LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON INDEPENDENT INTEGRITY COMMISSION

(Reference: Inquiry into an Independent Integrity Commission)

Members:

MR S RATTENBURY (Chair)
MRS G JONES (Deputy Chair)
MS B CODY
MS E LEE
MR C STEEL

PROOF TRANSCRIPT OF EVIDENCE

CANBERRA

FRIDAY, 1 SEPTEMBER 2017

This is a **PROOF TRANSCRIPT** that is subject to suggested corrections by members and witnesses. The **FINAL TRANSCRIPT** will replace this transcript within 20 working days from the hearing date, subject to the receipt of corrections from members and witnesses.

Secretary to the committee:
Dr A Cullen (Ph: 620 50142)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

Privilege statement

The Assembly has authorised the recording, broadcasting and re-broadcasting of these proceedings.

All witnesses making submissions or giving evidence to committees of the Legislative Assembly for the ACT are protected by parliamentary privilege.

"Parliamentary privilege" means the special rights and immunities which belong to the Assembly, its committees and its members. These rights and immunities enable committees to operate effectively, and enable those involved in committee processes to do so without obstruction, or fear of prosecution.

Witnesses must tell the truth: giving false or misleading evidence will be treated as a serious matter, and may be considered a contempt of the Assembly.

While the committee prefers to hear all evidence in public, it may take evidence in-camera if requested. Confidential evidence will be recorded and kept securely. It is within the power of the committee at a later date to publish or present all or part of that evidence to the Assembly; but any decision to publish or present in-camera evidence will not be taken without consulting with the person who gave the evidence.

Amended 20 May 2013

MUSCAT, MS BROOKE, ACT Regional Secretary, Community and Public Sector Union
KNOX, MS AMY, Union Organiser, Community and Public Sector Union

THE CHAIR: I now formally declare open this third public hearing of the Select Committee on an Independent Integrity Commission. This committee was established on 15 December last year to look at the establishment of an independent integrity commission for the ACT. Today the committee will be hearing from the CPSU, the ACT Bar Association and three individuals who have made written submissions to the inquiry.

On behalf of the committee I would like to welcome the CPSU. Thank you very much for attending this afternoon and also for making a written submission. We appreciate your contribution to the inquiry. I would remind you of the protections and obligations afforded under parliamentary privilege. You have got the privilege statement on the table before you. Are you comfortable with the content and implications of that?

Ms Muscat: Yes.

Ms Knox: Yes.

THE CHAIR: Would you like to make some opening remarks or are you happy to go straight to questions?

Ms Muscat: I would like to make some opening remarks, if that is okay.

THE CHAIR: Please fire away.

Ms Muscat: We want to thank you for the opportunity to present our members' views to this inquiry into the establishment of an independent integrity commission for the ACT. We represent workers in the Australian public service, the ACT public service and broadcasting and we are the largest trade union with coverage of workers in the ACT government. We have members across all directorates. We are committed and our members are committed to providing a strong voice for members in key public policy and political debates. CPSU takes issues of corruption and serious misconduct very seriously as they undermine and compromise the important work of our members, who take pride in serving the community.

The CPSU is broadly supportive of an integrity commission. However, we have some important views regarding issues to be addressed in its establishment. I will just quickly go through what our views are, if that is okay. First and foremost, we think the commission needs to be adequately funded and staffed. Regardless of the model of the integrity commission that is adopted in the ACT, it is essential that staff are well trained and that the commission is resourced adequately.

We have had experience in the federal jurisdiction with the Australian Commission for Law Enforcement Integrity and we know that they were very stretched in terms of staffing and funding. When their scope was broadened out to take into consideration

agencies like the Department of Immigration and Border Protection and the Australian Border Force we know that they were really, really stretched in terms of resources. We think that really undermines the important work that they are trying to do.

We believe the integrity commission should have a base level of funding and should not be relying on the government of the day. We understand that ICAC, for example, in New South Wales are looking to reduce their workload because of funding cuts. Once again, that undermines the important work that they are designed to do and, therefore, we think funding needs to be established separately.

There should be oversight and procedural fairness in relation to own-motion study investigations and requiring attendance. We believe there should be a separation between the assessment of allegations and an investigation. There should be an independent office to oversee the integrity commission and conduct audits for reporting purposes. It is crucial in our view that there is independent oversight of matters that are referred on for own-motion studies. One level of oversight that you could consider, from our perspective, would be an all-party Legislative Assembly committee established to ensure external scrutiny.

In terms of hearings, we believe that they should be private and that procedural fairness should be paramount. We support requirements for attendance at hearings but do not support public hearings. This is to ensure that witnesses' reputations remain intact and to prevent media attention and scrutiny which could make it more difficult for prosecutions down the line. Further, to ensure procedural fairness and natural justice, we believe that all persons should be informed of the nature of the allegation or complaint prior to a hearing.

If the commission is to initiate covert tactics such as integrity testing then there should be strict oversight and due process. The CPSU has some concerns relating to integrity testing. I will just go through those briefly: the selection and oversight of integrity testing authorities, the time frame to conduct an integrity test after authorisation, the use of information and how that is required in the integrity test and how it is protected, and the potential for entrapment of employees. We do not support excessive coercive powers and we believe the commission should be subject to the appropriate legal processes required when investigating corruption. Protections must be in place to ensure that the rights of individuals are upheld through an investigative process.

We believe the ACT integrity commission should refer cases for prosecution rather than make public determinations, in line with most other anti-corruption bodies. There should be penalties built into any integrity commission that deter people from making vexatious claims against individuals. We understand that there are fines available to other integrity commissions or anti-corruption bodies, and that should be something that is in the ACT government body.

We do not believe that the scope should be limited to ACTPS departments, agencies, parliamentarians and their staff. We think it should be broadened out to labour hire companies, outsourcing. Where you have got an outsourcing or privatisation arrangement it should extend to those employees. We think education of any new integrity requirements of staff and of our members in particular is really important and we see a role for the CPSU in going down and educating our members on their rights

and their obligations.

The other two things I would like to refocus on are: we do not believe that the commission should duplicate other integrity processes that you have, whether that be code of conduct processes or misconduct processes that apply under enterprise agreements. This should be really for serious misconduct and corrupt activity rather than lower level code of conduct matters. Finally, we would like to be involved in further consultation around what a body might look like and how it would be implemented across the ACT public service. That is it from us.

THE CHAIR: The committee will have some questions. I might start with the first one. You have talked about a preference for private hearings and then in your submission you talk about public hearings only being in extraordinary circumstances. What would you consider to be extraordinary circumstances?

Ms Muscat: I probably need to take that on notice and get back to you. From our perspective, for the most part it really should be a private hearing because you do not want to put people through an incredibly stressful situation, particularly if they have got no case to answer or if they are a witness. We would not want them to be dragged into something in the public domain that might impact on their standing in the future or might impact on your ability to prosecute down the line. I would probably need to get back to you in terms of what we might consider an extraordinary circumstance.

Ms Knox: Yes. I would say that the extraordinary circumstance would be whether it was an issue of public interest.

Ms Muscat: Yes.

Ms Knox: For instance, a politician or something like that. But, yes, we can take that on notice.

THE CHAIR: This has been a considerable topic of debate amongst witnesses and we have had very strong arguments put both ways. I think this is one of the most challenging issues for the committee. We are interested to explore your understanding. I guess the flipside or the issue of not having public hearings—and I would be interested in our view—is how, then, you ensure public confidence is maintained if it is all done behind closed doors. The other side of the argument is that sunshine is the best disinfectant. And it sends a signal to people. We are very cognisant of the view you are putting around reputational protection and procedural fairness and the like, but that is the other side of it that we are contemplating.

Ms Muscat: And I understand why you want that deterrent. From our perspective, corrupt activity or serious misconduct is not commonplace in the ACT public service. But I guess we are looking at it from an employee representative perspective. It is about making sure that how they are perceived publicly is maintained. As I say, there might not be a case to answer but their reputation might be tarnished down the line. And if, of course, there is something that is legitimate that needs to be prosecuted or investigated then you would refer them on to something, whether it be to the AFP or to the police. That would then become a public matter. So it is about maintaining the confidence of the people that may not genuinely have a case to answer.

MRS JONES: One of the things that have been presented to us is that these bodies do not launch into hearings as a first step; there is usually at least a two-step process before you get to that point. The point of the two-step process is, first of all, to assess if there is anything to even look at. The second step is actually an internal investigation. Even if we did have public hearings, none of that would occur until those two steps had been completely satisfied and the body still felt that there was a very significant case to answer. I guess, with that in mind, we are dealing with relatively serious matters. We are not talking about pencils going missing. We might be talking about, I do not know, land sales or something, bigger matters that have been in the public domain where there is quite a lot of push for a more public process. You would probably want to know more about that first stage.

Ms Muscat: Yes. I think we would need that level of detail to then make an assessment as to what our position is. But I could certainly get back to you in terms of the extraordinary circumstances that we have outlined in our submission, if that helps.

MRS JONES: Yes.

MS CODY: You were talking in your opening statement—and you have just answered Mr Rattenbury and Mrs Jones—about the potential damage to people's reputations. I also want to pick up on a point you made in your opening statement that public hearings could cause an issue, with the evidence collected tarnishing that. Is that something that you have some experience on or is that—

Ms Muscat: We do not have direct experience on that particular matter, but it is a concern for us. Branches of the CPSU obviously have members in ACLEI in state jurisdictions, and that is just something that has come through from our discussions with members elsewhere. It is about making sure that you do not set up a situation where it might impact on a case down the line.

Ms Knox: And make it difficult to prosecute.

Ms Muscat: Yes.

MS CODY: That was something New South Wales tended to raise a little with us.

MR STEEL: They used it in thinking about situations where someone might have been compelled to give an answer in a public hearing before an ICAC-like body and then basically self-incriminated themselves for a trial further down the track. Is that the sort of situation you are talking about?

Ms Muscat: That would definitely be a consideration, yes. Again, we can get you more detail on that, but that was something that was raised with us as a particular issue when we discussed it with our members in other areas. It is about ensuring that you do not impact on the ability to prosecute by having public hearings.

MR STEEL: But it might not be admissible when it goes to court. Is that the concern?

Ms Muscat: Yes.

MS LEE: It would be interesting to know that. We have also had evidence from the DPP and we raised that particular issue. That would be something that is very relevant to his office as well. He has said that circumstances that are outside ICAC situations arise in which those types of issues do come up as well. He said that the DPP obviously has experience in dealing with those situations. They have said that. But I just ask a supplementary question about the topic that we are on. You mentioned not wanting that public hearing because Canberra is pretty small. No-one wants their whole reputation sullied and all of that. You said we have got the referral process and then if it goes to the police and the DPP it will be in the public domain and all of that.

The situation is that obviously the threshold can be slightly different in that, where you have got the police coming into it, there is a very high level of criminal element. I suppose something that the committee has been talking about is that high-level, serious misconduct which does not necessarily cross the line into the criminal element. There may be some matters that do not get picked up by the DPP or the police, but if we have a situation where everything is private—going back to the chair's question—how do we instil public confidence that that serious but not necessarily criminal conduct has been effectively dealt with?

Ms Muscat: I think we would need to look at the model that you are considering in terms of the steps that you were talking about and whether we would be comfortable with that. From our perspective, though, for the most part we think those hearings should be private. We think it would be useful for us to come back to you with some examples of where we think it would be an extraordinary situation, where it could be a public hearing. I guess the other thing that would be useful from our perspective is to get a sense of what you would consider serious misconduct, because there are a number of varying views on that.

MRS JONES: And in a way, what we end up recommending to government and even what government instigates still would be very much affected by who the commissioner was—usually a former judicial officer is in charge—and what kinds of judgements they make, based on whatever legislation.

Ms Muscat: Yes.

MRS JONES: So we would not control everything from here either.

Ms Muscat: No, absolutely.

THE CHAIR: I am mindful of the time. We have some other questions coming through. I think you said, Mrs Jones, that you want a new line of questioning.

MRS JONES: Yes. My question is about whistleblower protections, which I imagine would be something that you would have a great interest in. I am not an expert on our current whistleblower protections, but I understand that there are some significant concerns that, in a small jurisdiction, people are already sometimes in a very difficult position. You said in your submission that you would work to consult with employees about the most effective integrity commission model. I do not know if you have had

any feedback yet, but is whistleblower protection something that you have an opinion on or suggestions of a model for? It is something that is certainly exercising us.

Ms Muscat: I do not think that we actually raised whistleblower protections in our submission. We can certainly put forward what we would consider to be best practice models for your consideration. I can come back to you on that. Yes, of course we would have a view on whistleblower protections. You are right: it is a small jurisdiction and we have to be careful that people do not feel nervous or uncomfortable about raising a particular matter.

MRS JONES: If they raise something and it ends up becoming controversial or they become known as the whistleblower at some point, say in a hearing process, what protections would you recommend to make it as strong as possible that that person not only has a right but also may actually be obliged or feel obliged to blow the whistle on something? How can we best set up legislation that protects them?

Ms Muscat: Can we come back to you on that?

MRS JONES: That would be fine.

MS CODY: Coming from a public service protection type background, as you have already mentioned, what are your views around the current misconduct processes in the ACT public sector? Federal, I know, is a different beast. I really want to know about the ACT.

Ms Muscat: Broadly, the misconduct processes that are incorporated into enterprise agreements are pretty good. They are strong; they are diligent. We think that they could probably be enhanced in some way, maybe not so much in the entitlement in the enterprise agreement but certainly in how it is applied across the service.

MRS JONES: Because it is different in different departments?

Ms Muscat: Yes, and there is inconsistency. My early view of the ACT government, shaped over the last eight months, is that there is a bit of an inconsistency in how these processes and procedures are applied across the service. Some directorates have really stringent policies and processes and give great guidance to HR managers; in other directorates it is a little bit loose. So I think it is a matter of maybe us sitting down with the employer and going through misconduct processes in the agreement but also working through a way that we can educate HR managers and educate staff as to what their rights and their obligations are and what HR should be doing, the role that they should play in misconduct processes, because from my perspective—

MRS JONES: Some work better than others?

Ms Muscat: Yes. It is really quite varied. That is something that I think you should be looking to consider in this process.

MS LEE: In your opening statement you mentioned that there should be a separation of assessments of investigations and the actual investigations themselves. Did I get that right?

Ms Muscat: Yes.

MS LEE: Can you expand on that? Are you saying that it should be a different body? What are you saying it should be?

Ms Muscat: From our perspective it is just about making sure that you have got a bit of separation of those two functions. That is important in terms of affording someone procedural fairness. Someone who makes the assessment and has that information would then refer it on for a second opinion, to make that determination, rather than the same person or the same body doing the same thing. It could well be that you have a function within an integrity commission where you have one group in that integrity commission making the assessments and referring them on, but you would not want the same people making the assessment and then making the determination on the particular—

MS LEE: So there would be Chinese walls and different teams in the structure?

Ms Muscat: Potentially, yes.

MR STEEL: You might have touched on this in relation to misconduct processes. You said the education function of a potential integrity body should play a prominent role, including training, research and risk reviews. But you have also commented on the ethics training that currently occurs in the ACT public service. How does that work at the moment?

Ms Muscat: It is really light on. I will be honest. I know there is some online training with modules that people get when they are employed in the ACT public service, but I think it is really important to remind people of what their obligations are. People forget. They have busy lives. And, again, there are discrepancies in how training is applied across the directorates. If you are looking at an integrity commission or a body that will be applicable to workers in the ACT public service, a core element of that has to be very structured education. There needs to be, from my perspective, something like CMTEDD oversight so that you do not just leave it to the directorates to do what they do; you have to be driving that centrally. That is really important so that you do not have areas where people just do not know that there has been a change and there are serious implications in terms of these changes.

MRS JONES: Would you suggest that there be, for example, codified modules or something that has to be delivered across the board?

Ms Muscat: Absolutely. Centrally driven—yes.

MRS JONES: Yes. With the way that adult education is now, you could pretty much give people a certificate for completing it or something like that.

MS LEE: The notion is that essentially you cannot hold people to a standard if they do not know what that standard is?

Ms Muscat: Correct—absolutely. When integrity measures were first introduced in

Border Protection, which at the time was Customs, and they set up the Australian Border Force, we had really significant and decent access to workers. We were actually in there, finding out what their views were and reporting those back to the employer. We were working through a model. We were educating our members. It was a really structured, consultative process that was not rushed. It gave our members confidence and it gave the employer confidence because they knew that from all angles we were feeding workers with information. I think that is really important.

MRS JONES: And getting new information back?

Ms Muscat: Yes. We were able to shape a lot of the policies that fell out of pulling the Border Force into the law enforcement integrity commission.

THE CHAIR: You spoke briefly about covering outsourced employees, and you even touched on this in your submission. I am interested to explore what you think the boundaries are: the reach of who should be covered by the scope of some sort of integrity commission.

Ms Muscat: I know that in other jurisdictions anybody who is hired through a labour hire organisation directly to whatever the jurisdiction is would be covered, for example. I think anyone that is involved in any sort of public interaction with the ACT government should be covered by these integrity measures, because it does not make sense to have one employee sitting in an organisation who is a full-time ACTPS employee being subject to integrity requirements, yet someone who works for a labour hire organisation, sitting in the next office, does not have the same—

MS CODY: Often doing the same work.

Ms Muscat: Yes.

THE CHAIR: So your idea is that, if someone comes into an agency, they would be covered. There has been some discussion of government-funded operations, because government contracts out a lot of services of course.

Ms Muscat: Sure. Can I get back to you on that one?

THE CHAIR: Yes, it is an open question and we would be interested in your view. Should government-funded NGOs conducting a range of work for government be part of the scope, or where government contracts out, say, the lawn-mowing service? We have a range of companies that work for government and provide lawn mowing and all sorts of other things. Lawn mowing is just an example. I am casting no aspersions on the lawn mowers, just to be clear. There is that range of scope of where government money goes and how far the reach of an integrity commission should go in that context. We would welcome your views on that.

Ms Muscat: That is a good question. We will come back to you.

MRS JONES: Some of the discussions have included the fact that, if integrity is an issue, it is easier to contract someone else to do the work, whereas with your full-time or office-based workforce you have got to work with that group always.

Ms Muscat: Yes.

MRS JONES: Your opinions on that would be really great.

Ms Muscat: We will come back to you on that one.

THE CHAIR: We have time for one or two quick questions.

MS CODY: Mine should be relatively quick.

MS LEE: Famous last words.

MS CODY: Yes, I know. You were talking about ACLEI and police integrity. One of the questions we have been asking and grappling with is whether ACT Policing should be included in whatever format or body we might end up with as an integrity commission.

Ms Muscat: You would probably need to speak to their union on that. Have the AFPA—

THE CHAIR: We have invited the AFPA to make a submission. We are waiting to see if they are going to make one.

Ms Muscat: My understanding is that they are subject to ACLEI requirements, so would there not then be crossover or—

MRS JONES: It depends, because that is a federal body and we are talking about ACT Policing here. The things we have discussed include the fact that just because there have not been a lot of stories breaking about corruption in the AFP does not mean it does not exist.

Ms Muscat: Sure.

MRS JONES: If there are bodies that are looking into that, that is great. But if there is not much being clarified, what is actually happening? Should our scope include that, just as a matter of course? In other jurisdictions it tends to.

MS CODY: Also it may not be widely known across the community that ACT Policing is actually subcontracted from AFP, so there is the perception of the community's views on this.

Ms Muscat: Absolutely. I do not have a view on that. Again, we can consider that and get back to you.

MS CODY: Thank you.

MR STEEL: Do you have a view about how ACLEI has actually functioned since it was established?

Ms Muscat: I know that there was a period when they were really stretched, from our perspective. From what we have heard, they do a really good job, but there was a time when the scope was broadened out to take into account a number of other agencies and they were feeling the pressure. They are a small organisation of, I think, about 45 staff.

Ms Knox: Yes, their submission said 47 was their ASL cap. Our members' stories are consistent with their submission. They are a very, very small agency and often have secondments from other agencies, depending on what they are working on. We do think that they do a good job under the circumstances. But part of the reason they do a good job is that they do have quite a limited scope to be able to consider. If this is going to be quite broad then definitely funding and providing it with adequate staff would be the go, to ensure that it is able to adequately take into consideration all of those things that it will investigate.

Ms Muscat: Otherwise you are undermining its capability, and you do not want that.

MR STEEL: You have not had any real issues with the processes that they have employed in investigating your members, or the legislative framework that they operate under?

Ms Muscat: We do not know, because a lot of it is covert. If there is integrity testing, we would not know. So I do not have an example. I do not know, sorry.

MR STEEL: That is all right.

MS LEE: My question might need to go on notice, because it is not a short one, but I think it will be helpful for the committee to know your views on this. One of your recommendations talks about not duplicating the existing integrity processes and making sure that the processes are enhanced, as opposed to having duplication across some of the other organisations. I would be interested to know where you see the line, because that is something else that the committee has been looking at—how you cross those lines, in terms of the Auditor-General and the Ombudsman.

Ms Muscat: We will probably need to take that one on notice.

MS LEE: Yes, I knew it would not be a quick one, but I thought it would be interesting to get your views on that.

Ms Knox: It probably relates to ACT Policing.

Ms Muscat: It is all-encompassing, yes.

MS LEE: That delineation of the different functions.

Ms Muscat: Yes.

THE CHAIR: We will wrap up your appearance there. Thank you for coming. There are a few issues on which you have undertaken to get back to us.

Ms Muscat: Yes.

THE CHAIR: Could you do that over the next few weeks?

Ms Muscat: Yes, sure.

THE CHAIR: We will provide you with a copy of the *Hansard* of this session as soon as it is available, which will also give you an opportunity to focus on the areas you would like to provide further comments on. We would welcome your further feedback on the issues that you have undertaken to offer further comments on. Thank you again for taking the time to appear today. We will now have a brief suspension of the hearing.

Short suspension.

HURLEY, MS RHYL

THE CHAIR: I welcome Ms Rhyl Hurley to the table, who has submitted to the inquiry as an individual. We thank you for making a submission and also for your time in coming along today to answer further questions. Have you seen the privilege card?

Ms Hurley: Yes.

THE CHAIR: Are you comfortable with the content and the implications of that?

Ms Hurley: Yes.

THE CHAIR: Would you like to make some opening remarks?

Ms Hurley: I will, yes. Thank you for the opportunity to speak with you today about my submission to this inquiry. In these opening remarks I want to do three things—to briefly go over my submission, comment on important points from other submissions and reinforce what I think should happen. I made my submission from the point of view of a new citizen of the ACT, having moved here nearly five years ago from Queensland, and having retired from a career, including in the public service, making and applying various parts of the integrity system there.

My submission questions the need for an integrity commission in the ACT. It asks what problems or issues need addressing. If an integrity commission is necessary, I propose that it identifies, investigates and deals with misconduct and corruption and that it has a preventive function as well. The staff should have appropriate knowledge, skills and capabilities to achieve these purposes and be answerable to three commissioners meeting monthly and reporting annually to an all-party parliamentary committee.

It should have wide powers over a wide jurisdiction of those receiving ACT government moneys, to investigate complaints of misconduct and corruption and to pursue publicly accountable outcomes. It should have education, prevention, discipline and advisory functions. While the judiciary and police should be outside the jurisdiction, as they are covered by other systems here, their roles and capabilities are essential to the work of the integrity commission. Because the ACT is a relatively small jurisdiction which already has an established integrity system, I am concerned about cost, duplication, lines of responsibility and meaningful results which meet public expectations and which give public explanations. Getting the relationships right is really crucial. There must be clear accountability to the parliament and to the people, including through an annual report with quantitative analysis of complaints, outcomes and actions.

I want to use a few of the many valuable points from other submissions to support my submission. A number of submissions suggest going back to first principles and the importance of refining the relationships among the current integrity regimes. The ACT has a lot of legislation, regulation, codes and other documents in this area. Penalties and remediation must be implemented in such a way as to be a true deterrent

and must thoroughly support staff who work hard to assure the community of best possible governance. A low threshold for investigations will assist public confidence. Regarding citizen involvement, one of the three commissioners could be a community representative and education strategies could inform the community.

The AFP should be co-opted for investigation but not be a part of the administrative structure. Post-investigation outcomes should include making disciplinary decisions and managing a remediation program. Criminal activity should be referred to a law enforcement agency and non-criminal misconduct addressed through a transparent process between the commission and the relevant agency or individual.

Independence and realistic funding levels must be assured. The relationship should be with parliament rather than with the government. An external reviewer such as the Supreme Court and perhaps an officers of parliament committee are worthwhile suggestions. In defining integrity, "integrity" means soundness of moral principle and character and the state of being whole, entire or undiminished. It has both individual personal application and a systems application. The ACT has a very detailed integrity system, including codes applying to individuals.

I recommend, first, an in-depth review of the current system, leading to rationalising functions and processes to improve the overall integrity of the system; second, to name the new agency an anti-corruption agency to focus on the anti-corruption function within the total integrity system, while giving it overarching powers and independence; and, third, there can be all the policies and legislation in the world to improve integrity, but if entities and people within them are not fully funded, skilled and provided with a clear mandate, it will not work. Commit to thorough implementation. Lastly, I am willing to assist the inquiry in furthering this admirable purpose. I am offering to be a constructive friend as you take this forward.

THE CHAIR: Thank you very much for that summary. I want to explore two of the threads of both your submission and your comments. You have said that it should have a remit to cover both misconduct and corruption. But separately you have made the point that we have some quite strong mechanisms already in the ACT. It would be fair to say that the committee is starting to see that perhaps that is where the gap is—that the current system is quite good at misconduct but corruption is perhaps the place where there is a bit of a gap. Do you want to elaborate on whether you agree with that analysis?

Ms Hurley: I do not know. You may have more information as to the success or otherwise of that. There are a couple of things about that. First of all, sometimes misconduct occurs and it is not fully remediated or dealt with at a level that might be, say, below criminal. I think that a lot of complaints can result in, as I said in the submission, a subprosecutorial outcome. If you have evidence that those matters are already dealt with then that is a case for a new commission to deal solely with more serious corruption.

If that is the way that it works out, what sometimes occurs is that if misconduct occurs, particularly in agencies, as far as I can see, sometimes it is not thoroughly dealt with or it is quite leniently dealt with. Sometimes there are some leftovers from that, where people feel that they want to go to a higher level to see if they can bring about some

justice from a situation that was not dealt with before. An independent commission can capture misconduct that has not been dealt with properly in agencies. That is my interest in and concern about that level of misconduct.

MRS JONES: One of the matters that you raised in which you have some experience or interest is the educative function.

Ms Hurley: Yes.

MRS JONES: I have raised, from the beginning of this process, that if there are going to be high expectations of people or if we are going to be clarifying our expectations through this process with government employees, politicians or their staff, we should have some sort of training on the standard. Do you have any comments specifically about how that function could work and what types of things it should cover?

Ms Hurley: There are lots of possibilities. During one of the ministerial situations in Queensland there was ministerial officer concern about a whole lot of matters. I actually did the training for Peter Beattie that, for all the ministerial offices over about three years, related to their codes of conduct and particularly to things like gifts and hospitality. It was focused on what was arising at the time. It was not online; it was face to face.

MRS JONES: Putting more detail around what is in your code of conduct, that type of thing?

Ms Hurley: Yes.

MRS JONES: So that people can interpret it clearly?

Ms Hurley: Yes. It is talking about scenarios, applying that code and implementing that code. The previous people you heard from commented that there tends to be disparity in the interpretation of codes and how they are actually implemented.

MRS JONES: Some of our codes are quite new.

Ms Hurley: Yes. I noticed that your overall code does not talk about what happens with breaches; that is obviously in enterprise agreements and other documents. If something is overlooked, perhaps somebody who is aggrieved over a matter that was not taken up in a department takes that to an integrity commission, and that is where the misconduct function of the integrity commission can apply.

MRS JONES: Also potentially feed back into the educative function, to say—

Ms Hurley: Absolutely.

MRS JONES: "We've missed this with this cohort. Who else have we missed it with and what needs to be implemented?"

Ms Hurley: Yes.

MRS JONES: Do you think there is a capacity, perhaps, if the commission is small, for it to make educative recommendations for the departments themselves to implement?

Ms Hurley: Absolutely; totally. Working with the departments is a very good idea, but there has to be an overall commitment to that kind of implementation. With the educative documents in one of the submissions, from the Queensland CCC, I looked at those, as I used to write them. I thought they were effective to some degree. There is nothing like face-to-face training, though. I am an educator from way back. Although it is expensive in some ways, having face to face gets results.

MRS JONES: I think Defence does a lot of that—pulls people out of the workforce and gets them up to scratch on the latest—

Ms Hurley: Yes.

MS LEE: Ms Hurley, in your opening statement you said that the body should be able to identify, investigate and deal with corruption and serious misconduct. You have talked about the need for three commissioners, the penalties being a true deterrent and that it should be a low threshold for public confidence, and that the independence and funding models should rest with parliament, not government, to ensure that. It seems like a pretty robust body.

Ms Hurley: Yes.

MS LEE: What are some of the mechanisms you believe we need to include in this body to ensure that it is able to actually carry out all of the issues that I have just outlined?

Ms Hurley: One mechanism is suitably qualified people to deal with those particular aspects. For example, with your investigatory function, you might contract the AFP here to actually do that. At the other end, as I have also mentioned, you might refer anything that looks as though it is a criminal matter to the DPP, to take on the prosecution. Internally, you will have units to receive and assess complaints, to then refer on to investigation and then to look at outcomes and how those are acted on. Does that answer your question? Is that what you were getting at?

MS LEE: I was getting at this: for example, we have had lots of discussions about private versus public and some of the powers that the people who are in that organisation have.

Ms Hurley: I agree with public hearings. I think that public hearings are valuable from the point of view that, first of all, they give some rigour to the regime so that the public can see exactly what is happening; and there are always rules and caveats around public hearings that make them as protective as possible of people's reputations. If somebody is called to a public hearing, they are usually a person who is in the public eye, so they have a responsibility to the public to answer questions or to justify whatever they have been doing.

MS LEE: Thank you.

MR STEEL: I think most of what I was going to ask was covered, but I wanted to just touch on the idea of having three commissioners, which ICAC has recently adopted and which you have mentioned in your submission. Do you have a view about what might be appropriate for the size of our jurisdiction?

Ms Hurley: Yes. When I made the suggestion about the three commissioners, I was thinking of the model that we used to operate under in Queensland, in the Crime and Misconduct Commission. With those three commissioners, there was only one commissioner who was the CEO, who was also a Queen's Counsel. They have separated out those functions recently, but I do not think those three commissioners had as many distinctive decision-making powers as the new New South Wales ICAC three commissioners do, although they oversaw on a monthly basis what was going on in the Queensland situation.

MR STEEL: Do you think that having three provides better decision-making?

Ms Hurley: I think it is a bit restrictive. I saw that change as basically reducing the powers of ICAC. We have yet to see how that works out, but I do not think three commissioners should be in charge. I think one commissioner should be in charge and then meet with the others to sort out their monthly decisions.

MRS JONES: Like a built-in review mechanism for decisions that have been made?

Ms Hurley: Yes, a built-in reporting, justifying and reviewing mechanism. That is where one of those people could be, say, from the community, if you want to get community involvement in it.

THE CHAIR: Thank you. That is it. You have been very succinct for us. Thank you again for the submission and for appearing before the committee, and for your interest in the topic.

Ms Hurley: What will I hear next about this?

THE CHAIR: We will send you out *Hansard* in a few weeks, when it is completed, and you will have an opportunity to review that. If there is anything in there that you feel is an inaccurate reflection of what was said, you can correct that.

Ms Hurley: Right.

THE CHAIR: Formally, the committee will report by the end of October.

MRS JONES: To the parliament.

THE CHAIR: To the Assembly. And I think normally we send a note out to all the witnesses that that report has been tabled, so you can have a look at it.

MRS JONES: Then the government will respond.

THE CHAIR: Yes. Within three months, the government is required to respond,

although with Christmas it might be a bit longer. Then there will be legislation, and there is a whole political process from there.

MRS JONES: Yes.

THE CHAIR: That is the best short summary I can give of that.

Short adjournment.

ARCHER, MR KEN, President, ACT Bar Association
BEHRENS, DR JULIET, Member, ACT Bar Association

THE CHAIR: We will resume the hearing of the Assembly inquiry into an integrity commission for the ACT. I would like to welcome representatives of the ACT Bar Association, Ken Archer and Juliet Behrens. Thank you very much for both your submission and your attendance today. We appreciate the opportunity to explore the issue with you. You will have seen the privilege card, and I imagine you are both familiar with the content and the implications?

Mr Archer: Yes.

THE CHAIR: I know the committee is looking forward to asking you some questions, but would you like to make some opening remarks?

Mr Archer: Yes. Thank you for the opportunity. The bar filed a submission, and we stand by the submissions that were made. In general terms, the bar sees the establishment of an ICAC-type body as important in the preservation of the faith of the ACT citizenry in the parliamentary and democratic process. We note in our submissions, and I remind the committee today, that the LCA has pursued this issue at a federal level. Philosophically, we support the general approach made by the LCA in the submissions it has made in relation to a federal ICAC.

Our view is that the body that is established, if it is to be established, must be allowed to function robustly, without getting bogged down in a hierarchy of bodies who may act as gatekeepers before the ICAC's investigatory power is exercised or can be exercised. To that extent, the bar is not attracted to submissions that have been made that suggest that other bodies act as gatekeepers for investigations into potentially corrupt conduct. In our view, a scheme that operates differentially as between members of the Assembly and other public officials may cause a loss of faith in the ICAC model that is eventually adopted. A filtering process that has been suggested in other submissions, in our view, has the potential to undermine the process of investigation that may take place.

The body, if it is established, in our view must be funded in a way that gives it a degree of autonomy to pursue investigations in its own way. We see the person who fills the position of commissioner—and we favour a single commissioner rather than a collection of commissioners—being appropriately qualified, preferably with legal qualifications and preferably with a background in either criminal investigation or criminal adjudication. Consistent with what the bar has said about significant appointments in the criminal justice domain, be they judicial appointments or police appointments, ideally that person would come from the Canberra community.

The powers of the body must be clearly defined. We would urge upon those who eventually sit down to nut out the model that they use the New South Wales legislation as a starting point. It has been in existence for a long time, and there is an established body of jurisprudence in relation to the operation of that act. Because anybody who is brought to the courts or before the ICAC body is going to be resourced—often they are resourced—the legal challenges that are likely to be made

against actions that are brought by the ICAC are more likely to be forthcoming than they are in a conventional criminal investigation or prosecution. Therefore, there is some advantage in relying upon the jurisprudence that has developed in relation to the New South Wales model.

That said, we operate in a society and a community that has a Human Rights Act, and we would urge considerations of the powers that are given to the ICAC body to be appropriately restrained, having regard to the principles of the Human Rights Act. Examples that the Bar Association would point to—and I know the Law Society did in their submission—would include that warrants should be granted by courts rather than just at the motion of the ICAC body itself. We favour a private hearing model, except when public interest considerations which are specifically defined suggest that the hearings should be in public.

We would also urge a model that closely aligns the ICAC investigation to the possibility of criminal offences and to the prosecution of criminal offences so that, whether it is a concept of corruption or corrupt behaviour similar to sections 7 and 9 of the New South Wales act, if that is to be the threshold and ultimately the basis of a finding of ICAC, the criminal code needs to be amended to ensure that the offences line up with the ultimate finding that ICAC can make, and, similarly, that the processes of ICAC make it possible, or more probable, that criminal prosecutions will take place. If there are to be compulsory powers made available to ICAC, we would favour a legislative model that directs the attention of ICAC to the desirability of its processes ensuring that if the finding is eventually to be of corrupt conduct, its processes will eventually allow a criminal prosecution to be brought. Otherwise, we rely on the submissions we have made.

THE CHAIR: Thank you for both that and the submission. I am interested, if you want to elaborate, on the issue of public versus private hearings. I could almost say it is fifty-fifty at this point; people have put countering views as to the merits of both. You have talked about a public interest test.

Mr Archer: Yes.

THE CHAIR: Are you able to elaborate on your sense of how that public interest test might play out?

MRS JONES: Or how it could be defined?

Mr Archer: Yes. I do not bring specific suggestions, but I am happy to comment in future. I think it is important that it goes beyond a statutory discretion that says simply that it is a choice between public interest versus a person's reputation. I think the model that is adopted should identify, beyond the generic, what the public interest is. It can be educative; it can be the interest that the public has in knowing where allegedly corrupt behaviour has arisen. But at the same time there might also be some consideration of whether or not, for example, the particulars of the behaviour that the person is about to be tested on have been disclosed to them before the hearing takes place; the degree to which preparation has been possible; and the likelihood of future court proceedings arising from the behaviour that is being examined.

It strikes me from a distance that the ICAC proceedings in New South Wales are good theatre, but if, given the body of material that ICAC, to the stage of examination, has gathered, it is likely that a criminal prosecution is going to arise, as with the Obeid matter, for example, I am not sure what the benefit to the public is in relation to the process of cross-examination that then happens in a public domain. If it is decided—if the commission has formed a view—that prosecution is likely, I am not sure what it does to the interests of justice, in particular, for that sort of theatre to happen before the person goes to the criminal court.

THE CHAIR: You are drawing a distinction between publicly interesting and the public interest.

Mr Archer: Yes; it is always interesting.

MRS JONES: Selling newspapers versus getting an outcome.

THE CHAIR: I also wanted to ask you this. In your submission, you talked about the AFP potentially being co-opted to undertake some investigative functions. Do you think there would be concerns about perceived conflict of interest and public confidence if this model were to be used, in the sense that one of the other issues we need to consider is whether the police would be covered by this organisation at all, as opposed to the current mechanism?

Mr Archer: I am not sure if a potential conflict arises other than in respect of matters that touch on the AFP. Having been a prosecutor for a long time, it strikes me that the AFP, for various reasons, has not been a completely convincing operator in this particular space, either locally or nationally. I do not want to speculate in public on why that might be so, but I am not sure if the public would perceive the AFP to be operating in clear space, as it were, in relation to the suggestion that they investigate potentially corrupt conduct of politicians. If the decision-making is taken away from them and they are exercising a co-opted role where discretion is vested in somebody else, I think the public might have a greater degree of confidence in the way that they might operate as an investigatory body.

THE CHAIR: One of the other options presented to us, mindful of this being a small jurisdiction, is that we co-opt investigative services from other jurisdictions.

Mr Archer: Yes.

MRS JONES: From their ICACs.

THE CHAIR: Whether it is their ICAC or something else—probably their ICAC. Something like the IBAC in Victoria, which has a much greater staff capacity than we will have, is one other option. Do you want to express a view on the suitability of that?

Mr Archer: Certainly there are some advantages. There is expertise there which will be missing in the early days of an ICAC here. I suppose expense is going to be another consideration. I do not know how the expense would pan out as between the AFP and public servants or people employed under ICAC-type acts, how that would

compare, but it must be a consideration, I suppose. It may not be the most important consideration, but it must be one of the considerations.

THE CHAIR: Thank you.

MRS JONES: In reference to that question, before I go on to mine, even the smallest of these bodies around Australia seems to have at least 12 to 15 employees.

Mr Archer: Yes.

MRS JONES: Obviously that includes at least one investigative team of forensic accountants—a forensic accountant, some administrative support, someone with a policing and investigative background and a lawyer: a set of people to look at one particular scenario that might involve corruption or maladministration. In relation to that set of people, we have thought about whether that could come from interstate, especially if there was a scale-up at some point and it needed to do a lot of investigations all at once or something like that.

Mr Archer: I do not see that there is a problem with that. It sounds like a good idea.

MRS JONES: My actual question was around this: you have alluded to matters which could, at least potentially, involve a criminal threshold. One of the matters that we have had some discussions on ourselves is whether our problems in the ACT, perceived or real, could be matters that are slightly below that threshold—maladministration or administration where the public has a different expectation from what is actually occurring, that sort of thing. Is there any reason you can see why that should not be covered by such a body? That is one of the things that we are considering at the moment.

Mr Archer: No. I think the terms of reference of the committee contributed attention to the educative aspect of this and the role it was going to play in the improvement of the standard of public administration. I note that if it is established there will be a number of bodies that have that task. I think it is important to establish an appropriate hierarchy at the threshold level as between those bodies. A matter may be raised; if it comes directly to a number of bodies and a reference is made, a decision has to be made as to who is going to take it over.

MRS JONES: Yes.

Mr Archer: The bar does not favour the hierarchy that has ICAC dealing with the leftovers. The investigation of the thing at the threshold level is likely to be all about defining how serious it is.

MRS JONES: Our current integrity framework involves a level of cooperation between the current bodies about who is taking on which matter. They obviously have to be very careful about personal particulars and not share that sort of information, but in the abstract they try to make sure that they are not both or all working on the same thing.

Mr Archer: Yes.

MRS JONES: To my mind, based on the frameworks under which they have been asked to operate, they see a fair bit of clarity about what is theirs and what is not theirs, each of them. Could you see it as more of a level playing field than a hierarchy where there are very defined roles?

Mr Archer: It can be. I am just thinking of forensic significance in relation to how the initial complaint is dealt with.

MRS JONES: Yes.

Mr Archer: If there is a matter that is potentially serious which goes, by necessity—by legislative arrangement or understanding—to everybody, the capacity for an investigation to be contaminated is reasonably high.

MRS JONES: Would it perhaps be better to have this body as the clearing house?

Mr Archer: I would have thought the ICAC would be the clearing house; then others can pursue that.

MRS JONES: Their own areas.

Mr Archer: Our general view is that if there is to be a hierarchy—and there probably should be—ICAC should be on the top of it.

THE CHAIR: I believe that is how they do it in Victoria under IBAC.

MS CODY: I think I heard correctly in your opening statement that you think that the role should be filled by someone within the Canberra community. Was that right?

Mr Archer: Yes.

MS CODY: Can you expand on that for me a little, please?

MRS JONES: Because we have had some divergent views on that.

Mr Archer: Philosophically—and I suppose it goes to appointments generally—the person who fills that role is standing in judgement in relation to members of the Canberra community. Also there is an issue about the knowledge that goes with involvement in a community as well. I hear what—

MRS JONES: The baggage that each person has?

Mr Archer: Yes. There is an issue of baggage, but ultimately you are making adverse findings in relation to somebody from your community. It is not a personal thing; it is a philosophical thing. If we are an independent polity, we need to govern ourselves. That is my general view. You are the representation of that philosophy and I just see that, if you do not follow that through in a fairly logical and cohesive way, you undermine the cohesion of the polity. We would become a subset of New South Wales or Victoria.

MS CODY: You also mentioned that the New South Wales legislation was a good piece of legislation. Why that particular piece of legislation as opposed to others or was it just an example and there are other legislative—

Mr Archer: As an example, yes. You could go to the Victorian model. I think philosophically you are going to arrive at a position and you will see the other state or jurisdiction that is closest to your philosophical position. It bedevils the courts in the ACT where you clean-sheet a process of legislation and you are going to get cashed-up people going before the courts challenging it. So it just does not make a lot of sense, in my view, to not use the jurisprudence and legislative models from the jurisdiction that you favour—

MRS JONES: At least to get it started.

Mr Archer: To get it started and make derogations from that as you see fit, as the Assembly sees fit.

MS CODY: I just was not sure whether you were being specific or just using it as an example. Thank you for expanding on that.

THE CHAIR: I come back to Ms Cody's first question on your view that it should come from the ACT. The contra view that has been put to us is that it is a small town and a lot of people who have these sorts of qualifications know the other sorts of people that would be called before such an inquiry, and the strength of bringing in somebody from outside is that they do not have that familiarity that might compromise this kind of a role.

Mr Archer: Yes. That is the contrary view. I respect that contrary view. And if you look at the Tasmanian experience, it just strikes me that what they have done in recent times is unfortunate in a way, in relation to the type of person they have appointed, rather than a person coming from the community. I think that person's background is Tasmanian, but I think the distinction that has to be made is about the public service nature of the person that is appointed. If they have recently been a senior bureaucrat in the ACT, I do not think the community is going to look at that person and think they are going to be of independent mind. And perhaps that is an argument against appointing locally. I do not know.

MS LEE: We were talking about this kind of body being robust, and one of the factors that you talked about was obviously making sure that the funding model allows independence, to ensure that that body is able to do what it is charged to do. Are there any other powers that you see that the body must have to ensure the robustness of it?

Mr Archer: The model would inevitably involve a concept of statutory independence. The financial aspect is important. The degree of oversight is an important thing as well in relation to that. There needs to be a capacity to act rather than just to justify actions taken. What has happened in New South Wales in the appointment of further commissioners, in my view, looks from the outside to be politically inspired and an attempt to provide an internal brake on the way that the ICAC operates. That may or

may not be appropriate. But if it just gets bogged down then that would be unfortunate. It needs to be well resourced and given clear powers to do its job.

MR STEEL: In your submission you raised things around the evidence-gathering process that a commission might employ, and particularly using its powers, like the power to compel witnesses to answer questions and the later effect of that in terms of admissibility of evidence. Can you elaborate on that further?

Mr Archer: By perhaps legislative direction, the bar would favour a model that requires the commission or the ICAC body to have regard to any future criminal prosecution that is going to possibly arise. And if it contemplates that a prosecution may arise from its investigation, that should inform, to the level that is appropriate, the methodology that it adopts. If there is a choice between a cautioned interview and a compelled statement, you would go down a cautioned interview path because that would be admissible at trial. And it would not be binding but it would seem to be good policy to have the ICAC body compelled to consider the downstream consequences of the methodology that it adopts, in light of the possibility of criminal conduct. Then judgements could be made. And if it is going to be compelled statements then it is going to be compelled statements, but that will inevitably derogate from the possibility of a successful criminal prosecution.

MR STEEL: What about evidence provided in a public hearing and the effect that that might have on a later trial or proceeding in court?

Mr Archer: Again, that could be on two levels. One is the capacity of the witness to be compelled to give the answer, and the other is the private versus public decision-making that the ICAC would have to make. The publicity associated with a hearing would, at the very least, slow down the process of criminal trial because the courts would be anxious for the dust to have settled at some level before a criminal trial is brought on.

MRS JONES: Is it reasonable to have perhaps a couple of tracks that a commissioner could decide to go down? One is to prepare more, if it looks fairly clear that there will be something criminal into the future, so that at least a system can be adopted for collating the evidence—one lot that might go off to the DPP and another lot that is not admissible—and to at least have that organisation as part of your system, even if your actual hearings are not quite done in the way that would perhaps be ideal for the criminal element. The body will also have to consider public interest and matters that fall short, and trying to get public confidence back after something has happened that the public wants an answer on. Perhaps at least the legislation or the regulations give some form of suggested mode so that from the beginning there is an awareness of those issues, even if it is not the overriding decision-making paradigm, if you know what I mean?

Mr Archer: Yes. And I do not want to suggest by what I am saying that one is to the absolute exclusion of the other. But if the model perceives accountability to be established by criminal prosecution, you would want to make sure that the ICAC was directed to make sure that that is given some priority in the way it goes about its business. It might gather inadmissible material, but that inadmissible material might be very useful in another context. But if the choice is between a prosecution and

gathering what is useful and important in another context—it depends on the model that the Assembly ultimately adopts—if you want to give priority to criminal court outcomes then you have got to direct the investigators to make sure that they are giving that priority in the way they gather their evidence.

MRS JONES: And do you think that typically the type of former judicial officer who ends up in these roles, running bodies like this, might already have a bit of an eye to that kind of thing, based on their own previous professional experience? We are not picking people who have run non-judicial courts in the past, if I am using the right terminology.

Mr Archer: Generally we would suggest that the person comes from a particular type of background: I suppose a former judicial officer; I suppose a police officer with a legal qualification. I do not know.

MRS JONES: What I am saying is: I assume from where I am sitting now that whoever is appointed to run this body—assuming that it gets up—would have a fair understanding of the difference between material that is criminally admissible and not and a sensitivity to that.

Mr Archer: Absolutely. But the question, I suppose, for you is: do you want to direct that person to maximise the potential for criminal court or criminal outcomes? That is a philosophical question that you have to decide.

THE CHAIR: Can I explore with you for a moment issues of oversight? Again, it is a feature that has come up several times. You have talked today about a preference for a single commissioner. In some other jurisdictions they are using multiple commissioners as a model of internal oversight because of that requirement for some internal agreement before matters are launched. I did note your comments on New South Wales and the way you have seen the appointment of multiple commissioners there as being an impediment. I guess the question is: how do we watch the watchers or police the police?

MRS JONES: Or a superintendent-type function?

Mr Archer: It is contemplated that there is a parliamentary committee in relation to it.

MRS JONES: But they would not see the details of what is being investigated.

Mr Archer: There would be a much more general sort of oversight. The previous witness talked about a community member as an internal appointee and a number of commissioners. I just wonder, in a smaller jurisdiction, whether the number of matters going across the desk is likely to be—you would hope—reasonably limited. Hopefully there are some there. There is a halo effect happening here. Clearly there will not be.

THE CHAIR: We will not know until we ask; that seems to be the theory.

Mr Archer: That is right. You will not know until you ask. It is going to cost some money too, I would have thought.

MRS JONES: Some jurisdictions have a superintendent who reviews a percentage of the decisions that are made, and that is perhaps one person and an administrative officer.

Mr Archer: Perhaps.

MS LEE: Earlier, Mr Archer, you were talking about there being no value in the public nature; the example you gave was of what happened with Eddie Obeid. Given that there was already a finding, in a sense, that it would go to the criminal jurisdiction, what was the point? You said, "I don't know what good would come out of that." The contrary argument, I suppose, that we have had put to us, is about things like public confidence: for the public to realise, know and get the satisfaction that something has been done in relation to conduct that may not necessarily be criminal but is quite serious in nature. The other argument is that it can act as a deterrent—that the possibility of a public hearing will deter bad behaviour, if you like. Do you have any thoughts on that?

Mr Archer: It is a balancing exercise. It strikes me, though, that if there is, in the view of the commissioner, a prima facie case in relation to criminal conduct, the public interest in relation to the public agitation of that issue can be as equally addressed in a criminal trial as it is in an ICAC hearing. Eddie Obeid stood his trial and that was a matter of public record.

MS LEE: I am talking about the stuff that does not necessarily go to a criminal trial.

Mr Archer: It is a balancing act. It goes also to the issue about the particularisation of what the witness is going to be facing before they come to the hearing. As a cross-examiner, it is great sport to show them a document that they have not seen, but that is done in the context of a court of law where I am under restraint, ethical and legal—

MS LEE: Of course, your duty and all of that.

Mr Archer: I just wonder what it actually achieves sometimes. But it is a balancing act. I am not saying that that should not occur; I am just saying that it is a balancing act.

MS LEE: The previous witness talked about some situations where, for example, if the matter gets referred back to the agency but the matter has not been dealt with or has been dealt with leniently, it leaves that sort of dissatisfaction in public. So I was curious about that.

Mr Archer: To give you an analogy, the AFP deals with its complaints through the ACLEI process which, to my mind, lacks a bit of transparency, particularly decisions as to why particular individuals are dealt with administratively and disciplinarily rather than criminally.

MRS JONES: And we will never know.

Mr Archer: The whole purpose of this system is to elevate transparency.

MS LEE: Yes.

Mr Archer: If that is not happening, it does not achieve much.

MR STEEL: I have a question about the suggestion that we should be making an amendment to the Criminal Code around matters of misconduct or corrupt conduct. Are you referring to a similar amendment that was made in Victoria where the common law definition of "misconduct in public office" was enumerated in legislation?

Mr Archer: Ultimately, with the threshold issue as to what ICAC is going to be concerned to investigate, whether it is called "corrupt conduct" or "misconduct in public office", whatever it is going to be, it is important that the criminal law reflect that as an offence. Whatever you hit upon as the threshold test, it needs to be reflected in the criminal law, so that you do not get—

MR STEEL: You do not think it is adequately reflected in our current ACT legislation?

Mr Archer: It depends on what you come up with as your test. It may be; it may not be. It depends on what your threshold test is.

MRS JONES: We will have to get advice on that. On that matter, it probably would be very difficult to cover maladministration in a definition like that or in a change to the Criminal Code because that matter is more difficult to define.

Mr Archer: Yes, and it is also a question of—

MRS JONES: Whose version of administration.

Mr Archer: I forget her first name, but Ms Shinawatra, who has just jumped the jurisdiction in Thailand, was prosecuted for negligent administration. There is always an issue about the extent to which you make the criminal law a test of—

MRS JONES: You are talking more about individuals who have a finding of corruption against them; you want to have a capacity to go down the criminal route with those people—

Mr Archer: Yes.

MRS JONES: rather than systems or heads of systems that could be run better?

Mr Archer: Yes. If there is going to be a referral at the end of it to the DPP, you do not want the investigation to have been conducted on a different basis to that which they can prosecute.

MRS JONES: Do you know if that has happened in other jurisdictions in particular?

Mr Archer: I have not followed it through finely but I assume there has been an attempt to marry up the two.

MRS JONES: That would be worth us finding out.

THE CHAIR: There being no further questions, thank you very much for both your submission and appearing this afternoon. We welcome the input from the ACT Bar Association. We will now briefly suspend the hearing.

Short suspension.

DEMPSTER, MR QUENTIN EARL

THE CHAIR: We will now resume this afternoon's hearing of the Select Committee on an Independent Integrity Commission for the ACT. I would like to welcome Mr Quentin Dempster as our next witness. We would like to thank you for bringing your well-known expertise on these matters to our inquiry process. We very much appreciate your taking the time to come and join us this afternoon. I imagine you are aware of the privilege card, and the implications and content of that?

Mr Dempster: I am.

THE CHAIR: Thank you. Of course, you would be aware that we are recording the proceedings for Hansard this afternoon, and they are also being broadcast.

Mr Dempster: Sure.

THE CHAIR: Thank you again for taking the time to appear. Would you like to make some opening remarks before we go to questions?

Mr Dempster: Yes, just to clear my mind, I suppose, in addressing this select committee. The Australian Capital Territory has a population currently of 406,000, and growing rapidly. I see you have another seat in the federal parliament coming with the redistribution. The ACT budget is around $4.5 billion. To help me put this into perspective, it is no comparison, I know, with the around $70 billion annual budget of the New South Wales government, or approaching $500 billion of the commonwealth. I realise it must be agonising for the territory parliament to consider that precious taxpayer funds, given your deficit, should have to be diverted to any anti-corruption bureaucracy, particularly one involving high-priced lawyers. They are all God's children and they do a good job, but it is very expensive.

A body with coercive powers beyond those currently available to your territory's Australian Federal Police force should not be necessary if everyone—public and private sector—conducts business, administration and policy development honourably and ethically. The risk from internal cultures which can become conducive to corruption is greater where decision-makers procure products, services or material, act as the consent authority for property development which can enrich proponents, and administer and award small, medium and large contracts. That is where the risk is.

In politics, the risk of compromise of integrity comes from political donations with unseen strings attached. I refer to slush funding by vested interests—industry or individuals—to, in effect, buy policy concessions—liquor, gaming, poker machine policy, for example—and the vested interest influence peddling which can come with that. That can even be applied through vested interest influence peddling down to political party preselection, branch stacking; all the games that adversarial political parties play.

Our Westminster-style parliaments sometimes redeem themselves, as far as public interest exposure of questionable conduct is concerned, through questions on notice. Under parliamentary privilege, members, through their informants and constituents, can raise things. Committees can look at problems, call witnesses and gather evidence.

That does redeem the Westminster parliamentary system, I am happy to acknowledge, and it can raise issues about breaches of public service and ministerial codes of conduct, and MPs' entitlements and codes of conduct.

Parliamentary committees using privilege can also look at systemic problems by, again, calling witnesses under privilege, and they certainly have that power with executive government. They have an overriding power over executive government. But the trouble with corruption is that it is conducted in secret with sometimes sophisticated countermeasures to avoid detection deployed by the corrupt. At a recent one-day forum on the need for a federal independent commission against corruption, there was an assertion made that any investigative body set up with coercive powers—frightening coercive powers—should only be engaged in the pursuit of systemic corruption.

I note that Mr David Ipp QC, the former New South Wales ICAC commissioner, commented pointedly that this was an absurd suggestion. "Every evidentiary thread had to be pulled," he said. Operation Jasper, the ICAC's biggest investigation into ministerial misconduct, started with an anonymous phone call. "You should look at corruption in coal licences in the Bylong Valley," the anonymous caller said. "A cabinet minister is involved." Investigators discovered a secret deal in which an exploration licence had been created by ministerial direction, not by the department's mining specialists, with beneficiaries to gain a windfall potentially of $600 million. So you do not know where the evidence will lead, if you have substantive evidence coming from an informant.

As far as the ACT is concerned, you could quickly establish—and I am sure this committee is—where corruption risk is the greatest, when you put all of your concerns into perspective here, to discover where the greatest corruption risk is. Your Audit Office could help in that analysis. I know you want to talk about public hearings, coercive powers, reputational damage and the role of the media. My submission covers the role and limitations of journalists, a problem now even greater through the digital disruption of digital media. As politicians and members of parliament, you interact with the media; you know its strengths and you certainly know its weaknesses.

One point I do want to highlight through any anti-corruption body's obligation is this obligation: to protect its informants, those courageous people who can put their lives, livelihoods and future employability on the line to help all of us expose corruption. Witness protection is problematic. There are protocols for witness protection, but you do not want informants to have to live their lives under witness protection, I can tell you. It is appalling.

I wanted to raise a few of those headline issues, and I am happy to take your questions.

THE CHAIR: Thank you; that is a great start for us. I am interested in the last point you touched on, about the need for witness protection mechanisms. We have a public interest disclosure act in the ACT. They are reasonably common. Is it your view that those mechanisms are strong enough or do you think we need further mechanisms on top of that?

Mr Dempster: Again it becomes an operational and tactical question with the competence of the people handling the witness. The only anecdotal thing I wanted to share was that in the Wollongong *Dirty, Sexy Money* ICAC investigation, the informant was fully protected, I understand. We journalists do not know. The secrecy of the operation was quite clearly established. But somebody inside that council made quite good observations about what was really going on, informed the ICAC and said, "You should look here." They started an operation, got a reference and, after they saw that the evidence was substantive, they went to do a raid and used their coercive powers appropriately. But no-one ever knew who the informant was. I thought that was a very good outcome because that person could get on with their lives.

As a journalist, I have dealt with whistleblowers and informants, and sometimes they are full of anger, resentment and bitterness and want to get the publicity. You have to sit them down and say, "Let's risk manage this, though. Do you really want to expose yourself in this way and really impact on your family and your future employability? You can get some sense of vindication out of this and make them think seriously."

Police work is very difficult. The police are assisted by the public, sometimes through anonymous information. What I am trying to drive at is that it is the information we want. Hopefully, people who are courageous enough to come forward are not mangled out of the process of helping us to expose corruption. I know a lot of journalists do that.

I am on the Walkley Foundation and we deal with investigative journalists. I put this to you: do you remember the Panama papers?

THE CHAIR: Yes.

Mr Dempster: Gerard Ryle, with the International Consortium of Investigative Journalists, was asked, "Who gave you that?" They got the whole of the download from Mossack Fonseca and said, "We went to extraordinary lengths to ensure that the anonymity of our informant was maintained." That was very important, particularly when people's lives and livelihoods are at stake.

THE CHAIR: I think you have answered my question, to an extent. You have seen we are having a considerable think about public hearings versus private hearings, and how one protects an informant in the context of public hearings. Your observation is that they should never be seen in a public hearing; they should provide the initial information and then it is for the police and the investigators to, in fact—

Mr Dempster: It becomes an operational consideration. In breaking the viciousness of police corruption and the code of silence in Queensland and New South Wales, when they wired undercover police officers who had rolled over—that concept of rolling over—they made the rollovers earn their indemnity. They had to go in and give evidence. But that is problematic for those individuals, even though they have redeemed themselves, as it were. So it is an operational question and it is a risk management question for the individual informant. But the accuracy of the information is the most important thing. There are other ways to get information, particularly if you have, heaven forbid, metadata, surveillance and all the other tricks that a good investigation can deploy.

MRS JONES: Mr Dempster, in your work in perhaps showing up matters of this nature in the past, have you experienced systems like Queensland or New South Wales where the processes of a body like we are looking at have satisfied people? For example, in the ACT at the moment some of us are considering matters which, in the last term of government, were probably exposed partly by political work and partly by journalists doing hard work. The problem we see at the moment is the non-resolution of those trains of thought about what might or might not be wrong in the ACT.

Mr Dempster: Are you struggling with unethical conduct, misconduct or criminality?

MRS JONES: Lower levels than criminality.

Mr Dempster: So unethical?

MRS JONES: Essentially, yes. Well away from the public's—

Mr Dempster: The compromise of integrity?

MRS JONES: Yes, and the public's expectations certainly not being met, at least in the way it has been presented back to them. So there has not been a resolution of a whole bunch of things. This body is then intended to resolve those matters, from my perspective, and I wondered whether you had any thoughts or advice on whether that has actually been the outcome.

Mr Dempster: I do not know the cases you are referring to, but many members of parliament in New South Wales, Queensland and other jurisdictions say, "I'm concerned about this and I'll write to the Independent Commission Against Corruption." They will apply their legislation. They will have a reference. They will have a discussion like this around a table and say, "We've got this. Is there anything in this?" They will bring their discretion to bear and they will have to write back to you to say—

MRS JONES: A bit like the Auditor-General. It will or will not be investigated further, that type of thing?

Mr Dempster: Yes. You will still get that with a standing anti-corruption body. But they will have to apply. So your real chance here is with the way you write the legislation, on this question of a high level of criminality as opposed to misconduct, compromise of integrity or unethical behaviour.

MRS JONES: What has become apparent is that, certainly across departments and our parliament, there are standards of expected behaviour, but then we have had matters which probably do not quite fit the wording of those things, are not quite criminal in nature and are in that band where light has been shed but there is not a resolution. Of course, if there is serious corruption—

Mr Dempster: No disciplinary action required? Are you talking about public officials or politicians?

MRS JONES: Mostly, we are talking about public officials.

Mr Dempster: In which case that is a matter for the public service, on the basis of disciplinary action—

MRS JONES: But it has not occurred, and that is the problem.

Mr Dempster: That is a matter for the cabinet, then, isn't it?

MRS JONES: If they have an interest.

MS LEE: I was going to ask the same thing.

Mr Dempster: If you have not got the numbers, you have not got the numbers.

MRS JONES: I do not have the numbers, that is for sure.

MS LEE: Can I ask a supplementary to that? In the ACT prior to the election, all three parties said, "We are committed to investigating this." That has to have come from somewhere; it does not just come out of thin air. Do you have any views in relation to how broad the body's powers should be in looking at the matters that are still to be resolved, as Mrs Jones was talking about, balancing that up against natural justice? Given the fact that we have the Human Rights Act here and all that stuff about making sure that we have integrity of evidence if the time goes too long and all those issues, do you have any views about how we weigh that up?

Mr Dempster: That is a matter for the competence and the sensibility of the people the executive government appoints to the positions in such a standing body.

MS LEE: We have had some feedback from other witnesses to say that the commissioner should probably be appointed by parliament as opposed to the executive government.

Mr Dempster: By all means.

MS LEE: But that is another issue.

Mr Dempster: By all means. If you all own it, it is better. If we are talking about trust in government—

MS LEE: Of course.

Mr Dempster: That is why I am here. The public does not trust government. It is awful. We have a First World economy. I am sure they trust the ACT parliament, but we have a First World economy and a robust democracy which has lasted for a very long time now. We just want to keep improving it. If we can get one step ahead of cultures inside us that are conducive to corruption, we will be doing a lot of good. If the parliament made the appointments in a select committee type sense—

MRS JONES: Or a two-thirds majority or something?

Mr Dempster: Whatever you wanted to do, so that all of you own it and, therefore, you all have a stake in it.

MS LEE: You just have to trust in that person—

Mr Dempster: You also have a stake in its procedures.

MS LEE: Yes.

MS CODY: I have a supplementary. In answer to one of the questions Mrs Jones asked you, you spoke about public servants being investigated by the public sector commissioner type body.

Mr Dempster: On disciplinary matters.

MS CODY: Yes.

Mr Dempster: That should be their leadership, shouldn't it?

MS CODY: Yes.

MS LEE: It should be, yes.

MS CODY: I am sure we all have a view on that. However, I wanted to ask this. We currently have an Ombudsman, a Human Rights Commissioner, an Auditor-General and a Public Sector Standards Commissioner. We have a lot of current bodies in the ACT. How do you think an integrity commissioner would fit into that structure?

Mr Dempster: The Australia Institute made a comparison of all those things, looking at the federal ICAC. As you do, it has a whole raft of people, including the Australian Federal Police, as you do; the Public Service Commission; and various other bodies. But David Ipp QC, Geoffrey Watson QC, Nicholas Cowdery QC and Tony Fitzgerald QC, all advocates for standing commissions, say that these bodies do not have the investigative coercive powers operationally, including the AFP. I am reading here from the discussion paper put out at the recent law and accountability conference; I am sure Andrea has got these. The paper says:

> Although the AFP has strong investigative powers it can only use them to investigate corruption when it is a Commonwealth crime. This means that many forms of misconduct covered by state based anti-corruption commissions are not investigated by the AFP as they are not crimes.

Again, a body with coercive powers could uncover criminality if you pull that evidentiary thread based on the information that has come in. It also says:

> This means that it cannot investigate any behaviour that affects the impartial and honest conduct of public office, which the state anti-corruption commissions define as corrupt conduct …

Does that answer it?

MS CODY: Yes. It was more—

Mr Dempster: It is a gap. There is a gap in your powers to uncover what happens in secret.

MS CODY: Yes. I was just after your views on that particular subject. We have had it raised by other witnesses, and it is just interesting to hear other people's opinions.

THE CHAIR: Your key observation is about the top end of coercive powers being where the gap is?

Mr Dempster: Yes. That is why, in my submission—report corruption here. The other thing is that somebody wanted to ask me about public hearings. It is not just we vile media people wanting to get sensation and boost our circulation and clicks—

MRS JONES: They were not our words.

MS LEE: Hansard had better get that right.

Mr Dempster: I will cut to the chase. It is the experience of all these investigators, from Fitzgerald through to the Wood royal commission, that the public hearing—when they determine operationally—sometimes you do not have to have one; you have enough admissible evidence to make findings already and the accountabilities will flow with that without you having to call in a lawyer or go through the process of a public hearing. But the advantage is in people coming out of the woodwork, the public coming out of the woodwork, when they can see that the anti-corruption body is fair dinkum about exposing it. The only thing I was impressed by was the statements by Geoffrey Watson, the counsel assisting the New South Wales Ipp ICAC.

> Just imagine for one moment that the work of the Royal Commission into Institutional Child Abuse had been conducted privately, not publicly: no-one would have trusted the processes, and the fine work done by that Royal Commission would have been lost to us—it would have been a pointless exercise. Worse—it would have perpetuated the secrecy which has surrounded those terrible activities.

If we have a negative perception about trust in government, this helps us to break that down so that no-one, in all our cynicism and scepticism about politicians and government, can say, "Oh, well, that's just a cover-up." It is fair dinkum. Wood, Ipp and others say that. This is David Ipp:

> Day after day, over a period of some three months, the media published reports that enthralled the public as the highly complex story unfolded.

This was Operation Jasper. He said:

> This had powerful effect on public attitudes, as well as potential witnesses. Witnesses unknown to ICAC came forward. Requests by politicians, government departments, local authorities and other agencies for educational classes on ethical behaviour flooded ICAC. The need to be careful and aware began to

> permeate the consciousness of public officials. Had the proceedings been held in secret, with no media reporting, the only means of knowledge the public would have had would have been the 172-page report issued by ICAC which, by necessity, contained only a summary of the evidence that had been led over many months.

And it has got washed away in the 24-hour news cycle. What I am trying to say is that this resonates and it has a great educative and sobering impact on public sector and private sector people—everybody wanting to interact where the risk really lies in corrupt cultures.

MRS JONES: Can I just clarify? It both encourages people to come forward with information because they constantly hear about a stream of information about what is going on, and also has the capacity to warn off people who might consider those types of behaviours?

Mr Dempster: Yes.

MR STEEL: You have previously written about some of the comments that Tony Fitzgerald QC has made about corrupt conduct findings and the difficulty of those. You have particularly mentioned the following quote, twice, in your submission:

> Such a declaration—

referring to a finding of corrupt conduct—

> which for investigative and prosecutorial purposes adds nothing, is likely to destroy the reputation of the person affected, even if that person is later not charged or is acquitted.

What is your view on the findings or the capacity of a commission to make findings of that nature?

Mr Dempster: The exposure of corruption and the educative benefit of it are more important. Andrea may have, from that information that I have been referring to, a graph that David Ipp put up of the efficacy of public hearings leading to prosecutions. If you really want prosecutions to be a benchmark, looking at Queensland, New South Wales and others, if you have not got that, I think you should have that, because if you have to make a decision on whether you recommend public hearings or not, that would be important as an attachment.

I was grappling with this view that came out of New South Wales from the most unpleasant Jasper and Spicer investigations, which went right into Macquarie Street, right up into the political parties, into the federal Liberal Party and the federal Labor Party. It was awfully embarrassing and everybody ducked for cover. There was this view that if you make people run a gauntlet of media cameras to go into the hearing room, that is reputational damage already. Some people were saying it was a show trial even though all the ICAC's procedural fairness was subject to judicial review in the Supreme Court and even up into the High Court, which is appropriate if you are worried about abuse of power.

In my interview questions of him, Fitzgerald was dealing with this point. In his inquiry into National Party corruption and police corruption in Queensland, he did not make any declarative findings that "Joe Bjelke-Petersen is corrupt. I find him to be corrupt under the terms and definitions of the act." They did find that he took bags of cash from developers and that the police commissioner took bags of cash from the bagman and various conduits. All that corruption was exposed. Then they went and appointed a special prosecutor, which went through the fair process of criminal proceedings some years after that.

Fitzgerald came to the view that you do not need to make declarative findings that "I find you to be not a credible witness," to make adverse remarks, or to say, "You are corrupt under the definition." That is because, even if no prosecution results from that or prosecutions do result and the person is acquitted, that person, with a Google-able world, now has to live with that finding for the rest of their life. He said that because it is the rule of law, and justice would indicate that that is a grave detriment to a person, why have it? I thought that made sense for all of the parliamentarians struggling with what was right about reputational risk as well as the need to expose corruption. Have I answered the question?

MR STEEL: You have.

Mr Dempster: You do not need to declare, but it is this question of disciplinary proceedings against unethical public servants and criminal proceedings, prosecutions with admissible evidence, where all the threads of evidence go up to criminality.

MR STEEL: Having heard the previous evidence given by the Bar Association, do you agree with the point they made that you would want to reflect the definition of corruption in some sort of offence under the Criminal Code, and misconduct as well, or do you think the existing laws, like for bribery, for example, in the case of getting cash in a bag, would be enough?

Mr Dempster: I noticed that the definition survived the ICAC inquiry set up by Mike Baird, with Gleeson, a former Chief Justice, and McClintock. They left the definitions as they stood, because you are looking at more than criminality. But it is a pretty good list. I think it has stood the test of time since 1988 and I think those definitions have been adopted by other jurisdictions.

MS CODY: In your opening statement I think it was, or in one of your answers to one of the questions—I have lost track there—you mentioned the AFP. I know that previous witnesses today have mentioned the AFP and some of their investigative responsibilities. One of the things that we have been asking a lot of questions about is how ACT Policing might fit into an ACT integrity commission-type setup, if that is what we go for, being that—

Mr Dempster: I am sorry for my ignorance, do you have a police minister?

MS CODY: Yes.

Mr Dempster: With no powers?

MRS JONES: We have an agreement with the AFP to provide—

Mr Dempster: Is it an MOU or a contract?

MRS JONES: It is a contract.

THE CHAIR: It is actually a contract.

Mr Dempster: Is it really?

MS CODY: It is a contract.

Mr Dempster: There you go. You have got—

THE CHAIR: But there are limits on the police minister's powers over the AFP.

Mr Dempster: Sorry, go on with your—

MS CODY: That is okay. It is very unique and, I guess, many members of the community probably would not understand the nuances of how we do contract our police force. It is an interesting scenario. I guess the question I am asking is about the Australian Federal Police integrity body that oversees them. Should ACT Policing come under the powers of our integrity body or should they remain under the powers of a federal—

Mr Dempster: Only you could assess that if you are deeply—

MS CODY: But what about your views on that? Ultimately it will be the government's decision.

Mr Dempster: You are talking about external oversight of the territory-assigned, ACT-assigned, AFP, are you?

MS CODY: Which are badged as ACT Policing as opposed to AFP.

Mr Dempster: I think you should have external oversight. We have learnt that. With external oversight, the more eyes you have, everybody watching, for all the right reasons, the better so that we do not have maligned cultures and abuse of power does not occur—anything that the parliament can do to have external oversight. We have learnt a hell of a lot about external oversight of police forces around the world since the police culture was so vicious in the 50s, 60s, 70s, 80s and started to be cleaned up in the 1990s. The police got on with the discharge of their honourable duties. I am sure there is still some police corruption and I am sure there is still some abuse of power. We all make misjudgements and what have you. But the accountability with external oversight would be a very wise thing.

MS LEE: I have got two clarifying questions, if you do not mind, Mr Dempster. You have raised quite a few very interesting issues and I am trying to put them together in my head. The first goes back to the issues that were raised by Mrs Jones and Ms Cody about that gap and the other bodies that we have that exist to look at things like

disciplinary action against public officials or politicians or whoever it might be, then the criminal element where we have got the police who have the powers to be able to take that through, and then the DPP that takes it through to the courts. Can I clarify: we are talking about that sort of gap, if you like. Is that right?

Mr Dempster: The crunch question is whether you devote the resources to establish an ACT integrity commission and work out the legislative underpinnings of that and the resources for it. And then if you resolve that question in your own mind, on the admissible evidence that it gathers and its passing on that admissible evidence to the prosecutor, it would have its own powers in that regard. Does that help?

MS LEE: Yes. Leaving that to one side, one of the things that you were talking about in terms of the Attorney-General, the Ombudsman, the public service commissioner and all of that was that they actually do not have coercive or investigative powers, and that is what is missing.

Mr Dempster: Yes, that is what is missing. The AFP has prosecution.

MS LEE: Sure, at a different level again, aren't they?

Mr Dempster: Yes. I do not know if you have got an Auditor-General.

MS LEE: Yes.

Mr Dempster: You have had evidence from them, from him?

MRS JONES: Her.

Mr Dempster: I am sorry to query you; I am sorry I have not caught up with the submissions; but did the Auditor-General say—

MRS JONES: She said there are things she cannot look into because of her remit.

MS LEE: It is not her job to specifically look for corruption.

Mr Dempster: But does she say that you need a—

MRS JONES: Yes.

Mr Dempster: What about the public service?

MS LEE: They have also done work within the framework of whatever we set up.

MRS JONES: They are less overt in their opinions on the matter.

THE CHAIR: They do not feel it is a matter of government policy.

MS LEE: Yes.

THE CHAIR: As the public service commissioner, they are in a difficult position.

Mr Dempster: It is a matter for you.

MRS JONES: Can I just clarify, then, that perhaps what can come out of that is that the range of matters that could be dealt with could be fairly broad but they are matters that might require that kind of investigation simply because other bodies do not have the capacity to look into certain matters?

Mr Dempster: Yes.

MS LEE: Going back to your first point about a lot of corruption taking place in secret and with sophisticated mechanisms and you need those powers.

Mr Dempster: I put that in my submission. I have a report corruption here button. We are in a digital world now. You press that button and then you have to back it up when you are passing on information. But anybody then would go through the definitions of "corrupt conduct" that are listed by the New South Wales ICAC and other anti-corruption commissions, and that would help them intellectually to focus on, "What am I dealing with here? What am I complaining about? What evidence do I have to alert the anti-corruption body?" And it is broad, it is necessarily broad, and people can come forward, including concerned public servants. I think in the New South Wales case the directors-general of departments have an obligation that if they have a reasonable suspicion about something, they just do not sit there; they have got to put their hand up and say, "What will I do about that?"

MS LEE: The second clarifying question is going back to the point that you made about the finding "he took bags of money", not the finding "he is corrupt". What I get from that is that there can be a finding of fact made by the commissioner.

Mr Dempster: Yes.

MS LEE: But a legal conclusion and what flows from that is actually up to the courts. Is that what you are saying?

Mr Dempster: You've got it. If you read some of the New South Wales ICAC reports, they say, "I find Mr Such and Such to be corrupt under the definitions of the act." That is a declarative finding, and it is certainly there in the act, but Fitzgerald is saying you do not need it. If you did have findings of fact and then we all learn, from the exposures of those facts, what systems and accountabilities should be called into place you could say, "We recommended, based on these facts, that this person be sent off to the Director of Public Prosecutions for consideration of charges under these Criminal Code offences."

MRS JONES: Or, indeed, back into their departments or parliaments to be dealt with?

Mr Dempster: Wherever you want to direct it. It could be that, under the disciplinary criteria that this public servant exposed, there is sufficient evidence to warrant their termination or some other disciplinary action if there are mitigating circumstances. That goes through procedurally fair consequences for that person. In the private sector,

for non-government officials, private sector officials, the findings of fact are still on the public record and what flows from that is public knowledge about those people.

MRS JONES: In a way it keeps it more nuanced than if you simply say, "Bad, bad, bad."

Mr Dempster: Yes, because in New South Wales there is an expectation, "This ICAC's no good." We can all shrug our shoulders and say, "It has found it." But they are so arrogant that they will never be prosecuted. They will never go to jail. The ICAC in New South Wales had to address that and they put on their website, "This is what our prosecution record is." And you can go through it and you will see—you can track them—"Still before the DPP," "Trial pending," or "Charges laid," or what have you. Or the DPP says, "No prospect of conviction. We're not proceeding."

MRS JONES: One of the other jurisdictions we spoke to can refer people back down the line. They can say, "You're not going on to criminal proceedings. You're being referred back to where you work," whether that is a parliament or a department or another body. And that ICAC-type body can require the group to whom they are giving instructions to come back to them and show that that process has been completed. That is a smart idea.

Mr Dempster: Yes, it could be a resolution to it—anybody tracking it down.

MRS JONES: So that then perhaps publicly, if it were a public matter, or at least for the reporting by the commission, it could ultimately say, "These matters have been resolved," and there is a reaction—

Mr Dempster: Yes, and how they were resolved.

MRS JONES: or, "Change within an organisation has been achieved and now we have evidence of that so that we can let them follow it through to the end"?

Mr Dempster: The public can follow it through. And I tell you what, every operator would follow it through as well. They would be very well aware of it. And if you are a public administrator, you would be very well aware of it.

THE CHAIR: Any other questions, colleagues? No. Thank you, that has been very enlightening. We appreciate the crispness of some of your points today. I think you have helped us nut through a few questions we were thinking about.

Mr Dempster: I am sorry if you have to spend some money on it. But it is the way the world is.

THE CHAIR: I think that is a sound observation. At this point we will suspend the hearing briefly while we prepare for the next witness. I forgot to say on the record, Mr Dempster, that we will send you a copy of *Hansard* when it is available and you are invited to review that and make any comments if you feel it is not an accurate reflection.

Short suspension.

HARRIS, MR TONY

THE CHAIR: Good afternoon and welcome back. We resume this afternoon's hearing of the Assembly select committee on the establishment of an integrity commission in the ACT. I welcome Mr Tony Harris, an individual submitter. Thank you for taking the time to come this afternoon and also for your submission to the process.

I will go through the formalities before we get underway. The privilege card is with you. I imagine you are familiar with both the content and the intent of that.

Mr Harris: Yes.

THE CHAIR: Thank you. We are recording these proceedings this afternoon for Hansard and they are also being broadcast.

Mr Harris: Thank you.

THE CHAIR: Thank you again for appearing. Would you like to make some opening remarks before the committee starts asking you some questions/

Mr Harris: If I may, yes.

THE CHAIR: Please do.

Mr Harris: The first thing I would like to talk about is the definition "corruption". In the ICAC report it runs for several pages. But it is not only illegality that is the subject of corrupt finding. For example, in the Metherell affair, the very first case heard by Commissioner Tenby against Mr Greiner, the then Premier, I have not been able to ascertain whether there was an illegality. It does look like there was an abuse of power by the Premier in order to enrich his political advantages but there was no subsequent criminality chased against him, and he was found, of course, not to be corrupt by the appeals court on a technicality, the technicality being that there was no code of conduct at the time against which he could be measured. So the presumption there from the appeals court is that there was not a crime; otherwise he would have been found to have been corrupt.

So corruption is not only an illegality. That might affect some of your thinking about prosecutorial processes afterwards. If it is not an illegality, there will be none. There will be no follow-up. You will end up with a finding with nothing hanging off it. Sometimes a finding of corruption is actually important to finalise the matter when there is no illegality.

You have got a code of conduct. The New South Wales parliament did not wish to be covered by the ICAC, so it took them several years to get a code of conduct which binds them in the terms already discussed.

The person to whom the act applies: the ICAC has public officers and others: non-public officers, elected public officers, appointed public officers and then the

public, if you like. We have to be careful about that, because we have seen in the case of Cunneen, who was a public officer, that she escaped because of the High Court saying, that Cunneen might—she never actually admitted it—have advised her son's girlfriend to feign heart problems but, had she done so, the High Court said, it did not affect the police officer. It affected the efficacy of the matter but not the probity of the matter. So the police officer was not corrupted by Ms Cunneen, had she done what is alleged, but the efficacy of the process was affected. Because the act relates to probity, not efficacy, there is no case for her to be considered by the ICAC. I thought that was a bit of a pity. You have a senior prosecutor using her legal powers to advise somebody to pervert the course of justice, perhaps. Now, she has not perverted the course of justice, apparently, because the police have taken no interest in the matter. And then we can work out why the police have taken no interest in the matter.

So persons to whom the act applies is an issue that you should be giving some consideration to, and whether efficacy is intended as well as probity.

The periods in which the act applies: we may have been having some corrupt activity now. You will establish a commission in the future. That corrupt act now might go for some years, and the commissioner should have the capacity to go back to the origin of it. Having some retrospective capacity is quite important, I think, for the commission. In New South Wales the ICAC never did go back, because they had more than enough work for the future.

MS LEE: We hope that is not the case here.

Mr Harris: Public hearings: this is an issue that has come up several times. Mr Dempster has spoken about it as well. I think it is terribly important to have public hearings to tell the public that this is a working mechanism and it is effective. If you do not have public hearings the kind of trust that you wish to elicit from the public in governmental processes will be missing, because they will just believe that everything is hidden is everything not done.

If you worry about the public hearing and reputational issues, then you should get rid of indictments and magistrates. That is a process where it is determined whether a person should go to the Supreme Court, and that is held in public. Sometimes they do not go to the Supreme Court. If you think there is reputational damage in front of an ICAC that does not proceed, then indeed there will be reputational damage for a person in front of a magistrate where that case does not proceed as well.

In any event, in both cases the ICAC does not—and Mr Dempster has already illustrated this—have public hearings out of the blue. They occur after a lot of work is done. They are not frivolous. They are too expensive to be frivolous.

Administrative arrangements: there was some discussion with Mr Dempster about who owns a future commission and who owns the commissioner. I suppose the best example is a parliamentary budget officer. I was the first in New South Wales. You are an officer of the parliament and your office is an office of the parliament. It is the same here in the commonwealth. The budget officer is not appointed by the Crown; it is appointed by the parliament. You would think that if it is important enough to have budgetary matters under the parliament, then certainly corruption matters under the

Assembly would be a very useful consideration.

The last thing is, as Mr Dempster noted, that directors-general have an obligation in New South Wales to advise the ICAC of any suspected corruption. Actually every public officer has that obligation. I would try to load that up to give some protection to public officers. Tony Lauer, when he was commissioner of police, once said to me, rather ironically, I thought, "Any policeman who sees corruption and does nothing about it is corrupt." I thought that was a very welcome admission. I think that we should say the same about public officers. If there is any corruption they see and do not report, they are corrupt.

Why did all this material about Obeid and coal mines occur? It occurred partly because the public service was captured by the government under contracts where they could be fired without notice and without reason at any time. A number of them learned it from the press. They were heads of department one moment and the press rang them up and said, "What do you feel about being fired?" They said, "Am I fired?" "Yes, you are." That capture of the public service, and putting the public service in slavery to the political process, was a very important reason why this was not discovered earlier. There are people who knew precisely what was happening, who had senior positions in the government, and they did nothing. They ought to have been burdened with the responsibility that if they did nothing then they themselves had some consequences of that.

MR STEEL: I want to ask you first about public hearings. You said in your submission that it is not in the interests of any corruption bodies to conduct public hearings that do not result in corruption findings.

Mr Harris: Yes.

MR STEEL: We have also heard today another view, which is that there should not be public hearings if the matters are going to court. What do you have to back up your point of view?

Mr Harris: There is one person in the past 20 years who has successfully appealed against a corruption finding in New South Wales, and that was under a rather cute view of the law administered by the appeals court. Their findings have not been able to be offset in the law in the main. So they are not frivolous when they come to that kind of finding. Secondly, there are people who appear before it and you might say their reputations are ruined, but I do not think they are. I mean, I do not think that the Premier who resigned because he had forgotten a bottle of Grange resigned because he was in front of the ICAC as a material witness; he resigned because, as he said, "It is impossible to forget that I received a bottle of Grange," and, having got the evidence that he did receive a bottle of Grange, he had to resign. So people who appear before it are not necessarily tarnished. Their reputation is not necessarily tarnished. I think the public can see that what they did is what matters, not the fact that they were there as a witness.

They found Joe Tripodi, who unfortunately was the chairman of my public accounts committee, to be corrupt. I thought, "Thank goodness it has emerged," because you could see it well before the event. The public hearing helps the public understand

what is going on. It helps the public know that the government, broadly defined, is at work, and it gives them some comfort that something is being done about corruption.

MS LEE: And, as you said, the public hearings do come after quite extensive work and investigation.

Mr Harris: A lot of work, yes.

THE CHAIR: I think that is the important point. It seems that in some ways public or private hearings is very black and white, but those who advocate public hearings make the observation that it comes after a fair bit of preliminary work, and so it is well past that prima facie moment rather than just any old case suddenly becoming a public hearing.

MRS JONES: Observers who are watching it from the outside are not always aware of what has gone on before we get to that point.

Mr Harris: Perhaps they are not, but the fact that there is so much work done beforehand means that what they are seeing is actually real; it is not—

MRS JONES: And the worst cases, yes.

MS LEE: You opened, Mr Harris, by talking about the definition of "corruption" and how that captures not just illegal conduct. You gave as an example former Premier Greiner. In your opinion, would it be better for us—because we are starting from scratch, essentially, so we have got a clean slate to start with—to codify and expand the definition so that we do not get a situation where someone gets off on a technicality to an extent? Or is it better to leave it to discretion and allow the definition of "corruption" to capture illegal, as codified, as well as non-illegal conduct?

Mr Harris: I think the three or four pages of corrupt activities listed in the ICAC will give you a good start—and they seem, as Mr Dempster said, to have survived the times—as well as codes of conduct. In the commonwealth I have been subject to three, I think, issues of corruption of ministers from time to time. One of them concerned a request that I waive criminal charges. A minister asked me to waive a criminal charge. I would like to see that as corruption, because of the power imbalance between me and a minister, who can persuade the Prime Minister to fire me at any time, and because of the seriousness of the event. The same minister asked me to make a public service decision in favour of a person who happened to be the mistress of his ministerial friend. I would like that to be corruption as well, because, again, you come under great pressure.

MS LEE: It is the abuse of power element, is it not? It is not just money.

Mr Harris: Yes.

MRS JONES: Or financial gain.

Mr Harris: Yes. This is, in lots of ways, the example of political pressure. It is not

obviously about money or benefits for the minister; it is about the exercise of power on behalf of others. I would like to see those kinds of issues captured, and I think they would be under codes of conduct, if not under the law.

MRS JONES: Could I go to your comments on the contract between government and the people?

Mr Harris: Yes.

MRS JONES: It is something that I focus on occasionally. Perhaps we do not focus on it enough, because often we hear, certainly in my experience of politics, about, "We have the power, we'll do this. If we think it's right, it's right." Yet some of the issues that I am certainly hoping that a body like this will be able to clarify involve matters from the last term, where people have ongoing concerns about how the government operates and makes decisions, almost certainly not of a criminal nature. Could you expand on the purpose of a body like this in restoring or strengthening the contract between government and the people, and perhaps informing governments by their process of what is and is not acceptable in maintaining that contract?

Mr Harris: Certainly, the ICAC has an educative role as well as an investigatory role. I would give more weight to the latter than the former. It is interesting, having read in this month's *Monthly* an article on the ICAC by Richard Denniss, he mentions that Greiner does not believe that he acted corruptly. I, for the life of me, cannot see how he came to that conclusion.

MRS JONES: But that is what happens in government because people get captured by their environment.

Mr Harris: Yes. I had to give addresses to parliamentarians in New South Wales. I would say, "Look, you should not be charging your constituents to give a talk." "Why? Why can't you charge constituents to give a talk?" The comprehension of what is ethical and what is proper eludes a lot of people, especially when they have some good in mind which they are trying to aspire to and they then determine that any method to achieve it is okay.

MRS JONES: That is exactly right. So this could be a helpful step in—

Mr Harris: Very much so.

MRS JONES: refreshing everybody's mind about what is reasonable?

Mr Harris: Yes.

MRS JONES: Do you think that a working definition of what such a commission could cover would necessarily have to enunciate that, or do you think by its own nature it will achieve it?

Mr Harris: No, I think it is worthwhile to have a clause indicating that any ACT commission would have as part of its role the promulgation of ethical behaviour.

MRS JONES: What about matters of the contract between government and the people?

Mr Harris: Yes, that can also be specified. They are intrinsic, aren't they? The promulgation of ethical behaviour is in order to enhance the social contract between the government and the—

MRS JONES: A lot of people either get elected or go into an office who do not know much at all about the concept of the social contract. I have come across it a lot.

Mr Harris: That is a bit disappointing.

MRS JONES: It is a philosophical and theoretical position which not everyone has a chat about at home. They might feel something is not right, but they may not actually put it down to damaging that, ultimately.

Mr Harris: Yes.

THE CHAIR: You talked about the person to whom the act applies.

Mr Harris: Yes.

THE CHAIR: We are considering how broad that scope should be. I think there is an assumption that it would be public officials, politicians and political staffers. I think they are all seen as well within the frame.

Mr Harris: Yes.

THE CHAIR: In the context of a world in which government increasingly lets contracts out for the delivery of government services, one of the questions we are exploring is how far that remit should go. Would you like to offer a view on that?

Mr Harris: Yes. If you look at the wealthiest people in Australia, they have got their wealth from dealing with government; whether it is the Rineharts or whoever they are, they have got licences. What is the saying? "A licence to print money." People like dealing with the government because the government has all of this wealth attached to it, not only in terms of revenue but in terms of powers that it can exercise in a person's favour.

We have to try to capture those people. Indeed we saw that, even with the High Court hearing on Cunneen, which came up with this probity-efficacy discrimination of powers, the New South Wales government felt obliged to pass a retrospective act to make those people who, apart from the one, were found to be corrupt to have been corrupt. They thought it was that important, and I think it is that important as well, because these people, although they were not dealing, other than with Obeid, in a corrupt way with public officials, they were the knowing beneficiary of corrupt activity involving government assets and powers, and they ought to be captured.

THE CHAIR: That is quite broad. That is well into the private sector.

Mr Harris: Yes, they are all private sector. The commonwealth Auditor-General is now allowed to chase the money. The commonwealth Auditor-General's powers are not restricted only to what the department spends; they can follow the cheque, for example, into charities, to see what the charity is doing. They can follow the cheque into business, to see that the business, whether it is building a frigate or not, is not wasting commonwealth money or seeing that it is not using it corruptly. So if we have given that power to the Auditor-General to chase money, why don't we give power to the commissioner to chase corruption?

MS LEE: I must say that your introduction was quite good in terms of addressing a lot of stuff. You probably had the advantage of sitting here and you realised the types of questions we would be asking.

THE CHAIR: I want to talk to you about oversight mechanisms for the integrity commission. Who watches the watcher? We are, in a small jurisdiction, contemplating perhaps how one effectively sets up an effective but cost-effective model. Do you have views on what that oversight mechanism should look like?

Mr Harris: It is interesting; I gave a reference to the ICAC as Auditor-General of New South Wales when I was advised that the then Premier had torn up a legal opinion by the Solicitor-General because the then Premier did not agree with it. Having given the reference to the ICAC, I was disappointed in the result. I was not interviewed, nor was the Solicitor-General whose opinion was torn up in his presence. I thought, "You've just dropped the ball, Commissioner of the ICAC." There was not much I could do.

The courts, of course, are always there, and the ICAC has been in front of the courts on a number of occasions, mostly successfully defending its position. The parliamentary committee has to have some say as well. But it is rather difficult for a parliamentary committee, unless they are very aggressive, and overly aggressive. Nevertheless the media are there as well.

Perhaps the best recourse is the fact that it is a temporary appointment: that if there is a problem with the appointment, the appointment will go in time. They cannot do much about an Auditor-General, either. They have to put up with the Auditor-General until the Auditor-General goes. There is a public accounts committee. I think the answer is to make the best appointment, and rely on the media, individuals and the courts to do the rest of it. It is a problem. It can be a problem.

THE CHAIR: In Victoria they have an inspectorate role that has oversight of, if I recall correctly, the Auditor-General, the Ombudsman and the ICAC, and they have the power to audit matters quite specifically. It is a much bigger jurisdiction with a greater level of resourcing.

Mr Harris: And inspectors often get captured. Our inspector-general in the defence arena in the commonwealth gets captured by the agencies which are much bigger and more resourced than he or she is. It is a possibility.

THE CHAIR: New South Wales uses the model of having three commissioners. We have had this discussion a little bit this afternoon. Some people have the view that

having a couple of commissioners provides a degree of internal scrutiny or internal challenge.

Mr Harris: It does. Having been a commissioner with others, doing things for the now Productivity Commission, we affect each other's position, arguments and views. That can help. It can also stymie matters. But perhaps the return for the resolution of internal conflicts is worth the stymieing problem.

With respect to quis custodiet ipsos custodes—who guards the guards?—the ACT police must be subject. They are amongst the most powerful group of people. When I asked Mr Lauer, who was in front of a royal commission into the police, how he felt, he said, "With 20,000 police behind me, I feel fine."

THE CHAIR: I take it you hold the view that the current mechanism of the ACLEI is not adequate for the oversight of the ACT branch of the Australian Federal Police?

Mr Harris: I do not know whether the law will allow it, actually. I do not know whether—

MRS JONES: For ICAC to be able to oversee?

Mr Harris: Yes.

MRS JONES: Our discussions have gone to the fact that it would need to be agreed because it is a contractual obligation.

Mr Harris: Yes. The powers of the police are reasonably well defined. Whether the police can actually subject themselves to another body would be quite interesting.

THE CHAIR: My question went to the fact that, at the moment, there is a commonwealth oversight body for the Australian Federal Police.

Mr Harris: Yes.

THE CHAIR: Are you putting the view that that is not appropriate or adequate for ACT Policing?

Mr Harris: We have an Ombudsman in the same position, don't we?

THE CHAIR: We do.

Mr Harris: There has been some criticism of the degree to which the Ombudsman looks after his second job. Maybe the same will occur there. The commonwealth has always been interested in state police, and with the oversight body and the commonwealth, it might retain that interest.

MS LEE: Mr Harris, you were talking earlier about how the commissioner needs to have some retrospective powers.

Mr Harris: Yes.

MS LEE: Could you give us some guidance on what those powers would look like, so that we can find that balance between making sure there is integrity of evidence, that it is preserved and natural justice is afforded to people where it is too long ago? On the other hand there are a lot of issues that are still worrying people that would need to be dealt with, and going to that sort of social contract concept that you were talking about. Could we have some guidance on what those powers would look like?

Mr Harris: I probably would not trammel the powers of the commission. I would leave it to the commission to determine. Certainly, Premier Greiner was very interested in the ICAC going backwards, looking at the Labor people. Commissioner Temby resisted that because he had so much work to do. The commissioner could look at the issues that you raised and say, "Look, this happened so long ago that the evidence is tainted; it's not worth my while." If you have a wise commissioner, a wise commissioner will make wise decisions.

MS LEE: Going back to your original point about making sure you appoint well.

Mr Harris: Yes.

MRS JONES: Who can find a wise man—or woman?

THE CHAIR: We have come to the end of the questions from the committee. We thank you once again for making a submission. I know you have also spoken at some public events and I know the community have benefited from your views on that. I also thank you for taking the time to appear this afternoon and entertain our questions. You will be sent a copy of the transcript of the hearing and you will have an opportunity to correct the record, if you feel there are any errors. The committee will now adjourn. The next public hearing is on Thursday, 7 September 2017 at 9.30 am.

Mr Harris: I acknowledge the earnestness of the committee.

The committee adjourned at 4:40 pm.