LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON INDEPENDENT INTEGRITY COMMISSION 2018

(Reference: Inquiry into the establishment of an Integrity Commission for the ACT)

Members:

MR S RATTENBURY (Chair)
MS E LEE (Deputy Chair)
MS B CODY
MRS V DUNNE
MR C STEEL

PROOF TRANSCRIPT OF EVIDENCE

CANBERRA

MONDAY, 24 SEPTEMBER 2018

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:
Mr H Finlay (Ph: 620 50129)

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

The committee met at 9.31 am.

HINCHCLIFFE, MS JAALA, Acting ACT Ombudsman

THE CHAIR: Good morning and welcome to the second hearing of the Select Committee on an Independent Integrity Commission 2018. On behalf of the committee, I thank you, Ms Hinchcliffe, for attending today. I imagine you have seen the privilege card on the table. You have no reservations with any of that?

Ms Hinchcliffe: No.

THE CHAIR: Proceedings are being recorded by Hansard for transcription purposes and webstreamed and broadcast live. Before we go to questions, do you want to make any opening remarks?

Ms Hinchcliffe: I have a very quick opening remark to make. Thank you to the committee for inviting me today. I am appearing as the Acting Ombudsman, and the Ombudsman apologises for not being able to be here; he is currently away.

Our submission talks of some technical issues in relation to the government's bill, but it really goes to the concepts of how integrity agencies work together and how the ACT Ombudsman would work with an independent integrity commission, whatever form that takes. It provides some undertakings to the committee that we would seek to work closely and in a collaborative way with an integrity commission.

We work with other integrity agencies in our ACT role and we would seek to work in the same way, which includes information-sharing, the ability to ensure matters go to the right integrity agency to be looked at, and where we have issues around overlapping jurisdiction, to work together to ensure that matters go to the right places.

THE CHAIR: I appreciate those remarks. Certainly in the first committee hearing, one of those important considerations was how we fit each of the agencies together to both respect their individual roles and also ensure the linkages between them. One of the observations in your submission is that any staff engaged by an inspector should be engaged under their own governing legislation, rather than under the ACT Public Sector Management Act. Are you able to elaborate on the thinking behind that recommendation?

Ms Hinchcliffe: We have made that recommendation particularly in light of the power the Speaker has to be able to appoint an inspector—I think it is under clause 236 of the bill—who has similar other powers. We would be willing to operate in that kind of role, should the Speaker be so minded, but if the Speaker would be minded to appoint someone like the ACT Ombudsman to that type of role we would need to use our own staff.

In our case our staff come under the commonwealth Public Service Act. So that is really the issue we are getting to there—if you want to enliven that provision and use a body such as ours, our staff are not currently employed under the ACT public service legislation. That might also be an issue for another integrity agency if you

were to look to appoint them as the inspector. So that is why we have suggested that might be a legislative amendment to think about.

THE CHAIR: So you are essentially suggesting that the Ombudsman could provide that oversight role, rather than necessarily needing to appoint another individual?

Ms Hinchcliffe: That is right; that is our position. We see that we have similar oversight functions to the ones that would be undertaken by the inspector. At the moment we currently do inspecting roles in relation to various covert powers, both in our ACT Ombudsman role and in our commonwealth Ombudsman role. We also oversight complaints mechanisms, both in our ACT Ombudsman role and our commonwealth Ombudsman role. So we see some synergies there.

We are also conscious of the fact that, in a smaller jurisdiction like the ACT, establishing yet another oversight inspectorate role, which would be quite a small role as compared to the integrity role, it may be of benefit for the ACT to be able to pick up an existing oversight function to do that. We see that we would be in a position to do that. We acknowledge that that is a matter for the Speaker to decide and so we leave it there.

MS LEE: You indicate that your office is willing to work with the commission once it is set up, to use best practice. Is it your view that the covert and intrusive powers the commission has should be similar to what the Ombudsman has? Do you have any views on that?

Ms Hinchcliffe: There are a range of covert powers we do not currently have. We have quite strong powers, and we are not looking for any additional powers in our own act. But there are covert powers that we do not have, such as in the ACT we do not have powers under the Surveillance Devices Act to undertake surveillance devices. We have powers under that act to inspect the use of ACT Policing in relation to those surveillance devices. We would assume the commission would have those types of covert powers.

There is a question about whether the ACT also seeks for the commission to have TI powers under the commonwealth act. If the commission was given those TI powers then, as I understand the way the mechanism works, the ACT would need to come to an agreement as to who would inspect the commission's use of those powers. In our commonwealth Ombudsman's role we currently inspect commonwealth agencies that use telephone intercept powers. So there needs to be an arrangement in place there. Of course, we would be happy in our ACT Ombudsman's role to discuss inspecting the commission's use of telephone intercept powers, were those powers to be sought for the commission.

There are other powers under the commonwealth Telecommunications (Interception and Access) Act you may want to consider to be used by the commission, and they include the stored communications powers and the metadata access powers. Were those to be given to the commission, then in our commonwealth Ombudsman's role we would inspect the commission's use of those powers.

THE CHAIR: Because they sit under commonwealth jurisdiction?

Ms Hinchcliffe: That is right.

MS LEE: You mentioned that perhaps the ACT Ombudsman could play a role in the inspector role. Obviously some other oversight-type offices exist at the moment. Is it your submission that the ACT Ombudsman would probably be best suited for that role?

Ms Hinchcliffe: I have not thought about other agencies. There clearly are other agencies in the ACT that could play that type of role. My submission is merely that we could also play that role and that we have a corresponding role, which I think is the test. They might not be quite the words in section 236, but we have looked at the section in relation to us and we are comfortable that we would be able to undertake that role. Whether other agencies might also is another matter.

MR STEEL: To clarify, your staff are employed under the commonwealth Public Service Act 1999?

Ms Hinchcliffe: That is right.

MR STEEL: So you think the benefit of that is that you basically provide separation, as your staff are employed under that act rather than the ACT's Public Service Act?

Ms Hinchcliffe: I would put it a little bit differently than that. The way the ACT Ombudsman Act is set up is that when the ACT Ombudsman is the commonwealth Ombudsman then the staff of the ACT Ombudsman are the commonwealth Ombudsman staff who are staff under the commonwealth act. So rather than it being an issue about the separation, it is more of an issue about the reality.

The reality is that the ACT Ombudsman staff are employed under the commonwealth legislation. So were we to become the inspector, the benefit of having an agency that already exists to be the inspector is that you get to use the resources of that agency that already exist. Our resources that already exist are resources of employees under the commonwealth act. If we were to become the inspector and that was not amended then we would need to employ staff under the ACT act to do that work. Whether you would get the economies of scale you would get were you to make the change is another question.

MS LEE: I want to go to the mandatory notification requirement. In your submission you say that there are some aspects of it that are incompatible with the Ombudsman Act. Your submission is that those requirements would need to be amended. Can you please elaborate for the committee why those provisions would need to be amended, as opposed to, perhaps, why the sections of the Ombudsman Act would need to be amended?

Ms Hinchcliffe: The Ombudsman Act continues the general principles of ombudsmen elsewhere, including our powers and functions under the commonwealth act, which include issues to do with the independence of the Ombudsman. The Ombudsman cannot be directed by other agencies to undertake various parts of work, and also the

Ombudsman investigates in private. And they are the issues that we raised in our submission. We think that having a mandatory corruption notification requirement then becomes like a direction on the ACT Ombudsman. It is butting against those principles of the Ombudsman undertaking, as I say, investigations in private and the Ombudsman being independent and not compellable.

MR STEEL: Just to clarify that, I do not think that you are suggesting that the bill be amended because it already exempts you. You are essentially supporting the exemption already in there under clause 62(6).

Ms Hinchcliffe: Let me make sure I get this right. Exemption is with one of them and not with the other. Let me work that one through for a moment. There is an exemption in relation to the directions but not in relation to—

THE CHAIR: Notifications.

Ms Hinchcliffe: The notifications, thank you.

MR STEEL: I read that bit in the submission.

Ms Hinchcliffe: Yes, that is right. I worked it through on the weekend but then I needed to have a look at it again. Thank you.

MS LEE: Sorry, I should have made my question clearer.

Ms Hinchcliffe: No, not at all. I knew exactly the point you were getting to.

THE CHAIR: This is an interesting point that has been brought to my attention. I accept the argument that you are making in the broad. But the other side of looking at our independent corruption commission is that they are given extraordinary powers. I think there is an interesting question there. All the points you raised about the Ombudsman are right, except that we are setting something up here that operates out of the ordinary. There is a question mark there, I think, about whether the Ombudsman should be allowed to view it to become aware of corruption. You, alone, would be the only people not required to report it to the corruption commission.

Ms Hinchcliffe: The way that I would answer that is: in our commonwealth jurisdiction already we deal with ACLEI in relation to issues of corruption that we would see in agencies that are covered by ACLEI. It is not all the commonwealth public service; it is a limited jurisdiction that they have. There are provisions in our act that allow us to provide information to ACLEI, just like we would expect to see provisions of the Ombudsman Act that would allow us to provide information to this commission as well. Then we ensure that matters that fall within our jurisdiction but relate to corruption go to the correct agency. We would send matters that relate to corruption to ACLEI, just as matters that we saw in the ACT that related to corruption would be sent to the commission.

MS LEE: The main difference being that ACLEI is only limited, obviously, to law enforcement.

Ms Hinchcliffe: That is right.

THE CHAIR: You have only looked at the bill put forward by Mr Barr. There is also a second bill by Mr Coe that the committee is considering. Have you had an opportunity to examine that one? Do you have any comments that you have not addressed in your submission?

Ms Hinchcliffe: I do not have any particular comments. We have looked more closely at the government bill than we have at the other bill, but we are aware of both of them. Our comments are more of a general nature. We picked up some technical points about the government bill but really our comments of a general nature go to both of them, which are really the comments that I made in my opening statement. We are very open to working with a commission, should it be established.

We see that there is no difficulty of jurisdiction in having both an ombudsman and an integrity commission. We see that, in other jurisdictions where there are both agencies working, they work well together and we would seek to work in a similar way, should a commission be established in the ACT.

THE CHAIR: Thank you. That has been a very helpful submission and you have been very clear in your evidence. I think you have helped us understand a couple of points of subtlety but of importance nonetheless. We appreciate your time today. Thank you, very much. They are complex matters.

Ms Hinchcliffe: They are complex matters.

HARRIS, MR TONY

THE CHAIR: I welcome Mr Tony Harris, the next witness before the Select Committee on an Independent Integrity Commission 2018. You have had a chance to have a look at the privilege card and I imagine you are familiar with it.

Mr Harris: Yes.

THE CHAIR: We will get straight into it, if you like. Thank you for making your submission to the committee. I know you made a very extensive one last time for the previous committee, which the committee found very valuable. I think your remarks and observations were reflected extensively in our last report.

Mr Harris: Yes, they were.

THE CHAIR: Thank you for having a look again at the bill. As you know, we are now looking at this to check the legislation against what the committee thought, particularly with two bills before us. You have made some comments on that. Do you want to make some opening remarks as a general observation?

Mr Harris: Okay. When I was the New South Wales Auditor-General I looked at all the legislation related to auditors-general throughout Australia and I found the ACT one was the best piece of legislation. I thought that was interesting, that this community could put up the best, and I think you are on the verge of putting up the best here for an integrity commission. I commend you for that.

Both bills have many features which are state of art, and there is a lot of overlap between them as well. I think the same author has been involved in preparing each of them. There are some little things that we could talk about.

When I prepared this submission I had come to one big feature that I do not know was raised earlier, and that is the funding of the organisation. We saw in New South Wales a very significant reduction in real terms in the annual provision for the ICAC and of course that affects the operations of the ICAC.

The state of the art at the moment for accountability organisations—and we see this with the Parliamentary Budget Office and I think with auditors-general in a number of jurisdictions—is that, in regard to the body that is typically being made accountable, the government does not set the provision for the accountability body but the legislature to whom the government is accountable sets the budget.

This first happened, I suppose, way back in the federal sphere, when they split the annual appropriation for the parliament away from the annual provisions for government. There is a separate bill for the annual provisions. That came out as a big argument, especially by the Senate of course—the House of Representatives is more captured—arguing that the government should not set the provisions for the Senate because the government was accountable to the parliament, not vice versa.

Senator Walsh, who was the Minister for Finance at the time, begrudgingly gave in to

that issue and it set a precedent that has extended slowly throughout Australia and other areas. I think it is worth while this committee considering whether the committee established to oversee the operations of the integrity commission should be the committee that sets the budget for the commission.

The several little things that I saw in the two bills that warranted some consideration included the status of the commissioner. In what I would call the Barr bill it is to be a judge. In the Coe bill it is to be a lawyer. I thought each of those was probably at the extreme. Maybe if you had a QC or an SC or a former judge then you would capture a wide number of people who are entirely competent. By making it a judge you are leaving out people like Brett Walker, currently the royal commissioner in South Australia, and he would be of course quite an eminent jurist if he were to apply.

The idea of making it a crime and an offence not to report a suspected corrupt activity is one that appeals to me, and that is in the Coe bill. Why? Because I saw in Sydney a number of heads of agencies not referring corrupt activity to the ICAC. This was after I retired. It concerned the Obeid matter. The officer that I knew, for reasons relating to his career prospects, did not want to even put an anonymous submission in to the ICAC. That was part of the reason that, even though they had an ICAC, we had this massive corruption at ministerial level in New South Wales. Having it as an offence not to do it imposes an obligation on a person, which I think is worth while.

I would also extend the obligation. Heads of agencies are not the only ones who see corruption. The corruption can be seen by senior officers. Indeed, senior officers can see corruption by heads of agencies. I would extend the requirement to senior officers and their equivalent—SES officers and their equivalent.

The Coe bill makes a tort if somebody suffers a disadvantage because they have provided evidence or made a submission to the ICAC. I think that is a worthwhile issue. As I say in the submission, every piece of evidence suggests that whistleblowers come out badly in any piece of legislation, and having it as a tort offers some protection.

I very much like the definition of corruption in both bills. I very much like the fact that each bill, although with different weights, allows the commission to decide whether to have public hearings or not. Giving the commission the choice—one as a default, and the other as an exception—seems to be acceptable. I do still point out, though, that all the hearings in courts are open to the public and the courts are able to impose a greater penalty than a finding of corruption, as severe as that is.

There were some issues raised recently about an obligation to provide evidence—in other words, even if it might be self-incriminating, as it were. I think that is important. We already have a number of institutions where you are obliged to provide evidence, although not in public and not in the way that is envisaged in this case. That evidence cannot be used against you. In the royal commission at the moment, for example, you are obliged to answer questions fully and accurately, even though it might lead to the fact that the commissioner says you may have committed a criminal offence from your own testimony. That testimony cannot be used against you.

It is much more important to me that the public understand the facts of the issue than

that a person is successfully prosecuted. The findings that a commission makes are fundamentally important to democracy, in my view, and they are much more important than that a particular person would later escape prosecution because they cannot have that evidence used against them.

The finding of corruption is much more important than a person being sent to jail. If we take poor old Eddie Obeid, the finding that he acted corruptly was much more important than the fact that he is now in jail, in my terms. It just reduces his power everywhere; it reduces his influence; it means that he is out of the game. The fact that he is in jail is just a passing moment issue for me.

One of the things that I tried to induce you to do was to ensure that the Cunneen case was captured in the legislation—and that was when a public officer acted against the interests of the government—and I think you have done that. If I am wrong then I am a bit saddened, but I believe you have captured Cunneen.

I think the idea of having as a prime test the fact that you may lead people to lose faith in government is a very important part of the definition. You have excluded the Auditor-General from advising the commission of a suspected corrupt activity and I do not know why. As the Auditor-General in New South Wales, I advised the ICAC on a couple of occasions. It did not worry me that I did it. In fact, I was pleased to do it in some senses because I could pass the problem over to the commission. I do not understand why they are exempt.

As I have mentioned in the submission, the exemption of staff from the purview of the integrity commission, staff of the inspectorate, is a debateable issue and I do not have a solid judgement; I do not have a particular, firm view on that matter. I just find it odd that some people are not subject to corruption findings just because of the activity that they are involved in. I understand that conflict of interest is an issue, but I think the corruption might trump conflict of interest.

THE CHAIR: If you are happy we will jump into some questions, if you like.

Mr Harris: Yes. I think I am done.

THE CHAIR: I think you have already prompted a few. I know we have some others and you have answered a few. We will jump straight into it, if you are happy with that. One of the points that you have touched on is that, as you know, both bills allow the commission to investigate on its own motion. Mr Coe, in his bill, created a provision for the Assembly to refer a matter to the commission. We spoke to Mr Coe about that on Friday afternoon and I was left with the feeling: why do we need that? In a sense, anybody can refer to the commission. Do you have any thoughts on that?

Mr Harris: It just gives it a tiny bit more weight. The Coe bill allows such a referral to not be acted upon. If the commission decides not to act upon a referral from the Assembly, that is entirely lawful. I thought that was strange. But I would also note that, if a majority of the Assembly sent a reference, the commission would do it just out of prudence, if anything else. But it is not needed. No, it is not needed.

On a number of occasions the parliament asked me to do something without passing

legislation and you do it because you were asked to do it by the authority for whom in some senses you are working. It is not necessary. It is not a hindrance. Having it in the legislation gives it a touch more weight.

MS LEE: Would you expand on something that you touched upon in your opening statement, the protection for whistleblowers? You have already mentioned that in the Coe bill it makes it a tort, which provides a bit more protection. But in the context of both bills, and also in the context of our current PID legislation, what more do you think could be done to provide protection for whistleblowers?

Mr Harris: It is an interesting question. It is one that I have involved myself in personally, again in New South Wales. The old saying goes that paranoid people can have enemies. People who appear to be paranoid can cause an issue for an agency. But I always insisted that agencies handle these people very carefully because, even if they are wrong, even if their information is wrongly based and even if they are embarrassing in some senses of the word, the fact that somebody is willing to make that intervention is important for agencies in order to improve.

But we did not have the legislation to protect the whistleblowers in a way that I think is important. So tort is important. I think it is an offence in the bills to act against a person who provides a reference to the ICAC or who provides information. I thought it was an offence in both bills, but if it is not I would have thought that would have been quite important, just as it is important for you to protect witnesses here. You have that ability yourselves, as does a court, as does a royal commission. I think it is important that the government allow the commission to protect witnesses from adverse response as well as giving witnesses an avenue in their own right—hugely important.

MR STEEL: In your submission you suggested that it should be the commissioner who conducts public hearings, rather than lower level staff in the commission. Why do you think that is the most appropriate thing?

Mr Harris: The fact that you have specified who a commissioner is—in the Coe bill it has to be at least a lawyer whereas a staff person who is a delegate does not have to be a lawyer—gives you some indication that you want the commissioner to have skills and the like at a higher level. One would have thought those higher level skills would be needed in public hearings where the atmosphere, the questions and the control of the hearings are much more important than in a private hearing.

I was also trying to alleviate work for the commissioner. Allowing the commissioner, as the Coe bill does, to undertake private hearings allows some efficiency in operations. I could see that as important, but I thought that if a commissioner was to be doing anything, it was to be conducting the public hearing.

MR STEEL: Do you think that in the ACT context those public hearings would be happening so often that it would be a burden on the commissioner to do that?

Mr Harris: No, and the commissioner, of course, is assisted by counsel. So the commissioner in some senses will not be burdened by having to work out what the questions are, although he or she is obviously involved.

MS LEE: I have a supplementary on that. You also mentioned in your opening that both bills have the ability to conduct public hearings, despite a different emphasis—

Mr Harris: Yes.

MS LEE: and that the Barr bill places a greater emphasis on human rights over the public interest test in determining whether a public hearing can be held.

Mr Harris: Yes.

MS LEE: Certainly, the Assembly's ethics and integrity adviser, in his submission, talked about the real risk that the decision to hold a public hearing could become frustrated by a legal challenge.

Mr Harris: Yes.

MS LEE: His view was that the only way that could—

Mr Harris: I sympathise with that view. Having a legislative concept called "serious" gives an option for somebody to take the matter to court. Having human rights versus public hearing gives the option for a matter to go to court. That is not very satisfactory. The best position is to appoint a good commissioner. In many senses, the public also provide a judgement, as well as the Assembly itself, as to whether or not the commissioner has overstretched themselves. I would prefer "serious" out. I would prefer the Coe bill—not so much the Coe bill. The Coe bill puts it as a default that you must have a public hearing. That provides the commissioner with some protection, but I would just leave it to the commissioner, full stop, as to whether they have a public hearing.

MS LEE: The ethics adviser also went on to say that the only way that that could be prevented is to oust the jurisdiction of the courts so that it is up to the commissioner. Would you agree? You have just said—

Mr Harris: Yes, leave it to the commissioner. Yes.

THE CHAIR: I was interested in the observation around who should be subject to the powers of the commission, specifically on judicial officers. In the previous hearing the committee recommended including judicial officers. We thought about it quite a bit and formed the view that, whilst there is the judicial commission, the nature of corruption itself and the difficulty of rooting it out is probably not a power that a judicial commission would tend to have. The exceptional powers you give to an integrity commission probably warrant it. You have formed the view that we should leave judicial officers out. I wanted to explore that.

Mr Harris: Yes. I actually did not come down that firmly on it. I just noted that in other jurisdictions the judicial officers were not covered because they had these separate bodies. I take your point that the separate bodies probably do not have the same investigative arrangements and resources that the integrity commission would have. I am just always fearful of an executive agency walking into the judicial sphere.

Of course, the High Court is even more concerned than I am about things like that.

THE CHAIR: Fair point.

Mr Harris: So I just opted out of the argument, I suppose. But I can see your point. We know that there were judicial officers, again in New South Wales—the chief magistrate being one of them and a district court judge being another—who were found to have acted corruptly. There might be more who were not found to be acting corruptly because of the limitations of the ICAC act. I understand your conundrum. I suppose that, if push comes to shove, including the judiciary is probably marginally more important than excluding them.

THE CHAIR: I think the rationale of the committee, in reflecting on it last time, was that the nature of the corruption issue is that the finding does not deliver the punishment. That is where a judicial commission would then come into the role. That is how we did some of the thinking last time on how to try to work through some of these questions—recognising the roles of the different bodies.

Mr Harris: True, but as you also said to the previous witness, with this body, even though it only has that one power, that power would be very devastating if someone who was a judicial officer was unfairly found to be corrupt. I presume they would have to resign anyway, even if there were no following circumstances, no following issues. So it is quite powerful.

MS LEE: You touched upon this in your opening statement, Mr Harris. The government's bill seemingly provides some exemptions, like the Auditor-General and also, if I read this right, the inspector and the relevant staff, from examination.

Mr Harris: Yes.

MS LEE: Do you think that the risks of this exemption outweigh that? There is conflict of interest, of course. You mentioned that corruption—I wrote down your words—"trumps conflict of interest".

Mr Harris: Yes.

MS LEE: Do you think that in that context there are any public office holders who should be exempt at all?

Mr Harris: No. We have that famous case of the New Zealand auditor-general found in court to have committed a fraud on the government—more than one, actually. Again, it was very difficult for the deputy auditor-general to make the claim. How did the deputy auditor-general bring that to the fore? In this circumstance, it would be very difficult. He would have to go to the police. It is much easier to go to an anti-corruption commission if your auditor-general is acting corruptly. It was to do with money, of course. Yes, I was a bit surprised by that exemption in the government bill and I did not think it was warranted.

MR STEEL: I refer to the tort that has been provided for in the Coe bill relating to defamation. Do you think that that might have a chilling effect on people making

complaints to the commission?

Mr Harris: The tort occurs when there is a detriment that has occurred because you have provided evidence to the commission—no, not because you have provided evidence to the commission. It is because you have acted adversely against the person outside the commission hearings. I am not worried about defamation. The protection that you provide is probably useful, but I do not know that it is even necessary, because you do have a privilege when you are in circumstances like that. Some people use the privilege quite maliciously, but that is up to the commissioner to control.

I am not worried about defamation. I thought the tort was all about somebody being detrimentally affected because they had provided evidence or because they had made a submission. That tort, because it involves lawyers, courts and the like, is only there as a threat to stop people acting detrimentally against one person. It is useful, but it is not a solution to the problem that whistleblowers face. Whistleblowers will have to have the finances and the chutzpah to take a tort on. It is useful, but it is not a solution. I would not get rid of it, but I would not see it as a solution. However, I do not see it as related to defamation. Am I wrong?

MR STEEL: No. I think you are saying that the Coe bill provides a protection from defamation proceedings, so it is kind of the opposite of—

Mr Harris: Any detriment, yes.

THE CHAIR: We did note your comments on funding. I am just trying to refresh my memory. I am almost certain that we recommended in the previous committee that this be set up as an officer of the parliament in the ACT. We have that mechanism for the Auditor-General, the Electoral Commissioner and somebody else.

Mr Harris: You are suggesting that the parliament does set its own budget?

THE CHAIR: Yes. There is a process for those budgets to go before the administration and procedure committee of the Assembly, which does provide that degree of independent oversight. Assuming I am not recalling this incorrectly, that is said in the recommendation the committee made last time that, for the very reasons which you have outlined today.

Mr Harris: The commonwealth Auditor-General is also an officer of the parliament, but not in the same sense: not in the sense that he is funded by the parliament.

THE CHAIR: I will go through and check our recommendations later on and cross-reference that.

Mr Harris: Top class.

MS LEE: Following on from that, you talked about how the oversight committee of the legislature should be the committee that determines the funding, not the government, which makes sense. Do you have any comments to make in relation to the type of committee that should be? If it was going to be an existing one, if it was going to be, for example, JACS, the current set-up of the committee is that it actually

has a majority of government members. There is a risk, is there not, perception-wise, that that might be the government, through that mechanism, actually still having the oversight, as opposed to a proper—

Mr Harris: Yes. I have been to committee meetings where the government members of the committee did nothing. They asked no questions and did not participate except for their presence. Yes, it is a problem. I suppose a legislative solution would be to have an even number of government and non-government members on the committee and make them come to a consensus or a majority view.

THE CHAIR: We have tried that.

MS LEE: It is easier said than done.

Mr Harris: Otherwise, I would always give the majority to the non-government members, because the government members' ability to intimidate other members is quite profound.

MS LEE: Sure. Thank you.

MR STEEL: The difficulty with a committee which is made up of non-government members making a budget allocation is that it is in conflict with the self-government act, with our constitution, in terms of government being the only one that can initiate money bills and so forth. How do you think we get around that?

Mr Harris: There is a provision in the New South Wales constitution that the upper house cannot amend the provision for the ordinary annual services of government. I asked the Crown Solicitor, "Does this include parliament?" He said he would not answer the question.

MS LEE: So that is still a question we need to look at.

Mr Harris: I do not think the government has the power to override a parliamentary law on any provision as long as it is not for the ordinary annual purposes. In the example I gave, I think the upper house had the power to change the bill for the purposes of parliament and there was no problem, and that is why the Crown Solicitor would not answer: the parliament trumps the government.

MR STEEL: I think the problem here is that it is a different parliament. The self-government act is not an act of this parliament.

Mr Harris: Correct. I have not looked at the self-government act. Does the self-government act talk about any provisions for government? In that case, I would say that the Legislative Assembly is not part of the word "government". That is how I would interpret the act. I mean, "government" has many meanings. But when you are reading an act like that, you would read it down, and the easiest way to read it down is to say that the Legislative Assembly is not government for the purposes of that act.

MR STEEL: There may be some different words used, I think. The word "minister"

may be used in that way, but—

MS LEE: But that is very interesting.

MR STEEL: I have not got it on me, so I will have to check that out after the session.

THE CHAIR: One of our roles in the whole thing is to have an inspector who oversights. We have just heard from the Ombudsman that they consider that they could play that role. I do not think that was something the committee had previously envisaged. We have not contemplated it. Do you have any commentary on who might play the oversight role? They suggested that, in a small jurisdiction like the ACT, rather than having a separate inspector and the mechanisms that need to go with that, the Ombudsman could play that role. Do you have a view? Or some other agency—they were not bidding for it, per se. Their framing was very careful. They said, "We believe we are capable of doing this if you would like us to."

Mr Harris: I find that having the Commonwealth Ombudsman makes us lesser citizens than if we had our own Ombudsman. We are nearly as big as Tasmania. Certainly in terms of the economy I presume that we are the same size as Tasmania, if not bigger. I think I would prefer to have my own inspectorate, as I would prefer to have my own Ombudsman.

THE CHAIR: Okay. So I think the answer to my question is that the Ombudsman could play that role but your preference would be to have an ACT Ombudsman rather than a subcontractor model from the commonwealth.

Mr Harris: Yes. We subcontract the police, which is interesting because the Northern Territory does not subcontract the police, and we are far, far, bigger than the Northern Territory. We are also, as I have suggested, as big as Tasmania, and they do not subcontract the police. And there are actually useful mechanisms in having your own police force which can learn from other police forces in their day-to-day activities rather more than the Federal Police can learn from other police forces in their day-to-day activities. There are countries that are considerably smaller than the ACT.

THE CHAIR: Our regional neighbours—numerous of them.

Mr Harris: Yes, and in the Caribbean and everywhere. I do not know that the economies of scale are that significant. It is part of the cost of democracy, and I am quite pleased we are paying for the cost of democracy.

THE CHAIR: Mr Harris, thank you for your time today. It has been very helpful through the whole course of the committee process to have your views and experience brought to bear on these matters.

Mr Harris: Thanks for doing such a good job.

Hearing suspended from 10.22 to 10.32 am.

SKEHILL, MR STEPHEN, Ethics and Integrity Adviser for members of the Legislative Assembly for the ACT

THE CHAIR: Welcome to the hearing, Mr Skehill, and thank you for making yourself available today.

Mr Skehill: Thank you, Mr Chairman.

THE CHAIR: You are, of course, familiar with the privileges of appearing before the committee, so we do not need to reflect on that.

Mr Skehill: I hope I am familiar.

THE CHAIR: Thank you for making your further submission to the inquiry. We appreciate your earlier participation. The committee now has the two bills before us, and we are examining those. Would you like to make some opening remarks?

Mr Skehill: As I read the two bills I thought that there were a lot of good points in each of them, but I hope the committee will not regard it as a choice of one or the other. I do not think either one is just right. So I do not see it as a binary choice; I think there is probably a compromise or a scissors-and-paste job to be done. The way I would see doing it—I did not have time to do it myself—would be a large spreadsheet that worked out which clause in which bill is equivalent to which clause in the other bill, and then particularly which clauses are not represented in the other bill and whether they should be in an optimal bill and go through a process like that.

There are a lot of excellent thoughts in both bills but, as I say, I do not think either is optimal. There are a few particular points I made in my submission. I will not repeat those because they are there. But, in particular, I thought the provisions in the government bill relating to the qualifications for appointment as commissioner were setting a bar too high that would rule out a lot of people who might be well suited to the job.

THE CHAIR: Your general observation about the two bills is the key conundrum for the committee—how we take two large pieces of legislation and find the right way through on both of them. We take on board your point about positive elements in both of them. That has been the consistent message we have had in hearings thus far.

I note your observations on public hearings and appreciate that you are not necessarily re-prosecuting that argument, but I am very interested in your point around the prospect of legal challenge. Can you elaborate on that a little?

Mr Skehill: Quite simply, if I was acting for someone who was a target and who did not want to be subject to a public hearing, I would challenge in court the judgement made by the commissioner about whether a public hearing was desirable. Those provisions are cast in terms of relatively nebulous concepts about whether it is in the public interest that there be a public hearing or whether it is in the public interest that there not be a public hearing.

I would be seeking a statement of reasons about the criteria that led the commissioner to the public interest view, and then I would use all the lawyer's tricks of saying that the decision had regard to irrelevant considerations or failed to have regard to relevant considerations or was so unreasonable that no reasonable person could have come to that conclusion and so on and so forth. If nothing else, I would try to stop the public hearing taking place for a considerable period while that challenge worked its way through the courts.

I think it is, quite frankly, a lawyer's picnic if they have a client who does not want to be examined in a public arena. So how do you avoid that? You either mandate that all hearings must be in public, and that is clearly not the right way to go. You mandate that no hearing should be in public, and I know the committee was of the view that that was undesirable. Or conceivably you put those judgements out of the jurisdiction and you preclude the court from reviewing those judgements. That is a significant step.

Leave the bills the way they are and the very real risk is that after a few challenges the commissioner is going to think: "Look, we need to get on with the job. It's just too difficult to spend potentially years caught up in legal challenge. Let's do it in private." I think that is the real risk. And I do not think I am alone in that view; I think some others might have put that to you.

MS LEE: Whilst it may be a lawyer's picnic to mount those legal challenges, do you think that having those legal arguments defeats the purpose of a person who is seeking to keep things under wraps? Given that, if it is aired in a court proceeding, there would be quite a lot of discussion on the substantive issue of the complaint made in the first place, if it was to be a legal challenge it would presumably—unless an exemption existed—be played out in open court.

Mr Skehill: There may well be orders for non-publication in relation to the challenge. As a lawyer, you would seek those. And depending on the nature of the allegations and whether they were reasonable, for a target's point of view, it may be preferable to have an argument about whether there was a public hearing than to have an argument about whether they were corrupt. It could be the lesser of two evils.

MS LEE: Yes. And surely that would be a risk any lawyer would need to advise their client about, if that was to happen?

Mr Skehill: Yes, exactly.

MR STEEL: Do you think a provision that bars judicial review of the provisions around the public hearing is undesirable?

Mr Skehill: I certainly do not like it, and certainly the courts do not like it. Courts interpret those clauses extraordinarily closely and try to limit their operation. But as a logical proposition I cannot see another way of avoiding the risk of legal proceedings.

MR STEEL: The other way that has been suggested by our previous witness is to not include some of the words of the government bill to make sure not only that it is in the public interest but that it does not have human rights implications and to take away some of those qualifying factors that might be considered in having a public hearing

and just allow the commission to hold public hearings.

MS LEE: And then the commissioner would use their discretion to determine whether it should proceed.

Mr Skehill: Yes, but that discretion would still be able to challenge.

MR STEEL: Because it is unreasonable, potentially?

Mr Skehill: Yes. You would still want stated the reasons for a public hearing—that is, have you had regard to the relevant considerations—or you have failed to give sufficient weight to relevant considerations. If it was possible to say the commission can hold a public hearing where A, B, C, and D occur and those were objectively observable things, we would not have this problem. But I cannot imagine that that is possible. That is why I think the draftsman in each case has some generalised, nebulous, cover-all-type criteria.

While I personally am opposed to public hearings, as I said in my submissions to the previous inquiry, I am not opposed to public inquiries in relation to systemic issues around corruption—for example, an inquiry into what should be the code of conduct for public servants or something of that order. What are the lessons to be learnt out of these prosecutions that have been through the courts, that sort of systemic inquiry? That could well be handled in public, but it is the targeting of individuals prior to judgements of guilt that concerns me.

MS LEE: If it was a generic public inquiry about conduct and what creates corrupt conduct, how would the commission to which we are trying to give quite extraordinary powers differ from, for example, an Assembly committee undertaking that particular inquiry and getting experts to come in and give evidence about what type of conduct is corrupt?

Mr Skehill: Not necessarily different; just a dedicated, hopefully expert, body doing it. Parliamentary committees, with the greatest of respect, are perhaps not as expert as one might hope the commission might be, otherwise the commission might not be necessary.

MS LEE: Sure. In the previous committee one important aspect of the commission included educating the public about what is corruption. That is certainly a part of the remit that, if I understand it correctly, the committee foreshadowed. But obviously some of the more controversial aspects are the use of covert or investigatory powers, which is why we are now charged with looking at some of those provisions.

Mr Skehill: Yes. Those powers are similarly appropriate for investigating allegations of corruption by individuals. If you are conducting an inquiry into a generalised matter like the desirability of banning political donations from property developers or something like that, I should not imagine that there would be any cause for use of those coercive powers. The public utility of that sort of inquiry could be very high.

MS LEE: Do you have any concern that if the targeted investigations, as you referred to them, all happened behind closed doors there is a real risk that one of the purposes

of setting up a commission like this—that is, to foster public confidence—may be impacted? And how do you get around that?

Mr Skehill: Always when you establish a star chamber-type entity there is concern about what happens behind closed doors, but it is a matter of balancing that concern with the rights of those people who are subject to the process and having safeguards against the wrongful exercise of those powers, such as the complaint to an inspector. There is that question about who looks into complaints about the inspector. Who is taking care of the caretaker's daughter while the caretaker is busy taking care?

The ACLEI legislation allows the minister to appoint a special investigator to investigate complaints against the performance by ACLEI of its statutory duty, and the special investigator has all the powers of ACLEI for that purpose. I have been appointed a special investigator on a couple of occasions. So there is a safeguard against ACLEI running amok behind closed doors. Similarly, there is some provision in these draft bills for review of the commission's powers through an inspector arrangement.

MR STEEL: I have a question in relation to the appointment of the commissioner. I think you suggested in your submission that the people that can be appointed to that role are from far too narrow a field. We had a suggestion from our previous witness that it might be extended to senior counsel and Queen's Counsel as well as to judges, which is the government bill requirement. What do you think about that suggestion?

Mr Skehill: I think that would certainly be preferable to what is in the government bill now. But it is still quite limited and I am not too sure quite why you need to have it so limited. Let me give you a couple of examples. The chap who was the inaugural ACLEI commissioner would not be able to be appointed. Yet he did his job, from my perspective, exceptionally well. The person who was appointed after the Fitzgerald inquiry to head the main administrative committee that came out of all that would not qualify under that. Why be so limited?

The requirement that it be a judge with knowledge of the process of government is way too limited. Bear in mind that we are talking about trying to find someone who is prepared to work, and probably live, in Canberra. You have a small population there. I can tell you from my experience in trying to recruit judges into the ACT, a lot of people who would be well qualified in other jurisdictions just do not want to come and live in Canberra—all sorts of reasons, notwithstanding that we all think Canberra is God's own city.

Very few of those people who are qualified as judges and as senior counsel or as Queen's Counsel will have real knowledge, detailed knowledge from experience of the way in which government operates, which is probably far more important in considering issues of corruption than legal skills, in my view.

THE CHAIR: I note that you have also made an observation around the fact that they probably should be able to hold other employment. I presume the reason it was drafted in one of the bills that they could not was to avoid conflict of interest. But you think that that is manageable.

Mr Skehill: I would have thought it is manageable, yes. It may not be important if the commissioner is going to be full time. But if there is any prospect that a commissioner might not be needed on a full-time basis, precluding other employment, again, narrows the field of potential candidates. I would have thought ordinary processes of dealing with conflict of interest would be an adequate safeguard, rather than banning other employment altogether.

MS LEE: The only other question I had was whether you might be able to elaborate for the committee on some of the concerns you have raised about parliamentary privilege and, in particular, the parts in Mr Coe's bill about the court's role in relation to determining privilege and also about the MOU when it comes to Assembly issues.

Mr Skehill: Yes, this is a very complicated issue and I—

MS LEE: I know. That is why I am asking you to explain it to us.

Mr Skehill: do not profess to be an absolute expert in the field of parliamentary privilege. I have been appointed by the Senate and the Senate privileges committee on previous occasions to determine issues of parliamentary privilege where police have raided members' offices and seized documents. So I have got a bit of experience. But my understanding is that one aspect of the law of parliamentary privilege is that it is for the parliament, not the courts, to decide whether parliamentary privilege extends to particular documents. These bills say, or strongly imply in the case of the opposition bill, that it is not a purpose of the bill to change the law of parliamentary privilege.

If that is correct, and if my understanding is correct, then the provisions that say the court can determine whether documents are subject to parliamentary privilege are inconsistent with the law of parliamentary privilege and, therefore, inconsistent with those provisions that say or imply that the bill was unintended to change the law of parliamentary privilege.

Under the self-government act it would be possible for the Assembly to vary the law of parliamentary privilege so as to give the court this role. But that would, in my view, require the bills to be amended to make it clear that the law of parliamentary privilege was being amended to that extent.

Similarly with the MOU concept, if it is for the parliament rather than the courts to determine the application of parliamentary privilege, then the Speaker, through an MOU with the commissioner, could do that. You could have an MOU which dealt with a whole lot of procedural things like whether the commissioner would give notice to a member before raiding their office, how much notice et cetera—those sorts of procedural things, but not determinative things.

As I say, I do not profess to be the law's leading expert on parliamentary privilege. Certainly there is the Federal Court decision that I referred to in my submission, and if that is right, and if my understanding is right, then there is a disconnect in both the bills. I suspect it is something on which you really do need, if you have not already got it, some very expert and very targeted legal advice.

MS LEE: In terms of determining parliamentary privilege, if, as you say, it seems it should be a matter for parliament, not the courts, is there any risk that it could be used as a political weapon? What I mean by that is that, by virtue of the numbers, the government of the day may be able to make that decision as a "parliament" and the opposition of the day would have no avenue to challenge that. Is it a real risk that that may occur?

Mr Skehill: Yes, it is a risk, I think. But my point is that that is my understanding of the relevant law.

MS LEE: Yes.

Mr Skehill: I think there are some risks that you just have to recognise and live with.

THE CHAIR: Thank you, Mr Skehill. There are no further questions at this end. Is there anything you want to add in light of that discussion?

Mr Skehill: No. Thank you for the opportunity. I wish you well in your deliberations.

THE CHAIR: We appreciate your taking the time to look at this and particularly touch on some of the more challenging legal issues. I think this has drawn a couple of very important matters to the committee's attention that we will follow through on. We appreciate your analysis. We will now formally suspend the hearing.

Hearing suspended from 10.58 am to 1.01 pm.

DUNCAN, MR TOM, Clerk, Office of the Legislative Assembly, Legislative Assembly for the ACT

SKINNER, MR DAVID, Director, Office of the Clerk, Office of the Legislative Assembly, Legislative Assembly for the ACT

THE CHAIR: Welcome to the resumption of hearings. I welcome the Clerk of the Assembly, Tom Duncan, and David Skinner. Thank you for appearing before the committee and thank you for your submission. I am sure you two are aware of the privilege card and are happy to proceed. Would you like to make any opening remarks before we go to questions?

Mr Duncan: No, I am happy to let the submission stand.

THE CHAIR: It is a very extensive submission. I want to talk about the execution of a search warrant. You have talked about the fact that that should be notified to the Speaker rather than the Clerk. I want to explore the thinking behind why you drew that particular distinction.

Mr Duncan: It is really a matter that goes to the precincts of the Assembly, and the Speaker is the custodian of the Assembly precincts. It is the Speaker who is directly relevant to the act. That is probably the main reason why I think it is more appropriate for the Speaker to have that responsibility than the Clerk. The Speaker is the person who can direct people to be excluded from the precincts, not the Clerk. All the power of the precincts is in the Speaker's hands rather than the Clerk's.

THE CHAIR: That makes sense. Recommendation 21 makes reference to the fact that the code of conduct should not be a basis for investigation. I take it from your argument that the code of conduct is quite different to a statutory definition of "corrupt conduct". Am I correct in that distinction, and do you want to elaborate on this point? I think there is an expectation amongst some that the code of conduct is quite an important measure of how parliamentarians are judged.

Mr Duncan: Sure. The system we have now is that any alleged breaches of the code of conduct go to the Commissioner for Standards, and that seems to work pretty well. The danger of putting that definition into a statute would mean that the jurisdiction of the Commissioner for Standards is made a bit murky. The things mentioned in the code of conduct are not systematic, high level corrupt conduct in my view.

With some other facts there may be an example where some breaches of the code of conduct with other behaviour could be construed as corrupt conduct. But I would argue that minor level breaches can be dealt with internally by the Commissioner for Standards. That is why I have argued in the submission that we should retain the Commissioner for Standards and have some sort of system where, if the Commissioner for Standards investigates a breach of the code of conduct and determines that there are some wider issues, there should be the ability for the Commissioner for Standards to refer to the integrity commissioner.

Equally, we have suggested that if the integrity commissioner looks at some sort of alleged breach and thinks that it is not of sufficient standard to be corrupt conduct,

they could refer it back to the Commissioner for Standards and the Commissioner for Standards could do it. That could be dealt with in an MOU, which I think has been suggested in both the exposure draft and Mr Coe's bill.

Mr Skinner: The way the code of conduct for members is currently drafted invites members to maintain positive attributes of conduct rather than prohibiting certain conduct. Often what you will find in the statutory definition of "corrupt conduct" is things that ought not to be done, rather than things that should be done.

The way it is currently drafted a lot of the things are to have integrity, be honest, be courteous to members of the community and so forth. And a breach of some of those positive attributes is not typically a way of making a statement about what may or may not be corrupt conduct.

That is not to say that you could not devise a new type of code of conduct that had more of the features of things that would be considered corrupt, but in its current form it does not neatly lend itself to shedding light on what is corrupt conduct. That is one of the points we considered.

THE CHAIR: In terms of the point you were making, Mr Duncan, I think the way the committee has thought about this in terms of public service agencies is that there is a level of internal investigation for lower level allegations and then there is another tier when you get into the serious misconduct or corrupt conduct. You are essentially suggesting that the Commissioner for Standards plays the role of that internal process for the Assembly.

Mr Duncan: Absolutely. My colleague the Clerk of the upper house in New South Wales is very much in favour of a commissioner for standards system in New South Wales. I am sure he will not mind me saying that if there is a breach there it just goes straight to ICAC and there is no lower level body that can determine minor breaches of the code. It can only go to one body.

A lot of our other jurisdictions across Australia look at our system where we have a code of conduct and a Commissioner for Standards and an ethics integrity adviser as a good system which seems to have worked pretty well since we established it.

Mr Skinner: To be clear, there should be no suggestion that because there is a code of conduct under resolution that that should in any way protect members who engage in corrupt conduct as a statutory matter. If there were a sense that something was corrupt conduct, it could be addressed under the statutory provisions rather than in breach of a resolution, which is a whole different process.

In a way you have a two-track process and both the Commissioner for Standards and the integrity commissioner should be able to cross-refer to make sure there is a level of proportionality to the level of misconduct that might be alleged. I do not think either bill presents problems in that regard.

MS LEE: Do you think that it satisfies the public's need for scrutiny? I am sure that when it comes to corruption issues the public are a lot more interested in what politicians get up to. Do you think that deprives the public from seeing things play out

in the public arena and making sure that they get their sense of justice? Do you think there are any concerns in that regard?

Mr Duncan: Not at all, because currently we have a Commissioner for Standards looking at breaches of the code of conduct. We are now going to double that effectively by establishing an integrity commissioner to deal with serious misconduct and alleged corruption. So we are putting more scrutiny on members than we already have at the moment.

I cannot see how that fails the pub test. If it is a minor breach of the code of conduct it will go to the existing Commissioner for Standards, but if it is a serious breach along with other types of behaviour then it will go to an integrity commissioner. Again, there is a great deal of scrutiny of members on both sides.

MS LEE: Given that both bills allow anybody to make a complaint to the commission, it gives them that right to do so.

Mr Duncan: Absolutely.

MS LEE: I want to talk about the oversight committee. Would you as the Clerk prefer that the oversight function be conducted by a newly established committee or by an existing committee?

Mr Duncan: I have been on record as saying that we have too many committees in the Assembly with the small number of members, so I preface my comments with that in mind. In my original submission to your predecessor committee I suggested that the oversight committee could possibly be the Standing Committee on Justice and Community Safety or the Standing Committee on Administration and Procedure.

Other jurisdictions have a standalone committee. I had a meeting this morning with the President of the Western Australian Legislative Council and she told me that they have a separate standalone committee in Western Australian, so there are various models around Australia. I do not have a really strong view. There are pros and cons for all arguments.

I do not think it would have a huge workload. I think it is something we should have a look at a couple years after establishment, but my sense of it is that it would not be great workload so it could go to an existing committee. The justice and community safety committee already monitors the Electoral Commissioner so that would probably be a good fit. Equally, the Standing Committee on Administration and Procedure monitors the Office of the Legislative Assembly and deals with their funding requests and things like that. So I do not really have a strong view.

MS LEE: Given that the justice and community safety standing committee currently has a majority of government members, do you think that there is a risk of perception that that might not be the right balance? Do you have any concerns about that?

Mr Duncan: I do not believe there would be an issue. That committee currently has an opposition chair, so I think that is a good thing. The composition of the Assembly as a whole does not really matter in the model I have suggested because we are

suggesting that if there are issues about parliamentary privilege it would go to an independent legal arbiter.

I understand you were talking this morning about government majority and things like that, but we are suggesting that if there is a dispute between the integrity commissioner and a member about documents or information and whether they should be available, that that go to an independent legal arbiter appointed by the Speaker following consultation with party leaders.

So it would not really matter whether there were a government majority or minority; the Assembly would be passing that to an independent third-party arbiter to determine. The Speaker would be submitting a bid like she does for the Electoral Commissioner, like she does for the Auditor-General and like she does for the Office of the Legislative Assembly after consultation with the relevant committee

If it was the justice and community safety committee, that committee would have a look at the budget bid and would transmit that bid. So whether it is a majority or minority, I would think that the committee would treat it on its merits. I guess that what you are suggesting is that if there are some problems with the integrity commission, there may be perception that government members—

MS LEE: My point was more about the perception to the public more than—

Mr Duncan: But I think you can say that about any committee, whatever the political persuasion of it is. Ultimately they will be responsible and accountable to the Assembly for their actions.

MS LEE: There were two big issues you just raised. One was in relation to the oversight in terms of the funding and is the commission doing its job and whether that is JACS or admin or whoever it is. The other part was in relation to issues of parliamentary privilege.

Mr Duncan: That was slightly irrelevant, but I was trying to drag it in.

MS LEE: Someone mentioned it. You have submitted a process, as a recommendation, on the independent arbiter determining an issue of parliamentary privilege. I am not sure whether you paid attention to any of the discussion that happened this morning. There was obviously a question we raised about who determines issues of parliamentary privilege, the parliament as opposed to the courts. Would you say that this is a good way for everyone to have faith in that process? If it is not going to a court, it would not be used as a political weapon per se because of that independent arbiter process.

Mr Skinner: Yes, I heard you touch on that this morning. The officers put this up, I guess, as a matter for consideration rather than sort of backing it to the hilt. I think what we wanted to say is: here is a model that might be able to be contemplated at the beginning of the inauguration of a commission that would not be in any way tainted.

If you were to decide a process for determining privilege when a certain case arose, there would be a risk that the adjacent political circumstances would cast some doubts

on the integrity of that process. So I think that what we were suggesting to the committee was that if you are able to think about this ahead of time and everyone could agree without having any particular claims on the table, you would have a process that more people would have faith in.

I think what was suggested is essentially that the authority for making a determination of a claim of privilege in this setting could be done through the Assembly through an independent arbitration process in a way that sort of maintained the jurisdiction of the Assembly in these matters, which is not to say that the courts are not entitled or able to make these sorts of determinations in particular cases. It is certainly the case that they have and do.

But at the very beginning of a scheme to have a commission like this, this is the Assembly's opportunity to put its stamp on how it will actually give effect to the doctrine of privilege. An independent arbitration process that operated along the lines of the process in relation to public interest immunity claims might be a suitable mechanism for doing that.

We were discussing earlier that in many ways this is sort of a mirror image of that process. In one case you have the Assembly, the legislative arm of government, making a demand for a document from the executive and the executive trying to withhold that information on the basis of a public interest immunity.

In this case you have essentially sort of an agent of the executive, through the commission, asking for a document that is in the custody of a member within the legislature who is resisting that claim potentially on the basis of an immunity, absolute immunity, under privilege.

To have a process that is quite analogous, to have a parity between the processes provides a nice symmetry to it. It could be done in such a way that the political circumstances around any particular claims were at least one layer removed. It would involve, I guess, anybody appointed to such a role being held in esteem by the people in the Assembly.

We would have thought, much like with standing order 213A, the person would be appointed by the Speaker, perhaps in consultation with the relevant committee. It would offer a way of producing an outcome also that did not then present as being judiciable down the track. The Assembly could decide the matter and the commission could move on without the need for protracted legal argument and all the rest of it.

I think we have said that if this were a model that the committee were interested in, it would need further consideration perhaps through administration and procedure and some legal advice around just how it would work in precise detail. But I guess we were putting to the committee what the committee's appetite was for that sort of arrangement.

MR STEEL: Following on from that line of questioning, the sort of rationale behind this is, potentially, going to the courts and basically arguing that it is unconstitutional. Is that where it is going, because of the separation of powers? Parliamentary privilege comes from the legislative branch. You are concerned about that being challenged if it

were determined by a court?

Mr Skinner: I guess there is an issue; I heard the Ethics and Integrity Adviser this morning talking about some particular cases that he had been involved in. He mentioned a very interesting case in the Senate a number of years ago where the Federal Court basically said that it did not want to determine a matter; what Justice French regarded as a claim between the executive and the legislature.

What came from that was a resolution of the Senate. When the Federal Court returned these documents that were in question to the Senate, it then proceeded to make an order that an arbitration process be engaged in. It was actually Mr Skehill who was the arbiter in that case.

We also adopted a very similar practice in either 2001 or 2002. There was an issue where a warrant was issued under member's office here. It was the subject of a privilege claim. There was a resolution in the Assembly that was almost word for word the Senate resolution.

The basis behind that is essentially one of the Assembly saying in these sorts of matters that it is desirable that the Assembly maintain its jurisdictional prerogative to determine them. But there is always this tension between whether the courts have a role and whether they do not.

I know that many legal scholars do not regard the Crane v Gething case as being determinative and the end of the matter. I think that is the way it will always be with privilege. I do not think we will ever have this end point at which we know all there is to know about that interaction. But I think that, from an institutional perspective, the Assembly has an opportunity to say how it would like to see these sorts of matters resolved in the course of the commission's activities, and that would be more in keeping with the spirit of the Assembly having some exclusive jurisdiction in these sorts of issues. Does that help?

MR STEEL: It does. You mentioned that a committee might be consulted during the arbitration process. Which committee would you see having a role because it would—

Mr Skinner: When I said consulted, I think I meant in relation to the appointment of the person.

MR STEEL: The appointment of the person; okay.

Mr Skinner: I think you would really have to make the arbiter completely arm's length once appointed. They would in many respects perform the role that a court would. They would have regard to relevant case law. They would have regard to the operation of the Parliamentary Privileges Act and section 24 of the self-government act. They would have regard to all the things that would be material to the issues.

But what the Assembly would need to do is be prepared to sign up to the arbitrated outcome and to avoid the sorts of problems that Ms Lee alluded to this morning where you would not want a majority in the Assembly to essentially be used as either a shield or a sword, depending on the political circumstances.

MR STEEL: How do you see that sort of arbitration system being established? Is it through standing orders or through a bill? My sort of follow-up question from that is: once the arbitration decision is made in relation to privilege, how then does it come to the Assembly? Is the arbitration decision determinative, does the Assembly just have to accept the decision or do they have to vote on it?

Mr Skinner: These are all really good questions. Again, without wanting to say that this is the categorical view of the office, this is something that the committee may be interested to explore further. Indeed, the admin committee could have a role in thinking these issues through further.

But what we initially had in mind was that there would be fairly limited statutory provision—in fact, no statutory provision—for such an arrangement. It would probably be our preferred view that in relation to privilege, the statute could say something along the lines of "Where there is an issue of privilege the Assembly will decide the matter." The concern is that we would not want to see some inadvertent declaration of powers and immunities of the Assembly. So having a very limited statutory or legislative basis for these sorts of things would preserve section 24 of the self-government act, which links us to the House of Representatives, and the Parliamentary Privileges Act.

We would like to see all that fairly much contained and stay the same. We would then see that there could be either a continuing resolution or a new standing order that would establish the source of authority for such a process. Then you would have sitting underneath it something more of the character of an MOU, which would be an agreement between the commissioner and the Speaker, which would be tabled in the Assembly, which is how it operates in, say, the New South Wales parliament or the Australian parliament with regard to the AFP or the ICAC.

It would be a three-level thing that would have some very earmarked piece in statute, something more concrete—an authority in a standing order or resolution—and then something more administrative and detailed in an MOU or a protocol.

Mr Duncan: To answer the other part of your question, Mr Steel, once the arbiter had made a decision, that would be final. Just like in the Assembly case when we call for documents from the executive: we have called for documents from Icon Water, for instance. If that goes to an independent legal arbiter, the independent legal arbiter will make a determination and either uphold or not uphold a claim. If there is a claim made, and I am assuming that a claim might be made, that decision would be final.

That is not to say that someone could not go off to the Supreme Court or the Federal Court and challenge that decision. But I doubt very much that the courts would not say, "Hang on; this looks like the internal workings of the parliament. I do not think we want to go there. We let the Assembly or the parliament determine matters of parliamentary privilege". They would leave it to us. That is the model that we would suggest in our submission they probably would want to go down.

I think Mr Coe's bill has the Clerk appearing before the Supreme Court to argue matters of privilege and that puts—

THE CHAIR: Mr Duncan, we know how much you would enjoy that.

Mr Duncan: I would not enjoy that because the reality is that members will be coming to me seeking advice on parliamentary privilege. That puts me in a very awkward position. I am advising members on all sides on parliamentary privilege and yet I am being thrust into the Supreme Court to argue a particular view point.

THE CHAIR: What you are essentially proposing here is a mirror of standing order 213A.

Mr Duncan: Yes.

THE CHAIR: In which all sides of politics have agreed to have a binding mechanism because of—

Mr Duncan: Independent.

THE CHAIR: an uncertainty about how else that decision can be taken.

Mr Duncan: Yes.

THE CHAIR: In terms of the surrounds of government and the like.

Mr Duncan: That is correct, yes.

MR STEEL: When the decision is actually handed down to the Assembly, the whole Assembly would be able to see the decision.

Mr Duncan: The way that the mechanism would work is that the decision would go to the Clerk. The Clerk is authorised to provide that decision to all members. If the document decided that it is not covered by parliamentary privilege, the Clerk would then give it to the integrity commission. But if the document were determined to be covered by parliamentary privilege, then the document would be returned to the member who had claimed the parliamentary privilege. That would be the process, I think.

MS LEE: Presumably there would be written reasons for the decision of the independent arbiter?

Mr Duncan: Yes, and just like in standing order 213, that decision is also circulated. When the Clerk informs members of the decision, the reasons for the decision are also given.

MR STEEL: And the document itself being made available to members?

Mr Skinner: The purportedly privilege document?

MR STEEL: The document in question or whatever it is. If it is a document, which it may not be, depending on what we are talking about.

Mr Skinner: Yes, and you are right; it could be a thing.

Mr Duncan: I have not turned my mind to that. But bear in mind that if the integrity commission has requested the document and gets the document, then they will be leading that as evidence against a member—

THE CHAIR: Maybe, maybe not—

Mr Duncan: Maybe not. But it—

MR STEEL: They could be doing it in private, though; that is the point.

Mr Duncan: That is right.

MR STEEL: Not necessarily in public hearing.

Mr Duncan: No, that is really up to the integrity commissioner and I have not got a view—

Mr Skinner: I think that is a really important point. Again, this is a proposal that has not contemplated every eventuality, but if there was a general view of this committee that that was workable, those sorts of issues could be things that the admin committee or, indeed, this committee, if it has views about it, could deal with. It is not beyond a person drafting that sort of resolution to contemplate those.

THE CHAIR: Mr Steel picks up the point that early in a commission's investigation, they may be doing the preliminary investigations and seeking documents. At that point it is still a confidential investigation. Yes, it is the nuance that will require a little work.

Mr Duncan: Yes.

MR STEEL: Executive documents are subject to FOI and non-executive documents are not, usually.

Mr Duncan: I can envisage the situation where an integrity commissioner comes into the Assembly, requests some documents, a member claims parliamentary privilege, the independent legal arbiter process is invoked and the independent arbiter says, "No, they are covered by parliamentary privilege." So the integrity commission effectively will have to rely on other evidence to prosecute his or her case.

But it may well be that as a result to that investigation, someone alleges that the member might have breached the Assembly's code of conduct. They may invoke the Commissioner for Standards to say, "Yes, you might not have met the threshold of corrupt conduct but you might have breached the continuing resolution in relation to the code of conduct."

You have to be a little bit careful to make sure if there were an action going on against a member in the integrity commission and a concurrent being done by the

Commission for Standards. But I think what would probably happen is that the Commissioner for Standards would hold off, wait for the completion of any integrity commission process and then, if necessary, pursue the things. But that is something that I just thought of when you raised that question, Mr Steel.

THE CHAIR: Colleagues, are there any other questions? I am conscious of the time. Thank you. I think we could probably discuss these matters at some more length but we appreciate both the quality and extent of your submission and for appearing before the committee today. We will briefly suspend the hearing.

Short suspension.

ARCHER, MR KEN, Former President, ACT Bar Association

THE CHAIR: I welcome Ken Archer, the president of the Bar Association. Thank you for appearing and for making a submission.

Mr Archer: I should clarify that I am no longer president of the ACT Bar Association; I am the immediate past president. There has been an election—

THE CHAIR: My apologies—I have failed to keep up.

Mr Archer: It was a tie. So there is no president of the Bar Association at the moment. We have to run a new election.

THE CHAIR: Thank you for clarifying that. Nonetheless, we welcome your appearing and representing the bar's views on these matters. You are, of course, aware of the privilege statement. You are probably perfectly comfortable with that.

Mr Archer: I am, yes.

THE CHAIR: Thank you. Would you like to make any opening remarks, or do you prefer to go straight to questions?

Mr Archer: Straight to questions, I think.

THE CHAIR: There are a number of matters that you commented on in your submission but did not really draw a conclusion on. If I might, I will seek to draw you out on a couple of those. The first is under the section on the definition of corrupt conduct. In the second part you refer to "the notion of a reasonable suspicion" and then note that the exposure draft is expressed in a particular way and that the bill has expressed it in similar terms. Do you think that the framing of words meets your original intent, or do you think there is a shortcoming there?

Mr Archer: It does meet our concerns.

MS LEE: You note, on page 2 of your submission, that there has been a bit of public discussion about the government's exposure draft clause 8(3). That is in relation to the fact that if an investigatory body has investigated the conduct it may preclude the commission from doing so. Do you think that the way that clause is drafted currently may risk the unintended consequence of restricting the commissioner from, in practice, investigating claims perhaps already investigated by the Auditor-General, given that the Auditor-General has given evidence previously confirming that it is not her office's role specifically to make findings of corruption, and that if it were to restrict a commission it would go against the whole purpose of the commission, which is to find corrupt conduct?

Mr Archer: There is a political issue involved here which is not ultimately for the bar to resolve. It seems to me that there is the potential, given the powers of the Auditor-General, for the effect of those provisions to be to identify past inquiries of the Auditor-General as potentially falling within the terms of the section and therefore

preventing consideration of them. It depends, though, on how you characterise the matter that was looked at. It is not for us to advise as to how it might be approached. But you can look at the same thing from many different angles, and it is the definition of what the referral to the Auditor-General actually was that will potentially define what the Auditor-General previously looked at. It is going to be very difficult, it seems to me, to define what that matter was in a way that will exclude it from consideration. That seems to me to be—

MS LEE: On a practical level, yes.

Mr Archer: Potentially, yes, a practical problem but ultimately, it seems to me, it is a political problem. If there is an intention on the part of the Assembly to exclude consideration of matters that have already been considered by the Auditor-General then that is a matter for the Assembly, ultimately. Our comment was that it probably needs to be looked at as a question of drafting, if that is what the Assembly's intention was.

MR STEEL: You have raised that both bills do not adequately deal with the potential role of the commission in gathering evidence and then sharing that evidence with the DPP, for example, for it then to prosecute people for criminality. What do you think the bill should be doing in that regard?

Mr Archer: I think that in our original submission we said that consideration has got to be given to the mode by which the commission gathers the information so that it can best use that information downstream to inform the prosecution. If the prosecution of wrongdoers is seen to be an important aspect of the commission then the commission needs to think about how it gathers its evidence so that ultimately it is going to be admissible.

In the exposure drafts of the government's legislation there are various privileges and so on that attach to pieces of information or evidence that is given at a hearing. Inevitably, given the derivative use immunities and other immunities, that is going to restrict the capacity of the commission ultimately, if that is the evidence they are relying on, to hand it to the DPP in a form that is going to be admissible. All we say is that, as best it can, the legislation should guide the commission to go about this task in such a way as to maximise the potential for prosecution. Both at the New South Wales level and at the national level it is a concern of the bar to make sure that things are done in a way that maximises the potential of what you are doing and guided by the commission accordingly.

MS LEE: This morning there was some evidence from Mr Harris that, in a way, when it comes to findings of corruption, the finding of corruption in itself is almost more important than the person going to jail for it—that is, the prosecution down the track. That seems inconsistent with what you have just said about the commission needing to be careful to collect evidence in such a way that it can be used further on down the track in prosecutions. Do you have any—

Mr Archer: I do not say the finding of corrupt conduct is without substance or meaning—to the contrary. But if you are looking at a complete package, where the ultimate intention would be to prosecute people who have breached the law and where

the evidence in relation to that has come out of a commission process, then you want to be able to maximise your chances of securing a conviction. That is all we are saying.

THE CHAIR: I want to explore the issue of how the commission would investigate judicial officers and the AFP. In your submission you have been clear and positive about the inclusion of the AFP but have precluded the judiciary. Your rationale for that is that there is already a group to look at the judiciary: judicial commissions and other processes. When the AFP appeared before the committee in the last round, they argued that they already had someone to oversee them. The committee ultimately concluded that both the police and the judiciary should be included. It would be fair to characterise that as forming the view that the Judicial Council probably is not equipped to make a corruption investigation, and that an integrity commission would largely be making a finding of fact and the judicial commission would come back later and form the view on a conviction. I would be interested in your views on how those things are consistent and any other commentary you have.

Mr Archer: It is a separation of powers issue. That is the way we put it. The same problem does not infect consideration of conduct engaged in by the AFP. In relation to judicial officers, you have got the executive investigating judicial officers through the commission's process. That is where the difference lies. I am trying to conceive of a situation where, in practice, the processes of the judicial commission would not be sufficient to raise the threshold of an investigation in that context and would not permit an appropriate investigation of the conduct of the judicial officer.

THE CHAIR: My observation was not about their powers but about their capability. One of the discussion points around an integrity commission has been that corruption is so hard to identify and investigate, and that is why we give it a series of extraordinary powers but also staff with particular skills.

Mr Archer: I hear what you say, and the answer is a simple one about separation of powers.

THE CHAIR: Okay, so it is a matter of distinct principle.

Mr Archer: Yes. It is an important principle.

THE CHAIR: Thank you for clarifying that.

MS LEE: Earlier today the ethics and integrity adviser spoke about the potential risk of creating a real, in his words, picnic for lawyers in a—

Mr Archer: Bring it on.

MS LEE: I know. I will give you a chance to stick up for the lawyers. When we were talking about public hearings and examinations—and I note the bar's views on that—previously he said that there was a real risk that it could create a picnic for lawyers in the event that the commission's decision to go down the public hearing route could be challenged in the courts, because then it has the potential for savvy lawyers, on behalf of their client, to tie up proceedings for up to a couple of years to have the fight that a

matter not be heard in public. He said that the only way that you could minimise or get rid of this risk was to oust the court's jurisdiction to be able to hear any challenges to that decision. Do you have any views on that?

Mr Archer: It is a very pessimistic view of the legal world.

MS LEE: To be fair, I think he is a lawyer too.

Mr Archer: It would not take two years, for a start. One would assume that the number of challenges would be rare. Philosophically, I do not see a reason for picking out one aspect of the process and exempting that from review because there is procedure set out under the exposure draft. I do not see why that would necessarily be one that you just pick out.

I should emphasise that the bar has taken a slightly different view to probably both sides. We have been suggesting that the presumption be in favour of private hearings rather than public hearings. I noted that the explanatory memorandum to the exposure draft described hearings as a form of punishment in themselves, which I thought—

THE CHAIR: I missed that one.

Mr Archer: That is what it said. I do not think that should be there in the final version of it. But our position has remained that the presumption should be in relation to private rather than pubic, because of the very fact that it has such a significant effect on people's reputation and rights. The presumption, which obviously can be disclosed, should be in favour of private hearings rather than public. If that is adopted, the challenge would be against a presumption. But I hear what you say in relation to the legislation speaking differently at the moment.

THE CHAIR: It is interesting that the account that you put to that is that all other court proceedings are starting from the presumption they are open court proceedings. One of the views put to the committee is: in acknowledging that that is our judicial history and protocol, why would this be different?

Mr Archer: It is not a court of law and it is not about the determination of guilt or innocence, which is the ultimate issue in justifying the court being open to the public. The breach of the law—it is an exploration, it is inquisitorial and it is about evidence gathering, really. And usually you could argue that the processes of the AFP are not in public. Investigations are not in public. Traditionally inquiries of that type, where you are actually evidence gathering, are not in public.

But I do not say that these hearings are the same as the police officers on the beat. It is clearly different. But you could make a case to say that, to some extent, it is a preliminary process to an ultimate finding and therefore in some cases—we do not say all—it should be in private rather than public.

MR STEEL: I want to ask you about the derivative immunities and whether you think the balance in the legislation is right. You said that there was a compromise that had been struck. Do you think that is the right compromise?

Mr Archer: The balance is between traditional privileges that apply and an attempt to preserve the utility of the evidence gathered. I did not research it exhaustively, but I think, as drafted, this is a place where other ICACs have not gone. I think. Is that right? You probably know better than I. But the derivative use stuff, I think, is probably a unique experiment to try to give some balance to the equation. And I do not see a problem with it.

It will have complications in a court of law. But there are challenges that courts routinely consider. It is a 128 restriction, the Evidence Act, section 128, self-incrimination protections. They have a form of derivative use there and the courts are used to filtering through evidence to determine what is fresh and what is derivative. I think it is a reasonable balance.

MS LEE: Just going to the appointment of a commissioner, I note, on a practical level, in terms of who is eligible to be a commissioner, one concern that has been raised is that if you make the bar too high then the risk is that it is such a small pool that it will really limit who can be appointed.

Mr Archer: Seventy-year-old blokes, I think.

THE CHAIR: You made that point very eloquently in the submission, I thought.

Mr Archer: Yes. If you want 70-year-old blokes, that is a matter for you. But I think realistically that is going to be the pool, is it not? There will be some retired female judges. But because they are fewer in number, they are going to be fewer in the pools. That is what you will be limited to.

MS LEE: And certainly the ethics and integrity adviser also thought that having to work in Canberra was a bar as well. We had that too. On that, you did say that there is a glaring omission in the exposure draft and the bill, I think you said, that does not set out a criteria in relation to the acting commissioner, and that should be addressed?

Mr Archer: Yes.

MS LEE: And also, of course, in terms of putting forward a time period in which an acting commissioner can be—

Mr Archer: I thought some of the background stuff was less convincing in both pieces of legislation, and even in the exposure draft, as to the inspector position it seems, although it is part time, quite large. I am not sure they are going to have enough work to do. In our original submission we thought that there was definitely a need for that sort of position. But the qualifications and the time in which acting appointments can be made, and the like, I thought, were not as convincing as other pieces of the legislation. I think the threshold for both positions is too high and the inspector might be too large in the scheme of things.

THE CHAIR: It is suggesting more what is generally described as judicially qualified, having been a lawyer for five to 10 years?

Mr Archer: You could make it for 15 or 20, if you wanted to set the bar high. But if

you think about the people that are potentially free-wheeling it—who you might think is going to be a good person—how many of them are retired judges? I do not know. It just seems to be quite restrictive. Given that, also, you have got the protection of how you agree, at a parliamentary level, about the appointment—I do not know; you are the politicians—I am not sure if that agreement is going to be easily reached or not. But it is a significant threshold in itself, is it not?

THE CHAIR: Yes.

Mr Archer: It would be somebody that you trust.

THE CHAIR: Yes. That threshold simply eliminates generally the prospect of somebody who is politically contentious.

Mr Archer: Yes.

THE CHAIR: It is traditionally how it works for those sorts of appointments. And it seems to largely work well.

Mr Archer: Yes.

MS LEE: It is the bar's recommendation that perhaps the better approach might be to have somebody who is eligible to be appointed a judge, as opposed to having been one?

Mr Archer: I cannot remember offhand what the standard in New South Wales is, but I think it is to that effect, is it not: eligible to be appointed to be a judge, I think?

THE CHAIR: In the ACT, for most bits of legislation I think that is generally five years as a lawyer.

Mr Archer: Yes, that is all.

THE CHAIR: For the SAB and things like that it is.

Mr Archer: It is not very long. But it is, after all, an appointment and you are going through a selection process. Obviously candidates will be chosen very carefully.

THE CHAIR: Just on the question of the inspector, I think the presumption had been that somebody would be appointed to that role. In evidence today the Ombudsman's office flagged the view that they felt that they could be eligible to fulfil that role.

Mr Archer: Yes.

THE CHAIR: And it is certainly not how I had been thinking about it. I had, in my mind, at least assumed there would be someone, as opposed to an agency. Do you have a view on the appropriateness of having someone like the Ombudsman fulfil that role?

Mr Archer: They could do. I think they could do it and it is a more cost-efficient way

of doing it. It is a matter for parliamentary judgement ultimately whether or not you want that independence to be pristine rather than potentially compromised. I do not want to cast aspersions anywhere.

THE CHAIR: It is an interesting question.

Mr Archer: They are much more an executive appointment than the commissioner would be, for example. The inspector is looking over the commissioner's shoulder and that person is a public servant. There could be appointments. That is the balance, but at the moment it just looks like the inspector is quite big for the role that they are going to play.

THE CHAIR: Thank you. Those reflections are helpful as we think that one through. Is there anything you want to add at this stage that we have not covered?

Mr Archer: Could I ask a question just as to process from here? The committee will report back?

THE CHAIR: Yes.

Mr Archer: What is your reporting date? Do you have one?

THE CHAIR: The end of October. I cannot remember the exact date.

Mr Archer: And then the government will provide a response to—

THE CHAIR: This is an unusual committee in the sense that we have had a second go after the tabling of the bill. The intent was to, I guess, use the accumulated knowledge of the committee to reflect but also to try to assist the political process. This seems to be a very complex bill. I think we have an aspiration to smooth the negotiating process of the final bill. I do not expect, necessarily, a formal government response. We have not canvassed that as a committee, but there is an expectation the bill will come before the Assembly in the November hearings. And we will seek to resolve it in the November sittings of the Assembly.

Mr Archer: And would the Assembly, independent of the committee process, be seeking the help of outside agencies, submissions, or would it rely on the process of the committee to inform the decisions it is going to make?

THE CHAIR: The aspirations are more of the latter because, between when the committee reports and when we intend to debate the bill, there is only a period of three to four weeks. It is probably not a submission process at that stage. I expect it to move into more of a political negotiation, if I am frank, at that point but with some need for some expert advice. I think there would be scope, and undoubtedly people will seek to contact you and others to get some advice as we go through those final phases.

Mr Archer: Is the legislation going to, one assumes, change out of this process, to some degree?

THE CHAIR: I would assume so. The two bills have been drafted differently.

Mr Archer: They are different styles. I understand the logic of both of them.

THE CHAIR: And I think most witnesses have said there is merit in both of them. We will need to find a way to come up with a suitable hybrid that also does not become a camel. They are my views and my expectations, but I think that is roughly how it is going to work out. Thank you very much for your submission and for appearing this afternoon. It has been very helpful to the committee. We will now close the committee's hearing for today.

The committee adjourned at 1.56 pm.