clear. It is only the court that has that power. Taking matters that might lead to a criminal charge and, ultimately, a trial, there is a real concern if all the matters that might lead to that are exposed to the public in advance in a public hearing. And it prejudices the fair trial of the individual. There may also be cases in which it does not look as though a criminal offence has been committed, but some form of misconduct, which would justify a recommendation for the Public Sector Commissioner to investigate whether disciplinary action should be taken—not a criminal charge, but disciplinary action.

[10.30 am]

Again I question whether it is really necessary in those circumstances or desirable to have a public hearing. A private hearing will achieve the purpose, obviously, of obtaining any responses, any particular evidence that is sought, and then it is, as a matter of course, handed over to the Public Sector Commissioner to conduct an investigation, which has been done in a number of cases, and I mentioned those.

The CHAIRMAN: If I give you the example recently of the tasering incident involving Mr Spratt, to my knowledge there has not been any criticism in the public arena about the holding of that instance in a public hearing format. Would that be an example of a situation in which you think a public hearing is justified?

Mr McCusker: It would appear to me probably, because in that circumstance you have the irrefutable evidence on video of what was happening. I think that it would be justifiable to expose that to the public. Even there I am a little bit guarded about it, because that material, that evidence, would, one would hope, then be taken to the next step and used for the purpose of not only some internal investigation by the WA police force, but possibly criminal action.

The CHAIRMAN: If we are concerned about people's reputations, if that is the primary driver and concern, because once they are damaged it is virtually impossible to repair them, should we not be equally concerned about the reputations of those individuals involved in the tasering case?

Mr McCusker: There is an argument for that, I agree—if you have got on video, as in the tasering case, irrefutable evidence that that is what happened. When I am talking about damage to individuals and their reputation, I am talking about people against whom there has been no final conclusion or finding, but if you have got on video what has happened, then obviously it would damage the reputation of the police officers concerned that that should occur. Perhaps I should make it clear that I am talking about damage that is unjustifiable damage. In some cases in which there is no video, there may be a clear answer to what appears, on the face of it, from some evidence, to be some kind of wrongdoing, but when you have got it on video, certainly the damage occurs, but I think in those circumstances it is probably justifiable to expose it to the public.

The CHAIRMAN: If we have got the clear evidence on video, presumably the commission is in a position to determine from that video evidence whether there is a prima facie case of misconduct, in which case should it not be referred to the DPP or the Public Sector Commissioner or, in this particular case, to the Commissioner of Police for an internal investigation?

Mr McCusker: It should be, but I think what you are saying, chairman, is refer to the police internal investigation without being exposed to the public. Well, there is an argument for that, I agree, but I do not think that is a clear situation. I think that the clear situation in which there should not be a public hearing is when there are allegations made that may or may not ultimately be tested and found to be right or wrong. For example, if Mr Spratt had made the allegation against the police at a public hearing and named the officers, and there was not any video, that would be extremely damaging to the police officers. I think that is the kind of material that should not be the subject of a public hearing; it can be done in private and an investigation and follow-up. The police officers can be examined in private. They may admit or they may deny the allegations. But when you have a very clear situation in which there is no possibility of denial, unless the police officers say the video has been rigged in some way, I do not see that that kind of damage to their reputation is one that should necessarily be avoided.

Mr J.N. HYDE: I have a couple of questions. Firstly, you made about 29 different points in your written submission, whereas the transcript here will be public. If the committee so resolved, would you be comfortable with your full submission being made public?

Mr McCusker: Yes, certainly.

Mr J.N. HYDE: The second issue: you are dealing with the prospect of closed hearings and harking back to the days of the ACC. I guess I am the only member here who was on the oversight committee of the ACC. What we lacked then was a parliamentary inspector, and it was extremely difficult to get, I think, proper oversight of the secretive body, the ACC. Given that we now have the situation of a robust parliamentary inspector, and I think a very robust committee, you would be in a position to comment on the importance of having oversight if the CCC was either to be totally precluded from having open hearings or certainly going to a situation of only using them on the rarest of occasions.

Mr McCusker: I think there is a great deal of merit, with respect, in that observation, because the problem with the secret hearings of the ACC was that it engendered a kind of suspicion amongst the public of what is going on behind closed doors. If the public is aware that there is, as you say, a

robust parliamentary inspector—I am pleased to hear, in fact, the evidence of that fact—and also a robust oversight committee, you have those two safeguards, which I think would do much to allay any public concerns about a kind of closed-door policy, because it is not going to be a closed door in the sense that the parliamentary inspector may investigate and find out what is going on, and the committee in turn has the same prospect.

Mr J.N. HYDE: Further to that, if we are looking at the exemptions or the situations in which public hearings may be justified, with Chris Steytler last week, I think we were getting to the situation that there is perhaps a different class of witnesses and that police and politicians should perhaps be exposed to more scrutiny or be able to be in public hearings in a way that a public servant should not be exposed. I think the issue of the Spratt case may be not so much the fact of there being irrefutable evidence on video, but the fact that that video was not made known to all sections of the police or the CCC. I think that is the deciding issue that perhaps justifies it having been in the public arena. The first issue would be your comments on whether there is, perhaps, a class of public people or people who are subject to the CCC who should be able to be called before a public hearing and perhaps others that could not. The second issue: we have had in the last week the magnificent George Brouwer in Victoria, the Ombudsman or in his role in the Police Integrity Commission, piggybacking on the great work of our CCC to expose the toner cartridges abuses in Victoria. Our CCC discovered that here, and it could be argued that it was only through having public hearings that other jurisdictions became more aware of what was happening with this Victorian company, so the argument might be mounted that by having a public hearing exposing that activity, it enables other activity to be exposed and acted on. What are your views on those two issues?

Mr McCusker: First, I think that if you put the police and members of Parliament in some separate category—in other words, verging on saying, "Well, it doesn't matter if you damage their reputation", that would be wrong. Everyone is entitled to safeguard his or her reputation and to privacy. I think that the toner incident that you mentioned, which is coupled with the Spratt thing, raises a different kind of scenario, and I think that in those kinds of circumstances in which the evidence is irrefutable, sure, you may be damaging the reputation of the police who are actually involved in that, but there is some value in terms of other jurisdictions seeing that material, although, there again, it is possible for this committee or the CCC to convey to other jurisdictions particular discoveries that it has made that may affect those jurisdictions, and that can be done without a public hearing. A public hearing and the results of it do not necessarily all get aired, although the more exciting newsworthy bits do, and they do not necessarily get read. I think that a better way of conveying to other jurisdictions matters that may be of concern to them would be for the CCC or the standing committee to do it.

The CHAIRMAN: Can I just pick up on the discussion on, I think we call it, the toner matter. Would that not yet again be an example of where the evidence is obvious that there has been some form of stealing, it should just be referred to the DPP for prosecution?

Mr McCusker: I think that there is a better way of dealing with it. There is a wide variety of possible offences being committed by public officers, and to say every time there is an allegation of an offence that we will have a public hearing—if there is ultimately a finding by a court, that would certainly be made public, but if a person is the subject of allegations as yet untested, I think it should go to the DPP and there should be a trial, the fairness of which would be prejudiced if there were in advance various allegations made in public.

The CHAIRMAN: Do you think there is anything to be said for a recognition that there is a different standard of proof applied in the criminal justice system from what there is in an investigation into misconduct—in other words, if every time the commission finds that it has prima facie evidence of some type of criminal activity, it has to refer the matter to the DPP, and yet,

ultimately, as we know, the criminal justice system might find the person not guilty, not necessarily because the act has not occurred; it is just that the standard of proof has not been met?

Mr McCusker: And it may be misconduct, notwithstanding that it is not a criminal offence.

The CHAIRMAN: That is right. How do we deal with that situation?

Mr McCusker: It should be referred then to the Public Sector Commissioner or the relevant authority to conduct an investigation. I will give you an example of that that is quite striking. Many years ago—I used to take prosecution briefs as well as defence briefs—I prosecuted some police officers. I will not go into the detail of it, but it was quite a lengthy trial. They were ultimately acquitted, to everyone's astonishment.

[10.45 am]

Following the acquittal, nevertheless, there came out of the trial evidence of what could only be described as misconduct, and as a result the then police commissioner, after consultation with the minister, dismissed them. He said, "All right, you've not been found guilty of a criminal offence, but nevertheless, this conduct amounts to misconduct in terms of the police requirements".

The CHAIRMAN: And you do not see an issue with that?

Mr McCusker: I do not see any problem with that, because you have two different levels. You might find evidence which suggests that there could be an offence, but perhaps not strong enough. It can still be referred as a possible misconduct to the Public Sector Commissioner. After all, that is the commissioner's job.

The CHAIRMAN: Yes. Can I then take you to another example of public examinations that we had this year? It was regarding international English language testing; I am not sure if you are familiar with the issue that arose at Curtin University.

Mr McCusker: I am, yes.

The CHAIRMAN: Those hearings were held in public. Would you say that those circumstances were justifiable for a public hearing?

Mr McCusker: I am not sure whether the individual concerned admitted what had occurred.

The CHAIRMAN: I guess at the end of the day there certainly was not any video footage that I am aware of.

Mr McCusker: No. Well, there again, I do not see the need for a public hearing. If the individual concerned is saying that for some reason they have a defence. It would be different, I think, if the individual said, "Yes, I did it. It's all done".

The CHAIRMAN: Then, Mr McCusker, if they say that they have done it and there has been some misconduct or some criminal activity, your evidence to the committee is that the matter should immediately be referred to the relevant jurisdiction, and that the CCC should not have a public hearing in those circumstances.

Mr McCusker: I am not saying that in absolute terms, because if an individual goes before the CCC privately and says, "Look, everything that this person has said is true, and I am guilty of the offence", then I do not see any problem there—there is no prejudice to a fair trial because there will not be a trial; there will simply be an admission of guilt and it will be a question of what penalties are imposed. But if these allegations in the case you are mentioning were untested and if the individual said, "I deny that I did these things", I think the danger of a public hearing is that you get one side of the coin, as it were, and it is publicly ventilated; then there is the danger, further down the track—while we still have a jury system—of juries being in some way affected by the pre-trial publicity.

The CHAIRMAN: So if someone is ever asked to appear before a public hearing of the CCC and they do not want to do that, their out clause would always be to deny the events and to say, "My reputation is going to be tarnished, therefore the CCC should not hold this in a public hearing".

Mr McCusker: Yes. "Have a private hearing; you can ask me questions, under compulsion I'll answer them, you can then decide what you do from there". What is the public benefit in having a public hearing?

The CHAIRMAN: So if every clever witness appropriately advised by their legal practitioner chose that course of action, we would never have public hearings.

Mr McCusker: I should say that if every clever, and possibly innocent, witness were to say that, yes. An innocent witness would say, "Look, if I'm exposed to a public hearing of all these publicly made allegations, which I deny, my reputation's going to be extremely damaged; I'll probably be dismissed from my work because of these public allegations, people will look down on me, my neighbours will shun me", and all these kind of things. If ultimately there is a trial and that person is proven guilty, what loss is there in not having had a public hearing first? Ultimately, the public hearing would be a public trial. You are presupposing, Mr Goiran, that people called before a public hearing, albeit guilty in some cases of some offence, might use this and say, "I'm not guilty, so don't have a public hearing", but there are many instances where not simply persons who are subject to an investigation, but witnesses, do not want to be examined in public. Most people would, I think, shrink from having a public hearing—witnesses who, for example, may have been party to telephone conversations in which, privately, they have said things that they would hate to be ventilated in public, and yet they are not guilty of any offence.

The CHAIRMAN: It is probably timely at that juncture for me to refer to a particular portion of your written submission, which I think is precisely on point there. You say that there has also been, for example, in the lengthy Smiths Beach investigation, a tendency to have every person called as a witness, even though not suspected of any wrongdoing, to be summoned to a public hearing. No-one should be subjected to a public hearing unless the commissioner is satisfied that there is a public interest benefit in publicly examining that person, outweighing the potential for prejudice to that person or some other individual by reason of the questions and the evidence to be given. I think that is the point you were just making there: that it is one thing for—I use the term loosely—an accused person to appear before the CCC in a public hearing; it is another thing altogether for a witness who might just be providing some evidence of a factual nature, and is not accused at all of misconduct or anything, to appear in a public hearing.

Mr McCusker: That is right, if there is no suggestion that that person is guilty of misconduct of any nature, but may have been party to telephone conversations with someone—perhaps the person who is the subject of an investigation—in which he uses, as people quite often do, profanities which are then publicly ventilated. That has been a feature from time to time which has caused not only me but a number of members of the public to say, "Why is all that being published? That's awful, but why is it being published?"

The CHAIRMAN: So really, the criticism there is in the application of the provisions in the act.

Mr McCusker: Yes.

The CHAIRMAN: I think what you are saying is that each and every witness must be taken individually, and the commission must undertake that weighing-up exercise on each and every occasion.

Mr McCusker: I totally agree with that, yes. I think that is what the act actually requires.

The CHAIRMAN: Yes. I have no difficulty with that; I guess what I am keen to get some clarity around in terms of the evidence today is ultimately: is the evidence to the committee that the CCC should not hold public hearings?

Mr McCusker: No, I would not go that far. There may be circumstances—I think the tasering incident is one such circumstance—where it may be justifiable in terms of public interest, because when you look at the balancing act that the section requires and when you talk about damage to reputations of individuals, the police have actually done this; it is on video, so I think that the damage to reputation has to be looked at in that context. If they have done this, the damage to reputation certainly would exist by having it exposed, and there is a public interest in knowing that this has taken place. I can see that as an outcome. It becomes less clear, much less clear, if you do not have a video but you have allegations. But if the allegations are admitted by the individual, there again, there may be a case for having a public hearing because there is no likely damage or prejudice to a fair trial because there will not be a trial.

The CHAIRMAN: In the Tasering incident, perhaps there is also a further argument to say, "Actually, the matter was originally being investigated by the police, and that investigation was taking"—in my words—"an incredibly long period of time. There was concern around that and so, perhaps, all the more reason why the CCC should take the investigation on".

Mr J.N. HYDE: Further to that, I think you give a very valid solution by requiring the commissioner, before any public examination of any person is to be held, to prepare and sign a statement justifying that decision to explain why the public interest outweighs the potential for prejudice or privacy infringements arising from a public examination of that person. You go on to explain that the commissioner would have to give detailed reasons, in particular explaining what the perceived benefits are of public exposure and public awareness. A copy of that statement should be provided to the parliamentary inspector before the hearing, and also to the person proposed to be publicly examined, giving that person the opportunity to make submissions as to why that person should not be publicly examined. I think your position is quite clear; it is not totally banning public hearings, but to have a transparent process for the CCC to adhere to on the rare occasions that they choose to do that.

Mr McCusker: Exactly, Mr Hyde. If they are going to be rare occasions—I certainly agree with Mr Steytler that they should be only rare occasions—then on those rare occasions, I think that procedure would give a self-discipline to the commission. It is very easy simply to say, going through the motions, "We've weighed the public interest as against the damage to the individual, and we think that the public interest outweighs it, full stop"; that tells you nothing. What needs to be spelled out is why it is thought that the public interest outweighs the damage to the individual. I suggested that further step that you mentioned, Mr Hyde, that the individual before the public hearing should receive the detailed reasons and be given the opportunity to make submissions to the commission, because the detailed reasons, for example, may not dwell adequately upon the likely damage to that individual and the consequences of it.

The CHAIRMAN: I want to pick up on that suggestion, because as you have indicated, that is taking it one step further than what the current parliamentary inspector suggested last week. If the Parliament was inclined to make the necessary changes to the act to accommodate that provision, by getting the commission to reduce its reasons into writing, will it create any right to litigate or right to appeal or right to seek to have that administrative decision set aside in any way?

Mr McCusker: That would be a matter for the Parliament to decide, because it could easily be prevented by providing that the ultimate decision of the commission should be non-appealable. I think that probably would be the best approach to it, because you do not want the thing to go on forever if there really is a genuine decision. And, of course, you have the fact that the parliamentary inspector is there. If he or she—whoever it may be in the future—receives a detailed statement, then the inspector may go to the commissioner and say, "Look, I don't think this is good enough". Although the inspector cannot veto it, there is a very clear persuasive power there.

The CHAIRMAN: Mr McCusker, can I also take the opportunity now to pick up on a couple of other things you have said in your submission that I think would be useful to confirm for the record.

Firstly, last week under questioning, the parliamentary inspector was put the suggestion by me that perhaps one way forward would be to use suppression orders more frequently in public hearings. Is that a view that you agree to?

Mr McCusker: Yes, I do. I think I have said that in my notes, actually—that I agree with that. One way of overcoming some of the prejudice that flows, in particular, from intercepted telephone conversations from time to time—that is, the kind of language that is used and so forth, which reflects badly on an individual—would be to give a suppression order in respect of those parts of the telephone conversation that have no relevance but certainly could be damaging, at least in the eyes of a lot of people in the community. That is one way of doing it; another is to suppress names, possibly, because there may be a public interest in having certain things exposed without it necessarily being in the public interest for the person concerned to be named at the public hearing.

The CHAIRMAN: The other thing that I just wanted to get confirmation from you on the record was that, under questioning last week, the parliamentary inspector was commenting on the statistics of private versus public examinations. The statistics were 49 private examinations and 15 public examinations, and Mr Steytler said that he would have thought that the ratio ordinarily should have been significantly less public hearings than have been held. Would you like to comment on that?

[11.00 am]

Mr McCusker: That is roughly 25 per cent. That is a very high proportion of the total number of hearings that have been public hearings. I agree with Mr Steytler; I would expect that if the act was being applied in substance as regards public hearings, there would be substantially fewer public hearings than that.

The CHAIRMAN: Would you go so far as to say that you think it is unlikely that all of those 15 public examinations are justified?

Mr McCusker: I think it is very unlikely. I have not looked at each one but it would be very surprising if they were all justified. I know of instances in which people have been called as witnesses, and presumably that is counted as a public hearing, and there was no possible valid purpose to be served to have them publicly examined rather than privately examined. The same result would have been achieved. They have the evidence such as it was.

The CHAIRMAN: I want to go back to the suggestion that where the commission has evidence of a prima facie case of misconduct, it ought to refer the matter to either the DPP or the PSC. Would you go so far as to say that that should be stipulated in the legislation?

Mr McCusker: In relation to the question of whether or not to hold public hearings?

The CHAIRMAN: Yes.

Mr McCusker: Yes, I think it would be helpful to do that when there is already sufficient evidence, but again I would qualify that. There may be cases in which even though there is evidence that can be referred to the DPP or the Public Sector Commission, that is not the step that should be taken. It may be thought, as in the Taser case or in cases in which people have pleaded guilty, that there is a public interest in having that exposed straight away.

The CHAIRMAN: Once again, I guess it comes down to the discretion of the commissioner of the day. Whilst it is good advice and wise advice, perhaps it would be problematic to include some of these things in the legislation because it reduces the discretion and flexibility.

Mr McCusker: It does. Certainly, I do not think it is desirable to have it as a flat requirement. It is one of the matters that can be taken into account along with the other suggestions that have been made by me and Mr Steytler that there be further consideration of whether it would not be simply desirable to send it straight to the DPP rather than have a public hearing.

The CHAIRMAN: Yes, so a factor taken into account and then ultimately reduced to writing?

Mr McCusker: Yes. Although I have referred to prejudiced individuals, it might be worth including a consideration of not simply damage to reputation but possible prejudice to a fair trial. I know that it is said by the commissioner, and we are careful to avoid prejudice to a fair trial but I have seen some instances in which I would not like to be the subject of a report that has preceded a trial.

The CHAIRMAN: Again, without limiting the flexibility, it could be a factor to take into account.

Mr McCusker: Yes.

The CHAIRMAN: You looked at several possible scenarios on the question of whether there should be a public hearing. The second scenario that you mentioned was where there may have been a suspicion by the commission, nothing more. Your clear evidence in that regard is that if that is all you have got, you do not proceed to a public hearing in those circumstances.

Mr McCusker: That is right.

The CHAIRMAN: Would that be something that should be included in the legislation, either as a very concrete provision or, alternatively, as a factor taken into account? This one, perhaps, is more than just a factor to be taken into account.

Mr McCusker: It would be more than a factor to be taken into account. The problem would be in practice to decide whether this is a mere suspicion or something a bit stronger. I would be inclined to leave that to the discretion provided the discretion is covered in the way that I have suggested and Mr Steytler has suggested; that is, before the discretion is exercised, there be a clear statement of why it is being exercised.

Hon MATT BENSON-LIDHOLM: Mr McCusker, I wanted to briefly focus on an issue that you mentioned on 17 November 2008. As the then parliamentary inspector, you appeared before the Joint Committee on the Australian Commission for Law Enforcement Integrity. I want to quote what you said in your introduction. I will not provide the whole quote because it is superfluous. You stated —

> There are pros and cons with public hearings, but the problem is that the person who is the subject of a public hearing and against whom allegations are made and propositions are put has no right to be represented by counsel for the purpose of counsel then questioning witnesses on whose evidence allegations might be based.

Is that still the case? Does that situation still prevail? If so, can you give the committee some idea of the significance you would attach to that particular situation, particularly bearing in mind, as you also said in the context of that quote, these are not trials?

Mr McCusker: No, and that is the real problem. Let us say you have an investigation of X and witnesses Y and Z are called in advance of calling X to a public hearing. Witnesses Y and Z make all kinds of allegations—this is not fanciful because I know this kind of thing has happened from time to time—and counsel for X or X himself does not know that these allegations are to be made in advance, so by the time that all happens in a public hearing, there has been no testing of them. They simply get up there and give their evidence and there is no testing by cross-examination. For example, if X was there and represented by counsel, he may be able to say, "Look at this document" or "Don't you agree that this happened?" Proper cross-examination may expose the evidence of those witnesses to be less than reliable.

Hon MATT BENSON-LIDHOLM: The reputation is irreparably damaged, or can be.

Mr McCusker: Yes, it can be.

Hon MATT BENSON-LIDHOLM: Perhaps as legislators, what sort of things need to be done within the context of the act? Is that something that we could address? Would there necessarily be

amendments to the act or is there some other way that may be appropriate for us to move to address this sort of situation?

Mr McCusker: You raised a very important point. That does not present a problem with private hearings because whatever is said by witnesses Y and Z against X, when X comes along, X may be able to say to the investigators, "You said that this is what they say but I can show you that that is wrong" and in that way, the whole matter can be resolved privately. In public, once these allegations are made, it may be that the commissioner adjourns the hearing and a couple of weeks later, X comes along and tries to make an explanation but has had no prior notice that Y and Z were going to make these allegations. To answer your question, I think that some thought might be given, where there is a public hearing, to ensuring that any person whose reputation may be damaged by the evidence to be given by any particular witness is given advance notice and the opportunity to be represented.

The CHAIRMAN: I want to take the opportunity, Mr McCusker, to pick up on something in your submission. You stated —

> … the Commission, being an investigative body, has neither the power to make a finding of misconduct, nor the power to take "*disciplinary action*". It can only make "*recommendations"*. The body ultimately responsible for making a finding of misconduct, and in that event taking "*disciplinary action*", is the Public Service Commissioner.

Do you think that the act should be amended so that the CCC can make such findings?

Mr McCusker: No, I do not. It seems to me that there is a real danger in duplication. Under the Public Sector Management Act, the Public Sector Commissioner is ultimately the person who arranges for an investigation of alleged misconduct by a public officer and ultimately decides what disciplinary action to take. If you have the commission doing it as well, I am not sure how that would sit. It seems to me that the commission is an investigative body. It is specifically provided under the act that it cannot make findings, and I think that is a good thing. It can investigate and then pass over results of an investigation to a body responsible for finally making a decision.

The CHAIRMAN: I think I have covered all the questions I have for you today. Is there anything further that you wanted to raise before the committee?

Mr McCusker: This is not directly related to the subject, which is public hearings, but going on from the last question, a real question—I will not express my views—has been raised from time to time as to whether it would be desirable to simply leave the investigation of public servants' misconduct to the Public Sector Commissioner. That might mean extra resources. It may mean giving the Public Sector Commissioner the power, subject to court approval, to intercept telephone conversations; in other words, the kind of investigative powers that the CCC has. It does seem a little odd to have two layers, as it were, of investigation of misconduct. I mentioned the cases of Mr Allen—Mr and Mrs Allen are here today—and Mr Frewer. There was an investigation and an adverse report against both of those gentlemen which, on investigation by me and independently by the Public Sector Commissioner's appointed investigator, we both found independently that the report was flawed and the view expressed, which was only a view or opinion expressed, was untenable. On that point, opinions expressed by the commission in its report truly are, as has been stressed many times, merely opinions but they are not taken as that by the public. They are taken as findings of guilt but maybe nothing happens thereafter so it is left as a cloud over the person subject to the adverse report because, on investigation, as in those cases, by the Public Sector Commissioner, it was found there was no case, but the damage has been done. Although the Public Sector Commissioner's report and, indeed, the parliamentary inspector's report may help to undo the damage, it does not undo it completely.

The CHAIRMAN: It is the case that the CCC has jurisdiction wider than just what the Public Sector Commissioner would have. For example, the investigating of police would not be something that falls under the —

Mr McCusker: No, and I am not suggesting that that should be considered. There may well be a case—I think there is—for having a body, the sole purpose of which is to investigate allegations against the police, because there has been a public perception at times that investigations by the police of the police is really appealing from Caesar to Caesar and not to be accepted. I do not think that criticism is entirely well founded but it is a public perception that could be dispelled if there were a separate body such as the CCC whose sole function was to investigate allegations against the police, as there is in New South Wales and Victoria.

The CHAIRMAN: If that was to be the case, would you agree that it would be unhelpful for that body—in this case, the CCC—to be working closely with WA Police investigating matters such as organised crime?

Mr McCusker: Yes, there would be a real danger of a conflict of interest there. Someone has to investigate organised crime, obviously, but the police do it. If it is said, "Well, what about these exceptional powers that are given to the CCC under the act", the response is: the CCC could still have exceptional powers in relation to its investigation of police, but the police could have those exceptional powers for the purpose of investigating organised crime.

[11.15 am]

Mr J.N. HYDE: I have a final overview question in the last few days before you get to move into the wonderful electorate of Perth and become a constituent, and also take on another job and perhaps may not be making as many public comments on policy. You are in the position of having been involved in the legal system but also the establishment of the CCC as the PI. Are we a less corrupt society today than, say, before the Kennedy royal commission? There is a lot of discussion in Queensland now that they have tried to tinker so much with their CMC–CJC, which we were based on, when they go after high-profile issues rather than their core reason for establishment—which was to combat police corruption; Queensland seems to be going back almost to the pre-royal commission days up there—would your overview position from the many hats you have worn be that we are in a better position than before the CCC was established?

Mr McCusker: That is a very difficult question to answer. I would prefer not to venture an opinion that would be purely on a kind of anecdotal basis. Undeniably there have been instances of corruption since the CCC was established. I do not know whether the establishment of the CCC reduced possible corruption or not. It is impossible to say. I think, frankly, that corruption will occur regardless of the nature of an oversight body. If it is going to occur, all that can be done is the best to combat corruption. You look at every state that has established a similar kind of commission, there has still been corruption. If you say the level of corruption is reduced, it may be because of the establishment of the CCC or something similar, or it may be simply that society has changed for reasons independent of the CCC.

Mr J.N. HYDE: Or the police service is managing itself.

Mr McCusker: Exactly. Talking to the police, yes; it may be that the police service is managing itself. That may be due to the influence of the commissioner. There are so many variables. I am giving a typical lawyer's answer—maybe!

The CHAIRMAN: Mr McCusker, to conclude I ask whether the following would be a fair summary of your evidence to the committee today: I believe you hold the view that there have been instances where the CCC have held public hearings and ought not to have; the CCC should retain its discretion to hold public hearings, however the use of that discretion should be very rare and it should make more use of suppression orders; the act should be amended to reflect the two suggestions offered by the parliamentary inspector last week as well as a further provision setting

out the factors the commissioner must take into account, together with a requirement to reduce that decision to writing?

Mr McCusker: Yes.

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

Mr McCusker: Certainly.

Hearing concluded at 11.18 am