LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON INDEPENDENT INTEGRITY COMMISSION

(Reference: Inquiry into an independent integrity commission)

Members:

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

TRANSCRIPT OF EVIDENCE

CANBERRA

THURSDAY, 20 JULY 2017

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

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 9.31 am.

COOPER, DR MAXINE, Auditor-General, ACT Audit Office
SHARMA, MR AJAY, Principal, Professional Services, ACT Audit Office
MANTHORPE, MR MICHAEL, ACT Ombudsman
OVERTON-CLARKE, MS BRONWEN, Public Sector Standards Commissioner

THE CHAIR: Good morning, everybody, and welcome. I now formally declare open this first public hearing of the Select Committee on an Independent Integrity Commission.

On 15 December 2016 the Assembly established the committee to, amongst other things, inquire into the most effective and efficient model of an independent integrity commission for the ACT. The committee is also to make recommendations on the appropriateness of adapting models operating in other similarly sized jurisdictions.

On behalf of the committee, I would like to welcome the ACT Auditor-General, Dr Cooper; the Ombudsman, Mr Manthorpe; and the Public Sector Standards Commissioner, Ms Overton-Clarke, and their staff. I would like to thank you for appearing today. We have taken the slightly unusual approach of inviting you to appear together. We felt this would facilitate a conversation amongst all of us, rather than just calling each of you individually for a specific discussion. We would invite, perhaps slightly differently from a usual committee hearing, each of you to respond to points others make as well, because you each play a very important role in the integrity of the ACT public sector, and we think that having you all here presents an opportunity to get a better outcome.

Can I remind witnesses of the protections and obligations afforded by parliamentary privilege? I draw your attention to the privilege card on the table. I imagine each of you is very familiar with it. Is everyone happy with that?

Dr Cooper: Yes.

Mr Manthorpe: Yes.

Ms Overton-Clarke: Yes.

THE CHAIR: Thank you very much. I remind witnesses that the proceedings are being recorded for Hansard. For those people following the hearing today, we offer our apologies. The Assembly's cameras are currently under maintenance, and this hearing will be broadcast with only audio, not visual. To any members of the public who may be listening to the proceedings this morning, we apologise for that, and the cameras will be back on stream shortly, but not for today.

Are there any opening statements? Dr Cooper?

Dr Cooper: If I may. Thank you first of all for the opportunity to be here, and particularly to be here with my colleagues. I think that is very symbolic of how the future should unfold.

Given the material already provided to the committee regarding consideration and options through various submissions, I thought my major contribution this morning should be to focus on the role of the Auditor-General, and in so doing show you the relationship which you may or may not be aware of between audits and the identification of fraud risks, which we actually do. I will then take the opportunity to comment on some considerations for the committee.

The Auditor-General's role is threefold: to provide an independent view to the Assembly and the community on accountability, efficiency and effectiveness of the ACT public sector; to foster accountability in the public administration of the territory; and to promote efficiency and effectiveness of public services and programs provided by or for the territory. This is done primarily through undertaking performance audits and financial audits. However, it is important to mention that I am also a disclosure officer under the Public Interest Disclosure Act, and that is also an important avenue for information.

In addition to receiving public interest disclosures, or PIDs, we receive what we term representations. While representations can take many forms, they may include requests for a performance audit on a particular issue, recognising that a significant issue may exist but the PID criteria may not be met. Sometimes a PID or a representation may be considered and background work undertaken that indicates it would be in the public interest for the matters of concern to be the subject of a performance audit. As you are aware, all performance audits are made public through being tabled in the Assembly, and, importantly, I think, as part of the integrity processes we have, all these audits are inquired into by the public accounts committee. This allows for any concerns that may be present to be further scrutinised.

While neither performance nor financial audits are focused on identifying fraud—and I think that is important for the committee to be aware of; we do not focus on identifying fraud—they are, however, incredibly important in identifying inadequacies in governance and administrative arrangements, systems and/or processes that present risks with respect to an agency's exposure to fraud or corruption, or reduce the potential for the agency to readily detect fraud or corruption if it were to occur. Having said that, there may be an occasion when fraud is detected. If this is the case, we would refer the matter to the appropriate authority for further action.

Before discussing audits and their roles in identifying fraud, it is incredibly important to remember that the primary responsibility for the prevention and detection of fraud rests with those charged with governance of an agency. Throughout all of this, we should reinforce that every possible time we can.

With respect to financial audits, under the auditing standards—again, the Auditor-General works according to auditing standards—when the ACT Audit Office audits the financial statements of an agency, we are responsible for obtaining reasonable assurance that the financial statements taken as a whole are free from material misstatement, whether caused by fraud or error. The office is not responsible for making a legal determination on whether fraud has actually occurred.

As part of our audit work, the auditing standards require the audit office to make

inquiries—and I think this is an important thing that you may not be aware of—of those charged with governance and the audit committees regarding their knowledge of any actual, suspected or alleged fraud. We do this annually in financial audits.

In practice, this means the head of the agency is interviewed annually as part of the financial audit process. In the interview process my auditors ask questions such as, "What is the process for allegations of fraud being reported to you?" "Has training been provided to staff on risks and fraud matters? If not, how are the staff made aware of their responsibilities in regard to fraud?" "Do you have knowledge of any actual, alleged or suspected fraud?" I think it is important that we ask that question. We have recently had an occasion where we knew at the same time as the head of the agency did. Another question that may be asked is, "What is your assessment of the risk that the financial statements of your agency may be materially misstated as a result of fraud and why?"

Answers to these questions are analysed and, if there are issues, the director of financial audits and I are made aware, and then we take appropriate action. Furthermore, during an audit, if the auditor out in the field identifies fraud, or has information that indicates fraud may exist, they must, under the standards, communicate it on a timely basis to management. In practice, that means usually telling me or the director, and we would contact the head of the agency.

If we do an audit under the Corporations Act, which we do, we are obliged to notify the Australian Securities and Investments Commission. In 2015 we actually reported to the Australian Securities and Investments Commission on an issue. It was not related to fraud, but it shows that we are completely aware of our obligations under the Corporations Act for different things.

In 2013-14, some of you may recall that the Public Trustee detected what they referred to as irregularities when we were doing the financial audits. The Public Trustee engaged KPMG Forensic to do an investigation and notified the police of the irregularities. The irregularities were considered by us in the financials. We did not qualify that audit, but a matter of emphasis was added, and we made sure that the disclosure of the irregularities was made public. Also, in our own financial audits report at the end of the year, we did not call it an irregularity. We called it suspected fraud so that the community could clearly understand. As you are probably aware, there has, I think, been a prosecution around that issue.

The audit office provides reports to agencies following completion of the financial audits to advise management and relevant ministers of any issues around systems that may allow fraud to occur more readily, and we then report this in our financial audits, financial results and audit findings, and also in our computer information system report that we put out mostly in December, but this year it came out a bit later. There are clear examples in there where we say, "This exposes the agency to a higher risk of fraud or corruption." It is then, as I said before, up to management to take those—and we make recommendations—and to action against those.

In doing a financial audit, the audit office does not examine every transaction of the agency. It is the responsibility of the agency to ensure that all transactions are checked and correctly recorded. If we looked at every transaction, we would never complete a

financial audit.

The financial audits should not be relied on to assume that fraud has not occurred. The first time someone detects fraud, they often say, "Well, why didn't the auditors pick this up?" I thought it was really important for the committee to know what we do in auditing versus investigating for fraud. However, the office reviews major systems and examines the transactions around those. So we are really focused on those systems, and I think that is an important part of the integrity framework.

With respect to performance audits, under the auditing standards we frame our audit objectives around economy, efficiency and effectiveness. Again these are the standards we work to. So our audit criteria do not have a direct fraud focus. In doing an audit, we may identify inadequacies in public administration, the governance, administrative arrangements, systems and processes, and this might highlight fraud integrity and probity risk, and we will make a call on that.

It is possible that actual fraud might be detected through a performance audit, but this has not occurred so far. We stop at a particular area rather than going further. However, in 2016, given the issues identified in the Calvary Public Hospital finance and performance audit, we did consider it appropriate to send a copy of our report to the Australian Securities and Investments Commission. We put it to them that the system was so problematic that there were clearly issues and there were clearly manipulations. So we sent it off to that commission.

The addition of an independent integrity commission will strengthen the integrity framework that exists in the ACT. I encourage the committee to consider that it is about strengthening what we have, and, as has been canvassed in various forms, possibly in some of the things that I see, for instance, from my colleague the Ombudsman, drawing upon resources from other bodies, and using another body possibly as needed.

To assist the committee in designing arrangements for the commission, I would suggest that a risk analysis of ACT government activities from a fraud perspective may assist. While this would identify risks that are prevalent in all jurisdictions, it could also highlight the points of difference in the ACT. For example, the ACT is unique with respect to policing. It is unique in planning. It is unique in land transactions and landholdings; so other jurisdictions may not have the same risk profile we do in those areas. I am not saying that it is all negative; the policing might be a positive one.

It seems from the committee's paper and submissions that it primarily wants to investigate alleged or actual corruption. It may be therefore appropriate, in terms of having many integrity bodies, to reflect "anti-corruption" in the title so that the public know what the major focus of any new commission is.

To conclude, I would like to reinforce that creating an anti-corruption culture in an agency, including encouraging the reporting of fraud and wrongdoing, totally rests with those charged with governance of the agency. However, those charged with governance are also responsible for detection and taking appropriate action.

Furthermore, the role of the Auditor-General with respect to identifying fraud risk, through undertaking either financial or performance audit, is likely to support the work of the commission. Given this, I would definitely welcome a strong mechanism being created that facilitated communication between my office, all the integrity bodies and any future commission.

THE CHAIR: Mr Manthorpe.

Mr Manthorpe: Thank you, chair, and thank you for the invitation to appear before you today. I have a few quick opening remarks. I was appointed as the ACT and Commonwealth Ombudsman quite recently. This is, therefore, my first appearance before an ACT Legislative Assembly committee, and I want to put on the record that I really look forward to assisting the ACT Legislative Assembly wherever I can during the term of my appointment and I am really pleased to be here.

Of course, the Commonwealth Ombudsman is also the ACT Ombudsman, and the ACT community is therefore in the unusual position of being able to complain to my office about both ACT and commonwealth issues, so we are unique in that respect. The Ombudsman is a core integrity agency in the ACT, and we seek to uphold four key concepts: assurance, integrity, influence for better practice, and improvement.

Providing assurance on integrity is an important part of my role and that of my office. I am happy to be part of the conversation about the development of an Integrity Commission and measures to ensure the ACT can detect, monitor and respond to corruption risks, particularly how that might relate to my role.

You will have seen that I suggested in our submission that work be done to assess the corruption risk in the ACT, which complements something Dr Cooper just mentioned, and that care be taken when establishing a further oversight body amongst the existing mechanisms.

I will outline the role of the Ombudsman with respect to the ACT. I have a range of responsibilities. In addition to complaint handling and investigation of ACT directorates, my office is also responsible for dealing with complaints about requests made to directorates under the FOI Act and also for disclosures under and complaints about the Public Interest Disclosure Act.

My office recently commenced a new function under the reportable conduct scheme—that took effect on 1 July—an employment-based child protection scheme. In 2018 we will oversight the new freedom of information regime. So we have experienced a broadening of jurisdiction both at the commonwealth level but also in the ACT and, indeed, elsewhere in recent times. I remain open to that possibility.

We monitor police use of covert powers through inspections conducted under the Crimes (Controlled Operations) Act 2008, the Crimes (Assumed Identities) Act 2009 and the Crimes (Surveillance Devices) Act 2010. Inspections of ACT Policing also include monitoring police management of the ACT child sex offender register under the Crimes (Child Sex Offenders) Act 2005.

It is worth mentioning, too, some things that we do not do, things that are out of our

jurisdiction. We do not include the actions of ACT government ministers or MLAs, the decisions of courts and tribunals, nor issues associated with employment, disability services or services for older people. With the exception of our role in terms of administering the reportable conduct scheme, which relates to certain employers, matters regarding services for children and young people are also outside my jurisdiction in the ACT.

Our submission speaks for itself, but the key points we suggest that the committee contemplate are defining the gaps in integrity and oversight. There is a suite of oversight bodies—some of whom are represented here today—frameworks and arrangements, so I would respectfully submit that the committee needs to think about what the gaps are that need to be filled in respect of effectiveness of and value for money considerations of a future commission.

If a new entity is created, the question of how it is held accountable is a really important consideration that features in all of the jurisdictions that get into this space. Similarly, from the point of view of effectiveness of any new arrangement, how the referrals between agencies work must be considered. Even in the short time I have been in the Ombudsman's office, it is very clear that as new integrity or oversight functions are provided to an entity, you have to be really clear about what part of a problem is mine versus what part is back to the agency, over to the police or off to some other entity. How it all works is an incredibly important part of an effective system.

In closing, I am happy to be part of the discussion about this very important matter in the ACT. I am accompanied by my colleagues who are more expert on the history of our dealings with the ACT than I, so I may throw to them depending on where we get to.

THE CHAIR: Thank you for those opening remarks and for the submissions from both of you, which I, and I am sure my colleagues, found very interesting and very useful. Ms Overton-Clarke, do you have anything to add?

Ms Overton-Clarke: No, we put in a comprehensive submission that covered as well functions of the Ombudsman and Auditor-General. I work very closely with my colleagues in the Justice and Community Safety space, so I do not feel the need to make an opening statement.

THE CHAIR: That was my understanding. Picking up on both the point where Mr Manthorpe finished and what you just commented on, Ms Overton-Clarke, I am interested in the relationship between the agencies, and particularly this idea of how referrals move between you and how you communicate and collaborate both now and in the context of if we were to establish an integrity commission. Do you see any issues you would see there?

Mr Manthorpe: The simple way to describe where the Ombudsman's office begins is, essentially, that it is driven by complaints. We have a variety of other activities, some of which I outlined in my opening comments. But the core jurisdiction, if you will, of an ombudsman is to deal with complaints from members of the public or others pertaining to some aspect of government administration that falls within our

jurisdiction. Sometimes those complaints are matters that we simply refer back to the relevant agency. A complainant says, "Look, I'm concerned I didn't get some payment," or "The service I was expecting from government wasn't adequate," and we can liaise with the relevant agency to ensure that that person gets the service they ought get and resolve a matter in a quite direct way with the relevant agency and the individual concerned.

But other times complaints identify more systemic issues or other sorts of issues. So if an issue came to us that pertained to some sort of serious allegation of wrongdoing or some sort of serious issue around corruption or fraud or the like, then we might undertake some investigation of the matter to get some sense of it, but we might then refer it to the police. In the ACT context we might engage with the Public Sector Standards Commissioner and so on. It really depends on the nature of the matter.

Ms Overton-Clarke: That is a really important point that Michael makes. Dealing with complaints—and certainly for that part of the role of the Public Sector Standards Commissioner—is a really important part. In any work this committee does around establishing a commission or working that through, that is one of the crucial matters you will need to work out, that is, how complaints are dealt with.

The Ombudsman, the Auditor-General and I have identified that how those mechanisms work between existing agencies is really important. At the end of the day, while we want to ensure that complainants have every right to have everything examined as much as possible, complaint shopping is something that can be undertaken. Because of the small nature of the ACT, there is a very good informal working relationship between the Ombudsman, the Auditor-General and me in terms of the appropriate place for those complaints to be taken up, both in a PID context and complaints in general. That is not to say that we breach privacy in any way, but, of course, you would not want to have three bodies undertaking the same investigation concurrently.

Triaging who has complained about what is important. It is absolutely right and proper, if a complaint has been investigated but then subsequently other issues emerge, that that is re-examined. Timing, the substance of the matter and what investigations have been done previously and by whom—and both the Auditor-General and the Ombudsman have mentioned the extent to which matters have been dealt with by a directorate, which is absolutely appropriate—are also important.

Moving forward into whatever regime we may or may not have, all those existing mechanisms and how they work together will be a really important matter. Indeed, in terms of effective use of resources, you may well want to consider—and this is a point put to me by Philip Moss—whether, like ACLEI, you decide not to investigate complaints. How government and oversight bodies deal with complaints which are very time consuming is a really crucial threshold matter.

THE CHAIR: Can you elaborate on that point about deciding not to investigate complaints? Is that individually or not doing them as a class?

Ms Overton-Clarke: It is really Michael's threshold, so maybe Michael can explain it better than I.

Mr Manthorpe: Yes, there are circumstances in which we decide not to investigate a complaint. Not every complaint that comes to us is investigated in a deep sense. If a complainant comes to us—I will use a commonwealth example—and says, "I haven't got my Newstart allowance this fortnight and it should have turned up," we ask, "Have you raised that with Centrelink," they say, "No, I haven't," and we say, "Look, how about you give them a ring first and if you do not get anywhere with them, come back to us." So we do not need to go any further. But from there to quite serious matters is the spectrum we operate on.

Ms Overton-Clarke: But the ombudsman role is about investigating complaints. To what extent does a fraud or corruption entity look at complaints per se? My understanding is that ACLEI has decided its role is to look for corruption matters as they are found, but it does not investigate complaints per se. I guess it is that front end of triaging and initial investigation. Many matters are purported to be fraud and corruption, and one needs to be able to make a quick but thorough assessment about the extent to which you need to pursue that matter in such a body. The whole triaging and referral process becomes really important.

MRS JONES: Is there any value in having a formalised system where representatives of all the integrity agencies meet on a monthly basis to make sure that all these things are occurring, and occurring smoothly?

Dr Cooper: In the ACT I would say monthly is too frequent; but the principle, I think—we already—

MRS JONES: Quarterly or something?

Dr Cooper: do communicate. Whether we need to meet is a different issue, but we certainly need to communicate. I want to give my perspective on these complaints and things. By the time someone comes to me, they are usually at the end of the line. They have tried the Ombudsman; they might have tried the Assembly members; they have tried the commissioner. Then they will say to our office, "Under no circumstances are you to tell anyone who I am. I am claiming confidentiality privilege."

So we are very practical. We say, "Have you been here and been there?" We cannot even mention the name to our colleagues. We will not be able to discuss cases. But what I tend to do, particularly with Bronwen, when there is a cluster of things happening, is to say to her, "Are we sure this is not systemic? Is this something that my office should be looking at?" I think, yes, communication is important but I think we have to be mindful that the key obligation is the privacy to the community.

MRS JONES: Yes.

Dr Cooper: Also, one of the things—

MRS JONES: Depersonalising cases is something that has been presented to us by all these bodies around the eastern seaboard. When discussing cases, it is always depersonalised.

Dr Cooper: In the ACT it is not that easy. We are a small jurisdiction on certain issues. The thing I would counsel strongly is that this is a great opportunity to have something focused on corruption: the really pointy end of this whole spectrum. I would strongly counsel that, yes, every complaint is important, but if you spend a lot of time in this commission focusing on every complaint, you may actually not be targeting what you were set up to do.

Often complaints do not highlight fraud issues. They are usually quite embedded in an organisation, or the person or people committing them are incredibly astute in how to use the system. This new commission I would hope would be looking at the high risk areas, would be actually looking at where they interrogate, independent of complaints. I am just throwing that out there.

MRS JONES: That is completely different from what has been proposed to us by these bodies around the country; that is all.

Dr Cooper: Is it? Well—

MRS JONES: It is a completely different take.

Dr Cooper: So they say take it on complaints?

MRS JONES: They are entirely, 100 per cent complaints driven.

Dr Cooper: Yes. I am not saying—

MRS JONES: I am saying that integrity bodies, just for your information, that are currently operating in jurisdictions that we have gone and visited—

Dr Cooper: Complaints driven?

MRS JONES: are 100 per cent complaints driven.

Dr Cooper: But I guess what I am trying to get to is the type of complaint.

MRS JONES: Yes.

Dr Cooper: We get complaints and we do PIDs. For instance, we have a few at the moment where we are doing background investigations. I am—

THE CHAIR: Not every complaint is the appropriate one for an integrity commission.

Dr Cooper: Yes, and I think that is—

MRS JONES: Well, I am not—

Dr Cooper: Thanks, Mrs Jones. I think that is the important issue. They are not another complaints body. They are a body to deal with specific issues in definition around what is going on.

MRS JONES: Yes, the definition will be important.

THE CHAIR: Have you got another question?

MRS JONES: I have another question. I wanted to ask about definitions, essentially. It is something we have to have a long conversation about as a committee once we have finished having conversations with the community. I refer to definitions of fraud that you work with, definitions of corruption, if you ever deal with that as a concept.

The public service commissioner would have a great deal to do with things that are below a criminal threshold, because you are dealing with systemic matters, and how the bodies operate to get the best sort of moral outcome, to use a more fluid sort of a term. I would love it if we could get on the record any definitions that you work with to define what is unacceptable and what is acceptable.

I think the thing we deal with often, even here in the Assembly, is that people come to work here with many different ideas about what is moral, what is acceptable and what is—what is the word?—an integral way of acting, and what is a break in integrity. That is quite a fluid concept, in fact. I would love each of your views, even if you can come back to us with some of the definitions you work with.

Ms Overton-Clarke: I have covered a bit of this in the submission on pages 48 onwards in terms of potential definitions. But I guess in terms of corruption, really what we are looking at is the ability to influence, and often the seniority of the officer. You are absolutely right, Mrs Jones. We tend to deal through the Public Sector Standards Commissioner with misconduct investigations, workplace grievances, workplace issues. As I have put in the submission, that is the vast majority.

MRS JONES: But how do you define misconduct?

Ms Overton-Clarke: Misconduct is defined under the Public Sector Management Act.

MRS JONES: Right.

Ms Overton-Clarke: Of course, we do a lot of work around the initial assessment. In the last round of the enterprise agreement the concept of a preliminary assessment was put in place. That is the most direct way to deal with issues quickly and at the workplace level. That is the most effective. So it may be around fraud. Fraud is pretty easily defined, I think. Anything that perverts—wilfully perverts—the way that you operate in the workplace is immediately referred to the police. That may range from misusing a sick certificate from a doctor. For our purposes, it is usually at the lower level. It could be stealing by people who deal with money. All of those issues are referred to the police. So fraud, I think, is—

MRS JONES: Easier in a way.

Ms Overton-Clarke: easier in a way. It is probably more clear-cut. In terms of corruption, for most of our matters you really have to look at the level of the person and the ability that they have to be able to pervert the workplace: their degree of

influence.

MRS JONES: That is good.

Dr Cooper: Our work is quite broad. We would ascribe to what Bronwen has done. We know section 9 of the Public Sector Management Act well. But also we have auditing standards that are very clear. If you would like, we can take a minute to walk you through what they are.

MRS JONES: Yes.

Dr Cooper: You would like that?

MRS JONES: Yes.

Dr Cooper: Mr Sharma will.

Mr Sharma: Under the auditing standards, it is auditing standard ASA 240. It talks about the auditor's responsibility relating to fraud in an audit of a financial report. When it refers to fraud, it refers to fraud as a material misstatement in a financial report. There are two types of intentional misstatements that are referred to in here. One is fraudulent financial reporting and the other one is misappropriation of assets. It is in that context.

The standard goes on to provide a number of examples of the types of discrepancies in accounting reports. For example, it refers to transactions that are not reported in a complete or timely manner, or are improperly recorded as to the amount, accounting period, specification and entity, obviously.

It also talks about unsupported or unauthorised balances or transactions and any last-minute adjustments that significantly affect financial results. It also talks about evidence of employees' access to systems and records inconsistent with that necessary to perform their authorised duties.

The other types of things it mentions in there are conflicting or missing evidence. That is where we are missing evidence, where there are not documents to support what is reported in the financial statements. It includes unavailability of information, for example, significant unexplained items on reconciliations. It talks about those types of things. It also talks about any entries and adjustments made to account balances in the statements, missing inventory or physical assets of significant magnitude—

MRS JONES: Yes, I think we understand that it is those sorts of very specific misuses of financial recording either through incompetence or for the purpose of hiding something.

Dr Cooper: In the performance audit area, we actually do interview people on occasion under oath or affirmation. If, under that process, there were a clear case of fraud we would report it to the police. In one case, for instance, at the Canberra Hospital a few years ago where there was manipulation of data, we actually referred that through to the head of the agency and also I think it was to you, Bronwen, for the

appropriate action to be taken under section 9. We put that out there. It was there.

A few years ago we did one on single dwelling development assessments. We were looking at the certifiers. We made some very strong recommendations about auditing and what the agency needed to do. Because our audits then become the material of the Assembly, when you have the Assembly committee they can actually interrogate even further, or the agency can, when we stop.

Having said that, recently because of the intersection of the issues, we are actually looking to engage somebody who has been involved in integrity commissions to assist us in a couple of ways, because it is not that black and white as to where the audit stops and where you would actually suggest further interrogation.

Mr Manthorpe: Can I add something for completeness around definitions? It might be helpful for the committee to contemplate the definitions around public interest disclosures. It is one of the areas where there are certain legislative thresholds that have been determined. I will read from the Public Interest Disclosure Act.

> … disclosable conduct means any of the following:
>
> (a) conduct of a person that could, if proved—
>
> (i) be a criminal offence against a law in force in the ACT; or
>
> (ii) give reasonable grounds for disciplinary action against the person;
>
> (b) action of a public sector entity or public official for a public sector entity that is any of the following:
>
> (i) maladministration that adversely affects a person's interests in a substantial and specific way;
>
> (ii) a substantial misuse of public funds;
>
> (iii) a substantial and specific danger to public health or safety;
>
> (iv) a substantial and specific danger to the environment.

I emphasise the word "substantial" because obviously the drafters of this piece of legislation were contemplating that you have to have a threshold here somewhere or you might end up being flooded with minor, trivial matters that then create a massive sort of bureaucratic and administrative burden for little gain and you cannot find the wood for the trees, if I can put it that way.

MRS JONES: Yes. I think integrity bodies around the country use the word "serious".

Mr Manthorpe: Yes.

MRS JONES: I guess what we have discovered—I think you would understand this well but perhaps it would be something for the public to realise—is that there are judgement calls being made all the time—

Mr Manthorpe: That is right.

MRS JONES: all across your bodies and government—

Mr Manthorpe: Correct.

MRS JONES: and to some extent, even in the integrity bodies we have spoken to, there is an element of judgement being made at all times. "Do I sense that there is something greater here?" It is sort of like the use of a sixth sense, but you cannot look at absolutely everything. I think we understand that.

Mr Manthorpe: Yes.

Dr Cooper: I support that, but also I think it is really important where there are usually—fraud can occur where there are solid systems. But if you have got an organisation where the system is not being effectively managed, that certainly opens up the opportunities for fraud that, if you had it tighter, may be able to be detected. So I think the complementary nature of what we do is pretty strong.

THE CHAIR: Ms Cody.

MS CODY: I am going to defer to Mr Steel. I note the time and I know that he has got a lot of questions. You have already covered most of what I was looking at.

MR STEEL: We have been looking at a range of different models for how a commission might be established, and one of them is Tasmania where they have a board model rather than a single commissioner. I think virtually all of you would be represented on that if the same model were established here. That sets a very formal mechanism for collaboration. You have mentioned that you already are operating informally in relation to complaints. How do you see that sort of model working if it were adopted here? Is that something you would support?

Dr Cooper: If it is the model—if that is the governance arrangements for the territory—you respect it and you make it work. Because we do not have something that is quite concrete, which is right and proper, we are incredibly mindful of privacy, we are incredibly mindful of not breaching anything. Given a clear framework, you therefore have to be able to share to a depth that maybe we cannot at the moment.

Mr Manthorpe: I would just say, conceptually, I could imagine that it would be possible to make such a model work and if that was the way that the government and the Assembly went we would be willing to engage in it.

Ms Overton-Clarke: I would just need to say, as a public servant who works for the government, that the government will look at all recommendations that come from the committee. I am just mindful that in policy matters I probably should not make a comment.

MR STEEL: I have got that impression from all of you.

Dr Cooper: It is just one qualifier.

MR STEEL: No statements of opinion.

Dr Cooper: Just a qualifier if I could on that, I would like to make sure that there is an analogous set of powers here with our various roles, as in Tasmania, because I am not too sure whether the Tasmanian Auditor-General can interview under oath or affirmation. I am limited in terms of how I can use that information and also, given that people have to tell it as it is, they are not protected from self-incrimination. I would have to be careful how we shared some of that, if I could just have the committee mindful of that.

MRS JONES: Yes, the detail would be very important.

MS CODY: I have a supplementary. We are talking to the three of you at the moment, which is fantastic, but do you see a role for the Human Rights Commissioner as well in this space?

Dr Cooper: If I may, I think you have got to look at the total system. We have come into a very interesting issue in the financial area at the moment, and that is the standards actually require disclosure of some information in other jurisdictions, except possibly Victoria. Because they do not have a human rights overlay, it is compulsory that you give this information.

In the ACT, we are very mindful of saying, "You don't have to give it to us." We cannot make something transparent because of the human rights legislation. Would you like to explain?

Mr Manthorpe: Yes.

MS CODY: I understand. Mr Steel was talking about the board model and I was just seeing whether—

Mr Manthorpe: Maybe this gets a bit circular but I think it comes down to what problem it is you are trying to fix.

MS CODY: Absolutely.

Mr Manthorpe: And it goes back to the proposition that our submission and others have inferred that there needs to be a risk analysis, an assessment of what are the areas of activity that ACT parliamentarians are concerned about that render the creation of a new body necessary. When one is clear about what those areas of risk and activity and sources of potential fraud, corruption et cetera and wrongdoing might be, then one can turn one's mind to which of the existing entities might be brought together and if a commission or a council of commissioners of some sort were to be created. I think it turns on that question of whom it is that you bring into the mix.

MR STEEL: In relation to the Public Interest Disclosure Act, you all have a role in taking complaints or disclosures. In Victoria the Victorian IBAC acts as a clearing house for those complaints and then they are referred out to other agencies. Is that one way of potentially dealing with complaints, should a commission be established in the

ACT? Would that be supported? Or would you prefer to have that more formal collaboration and referral just between you in relation to the PID Act disclosures in particular?

Dr Cooper: I think you could make both work. For the committee's benefit, we are not an investigating agency under PID. We can have material referred to us but we have to refer it on. The advantage of us being in the loop of PID ones is that there have been several performance audits which, as I keep on saying, are made public where maybe the PID threshold was not met but there were significant issues above a complaint that really required system changes. If you take the AG out of information broadly of what is going on, you will lose that nexus that the ACT has.

On the other hand, there are a lot of alleged PIDs that are not PIDs. They are complaints. And a lot of expectation by the community is that this is really a PID and you must therefore look at it when in actual fact it does not have that. Maybe it is even a hybrid model of the two you are proposing.

MR STEEL: I am not proposing anything in particular.

Dr Cooper: An option of those two models.

Mr Manthorpe: If it is of help, one way to think about PIDs is: in the commonwealth context, PIDs come to agencies, agencies investigate them, they report to us about them in trend terms and numeric terms and so on. Some come to us if they cannot be resolved at an agency level. If some raise matters of criminality we might refer them to the AFP. Some we might refer to ACLEI if they fall within ACLEI's jurisdiction. As Dr Cooper was just referring to, some are actually at a pretty low level of corruption or fraud or they are not even about corruption or fraud per se. They might be about, really in the end, a personnel matter.

Again, one has to work through the questions of thresholds as well as the questions of referrals and repositories. Until all those things are sorted out, I am not sure whether the model you describe is the right one or not.

Ms Overton-Clarke: Currently all public interest disclosures need to be notified to the Public Sector Standards Commissioner, and I report on them in the state of the service report; not that I am necessarily a coordination point but I certainly encapsulate all the ones that have been received across all disclosure officers.

MRS JONES: I have a question with regard to PIDs. What if the PID is about you? What happens then?

Ms Overton-Clarke: Then it is investigated by someone other than me.

MRS JONES: But you are notified of it? According to that system?

Ms Overton-Clarke: Yes. It is not open. It is not clear. There is no information about who made it.

MRS JONES: Is there any kind of a no wrong door process that goes on through your

agencies where everything is followed up one way or another, and if you find something that is someone else's you really have to pass it on?

Ms Overton-Clarke: Yes.

MRS JONES: Or is it just by cooperation? Or is it actually necessary? Is it legislatively defined, I guess is the question.

Dr Cooper: I do not think it is legislatively defined but in practice we will talk to someone who has raised something with us. If it is a complaint we will say, "Would you mind if we hand this to the agency, even without keeping your name?" And the agency will then respond back to us. We facilitate the communication between them.

MRS JONES: Yes, we do a bit of that through our offices as well.

Dr Cooper: Yes. And if we hand it on to colleagues, the one thing we do ourselves, informally, is that we then track that they tell us they have responded and they are in contact.

MRS JONES: If it is resolved or not, yes?

Dr Cooper: Yes. We tell the person who contacted us, "We are not contacting you anymore," but for efficiency and administration to make sure—humans are humans—we do follow up every couple of months to say, "Are you really dealing with this?" It is defined in the PID Act. It is defined, yes. For PIDs it is, for complaints it is not.

Mr Manthorpe: In our space, for general administrative complaints, it is not defined, as I understand it, but the idea of no wrong door is intrinsic to what we—

MRS JONES: Yes, ideally.

Mr Manthorpe: Once again, absolutely.

MS LEE: Ombudsman, earlier you were talking about the gaps, and looking at that. I noticed in—I think it is on page 8—your report you have said, "Corruption generally uses the power of existing structures for concealment."

Mr Manthorpe: Yes.

MS LEE: I was just wondering—and this question is open to the Auditor-General and to the Commissioner as well—whether you agree with that statement and, if so, what you see as the gaps in terms of what could be done to strengthen the existing structures that we have in place?

Mr Manthorpe: I think that is where the risk analysis is necessary. I would not purport to have an encyclopaedic knowledge of what the gaps might or might not be in the multitude of ACT government entities—certainly not at this point in my tenure—but the suggestion we are making is that it would be wise to do that piece of analysis to help inform the nature of whatever remedy is then put in place. It is the job of all of us, in a way—and ACLEI and the police and everybody else—to be

constantly looking for those gaps, and constantly looking for where concealment occurs. Collectively we try to control for that but I could not give you a detailed answer today as to what precisely those gaps might be.

Dr Cooper: I will be a bit forward here, but one of the key things I think the territory does in energy levels is make staff completely aware of their obligations. We will do some audits, and in those audits we will say, "Why didn't you report this?" The Calvary Hospital is a really good example. "Why didn't one of you come forward out of this whole area that deals with the finances?" You had a little four- or five-point plan as to how to manipulate things, and everybody did their little bit. And they will say, "Well, we knew it was wrong." "Why didn't you come forward?" The pulsing of making staff continually aware is critical: that you not only have an obligation not to do it but also, if it is being done, you should come forward.

MRS JONES: Absolutely. And here are your options for coming forward.

Dr Cooper: But it is actually really important that you do. You cannot just sit back and say, "Well, no, I'm not going to report it." There is that sort of invisible thing: you know, you will have these big training sessions, and they cost a lot but they are really valuable. And then, also, too, our audits do stop at the door on some things. We are contracting out a lot more. We have followed the dollar powers. I would hope that whatever commission you set up would also be able to do that: it is following the dollar in fraud. Just go for it. You know, some of the fraud is not related to dollars, but with the ones that you really want to go for, I would say just smell the money and keep going.

MS LEE: Following up on that, Auditor-General, I accept that it is not black and white where the audit ends and where it might go on, and there is a certain point where you do have to stop, but does that restriction make it harder for you in terms of your investigation powers? For example, you were saying, I think in your opening statement, how you may refer it back to an agency. Do you have any follow-up powers for that?

Dr Cooper: No.

MS LEE: That is it, is it?

Dr Cooper: We just then make sure that administratively the agency has really dealt with it—yes. That is PIDs. Even on performance audits and financial audits, we have the power of the pen, not the power of legislative direction that they must change. But that is why the whole system, I think, is so terrific: that what the PAC does can be made public.

THE CHAIR: Mr Manthorpe, if I might ask you a question as the Ombudsman, one of the issues the committee needs to consider is what coverage an integrity commission in the ACT might have over our police operations. You would be well aware particularly that the policing model in the ACT is a bit different. I would welcome any thoughts you have in that space about the current oversight of the Australian Federal Police, ACT Policing, and how that might fit. Certainly other jurisdictions have taken different approaches.

Mr Manthorpe: Yes. We certainly exercise important statutory powers in relation to inspecting the manner in which the AFP, including in their capacity as the ACT Policing service, conduct their covert powers through inspections, as I mentioned in my opening statement, through the Crimes (Controlled Operations) Act, the Crimes (Assumed Identities) Act and the Crimes (Surveillance Devices) Act, and also, with respect to the ACT, the Crimes (Child Sex Offenders) Act.

At this early point in my tenure I would say that the AFP is very accommodating, is cooperative in the work we do in that space, and takes our role very seriously. Indeed, I attended an inspection with respect to some of those pieces of legislation just a week ago, as I made my away around the areas of jurisdiction that I have responsibility for, and I was positively struck by the open, collaborative and cooperative manner in which the AFP engaged with us.

That is not to say that we do not occasionally find issues—procedural or other kinds—and we report those publicly. By and large I think it works and provides a reasonable model going forward.

THE CHAIR: Mr Manthorpe, if you have any further thoughts on the matter, they would be welcome. There is a degree of coverage of the AFP, of ACT Policing, by ACLEI at the moment.

Mr Manthorpe: Yes.

THE CHAIR: One of the questions that has been put to all of us, I think, is whether it would be more appropriate if they were dealt with locally—if we were to establish such a body. We need to think about both the appropriateness of that and the interaction with the Ombudsman's role.

Mr Manthorpe: Yes, sure. And if there are specific propositions you would like me to consider in that regard, I am happy to do so a second time.

THE CHAIR: We are more or less out of time. If we think of any afterwards, we will possibly put questions on notice to you. Also, if you have further thoughts, we would welcome the opportunity of further commentary if you wished to write to us or something along those lines. Thank you for your time today, and thank you for accommodating the slightly different format. I feel it has been quite valuable. We welcome your contribution. Thank you very much.

Dr Cooper: Could we leave some material about how we flag risk areas for fraud?

THE CHAIR: Certainly, thank you.

Short suspension.

DUNCAN, MR TOM, Clerk of the ACT Legislative Assembly
SKINNER, MR DAVID, Director, Office of the Clerk, ACT Legislative Assembly
SKEHILL, MR STEPHEN, Ethics and Integrity Adviser, ACT Legislative Assembly

THE CHAIR: Welcome to this resumed sitting of the Assembly Select Committee into an Independent Integrity Commission for the ACT. I welcome the Clerk of the Assembly; the Assembly's Ethics and Integrity Adviser, Stephen Skehill; and Mr David Skinner from the Assembly as well. Thank you for appearing before the committee today.

I take it that you are informed of the privilege card on the table and are comfortable with the contents of it?

Mr Duncan: Indeed.

THE CHAIR: I would like to think I could make that assumption, but I will formally acknowledge that. I would like to jump straight into it. You are aware, of course, of the terms of reference of the committee, and we thank you very much for both of your submissions. I found them very interesting, and I know my colleagues did as well. Would either of you like to make an opening statement, or would you prefer to just go straight to questions?

Mr Skehill: I think you would make your best use of the time by diving straight in.

Mr Duncan: I have just one thing to add. Since I lodged my submission, I attended the Presiding Officers and Clerks Conference in Sydney. At that conference the Clerk of the Northern Territory Parliament presented a paper on "The ICAC is coming: what consequences for the Assembly and what do we need to be ready for?" Also the Clerk of the Senate gave a paper on "Search warrants, privilege and intrusive powers", which related to—you might have read some publicity about this—Senator Conroy and his offices being raided by police, and the issues of privilege that arose out of that. So I would like to provide, after this hearing perhaps, those two papers to the committee, because I think the committee would find those papers of use.

THE CHAIR: Thank you; that would be very helpful. I will start with a question for the Clerk. In your submission you made a reference at paragraph 1.23 about the application of this body to parliamentary staff: staff of members of the Assembly. Could you elaborate on your observations in that space and on the current gaps you see in accountability of staff?

Mr Duncan: I just raised that with the committee because members' staff fall into a sort of special category. Even though they have a code of conduct, it is not quite clear to me whether, if there is an issue about the conduct of a member's staff, how that might be handled under current arrangements. It may well be that, if this committee looks at some sort of other body, it may be able to be covered by that.

Having said that, there is a public interest disclosure procedure. There is that arrangement where, if there were some malfeasance or anything in relation to a

member's staff, someone could make a public interest disclosure about it. But I also made later comments in my submission about the fact that public interest disclosures come to the Clerk, and it places the Clerk in the funny position of having to investigate public interest disclosures against members' staff or members themselves. That is not a position that I think is a good place to be for the Clerk. I do not think the Clerk is well placed at all to conduct those investigations.

It is something that—in discussions between David and me—we actually think is one of the hardest issues to resolve: what do you do about members' staff? They should not escape any scrutiny whatsoever, but there are problems with how they are to be treated, I suppose, given their special status with members.

THE CHAIR: Do you see any explicit barrier to them being included in the remit of an integrity commission?

Mr Duncan: Only to the extent of their handling of documents that attract parliamentary privilege. If they are preparing speeches for members and things like that, and the nature of the complaint relates to that activity, there is a privilege issue there, but if it is more about criminal or corrupt behaviour, I do not particularly see any issues.

THE CHAIR: Mr Skehill, in that vein, when people have approached you, have you ever had any matters relating to people's staff or has it been exclusively about members?

Mr Skehill: On occasions I have been asked for advice on issues that involve relationships between members and their staff or members and the staff of another member, but it has been advice to the member. With the issue that Tom raises, my view is that no holder of any public office, which would include a staff member, should be exempt from scrutiny, and if this body is created it should have equal remit for all holders of public office, including members.

There is an issue of the interrelationship between a body such as this and parliamentary privilege. I actually have a little bit of experience in that regard, because I have been appointed twice by the Senate to determine whether documents seized under police warrants were subject to parliamentary privilege, and the Federal Court had held that if documents were subject to privilege they were beyond the scope of a warrant. But the court said it is for the parliament to determine what is subject to parliamentary privilege. I see no reason why this body, if it is created, should have any limitation other than in relation to parliamentary privilege, and that is a matter for the parliament.

THE CHAIR: In your submission, in referencing who public office holders are, you talk about people under contract with government. One of the issues that arise, of course, as government does more outsourcing, is where the boundaries should fall on that. Could you elaborate on your observation there?

Mr Skehill: There are some people who are engaged under a contract of employment as opposed to being holders of a public office, and they should be within remit, and then you have people who are employed under a contract for service, where there is a

legal distinction. But to the extent that they are providing a public service, notwithstanding that it is not as an employee, I do not see why they should be outside remit.

The scheme I favour in my submission is that this commission would not be a primary investigator of allegations. It would pass allegations on to the existing body best empowered to deal with them. In that case, that might well be the contracting agency that has let the contract for these particular services, and it may have a contractual remit. The body that you are contemplating I would see as a last resort body, so that if there were no contractual remedy, or the contracting agency did not do anything about it, this body might be able to buy in. We have a large matrix of agencies with responsibilities for integrity in public office, and I do not perceive that it is broken. I perceive that this body can make it better.

THE CHAIR: Yes, I think that is broadly our view of it as well. Thank you.

MRS JONES: In relation to your suggested model, Mr Skehill, there would still need to be a preliminary investigation of some kind, presumably by this body, in order to ascertain whether there is any substance or not to a matter?

Mr Skehill: Maybe, to some extent, but I personally would think it more likely that this body would receive a complaint, ascertain what it relates to and ascertain who was the agency best suited to deal with it, pass it on, and then monitor progress with the handling of the complaint, so that if it does not get sufficient priority, if it turns out to be beyond the jurisdiction of the agency to which it has been referred or there is no legal capacity to deal with it, it might come back into the new agency. I do not know that you would necessarily have to have what I would call investigation to get to that point of referral.

MRS JONES: Just to go a little bit further, what has been presented to us from other similar bodies is that they take a several-stage approach. A lot of things fall over at the first step, and if it does not it might go on to the second and then to the third, and all these bodies tend to have investigative powers and so on. The other part of my question was in relation to Mr Duncan's suggestion to us that the current framework for the Assembly be left as is, and that a body might sit over the top for matters. I would like your comments on that, if you have any thoughts on it. We are MLAs; we deal with the current system as it is, and, in a sense, there are some positive elements to the way things work. I know that New South Wales is looking at instigating something similar. What are your thoughts on how our system here works at the moment?

Just to make it very clear, some of the types of things that probably led to the political decision to promise a body like this from all parties were public servants, on the whole, making judgements that were perhaps a little less than the criminal threshold, but that the public did not like, and that perhaps may be seen as corrupt. We have not formed that opinion yet, but there needed to be a method of dealing with these things that are not being dealt with at the moment. The problems were not so much with what was going on in the Assembly, but at the same time in the last term we had some issues with staff of ministers who may or may not have known that what they were doing was wrong, so I would like your opinion on that.

Mr Skehill: Okay. I have a biased view, of course, but I think the current system in the Assembly works well. To be frank, it works well based on the goodwill of members. At the moment, if there is a complaint about a breach by a member of the code of conduct, that is referred to the commissioner, and the commissioner will investigate, he will consider and report. At the moment, that works, and works well. But there is no coercive power in any of that. What would happen if a member refused to cooperate with the commissioner, so that the commissioner could not perform his intended role? We do not have—

MRS JONES: No next step.

Mr Skehill: The refusal to cooperate would be a breach of the code of conduct, but we do not have a mechanism to enforce it. This body should be able to step in and say, "We received the complaint about a member, we sent it to the Speaker, who sent it to the commissioner. The member did not cooperate. The commissioner has been unable to satisfactorily resolve. We will bring the complaint in house. We will exercise our coercive powers."

MRS JONES: As the next step.

Mr Skehill: Yes. You might end up with the intersection with parliamentary privilege but, in the ordinary course, that is the way I think that should be dealt with. When you talk about decisions taken by public servants that members of the public might think are inappropriate but that are not criminal, at the moment that might be something that excites the public service commissioner—

MRS JONES: Who is also an employee of the government.

Mr Skehill: Yes; who might be motivated to do something around codes of conduct and so on, to deal with it.

MRS JONES: Or might not.

Mr Skehill: Or might not. I would see that a role for this body would be to be alert to things that are not being dealt with and, where maybe there is not an existing mechanism for dealing with them, they might conduct an investigation or an inquiry—a better term—into whether we needed some systemic change to create a new offence, amend the code of conduct or put in place a new mechanism. But that is a systemic improvement and enhancement role. They are the enhancing of the existing system type roles that I see this body could very usefully play.

MRS JONES: Mr Duncan, do you want to add anything?

Mr Duncan: I agree with everything my learned colleague says, but there is a further step in between when the Commissioner for Standards does an investigation into a member, and if a member refuses to cooperate, that in itself is a breach of the code of conduct because the code of conduct says you should. Stephen indicated that that is when a commission of integrity might want to step in and use its coercive powers, but there is a further step in the middle that I think could be employed, that is, the

commissioner reports to the Standing Committee on Administration and Procedure, and that committee, like any other committee, can call for persons, papers and documents. If the commissioner informed that committee that a member or someone else was not cooperating with the commissioner, the committee could call the member; and we have had occasions where the commissioner has interviewed people, and they have cooperated, up to this point, as the commissioner has not informed me of any lack of cooperation. But bear in mind that there is a committee that could do that. If that cooperation were not forthcoming to the committee, which would surprise me, I suppose there is that recourse to an integrity body. But there are a few steps to take before we get to that final—

MRS JONES: The Assembly, presumably, if I am not mistaken, can act on the member's unwillingness to cooperate as a breach of the code of conduct, and they can be penalised by the Assembly by being suspended?

Mr Duncan: Absolutely.

MRS JONES: In relation to staff, they are not in the same roles, but there are not the same processes. I refer also to, at present, breaches where an ACT public service commissioner was not willing or keen to look into the detail.

Mr Skinner: You will note in the Clerk's submission that if an integrity commission were to be recommended, it is not proposed that members would be exempt under the model that is outlined here. What is proposed is that the remit of such a body would be slightly narrow, and it would have to have two things. It would have to have its jurisdiction applying where there was some criminal matter at hand, or potential criminal matter, and it intersected with the honest or impartial exercise of a public function. That starts to then scoop out things like privilege, contempt and issues that are the exclusive domain of the Assembly. So there is no suggestion of exempting members, if a commission were to be established. It is more a case of trying to allow different pathways to be obtained, depending on the circumstances.

MRS JONES: Given that suggestion, how are matters that are below a criminal threshold going to be dealt with? That is currently the problem that we have, that they are not being properly dealt with, necessarily.

Mr Skinner: With respect to members?

MRS JONES: No, with respect to—

Mr Skinner: That is a different issue. As far as members are concerned, the Clerk's submission would be that the procedures and resolutions that apply in relation to the Commissioner for Standards are suitable for dealing with many of those code of conduct issues and those lower threshold non-criminal matters, and matters that are the jurisdiction of the Assembly. It is only where these other more serious matters start to become apparent that you would perhaps want to involve a broader integrity commission. With respect to the broader policy question of whether or not an integrity commission is to be established and what it might look like, that is outside our patch.

MS LEE: Mr Skinner, you were just talking about the criminality element of it. What

powers do you foresee the body having that the AFP, for example, does not have to be able to do something about criminal—

Mr Skinner: Again, as a general matter, I think that is probably outside our patch but were there to be general powers of coercion and so on there would be no reason to exempt members from those sorts of powers. But that policy question about what powers a commission might have is probably outside our patch. We are trying very much to confine our focus to the interaction between such a body and members.

THE CHAIR: In this space, though, in your submission you outline those two areas of conduct that relate to an MLA's duties as a member of the Assembly. I am trying to contemplate a situation where you would be canvassing a situation that a member had done something that was not within their duties as a member and the all-encompassing nature of their role.

Mr Skinner: The critical question about the example we were talking about earlier this morning was really around where it may affect the impartial or honest exercise of a member's duties, not just any criminal matter. For instance, drink driving could have a bearing on how a minister for road safety might perform their role in terms of a political impact and so forth. It does not necessarily give rise to any questions of whether the performance of their official roles is in jeopardy. Are they doing those roles in a way that is impartial and honest? It is only where the criminal law intersects with that question that you start to end up with a corruption situation, and pretty much across Australia all the legislation grapples with that issue.

If you look through section 8 of the ICAC Act you will see that same conceptual framework brought to bear, and I would suggest that is probably an appropriate one, as it relates to members.

MS CODY: I take your points, Mr Skinner, about the fact that it is outside your remit to talk about anything else but MLAs. Mr Skehill, I note that you were talking about work that you have done on the Senate particularly around matters of privilege. I note that the federal parliament is also looking into whether we need a commonwealth integrity commission. How do you think that might all intersect? If the ACT did decide that an integrity commission were to be set up—I know we are talking a whole bunch of what-ifs here but sometimes we have to—and the federal body were set up, how would they interact when it comes to parliamentary privilege?

Mr Skehill: I think parliamentary privilege, at the end of the day, is supreme. If you have a matter which the integrity commission cannot investigate because it involves privilege then the Assembly has got to resolve it, and the Assembly stands or falls with the electorate by how they resolve it.

In the cases that I was involved in, there had been warrants issued, documents seized from MPs' offices, claims for privilege, and there was a process whereby I was appointed to ascertain whether the documents were or were not subject to privilege. If they were subject to privilege, outside the warrant, the police could not have them. If they were not subject to privilege, they could go to the police and they could do what they wanted with them. At the end of the day, you need to have the supremacy of the parliament but we have got an accountability mechanism every four years.

Mr Duncan: If I could just add to Stephen's point, I can give an example which happened in this Assembly where there was a public interest disclosure about the conduct of a staff member. It related to the illegal use of emails. In that case the matter was immediately referred to the AFP. The AFP executed a search warrant on a member's office in this building. It was done in the presence of the Clerk. The member was notified the night before.

The documents were seized. They were placed in the chamber lounge. The locks were changed on the chamber lounge. The member claimed privilege over all the documents. The Assembly, similar to the example that Stephen gave with relation to the Senate, appointed a person to examine those documents to ascertain which of those documents parliamentary privilege applied to and which of the documents could be given to the police for the purposes of their investigation.

That person was I, as the Deputy Clerk. I assessed all the documents. Most of them were covered by parliamentary privilege but we did hand some over to the Federal Police. The Federal Police then put a case to the Director of Public Prosecutions. The Director of Public Prosecutions found that there was insufficient evidence to mount a case.

At that stage, having finished all the criminal elements and the AFP investigation, the Assembly established a privileges committee to investigate the matter, and the privileges committee did a report, which we referred to in our submission, in which they made a finding and subsequently the staff member did resign as a result.

Just to go to Stephen's point that if you did have a federal corruption body or an ACT anti-corruption body, you would need—and I make reference to this in my submission—to have a memorandum of understanding between the police and the corruption body and the Assembly. We already do have a memorandum of understanding with the police but we would need to have one with the corruption body that might be established.

The New South Wales parliament has one with the ICAC but I can say—and it is in the paper that I referred to at the beginning—there have already been six inquiries concerning the execution of search warrants on members by ICAC in New South Wales. It is a very contentious issue between what powers the ICAC has and where parliamentary privilege intercedes. That is why I have urged in my submission that, whatever powers are given to such a commission, the issue of parliamentary privilege needs to be very carefully considered.

MS LEE: Mr Skehill, you were saying earlier that you foreshadowed this body being sort of the last resort. I just wanted to know if you could explain that in a bit more detail. Do you mean that when the complaints go through some people might go to the member in the first instance or whoever it might be and then if they do not get any satisfaction it travels along the line, or do you mean—

Mr Skehill: What I anticipate, because we have got a system that largely works at the moment, is that if a complaint is received—and I see this body as being a clearing house for complaints, and members of the public at the moment I think could

reasonably say they have great difficulty in working out whom to complain to about various things—a useful role for this body would be just to stand in the marketplace and say, "If you have got a complaint about public administration, give it to us." It will then pass it on to the agency that has power to deal with it.

If there is not an agency, then maybe there should be. It might be a systemic question. If there is not an agency, there might still be an issue that this body might investigate. But if they find that there is an agency with power to deal with the complaint, pass it on and then monitor that agency to make sure they do deal with it. If it does not rate on their priorities, if they ignore it, if they refuse to deal with it, then this body might step in. In that sense, it is a last resort.

MS LEE: Not in the sense of an appeals process: "I do not like the decision that has been made"?

Mr Skehill: No I do not think so. Unless the allegation is that the body that dealt with it were improper in the way it dealt with it.

MS LEE: Obviously in a small jurisdiction like the ACT, I think all of us would be not wanting any duplication of that.

Mr Skehill: Yes, and we do not want these things to perpetuate. You want to get to a conclusion. But if you had a complaint that the body that had power to deal with it dealt with it improperly, then I think that would be a complaint for this body to deal with.

But the other potentially important role—and I think in the previous session there was reference to ACLEI and complaints about propriety in the police—the police have got an internal standards unit which will look at it. That is sort of an oversight by ACLEI. In more serious cases ACLEI will conduct an investigation and deal with it, rather than the police internally.

If there is a complaint about misconduct or corruption within ACLEI itself, the act establishes a process whereby the minister can appoint a special investigator who is outside ACLEI to investigate the allegation against ACLEI. I have been appointed a special investigator a couple of times.

You have got a process that deals with who is taking care of the caretaker's daughter while the caretaker is busy taking care. There is a system. But that is unusual. For most agencies you do not. What would happen if you have a complaint about improper use of resources in the Auditor-General's Office? She would be conflicted in dealing with that. That might be one that this body deals with rather than referring to her or the Ombudsman's office or whatever.

MRS JONES: Or a complaint about the Public Service Commissioner, indeed.

Mr Skehill: Exactly.

MS LEE: And in that same vein, you are saying this body, whatever form it might take, should be answerable to a parliamentary committee?

Mr Skehill: Yes it should be answerable to the parliament.

MS LEE: But not for the actual decision. It is just the process, yes?

Mr Skehill: And through its oversight, yes.

MS CODY: Mr Skehill, in our previous hearing the Public Sector Standards Commissioner, the Ombudsman and the Auditor-General on numerous occasions mentioned that we as a committee and the Assembly and the government should look at the gaps. I guess you are saying the same thing in your scenario.

Mr Skehill: Yes. I see the role as enhancing what is there and filling some gaps. So the one I just mentioned of the caretaker's daughter, that is a filling of a gap. It could well be that you start seeing complaints about something or other on which there is no guidance to the public service, there is no offence, there is no code of conduct, it is a new issue. So this body might take the lead in developing a systemic response. That is another filling of a gap.

MS CODY: Mr Duncan, when we were discussing my previous question, you mentioned the investigation that happened here in the Assembly some time ago. I was wondering how anonymity was dealt with in that case?

MRS JONES: It can't be.

MS CODY: I guess that is my point. In looking at integrity bodies that currently exist across the eastern seaboard and around Australia, there are many different takes on anonymity and whether it should be a thing or whether it should not. How does that work?

MRS JONES: You mean in relation to members?

MS CODY: Yes. We have the media here today listening to our hearings, which is fabulous; it is really important for the public to know exactly what is going on in the Assembly. But what happens if that staff member was innocent and there was actually nothing wrong? It would be too late because already quite an amount of damage had been done to their reputation, one would presume.

Mr Duncan: It is a good question, Ms Cody. In that particular case, a public interest disclosure led to it. So up until the time it was resolved it was anonymous. The only people that knew about it were the police, the Clerk, the Deputy Clerk, the Speaker and, of course, the member concerned, although the member whose emails were the subject of the dispute was also aware. It remained anonymous until the police investigation ceased, and then a matter of privilege was raised. That was when the veil, I suppose, was lifted.

There is scope for anonymity, but in our current process you will be aware that if someone makes a complaint against a member the matter currently goes to the Speaker. There is a proposal before the Assembly that it go straight to the Standards Commissioner. By and large, the four complaints we have had so far have all

emanated from an election campaign or debates in the chamber. The intent was to be anonymous as much as possible, but the nature of the election campaign and the nature of debates in the chamber meant it was fairly obvious that a complaint had been lodged.

The previous Speaker adopted the policy that once she had referred a complaint to the Commissioner for Standards she would announce then that a complaint had been lodged. But yes, it is an issue, particularly in a small town. The criticism of the ICAC process—and this came through in a debate in Sydney at the presiding officers and clerks conference—is that even if the allegation is not proved, it does not matter. All members in the New South Wales Parliament who were named as part of the ICAC investigation eventually ended up losing their seats, either by way of resignation or just not getting re-elected.

MS CODY: That is right.

Mr Duncan: And even if there was no corrupt—

MRS JONES: It is too late.

Mr Duncan: So that is an issue. I have not got a solution for it; I am just saying that that is an issue in other jurisdictions.

Mr Skehill: I am strongly of the view that if we have an integrity commission it should not conduct public hearings. It could conduct public inquiries into systemic issues but not public investigations into allegations of corruption. They should be behind closed doors. If they find the person innocent, then their position has been protected. If they find the person has, in their view, committed an offence, off to the DPP. If the DPP then undertakes his process and goes to court, that is where it sees the light of day. But we can too readily trash people's good reputations without cause.

MR STEEL: That goes to my question to Mr Skehill in relation to your comments about public hearings. How do you think public hearings, if they were adopted here, might prejudice a later court hearing in relation to the same evidence?

Mr Skehill: Well, they possibly can. There is a very public matter at the moment where people are expressing very grave doubts about whether the accused can get a fair trial because of what has been in the public domain prior. But I think the more usual issue is not causing damage to people without cause, and the arguments that I hear put for public hearings I do not think hold water. One of them is that having a public investigation will induce potential witnesses to come forward who would not otherwise. I very much doubt that. I think it is more likely to deter people from coming forward because they do not want to be grilled up hill and down dale in a public forum.

It is a very vexed question and there are legitimately held different views on either side. But I think the safer course is to not have public investigations. As I say, you might have public inquiries into systemic issues; that is a completely different thing.

MR STEEL: I suppose I am referring to different rules of evidence applying in a

public hearing of what is an executive body, not a court body, for example, the right to silence does not apply, you are compelled to answer in public, general procedural fairness that might be provided in a court, like cross-examination of witnesses, does not apply. Is that one of the reasons why it is so concerning to have a public hearing in that sort of body rather than just leaving it to the court?

Mr Skehill: Yes. In that situation, your body with coercive powers may uncover matter that is inadmissible in court proceedings. It may come to the conclusion that it has found a breach that cannot be penalised. That may lead it to give some consideration as to whether there needs to be systemic change.

MRS JONES: Or change to the law.

Mr Skehill: Yes. I, in fact, chair a body that has these intrusive powers, coercive powers, of summonsing and requiring production of documents and evidence and so on and so forth. The legislation under which we operate very clearly states that we must do that in private. There might be a public outcome at the end, but it is only where there has been an adverse finding.

THE CHAIR: On that point of adverse finding, following on from Mr Steel's observation, some of the integrity bodies across the country have the ability to make a finding of corruption or misconduct, but that does not necessarily lead to a criminal prosecution because, as you have spoken to, the way they have extracted the evidence is not admissible in court and the DPP will make an independent decision that there is not a case they can mount.

How does having a private hearing settle with that? You have the private hearings to protect confidentiality, a finding of misconduct is made, but there is not a criminal outcome. You say once it goes to court that is when it becomes public. If there is an adverse finding, presumably it is in the public interest for that to be known, even if there is not a criminal charge.

Mr Skehill: There may not be a criminal charge; there may be a civil outcome. You may have someone dismissed from service, something like that. But it may also be that a finding by this body is adverse, but that is just an opinion. If it does not measure up as sanctionable under the existing law, why should that prevail? It raises a systemic question: maybe we need to do something about the existing law. But if you have essentially just an opinion that has no civil or criminal sanction, why should that opinion prevail?

THE CHAIR: That is a fair point. If there is a finding of a systemic problem, how is that acted upon if the finding remains confidential?

Mr Skehill: You may well go into a process of having an inquiry as to the need for systemic change where it has got to be a no names, no pack drill type of situation, to protect the person involved. But that is just a matter of discretion, I think.

MRS JONES: My question on that exact matter goes to the heart of where a matter is in the public domain. As I have outlined before, one of the matters that led to the decision for this committee to exist is around the sale of land in the ACT.

MR STEEL: That is your opinion, I think.

MRS JONES: Okay; Chris would like to put on record that that is my opinion. It related to issues of public confidence in government systems and potentially individuals acting outside what the community expects in a democracy. That does not necessarily constitute criminal behaviour. But it certainly may constitute, or may have constituted, something that is totally outside what the public expects. In a democracy, presumably the will of the public on the whole, as a general rule, about what they consider to be right and wrong should prevail. Bodies like this have a part to play, I would presume, in restoring confidence.

The New South Wales ICAC, for all of its flaws—I think we can all agree there are many—believes that the public hearings process on matters of that sort of nature can restore public confidence that something is being done about matters which have become an issue already. How would you see a body that only ever had private hearings be able to fulfil the function which perhaps this committee might be looking at, which is the restoration of public confidence?

Mr Skehill: I think it is the systemic route. So you have had—

MRS JONES: How did we get to this point in the first place?

Mr Skehill: an investigative process that has found something that you say is a matter of concern to the public, but there is no existing sanction. That raises the question: why do we not have a sanction?

MRS JONES: Right.

Mr Skehill: That is where this body could have a role in identifying those issues and seeking to develop, possibly quite publicly develop, a sanction to deal with that situation.

MRS JONES: It is like a process post the investigation, where there is a public—

Mr Skehill: Yes.

MRS JONES: A lot of these bodies produce reports that have depersonalised cases in them. I guess that in a small jurisdiction that will be successful only to a certain extent. Nonetheless, there is an attempt made. Possibly in a report like that, recommendations could be made to government; is that—

Mr Skehill: Yes, in a lot of these types of things that you talk about, the issues arise through, or become publicly known through, Auditor-General's reports, through Ombudsman's reports, things like that. It may be those reports that engender the public concern. Once the public concern is manifest, that is when the question is asked: "These problems are being found and we do not have a solution. What solution should we have?" That is where I would see this body coming in.

MRS JONES: Just to finish that thought, new sanctions would not necessarily have a

retrospective action, because in our system we try not to do that—

Mr Skehill: No.

MRS JONES: for fairness reasons—

Mr Skehill: Yes.

MRS JONES: which might mean that that actual matter then is never resolved, because there is no public statement necessarily about that matter and that person.

Mr Skehill: But if what was found was legally permissible at the time but is now judged to have been inappropriate, I think the position against retrospectivity is sound.

MRS JONES: Why should the person suffer, yes.

Mr Skehill: We are about avoiding future repetition.

THE CHAIR: Mr Skehill, what views or advice would you offer in terms of keeping an investigation behind closed doors, as you flag in your submission? How is the complainant prevented or contained from actually making the allegation? Certainly here in the Assembly in the four cases that we have had that have gone to our standards commissioner, they have been very publicly put out there.

MRS JONES: Through parliamentary privilege.

THE CHAIR: Sometimes just through a media release, but certainly through parliamentary privilege as well. Can you give us any advice on what you have seen on how that might be constrained under a model where you are seeking to maintain that?

Mr Skehill: I am not deeply familiar with it, but I understand that a number of the ICAC-type bodies have a power to issue orders to people who are complainants or witnesses to not publicly disclose anything, and that might be an appropriate power.

THE CHAIR: It becomes a contempt or an offence if they breach that?

Mr Skehill: Yes.

THE CHAIR: Mr Steel, had you finished your line of questioning before? You got interrupted quite a bit there. You started something that was obviously of interest to all the members.

MRS JONES: Yes, really important.

THE CHAIR: Clerk, one of the questions I have is whether you see any barrier to an integrity commission operating under the office of the parliament model in terms of, I guess, underlying its independence and integrity?

Mr Duncan: No, I do not. I think it could operate that way. I note in the Northern Territory paper that was given at the conference a couple of weeks ago they were

grappling with that issue as well, as to whether it should report via the Chief Minister or to the Speaker in terms of their annual report and things like that. They are of the view that it should be the Speaker, rather than the—

THE CHAIR: Effectively makes it an officer of the parliament.

Mr Duncan: They do not have the same officer of parliament arrangements that we do, but I do not think we have got any objections to that happening.

THE CHAIR: Yes. You have also flagged issues of parliamentary oversight in your submission. You have flagged, I think it was, the justice and community safety committee as probably the appropriate body to report to.

MS CODY: And admin and procedure.

Mr Duncan: And admin and procedure.

THE CHAIR: What are the pluses and minuses of each of those approaches?

Mr Duncan: I think either of those two committees would work. I am on public record as saying that 11 committees are enough for this Assembly and that we do not need a twelfth or a thirteenth. So I think it is—

MRS JONES: Are you sure about that?

Mr Duncan: The Speaker and I went to Tasmania earlier this year. We had discussions with the then-president of the Legislative Council, who at one time was the chair of the oversight committee for their Tasmanian Integrity Commission. Following on from that, I think our view is that it could be done by an existing committee. I do not have any strong view. The only advantage of the administration and procedure committee is if there are matters of parliamentary privilege and things of that nature that come up from time to time and whether the integrity body, if it is established, is transgressing on parliamentary privilege issues.

I again draw attention to the fact that there have been six inquiries in New South Wales as to whether the ICAC has overstepped the mark in terms of parliamentary privilege. Maybe the admin and procedure committee might be better suited to sort of keep an eye on things. But I do not have a strong view either way. It is up to the Assembly, really. I am agnostic.

MRS JONES: The make-up of the admin and procedure committee is that it is chaired by the Speaker.

Mr Duncan: The Speaker, and it has—

MRS JONES: It does not necessarily have a separation there. There is not the extra insurance of the possible other chair who is not involved in the budgeting process for this body, if it were to be an officer of the Assembly.

Mr Duncan: Yes, but the Speaker already deals with the Office of the Legislative

Assembly's budget, anyway. You have that—

MRS JONES: We have talked a bit in the committee on the problem of this body, if it were irritating a government, being stripped of its funds.

Mr Duncan: Sure.

MRS JONES: That is all I am saying. Federally, a similar issue is that other types of bodies that have been annoying the government ultimately have been stripped of their funds. By including a committee which does not have the Speaker as the chair of it, it gives an additional separation for the interaction with that body.

Mr Duncan: Yes and no, Mrs Jones, because Speakers have the advantage to appear before budget cabinet in their own right to argue for funds, so—

MRS JONES: No, I am not talking about whether that person could seek funds appropriately. I am saying that by having this body reporting to a separate committee is an additional sort of insurance against a set being taken against them, is what I am saying, in the long term.

Mr Duncan: Right. I do not have a strong view. I think that is probably up to the Assembly.

MRS JONES: It has been brought up.

THE CHAIR: We will suspend in a couple of minutes. Are there any further questions?

MR STEEL: I have one, if that is all right?

THE CHAIR: Please, Mr Steel.

MR STEEL: It is in relation to the Clerk and the Public Interest Disclosure Act. Currently you have an investigative function in relation to MLAs and their staff, but you would like to see that change. Who do you suggest would take over that role in the PID Act and in the context of a potential integrity body being established as well?

Mr Duncan: If the Assembly were to adopt an integrity commission, I think that role could be undertaken by an integrity commission. I notice that in the Northern Territory Martin report, I think they recommended—correct me if I am wrong—that the PID Act be abolished in that state. They will instead go to their integrity body, whatever it is called. From my perspective, I would prefer to be out of the lobbyist register role and I would prefer to be out of the role investigating possible PIDs, because I just do not think the role of the Clerk is ideally suited for either of those particular functions.

MR STEEL: I guess I ask because the concern might be that the disclosure that is made is a fairly low-level disclosure. There could be a mandatory disclosure regime that is brought in as well. Do you not think that a lower level like the standards commissioner might be more appropriate for that role—

Mr Duncan: It depends—

MR STEEL: rather than raising it to basically what will be seen in the court of public opinion as being a corruption matter—

MRS JONES: If it is known.

MR STEEL: straight away?

Mr Duncan: David is our PID-er; so I will hand over to David.

Mr Skinner: I think one of the issues around having the commissioner being the person receiving PIDs is that they are created under resolution. The PID Act is obviously a statute. There is a reason why the Commissioner for Standards was established as a resolution. It was to give it a proper parliamentary basis outside of the reach of the courts, to preserve separation.

We have pretty specific advice around what would happen if you were to refer a PID to the commissioner. The effect of that is likely to be that many of the protections that are associated with that act would disappear. If somebody is making a public interest disclosure with the expectation that there would be a number of protections available to them, which is a large part of the purpose of that act, and it was then referred off to this commissioner who exists only as a matter of resolution, that could create some problems, obvious problems, for the person making the disclosure, because they perhaps came forth on the basis that they would be protected, and those protections would go.

If there was a statutory arrangement that was codified in statute where there was a commissioner for integrity, for instance, or an integrity commission that was able to receive those, some of those problems would go away, but I still do not know that the Commissioner for Standards, established by resolution, would be the appropriate person. I would suggest it would be—

MRS JONES: To do investigations?

Mr Skinner: To do investigations into PID matters.

MRS JONES: Yes.

Mr Skinner: And, indeed, how the PID Act might integrate under an integrity commission model is a matter for further consideration. But there are some complex issues there as well.

MRS JONES: That is right.

Mr Skinner: I take your point; it would seem to be a natural place for those sorts of issues to be addressed, but there are—

MR STEEL: At first instance, then.

Mr Skinner: those issues of how those establishing legal frameworks interact with one another. They do not quite bolt together as they perhaps should.

THE CHAIR: Thank you. Gentlemen, thank you for your time today. I am mindful of the open discussion we have had. Are there any final observations you want to make on the issues that have arisen?

Mr Skehill: Not from me.

Mr Duncan: I want to correct one point. I was asked a question about who knew about that investigation. There was one other person. It was the minister in charge of shared services who knew about the investigation. As a consequence of that, the then Speaker instituted an MOU between the minister in charge of shared services and the Speaker to make sure that—

MRS JONES: That it would not be discussed.

Mr Duncan: It would not: that any issue relating to a member or a member's staff would be discussed only with the Speaker and not with other ministers; so I just wanted to correct the record.

THE CHAIR: Thank you for that. Gentlemen, thank you for your time today. That has been a very interesting discussion and very helpful to the committee. We will suspend the proceedings.

Short suspension.

WHITE, MR JON, Director of Public Prosecutions

THE CHAIR: We will resume the hearing of the Select Committee into an Independent Integrity Commission in the ACT. I welcome the Director of Public Prosecutions, Mr Jon White. Thank you for attending today, Mr White. I am sure you are familiar with the terms of reference for the committee. I will also confirm that you are comfortable with the privilege statement that is on the table in front of you.

Mr White: Yes, I am; thank you very much.

THE CHAIR: Mr White, we received your letter. Thank you for making clear your preparedness to attend. Do you want to make any opening remarks?

Mr White: Yes. I would like to thank the committee for inviting me to this hearing. There is one aspect in particular that I thought it would be useful for me to elucidate, that is, the relationship of any new body to my office. I do not wish to express any opinion, and the DPP has no opinion, about the necessity of such a body in the ACT or what powers it might have, although I am familiar with the various models around Australia and how they operate. I do want to emphasise the difference between the function that such a body would perform and the function that my office performs. I want to do that particularly because at some stage there was a suggestion that it might be possible to collocate the functions of any new body within my office or in some way attempt some synergies between the new body and my office.

Clearly, one of the issues that the committee is looking at from the terms of reference is how this body will operate in terms of this being a very small jurisdiction, and hopefully not needing a large standing army, so to speak; in other words, crafting an organisation which is able to expand when it needs to and then contract when it needs to. Clearly, the functions that my office performs are prosecutorial and not investigative, and the functions that this proposed body would perform would be investigatory. If, as is the case in many other jurisdictions in Australia, this body has powers of compulsion then that does raise issues about the way in which there is communication of information between this body and my office if there were any prosecutions in prospect.

Generally, the model in other places in Australia is that these bodies do have powers of compulsion but there are great restrictions on the use that can be made of material obtained under compulsion. The High Court has made a number of rulings in this area in the past few years. It is a very difficult area, and I think most lawyers would agree with me when I say that it is not entirely clear the extent to which some of the prognostications of the High Court affect the functioning of prosecutions after a compulsory hearing.

Nevertheless, clearly, the rule is essentially that it is unfair to use compulsorily acquired material against a person in any subsequent prosecution. This means that if these inquiries give rise to any matters for prosecution, there has to be effectively a reinvestigation of the matter, or at least a putting together of a brief containing material other than compulsorily acquired material. That interaction of who knows what from the compulsory inquiry has caused a lot of problems.

MRS JONES: It should not leak into your office.

Mr White: It should not leak into my office. That leads me on to the obvious point: there would need to be a clear delineation between the functions of my office and the functions of any new body that was set up. While I would not see a problem with, for example, staff being sourced from my office, or indeed other government lawyers within the territory—Legal Aid, the Government Solicitor and so on—there would need to be very careful Chinese walls put in place in respect of any of my staff who had participated in any way in any investigation by this proposed body. That is essentially the main point I wanted to make.

THE CHAIR: Thank you for elaborating on that. It was certainly one of the questions I wanted to explore with you, given the different evidentiary thresholds, how that is dealt with. It has been clear to us, in talking with other jurisdictions, that their integrity commission, in its various forms, is capable of making a finding of misconduct or corruption; they have different definitions.

Mr White: Yes.

THE CHAIR: With respect to how far that then goes in terms of a prosecution, there seems to be a bit of a gap. I think you have elaborated on that point for us quite well.

Mr White: Yes. The function of finding misconduct or corruption is a completely different function from the prosecution function. The committee may think, looking at other models, that there is some benefit in having the ability of a body to identify behaviour as corrupt, but that does not carry with it any significance. That finding of itself carries no significance for a prosecutor. A prosecutor would have to find an offence that had been committed, and then would have to find admissible evidence to substantiate that offence, and that admissible evidence would need to be other than compulsorily acquired evidence that came out of an inquiry.

THE CHAIR: I presume you would hold the view that any such body would not have prosecutorial powers.

Mr White: Yes. It would be very important that the function of prosecution is retained in my office. That would particularly be the case if the body had the power to make findings of corruption or misconduct, because there is clearly potential for confusion in the public mind as to what the significance of such a finding would be if that body also had prosecutorial powers. It would be my view that my office would retain the prosecutorial powers, which are exercised in accordance with the prosecution policy of the territory and the general law. They are well known, and they are elaborated on now by the High Court in cases like X7 and so on in terms of what use may be made of compulsorily acquired material.

MRS JONES: We are grappling with the concept of public hearings versus private hearings. There are arguments for public hearings in clearing up a matter which is bothering the public, for good reason sometimes, versus private hearings to protect the individuals involved, especially if they are not found to have been corrupt. Do you have any thoughts on how public or private investigations could impact on the role

that you are doing should you then receive a brief of admissible evidence about somebody, and having been through a public hearing or not?

Mr White: I do not see any direct consequence for any subsequent prosecution. Clearly, prosecutors operate in an environment where the general principle is open justice. Generally, prosecutors are of the view that, unless there are very good reasons that matters take place in closed court, they should take place in open court. That is a principle that is probably more extensive than just criminal prosecutions. It runs through our legal system. A lot of it is to do with the exposure that comes from a public hearing and the ability of other members of the community to react, sometimes, to information that comes out in a public hearing. Private hearings tend to mean that that sort of information is not necessarily exposed in the same way. Most bodies, as I understand it, have a mixture of public and private hearings.

MRS JONES: Yes, depending on the issue.

Mr White: Clearly, the discretion of any such body would be required to engage in private hearings when there was good reason to do that. The general principle of law is that what is sometimes called the disinfecting sunlight of public hearings should be a general rule.

THE CHAIR: In that vein, you have discussed the fact that because of the different evidentiary bases, in a public hearing evidence that might be subsequently inadmissible would become a matter of public discourse—

Mr White: Yes.

THE CHAIR: if there was then a finding, and you moved to a prosecution. What is the interaction between that previously aired inadmissible knowledge that juries will potentially have read about in the press and your seeking to then run a case that you cannot use that evidence?

Mr White: That is a problem that arises even under the current regime. In other words, it is not uncommon, for example, for a person who has previously been convicted of a particular offence to be then charged with another offence and brought to trial. So there is information out in the public arena—

MRS JONES: About that person.

Mr White: about that person. But a jury will be instructed very clearly not to have regard to that information. So that kind of scenario is actually quite common in the criminal law.

THE CHAIR: Yes. Media reporting as well.

Mr White: Yes; media reporting and of course the big development of social media has made that an acute problem. Courts have struggled with the way that juries, for example, interact with social media. Of course, there are standard directions that they are to have no regard to it, and standard directions that they are to try the case on the evidence presented within the four corners of the case.

My experience, and I think the experience of most of those who are familiar with the function of the jury system, would be that juries are very good at doing that. Juries are very good at following directions of judges and trying cases on the evidence before them, and not having regard to inadmissible material that they may be aware of from other sources. So I do not think, as a principle, there is much difference between the two scenarios.

THE CHAIR: Thank you; that is clear.

MS LEE: Director, going back to the notion of how important it is for open justice and an open court—and, as you know, any investigation done by this body is outside that realm in terms of the legal system—one of the comments that was made earlier in our public hearing was the notion that once it gets referred to the DPP and they do take it on and it goes to court, that is where it gets aired in public; hence we should err on the side of private hearings. In the instance that there has been a finding, as you say—that is just what it is, it is a finding—and it gets referred to your office, and, preserving the independence of your office, you make a decision that you do not have enough evidence to go forward, how do you think, practically speaking, that we could instil public confidence that a finding of misconduct is not hidden away in private and just swept under the rug?

Mr White: I see the issue raised by that question. Clearly, there are two different functions being performed. Members of the committee will readily appreciate the difference between those two functions but members of the community may have great difficulty understanding the difference. So if there is a finding of misconduct and, for example, no subsequent prosecution because a prosecutor makes a decision that there is insufficient evidence on the prosecution test to proceed, that may seem to be inconsistent, but in fact it is not inconsistent. That really is a matter for public education. The role of the integrity commission would be to identify what they found to be, for example, misconduct or corruption, but that does not imply that it is a criminal offence, or that there is evidence available to the criminal standard of prosecuting that person. Clearly, there would be a necessity for the public to be very engaged with that distinction. That is probably the best way I can answer that question.

THE CHAIR: As we discussed before, you have been very succinct, Mr White.

MRS JONES: Is there anything else that—

Mr White: No, I do not think there is anything else.

MRS JONES: Your role is so specific, and in a way disconnected from what we will be doing, to some extent.

Mr White: Yes, indeed.

THE CHAIR: Those couple of points you have made have been very useful to us. Thank you for your appearance today. If we have any further questions, we will of course contact you. Thank you for your time today.

Mr White: I thank the committee.

THE CHAIR: The hearing is now adjourned.

The committee adjourned at 11.47 am.