LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON AN INDEPENDENT INTEGRITY COMMISSION 2018

(Reference: Inquiry into the establishment of an independent integrity commission for the ACT)

Members:

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

TRANSCRIPT OF EVIDENCE

CANBERRA

FRIDAY, 28 SEPTEMBER 2018

Secretary to the committee:
Mr H Finlay (Ph: 620 50129)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 20 May 2013

The committee met at 1.33 pm.

MUSCAT-BENTLEY, MS BROOKE, ACT Regional Secretary, Community and Public Sector Union
HIGGINS, MR BRENTON, Lead Organiser, Community and Public Sector Union

THE CHAIR: Good afternoon and welcome to the final scheduled public hearing for Select Committee on an Independent Integrity Commission 2018. On behalf of the committee I thank you, Ms Muscat-Bentley and Mr Higgins, for attending today.

I think you have both seen the privilege statement before. Are you both comfortable with the privilege statement?

Ms Muscat-Bentley: Yes, we are both fine, thank you.

THE CHAIR: We have received your submission; it is quite a detailed submission and we appreciate the work you have put in. Do you want to make any opening comments?

Ms Muscat-Bentley: Yes. Obviously we welcome the opportunity to address the select committee today. We are one of the largest trade unions in the ACT public service and we represent workers across all directorates. CPSU members take corruption and misconduct very seriously and we are broadly in support of the establishment of an integrity commission.

Members also support the government's exposure draft pretty broadly, however there are some concerns we would like to step you through initially and then we can open for questions.

I will start with political disclosure. CPSU members are concerned about the proposed requirement to disclose the membership of a political party. Our members hold the firm view that public servants should maintain the right to political participation and this right should not be diminished by the nature of their work.

In terms of the definition of "corruption", CPSU members support the focus upon serious corrupt conduct in terms of the government's exposure draft. It is our view that the exposure draft needs an explicit definition of what "serious corrupt conduct" is. What we do not want to see is a muddying of the waters between misconduct provisions that are picked up in enterprise agreements and what should be done in terms of the ACT government as an employer contrary to the role of the integrity commission. They need to be quite separate in our view.

Mr Higgins: The next issue is the summons power for the preliminary investigation that has been slated. Currently the exposure draft allows the commission the power to issue a preliminary inquiry summons. While we support preliminary inquiries absolutely—they are similar to what are in the enterprises agreement when you are undertaking a misconduct investigation—we do not support the compulsion powers at the preliminary stage. We have concerns about that. We note that this is not a statutory power in other jurisdiction bodies such as ICAC or the Queensland criminal

misconduct commission.

The next issue is covert powers. Again, we have concerns about the powers provided to the commission regarding the availability of covert powers and surveillance. If surveillance and similar powers are to be utilised, strict protections should be in place such as the issuing of a warrant or by accessing these powers through joint stakeholders such as the Australian Federal Police.

I also want to take you to how the commission holds a hearing. It is our view that the default position should actually be switched: the default position should be private hearings rather than public. We value the reputation and the privacy of any parties in a hearing and they should be respected unless a significant public concern needs to be addressed.

Ms Muscat-Bentley: We have apprehensions in terms of the proposed ability for the commission to waiver a party's privilege against self-incrimination. Our view is that everyone's human right is the right to silence and that that should be maintained through the exposure draft.

Mr Higgins: Our final concern goes to the draft investigations on provision of the preliminary draft investigation and report to parties involved. The provision of information of this nature, particularly when the report may lead to criminal charges, may prejudice any further investigations.

THE CHAIR: Can I go to the staffing of the commission and the issue of political party disclosure. You have expressed concern about clause 48, that is, people needing to disclose personal interests that the commission considers relevant. One feature of this piece of work is obviously the political—small "p" political, not big "P"—sensitivity of the role of the commission and the generally sensitive nature of the work.

There is a general assumption that an organisation like this will be given some greater powers and responsibilities than normal work. It strikes me that at least having transparency about people's potential conflict is quite important, but that should not preclude them from being involved in the work. Fear is always the things you do not know about rather than the fact that someone belongs to a particular political party.

Ms Muscat-Bentley: From our perspective we would not want to undermine any process or role the commission would have. We think people can absolutely be a member of a political party but also perform their role in terms of being independent and maintaining integrity.

They would not necessarily need to disclose that they are a member of a party. As long as they are performing their duties to a high standard and they are performing the role I do not necessarily think there needs to be that exposure of what their political affiliations might be.

MRS DUNNE: I cannot remember if it is in the ACT Electoral Act but certainly the commonwealth Electoral Act requires that electoral commissioners and senior staff cannot be members of political parties. This is not a blanket ban on public servants being members of political parties; it is in a particular exceptional environment. Why

do you see that that is a problem?

Ms Muscat-Bentley: It is everyone's right to be a member of a political party; it does not necessarily mean it will negatively impact on your job or your role. People can definitely discern the two things they are involved in, whether it be their employment or their political affiliations.

I would not want to see a situation where you are diminishing someone's right to join a political party. That is someone's right effectively, and I would not want people to have the view that they could not join a political party and undertake this role. Whilst you are saying that, potentially, it is just about disclosing, that could be a deterrent for some people to not be engaged politically.

THE CHAIR: It goes to the integrity of the investigations, given how hypersensitive these can be. If we had an investigation where a member of a political party was investigated and it was then later revealed that one of the staff who worked on it was a member of the same or a different political party, it would potentially undermine the whole investigation. I totally agree with you that people should be free to join any political party, but that does not mean that they are necessarily suitable for every job or that we would want that to be a secret until after the fact.

Mr Higgins: There is a standing provision in the ACT public service whenever you start any meeting or whenever you engage in anything throughout the entire public service that there is a disclosure of interests. That is taken quite seriously by the public service. That is the case for all purposes, whether it be the provision of funding, whether it be deciding on grants. That is adequate at the moment. That works for the public service, and we believe that that would meet the disclosure requirements you need.

Obviously, in the scenario you outlined, yes, that is absolutely relevant and the officer should disclose at that point that there is a conflict of interest. That is a standing provision in the ACTPS, and it is not necessary to repeat that in this legislation.

MS LEE: But that would be the case if the staff members were employed by the public service. But we had evidence from the Ombudsman saying that perhaps their office might be in a position to play the inspectorate role and they would need a different regime for staff.

Mr Higgins: Sorry, I should clarify: it is not a standing requirement under the ACTPS legislation. It is not under the Public Service Sector Management Act; it is a standing practice in the ACT public service that there is a disclosure of interests, much as the same as for you.

MS LEE: So are you saying a similar practice might be able to be adopted?

Mr Higgins: Yes, absolutely.

Ms Muscat-Bentley: It makes sense to identify if there is a potential conflict of interest in your role, but we would not want someone to be deterred from being a member of a political party.

MS LEE: In your opening as well as in your written submission you say that the hearings should be conducted in private as the default. This was a big issue previously and still is amongst a lot of people, including witnesses who have appeared before us. As the chair mentioned, this body will be given relatively strong powers to undertake conduct we probably have not seen previously in a separate body. Is it not important in order to foster public confidence that, with the relevant public interest test being met, the hearings happen in the public arena?

Ms Muscat-Bentley: It is a balancing act, I guess. Obviously you would want to protect the reputation or privacy of a witness or even someone who could be potentially charged with something because you are innocent until proven guilty. Our view is that you need to give someone those initial protections where possible until there is actually a case to be heard.

Yes, it is important that some cases would need to meet a public interest test, but I do not think every single hearing should be public. There are serious personal ramifications of that, particularly if somebody is a witness or if somebody is found not to have done anything wrong.

So it is a balancing act. As we say, the default position would be private, but if there is a significant public interest test that could be applied you would obviously go for a public hearing in that instance.

Mr Higgins: The other point you may want to consider is if you have got other legislation enacted by the ACT government, such as freedom of information, there is a default where there is the chance for a person to say, "Actually, no, the release of that information is personal to me and there is a the reason why I don't want that." Here that decision is not taken to the witness or to the party; it is a decision of the commission.

Of course, we are not saying that there are not scenarios where there should be public hearings. There absolutely are scenarios where we believe there is a public interest and they should absolutely be there. But at the moment the fundamental basis should be that unless there is a genuine public interest as to why this needs to go forward in the public arena it should be in private.

Particularly if you are in a scenario where there is an investigation and there is testimony from a witness and the investigation finds there were no claims, there could be potential to damage that person's reputation.

MS LEE: Both the bill and the exposure draft make provision for both; it is just a matter of where the focus is. Certainly witnesses have given us different views. One of the concerns raised by the Assembly's ethics and integrity adviser with the default private hearings scenario is the possibility that the commission could be tied up in legal proceedings over whether the hearings should be public or private and that that will frustrate the commission's role in undertaking an investigation. Do you have any comments on that?

Ms Muscat-Bentley: I would probably need to take that on notice. My initial view is

that you would not want to be drawn into a lengthy legal battle. Everyone understands and agrees that this commission has important powers and should be able to do the work it needs to do. However, there needs to be that ability for someone to say, "I need to protect my reputation and my career or my potential future careers." It is a risk you take, but it could potentially be very damaging for individuals, and that needs to be at the forefront of decision-making.

MS LEE: You also mentioned in your previous answer that you would not want to see a situation where something has not been proven and it has gone public, and that is precisely why we have provision for preliminary investigations. Do you think another way of putting forward protections is to ensure that the preliminary investigations process is robust?

Ms Muscat-Bentley: Potentially. We have found in our experiences in the ACT public service that you can undertake a preliminary investigation and think there is enough there to proceed down a particular track but then find out once the process becomes more formal that nothing is substantiated or there is nothing in it. Potentially that leaves people exposed by just relying on a preliminary investigation. There needs to be that ability to go through the formal process where you can have your more significant right of reply and procedural fairness.

Mr Higgins: In regards to your comment regarding frustrating the process, you are currently in a scenario where if you have the default of a public you are more likely to get appeals against that with people saying, "We don't want it to be in public." I believe that there is more chance under the current provisions that people could frustrate the process than if the default is private.

MS LEE: If you are going to come back to the committee you might want to take this on notice as well: one issue that has been raised is that court proceedings are generally in the open unless exceptional circumstances exist and courts have greater power to impose and make findings of guilt. The commission is a finder of fact that does not impose any penalties per se, and it has been said that putting it at such a high bar is not consistent with some of the transparency issues. Could you comment on that?

Mr Higgins: Yes, we probably would want to take that on notice.

MRS DUNNE: You raised in passing issues about preliminary assessment and lack of procedural fairness. Do you think preliminary assessments are essentially lacking in procedural fairness and, if so, how would you address that?

Ms Muscat-Bentley: They can be; that has been our experience in the ACTPS. We have looked at beefing up preliminary assessment provisions in enterprise agreements in bargaining quite recently to allow people to be aware of what the preliminary investigations are about and also to have a right of reply. Initially and in some instances investigations happen and an individual is not even aware that there is an investigation into their conduct or their behaviour. Our view is that that stuff should be very transparent and people should have a right of reply from the outset.

MS CODY: Mr Higgins, you mentioned that no-one should be compelled in a preliminary hearing. Can you expand on that a little bit?

Mr Higgins: Sure. We draw a paradigm of what does occur with the preliminary assessment in the enterprise agreements. In the enterprise agreements the purpose of the preliminary hearing is to assess whether there is enough information to proceed. It is our view largely that this should be the same case. It is not a formal hearing, it is not a formal process. It is not going through the entire gamut of what the investigation needs to be. It is preliminary.

As we have explained in the previous response, there are scenarios currently where preliminary assessments are done without people even knowing that they are being done. Whilst a balancing act needs to occur there, there is a natural right to know that something is occurring with you. The compulsion powers are quite strong in this; they certainly are above and beyond what is in ICAC and the criminal misconduct commission in other jurisdictions.

MS CODY: You spoke to Mrs Dunne about people being included or understanding. Mr Coe's draft legislation states that people should not be kept informed of the investigation. Where do you sit in regards to that?

Ms Muscat-Bentley: We absolutely support transparency and we support people having the full gamut of information that relates to them and their employment or whatever. That allows for procedural fairness and allows them to be fully aware of what potentially they could be investigated for. That is just natural justice, really, from our perspective.

MS CODY: You also mentioned in your opening statement surveillance and—

Ms Muscat-Bentley: Sure, the high bar?

MS CODY: Yes. Can you expand on what you think is procedurally fair?

Mr Higgins: To be clear, where we are at with this is that we understand that with the appropriate evidence there is a requirement to undertake those activities. There is no question on that. There will be times where surveillance with covert operations with assumed identities needs to be done. We have no issue with that whatsoever.

We are asking that the requirement on the Australian Federal Police is the same requirement used for the commission. We note that there can be stakeholder relationships with the Australian Federal Police; that is something that can be done. What we do not support is the use of those powers wholeheartedly, such as the authorisation of that without a warrant from the commission. That is deeply concerning for us.

MS CODY: So you support the fact that a commissioner could do own-motion investigations but needs to go through all the same channels?

Mr Higgins: Such as seeking a warrant, absolutely. And we believe that that would be the community expectation as well.

MRS DUNNE: I want to reflect on something that Ms Cody said this morning. I

missed Mr Coe's evidence the other day but I believe that Mr Coe was saying that if someone makes a disclosure then they are not necessarily kept abreast of the inquiry once it starts. He used the analogy that if you make a disclosure to the Auditor-General and the Auditor-General takes it up, then you are not kept up to date after that. I want to ask something that has not really been touched on in your comments so far today: how do you see the interaction between this body and public interest disclosure legislation, one of my little bugbears?

Ms Muscat-Bentley: We might need to come back to you on that one, if that is all right.

MRS DUNNE: Yes. There has been some discussion of this perhaps leading to amendments to the public interest disclosure legislation, which I would wholeheartedly support, because I think that it is very lacking in some ways. This is probably on notice: how do you see the interaction between this and the PID legislation? And, as a sort of consequential follow-on, how would you see the PID legislation being modified to more appropriately dovetail with this legislation?

Mr Higgins: We will need to come back on that.

MRS DUNNE: Thank you. You commented based on the government's bill. Have you reflected on Mr Coe's tabled bill?

Ms Muscat-Bentley: We have. Our broad view is that we are in support, other than the issues that I have raised, with the government's bill at this point. We are in support of the government's exposure draft.

MRS DUNNE: What do you see as the departures that put you down the path of saying you support the exposure draft rather than Mr Coe's bill?

Mr Higgins: The principle with both was for the establishment of the commission, which we wholeheartedly support. What we believe the government's bill does that lies with the interests of our members is to put strong protections in place. Notwithstanding the points we have raised, of course, there are strong protections in place that allow public servants to be protected and allow you to undertake the work you need to undertake. For us it is about an even-keeled approach that provides the appropriate protections for those who are either providing statements or being investigated but also balances with what the public interest would be.

MRS DUNNE: In what sense do you see that they are lacking from Mr Coe's tabled bill?

Ms Muscat-Bentley: There are some technicalities that, again, we might need to take on notice. We have largely based our submission on the exposure draft. However, we have read both, so I think we can come back to you broadly with some of the concerns, or where we see the differences lying, and why we support the government's exposure draft.

MRS DUNNE: I would just like some more elaboration, because one of the things we have to decide is where we as a committee start as a sort of stepping-off point.

Ms Muscat-Bentley: Sure. We can come back to you on that.

MRS DUNNE: Thanks.

THE CHAIR: Late in your submission, towards the end, you talk about the comments on investigation reports. You have made reference to the fact that you do not think that there should be a provision for relevant persons or public sector entities to provide a copy of the proposed report. I wonder if you could take me through a scenario or what your thinking was to prompt that comment. On the face of it, it caught me by surprise. It is quite standard in Auditor-General processes and the like that draft reports are tested. I am interested in the scenarios you had in mind in making that observation. It is on page 5, in the middle.

Mr Higgins: I draw your attention to the last sentence there, which says it is not in all circumstances that they not be provided. It was our view that under the current draft proposal it is that they must be provided. When you are dealing with serious misconduct, particularly when there is a significant public interest, where there may be financial implications, there may be times when the commission may need the power to say, "No, it's not appropriate that we put this forward at this time," particularly where it is going to head towards noting that they cannot make a recommendation to proceed with criminal charges but it is referred to the DPP. Whilst I note again that your exposure draft says that you cannot put information in the report that would prejudice an investigation, there may be information in it that may inadvertently prejudice the information, depending on what it is. It is not a cover-all that they should not be provided; it is a case of the commission being able to have the power to use discretion as to whether they are provided with a report.

MRS DUNNE: Does that not risk that the default will always be that it will not be?

Ms Muscat-Bentley: That is not our intention.

Mr Higgins: That is not our intention, no. But it is a question of what the bar is. That is certainly not our intent there.

THE CHAIR: That is why I was asking about scenarios, because my instinctive reaction to what you wrote there was that it seems to be a denial of procedural fairness that somebody is not given a chance to correct the record. To use that Auditor-General model, often there are things where the Auditor-General has thought about it and interpreted and the department or somebody comes back and says, "Actually you've misunderstood us" or whatever. That is what I presume this process is predominantly for. As I understand what you are saying, it feels to me like you are denying a step of procedural fairness. That is why I was interested in scenarios.

Ms Muscat-Bentley: That is definitely not our intent. What—

THE CHAIR: I am sure it is not; that is why I am trying to understand it.

Ms Muscat-Bentley: What we will do is come back to you pretty quickly with some of the scenarios we see where you might not provide that information, and the reasons

why, and how that might hinder future charges or processes.

THE CHAIR: Thanks.

Mr Higgins: I know we do have them but I just need to go back—

THE CHAIR: Sorry, it is not meant to be a pop quiz.

Ms Muscat-Bentley: No, that is fine.

THE CHAIR: There were a number of places today where you said you will have a look at things. We are not running a formal questions on notice process but we would appreciate it if, where there are areas you want to follow up on, we could get those reasonably quickly. This is the last day of hearings and we will move to deliberations fairly quickly. Would some time next week be possible?

Ms Muscat-Bentley: Yes, absolutely.

Mr Higgins: To clarify, we have the question of the public v private default and frustration of the courts from Ms Lee; the interaction between legislation and the PID and the subsequent amendments from Mrs Dunne; what the technicalities in the bill that we do not support are, rather than in the exposure draft; and the scenarios in which the report would not be provided.

THE CHAIR: That matches my recollection. Thank you, that is very good. Thank you very much for appearing today. We appreciate your time and input.

Short suspension.

MR BARR, Chief Minister, Treasurer, Minister for Social Inclusion and Equality, Minister for Tourism and Special Events and Minister for Trade, Industry and Investment

LEIGH, MS KATHY, Head of Service and Director-General, Chief Minister, Treasury and Economic Development Directorate

WHITTEN, MS MEREDITH, Deputy Director-General, Workplace Capacity and Governance, Chief Minister, Treasury and Economic Development Directorate

GLENN, MR RICHARD, Deputy Director-General, Justice and Community Safety Directorate.

THE CHAIR: We will resume this hearing of the Select Committee on the Independent Integrity Commission. I welcome the Chief Minister, Andrew Barr, Head of Service, Kathy Leigh, and supporting officials. I imagine that you are all familiar with the privilege card, thank you. Chief Minister, do you want to make any opening remarks?

Mr Barr: No, thanks. That is fine.

THE CHAIR: We will go straight to questions. One of the questions that has come up is around the eligibility of who might be the commissioner of the commission. That is one of the substantial points of difference between the bill that you have drafted and the bill put forward by Mr Coe. There is a concern that if we allow only former judicial officers, as opposed to somebody who is judicially qualified, we may narrow the field. Have you any further comments in light of the two differences and the witnesses we have heard?

Mr Barr: I will ask Ms Whitten to respond to that.

Ms Whitten: Thank you, Chief Minister. In relation to the development of the exposure bill for the government, we obviously looked at the recommendation of the 2017 select committee. There were some recommendations in relation to the appointment of the right person for the role. In doing that, we also then looked at what the appointment processes were in other jurisdictions so that we could look at the comparative analysis. Of course, the human rights consideration in this jurisdiction is also really important.

What we see is that this role in the ACT is such an important role that we need to get the right skill set and experience to take on that role. That is how the clause has been drafted at this point in time. Of course, other people have perspectives, but that is the position at the moment.

THE CHAIR: It is your sense now, I take from that, that the seniority of having a former judge is quite critical to the conduct of the commission?

Ms Whitten: Yes.

MS LEE: Following on from that, whilst we understand the robustness and importance of the position and that you do want somebody who obviously comes with a lot of experience, the bar has put to us that the reality, unfortunately, is that if you

narrow the pool too much, you will be selecting from a bunch of over 70s men. That is how they sort of put it—in those terms. Is that a concern at all?

Ms Whitten: I think we did not limit, obviously—

MS LEE: Obviously not, but that becomes the reality of it.

Ms Whitten: It is really interesting from a human rights perspective. But what we think is really important is that there is sufficient experience for someone who takes on this role and getting that balance with some of the recommendations from the 2017 select committee. In relation to an appointment, it was sort of somebody, say from the public service, not to have been appointed for 10 years or not being a member for 10 years. We have changed that a little.

But it is that experience and having an understanding of the range of issues that the commission might consider and also in terms of the diversity of the responsibilities of the territory. Because the bill covers a range of public officials, not just the public service, we thought it was important to have somebody with quite substantial skills and experience to take on this really important role.

MRS DUNNE: Looking at other places like ICAC, IBARC, CMC, what is the bar there? Is it just a judicial officer or do they look elsewhere?

Ms Whitten: Thank you, Mrs Dunne, for your question. I do not have that level of detail in my head at the moment. But there is a bit of a variety and we did look at all of that. So this is the position that the government has taken at this point in time.

MRS DUNNE: Could you get back to us with how it sits in other jurisdictions?

Mr Barr: Sure.

MS LEE: Chief Minister, your bill, in terms of retrospectivity, talks about a restriction on investigations if a conduct had been investigated previously by an investigatory body, which has been defined. What is your intention? Would an investigatory body include an office like the Auditor-General's office?

Ms Whitten: Obviously the Auditor-General has a particular role in legislation, particularly an authority as an officer of the Legislative Assembly. I need to have a look at the bill again to answer that question.

MS LEE: You will get back to the committee with that?

Ms Whitten: Yes.

MS LEE: Following on from that, besides the Auditor-General's office, are there any other investigatory bodies that you are referring to in terms of bodies that you were trying to capture within that provision?

Ms Whitten: In terms of referring matters to another investigatory—

MS LEE: No, if it has been already investigated; the bill says that then this new commission will not look into it. The obviously example is the Auditor-General's office.

Ms Whitten: Sure.

MS LEE: But are there any other investigatory bodies that fit that definition as defined in this exposure draft that you consider would fall into that category?

Ms Whitten: Other integrity entities that currently exist within the ACT, in the territory, also include such statutory positions as the ACT Ombudsman, for example; just really the range of entities, including the Public Sector Standards Commissioner.

MS LEE: Do you have a concern—certainly, the Auditor-General has given evidence on this—that it is not her role to investigate or find corruption per se. With this new body that we are trying to establish, that is their primary goal. Do you have any concerns that by making that restriction and applying it to bodies like the Auditor-General, the Ombudsman and the Public Service Standards Commissioner we are going to be losing through the gaps a lot of those issues, because those bodies are not actually designed to investigate? Is it going to do this commission a disservice, essentially?

Ms Whitten: No. I think that there is a range of integrity bodies in the ACT. That was evident from the first select committee report. They each have specific functions.

MS LEE: That is right, yes.

Ms Whitten: So if a matter is received by the commission and they think it might be more relevant to another entity, they will consider a referral.

MS LEE: Sure.

Ms Whitten: We did consult with those organisations such as the Auditor-General, the ACT Ombudsman and the Public Service Standards Commissioner. I think there is an opportunity for those entities to develop an MOU among themselves to clarify the relationship between those entities.

MS LEE: Is your intention that that MOU will also cover matters that have already been investigated, because that is what that restriction is talking about; matters that have been investigated?

Ms Whitten: Yes.

MS LEE: Not moving forward.

Ms Whitten: That is right. The only thing is that if something were being investigated already, and if there were new evidence that came to light, that would put that matter in a different context.

MS LEE: Sure, yes.

THE CHAIR: I do not want to put words in your mouth but I take it from what you are saying that your implicit point is that if the Public Service Standards Commissioner is looking at something and thinks there is corruption, they will pass it on.

Ms Whitten: That is right, yes.

THE CHAIR: So they would not in fact finish their other investigation. That would actually mean that that provision was not a blocking provision. That is what you are—

Ms Whitten: That is right.

THE CHAIR: Yes, thank you.

MS LEE: I suppose I want to clarify in terms of the matters that had already been investigated as per clause 8.That was my point.

Ms Whitten: Yes, but there were also terms within that clause to determine whether or not something gets referred.

MS LEE: Yes, sorry. The specific one that I was looking at was in terms of the matters already being investigated.

MS CODY: I have a couple of questions. In clause 138 you leave it very open almost as to whether private or public hearings will be the default position. You have done that so that it is entirely up to the commission's expectations, I would assume.

Ms Whitten: Sorry, say that again.

MS CODY: You have left it open so that the commissioner makes a decision.

Ms Whitten: Yes.

MS CODY: Looking at—

Ms Whitten: Okay; so what was important in terms of looking at the policy considerations, besides the select committee's recommendations, was to look at how that might play out in our human rights jurisdiction. We also looked at what was happening in other jurisdictions. Some jurisdictions have public hearings; some have private hearings. So it is a real balancing matter. That particular clause was also put in place as the public interest test in terms of whether the matter would be public or private without actually directing the commission as to how they would consider the facts when they receive the facts in relation to a particular matter. So each matter is different.

MS CODY: In part 3.5 of clause 108, you talk about having an investigator. But, unless I have missed it, there is no actual outline of what qualifications an investigator may have. It just says that the commissioner may appoint an investigator but there is no actual outline of what that looks like, who they may be, what sort of qualifications

they might hold. Have you given any thought to that?

Ms Whitten: If we talk about the role of the investigator and then the powers of the investigator—

MS CODY: Correct.

Ms Whitten: I would expect that the commissioner would want to employ people who have skills and experience in undertaking investigations.

MS CODY: Again, that is being left up the commissioner's discretion to ensure that they are employing the people who would want to be able to take the role.

Ms Whitten: Yes. Well, one would hope that that would be the case.

MS LEE: As to public and private hearings—please correct me if I am wrong—it seems that the government's intention is to leave it up to the commissioner. Another witness has interpreted the government's exposure draft as akin to a default private because some of the tests contained within the provisions create a high balance for a public hearing. Do you have any comments on that? Is that the government's intention or is it just an unintended consequence of the drafting and how it has been interpreted?

Ms Whitten: It is a real balance; it is a very complex policy question. The clause allows the commission to determine whether a hearing is public or private and that that will depend on the facts before the commissioner in relation to that individual matter. What is important from a human rights perspective is the reputation of people and balancing that with the public interest in knowing about a particular matter.

MS LEE: Are you satisfied that you have that balance right, given some of the concerns that people have raised that it might be akin to a default private?

Ms Whitten: Those concerns have been raised to the committee and I am sure the committee will have a view on what those concerns are.

MS LEE: Which is why I am asking.

MRS DUNNE: We have not really plumbed the sentiment of Ms Lee's question: what is the government's position? Is it default public or default private?

Mr Barr: I believe it is case by case.

MS LEE: So that is the intention?

Mr Barr: Yes, that is the intention.

MS CODY: It is entirely up to what the commissioner believes meets the public interest test?

Mr Barr: Yes, that is correct.

MS LEE: That is helpful in us looking at that test.

Mr Barr: They have to balance the competing issues.

MS CODY: Clause 66 of the exposure draft provides that the commission must keep people informed whereas the Coe bill says they should not be kept informed. Can you clarify why you believe people should be kept informed?

Ms Whitten: It goes to human rights and it is that real balance between people making a complaint, if we use that language, and having a sense of what is happening with it. Sometimes when complaints are received it takes a little time to work through what the issues are. If a person puts in a complaint they really want to know what is happening, and sometimes it takes a bit of time. The government's exposure bill is as it is in terms of trying to keep people informed.

MS CODY: I note that the exposure draft refers to a risk to security, so that is something you looked at to ensure that people making complaints against entities or other people are protected?

Ms Whitten: Yes. The other thing for us is that we have the Public Interest Disclosure Act, and that particular clause of the exposure draft is modelled on one of the clauses on the Public Interest Disclosure Act.

MRS DUNNE: I want to go to the threshold question of how we manage this process from here. This committee will report, but we have with Mr Coe's bill a tabled bill which could be amended and debated and passed. We do not have a tabled government bill; we have an exposure draft. If the committee decides that the government proposal is a better model, what sort of time frame are we talking about in getting this turned from an exposure draft into a tabled bill? And why did you go down this path in the first instance?

Mr Barr: The time frame would be introduction in the November sittings. Should this committee reach a consensus view I think it would be appropriate for the Assembly to suspend standing orders and deal with the bill in that November sitting week. That is on the presumption that there is agreement on a way forward or if there are one or two threshold issues that would be quite simple to deal with by way of amendments in the detail stage. There would be every reason to want to conclude the debate on this in the Assembly in November.

Obviously it depends on the level of potential amendment emerging out of the committee's recommendations; or if there is a range of threshold issues for which the Assembly needs to determine one way or the other what the final position will be and there is not agreement but we know that there are three issues and that there will be three amendments moved and we will vote on those amendments.

I am keen to avoid a situation where we go through two bills concurrently clause by clause and things are inadvertently left in or out. I do not want a situation where we have special advisers sitting next to us.

MRS DUNNE: We have done that.

Mr Barr: Indeed. We have seen that process and that would be best avoided if possible. Again, subject to the conclusions of this committee's deliberations, it would be my intent to be able to make any amendments to the government bill and introduce it in November and seek to pass it in November. If that is agreeable to all parties in the Assembly, that would be preferable. I acknowledge there may be, as I say—

MRS DUNNE: Disagreement.

Mr Barr: Yes, but if there is broad agreement on most of the bill, then that would be a preferable way forward.

MRS DUNNE: I note, Mr Chair, that I think the Chief Minister has given an answer that I utterly agree with. Most unusual.

Mr Barr: There is a first for everything—a Friday afternoon in September of 2018.

MR STEEL: One of the concepts in the government bill is the notion of serious and systemic corrupt conduct which is picked up in several areas, particularly the functions of the commission under clause 23, that is, in exercising its functions the commission must prioritise the investigation exposure of corrupt conduct which the commission considers may constitute serious corrupt conduct or systemic corrupt conduct. Why do you think it is important that the commission prioritise serious and systemic corrupt conduct?

Ms Whitten: Going back to the 2017 select committee the recommendation in the committee report was around modelling this clause on the New South Wales legislation, so of course we looked at that. The New South Wales legislation also includes misconduct, which is what we have covered under our certified agreements. Those two aspects have influenced why the focus is on serious corruption and systemic corruption in the definition of "corruption" in the bill.

MR STEEL: And that applies to the functions of the commission as a guide for the commission's duties under the proposed act. What other points in the bill does this concept of serious and systemic corruption apply to?

Ms Whitten: The whole foundation of the bill is around investigating allegations of that nature, and so they are the main areas.

MR STEEL: I am thinking about the findings of the commission in particular. I understand that they can make findings only if it is in relation to serious and systemic corrupt conduct, is that right?

Ms Whitten: Yes.

MR STEEL: Why is that important as opposed to all corrupt conduct and a lower threshold?

Ms Whitten: If there is anything else less than that it could be referred to another

entity.

MRS DUNNE: For instance?

Ms Whitten: For example, the reason misconduct is not in the definition of "serious or systemic corrupt conduct" is that the Public Sector Standards Commissioner has that responsibility under the enterprise agreements in relation to public servants. Therefore, if something came up akin to that it could be referred to the commissioner, as an example.

MRS DUNNE: Could you give an example of what is out and what is in? What is considered misconduct that would be covered by the EBA and the Public Sector Standards Commissioner and what would be considered serious corruption? And is there an area in between where the Venn diagrams do not overlap?

Ms Whitten: Misconduct particularly goes to section 9 of the Public Sector Management Act where it could relate to someone's behaviour. Inappropriate behaviour is an example of misconduct. I do not have a Venn diagram with me, but we could look at that.

Mr Barr: We could possibly provide one.

MRS DUNNE: It is just that there is a risk that we end up with gaps in the definition so that they do not overlap. There may be something that somebody says, "Oh, well, that's misconduct," and then the public service commissioner says, "No, it's not." That may be resolved by MOUs between agencies and things like that, but have we thought of it and have we ticked it off?

Ms Whitten: We have looked at it and we had quite long conversations around the definition of "serious and systemic corruption" and how that applied, but I cannot give you examples off the top of my head.

Ms Leigh: Under the Public Sector Management Act misconduct has a very low threshold but has no upper limit. I do not think there is a risk of a gap being left because it will always be misconduct; it is just that some misconduct is so serious or systemic that it would be appropriate to go to an integrity commission.

I do not think that there is a concern that something could fall into the gap. I think the greater concern is that the resources of the commission be able to focus on the most important and most egregious behaviour and not be distracted by things that other bodies can already appropriately investigate.

MRS DUNNE: Yes, but if someone goes to the Public Sector Standards Commissioner and he says, "No, this is too big for me; it should go to the integrity commission," there is a recognisable path up. But is there a recognisable path down where the integrity commissioner says, "Maybe this fits better with the Public Sector Standards Commissioner"? How do you envisage addressing that?

Ms Whitten: Clause 10 of the exposure bill defines what corrupt conduct is so we all know. Then there is the opportunity for the integrity commissioner to issue directions

in terms of those referral pathways and also having MOUs between particular commissioners or other statutory authorities. That is what has happened in the past, for example, with the Ombudsman and the Human Rights Commission. MOUs or arrangements have been put in place to be clear about where those referrals will occur.

Mr Glenn: One of the key operational arrangements between the different parts of the integrity system from the Ombudsman to ACLEI and the other players is that there are two-way referral mechanisms built into both the legislation and their operating arrangements. There is a very strong degree of cooperation between those office holders to make sure that matters that could go to all of them end up in only one of them if that is appropriate and in the right one.

That can take a bit of working out for those that sit at the margins. There are lots that are very clear, but those officers are very much engaged in that process to make sure that issues end up in the right spot. We would not expect the integrity commissioner to operate in a different way as part of that broader scheme of integrity agencies.

MR STEEL: Do you think that this concept of serious and systemic corrupt conduct provides that guidance around the hierarchy and the whole integrity framework across the ACT, with all the integrity agencies we have, to make sure they all fit and work together, and that a lower level, where the notion of seriousness does not come in, might lead to a duplication of integrity functions across ACT government?

Ms Whitten: This is new legislation and it provides for the establishment of an entity to look at serious and systemic corruption. My recollection from the 2017 select committee report is that the commission and the other integrity entities relate to one another, and that is how the piece of work would be undertaken.

THE CHAIR: I want to explore the issues of notification of corruption. In your bill there is a positive obligation on people to report corruption if they suspect that it is the case. One witness has put a view that you have put some exemptions in there, such as the Auditor-General and some other office holders, and that weakens the bill. Why have you removed that positive obligation for them to report? We have just discussed the potential for referral, but I guess that there is a sense that there is a qualitative difference about actually putting a positive obligation on them.

Ms Whitten: My recollection of the 2017 report recommendations is that there was a positive obligation on directors-general, for example, to report, and that has been picked up in this legislation.

THE CHAIR: Yes, it has.

Ms Whitten: And you are making a distinction with other integrity bodies as well. Can you tell me what clause it is?

THE CHAIR: Yes. The suggestion was that the bill exempts some office holders, such as the Auditor-General, from having to notify.

Ms Leigh: My understanding is that there is potential conflict between the roles of the bodies. The Auditor-General normally conducts their work carefully and without

disclosing their work until they discuss it with witnesses or put out their report, so I think there was a concern not to affect the integrity of the other processes.

THE CHAIR: Thank you.

MRS DUNNE: The Auditor-General, for instance, was consulted on this?

Ms Whitten: We certainly consulted the Auditor-General as part of the development of the bill. I know we received feedback from the Auditor-General. I cannot recall whether it went to that issue.

MRS DUNNE: Could you get back to us on that?

Ms Whitten: Yes.

THE CHAIR: In a similar vein, it has also been suggested to us that the bill would be improved by, in fact, expanding that requirement of compulsory notification to SES-level staff rather than just directors-general. I take your point around the earlier committee finding, but this has been put to the committee now as an improvement. Would you see any concerns, from a public service point of view, with expanding that obligation?

Ms Leigh: One observation I would make is that under the PID Act officers already would have an obligation to report it to their director-general, so that probably provides the continuity.

Ms Whitten: There is also provision within the Public Sector Management Act for reporting particular types of conduct to the Head of Service anyway. So there is a flow-on.

THE CHAIR: That would then elevate to the director-general, who would then have the obligation from there.

Mr Barr: Would it be helpful if we mapped out those provisions, just so the committee is aware of—

THE CHAIR: That would be useful.

MRS DUNNE: A map and a Venn diagram.

THE CHAIR: Very good. Finally in this space of notification, in Mr Coe's bill he has created a provision that the Assembly can essentially pass a motion or act to make a referral to the commission. I asked him about why this was necessary, given that anybody can refer to the commission. To be honest, I was not left with a clear answer. Do you have any views on whether there is any value in that or whether there is a gap there that he has identified?

Mr Barr: There is a presumption then of adding some political element to a referral. That is what that would be. In a majority government situation you can imagine the floor of the Assembly being used to refer the previous government, a la trade union

royal commissions and those sorts of things where parties could seek to use numbers on the floor of the Assembly to add some sort of political element to a referral. It reeks of that sort of behaviour, given that individuals can make references anyway. There would be the equivalent, I guess, of a parliamentary censure or something to that effect.

MRS DUNNE: I think it requires a special majority.

Mr Barr: No, essentially it is just a simple majority, where you would simply gang up on your political opponents.

MS LEE: Mr Coe in his answer did say that he saw a situation more along the lines of all 25 members going, "Hey, this is a situation where it should be referred" and that one of—

Mr Barr: Sure, but there would be many mechanisms for that to happen. You could have 25 people sign the referral letter if there were such a circumstance. But as to the need for it, I can immediately see it being abused politically. That seems to be what it would be about.

MS LEE: Chief Minister, the government's exposure draft specifically excludes the judiciary but does include ACT Policing. I understand this is a difficult one. There certainly was quite a lot of discussion amongst the committee last year. Can you take the committee through your thoughts in terms of why you ended up with that distinction? Why have you distinguished between the judiciary and the police, and specifically excluded one and included the other?

Ms Whitten: I am happy to do that, Ms Lee. The judiciary are actually covered by the Judicial Commission, which was established at the beginning of 2017. That was how the government responded to that particular question. Given the recent establishment of the Judicial Commission, it was considered that it would be best to let that run its course and see how that proceeds. In relation to ACT Policing, that was a recommendation from the 2017 select committee report.

MS LEE: So was including the judiciary.

Ms Whitten: Yes. The government's response to that was that given that ACT Policing is part of the broader Australian Federal Police, this creates an opportunity for that community policing part of AFP to have oversight by the independent integrity commission. Of course, as has been identified in the explanatory statement, the Chief Minister has written to the Prime Minister—

Mr Barr: Multiple prime ministers, I think. We have had a few in recent times. I have to keep on rewriting these letters.

Ms Whitten: and to have that dialogue about what is possible. Also, the bill has, as part of the commencement provisions in relation to ACT Policing and the coverage by the commission, a 12-month commencement date to allow those discussions to proceed with the commonwealth.

Mr Glenn: Can I add that there is a qualitative difference between the way one might deal with an allegation of misconduct by a judicial officer and by a creature of the executive like a police force. A judicial officer is clearly subject to the jurisdiction of the court itself and to the Chief Justice. Ultimately, the resolution of any allegation of misconduct against a judge is determined by the Assembly. Police, as public servants or public servant-like officers, actually go through a much different path along the lines of any other public official. I think why those paths diverge actually has a lot to do with the nature of the entities that we are dealing with.

MR STEEL: I have a supplementary on that. The bill, under clause 124, provides that the Supreme Court decides matters of privilege, which is sort of an example of the judiciary looking at a matter that is ordinarily in the purview of the legislature. On the one hand you are saying that there is a separation of powers issue in relation to the judiciary but on the other hand we have got—

Mr Glenn: Is this clause 124, legal professional privilege?

MR STEEL: No, this is on parliamentary privilege.

Mr Glenn: I will get the provision.

MR STEEL: I am pointing out that there is a potential inconsistency in relation to the way the separation of powers is dealt with.

Ms Whitten: I think it is broader than parliamentary privilege.

MS LEE: I do not think Mr Steel's question is about the parliamentary privilege clause itself but in terms of why the judiciary is given the power to do that.

Mr Glenn: Those series of provisions talk about claims of privilege. Clause 122 excludes parliamentary privilege from that list. The intention is that claims of legal professional privilege or other types of non-statutory privilege are dealt with by the courts in the ordinary process but that parliamentary privilege would continue to be dealt with by the Assembly.

MR STEEL: The intention is that it would be dealt with by the Assembly?

Mr Glenn: Yes.

Mr Barr: The clauses need to be read together.

MR STEEL: Thank you for clarifying that.

MS LEE: I have a follow-on from that. You say that it is because the Judicial Council is there and exists essentially to look at the conduct of judges. Mr Glenn, you specifically talked about misconduct. But it is not the role of the Judicial Council to look for corruption. Are we at risk of perhaps there being a gap in that regard?

Mr Glenn: The Judicial Council will look at any matter that is put before it in terms of an allegation against a judge.

MS LEE: Yes, but they will not have the same covert powers, for example, or the same powers in terms of an investigatory role that an integrity commission will have.

Mr Glenn: Certainly, there is a degree of power that exists there. There is also the judicial commission. So there is a series of processes that happen through the Judicial Council process from the council, to the commission, to ultimately a petition before the Assembly. You are correct. The powers are not the same along the way but the mechanisms and the investigations do become progressively more serious as you progress through the process.

MS LEE: I guess what I am getting at is, you have put forward all the arguments about the Judicial Council being available to look at the conduct of judges. The police have told us that they have ACLEI; so why would we try to include the police? I guess I am more getting to the nub of the reason of why they are different.

Ms Whitten: I think the distinction is that the Judicial Commission and council are in the territory jurisdiction whereas ACLEI is in the commonwealth jurisdiction. This would make it within the bounds of the territory rather than the commonwealth jurisdiction.

MS LEE: I note that you mentioned earlier, Ms Whitten, the 12 month lead-in time to have that, no doubt, robust discussion about how that will work.

Ms Whitten: Yes.

MS LEE: Are you confident that that 12 months is going to be enough time to have that all sorted?

Mr Barr: The Prime Minister has advised that he is seeking advice from the commonwealth Attorney-General and the Minister for Home Affairs and will inform the territory government of the commonwealth's position as soon as possible. Clearly, the change in prime minister has delayed this somewhat.

MS LEE: No doubt.

Mr Barr: But we will get a firm view from the commonwealth, I hope sooner rather than later, noting that if they do not amend the self-government act, then we cannot. We will await that advice and then make a further determination, conscious also of moves at the commonwealth level to establish an integrity commission. There is a scenario next year, in 2019, where there is a change of government federally. A new federal government, the current federal opposition, has committed to establishing a federal integrity commission.

My understanding at the moment is that the former prime minister—although I have not heard directly from the new Prime Minister; I have not heard him make a public statement on this—was not supportive of a federal integrity commission. That position may change under Prime Minister Morrison and it is very clear it would under a Shorten prime ministership.

We would need to have a watching brief on developments federally next year in terms of whether the federal parliament will put in place a structure that would cover the Australian Federal Police and whether they would then seek to allow ACT Policing to be covered by our arrangements or some potentially new arrangements that a new commonwealth government would put in place.

But it remains to be seen whether Prime Minister Morrison may have a different position than Prime Minister Turnbull did on this matter. Nothing surprises me in politics anymore, Ms Lee. A change in position is quite possible when prime ministers change.

MRS DUNNE: I follow up on the sort of threshold question about the coverage of the police in an integrity scheme. Correct me if I am wrong. The government seems to take the view that because the provisions in the self-government act prevent us from establishing a police force of our own, we, without the intervention of the commonwealth, cannot investigate a police force—the police force that provides services to us. Is that the reason, in 25 words or less, why you are in this position?

Ms Leigh: Mrs Dunne, the words in the act are slightly more specific; it is not just that we cannot establish but we cannot make laws for the provision. So it extends to laws that provide in any way in relation to policing. That is the basis.

MRS DUNNE: But we do have integrity provisions that cover the AFP. We have the ACT Ombudsman, who looks at ACT Policing matters.

Mr Barr: Yes.

MRS DUNNE: How do we do that if that is the case?

Mr Glenn: Mrs Dunne, the Ombudsman attracts the powers over the AFP through its commonwealth jurisdiction. All of that oversight of AFP and the professional services of the AFP comes via the commonwealth jurisdiction. If ever that link between the commonwealth and ACT Ombudsman were severed, the ACT Ombudsman would not have that responsibility by itself.

MS CODY: A quick question, I hope. I missed it in the exposure draft to be honest; so I am hoping that you will be able to answer the question. You obviously decided that search warrants are applicable only when applied for through the appropriate channels; yes?

Ms Whitten: Yes.

MS CODY: Yes. I have gone through the exposure draft and I keep missing it. I note in part 3.3 that in preliminary inquiries you have specifically referred to "must not in carrying out preliminary inquiries use the powers in part 3.6," which is the examinations. They are not allowed to apply for a surveillance device warrant.

Ms Whitten: Correct.

MS CODY: That is to protect individuals while a preliminary investigation—

Ms Whitten: That is correct.

THE CHAIR: Mr Barr and officials, thank you very much for appearing this afternoon and for answering all those questions.

Mr Barr: We will provide a Venn diagram and a map.

THE CHAIR: We are about to start deliberations. In terms of trying to keep to the time line, we would appreciate getting those as quickly as is convenient.

Mr Barr: Understood, thank you.

THE CHAIR: The hearing is now closed for today.

The committee adjourned at 2.48 pm.