

STANDING COMMITTEE ON LEGISLATION

CORRUPTION AND CRIME COMMISSION BILL 2003 AND CORRUPTION AND CRIME COMMISSION AMENDMENT BILL 2003

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
ON WEDNESDAY, 23 JULY 2003**

**Hon Jon Ford (Chairman)
Hon Giz Watson (Deputy Chairman)
Hon Kate Doust
Hon Peter Foss
Hon Bill Stretch (substituted by Hon Derrick Tomlinson)**

Committee met at 12.50 pm**O'CONNOR, MR TERENCE****Chairman, Anti-Corruption Commission,
examined:****CHARLWOOD, MR GRAEME****Chief Executive Officer, Anti-Corruption Commission,
examined:**

The CHAIRMAN: Before we start, I apologise for the delay. I appreciate your patience and your coming here today and, on behalf of the committee, I welcome you to the meeting. You have both signed a document entitled "Information for Witnesses"; have you read and understood that document?

Mr O'Connor: Yes.

Mr Charlwood: Yes.

The CHAIRMAN: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard, please quote the full title of any document you refer to during the course of this hearing for the record. Please be aware of the microphones, try to talk into them, ensure you do not cover them with papers and make noise near them, and please try to speak in turn. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today's proceedings, you should request that the evidence be taken in closed session. If the committee grants your request, any public and media in attendance will be excluded from that part of the hearing. Please note that until the transcript of your public evidence is finalised, it should not be made public. Premature publication or disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege.

Would you like to make an opening statement to the committee?

Mr O'Connor: Yes. The Corruption and Crime Commission Bill will provide to the Corruption and Crime Commission powers that the Anti-Corruption Commission for some time has been calling for as necessary for an effective anticorruption body. A number of issues, however, concern us. We believe that if some issues are not addressed within three years or so, the CCC will be subject to the sorts of criticisms and so on that the ACC has been subjected to in the past few years. We have provided to the committee clerk a submission and a written response to the committee's questions. We thought it appropriate to leave the submission as a draft until after this hearing because, following the discussion this afternoon, some elaboration or clarification may be needed to make it intelligible to the committee or others.

The CHAIRMAN: I do not know whether you have appeared at these parliamentary committees before, but the committee wants to ask you a number of formal questions that have been prepared by the staff and I am sure members have a number of questions they wish to ask.

Your draft submission suggested that the Corruption and Crime Commission comprise more than one commissioner and that other part-time commissioners assist in more crucial decisions. Will you please set out the reasons for that view?

Mr O'Connor: The view is that there are significant powers in the Bill and, although we argue that many of these powers are necessary for an effective corruption-fighting agency, it is also important

that the powers not be abused. Although that is always a possibility, no matter how many people comprise a committee or commission to consider the powers, the reality is that they are less likely to be abused if the people who have input to the exercise of those powers come from different backgrounds.

The CHAIRMAN: Do you envisage those people coming from backgrounds outside the legal and judicial framework?

Mr O'Connor: Yes; for example people who have an interest in civil liberty questions and that sort of thing. The Anti-Corruption Commission was set up as a three-person body to allow for different inputs. That has been quite successful, although that is not publicly recognised as the case. The reality is that over the years, because of the different backgrounds of the people in the commission, it has actually worked quite well. That is one way of doing it. In certain crucial matters there is also a basis for considering someone such as a public interest monitor, which I believe applies in Queensland, where a monitor has the right to make submissions on the exercise of certain powers. I am thinking particularly of the power to conduct public hearings. Although I believe it is inappropriate for such a person to have the right to veto a public hearing, it is nevertheless appropriate that submissions from someone external to the commission be considered by the commission before it makes a decision to proceed to a public hearing.

Hon PETER FOSS: A sort of devil's advocate?

Mr O'Connor: Yes. However, ultimately the commission must take responsibility for its decisions. It should not be put in a situation in which it strongly believes a course of action is appropriate but is prevented from taking that course of action by some external body or person.

Hon PETER FOSS: In making crucial decisions you mentioned one power; that is, the holding of public hearings. Do any others occur to you?

Mr O'Connor: Yes. Another one is the exceptional powers provisions, which are contained in the Bill, many aspects of which concern us. In other areas of the exceptional powers I think there should be the opportunity for less regulation than currently exists.

Hon PETER FOSS: Without giving us an answer now, will you give some thought to whether there should be a provision for argument by a devil's advocate or whether other commissioners should be involved in decision making or reviewing decisions, or whatever mechanism you would suggest? While giving some thought to those matters, could you bear in mind the add-on power of the exceptional powers Bill, in addition to the core power of the corruption Bill.

Mr O'Connor: The original exceptional powers legislation involved a Supreme Court judge in the operation of those powers. I believe the threshold decision that the powers should be exercised should remain a judicial decision, not an administrative decision, as currently proposed by the Bill. If the Police Service wishes to avail itself of the exceptional powers provisions, it must go to court and ask for an appropriate order. It is a question then for the Parliament as to whether the oversight of if that is conducted by the CCC or some other agency.

Hon PETER FOSS: We had a problem with that. The Criminal Lawyers Association did not like the idea of a judge deciding that. It asked how a person who eventually appeared before a judge would know what information was before the judge in secret before the judge was involved in issuing the order to go ahead. Do you think that is a problem? Would it in any way be offset if a public interest monitor could argue the devil's advocate side, who would not be exactly ex parte nor inter partes, but at least the judge would not be involved as a participant in the situation?

Mr O'Connor: I can understand the problem and it should be readily soluble. Two thoughts come to mind. The judge who made the decision should not be involved in the criminal trial. Alternatively, the information provided to the judge when making the decision should be part of the documentation provided to the accused prior to trial. A brief is handed over to an accused prior to

trial and the affidavit, or the evidence that was relied upon, could also be provided as part of that brief.

Hon PETER FOSS: Including the identity of the judge who made the order?

Mr O'Connor: Yes.

[1.00 pm]

The CHAIRMAN: Following that line, I seek your views on the qualifications of any commissioner or commissioners. If the primary commissioner is a judicial officer, what sort of qualifications -

Mr O'Connor: If I may interrupt you there, I have a problem with that because the functions of the Corruption and Crime Commission will be administrative. There is a lot of learning and discussion about the undesirability of mixing the different arms of government. The judicial arm should not be engaged in the administrative functions of government. There are a lot of learned articles on this subject. There would be no problem with a retired judge, but I think a serving judicial officer is quite inappropriate because of this confusion between the judicial and the administrative arms of government.

Hon PETER FOSS: When you say "retired" do you mean fully retired? This Bill contemplates one who retires for the time being and then goes back again.

Mr O'Connor: I think that is quite inappropriate. A while back when Mr Justice Owen was appointed the HIH royal commissioner, I happened to read in the *Australian Law Journal* a rather snooty editorial by the judge who is the editor of the ALJ and who is Sydney based suggesting that this was not an appropriate thing to do. In his article he published a response by our Chief Justice saying that, in that case, the administrative function was a commonwealth function and not a state function and therefore that made it a different case. However, there is a strong view that there should not be this blurring of the distinction between the different arms of government.

The CHAIRMAN: You have said in your submission that the CCC should not be involved in police operations. Is that for the same reason?

Mr O'Connor: No, it is a different point. It is just the principle that the judicial arm of government should be different from the administrative arm of government, and the functions of the CCC will be administrative as part of the executive operation of government. A separate point is that there are potential difficulties in mandating relationships between the CCC and the Police Service when the CCC is responsible for overseeing and investigating police officers. I think that is undesirable. However, in Queensland police officers are routinely seconded to the Crime and Misconduct Commission, which I think is quite inappropriate, but that is the way it does it.

Hon PETER FOSS: You are saying that it is hard one day to chase them and the next day to work alongside them.

Mr O'Connor: In response to the question about the Director of Public Prosecutions and our problems with the DPP, which continue to this very day, one thing I must say in defence of the DPP is that it is very difficult one day to put up a police officer as an honest, reliable, truthful person to be believed in any circumstance against the calumnies of the accused and the next day to consider a brief in which that police officer is alleged to have engaged in criminal and corrupt conduct.

Hon PETER FOSS: What is the solution there? Do you start your own prosecution system?

Mr O'Connor: When you were Attorney General, I suggested to you that maybe the Crown Solicitor's Office should handle that.

Hon PETER FOSS: I was quite happy to go along with that. Is the answer that we get someone else to do it?

Mr O'Connor: There must be some other system, yes. The other alternative is for the CCC to charge. Again, referring to Queensland, at the moment the CMC is under great pressure and criticism from many quarters in Queensland, and one of the complaints is the delay in dealing with briefs. It attributes that to the DPP and in fact Brendan Butler said at the round table conference he attended that it had great difficulty getting advice from the DPP. Certainly its experience seems to mirror ours, although I think ours is probably worse. The DPP in Queensland herself has called for the CCC to be permitted to charge.

Hon PETER FOSS: And indict?

Mr O'Connor: Yes.

Hon PETER FOSS: That was my next question. Do you think the CCC should be able to indict?

Mr O'Connor: I do not know. I have some problems with it. I have a long list of grievances about the DPP's office. I attribute many of the problems of the ACC to failures by the DPP. However, one grievance I have is the view the DPP takes of what sorts of prosecutions are in the public interest and also when it is appropriate to allow disciplinary proceedings to take the place of criminal proceedings. It would be very embarrassing, particularly two or three years down the track when I am sure the CCC will be under pressure and criticism, if the DPP decided in the exercise of discretion to discontinue proceedings because it was not in the public interest or because the disciplinary hearing was sufficient.

There is a lot of publicity at the moment about the Aboriginal health difficulties. We put a brief to the DPP on a matter involving an Aboriginal health officer and after some lengthy period the advice was to charge, which was done. Then when the thing was on its way, the DPP communicated with the Department of Health and asked whether it would exercise its disciplinary functions if he sent it the brief. The response was yes, and that is what happened; he discontinued the proceedings. We were criticised for that.

Hon PETER FOSS: However, I cannot see an alternative to that. You can always take advice from Crown Law, but ultimately only two people can indict - the Attorney General and the DPP. The Attorney General obviously will not indict and the DPP will not indict without taking further advice, so you are right back to getting advice again.

Mr O'Connor: I do not know what the answer is. At the least, things should be dealt with in a timely way. We have a matter with the DPP that is now approaching four years old. We still have not received any formal advice, although we were told a couple of years ago that charges should be laid. If an officer or officers of the DPP were designated as responsible to advise the CCC, that might improve the situation.

Hon PETER FOSS: You could be designated as an indictable officer. That could be done now. The Attorney General has the power to designate you as a person who can serve indictments.

Mr O'Connor: It is preferable, if possible, that it go to the DPP.

Hon PETER FOSS: However, you cannot have it both ways. You cannot complain about the DPP -

Mr O'Connor: My fundamental complaint is a failure to act in a timely way.

Hon PETER FOSS: It is the old problem in which if you are held accountable but somebody else is responsible, there are difficulties. If you could indict and it goes to trial and you lose it, that is your problem. However, it is a bit rough if you want to indict but you cannot get an indictment.

Mr O'Connor: One way or another. We take the view that it is not for the ACC to make a decision on whether there should be a prosecution. On occasions we have sent forward briefs in which the view was that it was probably not appropriate but it was not our decision, so we sent it to the DPP.

Hon PETER FOSS: Can you give some thought to what the solution might be - you have suggested the Crown Solicitor - and whether it may be appropriate for you to seek the advice of the Crown Solicitor in view of the fact that he does not have to work with the police every day and that it may be appropriate for the Crown Solicitor to indict under those circumstances? That might be the answer. That is a real problem and, if the CCC is not to face the same problems as the ACC, it will need the capacity to bring things to completion.

Mr O'Connor: One way around it that we have employed is to engage in joint operations with police. Obviously that becomes more difficult when police officers are involved. We are also resorting to sending the brief to the police after we have done the investigation and asking them to consider whether they would like to charge, which involves duplication which is unsatisfactory. I am sorry, Mr Chairman, I think I have led us off on a tangent and I have forgotten your original question.

The CHAIRMAN: That is fine. You have had a couple of part-time commissioners. I was particularly interested in the sorts of qualifications you feel would be appropriate for those other commissioners?

[1.15 pm]

Mr O'Connor: You might consider someone who has some sort of civil liberty background. Although I said not necessarily lawyers, you might consider someone who is from the criminal Bar, so that he looks at things through the eyes of the accused. I must say that having had no experience in the public service prior to this - and hoping to go to my grave having no more experience in the public service, I might say - I have found it particularly useful to have former senior public servants on it. Because there are so many intricacies, conventions, rules and things in the public sector that are not within my experience in any other walk of life, I have found that very useful. To borrow Mr Foss's phrase, you really want a person or two who will be a devil's advocate in these major decisions.

The CHAIRMAN: The committee understands that the Anti-Corruption Commission has concerns about the workload for a single commissioner, given the limitations on delegation. Would these concerns be ameliorated if the Corruption and Crime Commission consisted of more than one commissioner or if they were part-time commissioners?

Mr O'Connor: Who have some of these delegations?

The CHAIRMAN: Yes.

Mr O'Connor: Obviously, that would ameliorate it to some extent, yes. One obvious thing, which I think we highlight in the answers to the questions, is that at present, under our legislation, there are two steps we can take. If we get an allegation, we can undertake what is called a preliminary inquiry. At that stage you just have a quick look at things and then decide whether or not the matter should go for investigation either by the ACC or some other agency. For some reason that escapes me, at the preliminary inquiry stage the ACC is entitled to compel people to provide information. It cannot in an investigation, but it can at the preliminary inquiry stage. The ACC has delegated to senior officers the power to require people to provide information, and that has worked very well, I believe. It seems to me that the problem with this legislation is that the commissioner has got to sit in a formal hearing every time anyone is compelled to provide information. I just think that that is going to be ridiculous in practice, because the workload will just be overwhelming.

Hon PETER FOSS: If the power could be delegated, would that include delegating the power to compel a person to make admissions against interests and overcome legal professional privilege, or do you think that should be a special power?

Mr O'Connor: I have not given any particular thought to that, but I do not see why not. We have tried to be scrupulous. Obviously, people could look at what we have done in particular cases and criticise it. However, we have tried to not go overboard with the exercise of this power to compel

in a preliminary inquiry. We have tried to say, "Well, we have gone far enough. We can now make a decision to move to an investigation", although in fact that move does make it much more difficult, because you cannot compel people to give information. However, if we have someone in our sights, the general rule - I would not say it is an invariable rule - and the general instruction is that that person should be given the appropriate caution and interviewed under caution, not compelled, partly because if that person does say anything, obviously you want to have it admitted in evidence, which you could not do if you compelled them.

The CHAIRMAN: Do you have a view about the vesting of an organised crime function in the Corruption and Crime Commission, given that it will also have police and public sector oversight functions? You have already touched on this.

Mr O'Connor: Yes. The recommendation of the royal commission was that there should be an organised crime function. Somewhere along the line that got watered down to just the so-called fortifications provisions. I think that if the police are not doing the investigation of organised crime satisfactorily, changes should be made so that they do. I know it is probably easier said than done, but I am not sure that the answer is necessarily to have another body, which inevitably must work very closely with police. Relationships will be built up between the CCC people and police that make it more difficult to investigate police and so on. I think it will cause problems. I suppose that is my principal objection to it.

Hon PETER FOSS: I am interested to know how you see the public interest monitor and the parliamentary inspector working. One would be inside the operation arguing as the devil's advocate, and the other one would be totally outside the operation.

Mr O'Connor: I am sorry?

Hon PETER FOSS: One would be inside the operation arguing the contrary -

Mr O'Connor: And the other would be outside looking at the operation.

Hon PETER FOSS: Yes. That is it?

Mr O'Connor: You have done as good a job as I could. If you have a number of commissioners, particularly people from other backgrounds, you may not need a public interest monitor. However, when the fortifications legislation was originally introduced, I had a few concerns about it. One of them was that the police go along to the court - in this case to the commissioner - and put up a case to someone who is busy and so on. We all know that people - even the smartest people - do not necessarily always think things through. If you have someone whose job it is to test whether or not the order being sought is appropriate, then I think you are likely to get a much more balanced outcome, because the judge or the commissioner will have a reasoned argument before him or her, and the decision making is likely to be better as a consequence. However, I should say that I would be strongly opposed to the function of the public interest monitor, or whatever one might like to call it, or of the extra commissioners being undertaken by the parliamentary inspector. The responsibility of the parliamentary inspector is to oversight the decisions that are made, not to be part of the decision making. If the parliamentary inspector is engaged in making the decisions, how on earth does he or she review the decisions?

Hon PETER FOSS: One eastern state model has the parliamentary inspector as the working person of the parliamentary committee. Do you see problems with that?

Mr O'Connor: As a member of the committee?

Hon PETER FOSS: The person works with the parliamentary committee rather than independently of it.

Mr O'Connor: I think there should be a close association between the parliamentary committee and the parliamentary inspector, yes. At the end of the day, the whole shooting match is

accountable to the Parliament, so the Parliament must get the best possible information without prejudicing the actual operation or details of the CCC.

The CHAIRMAN: In your written answer to question 8 you refer to the relationship between the ACC and the Director of Public Prosecutions. Earlier you touched on the fact that the CCC will have the same problems unless there are some changes in the operations and philosophies of the Office of the Director of Public Prosecutions. I suppose if the CCC had the power to bring charges, that might deal with it. However, if it did not have that power, can you elaborate on how you see there being a workable relationship between the DPP and the Anti-Corruption Commission?

Mr O'Connor: Over the years Mr Charlwood and I have had numerous meetings with the DPP to try to resolve these issues. We met with Hon Peter Foss when he was Attorney, and we have met with Hon Jim McGinty now that he is Attorney, and the DPP to try to reach some resolution. In our discussions with the DPP, over the years we have been given different views of what needs to be done to improve the situation. Initially we were told that if we could get advice from counsel and put that on top of our brief, that would certainly improve things. Therefore, we agreed on certain counsel whose opinions were respected in the Office of the DPP, and did that. That made no difference. We were told that our briefs were too long. We provide full briefs, which often run to several folders of material. We provided a summary. We were then told that was no good. We offered to pay the DPP to employ external counsel, but that was not accepted. More recently we have been informed - this is some time ago now, because we have not had too many conversations for a while - that the DPP is not sufficiently resourced to do our work. I accept that the DPP does have a problem. If police charge someone, it goes to the DPP, whether the DPP likes it or not, and it is in the court system and must be dealt with. Therefore, that must take priority.

[1.30 pm]

However, I do not accept that it should take years to get a response to briefs, which is our experience. The answer may be to provide to the office of the Director of Public Prosecutions one or two crown prosecutors whose primary function is Corruption and Crime Commission work. That might work. Something must be done. We have exhausted all the things we can think of, unless there is something else we can mention.

Mr Charlwood: No, I think that covers it. One option - although one with which the Director of Public Prosecutions would need to be comfortable - would be to outpost Director of Public Prosecutions' prosecutors with the CCC. The Crown Solicitor's Office outposts solicitors with the Police Service to provide advice, particularly in relation to internal investigations and the briefs that might arise from them. That would be an alternative, but I reinforce the comments of Mr O'Connor that the Director of Public Prosecutions needs to be properly resourced to deal in a timely way with matters coming from the CCC.

Hon PETER FOSS: You can see the problem we have, though. The suggestion really needs to come from the people involved. This committee should not be making recommendations that are not based on some sort of acceptance by the people involved in the solutions. That is why I keep saying that we must come back to some sort of solution. If you cannot come up with one, there is no way that we can possibly recommend one.

Mr O'Connor: We will certainly give it some more thought, but it is a difficult area.

Hon KATE DOUST: I note that in your submission you talk about how the term of the commissioner should not exceed seven years, and should not be renewed. Do you have the same view of the parliamentary inspector? The term of the parliamentary inspector, I understand, is four years, but they have the option of renewing it. In terms of maintaining independence, do you think the inspector should also comply with the same recommendation you are proposing?

Mr O'Connor: I do not feel as strongly about that. The situation in New South Wales is that people are appointed for only one term. The difficulty with giving the Executive Government the

opportunity to set terms and renew or decide not to renew is that it can become an instrument by which it seeks to affect what is happening at the agency. I am not saying that it is likely, but it is possible that someone who is appointed to the agency will make decisions based not on what he or she thinks is appropriate, but rather on the desire to be reappointed. If that person cannot be reappointed, all he or she can think about is what is most appropriate.

Hon PETER FOSS: Do you not think that applies as much to the parliamentary inspector?

Mr O'Connor: No, I do not.

Hon PETER FOSS: Why is that?

Mr O'Connor: The parliamentary inspector is reviewing the operations of the agency, and I do not see it as the same sort of situation. The parliamentary inspector is unlikely to be engaged too much in looking at government itself, whereas one of the core functions of the CCC is looking at government generally.

Hon PETER FOSS: Do you have any views on the relative status of the two? In New South Wales the inspector has always been above the commissioner. If a district court judge is running the commission, the inspector is a supreme court judge. I do not think that is quite the situation now, but that is how they started out. Do you see any advantage in the inspector having reasonably good status?

Mr O'Connor: It is not something to which I have given great thought, frankly. A senior member of the bar might enjoy the opportunity to beat up on a judge. If people have a job to do, they generally do the job.

The CHAIRMAN: The committee notes that in report No 4 of the Joint Standing Committee on the Anti-Corruption Commission entitled "Report of Hearing with the Anti-Corruption Commission on 7 April 2003", the issue of the ACC quarterly report was considered. The committee noted that one of the difficulties faced by the ACC has been how to keep both Parliament and the public adequately informed of its activities without compromising operational integrity. In order to provide a greater level of insight into the activities of the ACC, the ACC provided a statistical overview of its operations. This information is included on the ACC web site and is to be included in the annual report. Clause 91 of the Corruption and Crime Commission Bill 2003 provides for the annual reporting of the Corruption and Crime Commission to the Parliament. The clause sets out a number of matters that must be included in the report but omits details of the number of allegations received. Based on the experience of the ACC, you have said that this requirement of the annual report would be beneficial. Are there any other practical ways you have thought about to keep the Parliament and the public informed?

Mr O'Connor: It is very difficult to do in respect of current operations but the advantage of this legislation, as against the Anti-Corruption Commission legislation, is that there will be the opportunity to report on completed investigations. The ACC could not do that. We had advice from senior counsel that where the legislation talks about reporting on the facts disclosed, they really needed to be incontrovertible facts. When there were two versions of events, it was not appropriate for the Anti-Corruption Commission to conclude which version was right or to reach its own conclusions.

Hon PETER FOSS: No matter how improbable?

Mr O'Connor: Basically, yes - no matter how improbable. We did have a crack at producing a report, and then gave it away because it ended up meaningless. It never saw the light of day. That was the problem, but this legislation does permit opinions to be formed, and expressed in a public report. That is important, provided it is done carefully. That will help keep the Parliament in the loop about what is going on. We were only ever able to provide a mass of figures to the Joint Standing Committee on the Anti-Corruption Commission, and not much else.

The CHAIRMAN: That contributed to the public perception about what the ACC was about, did it not?

Mr O'Connor: Yes.

Hon PETER FOSS: We have been asked to handle this legislation rather urgently, on the basis that there is an urgent need to pass the new legislation, so that we do not lose a lot of worthy people from the Royal Commission Into Whether There Has Been Any Corrupt or Criminal Conduct by Western Australian Police Officers. I am interested in a couple of points about that. I was surprised that the royal commission was not originally extended. It has since been extended, but I was surprised that this had not been considered at an earlier stage. Were you ever consulted on that?

Mr O'Connor: As to whether or not the royal commission should be extended? We are not consulted on anything these days. I think Mr Charlwood was at a meeting on 28 May, where something was raised about it.

Mr Charlwood: The Anti-Corruption Commission is a member of the steering group established by Cabinet to oversee work in preparation for the establishment of the CCC. The royal commission is also a member of that steering group, as is the Director General of the Department of the Premier and Cabinet. At a steering group meeting on 28 May, Mr Hastings raised the matter of discussions he had had with the Attorney General about extending the royal commission. Those discussions were left open.

Hon PETER FOSS: Was no decision made?

Mr Charlwood: No decision was made, but Mr Hastings indicated that the Attorney General's response had been that he would be prepared to consider it.

Hon PETER FOSS: The other concern was about the people from the police royal commission. I am a little concerned that the police will comprise only a small part of the work of the CCC. Somewhere in one of your answers, you have stated that the police were only 5 000 out of a huge number of people. The ACC has dealt at least with the public service, if not organised crime as well. I am concerned about the body of knowledge and experience that your people have - which would obviously be in a far wider area - and what will happen to all that information. There does not appear to be any automatic carryover of staff or knowledge, or any provision to enable that to be dealt with. Have you any views on that?

Mr O'Connor: I have very strong views on it. This legislation has clearly been drafted as if it were concerned only with the police. The other elements of its jurisdiction are, in a sense, an afterthought. Fifty-four per cent of the allegations received by the ACC involve public officers other than police, so only 46 per cent involved police. Let us say that it is more or less 50-50. There is a vast amount of work involved other than in police operations. I do not know how many matters the royal commission is currently investigating, other than those in the public hearings, but I do not think it is very many. It is infinitesimal compared to the number of police matters we have. We are still heavily involved with police matters. There is a huge amount of corporate knowledge and information in the ACC that should go across to the CCC. The royal commission has quite unashamedly availed itself of that corporate knowledge in its operations. The bulk of the matters subject to public hearings are matters that the ACC investigated.

Hon PETER FOSS: A lot of them seem to be pretty old.

Mr O'Connor: Some of them are. The royal commission has certainly been able to add to the information because it had the power to compel people to give evidence, which the ACC did not. Obviously, police officers generally will never answer any questions voluntarily; they must be compelled. The royal commission has had no difficulty availing itself of the ACC corporate knowledge, and it has obviously found it extremely useful, because it has run public hearings on the basis of that knowledge.

[1.45 pm]

It beggars belief that the Corruption and Crime Commission will not also find that to be the case. Instead of the Anti-Corruption Commission and, more particularly, its staff, being encouraged by the Government to continue, and instead of its staff having the prospect of further employment, what I can only characterise as an absolutely disgraceful effort is occurring within government to disadvantage ACC staff. That is something about which I feel very strongly. The way in which they are being treated is absolutely appalling. They are expected by both the Government and us to continue working as though nothing has happened. To their credit, that is essentially what they have been doing. As time goes on and their requests for information and so on are ignored, that obviously becomes very difficult. Quite a number of people have been with the agency for only a relatively short period; some people left jobs in the eastern States to come over here. What is happening is very wrong.

Hon PETER FOSS: I do not know whether you have some idea of the workload of the police royal commission compared with the workload within the ACC. You may want to take this question on notice. Are you able to provide an estimate of the total workload that that would represent; that is, how much work of the ACC is ongoing compared with what is being handled by the police royal commission?

Mr O'Connor: We do not know what the royal commission is involved with, although we have been involved in virtually everything that has been the subject of a public hearing. In many cases the ACC has had joint operations with the royal commission to conduct further investigations on matters - I will not go into which ones - but the bulk have been joint operations. The ACC does not have any joint operations with the royal commission at the moment, which leads me to believe that the royal commission is probably not conducting many inquiries that are not already public.

Hon PETER FOSS: The ACC has most of the equipment, does it not?

Mr O'Connor: The ACC has the power to intercept telephone conversations, which the royal commission does not. That is an absolutely essential tool in the investigative process. We believe it is unlikely that the royal commission has too many significant inquiries; otherwise, it would want another joint investigation with the ACC to access telephone interception equipment. That view is further reinforced by the fact that the royal commission approached us to become engaged in an investigation involving a public officer and not a police officer. That surprised us, because it does not have the jurisdiction. We were obviously not prepared to become engaged in such an operation, because if a prosecution resulted at the end of the day, questions might be asked about the royal commission's involvement in that investigation. That approach led us to the conclusion that the royal commission was perhaps looking for things to do.

Hon PETER FOSS: Do you have a solution?

Mr O'Connor: The obvious solution would be to move ACC staff across to the new body, who would take with them their corporate knowledge. There is a great emphasis on the need for a seamless transfer from the royal commission to the new body, whereas the seamless transfer of a vastly larger number of matters from the ACC to the new body has simply been ignored. The sensible thing would be for ACC staff to move to the new agency. The Government has said that it wants selection to those positions to be based on merit. If that is a non-negotiable position, an alternative is that, at the very least, ACC staff be seconded to the new agency for a period of, say, 12 or 18 months. If the Government wants selection to be based on merit and does not just want to wheel in royal commission people to the new agency, which is what we suspect will happen one way or another, it will take an inordinate length of time to get through that process. This body will not be fully operational until this time next year at the earliest.

Hon PETER FOSS: You are saying that if selection is to be based on merit, it should be based totally on merit, which includes the people from the police royal commission. However, in any

event, there should be a transition process so that the new agency does not fall in a heap in 12 months or more, and so that corporate knowledge is not lost.

Mr O'Connor: A number of major investigations involving non-police officers are occurring at the moment. If all our staff disappeared and the CCC was presented with a pile of paper to try to wade its way through, it would be ridiculous.

Hon PETER FOSS: It would have lost value.

Mr O'Connor: Yes.

Mr Charlwood: In response to your question on the workload, as at 30 June 2003 the Anti-Corruption Commission had 819 live case files that it was either investigating or oversighting.

Hon PETER FOSS: Many of the cases that have been dealt with by the police royal commission were previously dealt with by the ACC. This question can be taken on notice. If, for the time being, we assume that what has appeared in public also appeared under the water, are you able to make an approximate calculation of the relationship between the workload? The problem I have is that telling me that there are 819 live cases does not mean a lot to me. Could you perhaps relate that to the amount of work that was involved in the files that the ACC dealt with and which have been dealt with publicly? That might give us an appreciation of it. I am asking for whatever you are prepared to give the committee as a comparison between the workloads involved. I am not asking you to do it now.

Mr O'Connor: No. I am trying to understand what you are asking.

Hon PETER FOSS: I am trying to get an idea of the comparison between the 819 live files that the ACC currently has and what has publicly passed through the police royal commission.

Mr O'Connor: Okay.

Hon PETER FOSS: I am sure you know those cases.

Mr O'Connor: Yes. The number of current investigations before the ACC is greater than the number of investigations that has gone through the royal commission to date. We are handling them. A team of people is involved with the oversighting and monitoring of external investigations by the police or other agencies, but we also have our own investigations. At the moment we have 50 or 60 investigations.

Hon PETER FOSS: I am asking you to provide your best estimate of the amount of carry forward from the ACC and what will carry forward from the police royal commission. I suspect that there will not be an awful lot carried forward from the police royal commission because it has really all been done.

Mr O'Connor: The royal commission is sending matters back to the Police Service and the ACC as it is.

Hon PETER FOSS: Are you able to estimate the ongoing workload of the CCC? How much will continue from the police royal commission and how much will continue from the ACC? I realise that you might have to put all sorts of qualifications on your estimate.

Mr O'Connor: Obviously there needs to be an allowance in that calculation for the team involved in the oversight side of things. The other side of the corporate knowledge issue is that even at my level a person can see a name and think, "Hang on, maybe we should start looking more closely at this guy because we have heard of him before or a similar allegation has been made."

Hon PETER FOSS: The sorts of things human minds pick up but which computers do not.

Mr O'Connor: Yes. That level of corporate knowledge goes right through the organisation. We can try to make some allowances for that as well.

Hon PETER FOSS: Going back to the earlier question I asked on early discussions with the royal commission on extending the royal commission, could you provide the committee with any documentation relating to that?

Mr O'Connor: We have minutes of a meeting.

Hon PETER FOSS: That would be helpful. I am asking for minutes, reports or anything like that.

Mr O'Connor: We also have an internal memo. I will see whether we can get that.

Hon GIZ WATSON: My question is more general. You have said a couple of times that we will want to avoid the situation of having to revisit this issue in a few years time, and the same criticisms.

Mr O'Connor: I am saying that we will. That is the reality of life with these sorts of bodies.

Hon GIZ WATSON: If you are saying that we will have to revisit this issue, is there anything that could be done to lessen that chance, or do you consider it to be inevitable? In terms of the way in which the Bill has been drafted, what changes could be made to reduce the chances of revisiting the same questions three years down the track?

Mr O'Connor: The fundamental issue is the non-delegable responsibilities of the commissioner. If the commissioner is sitting in a place such as this from, say, 9.30 in the morning to 4.30 in the afternoon listening to a compelled witness giving evidence, when will he or she do all the other things he or she must do and which cannot be delegated? I made the point in the submission that one of the obligations of the commission is to receive allegations, to consider them and then, if appropriate, as will happen with the great majority of allegations it will receive, pass them up, generally to the police, for investigation. If the commission recommends an investigation, the commissioner must make that decision, so he or she will have to consider every matter if there is to be a recommendation to some external agency. One thing has been ignored, which we made reference to in the submission. How many allegations involving police did the Ombudsman receive last year?

Mr Charlwood: It was in excess of 1 600.

Mr O'Connor: There were 1 600 allegations involving 1 200 complainants. That must be added to our number of matters. Inevitably, there will be huge delays in the making of decisions and so on because of the workload of the commissioner. Very quickly, complaints will be made about nothing happening and all that sort of thing. That is an obvious thing to improve the situation.

Hon GIZ WATSON: I assume you mean by that comment that it would assist the workload issue if there were more than one commissioner.

Mr O'Connor: If the commissioner were able to delegate to that person the responsibilities. I do not know why some of the responsibilities cannot be delegated to senior officers in the commission. I am sure that very competent people will be engaged as senior officers. I have had no hesitation in delegating powers to the man on my right, who is not a lawyer but who would be able to discharge those functions appropriately. It does not have to be delegated to another commissioner. Indeed, the delegation power contemplates delegation of the powers that are delegable to anyone in the organisation.

Hon PETER FOSS: The point you raise is a good one. I will read from the evidence given at the committee's previous hearing on 11 July. Hon Derrick Tomlinson pointed out to the witnesses that the definition of what could be picked up included any form of offence by a public servant, no matter how small. I think he said it included anyone from the Commissioner of Police to the janitor at Wiluna. He referred to the number of complaints that were made just to the ACC and asked -

Did you seriously consider making this body a truly specialist corruption and organised crime body rather than a postbox from which complaints could be sifted and sorted, some of which would be seriously investigated by the commission itself?

[2.00 pm]

The answer was as follows -

That was quite deliberate. I see the CCC as an external oversight agency. It will have a strategic function of overseeing not only the Police Service but also the public sector. It needs to know about and have come into it as much information as possible about complaints about the conduct of the public sector.

It could be difficult to do that because it is to be non-delegatable.

Mr O'Connor: Exactly. There is some warrant for the body to receive information on all these matters. We suggest in our submission that the commission should have power to receive a matter, and also to state it will not get involved with it.

Hon PETER FOSS: It would need to be able to delegate that matter.

Mr O'Connor: Yes. It is quite important to have a significant intelligence function in the agency, as I am sure will be the case. It is amazing how little pieces of information and little complaints that on the surface are not all that significant can help a pattern emerge of conduct by a person; therefore, an intelligence profile builds up that might indicate that some proactive action is necessary.

One provision in the Bill is outrageous. I specifically highlight clause 101. I assume we are using the Bill as passed by the Assembly.

Hon PETER FOSS: We are dealing with it as though it had not passed the Council.

Mr O'Connor: I was thinking of the numbering.

Hon PETER FOSS: We thought it would be far too confusing to do it any other way.

Mr O'Connor: Clauses 100 and 101 are concerned with searches. Clause 100 creates a problem as it will permit an officer of the commission to enter premises and to seize stuff, and so on. It refers to public premises. I will refer to it to get it right.

Hon PETER FOSS: You already have that - it is your ACC power.

Mr O'Connor: Yes. There is a problem here. The provision would permit an officer to go into a private house if someone took home papers to read. That is not the biggest problem. The biggest problem is with clause 101. Someone can apply to a judge for a search warrant on the basis of reasonable grounds of suspecting material may be relevant to an allegation of misconduct. Misconduct has a wide definition; it is not only criminal misconduct, but also conduct that might result in disciplinary proceedings. I do not know whether the draftsman thought that obtaining a warrant from a Supreme Court judge made the clause better. Nevertheless, the Supreme Court judge will operate on the basis of the provision. If the judge accepts there may be some evidence that is relevant to the disciplinary event, he will grant the warrant. It is outrageous.

Hon PETER FOSS: Could it be done under the public interest test if it were not a matter of criminality?

Mr O'Connor: Section 711 of the Criminal Code is perfectly acceptable and applies only to criminal conduct. The Anti-Corruption Commission has used that section. Specific provisions are not needed in this Bill governing that matter. The commission certainly should not have the power, with force, to enter premises, not only those belonging to the person against whom the disciplinary allegation is made, but others - it may be to my house - to seize something relating to a disciplinary offence.

Hon PETER FOSS: It could be a newspaper article making an allegation against a civil servant. Officers could go to the newspaperman's house -

Mr O'Connor: If it were a newspaperman's house, it would be okay!

Hon PETER FOSS: I will note that! It could pick up the non-guilty person or the non-accused person in the search for evidence relating to the misconduct.

Mr O'Connor: It is an outrageous provision.

Hon PETER FOSS: Are there any there other outrageous provisions?

Mr O'Connor: We picked up a number of issues in our submission.

Hon PETER FOSS: As you have picked up a lot of issues, it might be worthwhile to pick out the ones you feel particularly strongly about so we can -

Mr O'Connor: I hope you will pick them all up.

Hon PETER FOSS: I am sure we will. I refer to the ones you feel strongly about; those we will spend time on.

Mr O'Connor: Yes. Clause 43 is an odd provision.

Hon PETER FOSS: Shall we ask where?

Mr O'Connor: It was based on misleading representations made in the party room, I believe. If a brief goes off to the DPP about a person, that person must be notified that it has happened.

Hon PETER FOSS: That the person is about to be prosecuted.

Mr O'Connor: It is that the brief has gone off. This relates to the time before the person is charged. The Attorney in the second reading speech said something else about that aspect. I cannot pick it up at the moment. Police do not do this: people are charged, and that is it - they still have all their rights.

Hon PETER FOSS: Sometimes it is bad to give that information.

Mr O'Connor: Exactly. It provides an opportunity to interfere with witnesses, destroy evidence or whatever.

Hon PETER FOSS: They cannot be in contempt until they are charged, either.

Mr O'Connor: That is right.

Hon PETER FOSS: I raise another point of concern. A person can say he has made a complaint to the CCC. I have no problem with that. I suggested in debate in the Chamber that if people do make such a statement, it can carry with it the imputation that grounds existed for making the complaint. In other words, it can be said; however, it carries with it in the mind of the public, regardless of what the courts say, the negative imputation that the person had grounds for making the allegation. If it is made, the person making the allegation takes a risk. The person who says publicly I have made a complaint to the CCC can do so. That is prohibited under your legislation. I suggest the possible negative or defamatory imputation that a ground existed for making the complaint.

Mr O'Connor: Which is what happened recently over east when council elections were coming up; that is, people made allegations to the ICAC and announced them to the Press. Everybody thought there was something in the allegations. I suspect that this problem will occur here. My view is that senior officers and ministers should be able to state that matters have been referred to the CCC. If I go along and make an allegation, I should not be able to say so publicly.

Hon PETER FOSS: That is a statement by a non-public officer.

Mr O'Connor: We can tell without checking when council elections are coming around because we receive a big upswing in allegations regarding the conduct of councillors by other councillors or by candidates, and so on.

Hon PETER FOSS: What do you think of the argument - with the exception of the example you just gave - that the allegation should carry with it some imputation of justification for making the complaint? It can be stated, but the person runs a risk.

Mr O'Connor: I see - so the imputation will be actionable.

Hon PETER FOSS: That is as opposed to non-actionable. It is based on the theory that everybody is innocent; that is, the legal fiction that does not exist.

Mr O'Connor: I have not thought it through, but I am attracted to it initially.

Hon PETER FOSS: Has there been a problem with ICAC in New South Wales?

Mr O'Connor: I refer to later provisions in the ACC Act. Complaints were made to ICAC about councillors, but the complainants failed to produce any evidence to substantiate the allegations. The matters died a natural death when the elections were over.

Hon PETER FOSS: Problems have arisen with people not being able to state they have made a complaint to the ACC. My suggestion would seem a reasonable midpoint: you can say the allegation has been made, but the person might be in trouble if there is no evidence to support the allegation.

Mr O'Connor: Under our legislation, a person had to have some reasonable grounds for the belief. I have not checked in this Bill.

Hon PETER FOSS: There is nothing about that at all.

Mr O'Connor: This is quite a hard Bill to find your way around. It does not seem obvious to me.

Hon PETER FOSS: There is nothing in there at all.

Mr O'Connor: There should be. We take the view that if there are not reasonable grounds for an allegation, it is not even within our jurisdiction. We do not have to offer a person a section 20 review if we refuse to accept a matter. Section 16(1) of the ACC Act reads -

A person (including a public officer) may report to the Commission any matter which that person suspects on reasonable ground concerns or may concern . . .

It then refers to the relevant conduct.

Hon PETER FOSS: It is not that so much as telling the public.

Mr O'Connor: I understand that. If you say you are liable for imputation if there are no reasonable grounds for the allegation, it also would be appropriate to put in a provision stating there must be reasonable grounds for the allegation.

I beg your pardon; it has been pointed out to me that such a provision is part of the Bill. I withdraw what I said earlier.

Hon KATE DOUST: Of the current 819 live cases, what period do you normally take to process a complaint, and how many staff are allocated?

Mr Charlwood: The 819 live matters are for the full financial year 2002-03. The Anti-Corruption Commission presently has a total staff of 83, not all of whom are engaged in dealing with case files - there is an administrative component. We have 20 investigators, whose role is to assess matters and to put reports to the commission, and then to review investigations of matters referred to other agencies; they also conduct investigations that the commission determines to conduct itself on allegations. Does that assist?

Hon KATE DOUST: I am curious whether you expect to have matters dealt with in a certain time.

[2.15 pm]

Mr Charlwood: There is. We have performance indicators for the timeframes in which matters will be assessed and completed. Obviously it is not realistic to set timeframes for some of the more

complex matters the commission deals with. Unfortunately, some matters do run on for some years. There are often valid reasons for that. I am sure that the Police Service will tell you the same. It is not possible to bring some matters to conclusion in a short time, because of their complexity, witnesses not being available and a variety of other reasons.

Mr O'Connor: The bulk of our matters are referred upwards. Obviously with 20 investigators we have fewer investigators than the macro task force, the bikie gang task force and so on. Clearly we cannot conduct that many investigations, but we do have some 50-odd investigations at the moment. When a matter comes in, we try to deal with it within two months. It is assessed by our people and it comes up to the commission for consideration as to what is to happen to it. The bulk of them get referred to the Police Service, but some go to other agencies. Every three months, if we have not heard something, the matter comes back onto the commission's agenda and we make a decision as to whether we undertake some follow up. It is an extremely irritating job, because some matters keep coming up. Indeed, we were recently forced to write to the Commissioner of Police asking him to provide more investigators to the public sector investigation unit because of the delays in that unit. This he has done, I am pleased to say.

The CHAIRMAN: Thank you very much for coming today. You will table the response that we received from you to our indicative questions.

Mr O'Connor: Perhaps we need to table the submission as well, because it refers to some of the questions.

Hon PETER FOSS: Will you be updating it?

Mr O'Connor: Yes. You asked us about a couple of matters, so we may complete some of those at least.

The CHAIRMAN: A number of other questions have been given to us that go into some detail. We did not think it would be very fair to ask you about them today. We will therefore send those to you formally in order to give you a chance to respond in your draft submission.

Mr O'Connor: I will be away for three weeks from the weekend after next.

Hon PETER FOSS: Is somebody else able to send your response to us?

Mr O'Connor: Yes, but I would like to see the issues.

Hon PETER FOSS: Can we ask you to arrange that it be sent somehow, whether by e-mail or whatever?

Mr O'Connor: If you get the questions to us quickly, we will deal with them.

The CHAIRMAN: We can give them to you now.

Hon PETER FOSS: Could you also provide the documents I asked for?

Mr O'Connor: Yes. May I ask - this is a matter of great interest to our staff who are in limbo - when it is likely that the committee will report and therefore when the Bill is likely to be back in the Council?

The CHAIRMAN: The committee has had some discussion about that. We will endeavour to table a report at the end of September.

Committee adjourned at 2.20 pm