

## Transcript

### Podcast episode one: public examinations - the helpful vs harmful debate

**Host: Marie Mills, Mills Wilson**

Welcome to the corruption and crime Commission's podcast series, where we demystify the inner workings of an organisation perceived to be secretive.

Public examination. Two terrifying words when you think about it. Especially when the Corruption and Crime Commission is asking you questions, and the world can watch. The CC says they're in the public interest. Critics say they cause reputational damage.

Today, we talk to Western Australia's Corruption and Crime Commissioner John McKechnie QC, and get to the bottom of the debate. Are public examinations helpful or harmful?

Well, what do you say Commissioner?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

The *Corruption Crime and Misconduct Act* has as its default position that examinations will be private, and there's good reason for that. But it also gives the Commissioner power to order an examination maybe in public, having weighed the benefits of public exposure, and public awareness against the potential for prejudice and privacy. So it's a balancing act at all times in the public interest. And there are good reasons on occasion why such thing should be held in public?

**Host: Marie Mills, Mills Wilson**

So you can see that they can be harmful, but the public interest outweighs it.

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Undoubtedly, they can be harmful, probably in most cases they can. But the public interest on some occasions may require that they nevertheless be held in public. In public these days means of course, available on the World Wide Web, because when we hold public examinations they are live streamed throughout the country, throughout Western Australia, and of course available overseas.

**Host: Marie Mills, Mills Wilson**

So why do you call people before the commission?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

The principle reason to call a person before the Commission is to get evidence or information in the course of an investigation. Most of the people who give evidence do so in private, and mostly they are not persons suspected of serious misconduct. They are giving context, information or joining dots.

**Host: Marie Mills, Mills Wilson**

But why make it public? Why make it a public event? Is that just for entertainment value or perhaps to add a layer of pressure?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

It's not deliberately to add a layer of pressure, I think there's enough pressure when you are summonsed to the Commission, whether public or private. It is to inform the public a little more than a report might do, because everything will generally end in a parliamentary report, and that's one reason why most of our examinations are in private. But to take an example from some years ago, the Chief Executive of the Shire of Dowerin was charged and pleaded guilty to embezzling significant number of funds from the Shire. We held public examinations in Dowerin so that the rate payers might know where their money went, and more importantly, how it was able to happen. Now the people who were examined weren't going to have an opinion of serious misconduct. But the rate payers were entitled to know who was asleep at the wheel, and how did this continue for so long.

**Host: Marie Mills, Mills Wilson**

So can people who are called to appear before you refuse to answer your questions or perhaps even to show up at all?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Not without incurring very significant penalties, which might include and has included in the past jail time.

**Host: Marie Mills, Mills Wilson**

A lot has been said about the reputational damage public examinations can bring to a person. Look at Gladys Berejiklian in New South Wales for example. What are the kinds of things that you consider when you decide whether to do public or private?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

The overall consideration, as I said, is the public interest.

**Host: Marie Mills, Mills Wilson**

And what does that mean?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Well, it's a very difficult concept. Judges and lawyers seem to use it all the time, and it's hard to explain. It's one of those things where you think to yourself, is this an important enough story to get out now? Rather than wait for a report? What damage will it do, what right to privacy do people enjoy. But against that, it is a means of holding public officers to account. The public can see their responses to sometimes difficult questions put to them, and that's part of our open democracy.

**Host: Marie Mills, Mills Wilson**

Your public examinations or I guess anyone's public examinations have sometimes been called a star chamber. There's not a lot of protections or transparency that you might see in a traditional court hearing, no legal representation for witnesses, no chance to object to questioning. How do you respond to that?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Well, those people who call it like a star chamber generally have absolutely no idea what the star chamber was. It isn't the case that people are left to themselves, they're entitled to be represented, and most are. Their lawyers are entitled to ask questions. They're entitled to know the scope of the investigation. There are quite a lot of safeguards, and the Commissioner may also restrict examination in public, perhaps hold some in private, and some in public. We do not follow the New South Wales model at all.

**Host: Marie Mills, Mills Wilson**

So do people generally 'lawyer up' or do lawyers get in the way?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

No, they generally will come with a lawyer. There is in fact a provision that allows them to have their expenses or reasonable expenses paid by the state because it is important that people are represented. It is their reputation on the line.

**Host: Marie Mills, Mills Wilson**

So paint the picture for us. Who's in the room? How does it all go down?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Well, the Commissioner presides over the examination. The examination room looks very similar to a court. There will be counsel assisting who is a lawyer that the Commissioner has appointed to ask questions on behalf of the Commission. Commissioners generally adopt a pretty hands off approach to examinations. That is, they don't intervene, take over the questioning, and lead it. Rather, they allow counsel to do it. It's important for the commissioner to remain detached from the process so that the commissioner kind objectively consider whether the witness is honest, truthful, trying to do their best, and it's hard to do that if you're also in the scrum so to speak. The other people in the room will usually be the investigators, the Hearing Coordinator of course, because we don't have documents, everything is electronic, all the witnesses are shown are electronic exhibits. There is some small space for the public. But with live streaming, mostly people watch it from their desks, as I've been told. And of course, most importantly, there is the witness themselves and their lawyer.

**Host: Marie Mills, Mills Wilson**

So how do you prepare for an examination, you say you shouldn't interfere with questioning, but what's the person in the witness box to expect? And what can they do to give themselves the best chance in front of you?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Well, easiest answer to the last question is tell the truth. That will give them the best chance even if the truth is unpalatable. So far as my preparation goes, while I am of course ultimately oversee all investigations, I try and keep a distance. So I will know generally what the topic is, but I deliberately don't inform myself of the detail. That's counsel assisting's job. I sit there to preside, and also because ultimately any report or opinion formed is mine alone, to give myself the best chance of being a little bit removed from the process to be objective.

**Host: Marie Mills, Mills Wilson**

So counsel assisting has done a fair bit of work before they enter the room?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Yes, counsel assisting carries it, as you can see in the current Royal Commission, where there's relatively small interventions by the commissioners, but counsel assisting will do the examining and cross examining.

**Host: Marie Mills, Mills Wilson**

You must feel pretty bad when people are clearly really upset in front of you really stressed, or even break down in tears?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Well, as a human, that's natural. But I've been a judge and a prosecutor and Commissioner for a long, long while and I'm relatively unmoved by everything, every emotion. And it's hard always to judge how real the emotion is. And it's not, particularly because they are in front of the commissioner giving evidence in public. It's because of what they may have done, which has caused the difficulty.

**Host: Marie Mills, Mills Wilson**

But you're not a callus man.

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

No, I hope I'm not. But on the other hand, there's a firm public interest in the integrity of our public sector, in the protection of the public purse, which I think outweighs individual's hurt feelings.

**Host: Marie Mills, Mills Wilson**

You talk about your time as a Supreme Court judge. After so many years as a Supreme Court judge, then Director Public Prosecutions before that, and now the Corruption and Crime Commissioner, you surely must have heard every excuse under the sun. How easy is it to pick it when someone's trying to pull the wool over your eyes?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

I have heard I think everything that could possibly be said as an excuse. That said, I'm not one of those who believes you can tell a liar by looking at the more body language or anything of that nature. I've had experiences, I remember one murder case in particular, where a man murdered his wife buried her behind the back shed, and then carried on as if nothing had happened. Appeared on television and a heartfelt appeal for his wife to come forward, because she'd run off. He was missing her, the children were missing her. Interviewed by the police - continued the story, offered to go with them that very night to check the back of the shed, could there be nothing there? He was a first class liar. If you didn't know the end of the story, which was that the police dug up and found the body and he had removed himself to Melbourne and was extradited back, you'd believe him watching him on television or watching the police interview. So that's always been in my mind. What usually stumps people is what they've said before or written before, and that's the best indicator. They may say one thing to me. But an intercepted telephone call will show a completely different thing.

**Host: Marie Mills, Mills Wilson**

It must give you immense satisfaction when your hearings do result in the truth coming out?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

It does. That's the reason we do it. And that's reason we're here is to get at the truth. We don't always form opinions of serious misconduct after examinations. We may well take the view that we've listened to everybody and there is nothing there.

**Host: Marie Mills, Mills Wilson**

So people who lie are obviously very annoying, but what about those people who are constantly saying, "I can't recall"?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

We get quite a lot of that, and that's nothing new. If you go back 30 years to the Royal Commission into the activities of government WA Inc. Royal Commission, their computer more or less gave up counting "I don't recall". In fact, the investigators had an amusing tie 'non possum' record diary. It's a refuge or can be a refuge of scoundrels. But a good counsel assisting, a good cross examiner, can usually show that the person can recall or an ordinary person would recall a particular event in question. It's an easy shield, but it doesn't really shield very often. Because counsel just keep going. And obviously, there are times when something happened so long ago, it would be reasonable not to recall it. For the sort of things that we're asking about, everybody would remember.

**Host: Marie Mills, Mills Wilson**

The theme for 2021 International Anti-Corruption Day is "Your right; your role: say no to corruption." Do you think the prospect of being dragged into the Commission to give evidence against someone at a private or a public examination actually deters some people from coming forward and making allegations?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

I think that might well be a factor in some people, but we have very considerable processes to protect people, ranging from whistle-blower protection, victimisation of witnesses and the like. And we make it as easy as we can, for whistle-blowers to come forward and give evidence and not be identified. It would be highly unlikely that you'd ever see a whistle-blower in a public examination.

**Host: Marie Mills, Mills Wilson**

We'll talk about whistle-blowers another time. But one of the other frustrations is that if a witness confesses a crime to you in an examination, as I understand it, that evidence can't be used in court?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

That is correct, or nearly so because there is one exception. And the reason for that, and that is common throughout Australia in relation to anti-corruption authorities, is our main aim is, as I said earlier, to protect the public sector integrity. It's sometimes more important to do that with an investigation and a report to parliament, than a prosecution. So what parliament has done is an act of balance, a person can come before the Commission is compelled to give evidence against their interest. But that is not the rule in relation to criminal law, where everyone has the right to remain silent. And so Parliament's solution is to make everything that is said in the commission inadmissible

in a court if it's said to be against a particular person's interest. The one exception, which is unique to this state, is that if a person subsequent gives a different account in court, it may be that what they've said in the Commission can be tendered into evidence to rebut their different account.

**Host: Marie Mills, Mills Wilson**

So Commissioner, what happens after a public examination? Where does everything end up?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Well, after a public examination, that may not be the end of the investigation. Generally, the investigation will have been ongoing for many months, the public examinations are held or private examination. What follows then, is a report to Parliament. And that's very important in the context of a public examination, because before a report can be given to Parliament, we are obliged by procedural fairness amongst other things, and by statute, to give people an opportunity to comment or respond to anything adverse that might be said about them. So that's a further built in protection that a person might have before a report is tabled. But the report is usually the end point of an investigation.

**Host: Marie Mills, Mills Wilson**

So public examinations, nothing to fear?

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Well I wouldn't go that far. But people can be assured that we do not treat them lightly. We consider each application for a public examination and make a decision on what we regard as the public interest and the best interest all round. It's not a decision which are leave to commission officers. It's a decision I or the acting commissioner will make in each case.

**Host: Marie Mills, Mills Wilson**

Commissioner, great to talk to you.

**Guest: John McKechnie QC, Corruption and Crime Commissioner of Western Australia**

Thank you.

**Host: Marie Mills, Mills Wilson**

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