



**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**13<sup>th</sup> Assembly**

**Social Policy Scrutiny Committee**

**Independent Commissioner Against Corruption Bill 2017**

**Public Hearing Transcript**

8.40 am – 1.50 pm, Monday, 9 October 2017

Litchfield Room, Level 3, Parliament House, Darwin

- Members:**
- Ms Ngaree Ah Kit MLA, Chair, Member for Karama
  - Mrs Robyn Lambley MLA, Deputy Chair, Member for Araluen
  - Mrs Lia Finocchiaro MLA, Member for Spillett
  - Ms Sandra Nelson MLA, Member for Katherine
  - Mr Chansey Paech MLA, Member for Namatjira
- Substitute Member**
- Ms Selena Uiibo MLA, Member for Arnhem for Ms Sandra Nelson MLA, Member for Katherine – 1.00 pm to 1.50 pm
- Mr Scott Beaton – NT Resident
  - Mr Alan MacSporran QC: Chair, Crime and Corruption Commission QLD
  - Hon. Bruce Lander QC: Independent Commissioner Against Corruption SA
  - Mr Richard Bingham: Chief Executive Officer, Integrity Commission TAS
  - Mr John Hyde: Chair, Global Organisation of Parliamentarians Against Corruption – Oceania Region
- Witnesses:**
- Mr Peter Shoyer: Ombudsman NT
  - Mr Craig Allen: Commissioner for Public Employment
  - Ms Brenda Monaghan: Commissioner for Public Interest Disclosures
  - Mr Greg Shanahan: Chief Executive Officer, Department of the Attorney-General and Justice
  - Mr Robert Bradshaw: Director, Policy Coordination, Department of the Attorney-General and Justice
  - Ms Caroline Heske: Senior Policy Lawyer, Department of the Attorney-General and Justice.

The committee commenced at 8.37 am.

**Madam CHAIR:** On behalf of the committee I welcome everyone to this public hearing into the Independent Commissioner Against Corruption Bill.

I acknowledge that this public hearing is being held on the land of the Larrakia people and I pay my respect to Larrakia elders past, present and emerging. I also acknowledge my fellow committee members, Mr Chansey Paech the Member for Namatjira, Mrs Lia Finocchiaro the Member for Spillett, Mrs Robyn Lambley the Member for Araluen, and Ms Sandra Nelson the Member for Katherine.

**Mr Scott Beaton – NT Resident**

I welcome to the table to give evidence to the committee Mr Scott Beaton. Thank you for coming before the committee this morning Mr Beaton. We appreciate you taking the time to speak to the committee and look forward to hearing from you today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply.

This is a public hearing and is being webcast through the Assembly's website. A transcript will be made for the use of the committee and may be put on the committee's website.

If at any time during the hearing you are concerned that what you will say should not be made public, you may ask the committee to go into a closed session and make your evidence in private.

I will ask you to state your name for the record and the capacity in which you appear. I will then ask you to make a brief opening statement before proceeding to the committee's questions.

Could you please state your name and the capacity in which you are appearing this morning?

**Mr BEATON:** Scott Ashley Beaton and I am a private citizen of the Northern Territory, currently unemployed.

**Madam CHAIR:** Thank you Mr Beaton. Mr Beaton, would you like to make an opening statement?

**Mr BEATON:** Yes, I would. I will read from this statement. It is time for the Northern Territory to catch up with the rest of Australia in terms of taking specific Action on corruption. It is my belief that much of the corruption that occurs in public bodies in the Territory is a result of a lack of appropriate policy and procedure or when that policy and procedure does exist it is simply not followed.

It is a duty of parliament to care for the people of the Territory. A caring parliament will protect the people of the Territory from corruption. Corruption can only be eliminated with comprehensive legislation, policy and procedure as well as a will to apply that legislation, policy and procedure.

An anti-corruption commission is the pinnacle of the corruption elimination mechanism. In fact, there should be no need for one given the current legislation an opportunity for public bodies to take Action on ridding the Territory of corruption.

The current situation unfortunately for honest people in the Territory means that they are forced to deal with corruption outside of the legal system. For example, the *NT News* has become the Territory's corruption fighting body because honest Territorians have no other place to go. Another would be self-published internet blogs such as Cardfightback.

The Territory needs an anti-corruption commission now more than ever and it cannot be a toothless tiger.

**Madam CHAIR:** Thank you very much Mr Beaton. Do committee members have any questions for Mr Beaton?

**Mr PAECH:** If I may Madam Chair. Mr Beaton, your submission notes the need to work against corruption. Just wanted to ask, do you consider the ICAC bill will help fight corruption?

**Mr BEATON:** Yes, I do.

**Mr PAECH:** And I note in your submission, you have made some suggestions around the ICAC bill. Is there anything further that you would like to take this time to elaborate that is not already in your submission?

**Mr BEATON:** Look, the only thing I can stress is, is the mandatory reporting elements ...

**Mr PAECH:** Rights.

**Mr BEATON:** With parties who know about corruption but either do nothing or go and tell people and then when asked to officially divulge, they simply clam up. They say nothing. That would be ...

**Mr PAECH:** Yep.

**Ms NELSON:** When you say 'clam up' when they are asked to officially divulge, and they clam up ...

**Mr BEATON:** Yes.

**Ms NELSON:** Can you just, in your opinion, what would be the reason for that? And how we could ...

**Mr BEATON:** Fear. Fear of retaliation.

**Ms NELSON:** Retaliation, yes.

**Mr BEATON:** Talking about public bodies, so fear of retaliation. Especially with, for example, workplace performance procedures being misused and so forth.

**Ms NELSON:** Okay. And do you feel that the ICAC bill, the draft legislation that has been presented, do you feel that that addresses that?

**Mr BEATON:** I think it goes part of the way. But I mean the legislation is part of the tools used to fight corruption. It think they're all right other things that can be done.

**Ms NELSON:** Yep. Okay.

**Mr PAECH:** So, I can I just ask, Mr Beaton, do you feel that within the current bill that is before us, that the enforcement could be strengthened?

**Mr BEATON:** In that bill?

**Mr PAECH:** Yes.

**Mr BEATON:** Yes, I do. I believe that the Commissioner should have the powers to Actually charge people.

**Mr PAECH:** Yep.

**Mr BEATON:** Rather than using the—I think they are going to use the Public Prosecutor, the DPP, I think.

**Mr PAECH:** Yep. So your suggestion is that the Commissioner have the power to do so.

**Mr BEATON:** Yes.

**Ms NELSON:** I have got a question, Madam Chair, if that is that okay.

**Madam CHAIR:** Yes.

**Ms NELSON:** You have spoken extensively in your public submission about the whistleblower protections and the need to have those in place, I just wanted to ask if you could elaborate on how the provisions for the whistleblower protection could be improved.

**Mr BEATON:** How they could be improved?

**Ms NELSON:** Yes, in your opinion, how do you think they could be improved?

**Mr BEATON:** Look, I will speak from personal experience and my dealings in the public sector and the Northern Territory. I think that if a person finds corruption and wants to report it that there needs to be some mechanism where the ICAC Commissioner can essentially freeze that person's employment and all sorts of, you know, from their agency.

**Ms NELSON:** Yes.

**Mr BEATON:** And basically, manage them so that they become subject to the Commissioner. And the Commissioner is able to manage their circumstances to prevent retaliation and so on.

**Ms NELSON:** Okay.

**Madam CHAIR:** Mr Beaton, you find that the provisions we currently have in place does not protect whistleblowers as well as it should if they are reporting ...

**Mr BEATON:** No, I do not ...

**Madam CHAIR:** ... misconduct in the work place.

**Mr BEATON:** ... believe that it protects whistleblowers at all.

**Ms NELSON:** Okay.

**Mr PAECH:** But, do you feel that the whistleblower protections in this bill will be effective? Or do you believe that they should be further enhanced?

**Mr BEATON:** I believe that they are an improvement, but I don't know whether you could ever reach some sort of perfect catch-all arrangement. But certainly the ICAC is an improvement.

**Madam CHAIR:** Mr Beaton, after reading your submission it resonated a lot with me. My interest in the bill has a lot to do with whistleblower's protections. I too have come across instances in the public service when I worked there, and had a number of instances disclosed to me as a member of parliament.

That is what I really took out of your submission was the need for the whistleblower protections to be strengthened, and the fact that this bill goes towards strengthening those – I want to come back to the point that you made in regards to the bill being part of the mechanism or one of the tools that we can use to encourage our public servants to report matters in the work place for follow up.

Do you believe that by coming to the ICAC commission more public servants or Territorians in general might feel safer or more encouraged to report misconduct to the ICAC rather than through already existing reporting mechanism?

**Mr BEATON:** I believe that people will be more confident if they feel there is protection there for them to be able to make comment on – certainly it would be an improvement, but there will always be fear, people will always have fear.

**Madam CHAIR:** I guess, a lot of that will probably come back to the education that is required with this legislation as well, is educating people to let them know what provisions are in place, and ensuring that they do feel protected when they are making these complaints.

That is all the questions that I have. Does our committee have any further questions for Mr Beaton?

**Ms NELSON:** I do thank you though, Mr Beaton, for your submission and for taking the time to read the draft legislation and participating. I found your submission to be quite detailed, thank you.

**Madam CHAIR:** Thank you very much for your time, Mr Beaton.

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**Mr Alan MacSporran QC: Chairperson, Crime and Corruption Commission QLD  
(via teleconference)**

**Madam CHAIR:** Mr MacSporran, my name is Ngaree Ah Kit, I am the member for Karama and the Chair of the Social Policy Scrutiny Committee.

**Mr MacSPORRAN:** Yes.

**Madam CHAIR:** I wanted to welcome you in giving evidence today before the public hearing on the Independent Commissioner Against Corruption Bill.

**Mr MacSPORRAN:** Yes, thank you.

**Madam CHAIR:** Please let me know if at any time you cannot hear us.

**Mr MacSPORRAN:** I need to say I have with me my Director of Legal Services, Mr Rob Hutchings and Mr Mark Docwra, a senior legal officer within the commission. Now I have you on speaker phone if that is satisfactory to you?

**Madam CHAIR:** That is fine, thank you very much for letting me know.

**Mr MacSPORRAN:** Thank you.

**Madam CHAIR:** Mr MacSporran, we might proceed, I am going to start by giving you an introductory statement. So thank you for dialling in before the committee this morning, we appreciate you taking the time to speak to the committee and look forward to hearing from you today.

**Mr MacSPORRAN:** Thank you.

**Madam CHAIR:** This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public hearing and is webcast through the assembly's website. A transcript will be made for you to the committee and may be put on the committee's website. If at any time during the hearing you are concerned that what you will say should not be made public, you may ask that the committee go into a closed session and take your evidence in private.

I will ask you to state your name for the record and the capacity in which you appear. I will then ask you to make a brief opening statement before proceeding to the committee's questions. Could you please state your name and capacity in which you are appearing for us.

**Mr MacSPORRAN:** My name is Alan John MacSporran. I am the Chairperson of the Queensland Crime and Corruption Commission.

**Madam CHAIR:** Thank you, Mr MacSporran. Would you like to make an opening statement?

**Mr MacSPORRAN:** Simply to reiterate and endorse the submission that we, as a commission, have made to your committee in respect of the proposed legislative setting up of the commission. I am happy to answer any questions that arise in the committee members' minds about any of those submissions.

**Madam CHAIR:** Excellent. Thank you, Mr MacSporran. Do committee members have any questions?

**Mr PAECH:** I would like to proceed, if I may, Madam Chair? Hello, Mr MacSporran. My name is Chansey Paech. I am the Member for Namatjira. Concerns have been raised with the committee that the definition of 'corrupt conduct' in the bill could give rise to uncertainty or injustice. I am interested to go into detail with you about how the term 'corrupt conduct' is defined by the Queensland legislation.

**Mr MacSPORRAN:** The definition is always a vexed area because definitions in this area almost always tend to be rather obtuse for the simple reason that they seek to canvass and cover a lot of potentially corrupt conduct. In doing so, the definitions themselves can become unwieldy. I must say our Act is no exception to that concern. Our definition of 'corrupt conduct', as you probably know, is contained in section 15 of our Act. I will read it to you. Bear with me because it is somewhat lengthy. To illustrate the point I just made:

- (1) *Corrupt conduct means conduct of a person, regardless of whether the person holds or held an appointment, that —*
- (a) *adversely affects, or could adversely affect, directly or indirectly, the performance of functions or the exercise of powers of —*
    - (i) *a unit of public administration; or*
    - (ii) *a person holding an appointment; and*
  - (b) *results, or could result, directly or indirectly, in the performance of functions or the exercise of powers mentioned in paragraph (a) in a way that —*
    - (i) *is not honest or is not impartial; or*
    - (ii) *involves a breach of the trust placed in a person holding an appointment, either knowingly or recklessly; or*
    - (iii) *involves a misuse of information or material acquired in or in connection with the performance of functions or the exercise of powers of a person holding an appointment; and*
  - (c) *is engaged in for the purpose of providing a benefit to the person or another person or causing a detriment to another person; and*
  - (d) *would, if proved, be —*
    - (i) *a criminal offence; or*
    - (ii) *a disciplinary breach providing reasonable grounds for terminating the person's services, if the person is or were the holder of an appointment.*

It goes on to talk about some clear cases which would come within that definition. You can see immediately the breadth of the definition and the cumulative requirements of the definition to satisfy what is or is not corrupt conduct.

It is a matter of educating the public sector as to how to apply the tests relevantly to be satisfied to meet that definition.

**Mr PAECH:** Thank you. What do you consider the risks of including conduct that may not have an element of criminality or dishonesty within the definition of corrupt conduct?

**Mr MacSPORRAN:** One of the things that is a risk, if that is the outcome, is that you have a commission set up to deal with the more systemic and serious matters being inundated with the less serious and less problematic matters. Having said that, there is a balance to be drawn between matters coming to the commission, or coming at least to the commission's notice, such that the commission is at least aware of them and can monitor the way they are investigated by agencies themselves. Often, once they are looked at carefully, the less serious matters lead to more serious systemic conduct which should come to the commission.

It is a fine line between not burdening the commission with things they should not have to deal with, but not preventing them from exercising their jurisdiction in appropriate cases.

**Mr PAECH:** In that situation, you would be suggesting that avenues such as Ombudsmen are utilised before matters are referred to or taken up by an ICAC?

**Mr MacSPORRAN:** I think so. Although what we do here is the matters that satisfy our test of a reasonable belief or suspicion that there is potentially corrupt conduct come to us, we also require matters that are not that serious to be notified to us by way of a schedule of matters that are dealt with by the agencies themselves. So, we do not lose oversight of those matters but we do not deal directly with them. Then, at the end of the day we are able to audit the way agencies have, in fact, dealt with matters that have not come to us to make sure they are applying the appropriate tests. You have to have oversight of the entire system, if you like, but not be burdened with having to exercise your jurisdiction in respect of all of those matters.

**Mrs FINOCCHIARO:** Lia Finocchiaro, Member for Spillett. Is it a concern then that without a threshold in the definition such as it being of a criminal nature or resulting in disciplinary Action that would result in termination, it would then overburden the ICAC, or compel the ICAC to do a thorough investigation for all of those more minor matters that are raised with it?

**Mr MacSPORRAN:** That is so. As I said, it is not easy to achieve the appropriate balance. It just depends on what you want your commission to do. If you want it to investigate and have oversight of everything in that space, including just minor matters of misconduct and disciplinary breaches and so forth, you would need to properly resource the commission.

Under our Act, that was never the intention. We are simply to deal with the more systemic and serious matters and the devolution principle is in place in our Act to make it the case that, where possible, and if the public interest is satisfied, the matters are devolved back to the agencies to investigate subject to our monitoring and our ability to take them over if they become more serious.

For that reason, we have a threshold test which must be met to allow us to only be dealing with the matters that are more serious and systemic. In that space, we would like to think we do not miss out on things that may ultimately satisfy the threshold test for our jurisdiction. That is done by a series of monitoring of investigations that are carried out, quite properly, by agencies without the need to refer them to us because they do not meet the test.

**Mrs FINOCCHIARO:** Is that power you have to devolve matters down to agencies enshrined in your legislation or is it more like a process you have developed as a result of having that threshold definition?

**Mr MacSPORRAN:** No, it is in our Act. It is statutorily mandated that, as a first port of call, matters are to be devolved back to the agency unless it is not in the public interest to do so or the agency does not have the capacity to deal with the matter.

I will get the section for you so I can give you the exact terms of it. It is in section 34(c). It says:

*Subject to the cooperation and public interest principles and the capacity of the unit of public administration, Action to prevent and deal with corruption in a unit of public administration should generally happen within the unit ...*

It goes on to talk about the public interest. Clearly, if something is serious and systemic or there are other public interest considerations that might apply, we are required to retain the matter and deal with it ourselves. You might understand that would clearly be the case where you had something that was perhaps more systemic. Although the level of seriousness of the individual allegation was not such as that you would be reluctant to send it back to the agency, either with a symptom of much wider systemic issues, we might retain the investigation, do it ourselves, with a view to producing a public report, for instance as to how the conduct might be prevented from continuing to occur across the agency.

**Mrs FINOCCHIARO:** Thank you.

**Mr MacSPORRAN:** But that is in section 34 of our Act, it sets out the principles that apply in that case. I must say, that system does seem to work fairly well. We do not find that we are missing out routinely on allegations being reported to us that should come to our agency and we find where that has happened, we are picking it up but in a variety of ways including an audit function we have, such that we are fairly comfortable, we are getting to see the serious aspect of complaints and conduct across the public sector and are happy that we are dealing with those that we should be dealing with.

**Mrs FINOCCHIARO:** Okay, and so I guess is it in your view that I know the Member for Nelson, Gerry raised it also in the initial part of his question but it has been raised that without that proper definition of corrupt or without having that criminal and dishonest component of the definition of corrupt, it could rise to uncertainty and injustice, do you have any comment on the uncertainty or injustice? I suppose you have talked to the uncertainty but I guess I am more interested in the injustice it could cause to individuals who have potentially or allegedly engaged in more minor administrative or a maladministration issues within the department?

**Mr MacSPORRAN:** Well I think it is, it is worthwhile to not have the anti-corruption agency dealing with things that should be properly be dealt with by the agency themselves. I mean agencies across the public sector routinely do manage their codes of conduct which are designed to ensure that public sector employees and public officials, more generally, do behave appropriately. There are lots of aspects of breaches of the code of conduct which are matters properly to be addressed by the human resource department I suppose within the agency, rather than coming to the anti-corruption agency, such as ourselves and the proposed Northern Territory model.

The key is though, to make sure that there is nothing missed in the translation of that text. I think that is the tricky bit if you like, but our experience has been that it works fairly well, we do not seem to be missing conduct that should properly come to us and where we do pick it up, where people are not applying the right test, we seek to educate them to make sure that the correct test is applied and part of that process is in us performing an educative I suppose function to the agency to make sure they do understand and we produce advisories and our manual, really, we have on our websites called 'Corruption in focus' which sets out all the tests to be applied, how they might be applied, how you might investigate the less serious matters and so forth.

It is all about getting that balance right, but I think you do need, I think, the appropriate test to limit the jurisdiction of the agency, that is your determination of the more serious systemic issues.

**Mrs FINOCCHIARO:** I guess at first instance, really, because you do have that devolution mechanism, everyone could report everything to you guys and that would be farmed out as appropriate in any event?

**Mr MACSPORRAN:** Yes, well that is not our – we are not required to report everything, they are required to report things that satisfy the test of potential corrupt conduct and there are some nuances about but it is either got to be a criminal offence or a disciplinary breach serious enough to warrant dismissal, that is the nub of what our definition says and as I say, that makes sense because otherwise there are matters that should be dealt with appropriately, internally, and if for instance, they are dealt with internally, and during the investigation something comes out of the evidence that indicates that it is more serious than at first thought, well then there is still an obligation to report that to us and for us to deal with it.

**Mrs FINOCCHIARO:** Thank you.

**Mrs LAMBLEY:** Mr MacSporran, Robyn Lambley from Alice Springs, electorate of Araluen. In your opinion, do you think our definition of corruption is too broad at the moment? Is that your general thought?

**Mr MacSPORRAN:** No, I do not think so. It is more a matter of how the test is to be satisfied, and that, as I say, comes down to education and assistance to be given to the public sector more generally.

**Mrs LAMBLEY:** Your legislation was put through many years ago in 2001, is that right?

**Mr MacSPORRAN:** It was initially but it has been refined since then. The most recent changes occurred in about 2014, I think, when our jurisdiction was confined to the more serious and systemic issues. Under your proposal the ICAC itself would direct as to public sector agencies as to how that definition is to be applied, to give some certainty and focus to what needs to come to the ICAC.

**Mrs LAMBLEY:** So your legislation has evolved as you have learnt, I suppose.

**Mr MacSPORRAN:** Yes. Initially we were getting, in the view of those that reviewed our Act in 2013, I think it was, we were getting too far too many complaints. Many of which were so minor and many which had no substance at all that we were getting bogged down in things that we should not have been involved in the first place.

There was an attempt made by the amendment to further limit our jurisdiction to the things that the committee thought what the reviewers thought should be more the subject of our jurisdiction being the more serious to systemic issues, and since that definition has been changed we refined our advisories to the public sector to assist them as to how that test might be applied.

**Mrs LAMBLEY:** I suspect that is what will happen in the Northern Territory. I think initially we will be inundated, the ICAC will be inundated with all sorts of referrals like you have described. Does your legislation have, I mean most legislation has regulations underpinning it – when you talk about the test to test corruption, is that what you are talking about, some sort of underwritten regulations or guidelines?

**Mr MacSPORRAN:** No, we had simply guidelines that we produced at the commission, which we make available to the public sector more generally from the website. As I say, our manual is called *Corruption in Focus*. Prior to the amendment to our definition it was called *Facing the Facts*, and they are really just guides that we produce voluntarily for the assistance for public sector.

There is no regulation to such which determine how our jurisdiction is to be exercised, that is a matter for us within the constraints of the law.

**Mrs LAMBLEY:** Is your legislation similar to this, to ours in terms of the definition of corruption?

**Mr MacSPORRAN:** Just bear with me.

**Mrs LAMBLEY:** Page 11 of our draft legislation.

**Mr MacSPORRAN:** I think it is in respect of your definition of corrupt conduct is not too far away from what we have in our Act in section 15.

**Mrs FINOCCHIARO:** Mr MacSporran, in your Act is the definition of corruption the same as in your criminal code?

**Mr MacSPORRAN:** No, it is not. It is unique to our Act.

**Mrs FINOCCHIARO:** Broader?

**Mr MacSPORRAN:** Yes, much broader. The difference with your bill is that your definition of corrupt conduct is similar to ours in a broad sense, but your Act also includes misconduct and unsatisfactory conduct. Both of those latter definitions, we would say, are more appropriately dealt with by the public sector itself, and would not normally come to us.

**Ms NELSON:** Mr MacSporran, I am Sandra Nelson, the Member for Katherine, can you tell me, in your opinion do you think that the definition of corruption should be the same in both, like the commission and also the *Criminal Code Act*?

**Mr MacSPORRAN:** I do not know what definition you have in your criminal code in the Northern Territory for corrupt conduct, but I think the definition of corrupt conduct under the Act here in Queensland, our Act, is necessary quite broad because it does encompass, as I tried to indicate before I read the definition out, it has to encompass a wide range of potential breaches of the law. I do not think it is necessarily wise to marry it up with a criminal code definition. Unless you did it broadly because you would be giving a whole different scenario, really.

Bear in mind that it encompasses disciplinary breaches which would not normally be taken up by the criminal code, obviously. Serious disciplinary breaches that warrant dismissal, so it covers those as well.

**Ms NELSON:** Okay. That's true.

**Madam CHAIR:** Mr MacSporran, it is Ngaree Ah Kit, Member for Karama, I was wondering if your legislation incorporates any mandatory reporting requirements for public officers and public bodies?

**Mr MacSPORRAN:** It does. Our Act requires the mandatory reporting by public officials of suspected corrupt conduct. So there is no voluntary nature in that. They have to report it if it reaches that threshold test. And how you apply that test is what we call the tricky bit, but we try and assist public officials with an understanding of that threshold test and how it is met. But it is met, once there is a reasonable belief of corrupt conduct and also for our police officers, police misconduct, there is a requirement to report that to us. It is not a matter of choice. They have to. Then we decide how it is dealt with, whether it is sent back to the agency to be investigated, with somebody monitoring. Or whether we retain the matter and investigate it ourselves and report as required.

**Madam CHAIR:** And does a part of that decision go towards public interest? What would be in the public's best interest for the way forward?

**Mr MacSPORRAN:** It does, yes. Under section 34, the one I referred to earlier, we are required to devolve matters that are reported to us back to the agency, unless it is in the public interest for us to retain them. And one of the reasons for that would be if the public sector agency does not have the capacity or wherewithal to investigate the matter themselves. Where it is serious enough, that might be a case where the powers that we have, which are far more extensive and wide-ranging than the public sector agency has, we can do a lot more with it often. And if it is more serious, we should retain it and do it ourselves.

**Mrs FINOCCHIARO:** Can I just ask for clarification, Mr MacSporran, so two questions: Is it for the agencies to mandatorily report to the ICAC? Or publically report?

**Mr MacSPORRAN:** No, they report to us.

**Mrs FINOCCHIARO:** Okay.

**Mr MacSPORRAN:** Not publically.

**Mrs FINOCCHIARO:** Okay, not publically.

**Mr MacSPORRAN:** It comes to us. And that is pretty important because we need to know about it and be able to investigate it or send it back to them.

**Mrs FINOCCHIARO:** Yes.

**Mr MacSPORRAN:** Because the integrity of an investigation often depends upon it remaining covert until it is ready to be a decision to be made as to what is to happen to it. Otherwise, you are giving the corrupt individual a chance to muddy the waters or endeavour to destroy evidence and so forth.

**Mrs FINOCCHIARO:** And then, my second part of that question is: Who establishes the threshold test, of that level of reasonable belief before it is reported? Is that the agency? Or it comes to you guys? You say, 'yes, it has met the test' and then the department goes and prepares their report?

**Mr MacSPORRAN:** Yes, it is for the agency to satisfy itself as to whether the test has been met.

**Mrs FINOCCHIARO:** Okay.

**Mr MacSPORRAN:** But the test itself is somethings that is mandated, if you like, by the terms of the definition in our Act's section 15. And we try to assist public sector officials with an understanding of how that test is to be administered.

**Mrs FINOCCHIARO:** Yes.

**Mr MacSPORRAN:** That is our job to make that clear and then hopefully the public officials will understand matters that should and matters that should not come to us.

**Mrs FINOCCHIARO:** Okay.

**Mrs LAMBLEY:** Robyn Lambley from Alice Springs. Mr MacSporran, just going back to your definitions, did you say that your legislation does not include reference to misconduct and unsatisfactory conduct? And would you? Is that correct? Is that what you said? That?

**Mr MacSPORRAN:** That the global proposition under our section 15 of corrupt conduct but it does include police misconduct so far as police are concerned. Police are a bit different to the rest of the public sector but, generally speaking, in terms of corrupt conduct under section 15, it includes the matters are that serious enough to provide evidence of a criminal offence; or a disciplinary breach which are serious enough to warrant dismissal.

**Mrs LAMBLEY:** So in your opinion do you think that including misconduct and unsatisfactory conduct is that making our definition too broad?

**Mr MacSPORRAN:** Not necessarily. I suspect that including unsatisfactory conduct is going a bit far because that would normally go to a disciplinary tribunal within the sector itself. Misconduct, if it is serious enough to warrant dismissal can come within our definition of corrupt conduct.

I think the answer is if you make your definition of corrupt conduct broad enough – and from what I have seen of yours it does – you do not necessarily need to have a separate definition of misconduct and unsatisfactory conduct to enliven your jurisdiction.

**Madam CHAIR:** Does the committee have any further questions? No further questions. Thank you for your time Mr MacSporran. It is has been great to be able to ask these questions and have the detail provided by somebody who is actually involved in a Crime and Corruption Commission.

Do you have any further comments you would like to leave with the Committee?

**Mr MacSPORRAN:** No, I do not except to say that you should not feel inadequate in trying to grapple with these concepts because our experience has been over the whole period that we have been involved in this area which has been some considerable amount of time, there are always grey areas and there are always areas that need to be fleshed out. The public sector does need assistance to apply the appropriate tests. That is part of a battle of performing an educative function if you like by a Commission such as your proposed ICAC and our CCC here. It is a very important part of the function.

**Madam CHAIR:** Excellent. Thank you very much for your time Mr MacSporran. We really appreciate it.

**Mr MacSPORRAN:** Thank you and good luck.

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**Hon Bruce Lander QC: Independent Commissioner Against Corruption SA  
(via teleconference)**

**Madam CHAIR:** Hi Bruce. This is Ngaree Ah Kit. I am the Member for Karama and the Chair of the Social Policy Scrutiny Committee. Thank you for linking in with us this morning as a part of our Independent Commissioner Against Corruption Bill Public Hearing. I am joined at the table by fellow committee members. We have Mrs Lia Finocchiaro, Member for Spillett, Ms Sandra Nelson, the Member for Katherine, Mr Chansey Paech, the Member for Namatjira and Mrs Robyn Lambley, the Member for Araluen.

I am just going to run through a few of the introductions. Thank you for coming before the committee this morning. We appreciate you taking the time to speak to the committee and look forward to hearing from you today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public hearing and is being webcast through the assembly's website. A transcript will be made for you to the committee and may be put on the committee's website. If at any time during the hearing you are concerned that what you will say should not be made public, you may ask that the committee go into a closed session and take your evidence in private. I will ask you state your name for the record and the capacity in which you appear. I will then ask you to make a brief opening statement before proceeding to the committee's questions.

Could you please state your name and the capacity in which you are appearing?

**Mr LANDER:** My name is Bruce Thomas Lander. I am the independent Commissioner Against Corruption in South Australia.

**Madam CHAIR:** Thank you Mr Lander. Would you like to make an opening statement?

**Mr LANDER:** I think I have said most of what I wish to say in the letter that I wrote to you as Chair of the committee on 29 September of this year. There are a couple of other matters that I might mention very quickly.

**Madam CHAIR:** Sure.

**Mr LANDER:** As I tried to explain in that letter, the definition of improper conduct in clause 9 is very wide and it seems to me that there are no distinct lines between criminal conduct and misconduct. Corrupt conduct includes some conduct which would be categorised as misconduct, that is in clause 10(2) and misconduct includes less serious criminal conduct and that is evidence in clause 11(1). So you have a situation where you have a cross over between misconduct and criminal conduct in the definitions of corrupt conduct and misconduct.

Also it would appear unsatisfactory conduct includes some form of illegal conduct. It talks illegality. I am not sure what is meant by that, whether that means criminal conduct or unlawful conduct or some other type of conduct, because illegal conduct and illegality is not defined. So I think therefore there are some tensions between the various clauses and they are tensions that I think probably need to be addressed. That is all I wish to say in opening.

**Madam CHAIR:** Thank you Mr Lander.

Does the committee have any questions for Mr Lander?

**Mrs FINOCCHIARO:** Mr Lander, it is Lia Finocchiaro, I am the member for Spillett here in the Northern Territory.

**Mr LANDER:** I am sorry, I am having trouble hearing you.

**Mrs FINOCCHIARO:** Sorry. I am talking into the microphone but you are on the speaker phone. Okay, that should be better.

**Mr LANDER:** Yes, that is much better, thank you very much.

**Mrs FINOCCHIARO:** Okay, thank you. Concerns have been raised with the committee that the definition of corrupt conduct in the bill could give rise to uncertainty and injustice and so how is the corrupt conduct defined in South Australia, as distinct from ours?

**Mr LANDER:** I think those concerns are must be addressed. In South Australia, corrupt conduct is defined by reference to firstly a number of offences under the *Criminal Law Consolidation Act*, offences such as bribery and abuse of public office, the types of offences that you would usually associate with corruption. Secondly, offences under the *Public Sector Honesty Accountability Act*, which are offences that relate to conflicts of interest and failing to Act honestly, effectively, are those two offences and then lastly, corrupt conduct includes any criminal conduct engaged in by a public officer while a public officer is discharging his or her public duties. So, for corruption in South Australia, it must be criminal conduct, misconduct cannot amount to corruption.

**Mrs FINOCCHIARO:** Okay, and so is your definition of corruption the same as in your Criminal Code?

**Mr LANDER:** No, the definition of corruption under the *Independent Commissioner Against Corruption Act*, picks up the suite of offences that are usually as I say associated with corrupt conduct in the *Criminal Law Consolidation Act*, so that they work together.

**Mrs FINOCCHIARO:** Okay and what do you consider to be the rest of including conduct that may not have that element of criminality or dishonesty within the definition of corrupt conduct, like our proposed bill does?

**Mr LANDER:** Look what concerns me about the bill from an outsiders point of view is that you have got all these very strong powers that the ICAC has in relation to an investigation and those strong powers can be used for those trivial little matters because of the way in which the bill is constructed. It would mean for example that you could use the coercive powers that overrule the common law for matters that do not amount to criminal conduct. I do not think that those are usually provisions that are given to investigative bodies such as ICAC. Usually those coercive powers are given in circumstances where you are investigating criminal conduct or very serious conduct.

**Mrs FINOCCHIARO:** Is it your view then that it could lead to injustice for the individual because of that breadth of power?

**Mr LANDER:** Yes. I think there could be a number of injustices visited on people because of the wide definitions given under the bill.

I think there is another tension, a serious tension in the bill and that is between private examinations and public inquiries.

I tried to identify that in my letter. Examination under Clause 34 has to be in private by reason of Clause 35. Then the Commissioner is empowered to have public inquiries. A public inquiry must be something different from a private examination but the bill does not say what it is and when it is that a public inquiry should be carried out.

There is a tension then that arises because under a public inquiry the person whose conduct is inquired into for the investigation must be accorded procedural fairness but for a private examination no procedural fairness needs to be accorded. I am not sure how those clauses will work with each other.

I think the risk for the Commissioner will be in due course claims by persons who are under investigation that the exercise of power should be reviewed by the Supreme Court under the judicial review provisions. There will be a risk I think that a lot of this will end up in litigation.

**Mrs FINOCCHIARO:** I think our bill has a very broad test to hold a public inquiry. It is just if it is in the public interest, which is extremely broad or at the discretion of the Commissioner.

**Mr LANDER:** It is completely at the discretion of the Commissioner and not subject to any threshold as to even the seriousness of the matter under investigation. That is not a matter that has to be taken into account provided it is in view of the Commissioner in the public interest.

Usually when you hold public inquiries it would be in circumstances where the seriousness of the matter demanded it.

**Mrs FINOCCHIARO:** What type of provisions does South Australia have to safeguard that procedural fairness when holding public hearing or in making the decision to hold a public hearing?

**Mr LANDER:** In South Australia you cannot hold a public hearing for corruption. I have recommended to government but government has rejected my recommendation that there should be the power to hold a public hearing in relation to inquiries into maladministration but as I say, the government has rejected it.

**Mrs FINOCCHIARO:** Are you able to say on what basis?

**Mr LANDER:** A wrong one.[Laughter.] I think a political judgement. It is fair to say that the government thinks that if I were to conduct an inquiry into maladministration in public that it might impact upon ministers and therefore have a political fallout.

**Madam CHAIR:** Any further questions?

**Ms NELSON:** I do. Mr Lander, this is Sandra Nelson. I am the Member for Katherine. I have a couple of questions on mandatory reporting.

Before I go there, you just talked about the threshold and cases needing that threshold to go to investigation or hearings. Are we not already meeting that or doing that by the various policies and procedures that the individual government agencies have in place in regards to corruption and misconduct?

Do we not already have steps like that in place? Does South Australia already have steps like that in place?

**Mr LANDER:** I am not quite sure I follow. I think under this bill the Commissioner could, if the Commissioner was satisfied that something was in the public interest embark upon an investigation by holding a public inquiry in public and then if necessary reverting to in private.

That must be something, as I said, different to an examination in private, which is provided for in clause 34 and clause 35. In making that decision to hold a public inquiry, the Commissioner does not have to be satisfied that the gravity of the matter is of a kind that ought to be examined in public, or that there are particular circumstances that need to be addressed before the matter can be heard in public.

You will see in the Victorian legislation, and I think also in the Queensland legislation that public inquiries there cannot be held unless various thresholds are first met, but in this bill there are no threshold.

**Ms NELSON:** Okay, thank you. Mr Lander, you note that the reports – first of all, I just want to clarify because I was not quite sure, does the ICAC South Australia legislation incorporate any mandatory reporting requirements?

**Mr LANDER:** Yes.

**Ms NELSON:** Yes, okay. Are the reports that may be made and have to be made under part 3, division 7, may lead to confusion in the manner in which the NT ICAC deals with investigations into criminal conduct? Just as a matter of interest, can you please briefly summarise the South Australia's ICAC reporting regime?

**Mr LANDER:** Yes. In South Australia a public officer and a public authority have to report any conduct that it or they reasonably suspect raises a potential issue of corruption or serious or systemic misconduct or maladministration in public administration.

**Ms NELSON:** Okay, can I just stop you there? So, there are steps already in place in South Australia where they have to – there are certain criteria they have to meet?

**Mr LANDER:** Yes. That is right, yes, and I have given those directions and guidelines, which I was obliged to do under the South Australian Act.

**Ms NELSON:** Okay, go on.

**Mr LANDER:** Sorry, not sure where I was going. They are the reporting obligations and all public officers have to meet those. We have a definition of improper conduct of (inaudible) that you have here. A lot of public officers will find it difficult to determine what sort of conduct it is, and therefore may be reticent or reluctant to report it.

We have found in South Australia that even with all the education that we have offered to the public sector there are still many in the public sector who do not understand when their reporting obligations are engaged, and therefore do not report things.

For example, some do not report under suspicion that they think they have to be satisfied or have to be witnesses before they can report conduct, which of course is quite wrong. The more complicated the definition of the conduct, I think, the less report you will get because of the confusion that is caused at the public officer level.

**Madam CHAIR:** Mr Lander, it is Ngaree, the Member for Karama, just on that point – sorry, we are just moving the phone around from person to person. Can you hear me now?

**Mr LANDER:** Yes, I can thank you.

**Madam CHAIR:** It is Ngaree Ah Kit, the Member for Karama. I am just following on from the point that you made there about people not being aware of the, I guess, the threshold that they have to meet before – or not being sure that they have to report on suspicions they think that they have to have confirmed evidence – what sort of education processes are in place to educate our public officers about their responsibilities to report?

**Mr LANDER:** We have our website which offers advice. We also hold awareness sessions once a month which any public officer can attend. I have also addressed all of the senior officers in South Australia, 1200 public officers, for the purpose of educating them and requiring them to educate those who they may lead in their obligations.

We have a fairly aggressive education program in South Australia, but it still has not proved to be as effective as I would have wished, because there is this misunderstanding at some public officer level as to when a suspicion arises and when you have knowledge or belief as to particular circumstances.

People do not understand what a suspicion is, I do not think. They think they have to be aware of conduct or they have had to witness conduct, which of course is not the case. I might have a suspicion if one of my employees told me of a particular circumstance they had witnessed, and I had confidence in that particular employee, I would suspect that conduct had occurred. I would not know, I would not believe it, but I would suspect it because I would have been told by someone I thought was a credible reporting person. Under those circumstances I would be under an obligation to report it. I am having difficulty explaining that to people in the public sector that that is as much as they need before their reporting obligations are engaged.

**Madam CHAIR:** Thank you, Mr Lander, for clarifying that. Are there any further questions?

**Mr PAECH:** If I may, Madam Chair. Mr Lander, it is Chansey Paech, the Member for Namatjira. You note that the report may be under Part III, Division, section, may lead to a confusion in which the matter in which the ICAC in the Northern Territory deals with investigations of 'criminal conduct'. For my clarification, could you elaborate what you mean by this?

**Mr LANDER:** The definitions of improper conduct are so complicated that most people at a level in the public sector would not understand them or when their reporting obligations were engaged. As a consequence of that, you will get less reports than you should.

The more straightforward the definition – as I said, in South Australia it has to be criminal conduct otherwise it is not corruption. It is as straightforward as you can get, but still we have people who are not quite sure whether they should report the conduct.

**Mr PAECH:** The committee understands that the South Australian legislation limits whistleblower status to public officers only. Can you clarify for the committee why it is not extended to members of the public?

**Mr LANDER:** Ordinarily, a member of the public is not a whistleblower as such. A whistleblower is someone who has information within their remit, as a result of their employment, and who then wishes to provide that information for the purpose of having the matter addressed, and does so at a risk to that person.

Members of the public are not those types of persons. Members of the public may be victims but they are not whistleblowers as such. They will bring it to the attention of the authorities for the purpose of getting redress as against themselves. Members of the public sector bring it to the attention for the altruistic purpose of having the matter addressed, rather than as victims. They are the people who need to be protected.

**Mr PAECH:** Mr Lander, following on from that, in your submission you noted that declarations of protected communication should be made by a court rather than an administrative decision maker. Are you able to explain why you do not consider it appropriate to empower the ICAC to make such declarations?

**Mr LANDER:** Declarations of that kind are usually reserved for the courts. The courts which are independent of the organisation Act upon objective evidence. It seems to me to be a strange power to give to the ICAC to make declarations of that kind that are mentioned in clause 93. I believe it would be better given to the courts, frankly.

**Mr PAECH:** You are referring to section 93?

**Mr LANDER:** Yes.

**Mr PAECH:** Thank you.

**Mrs FINOCCHIARO:** Mr Lander ...

**Mr LANDER:** Can I mention one other matter I meant to mention in the opening and forgot? It is clause 18(1)(c)(iv) which addresses the ICAC's functions. One of the functions is to refer matters to another entity for investigation or further investigation.

I do not know why the words 'another entity' have been used there, because the Act has a scheme for referring matters to referral entities. Another entity must be something other than a referral entity. I wonder why you would be referring it to something than the organisation which, under the bill, are the organisations to which references should be made. It might be a typo. If it is a typo for 'referral entities' rather than 'another entity'.

**Mr PAECH:** I certainly have that noted.

**Mrs FINOCCHIARO:** Thank you Mr Lander. I just was interested in your comments around Justices of the Peace issuing warrants. So I was interested in your comments around that and then how is it done in South Australia?

**Mr LANDER:** The only persons who can issue warrants in South Australia are me – I can issue a warrant for my investigators to go on to public premises or premises occupied by a public officer; and if a warrant is needed to go on a private premises, application has to be made by my investigators at my behest for the Supreme court.

**Mrs FINOCCHIARO:** And so, what do you think the ramifications of having Justices of the Peace able to issue the warrants?

**Mr LANDER:** The issue of a warrant for investigation of criminal conduct is a serious matter. I think it is probably above the level of a Justice of the Peace if I could put it that way without trying to denigrate their office. But I think it is probably at a level which should be addressed by the Supreme Court or, at the very least, by the Local Court. And, in South Australia, it is addressed by either the Supreme Court or by me.

**Mrs FINOCCHIARO:** Thank you.

**Mr LANDER:** Justices of the Peace do not necessarily have any legal training at all and to issue a warrant under clause 67 could be, could have serious ramifications. And I should point out, if you issue a warrant under clause 67 it can be for the most serious matters. Because of the definition of improper conduct, you could issue warrants for matters in South Australia could never be issued. Because a warrant here must relate to criminal conduct.

**Mrs FINOCCHIARO:** Thank you.

**Mr LANDER:** I am sorry that I do not sound too much like a lawyer.

**Mrs FINOCCHIARO:** No, no, no.

**Madam CHAIR:** Mr Lander, it is Ngaree Ah Kit, Member for Karama.

**Mr LANDER:** Yes.

**Madam CHAIR:** I wanted to go back to the comments you made in regards to our bill not having a threshold test for public inquiries.

**Mr LANDER:** Yes.

**Madam CHAIR:** Under schedule 1 of our bill, it states that:

*Matters should be dealt with by the ICAC in private, unless it is in the public interest to do otherwise, taking into account ...*

There are about eight lists of scenarios in which it would be taken into account why it would be a private session. Does that schedule 1 of the bill address your concerns about the lack of threshold tests?

**Mr LANDER:** Not quite. I was aware of that. Not quite for this reason: That really only defines what is in the public interest.

**Madam CHAIR:** Yes.

**Mr LANDER:** It does not provide specific thresholds that must be met before the power can be exercised. And that is what is in the Victorian and the Queensland legislation. It has got to be in the public interest in those jurisdictions and it must meet certain thresholds. In Schedule 1, you are really defining in clause 2, what is in the public interest which is a different thing, and a narrower test, I am suggesting.

**Madam CHAIR:** Right. Thank you for clarifying.

Does the committee have any further questions?

**Mr PAECH:** No.

**Madam CHAIR:** Mr Lander, I have one final question. It is Ngaree, Member for Karama.

**Mr LANDER:** Yes.

**Madam CHAIR:** Yeah, in your submission you question whether it would be appropriate to empower the ICAC to make a declaration of the kind mentioned in clause 93, subsection 1 of the bill. As you can appreciate, I guess I was thinking of this in regards to the small population base that we have in the Northern Territory. I was just wondering if you think that for the Northern Territory having a small population, whether that would help to justify the clause for having the declaration of protected communication by people?

**Mr LANDER:** It is not so much the size of the population. I think it is a judicial function.

**Madam CHAIR:** Okay.

**Mr LANDER:** It might be the size of your courts. I would reserve that power for the Supreme Court or, as I said earlier, at the least the Local Court. As I say it is not so much the size of the population. It is the seriousness of the declaration and the fact that it really is, and looks like the exercise of judicial power. So that is why I think it should be reserved to the courts.

**Madam CHAIR:** Thank you very much.

**Mr LANDER:** I do appreciate that your parliament will have to address this on the basis of the size of your population and the particular needs of the Territory. I mentioned that in my letter – that each jurisdiction must tailor this type of integrity agency to the needs of the jurisdiction.

**Madam CHAIR:** Mr Lander, do you have any final comments you would like to leave with the committee?

**Mr LANDER:** No, thank you, other than to say thank you for listening to me.

**Madam CHAIR:** Thank you very much for your time today. We really appreciate it.

**Mr LANDER:** Good, thank you very much.

**Madam CHAIR:** Thank you. Bye.

**Mr LANDER:** Thank you. Goodbye.

**Madam CHAIR:** Ladies and gentlemen, we will now break until 10.30 when we will resume with our committee hearing. We will be talking to Mr Richard Bingham of the Integrity Commission in Tasmania.

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The committee suspended.

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**Mr Richard Bingham: CEO, Integrity Commission TAS  
(via teleconference)**

**Madam CHAIR:** Good morning Mr Bingham. This is Ngaree Ah Kit. I am the Member for Karama and the Chair of the Social Policy Scrutiny Committee. How are you?

**Mr BINGHAM:** I am well, thank you. Thanks for the invitation to speak with you.

**Madam CHAIR:** Thank you very much for joining us. We might kick it off.

I want to thank you for coming before the committee this morning. We appreciate you taking the time to speak to the Committee and look forward to hearing from you today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply.

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I will ask you to state your name for the record and the capacity in which you appear. I will then ask you to make a brief opening statement before proceeding to the committee's questions.

Could you please state your name and the capacity in which you are appearing?

**Mr BINGHAM:** My name is Richard Bingham. I am the Chief Executive Officer of the Integrity Commission in Tasmania.

**Madam CHAIR:** Thank you Mr Bingham. Would you like to make an opening statement?

**Mr BINGHAM:** Sure. I will make a brief statement. The reason I put in a submission to your committee was that I am conscious that this is a significant piece of legislation for the Northern Territory and I commend you on your consideration of it. I think there is a lot that is good in it.

I wanted to draw to your attention the way in which Tasmania, as a small jurisdiction has dealt with these issues and to suggest that if there is anything in the way that we have approached it that appeals to you we would be very happy to provide help and assistance to the extent that we can.

The reason I think it is perhaps instructive to think about this from the perspective of a small jurisdiction is that some of the issues which arise in the context of Tasmania for example are more to do with a body which works in collaboration with the rest of the public sector to promote and enhance standards of ethical conduct by public officers as much as it is to conduct investigations and to deal with misconduct.

I know that other commissions — I know you have heard from the Queensland Crime and Corruption Commission and also from the South Australian Independent Commissioner — have similar misconduct prevention functions. In the case of the Tasmanian Commission it forms a larger proportion of the work that we do and hence is a more significant part of our work than is the conduct of investigations.

That does not mean that we do not get complaints, we do but the investigations which this body undertakes are ones which relate to more serious matters and we tend to refer other matters to public authorities in Tasmania for them to investigate.

Obviously we do not just refer them and then forget about them. We require authorities to report back to us and we conduct audits of investigations once they are completed.

I think that gives you a bit of a picture about in the very broad sense how the integrity commission in Tasmania operates, I am very happy to provide any further information which might be of particular assistance to your committee. So thank you for the opportunity to make an opening statement.

**Madam CHAIR:** Thank you very much. Did the committee have any questions for Mr Bingham?

**Ms FINOCCHIARO:** Yes, I do. I was very interested — sorry, Lia Finocchiaro, I am the Member for Spillett. I was very interested obviously being a smaller jurisdiction, not as small as ours, but small nonetheless and

larger, perhaps in land mass, but how have you guys dealt with the integrity of the independence of the appointment of the Commissioner given your small jurisdiction?

**Mr BINGHAM:** Yes, the structure that we operate under is a board so we have a Chief Commissioner who is, if you like, the Chair of the Board and my position is Chief Executive Officer who reports to that board. The way that the appointments are done, is that the legislation provides for an independent process for the appointment of the Chief Commissioner. That is done in conjunction with the Joint Standing Committee on Integrity which is the parliamentary committee that oversees the operations of the integrity commission.

I have only been in this role since July and when I was appointed, the process that occurred was that the Chief Commissioner was involved in the selection panel that also included the secretary to the Department of Premier and Cabinet and the Department of Justice and that the selection process for my position was also required to be done in conjunction with the Joint Standing Committee.

I am conscious that independence is very important in all of these positions and the capacity to do the job according to the legislation rather than according to the wishes of whoever might be making the appointment. My experience in working in a number of independent statutory offices, is that the best protection lies in the legislation itself and in the preparedness of the person who holds the position to Act in a way that furthers the objects of that legislation, rather than anything else.

So there are lots of different ways that you can go about appointments and ensuring appointments but in my way of thinking, the most significant matter is what the legislation says the person should do and that person's preparedness to do it.

**Mrs FINOCCHIARO:** And what is the tenure of the Commissioner?

**Mr BINGHAM:** It is a maximum of two terms of five years each.

**Mrs FINOCCHIARO:** Okay and is the board appointed by the minister?

**Mr BINGHAM:** Well subject to what I have said about the concurrence of the Joint Standing Committee, yes, that is the case.

**Mrs FINOCCHIARO:** Okay, thank you.

**Mr PAECH:** Chansey Paech, the Member for Namatjira here. Richard, I just wanted to ask you around the – the committee notes that the integrity commission has a significant educative function, can you briefly summarise the commissions main Activities in that particular area?

**Mr BINGHAM:** Sure. Well first and foremost, we provide a website which has got on it a number of different resources that public bodies in Tasmania can use to raise awareness and knowledge of integrity issues. They include videos with various scenarios in them, they include fact sheets and a range of different types of publications for different situations.

That resource is very well used by the public sector in Tasmania. There is a specific obligation in the legislation for the heads of statutory bodies and departments in Tasmania to educate their staff about integrity issues and in order for that statutory obligation to be met, the resources that we provide on the website are used a lot for that. There are some e-learning resources there as well which get used for that purpose.

In addition to that, we conduct a number of other sort of stake holder engagement strategies. I have just been this morning for example at a meeting of representatives from all government statutory bodies, statutory authorities, government owned corporations and government business enterprises. The forum is provided as an opportunity for them to find out what the commission has been doing and for them to raise any issues that they are particularly concerned about. They meet under a confidentiality obligation so there is the opportunity for candid discussion about issues that might be causing concern for them.

My experience has been that one of the things that is most important in the integrity space is for people to get advice about situations that are troubling them. It is always a good idea to consult with someone else who is not involved in the issue that is causing concern. That person can provide a second opinion or an objective view or is a reasonable person who has all the information – whatever test you want to apply. It is always good to test with someone else. That is one of the things that the commission here does – provide that second pair of eyes about integrity issues when they arise.

We also conduct training courses. We have people who go to local councils, for example, and work with, say, the open air workforce in dealing with some of the ethical and integrity issues that will confront them. We tailor

the training we do to that type of situation. We run, as I said, online courses and in-person training as well as one-on-one.

**Mr PAECH:** I want to follow on. The committee understands that the commission deals with complaints about misconduct and serious misconduct. What type of behaviour is included in the definition of misconduct and serious misconduct in the *Integrity Commission Act*?

**Mr BINGHAM:** The essence of it is that the way the Act works is to distinguish in two ways. First, misconduct, as it is defined, has a number of limbs. A breach of a code of conduct, for example, can be misconduct or the performance of the public officer's functions in a way that is dishonest or improper. It can also be a misuse of information or public resources - those types of things that fall short of any criminal behaviour.

Serious misconduct, on the other hand, is anything that could, if proved, be a crime or an offence of a serious nature, or misconduct providing grounds for terminating the public officer's appointment. That is how we distinguish between misconduct and serious misconduct.

The Act also distinguishes between the people who might commit it. There are what is called 'designated public officers' who are more senior people. The options for dealing with misconduct by more senior people are the same as those for dealing with more serious misconduct by junior people. So, if the person is more senior it automatically is treated more seriously and the commission is under a legal obligation as to how it treats allegation of misconduct by senior officers. Those distinctions are important.

I have to say that one of the things that is significant in this space is that you need to have a definition – and your bill has a fairly wide definition – of 'improper conduct'. From my perspective it is sensible not to have too many bars over the types of things that might be reported to the anti-corruption body. I would prefer that it is a wide definition with the integrity agency having the job of sifting out what might be serious and what is not, rather than people being prevented from reporting potential misconduct just because it does not meet a certain standard. From the brief look I have had of your legislation, it deals well with that issue.

**Mr PAECH:** Just talking about the *Integrity Commission Act*, does it actually incorporate any mandatory reporting requirements for public officers or public bodies?

**Mr BINGHAM:** No, it does not, and that is one of the things that this commission has said. I referred in my submission to your committee to a five year review of the operation of the Act, and that was one of the issues that was addressed in that five year review. That is one of the things that we would like to see included in the legislation – some mandatory notification obligations.

That is not to say that we do not receive notifications – we certainly do, and we have some memoranda of understanding with some of the key players like the police, for example, who notify us of particular misconduct allegations that might have been made to them – but it would assist us in getting a proper sense of the extent of the reporting that is going on or the allegations that are being made if the reporting obligation was a bit broader to us.

**Mr PAECH:** That is it from me and Madam Chair, but I think that there are some other members, Mr Bingham.

**Ms NELSON:** Mr Bingham, I am Sandra Nelson, and I am the Member for Katherine. Thank you for your submission. I wanted to ask you a couple of questions – so I noted on your submission that you had stated on there that you do not have the resources available to address the detail of the bill which our committee is considering – can you just tell me what did you mean by you do not have the resources? Is that in practical terms as far as, like, human resources available?

**Mr BINGHAM:** Yes, it is. Basically, we have a lot to do at the moment, and there is a limited amount of time that we can devote to things which we would like to be able to help with. With the extent of human and physical resources that we have available, if they have to – take second priority, if you like, to the investigations and the education work that we need to do in Tasmania. That is all I meant by that statement.

We are a relatively small organisation. It is about 13 and a half or 14 FTEs that we have and it is split roughly fifty-fifty between the resources that are devoted towards investigations and the resources that are devoted towards education and awareness.

We do have some back log of significant complaints and some large investigations that we currently are working to clear, and in common with most integrity organisations experience we have had over the last year is of increasing numbers of complaints from the general public to the commission, which keep us pretty busy.

**Ms NELSON:** Thank you, Mr Bingham, you answered the other question that I was going to ask you was – how many staff you have and how the provisions that are made.

**Mr BINGHAM:** Yes, it is traditionally – and the commission has been keen to make it known to government that if it had more resources it could do more, and that is certainly the case. We have actually only just got back to the full strength that we were supposed to have and we in previous years, a couple of years ago, there was some across the whole-of-government budget cuts, which impacted on the commission as they impacted on a number of other parts of government as well.

So, it is a constant juggling Act in this space for the organisation to be able to do what it needs to do whilst also being accountable for the use of public resources. We think that we get that balance pretty right in Tasmania at the moment, but one of the criticisms that is sometimes made of the commission is that we take too long to do investigations, and we would certainly like to do them more quickly but the reality is that we use the resources to do them as quickly as we can, and if we have not got the resources we cannot do them any quicker.

**Ms NELSON:** Mr Bingham, also with your appointment at any point was the hearing public?

**Mr BINGHAM:** During the process do you mean?

**Ms NELSON:** Yes, during the process.

**Mr BINGHAM:** No there was no publicity that attached during the process. I am guessing you are thinking about whether or not there should have been public hearings into my suitability to take on the job, or something like that.

**Ms NELSON:** Yes.

**Mr BINGHAM:** No there was not anything like that. I can say that I have held a previous statutory position which was the ombudsman in South Australia and in that case there was a public hearing with the parliamentary committee there, and there needed to be a resolution passed by each House of Parliament endorsing my appointment.

As was the case with another position I held which was the Chair of the Electoral Commission in Tasmania. There are varying ways of doing these sorts of things, some of them have those sorts of hearings obligations, some of them do not.

**Ms NELSON:** Thank you Mr Bingham. I have one quick question.

In your submission you did note that the commission's focus is more on the triage and referral of complaints. I was wondering what capacity you have to direct a follow-up on a body to which you refer a matter as a Commissioner?

**Mr BINGHAM:** When we refer a matter the legislation makes it clear that we can require the body to report back to us on what it does with the referral.

Similarly we can conduct 'own motion' investigations. If, for example, we find out that the body has not done something we think it should have done, one of the things we can do is conduct an 'own motion' investigation into how it dealt with the matter that we have referred to it.

As I say, I am very conscious of the fact that if I were a complainant I would be sceptical if my complaint was referred back to the body that I was complaining about. I do think there are some ways in which that natural scepticism can be ameliorated and they are by making it clear that the oversighting body will take a keen interest in the way the complaint is handled and does have the capacity to revisit it, if it feels that the complaint has not been dealt with properly.

**Ms NELSON:** Thank you Mr Bingham. I am just going to pass this on to my other colleagues.

**Mr BINGHAM:** Thank you.

**Mrs LAMBLEY:** Hello. My name is Robyn Lambley. I am from Alice Springs. I am interested in your comment about keeping the definition of corruption quite broad. We have spoken to several people from other larger jurisdictions than the Northern Territory and Tasmania who have advised pretty much the opposite, to keep it more narrow.

Could you talk about that? It sounds like a dilemma.

**Mr BINGHAM:** It is a moot point. People do have different views about it. I am conscious of that. One of the things with integrity systems is that they need to work out ways that the bits fit together. If I am a member of the public knowing which is the correct body for me to complain to – I might know that something has gone wrong but I might not know whether it is misconduct or maladministration or a breach of the privacy legislation or whatever it is.

One of the things that governments tend to do is organise themselves on the basis of what is convenient for government rather than what is convenient for the citizen who wants to complain. I noticed that in the Martin Report for example there was consideration about whether the Office of Public Integrity should be if you like a portal into the whole of government or whether it should be limited to just being into the ICAC.

I think all of these issues are interconnected. If you are going to have organisations with limited jurisdictions not only is it difficult for those organisations to make an assessment of what is the way in which a particular matter should be dealt with, whether it is a sufficient degree of concern that a particular factual situation warrants an investigation for example. I have certainly had experiences in which some of the more serious indications of things having gone wrong have come from a very small complaint or a complaint that does not appear serious on the surface, but when you put it together with other complaints or you put it together with a pattern of behaviour that you know about from other sources, then it can be an indication of a more serious thing.

If the jurisdiction of the anti-corruption agency is too limited, it is difficult for it to get it involved in those sorts of matters because it will not find out about them, they will end up being dealt with by a body whose focus is something other than anti-corruption like maladministration or privacy protection or something so some of the most significant integrity issues could get missed. I know that that runs a risk of the anti-corruption body being if you like overrun by complaints about comparatively trivial matters, but for me, that is a lesser evil than the anti-corruption body not finding out about something which may involve significant corruption.

**Mrs LAMBLEY:** What other complaints mechanisms do you have in Tasmania and do you work closely with them?

**Mr BINGHAM:** Yes we do work closely with them. The most significant other one is the ombudsman. The Ombudsman in Tasmania has a number of different jurisdictions, so not only is he an ombudsman in the traditional sense of complaints about what government agencies do, but he is also the Energy Ombudsman so he deals with complaints about energy companies. He is also the body that administers the whistle blower protection legislation, so he deals with protected disclosures. He deals with right to information, appeals and so on, so a lot of those bodies which in bigger jurisdictions are all separate and which tend to operate separately, in Tasmania, because we are small, they are all rolled up into one office. It is easier for us an integrity commission to work with the ombudsman, it means we are also picking up the whistle blower person and the privacy person and the RTI person as well by working with one agency.

**Mrs LAMBLEY:** So do you have any other complaints Commissioners, like Health Complaints Commissioner or?

**Mr BINGHAM:** The ombudsman is also the Health Complaints Commissioner but there are separate people in relation to anti-discrimination for example. There is a separate anti-discrimination Commissioner, there is a separate children's Commissioner who deals with complaints that relate to protection of children and the treatment of children but they are often – the numbers of different bodies are minimised by the fact that this jurisdiction is shared particularly by the ombudsman who is multitalented, does a lot of different things.

**Mrs LAMBLEY:** So you work closely with your ombudsman?

**Mr BINGHAM:** Yes we do and it is not uncommon for us to say when we get a complaint for us to be in touch with the ombudsman and say have you got anything on this particular matter and have you dealt with it. Under the whistleblower legislation for example, one of the things that we do is refer matters back to the ombudsman, whistleblower complaints because the ombudsman administers that Act and so it is a frequent occurrence for us to be negotiating with the ombudsman about who is going to do what.

**Mrs LAMBLEY:** So when your ICAC was established was there a rationalisation process of these complaints mechanisms, were they reduced or consolidated?

**Mr BINGHAM:** No, what tends to happen is that an integrity body gets established to meet a particular need and it gets bolted onto the side of all the existing bodies and there is not a proper reassessment of the way in which all the agencies should fit together. I think that there are a number of jurisdictions in which I can see

evidence of that having happened. So as far as Tasmania is concerned, it is most evident in relation to the whistleblower legislation, our *Protected Disclosures Act* as it is called does not fit neatly with the *Integrity Commission Act* because at the time, the *Integrity Commission Act* was drafted, it was impossible to work through all of the possible ramifications and permutations and so on, about what Actually happens in practice.

So I do think it is something which bears careful thought as to how one integrity agency will interact the others that are occupying other bits of the related spaces.

**Mrs LAMBLEY:** A final question. What is your budget in Tasmania?

**Mr BINGHAM:** In Tasmania it is about \$2.5m to \$3m - \$2.7m, \$2.8m.

**Mrs LAMBLEY:** Thank you very much.

**Mr BINGHAM:** A pleasure.

**Madam CHAIR:** Thank you very much, Mr Bingham. It is Ngaree Ah Kit, the Member for Karama. We have come to the end of our time with you at the hearing this morning. I was wondering if you have any final comments you want to leave with the committee.

**Mr BINGHAM:** No, nothing other than I commend you on the work you are doing and I believe the legislation you are looking at is a very good start. If there is anything else we can assist with, as a small jurisdiction, we would be very happy to do that.

**Madam CHAIR:** Fantastic. Thank you for your time today and for that offer.

**Mr BINGHAM:** Cheers. Okay. All the best. Thanks. Bye, bye.

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**Mr John Hyde: Chair Global Organisation of Parliamentarians Against Corruption – Oceania Region  
(via teleconference)**

**Madam CHAIR:** Good morning, John. My name is Ngaree Ah Kit. I am the Member for Karama and the Chair of the Social Policy Scrutiny Committee. How are you today?

**Mr HYDE:** Very well, thank you, Madam Chair. Thank you for inviting me to give evidence.

**Madam CHAIR:** John, I am joined by my colleagues on the committee. We have Mrs Robyn Lambley who is the Member for Araluen ...

**Mr HYDE:** Hello, Robyn.

**Mrs LAMBLEY:** Hello.

**Madam CHAIR:** Mr Chansey Paech, the Member for Namatjira ...

**Mr HYDE:** Yes.

**Madam CHAIR:** We have Ms Sandra Nelson, the Member for Katherine ...

**Mr HYDE:** Excellent. Hello.

**Madam CHAIR:** ... and Mrs Lia Finocchiaro, the Member for Spillett.

**Mrs FINOCCHIARO:** Good morning.

**Mr HYDE:** Excellent. Good to meet you all.

**Madam CHAIR:** I just wanted to thank for coming before the committee. We appreciate you taking the time to speak to the committee and look forward to hearing from you today. This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply.

This is a public hearing and is being webcast through the Assembly's website. A transcript will be made for use of the committee and may be put on the committee's website. If at any time during the hearing you were

concerned that what you will say should not be made public, you may ask the committee to go into a closed session and take your evidence in private.

I will ask you to state your name for the record, and the capacity in which appear. I will then ask you to make a brief opening statement before proceeding to the committee's questions.

Could you please state your name and the capacity in which you are appearing?

**Mr HYDE:** My name is John Hyde. I am a former Member of Parliament and Chair of the Joint Standing Committee on the Corruption and Crime Commission in Western Australia, over sight committee of the Triple C in WA. I was a Member for Perth in the State Legislative Assembly for 13 years. I am also the secretary of GOPAC (Global Organisation of Parliamentarians Against Corruption) and since leaving parliament in WA in 2013, I have worked as an anti-corruption consultant, mainly with the United Nations and working with various parliaments in Asia and the Pacific.

**Madam CHAIR:** Excellent. Thank you very much.

Mr Hyde, would you like to make an opening statement?

**Mr HYDE:** I am appreciative of being given this opportunity. I have looked obviously at your terms of reference and seen a number of the other submissions from others. I guess primarily from my position of having been the chair of a parliamentary oversight committee and involved in helping to write the original Triple C legislation in Western Australia, I thought I would perhaps just concentrate on some of the issues in terms of oversight of parliament.

I guess my major concern in the legislation was through the establishment of the Inspectors' position and being in terms of his or her reporting to parliament. Now the current wording of your legislation requires the Inspector to make an annual report. I think the strength in the West Australian model and also the Queensland CMC and the previous CJC model in Queensland was that there was ongoing reporting between the Inspector and the parliamentary committee.

As legislators, we give an anticorruption body incredible powers. They have powers in many cases much superior to the police in terms of individual rights, access to information and I think there is also a requirement on us to ensure that there are checks and balances. It would be naïve not to think that anticorruption bodies are involved in oversighting parliamentarians. But I think that the history of corruption prevention around the world – and I think that history since the establishment of perhaps the first successful ICAC which was in Hong Kong – is that by having checks and balances, you actually make the anticorruption agency stronger.

If I can make reference to one public incident so in terms of the West Australian Corruption and Crime Commission where officers involved in there were able to choose and allocate their own vehicle and it was discovered through the operation of the parliamentary Inspector and the ongoing liaison with the committee that there was misconduct behaviour in terms of officers of the Corruption Commission enabling the Commission to buy and lease four-wheel drive vehicles which were being used primarily for weekend recreation and not for the original use for CCC investigations in the metropolitan area. In my time of 11 years on the committee, there were a number of other occasions where, by having a parliamentary Inspector in an oversight arrangement with the committee, we ended up with much strong transparency and accountability.

One other issue I will finish my introduction with is – the committees in WA, Queensland and Victoria also followed on from us when they established the ICAC there – they had the committee involved in the appointment. The preferred candidate of the Premier, the government of the day or the system involved the Chief Justice and had to get the approval of the committee.

I have referred previously in public hearings of our committee and the courts where we had one parliamentary Inspector who did not appreciate the full role and the requirements of the position until he was able to meet with the committee. Because the committee had ongoing relationships with previous Inspectors – there is obviously much confidential Activity that occurs. For a parliamentary Inspector to be effective he or she should not just be a cheer squad for the anti-corruption commission. He or she, in effect, is the one who has the right to access any of the Activities of the commission. It can often be just one person or a part-time person, but that person needs to be encouraged to have a sounding board, not on the specific Activities or persons involved, but in the processes and the way the anti-corruption commission is working.

**Madam CHAIR:** Thank you very much. I will forward you to our committee members who will have some questions.

**Mrs FINOCCHIARO:** Thanks very much, John. This is Lia Finocchiaro. I am the Member for Spillett. Given your experience as Chair of the Western Australian parliament's Joint Standing Committee could you briefly

outline what that committee's role was and how we in the Northern Territory would benefit from having one. Our legislation provides that a committee can receive reports from the ICAC, but that sounds quite distinct from the committee you were chair of – yes, the role that your committee plays and then how a similar committee would benefit the Territory.

**Mr HYDE:** Okay. Under the Western Australian legislation the CCC, Corruption Crime Commission, has the option to either table directly to parliament or to table through the committee. In Queensland, the original legislation is quite unique in that the parliamentary Inspector there could not speak publicly but only through the committee. They were obviously established before us.

What we took from those models was that the parliamentary Inspector was being protected by the committee in not being subject to media or public attacks because his work was coming through the committee. That Queensland model worked well but we opted to, I guess, not straight-jacket the parliamentary Inspector in WA by giving the Parliamentary Inspector and the anti-corruption body the option of reporting directly to the Parliament or to the Committee.

The benefit of having an oversight committee is not only in terms of the sounding board but also in terms of getting some public engagement in the Activities of an anti-corruption agency.

I speak now as somebody who has also been involved in Pacific governments, Bhutan and other Asian countries that have established agencies and will look at this ongoing issue of monitoring of agencies. The skill set, the people that are involved in anti-corruption agencies are often the crème de la crème of investigators but there is still a need in terms of the huge powers they have particularly regarding warrants that they are being used appropriately.

In Australia particularly our original ACC was set up after a Royal Commission into the police in Western Australia. If we look at the ICACs and New South Wales, Victoria, Queensland and even South Australia you can see that police Activity has also been a major focus. You do need the oversight that a Parliamentary Committee and parliamentarians as representatives of the people can give to the investigative oversight.

**Mrs FINOCCHIARO:** Can I just follow up on your comment about the warrants. In our bill it is proposed that justices of the peace could authorise warrants. Do you have any views on that creating uncertainty or injustice?

**Mr HYDE:** Yes, very strong views. Under our legislation and the other legislation there was a threshold particularly in terms of getting a telecommunications intercept warrant. For example for a judge to be able to issue that sort of warrant there had to be a threshold that there was a reasonable belief that the investigation could lead to a conviction which would carry at least a five-year sentence. In WA it was only the senior court judges who could issue these warrants.

What our committee discovered – and again I am just referring to what is on the public record-the statistics showed that the majority of the warrants were being sought by the CCC from the family law court judges. WA is unique in having its own family law court so rather than going to judges who were involved in criminal law which is what you would think, they were going to the family law court.

This is public again so I am not saying anything that is committee-privileged. One judge had said that quite often 'the only time we can do these is during lunch so while I am having a tomato sandwich I am being presented with warrants and we are having to sign a number for the agency'.

Again, if we look at policing and anti-corruption agencies it is only natural they believe they have a suspect, they do need a warrant, and administratively they want a quick situation so obviously they are going to a judge or somewhere to get the warrant dealt with quickly.

We have got a strong duty to ensure that these warrants, particularly in your case where I think some of the Actions can be done even without a warrant that there needs to be oversight in the practice. If there is a warrant that is involving access to a private or public sector office, a telephone intercept that there are opportunities there for oversight. I am also a justice of the peace. I know many fine justices of the peace but I would think that there would need to be a strong benchmark in terms of the experience of JPs that would be able to issue a warrant for access that is proposed under your bill.

**Madam CHAIR:** Are there any further questions?

**Mrs FINOCCHIARO:** I might ask about independence. In all of your, I suppose, experience – how is the ICAC Commissioner best appointed, or how was it done or is it done in Western Australia or your version of the best way to do that?

**Mr HYDE:** It is an interesting issue that the tradition has been that many have been newly retired judges who have taken on the position. We certainly found, and my examination of what has happened in other jurisdictions – say if you were looking for, I guess, what you would think would be a gun judge, somebody who is at the peak of his or her powers – that when you are approaching this level of judge to take on that position they are very much aware that it can often be the final position that you are going to get – so if you are in your late forties or early fifties and you are still wanting to go further in terms of the judiciary in Australia those sort of quality judges were not looking to take on the position.

It does attract a lot of publicity. You are dealing with investigations of public figures of police and others and whereas I do not think any of our proposed applicants said that they felt it was career lessening, there was very much the feeling, particularly if they wanted to go further in private practice or go into other jurisdictions in terms of judicial appointment that having been involved in what is often very controversial work as an ICAC Commissioner or CCC Commissioner that that can impact on your career.

On the other side, I think, a number of Commissioners that we got in WA who are recently retired, they owed no allegiance to anybody, and they were incredibly independent and were able to fill the job exactly as it should be. Having met with and discussed in camera with New South Wales, Queensland Commissioners as well, I would say that, on the whole, in Australia, we have ended up with very able Commissioners, but it is primarily in the model of recently retired judges.

**Mrs FINOCCHIARO:** I know in Tasmania they were saying that the minister appoints a board, and then the board goes through a process of identifying a Commissioner. I believe, for us, the government has indicated that it would be in the same manner in which a Supreme Court judge is appointed.

There a number of ways to do it – our concern here in the Territory is we have a very small population and ensuring the integrity of the appointment will really make the difference between ensuring the independence of the Actual commission itself. It is a key issue we have been looking at. I do not know if you have a preferred appointment model.

**Mr HYDE:** Obviously coming from Western Australia with our threshold, which is also a similar appointment to the Supreme Court Justice. We had a three-person committee. I think it was the Premier, the Supreme Court Justice and one member of the community. They created the nominating and selecting committee. That selection then went to Cabinet and Cabinet then passed on that recommendation to the parliamentary oversight committee.

I have also worked in very small Pacific governments looking at a similar situation. Nauru, for example, put into its legislation that its Ombudsman/Anti-Corruption Commissioner had to come from outside Nauru. You are going to the other scale of very small communities that addressed this issue of small community and everyone knowing everybody else.

Even in Western Australia, we had to have the provision for Acting Commissioners because a number of our Commissioners, being eminent jurists, had obviously been involved in previously controversial cases which had a connection to investigations with the CCC in WA. They obviously had to excuse themselves from that, so you then needed an Acting Commissioner or were able to bring in one. Finding Acting Commissioners was probably the hardest part of our role in WA.

**Mrs FINOCCHIARO:** Yes, in the Martin report it said that the Commissioner should be someone from outside the Northern Territory due to our population, but that has not made its way into the bill. I cannot remember what jurisdiction it was, but do you have much to say where the committee is involved in the appointment of the Commissioner? Is it a public process?

**Mr HYDE:** No, it is not a public process at all. You will find out that for the calibre of the person you are after, there is a very small pool in Australia. So, they will need to be sounded out quite confidentially because, again, many of them do not have hands-on experience of working with an anti-corruption commission. Before an eminent judge would agree to such a position, they would need to satisfy themselves quite severely about what is required.

All of the Australian anti-corruption commissions are different. They have different powers and requirements. I do not think you could have a public investigation or vetting. You want to make sure you have the most eminent people being persuaded to put their hands up.

**Mrs FINOCCHIARO:** Okay, thank you. I will pass to my other colleagues. Thank you.

**Mr HYDE:** Thank you.

**Madam CHAIR:** Mr Hyde, it is Ngaree Ah Kit, the Member for Karama. We have come to the end of our time with you. I was wondering if you have any final comments you wanted to leave with the committee?

**Mr HYDE:** No. I think we have discussed most of the key issues – warrants and oversight. Yes, I am happy.

**Mr PAECH:** Could I ask one question? Mr Hyde, this is Chansey Paech, the Member for Namatjira. I want to following up from my parliamentary colleague, Lia Finocchiaro, the Member for Spillett. In your opinion, it would be strongly encouraged that the Commissioner be an appointment from outside a small jurisdiction to keep the integrity. Is that correct?

**Mr HYDE:** I do not think you need to legislate that. I think you probably come to that conclusion internally if you are looking at the requirements of the position and if you are looking at an internal appointment I think you would see that there may be so many potential conflicts or perceptions of conflicts of interest that would be ruling the person out.

I think it is a moot point about whether you need it in the legislation to exclude – Nauru is probably one of the few places that has actually put that into the legislation. By just looking at the requirements most local applicants would be excluded anyway.

Again, I am not familiar enough with the territory of the Territory internally or judicially. I am sure you will be able to make that judgement yourselves.

**Mr PAECH:** Mr Hyde, one last question. You would encourage there to be a deputy Commissioner or someone from your experience on stand-by at all times to fill in if that Commissioner role is not able to be filled?

**Mr HYDE:** Definitely. You need that as a priority. If somebody working in Sydney-we Actually had three Acting Commissioners and they were amazing. Under our legislation, I am not sure it is in yours or not, the moment the Commissioner leaves the state or the territory he is unable to act. So even if he is on holidays or at a conference somewhere else he was not able to issue a legal order. There will be numerous occasions where you need to have somebody on stand-by.

**Mr PAECH:** Thank you.

**Madam CHAIR:** Thank you very much for your time today Mr Hyde. On behalf of the Committee I just wanted to say thank you. It has been very informative. We appreciate you taking the time to speak with us today.

**Mr HYDE:** Thanks very much and I look forward to your final report.

**Madam CHAIR:** Excellent. Have a good day.

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**Mr Peter Shoyer: Ombudsman NT; Mr Craig Allen: Commissioner, Office of the Commission for Public Employment; and Ms Brenda Monaghan: Commissioner, Office of the Commissioner for Public Interest Disclosures**

Good morning and welcome. I welcome to the table to give evidence to give evidence to the Committee Mr Peter Shoyer, Mr Craig Allen and Ms Brenda Monaghan.

Thank you for coming before the Committee. We appreciate you taking the time to speak to the Committee and look forward to hearing from you today.

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If at any time during the hearing you are concerned that what you will say should not be made public you may ask that the committee go into a close session and take your evidence in private.

I will ask you state your names for the record and the capacity in which you appear, I will then ask you to make a brief opening statement before proceeding to the committee's questions, if you choose.

Could we please start left to right and could you please state your name and capacity in which you appearing before the committee today?

**Ms MONAGHAN:** My name is Brenda Monaghan, I am currently the Information Commissioner and the Commissioner for Public Interest Disclosures and I am happy to be here to assist the committee.

**Madam CHAIR:** Thank you.

**Mr ALLEN:** Hello, my name is Craig Allen, I am the Commissioner for Public Employment and I am also happy to be here to assist the committee.

**Mr SHOYER:** Peter Shoyer, Ombudsman for the Northern Territory.

**Madam CHAIR:** Thank you very much.

Does the committee have any questions they would like to ask?

**Mr PAECH:** Yes Madam Chair.

Thank you for attending. I just wanted to highlight, in your submission you note it is important that the Commissioner have the capacity to refer matters to appropriate bodies, has consideration been given how this might impact on operations of public sector agencies and statutory bodies?

**Ms MONAGHAN:** If I could commence?

**Mr PAECH:** Yes please.

**Ms MONGAHAN:** Certainly, that was a consideration when we saw the draft bill and saw the recommendations of Commissioner Martin in his report. However, as Commissioner for Public Interest Disclosures for a number of years, I have wanted just this sort of process and had *Public Interest Disclosures Act* been reviewed as we were anticipating, that was one of the things that I would have asked for.

I think that at the moment, the model for my current office, the PID office, is that we provide everything, so we provide – we are doing the protection of disclosures, the support for disclosers/whistleblowers, and the investigation of the matter. It can become quite difficult and also it means that the public bodies themselves often do not have a good process set up to support and protect those people who are whistleblowers within their organisation.

So my thought is that having a process where an obligation of responsibility is placed back on the body not just – sorry, I think I have got off topic a bit because you were talking about investigation. I think it is not just to investigate the matter, but to support the disclosures, that is an important thing. As regards to the investigation, the public bodies assist us, assist the Commissioner for Public Interest Disclosures quite often with their investigation, they may well provide audit functions or under our guidance, they already at this stage, under our model, conduct investigations. So I think it is a sensible option.

**Mr SHOYER:** It really is a formalisation of an existing process. Certainly in relation to Ombudsman complaints, we take the view that every agency is responsible for the conduct of its business and on a lot of occasions we will refer a matter back for investigation or for the agency to deal with in the first place.

Now that does raise issues for small agencies being able to respond to more complex matters and that is something that I think the Commissioner, as with our office, has to work with those individual agencies. It is something to be borne in mind though in terms of the relevant of allocation of resources to agencies and I do not think anyone would expect a small agency or a local council to undertake a major investigation by itself. In those circumstances, the Commissioner will need to look at, well, who is the best body to actually run this investigation. It may require cooperation from that particular council or department or agency, but at the end of the day, it is something you need to sort out in an individual case. You need to have that flexibility there to be able to refer the matter back.

**Mr PAECH:** So you are suggesting a case by case basis?

**Mr SHOYER:** Absolutely yes, and I think it is a matter for the Commissioner to determine along those lines and there will be cases for example where, probably quite a few cases where, the Commissioner decides it is better for the Ombudsman to look at a matter and it is more relevant, it is about administrative Action not necessarily about corruption. That is something that, again, we are going to have to deal with whether it will

increase the resources we need to allocate to handling complaints. But that is something, really, I think will develop over time. You will need to look at that as the situation develops.

**Madam CHAIR:** Thank you Mr Shoyer. Can I just ask our guest before you respond, to capture on Hansard, can you please say your name and your position?

**Mr ALLEN:** Craig Allen, Commissioner for Public Employment. I think the agencies from the government's side will have to do a bit of work about getting prepared for the ICAC. There will be, as quite rightly pointed out by the Commissioner for public interest disclosure some work around whistleblower protections within agencies because I do not think the agencies are sophisticated in that space at the moment. So, I think working with the Commissioner there will be a body of work that government agencies in particular will need to do to prepare themselves. And I think it is essential that the Commissioner have the capacity to return certain investigations back to the agency because I think that gets into that threshold question about things that the Commissioner should investigate and things that they should refer back to the agency.

**Mr PAECH:** Mr Allen, I am just picking up when you talk about there is a volume of work that needs to be done, do you anticipate that that is a large volume of work that will take will take some time upon an ICAC being legislated?

**Mr ALLEN:** Craig Allen, Commissioner for Public Employment. I think that all of the government agencies are well aware that this is coming and I think that they have started to think about how that will impact on their agency. I agree with the Ombudsman the smaller agencies are going to find it a little more difficult. The larger agencies that have got internal capacity to do their own investigations and the reports et cetera will be in a far better position. So volume of work is an interesting question. I am not sure where we will get, what that is until we actually get to that point.

**Mr PAECH:** Yes.

**Mr ALLEN:** I have got familiarity working in another jurisdiction, in Queensland where the Crime and Misconduct Commission which became the CCC. So I know the impact that will have on an agency and we can start thinking about how that might work here.

**Mr PAECH:** Great. Thank you, Madam Chair.

**Ms NELSON:** Thank you, Madam Chair. I have got a couple of questions. So it has been suggested to the committee that the bill does not go far when it comes to dealing with persons who make false allegations or make allegations as an abuse of process, can you just clarify for the committee what provisions, if any, are currently in place to protect people against frivolous, vexatious or unfounded allegations?

**Mr SHOYER:** Peter Shoyer, Ombudsman. We already have similar situations that may arise in relation to whether it is the Ombudsman or the Commissioner for Public Interest Disclosures. There are provisions in there that do allow for taking of criminal proceedings in relation to people. That is not something that I would look at using, and I certainly would not be suggesting that the Commission look at using, except in an extreme case.

We have done a lot of work around dealing with problematic complainants and different ways of approaching them. But the reality is that people do not have to be well motivated to actually make a valid complaint, to raise a valid issue. People often raised valid issues because they feel they have been hard done by in order to get in, I suppose to respond to slights or affronts that they may have perceived.

So there are numerous ways that you deal with the situation where you have got a disclosure that you do not necessarily hold much credence with. And that is something that I think is part of any broad complaints organisation. You deal with those in an appropriate manner. You take them on board, you consider them and you deal with the individual who is making the complaint or disclosure. So I do not see having more strict provisions in that regard as a necessity. That is something where you need to allow the Commissioner discretion to be able to say, 'All right, we do not think there is enough in this. We are not going to investigate it'. I think the current bill provides for that.

**Ms NELSON:** Yes.

**Mr SHOYER:** But I do not think it is a matter of having to put every disclosure to the test before you decide, yes, we will go ahead with this. You want to invite people to make disclosures, but you want the Commissioner to make their assessment of yes, this is worth pursuing or no, it is not.

**Ms NELSON:** Okay. Earlier this morning, there was evidence or testimony provided by a gentleman who is concerned about the whistleblower protections and provisions. Can you tell me briefly what the whistleblower current provisions for protection of whistleblowers are?

**Ms MONAGHAN:** You are meaning currently under the *Public Interest Disclosure Act*?

**Ms NELSON:** Yes.

**Ms MONAGHAN:** In truth, the main protection for a whistleblower is the confidentiality of the process. In practical terms, we can usually ensure that they remain anonymous throughout the process. If the reality is that at some stage they will not remain anonymous, then we can work closely with often the CEO and the public body to make sure they are well treated. The confidentiality of the process is a really big issue.

It is a criminal offence to bully or sack a whistleblower. That, in practice, acts more as a big stick. The reality of successful prosecutions across numerous jurisdictions in Australia is that it is easier to threaten, it is often harder to actually accomplish. However, being a criminal offence, on the books, with a penalty of two years' imprisonment is a very strong deterrent.

There are also protections in that a person who, for example, was sacked as a result of reprisal action, can seek compensation through the courts for that. There is a damages opportunity.

The benefit of the new legislation is that it seems to me there is much more comprehensive protection for the whistleblower. It is comprehensive in that it starts from the outset because the definitions are much broader. It means that – from my interpretation of it - if you have a person who comes and complains about a number of things - some of which might be protected disclosures, some not – my understanding is the whole of their discussion and complaint would be a protected disclosure.

That is very comforting for a person, whatever their motivation. It may be mixed. Some of them have personal grievances; they have lost trust with their organisation – whatever. If they have come to us with an allegation of improper conduct with a skewed motive – it is not a lie, it is the truth, or as far as they are aware it is the truth – then they should get that protection, as long as it falls within one of the definitions in the Act. The great thing is there is the ability for the Commissioner to make a declaration. If someone sincerely comes and considers that they have a disclosure and for some reason it is not quite within the jurisdiction of the definition, then they can still have the protection.

There is also the issue of vicarious liability, which is great. If there is bullying or a sacking that occurs that should not have and the department or public body should take some responsibility it, then there is that opportunity for damages/compensation ...

**Ms NELSON:** If we are sticking to the protection criteria, there would not be any bullying or sacking because someone has made a complaint, would there?

**Ms MONAGHAN:** The reality is your whole focus has to be at that beginning. It has to be to try to protect the discloser at the beginning.

I am sorry, I went off topic with an earlier question to begin with, but it is such an important thing that the public body and all of those within the public body are very aware that they must not bully or sack the discloser.

**Mr PAECH:** Madam Chair, if I may, with the ICAC will obviously come the requirement or the need to establish a mandatory reporting – question for your Mr Allen, is it envisioned that the OCPD will have a role in assisting the implementation of this system, for example, around educating public officers?

**Mr ALLEN:** Craig Allen, Commissioner for Public Employment. We will assist the ICAC in any way that they want us to and if part of it is accessing public servants around the education – I think, the education part of the ICAC is a really important component, and the opportunity to speak to public servants – and remember the role of the ICAC is wider than just the Northern Territory Public Service, it is local council et cetera as well, so obviously there is a wider training.

In terms of our office we would certainly be a partner if required in terms of access to training for public servants. Our level of investigation or our level of complaint is probably at a lower level than ICAC in general. It is mainly about appeals against decisions that are made and dealt with at that level but I can see from a training and educative process that there could be involvement from our office.

**Mr PAECH:** Based on the draft bill there is a component of a financial commitment to run an ICAC. Do any of the agencies of which you are here representing here today anticipate growth in terms of staffing or financial growth is going to be needed when an ICAC is introduced in the Northern Territory?

**Mr SHOYER:** Peter Shoyer, Ombudsman. That is a possibility. It could well be that at least in initial years there are more complaints drawn out. However, we do have an existing system that deals with public sector agencies and local councils, so I would anticipate that most of the matters that would be raised with the ICAC would have previously been raised with my office or with the public interest disclosure office.

I am expecting it to be a bit more work. There will be referrals but that is something that again we need to see what the outcome is, and if further resources are required then that is something that we need to approach government about.

**Mrs FINOCCHIARO:** Lia Finocchiaro, Member for Spillett. In your submission under flexibility it said the commission not be distracted by minor matters and tit for tat allegations – so I was just wondering if individually or collectively Commissioners you had a comment on the definition, including misconduct and unsatisfactory conduct?

Today, some jurisdictions have said the definition does not need to go that far. They are matters for other bodies or the agency itself – if you have any views on those two additional definitions being included in what is caught up by the ICAC.

**Mr SHOYER:** I think, the way as a group that we have seen it is that the Commissioner needs to have significant flexibility. There needs to be a situation where there is not a lot of room for jurisdictional argument. We do not necessarily want people putting up their hands and saying you do not have the power to do that. What I would certainly prefer is that the Commissioner be able to consider a broader range of matters, but have the flexibility and the clear power to say, okay, we hear what you say but that is not something we are going to pursue.

That may be the situation, particularly in the political sphere where issues are raised from time to time where someone makes an allegation, someone makes a counter allegation. It should be a matter for the Commissioner to fairly bravely, I suppose, and there is no doubt that the more flexibility you provide the more courage that a Commissioner has to show, to say no, I understand that this is a matter that is important to you but in the bigger scheme of things this is not something which is a major priority for this office based on the legislation and therefore I am not going to deal with it. The Commissioner needs to have that scope to deal with something but also the ability to say no, we are not going to deal with that.

**Mr ALLEN:** Craig Allen, Commissioner for Public Employment. We three of us along with Auditor-General have acted as an integrity body in the absence of an ICAC. It is a very informal grouping but we have had a lot of discussions around integrity within the public service. One of the issues we have talked about is the threshold. I agree with the Ombudsman. It is difficult to set exactly what the threshold is because each individual complaint has its own complexities.

I think that flexibility is an important aspect of the Commissioner being able to determine that. I would anticipate that in the early days of the ICAC there will be a number of complaints that have been dealt with before by competent bodies and then it will be a matter of whether the ICAC Commissioner decides that the work that has happened in the past is the end of the issue or whether there needs to be more work done on it.

**Madam CHAIR:** Thank you.

**Ms MONAGHAN:** I only have one brief thing to say. I am Brenda Monaghan, Public Interest Disclosures Commissioner. That is, you will have noted in the legislation in the transitional provisions that any of the current investigations of the Public Interest Disclosures Office continue on as ICAC investigations.

I imagine any of our closed files will be available if people want to reinvigorate complaints that have already been done. That is something the ICAC Commissioner would have access to, and that may well prevent a lot of matters being unnecessarily reinvestigated if the ICAC Commissioner considers it is not necessary.

**Madam CHAIR:** Thank you.

**Mrs LAMBLEY:** Robyn Lambley, Member for Araluen. Earlier today – I am not sure if you have been listening to the telecast – we heard from the Chief Executive Officer from the Tasmanian Integrity Commission. As you would know Tasmania has a population more than double that of the Northern Territory. They have a far more

consolidated group of integrity Commissioners. We have the whole plethora of integrity Commissioners in the Northern Territory.

He argued that the definition of corruption should be kept very broad for the reasons you and Mr Shoyer just stated – that it allows inclusiveness and openness. It also allows the ICAC Commissioner to have more of an overseeing role in terms of what is happening in terms of allegations of corruption and maladministration.

There are two schools of thought and that has come out very clearly today in the people we have spoken to around narrowing it, and not wasting the time of the ICAC as opposed to keeping it broad and allowing them to capture the full picture of what is happening.

Our jurisdiction is unique. We are so small and we will be incredibly well-resourced in terms of our watchdog abilities in terms of corruption. I am wondering what your thoughts are?

I have this image in my mind of people – all of you – falling over each other trying to get your teeth into the various allegations that are made. How will you work together?

I know Lia just asked a similar question around this issue of definition. I am still not convinced where we should be sitting in terms of keeping it broad, keeping it narrower. How is this all going to work? How do you see it working in your minds?

**Ms MONAGHAN:** Brenda Monaghan, Commissioner for Public Interest Disclosures. If I can just quickly comment. There are lots of different models around Australia. I think it is a very valid discussion to have of whether it should be broad and where the limits should be. It is something that we have discussed.

The task force that was put together by Attorney-General's Department talked about this issue. That is a valid comment.

If I can just say, yes, we do have a number of integrity bodies. In my seven years in this sort of role, I essentially – we have had in my dealings with the ombudsman and other integrity bodies, we have had no jurisdictional problems in deciding who is the best person to deal with it. We really have, you know without breaching confidentiality provisions, but we really have been able to be very professional and just tap into others if you are making sure that when a complainant comes in, you have gone to other places and is someone else dealing with this, and also speaking to our colleagues if we think that there is another person that may have dealt with it or maybe dealing with it or maybe better placed to deal with it. It has not been a bun fight and I cannot see why that should change.

I note your comments about the definitions but I also note the comment that jurisdictional issues can be very challenging and I just I think that was the reason the broader definitions were supported.

**Mr SHOYER:** Peter Shoyer, Ombudsman, I certainly support the comments by the Commissioner for Public Interest Disclosures. I would say though, it is very much a valid point and in other jurisdictions there have been cases where there have been all out wars between different integrity bodies, if you like, and they have produced report for report against in that sort of vein. But with good will, I think that we have not experienced that here and I would foresee that a similar approach would be taken so that we do actually all have referral powers, we have powers to exchange information for the purpose of deciding who should look after a matter.

So in practical terms to date, I think we have achieved a very good mix of responsibilities in ensuring there is not undue duplication of resources there. But it is a possibility and it very much depends on the individuals who are the officers and it does not necessarily always work out that way.

**Madam CHAIR:** Thank you.

Are there any other final comments for the committee?

**Mr PAECH:** I suppose from our perspective, I am just picking up the Member for Araluen's remarks is we have heard from other jurisdictions today on the language of, I think it was in South Australia, criminality and dishonesty and corrupt conduct and then misconduct and I suppose it is around finding out what is the bench mark, and interested to get your thoughts on that around the determination of what we are going to perceive that will go onto a ICAC and what can be dealt with in the initial stages with the public interest or with the Commissioner for Public Employment or the ombudsman.

Very much today has been very different jurisdictions have very different interpretations and I suppose from our or from my perspective and picking up from the Member from Araluen's, we do not really want to put it in

a position where it is left upon Commissioners or ombudsman to make a determination based on very little ability of a definition.

So I think we need to be very clear here in what the definition goes into exploring because otherwise, as you said Peter, it can become quite a hostile environment because for something that the Commissioner for Public Interest Disclosures may see in a very different light or interpret the legislation very differently, as you might, so I think that is certainly one of the things today is trying to make the determination of what is a serious misconduct or a conduct or I think South Australia called it corrupt conduct, so I think, just interested around your thoughts on how we would go around finding a particular benchmark

**Ms MONAGHAN:** Brenda Monaghan, Commissioner for Public Interest Disclosures. A lot of reliance will need to be placed on the ICAC because they are the ones who will be setting the guidelines. From the guidelines will flow all of the public information to inform the public on what the threshold tests are.

It is funny, I saw this in a different way when I first read the draft legislation. I thought it was quite detailed with regard to the definitions – more detailed than many of the other Acts. I thought it was written for a lawyer to try to tease out jurisdictional issues. It was more detailed and quite challenging for a lay person to read. I was thinking the challenge would be in making sure that the public information that is given out on the websites provided to complainants and departments was simplified and sufficiently clear. I see it in a different way.

**Mr ALLEN:** From my experience, people in agencies will err on the cautionary side and refer matters to the ICAC. That will become a default position. Then the ICAC will hopefully be quickly able to say, 'Yes, this is a matter we believe we should be looking at', or 'No, we believe we will give that back to you to investigate and you provide us a report'.

The ICAC then may decide, based on the report that we provide them, that they might want to take some more Action or they might close it off from there. But it will be very much driven by the ICAC. I do not think there would be too much of us saying, 'No, we will not send that to ICAC because that is our matter'. There will be a tendency to provide information to the ICAC.

Clearly, my remit is around the behaviour of public servants. But some of that behaviour may be criminal behaviour which would, therefore, end up in an ICAC or police environment.

**Mr SHOYER:** In broad terms the bill, as it is set out, provides a good balance. It provides the flexibility I was talking about. It provides quite a bit of guidance for the Commissioner regarding the public interest factors that are relevant. It indicates that the chief focus of the Commissioner is on corrupt conduct, but it allows reference to other bodies.

I expect that the majority of the matters would be referred to other bodies, particularly the Ombudsman's Office. Some of them may be referred to the Commissioner for Public Employment in appropriate circumstances. But it allows that flexibility so that things do not fall through the gaps so that things are dealt with, particularly so that people who make disclosures are protected. That is a major part of the Act; that you do not want someone worrying about whether something falls within a narrow definition of corrupt conduct before they make a disclosure. So let them make the disclosure, the Commissioner consider it based on the public interest factors that are in the Act and then either refer it on or simply say, 'No, we will not deal with this; it is not at an appropriate level', or take it on and investigate it as considered appropriate.

**Ms NELSON:** Yes, I agree.

**Mr PAECH:** One further question, if I may?

**Madam CHAIR:** Can we keep our answers succinct? We are chewing into our lunch break. It is 12.10 pm.

**Mr PAECH:** I note the submission has provided a lot of information and analysis on the bill. I very much appreciate the commentary tied to that. However, are there any areas of the bill that you believe could be improved?

**Ms MONAGHAN:** You first.

**Mr ALLEN:** We have had a lot of input into the bill and opportunity to have our opinions heard. There are always things that can be improved. But my view is we support the bill and there will be things that unfold as it is rolled out that will have to be dealt with.

**Mr PAECH:** In its current form, you would be satisfied that the ICAC bill will begin to fight corruption?

**Mr ALLEN:** Yes.

**Mr PAECH:** Thank you.

**Madam CHAIR:** Thank you very much. On that note, we thank you all for appearing before the committee today. The time is 12.11 pm. The committee will break for lunch and be recommencing at 12.30 pm with the Department of the Attorney-General and Justice.

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The committee suspended

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**Mr Greg Shanahan: CEO, Department of Attorney-General and Justice; Mr Robert Bradshaw: Director, Policy Coordination, Department of Attorney-General and Justice; Ms Caroline Heske: Senior Policy Lawyer, Department of Attorney-General and Justice**

**Madam CHAIR:** Welcome back, everyone. The committee will now recommence with the public hearing. I welcome to the table to give evidence to the committee Mr Greg Shanahan, Mr Robert Bradshaw and Ms Caroline Heske. Thank you for coming before the committee. We appreciate you taking the time to speak to the committee and look forward to hearing from you today.

This is a formal proceeding of the committee and the protection of parliamentary privilege and the obligation not to mislead the committee apply. This is a public hearing and it is being webcast through the Assembly's website. A transcript will be made for use of the committee and may be put on the committee's website. If, at any time during the hearing, you are concerned that what you will say should not be made public, you may ask the committee to go into a closed session and to take your evidence in private.

I will ask you to state your names for the record and the capacity in which you appear. I will then ask you to make a brief opening statement before proceeding to the committee's questions. Could you please state your name and the capacity in which you are appearing? We will start from left to right, thank you.

**Ms HESKE:** I am Caroline Heske. I am a senior policy lawyer with the Department of Attorney-General and Justice.

**Mr SHANAHAN:** I am Greg Shanahan. I am the Chief Executive Officer of the Department of Attorney-General and Justice.

**Mr BRADSHAW:** I am Robert Bradshaw, Director of Policy Coordination in the Department of Attorney-General and Justice.

**Madam CHAIR:** Thank you very much. Before we proceed I will ask our guests to say their name and title for Hansard before responding. I am wondering if any of you would like to make an opening statement.

**Mr SHANAHAN:** No, we have not prepared an opening statement.

**Madam CHAIR:** Not a problem. The committee has a few questions. Who would like to start?

**Mr PAECH:** I am happy to start, Madam Chair.

Thank you for making the time to attend today. We have heard from a range of other people who put in a submission. I am interested to follow up and get some comments from the Department of Attorney-General and Justice about some of the other submissions we have received.

I want to pick up on Hon Bruce Lander QC noted the complex and wide-ranging definition of 'improper conduct' in the bill may have the unintentional consequence of delaying or hindering reports by public officers. What consideration has been given to how the definitions in clauses 10 and 15 might be simplified in order to encourage prompt reporting? To further elaborate, we have heard from many of our submissions and people who attended today that from their experiences the use and interpretation of definitions can sometimes cause a lot of confusion and hold up the process.

If we can just start with consideration of the definitions.

**Mr SHANAHAN:** I might just ask Caroline to answer that.

**Ms HESKE:** Just before I answer I have prepared detailed written responses to all of the questions that were provided to me by Ms Knight. I have copies for everyone if that would be of assistance. Would you like me to hand those up?

**Madam CHAIR:** Yes please.

**Ms HESKE:** With respect to how these definitions would work they have two functions in the bill. One is to define what the ICAC can investigate and the other is to define what whistleblowers can report.

We have taken into account both best practice whistleblower protection as well as how you would define an anti-corruption body's jurisdiction.

The definitions follow very closely the recommendations of the Martin Report which were quite broad definitions. They have a lot of different components in them so they are necessarily quite long and technical.

From the whistleblower protection perspective the important point is that they are broad. If they are not sufficiently broad you end up in these complicated definitional questions about whether this person is in, out, are they really protected or not.

The general approach the Martin Report has is there is a very broad scope but the Commissioner is instructed to prioritise the most serious systemic matters so there is some discretion in there.

The broader end covers what can be protected by whistleblowers.

In terms of simplifying the definitions we note that the Commissioner has the responsibility for producing guidelines, a website and all those kind of public communications materials. The definitions in the bill themselves are not meant to be a communications tool. They are meant to define with precision all the different elements that the ICAC is required to prove and to enable officers who would be experienced in anti-corruption assessments to assess against those criteria.

They form a detailed checklist.

**Mr PAECH:** Ultimately you are suggesting that the Commissioner would then make the determination of what the definition is in a practice sense.

**Ms HESKE:** In a practice sense, yes. Someone would disclose information and the Commissioner would look at that information. Because they have an 'own motion' power they can combine that with other information and determine whether this is something that can be investigated, then is it something we want to investigate and they decide on that basis.

With respect to the protection that a person has the Commissioner can certainly say that they have the protection, or they do not but at some later stage that can be litigated in a court. The Commissioner does not decide what the definitions in the bill finally mean in a legal sense.

That said, there is a provision in the bill that allows the Commissioner to decide at the outset to cure a technical irregularity in the report. It is very common – to give an example – a whistleblower comes in and says they do not like Joe down the hall and he has done this and this and this, and by the way he is also a terrible person to his pet dog.

That last bit is not a disclosure. Disclosures sometimes go in and out of jurisdiction like that. The Commissioner would not follow that up but what they can cure that irregularity. If the person went to their supervisor at first and said Joe down the hall has done this, this and this wrong, that is not a protected disclosure because the supervisor is not the right channel to make the protected disclosure through so the Commissioner can cure that irregularity too. That is done with clause 93.

When you are looking at the function of those definitions there are all these other mechanisms by which someone would come into the process to find out what they do.

The mandatory reporting provision at clause 22 is particularly important in this respect because the Commissioner will issue guidelines on what you have to report. There are similarly provisions with respect to the whistleblower reporting provisions that people will have guidelines before them about the kind of things they can report, cannot report.

I would also expect there to be usual practices like a 1800 number that someone can ring up and say they were thinking about disclosing this and wondering if that is a possibility.

I should just say my background was for a number of years as an investigator with the Public Interest Disclosures Commissioner. I had a number of years handling these kind of allegations. It is very common for people to ring up and have that sounding-board discussion, or to email in anonymously first.

**Mr PAECH:** When you talk about the mandatory requirement component and the guidelines for that, I am just interested, based on the example of which you have provided, there might be a component of which is directly related around the alleged conduct and then you have spoken about a secondary issue – I think you used the man being nasty to a dog.

That obviously may be of a serious nature as well, do you anticipate that that is – I mean you are talking about curing it but if it is very serious then is there something in the guidelines that would allow that to be two separate investigations.

**Ms HESKE:** Yes, so there is nothing to prevent the ICAC splitting it up into different investigations or referring some or all of the allegations off to other bodies, in fact, there is very extensive referral powers. For example, in that case you could refer that to an animal welfare investigation. However, there is also the option to essentially not take it further and one of the reasons you might do that is to protect the whistleblowers identity and you would then just instruct them, look if you want to take that issue up this is where you report it, but it is not our role to follow that and we are not going to follow it.

**Ms NELSON:** Through the chair is it fair to say then that the whistleblower protections within the ICAC bill fill in the gaps where – with independent government agencies or – is it fair to say that?

**Ms HESKE:** Yes, I should say, they come from initially the *Public Interest Disclosure Act*, which is also being repealed by this bill, so that is the existing whistleblower protection framework. Those provisions are being moved into this bill but also being made a bit more comprehensive, so yes, to some extent there will be guidelines and information that people can refer to, and in my experiences someone who has taken a lot of these complaints over the years very few people look to the Actual wording of the Act itself. They rely on people advising them and they rely on looking at things like websites and pamphlets and that sort of information. They are not a communications tool per se.

**Mr PAECH:** Following on from that, with regards to Actually encouraging general members of the public to report and be aware of the educations functions of the ICAC – so far, from hearing and reading the content it would seem that it is primarily directed at public bodies and public offices – I am curious how you see the ICAC communicating with the general public, with the relationship.

**Ms HESKE:** I partly refer to the previous remarks I have made about what are the general practices – the bill requires you to have a website, you would normally produce those kind of materials. The ICAC does have a general function to conduct education and training and ultimately it is up to the ICAC how they choose to do that, how they choose to divide up their budget, what kind of resources they allocate to education and training.

In addition to general education and training, they have the capacity to conduct public inquiries. When I spoke to – at officer level to the New South Wales ICAC during the development process for this bill they indicated those public inquiries are, in fact, a really important way of communicating to the public what the ICAC does.

They have the capacity to make a number of different kinds of public reports. They produce an annual report, which is tabled in the Legislative Assembly and there are the guidelines I previously mentioned. Does that answer your question?

**Mr PAECH:** Yes. Thank you. I wanted to continue on. Professor Aughterson, notes that the nature beneath matters that can be categorised as corrupt conduct and investigated by the ICAC could give rise to uncertainty and injustice. In the New South Wales court of appeal has stated that labelling conduct as corrupt where apart from the Act it would not normally attract the description is misleading and that the context gives rise to injustice.

Subclause 10, includes as corrupt conduct. Conduct that has had an adverse effect on the effective performance of official functions without the need for any element of dishonesty or what would normally be considered corruption. Why is this included in the definition of corrupt conduct?

**Ms HESKE:** The short answer is that is what Commissioner Martin recommended in the Martin Report.

**Mr PAECH:** Right.

**Ms HESKE:** He had content of those definitions, he defined what corrupt conduct was and in fact it is broader than in that particular subsection. If you look at sub clause 10(2)(c)(vi), you are looking at a very broad

definition there. Now the interesting point is that this definition borrows closely from New South Wales, but in fact broadens it in a respect that it covers conduct quite deliberately that does not just go to dishonesty, it also goes to efficacy and I set out the reasoning why that is, I can take you through it, but essentially, it relates to the Cunneen case which you may have heard of in New South Wales.

That case was about whether the New South Wales definition should be read as being limited to dishonest conduct or whether it extended to sort of more inefficient conduct and the High Court said that definition is only to be read as relating to dishonest conduct because of how they have worded it. So he then took that definition and added in the word “effective exercise of official functions”, so we took the view that that was what was intended to be included in the definition of corruption, that it was not just meant to be dishonesty on that basis.

In terms of why you might do that, I would just draw the committee’s attention to the following points: apart from the broad definition of the ICAC’s jurisdiction and avoiding a legal challenge on that basis, there is also the fact that you do not generally get your allegations packaged up in sort of nice little briefs of evidence. What you get is sort of a general spiel from someone where they have heard a bit of information here, a bit about this, they might have noticed an irregularities and how did that public officer get that jet ski in their backyard, like why can they afford that, so you get all these clues that something is fishy but based on the information that initially comes in, it would be very hard to get it over the line of dishonest a lot of the time, but then once the matter is probed into, it turns out to potentially sometimes to involve dishonest conduct.

So if you were to narrow the definition, one of the consequences of that was that it would make it very hard for the ICAC to look at those situations where there is something fishy but you initially don’t from your initial information have that evidence of dishonesty.

The other point I would notice, because I know this derives from Professor Aughterson’s advice, is that I think he is saying “corruption” or the word corrupt conduct has a bit of a sting to it, that if a finding was made that someone committed corrupt conduct when really they have just been inefficient, that would be a bit unfair to the person. I would suggest with respect, that is not really about the definition per se, it is about the terminology, so if you wanted to address the sting for example, there would be one way to do that, would be to look at whether corrupt is the right word to use, rather than changing what the ICAC can investigate.

**Mr PAECH:** Okay. I have just two more questions around definitions, just I am needed to get clarification. I just wanted to ask Mr Brett Walker raises concern regarding the application of clause 12 to members of the Legislative Assembly noting that subclause 12(3) excludes judicial officers in the performance of judicial functions from failing within unsatisfactory conduct. So why does subclause 12(3) of the bill exclude conduct by a judicial officer in the performance of judicial functions from unsatisfactory conduct?

**Ms HESKE:** So there is a couple of reasons. One is to protect the independence of the judiciary and that is something that was recommended in the Martin Report that that be maintained and also a similar protection for the house which I know is coming up in the next question, but the other reason is that the courts already have a process for challenging basically incompetent decision making and that is the formal appeals process, it is a public process and it is very well established.

My concern and the concern of the department was that if we include – if we do not carve out the ability to complain about those matters, the ICAC will become a de facto appeals process for everyone who does not like their court decision and that would bog down the ICAC, it would not really be a good use of resources. So they are the two main reasons.

**Mr PAECH:** Okay, thank you. Why does the bill not make similar provision for members of the Assembly?

**Ms HESKE:** Section 82 of the bill clarifies that parliamentary privilege is not limited in this respect so the bill has to be read in light of the *Northern Territory (Self Government) Act* which means that parliamentary privilege applies, except to the extent that it is limited.

If I can clarify that subclause 12(3) only excludes judicial officers with respect to them performing their judicial function; that means making decisions in the court room. It does not exclude them with respect to administrative matters for example, what kind of bills they are racking up as travel expenditure.

Similarly parliamentary privilege excludes looking at members of the house with respect to performing the business of the house but does not exclude them with respect to anything outside of that.

We would submit that section 82 has a similar carve-out effect to section 12(3).

**Mr PAECH:** Great. Thank you. Is there any reason the Legislative Assembly should not be expressly excluded from the proposed definition of a public body.

**Ms HESKE:** Yes. I believe it is unnecessary. I have had a look at Mr Walker SC's analysis of this issue. He points to clause 16(1)(f) and clause 16(1)(l).

Clause 16(1)(f) is a body established under an Act but the *Interpretation Act* section 17 defines an Act to mean a Northern Territory Act. The Legislative Assembly is established under a Commonwealth Act.

With respect to clause 16(1)(l) this includes bodies that receive directly or indirectly public resources. The Legislative Assembly does not receive public resources, members receive public resources and the Department of the Legislative Assembly receives public resources. For that reason we do not believe that those definitions extend to the Legislative Assembly itself.

**Mr PAECH:** Thank you.

**Madam CHAIR:** Ngaree Ah Kit, Member for Karama. I have a few questions in regards to the functions of the ICAC.

As Professor Aughterson points out being subject to investigation by a body such as ICAC will have serious implications for the person under investigation both personally and in the public perception.

My question is what is the benefit in subjecting persons to an ICAC investigation for conduct which in the case of a public servant would not necessarily warrant dismissal?

**Ms HESKE:** There are two main points I would like to make.

The first is that there are numerous situations where conduct can be of great public concern even though it does not warrant dismissal.

The second is that it is a question of policy in the end what those definitions are, so we have followed what is in the Martin Report. Insofar as that is a good policy or not a good policy. It is not my role to comment on that.

With respect to the kind of matters that could be serious but not warrant dismissal, what you are talking about is group efforts. You could have something go terribly wrong, what is traditionally known as a word that begins with cluster, and you might not know individually that anyone is responsible in a way that involves dishonesty. If at the hospital something goes terribly wrong and no-one knows quite what happened but it went haywire. Lots of people died. You do not necessarily pin it on any one person but there is a substantial public interest issue there that might need to be investigated.

There are examples of where the ICAC may have something very serious to look at that does not fit within that first definition of corrupt conduct which revolves around individual culpability.

The second situation is that with some people, particularly members of Legislative Assembly there are very limited grounds on which a person can be legally dismissed from the role. Essentially you can be voted out, and then on a very few grounds you can become ineligible.

The bill provides for looking at things like substantial breach of public trust in order to fill that gap. Otherwise there would be people in those situations who have very limited grounds for dismissal but effectively could not be looked at with regards to much conduct at all.

I will just make the other point though that while the provisions are broad, and I have discussed why you might make them broad, not only for whistleblower protection but to avoid a legal challenge down the line.

If you define them quite narrowly and it results in a prosecution you can end up with legal challenges. One bit is said to be outside jurisdiction, therefore invalid, therefore the whole thing is tainted and therefore you cannot proceed with the prosecution. So, there are reasons to do that.

However, it is broad for those kind of reasons, but the ICAC is directed to focus on the most serious systemic conduct. I do not think in a jurisdiction this size, with the resources that the ICAC will have and the size it will be, will have a lot of time to be following up every miscellaneous minor matter. While that jurisdiction is in there, with respect, I believe it would not be exercised very often.

**Madam CHAIR:** Thank you. The East Arnhem Shire Council has raised concerns regarding the potential impact ICAC referrals may have on the financial and human resources of public bodies. I have a couple of questions under this point.

If the ICAC refers the matter to a public body and gives directions on how the referral is to be dealt with, how will the implementation of those directions be funded?

**Ms HESKE:** The initial point to make is the Department of Attorney-General and Justice was tasked with developing the bill, not the funding. Implementation and funding issues should be directed to the Department of Chief Minister.

However, as a general point, if an investigation is to be conducted at all, be that by a regional council, the ICAC or someone else, it will be funded with public money. If you want an investigation conducted it is a matter for government where the funding is allocated and who should conduct it.

**Madam CHAIR:** Thank you. My next question is what recourse does a referral entity have if it considers the directions from the ICAC requiring inappropriate prioritisation of its resources?

**Ms HESKE:** The ICAC does not have the power to insist that the public body follow this direction. There is not a legal consequence for refusal other than the fact that it can escalate up and become public – a shaming effect.

The process that is designed to occur under the bill is that if they reach a standoff, it is escalated to the appropriate minister and, failing that, to the Legislative Assembly. I submit that is a process through which funding and a scope can be negotiated.

**Mr PAECH:** Madam Chair, can I ask a question while we are talking about funding?

**Madam CHAIR:** Sure.

**Mr PAECH:** I could be off track, so please excuse me. It is anticipated that the ICAC body will then appear before the Legislative Assembly for estimates and that level of scrutiny?

**Mr SHANAHAN:** You would have to ask Chief Minister's. It is an output, but not all ...

**Mr PAECH:** It is a beneficiary of public funds. I am making the assumption that it would then appear ...

**Mr SHANAHAN:** I do not know whether the minister might appear rather than the Commissioner.

**Mr PAECH:** Okay. Because it is a statutory organisation.

**Ms HESKE:** It is an agency. It will be its own agency for the purpose of ...

**Mr PAECH:** Agency?

**Ms HESKE:** Oh well, the ICAC office is the agency, the ICAC is the CEO and for the purposes of the *Financial Management Act*, it is its own agency.

**Mr PAECH:** Okay. Right. Thank you.

**Madam CHAIR:** Thank you for clarifying. My last question on this. Is there any reason why clause 18(4) could not be expanded to provide that it is a good reason for the ICAC not to refer a matter to another entity if doing so may adversely affect the performance or future performance of the other entity, particularly a public body?

**Ms HESKE:** This proposed provision is very broad to the point that it could be used to, essentially, say, 'We will not do anything because we just do not think we should have to. We do not like resources being allocated that way'. At best, this would be unproductive and at worst it could be an excuse for a corrupt body to just delay things.

There are factors in Schedule 1 of the bill that direct the ICAC to consider the impact the investigation will have on a public body. But that is in the context of a wide range of other public interest factors that are also important.

We took the view that it would be inappropriate to elevate this factor above all those other factors in Schedule 1.

**Madam CHAIR:** Thank you.

**Ms FINOCCHIARO:** I have a question about the independence and appointment of the Commissioner. You may or may not be able to say, but why was that recommendation in the Martin report was not followed? Also, what provision in the legislation is there setting out how the appointment of the Commissioner will take place.

My understanding is it was the view – or a much lesser term – that it would follow how a Supreme Court judge is appointed. But that is not enshrined anywhere.

**Ms HESKE:** Yes. My understanding is the Martin report said it should be similar to a Supreme Court judge's appointment. It should be a judicial panel. When I had a look at what that process was, that itself is not enshrined in legislation so it was difficult for me – and at the time that was under review – so it was difficult for us to then put that test in legislation because if it changes, then the bill would be out of step.

So it was left as an administrative matter and the matters that could be put in the bill which was that the appointment goes to the Legislative Assembly for a vote, that was put in and the eligibility criteria.

**Madam CHAIR:** Yes, okay.

**Mrs FINOCCHIARO:** I had a question on the Commissioner's discretion to hold hearings in public if it is in public interest and I can completely understand and appreciate why a lot of breadth has been, you know, put in so that things can be captured at the same time, whether you have (inaudible) that the ICAC – really we are looking at the pointy end of things – it does not take away from the fact that they could, they do legitimately have the power to look into much more minor things with very, very serious powers right out for the world to see which, you know, may or may not have its merit. I am just wondering, more specifically, why there is no sort of threshold as some other jurisdictions have and meeting, I guess, a public hearing test or a public interest test.

**Ms HESKE:** That was one of the questions I looked at so I will just see if I ...

**Mrs FINOCCHIARO:** Yeah, I think Mr Lander might have raised a distinction of what is public interest as distinct from what the threshold test.

**Ms HESKE:** Question 21? Is that what we are after?

**Mrs FINOCCHIARO:** It may very well be.

**Ms HESKE:** Or 12, there was an earlier one.

**Mrs FINOCCHIARO:** Yeah, it sort of is all in that vein, I suppose.

**Ms HESKE:** Yes.

I suppose that the recommendations of the Martin Report would framed in terms of a presumption that hearings should be held in private unless the ICAC decides in the public interest that they should proceed in public, which is what we have replicated. Similarly, it had those broad definitions so what follows from that is that anything in that scope could be a public inquiry. There was no distinction drawn. I cannot really comment again on whether that is a good policy but ...

**Mrs FINOCCHIARO:** How is that presumption, sort of, set in place? Like that the presumption would be private rather than public?

**Ms HESKE:** The presumption is Schedule 1.

**Mrs FINOCCHIARO:** Okay.

**Ms HESKE:** So it is Item 5 in the Schedule 1. It says that the – sorry, I will get the exact wording for you.

**Mrs FINOCCHIARO:** There is a level of safeguard.

**Ms HESKE:**

*Matters should be dealt with by the ICAC in private, unless it is in the public interest to do otherwise, taking into account the following:*

So there are those safeguards, plus there are some provisions in the Act that allows them to close parts of those hearings as well.

Like I said before, the kinds of matters the ICAC may look at that are less than criminal could still be very serious matters. So for those reasons, maybe it would be appropriate that some of them be in public. But ultimately it is a question of policy.

**Mrs FINOCCHIARO:** Yes. Policy for the commission? Or policy of the government?

**Ms HESKE:** Both really. Policy for the government whether you allow that. Policy for the commission about how they weight those public interests factors in a given case.

**Madam CHAIR:** Thank you for that. I just wanted to note for *Hansard* that Ms Sandra Nelson has left the public hearing and Ms Selena Uibo, the Member for Arnhem, is standing in for her for the rest of the public hearing.

Are there any other questions from the committee?

**Mrs FINOCCHIARO:** I just have one last – sorry. Quite a few of the submissions we received commented on the addition of misconduct and unsatisfactory conduct; and I also note that in Tasmania is the opposite that's sort of much a part of how their ICAC operates; so I think the Member for Araluen has said today as well, you know there really seems to be two camps of different views on how this should and should not go. So I guess that I just wanted to know a bit about why, you know, you finally landed on the point where misconduct and unsatisfactory conduct should be within the scope of the ICAC as opposed to being, you know, belonging to our other entities or the agencies itself?

**Ms HESKE:** Other than the points I have already made I would note that there is a very strong referral power.

There is a provision that all those matters in unsatisfactory conduct and misconduct are required to be referred unless there is a good reason not to, so you would expect them to go back to other agencies and to other investigation organisations most of the time.

**Mrs FINOCCHIARO:** Thank you. I had one more, sorry. I was just thinking in terms of staffing, the ICAC need to be independent of government but from time to time would there be AGD staff perhaps assisting on an investigation or a chain of inquiry? Would there be that mixing or would it be sanitised and there is a line.

**Ms HESKE:** One of the ideas in the bill is given that this is such a small jurisdiction with only so many resources that the scheme is able to leverage existing resources where possible. At the same time you need to have those carefully vetted to make sure there are no conflicts of interest arising which are also issues in small jurisdictions.

The ICAC has been given a lot of flexibility in that respect. They can contract people from interstate, they can borrow people from other agencies, they can have their own staff, they can have slightly different arrangements on different investigations.

They have very strong powers to vet anyone who is doing work for them including requiring them to produce statutory declarations, to look into police intelligence about them, to require them to produce biometric data to check those sorts of things.

In addition they have powers to conduct joint investigations and to direct another body to conduct an investigation. They cannot direct the Ombudsman in how they do it but if they were to put it to an agency they can direct how that agency would investigate a matter that is referred.

In addition to those powers, and the way they are exercised is in the discretion of the ICAC. I cannot speak to how they would do it but they have the opportunity to put in place different arrangements compared on the nature of the matter.

The other option is if the ICAC themselves are completely compromised, is that an Acting ICAC can be appointed and that person, their authority flows directly from the Act, not through this existing ICAC so they are not tainted.

That was one of the issues that arose in the matter of investigating the former Police Commissioner. There was no capacity to have anyone given the powers except under existing bodies. This allows someone for example in that sort of situation to be brought from interstate, given the full powers of the ICAC to operate as

a separate person if that kind of investigation arises to avoid a resourcing issue of needing to have ongoing tools for that all the time it is on an 'as needs' basis.

**Mrs FINOCCHIARO:** Mr John Hyde mentioned that Nauru, a very small jurisdiction had enshrined in their legislation that their Commissioner would not be from Nauru and Mr Hyde noted that they are one of the few jurisdictions he is aware of that went to that extent.

I want to know, given we are a very small jurisdiction, and the independence of the Commissioner will be key to this process, and that we do not have a proposed enshrined process for appointing the Commissioner why it was decided that we would not mandate that the Commissioner come from somewhere other than the Northern Territory.

**Ms HESKE:** I suppose again this is a policy question. The government has adopted this particular proposal but I can say there are a couple of factors that might be relevant.

One of them is that as soon as you appointed an ICAC they might be from interstate but they would not be not part of the community for very long. That is an initial factor.

Secondly, in terms of the ICAC understanding the Territory context and being able to be here on the ground to be able to coordinate the office, to direct investigations if you were to base it elsewhere that would be immensely complex and would lack awareness of the Territory context. That would be particularly relevant with respect to recommendations that might get made.

**Mr PAECH:** Can I jump in? I need some clarification. The ICAC has the ability to revisit previous decisions, yes?

**Ms HESKE:** Decisions of?

**Mr PAECH:** Public interest disclosure. My questions is in terms of keeping the integrity of a Commissioner or someone who has made a determination previously, someone appears and asks for that decision to be revisited, to the ICAC, how is that managed and how do you maintain that the integrity of the Commissioner and their decision is not eroded by the ICAC?

**Ms HESKE:** This is something that Mr Walker SC touches on in his advice, that matters can have different categorisations like the one set of facts can give rise to criminal liability, civil liability, investigation, for example, by the coroner, these sorts of things do happen frequently and what usually happens as a matter of practice is that the body making the decision is very clear that they are making a decision with respect to a particular framework and that that framework may lead to different results than another body making a decision in relation to another framework.

In terms of bringing each other into disrepute, I think there is an awareness they are conducting them under different tests. In terms of double handling, there is discretion for the ICAC to consider whether it should investigate and all, and one of the factors in schedule one is whether the matter has already been investigated.

**Mr PAECH:** Maybe this is a question for you Mr Shanahan. You are confident as the department that the decisions made by an ICAC would not put the decisions made by a Commissioner in disrepute.

**Ms HESKE:** No, I would not say that because one of the roles of the ICAC is to investigate corruption.

**Mr PAECH:** That is alleging that the independent body, which is a Commissioner has done something that is unwilling.

**Ms HESKE:** The ICAC could say anyone has done the wrong thing if that was relevant to its investigation but it is only going to do that within the ambit of its powers. I am not sure that answers your question.

**Mr PAECH:** From my perspective, I am wanting to gather that point an ICAC is introduced and it is law and it is passed, that there is not a massive flow of work where a range of Commissioners have done a volume of work, have done something and because someone is not satisfied with the response at that time they will try an ICAC to do that – does that not put that whole situation in disrepute?

**Ms HESKE:** I would say it is very normal. The vexatious litigants – repeat litigants as they are sometimes called – will come to the ICAC in the way they go to the ombudsman and they go to every other available avenue. Whether the ICAC looks at them will depend on whether there is any substance to what they are saying and whether the matter has already been fully ventilated. The ICAC has to make decisions about

prioritising resources, but the ICAC's discretion is not constrained by what another body thinks, so it would ultimately be up to the ICAC to make that decision.

**Mr PAECH:** Who would make that determination of the guidelines whether they would revisit a decision made by – like a Commissioner of another area?

**Ms HESKE:** The ICAC has complete independence to make that decision.

**Mr PAECH:** The ICAC would make those guidelines at the commencement of it being introduced...

**Ms HESKE:** Within two months of the commencement.

**Mr SHANAHAN:** The same concerns were there when the public interest disclosures first started up. We thought we would get a flood of all the disgruntled people who had previously made complaints, and it is normal it does happen. People will try a new system and it really is up to the Commissioner concerned to look at those things very closely and make sure that they are very discreet in terms of which ones they pursue and which ones they do not.

**Mr PAECH:** I think it is very important, and I think I am getting this from the conversation with you now – that the guidelines are there, so it is not based on the Commissioner of the ICAC having to make a sole decision that there are guidelines which are framed by everyone who is part of the ICAC.

**Ms HESKE:** The ICAC will create general policy guidelines and procedural guidelines as to how it will operate, I would also suggest for this purpose those factors in schedule one are intended to form the policy framework for evaluating those competing considerations. So the ICAC's own guidelines will fit under the Act and fit under schedule one.

**Mr PAECH:** Thank you.

**Mrs FINOCCHIARO:** I have a question, it is sort of question 35. What provisions are there for the oversight of the ICAC? When we spoke to Mr Hyde in Western Australia they have a parliamentary committee. I know within our bill there is an opportunity to have one but if you could just talk more specifically around who is monitoring the ICAC.

**Ms HESKE:** So the provisions in the bill itself provide for the creation of a role known as the Inspector and there is equivalent provisions interstate. The Inspector serves this role where they can look at any of the ICAC's files, they can demand the ICAC and their staff answer questions and the purpose is to evaluate whether the ICAC is essentially acting appropriately and within power. They provide an annual evaluation and they are also able to respond to a complaint on an as needs basis.

**Mrs FINOCCHIARO:** And that was one of the points why have we got it as an annual reporting rather than on a continuous reporting schedule, I do not know if you can...

**Ms HESKE:** Yes, my consideration of that is that there would not be any significant difficulty with the committee recommending an amendment that empowered the Inspector to make such reports on an as needs basis because there is an ability to accept complaints on an as needs but not then to report on as needs.

The only thing I would suggest you may want to watch is that there is not a risk of 'function creep' because the intention is not to create a secondary ICAC to monitor the ICAC, so it might be prudent for example to specify that the powers applicable only when the Inspector forms the view that the annual evaluation would be an insufficient tool to communicate this concern, but other than that, that might be a sensible thing to do.

**Mrs FINOCCHIARO:** So how is the investigator independent from the ICAC, like they are within the same office, they are ...

**Ms HESKE:** No, they are a completely statutory appointment. I would anticipate it would be probably be in the nature of a casual appointment, like it could be someone who sits interstate or someone for example like a former judge interstate, that sort of thing, but they are not part of the ICAC, and in fact, there is a requirement that they have not been involved in the ICAC in the previous 12 months so that they will not have that connection to anything they are evaluating.

**Mr PAECH:** Can I just ask another question following on from the Member for Spillett? Does the department still see the need for the other Commissioners once an ICAC is up and running?

**Mr SHANAHAN:** That is a matter of policy I think.

**Mr PAECH:** Matter of policy? Thank you, Madam Chair.

**Madam CHAIR:** Thank you. Ngaree Ah Kit, Member from Karama, I have a few questions in regards to the ICAC Bill. Mr Lander raises concerns that the bills compulsive powers are not scaled to the gravity of the matter being investigated. Why does the bill provide the power to compulsorily examine a person or search premises to be used for the investigation of the matter which is not criminal in nature, and indeed, might only be low level misconduct?

**Ms HESKE:** So in addition to the comments I have made why the ICAC would be looking at those kind of matters at all, I would raise the general point that when a law enforcement agency is given these kinds of powers, like police are given, they are given them generally, so the police have the power to conduct search warrants with respect to any offence, it does not have to be a serious crime and it is a matter of discretion essentially and responding to an individual situation how those are used.

I can also offer some background information on why Mr Lander, in particular, might say that which is that the South Australian scheme has a division in it. The South Australian scheme allows the ICAC to look only at criminal offences, so they do not ever conduct public hearings, they do not ever investigate anything except for criminal offences.

That said, there is this sort of quirky power in that Act that allows the ICAC if it is a matter less than criminal that fits within a definition of misconduct or maladministration, which is similar to our misconduct or unsatisfactory conduct, to handle that by taking on the hat of the ombudsman, temporarily, under their ombudsman legislation and that is why, if he was Acting as the ombudsman, he would not be executing search warrants and things of that nature.

There are some challenges to adopting that approach in the Territory, bearing in mind a comparative size of the jurisdictions, in that staff would have to be trained to operate under two completely separate regimes, you would need all the record keeping systems, all the processes, depending which one you are under and when you are conducting investigations, there would be an additional level of complexity, particularly if there were related corrupt conduct and misconduct allegations that you are attempting to conduct them under two regimes and not letting them cross-contaminate.

So it is a more complicated way to go and it is not what was recommended by Commissioner Martin but it may be what Mr Lander operates under in his jurisdiction.

**Madam CHAIR:** Thank you.

**Mrs FINOCCHIARO:** Madam Chair, can I ask a follow-up question. Something triggered my memory. Why did we make the decision to go with a Justice of the Peace for the issuing of warrants?

**Ms HESKE:** This was a departure from the recommendations in the Martin report. Commissioner Martin recommended it be a judicial officer. One of the difficulties when we looked at this is that in the Territory, Justices of the Peace issue search warrants to police for any kind of offence. That includes murder, the exact corruption offences that the ICAC will be investigating and minor offences.

You then end up with a rather strange result that if the police are investigating official corruption they can get the warrant from the JP, but if the ICAC is it has to go to a judicial officer. As a matter of policy if you do not trust JPs to do it for one, what is the issue with them doing it for the other?

The reason why we have that as a matter of policy in the Territory is that there is a very small pool of judicial officers and it can be hard to get hold of one.

I make one other point in relation to this, which might allay some of the concerns about whether this would be used properly. As a matter of practice in other jurisdictions, I suggest a prudent ICAC would never go to a JP because down the line, when this is contested, it is contested in these matters by people who have armies of QCs. They put warrants through the wringer. If the JP is not a competent person to assess it – and the skills of JPs vary – they will not have done the assessment sufficiently well to make the warrants stick and the whole thing would fall over.

That is why you will find major crime investigations go to judicial officers. You would expect the ICAC to go to people who will rigorously test it enough so the investigation will stand scrutiny.

**Madam CHAIR:** Mr MacSporran noted that the provisions of clause 80(2) would likely prevent the ICAC from properly examining persons charged with offences for legitimate purposes concerning the improper conduct of others, which may well be contrary to the public interest. Has any consideration been given to the inclusion

of provisions similar to section 331 of the *Crime and Corruption Act 2001* in Queensland which provides a robust mechanism to allow CCC investigations to proceed and examine any witnesses, including those charged with an offence in closed investigation hearings?

**Ms HESKE:** Essentially, this section is about the privilege against self-incrimination which is more colloquially known as the right to silence. I have some answers to this both in this question, which was 12, and also in question 30.

Essentially, what Martin recommends is that the privilege against self-incrimination be abrogated and provisions be included concerning subsequent use of evidence obtained in fact of the privilege.

What happens is when the ICAC investigations someone, they can call them in and demand they answer questions. You cannot refuse to answer the questions on the basis it might incriminate you. That is what the abrogation generally does.

But these provisions concern what happens after. The usual state of affairs is that when someone gives evidence in that situation you cannot then take that evidence and lead it in a criminal trial against them, because that would then interfere with the accusatorial nature of the process.

The question is though, what if the person in their interview says, "Yes, I killed them and I buried the body over there." Can you go and dig up the body and lead evidence of the body and the fact you found it, or is that tainted by the fact you found out through the coercive interview? This leads to the question of what you do about derivative use.

We have provided in the bill that you can have derivative use of this evidence but there are a couple of limitations on that. Also, in terms of the questions you are allowed to ask someone there are some limitations. This is to prevent the later trial being corrupted.

This is where this question comes up, which is what the Queensland provision allows very explicitly is for you to question someone about a matter which they are already charged with. In fact, you can question them even if they are in the middle of the proceedings. So, they could be in their trial for that offence and the ICAC can question them. That is what he is asking for in that provision.

Our bill specifically prohibits that. At the point of charge you are not allowed to ask that person questions about that charge. Why they might want that power, particularly in Queensland where their Crime Commission looks at a much broader range of conduct, including you know gang organised crime and looks at terrorism matters is that you can question co-offenders that are before the court about what was happening in relation to other co-offenders which might have networks and things. But there is a further issue which is that that provision in Queensland has not been tested for constitutionality. And nothing like that has in fact been tested and the High Court over the last few years has been moving closer and closer, I would suggest – and some academics have suggested – to saying, look, we are not quite sure how well that works and whether that interferes with the inherent nature of the judicial process and the accusatorial nature of a criminal trial.

So to avoid that issue, in case that emerges – and also in terms of how we structure balancing the rights – we put in section 80(2) which just prohibits questions after the point that the person has been charged about those charges.

**Madam CHAIR:** Thank you. I have one more question in this area. Clause 5 of Schedule 1 includes a number of matters that should be taken into account when determining whether a public hearing should be held. Why does not the bill include a statutory prescription in relation to public or private hearings?

**Ms HESKE:** My view is that it does. That in fact Item 5 in the Schedule says matters should be dealt with by the ICAC in private unless it is in the public interest to do otherwise and that is a prescription which is a presumption against public hearings but allows them sometimes in the public interest which what Martin recommended in Recommendation 35. I am not sure if that answers the question.

**Madam CHAIR:** No, that's fine.

I have a different one. It has come up a lot in our public hearing today. There was a suggestion for the ICAC to have been provided, given the power to prosecute. Can I get your thoughts on that?

**Ms HESKE:** Again, a matter of policy. But it would be obviously of additional resources. It would involve the ICAC having to maintain expertise in that area. There are public interest reasons why you might want prosecutions conducted by a separate body which is that an investigation body, by its nature, you know puts a lot of effort into the investigation and to some extent may form a vested interest if you like in seeing all that

hard work not go to waste. Whereas a separate prosecution agency, like the DPP, comes in impartially assesses it, considers it, you know, in line with other prosecutions that are being conducted as to whether it should proceed.

**Madam CHAIR:** Thank you very much.

**Mrs LAMBLEY:** Can I just go back to the answer you gave to the question that Ngaree asked before about public hearings? Did you say that? What did you say? That public hearings can be held when it is in the public interest?

**Ms HESKE:** There is a presumption against it. But, yes, if the ICAC considers that despite that presumption, that it should hold the public hearing because it is in public interest, it can do. And there is a reference of factors that must take into account at Schedule 5. They include things like:

- *the desirability of the public sector being open and accountable to the public;*
- *the benefit of exposing improper conduct to public scrutiny;*
- *the extent to which [the] allegations .... are already in the public domain;*
- *the extent to which [the] allegations ... raise issues of continuing public interest;*
- *the risk that a person may suffer undue hardship, including undue prejudice to the person's reputation;*

I will not read them all out. There are a range of factors.

**Mrs LAMBLEY:** Mr Lander told us earlier today that in South Australia they cannot provide a public hearing into maladministration. Did you consider that? That other jurisdictions do not have public hearings into certain matters?

**Ms HESKE:** We did not consider it extensively because the policy was to follow the Martin Report and the Martin Report recommends this.

**Mrs LAMBLEY:** Okay.

**Ms HESKE:** There are different models, different ways of doing it. There are certainly people who are fans of public hearings. It does mean that the public actually know the matter is being dealt with. On the other hand, it does carry risks and those risks are particularly can be very detrimental to the people who are put through that process.

**Mrs LAMBLEY:** And a possible breach of human rights, Mr Lander said this morning.

**Ms HESKE:** Is he referring ... Well, I was not listening to Mr Lander's evidence this morning.

**Mrs LAMBLEY:** And I might have taken it out of context. That's my understanding.

**Ms HESKE:** Look, at a guess, he is probably referring to the potential for it to impact adversely on a subsequent trial for a criminal offence. All I can say with respect to that, is that there are safeguards in place to try and keep that evidence out of the public view. But occasionally, evidence or information about what someone has alleged to have done does become public and used before a hearing and the courts have processes to deal with that. And ultimately, if it does affect the criminal trial, to the degree that the person doesn't get a fair trial, the courts will quash the conviction.

**Mrs LAMBLEY:** He actually recommended that the legislation provide a clear definition of when a private examination occurs and when a public hearing is conducted. Have you any thoughts on that? Do you think that our legislation is clear enough on this issue?

**Ms HESKE:** It is a matter of policy but I presume perhaps he is suggesting just based on what he has written in his submission is that there be a clear dividing line, either between you are allowed to do it for corrupt conduct but not misconduct and unsatisfactory conduct or you are allowed to do it for criminal allegations but not others or some kind of test on that basis that would be a very clear cut yes or no, it is a matter of policy, I do not have a view myself.

**Mrs LAMBLEY:** He said that he felt the way the legislation is written at the moment, there is a risk that it will end up in litigation; that was his concern I just...

**Ms HESKE:** I think that the discretions are very broad and it is very clear that the ICAC has a broad discretion to decide this issue. Certainly they are the kind of matters that people feel very strongly about, particularly if

you are a witness going to be called in a public inquiry, so quite possibly even if it is not a very strong case you might try and contest it. I do not know there is really any way around that.

**Mrs LAMBLEY:** Do you think – so you are not concerned that our legislation is not tight enough in this area?

**Ms HESKE:** No, I am not concerned, I think the ICAC has an extremely broad discretion, it is very clearly worded that that is the case.

**Mrs LAMBLEY:** Okay, thank you.

**Mrs FINOCCHIARO:** I just wanted to ask, why there was a five plus five tenure for the Commissioner?

**Ms HESKE:** An option – I believe that was a recommendation of the Martin Report.

**Mrs FINOCCHIARO:** How is the investigator appointed as distinct from the Commissioner or it is the same process?

**Ms HESKE:** The Inspector?

**Mrs FINOCCHIARO:** Sorry, yes.

**Ms HESKE:** There is not a specific process provided in the bill. In terms of eligibility the Inspector must be someone who meets the same eligibility criteria as the ICAC and in addition, cannot have been involved in the ICAC in the past 12 months.

**Mrs FINOCCHIARO:** Sorry, keep going.

**Ms HESKE:** I was going to say, there is one other accountability aspect that I did not mention in relation to your previous question which is that in the event – so the Inspector is envisioned, like I said, as a secondary ICAC, but what if the ICAC themselves seems to be involved in something corrupt, the Inspector, what they can do and indeed this process can happen without the Inspector, but the Inspector can recommend it, is that an Acting ICAC is appointed to investigate the ICAC and then that Acting ICAC has all the powers the ICAC would have in that situation, there is an additional limitation on who can be that Acting ICAC, in addition to the usual criteria, and that is, they must be a person who is not and has never been a public officer which effectively means they would probably have to come from interstate.

**Mrs FINOCCHIARO:** Are there other jurisdictions that do enshrine the process for appointment, I mean I know ours does not and it will probably maybe follow the appointment of a judge, but do other jurisdictions firm that up in their legislation?

**Ms HESKE:** I would have to research the answer to that question.

**Mrs FINOCCHIARO:** Sorry, no that is fair enough, that is fine.

**Madam CHAIR:** Any further questions?

**Mrs LAMBLEY:** Mr Lander made lots of other – have you read his submission, yes, he made some – a number of smaller comments, for example, in 18(1)(c)(iv), it says, it is about the Commissioner against corruption the functions, he said that 18(1)(c)(iv) it says something about another entity and he thought that may have been a typo or something, have you – did you – I am not sure if it is Actually in his submission but he suggested that that needed to be deleted, I mean, I have not opinion of that whatsoever.

**Mrs FINOCCHIARO:** So was it another entity should be removed because that would suggest then that it is an entity other than those in the schedule? So there is the entities in the schedule and then there is another entity which could mean a body that is not caught up in the schedule? So that could maybe just be something ...

**Mrs LAMBLEY:** The difference between 'another entity' and a 'referral entity'.

**Ms HESKE:** You could delete the word 'another' to ensure that it does not have that potential ambiguity.

**Mrs FINOCCHIARO:** Yes to make sure that the only entity you are talking about is that in the schedule as opposed to giving an opportunity for there to be new entities.

**Ms HESKE:** It is pretty broadly defined, what an entity is. Yes, it is not something we considered. The general functions that are described in that section are described in very general terms. But potentially, yes, an argument could be made that it is limited in that way. It would not make a lot of sense reading the bill in context. The High Court has been pretty clear in Project Blue Sky that you look at all the provisions in the bill in context. There is a very extensive referral scheme so it would not make sense to read that to me. You cannot use the referral scheme. It has to mean essentially that the ICAC's function include using the referral scheme or it would just deprive the entire referral scheme of meaning. I am not concerned about it but it would not hurt to make that amendment.

**Ms UIBO:** A search warrant allows for a significant infringement to a person's right to privacy and property, yet the bill provides the only test for whether a warrant be issues is a belief on reasonable grounds that a search warrant is necessary for investigation.

Why does the bill not require a threshold for the seriousness of the matter under investigation or an assessment of whether such an infringement of rights is warranted by the seriousness of the investigation?

**Ms HESKE:** The search warrant test that has been adopted is borrowed quite closely from the test for the IBAC in Victoria. We have used that wording almost exactly. I have set out at paragraph 140 of my answers to these questions interstate examples of very similar provisions. You can see from those that this is a middle-of-the-road test.

There are some that have lower tests. In fact, I think in WA all they need to show is that there are reasonable grounds for suspecting the evidence may be on the premises. The ICAC in New South Wales self-issues these warrants. So, we have middle-of-the-road safeguards in this respect. None of the statutory tests anywhere interstate have any consideration of the seriousness of the matter. They are all done solely on the terms that are in the legislation.

**Mrs FINOCCHIARO:** I am still a bit hung up on the appointment of the Commissioner - only because it is so critical. I thought Martin's report set out more like a proposed system of how the first Commissioner could be appointed and that they would be someone from interstate and it stepped through it. Is that ...

**Ms HESKE:** Yes, in that respect, yes. The government decided it would not follow those recommendations which were to appoint Mr Lander himself for the first Commissioner for the first two years ...

**Ms FINOCCHIARO:** Oh, right, okay.

**Ms HESKE:** Those recommendations were the ones they decided not to follow. So, then there was a subsequent flow-on effect from that. Some of the other recommendations about process did not make sense because we were not doing an initial part-time appointment into that role.

**Mrs FINOCCHIARO:** Okay.

**Mr SHANAHAN:** My understanding of what will happen is there will be a call for expressions of interest and there may also be head-hunters involved. Then it will be referred to the committee that makes the recommendations on judicial appointments.

**Mrs FINOCCHIARO:** Who is that, Mr Shanahan?

**Mr SHANAHAN:** Under the protocol it is a retired judge, the Solicitor-General and me. We are the three who make the recommendation.

**Madam CHAIR:** Any further questions?

**Mrs FINOCCHIARO:** Sorry. That recommendation goes to the minister and directly to the parliament?

**Mr SHANAHAN:** Yes. Then there will be a resolution of the parliament appointing the person

**Ms HESKE:** To the minister then to the parliament.

**Mrs FINOCCHIARO:** So it can be knocked out by the minister at that first hurdle and sent back to the committee?

**Ms HESKE:** Essentially, that process is not legislated, as you have noted. The bit that is legislated is that the minister has to put up an appointee to the parliament.

**Mr SHANAHAN:** I note, for example, with Commissioner Martin's appointment, the panel made a recommendation to the Administrator. There was no involvement of ministers.

**Ms UIBO:** In regard to whistleblower protection, given an objective of the bill under clause 3(c) is to assist the reporting of improper conduct, why does the bill not provide a statutory right for any person to make protective complaints of improper conduct directly to the ICAC or public bodies and public officers, as in the case under the Queensland legislation?

**Ms HESKE:** I understand this question derives from comments made by Mr MacSporran from Queensland, who referred to sections under the Queensland *Crime and Corruption Act*. I have had a look at those sections and I submit that our bill does, in fact, provide a stronger right to make protective complaints.

Clause 98 of the bill provides that a person who reports improper conduct to the ICAC is protected from civil, criminal or disciplinary Action as well as from defamation proceedings or any claim of breach of confidentiality. So that creates a very similar right to the right provided in Sections 36 and 343 of the Queensland legislation.

Further, our bill provides comprehensive whistleblower protection scheme with a range of tools to pro-actively protect whistleblowers who do not have equivalents in the Queensland legislation. In fact, I would suggest that the right in Queensland is narrower than the right in our bill because Section 343 of the Queensland legislation provides the legal immunities only if the report is made to the Crime and Corruption Commission so you cannot report through other mechanisms and get these protections.

Ours allows you to report to the Ombudsman, to the CEO of the organisation, to certain nominated recipients by those organisations who are trained and nominated to accept the matters. Also to some other bodies like the EPA, the Anti-Discrimination Commission.

Further, Queensland has some problematic carve-outs. Clause 216(a) of the Queensland Act makes it an offence to make a report of corruption that is vexatious, reckless or primarily for a mischievous purpose. The practical result of this narrow definition means that a whistleblower cannot report mere suspicious behaviour. They have to have, like, clear evidence of what is going on or they will not be protected. And in fact, terms like 'reckless' – like, what is a reckless report? – that could be litigated at a further point by the court who says, 'Yep, we think it was reckless.' The person would not have really known and that removes all their protections at a later date. So these high thresholds and carve-outs would make it very difficult to create an 'if in doubt, report' culture which is what the aim of our legislation is to have the foundations there to do that.

I would also note – and I think there are going to be some questions on this – Clause 93 is used to cure technical irregularities so you can establish at an early stage that a whistleblower definitely does have the protections that follow on from the statutory right to be protected when you make complaints in accordance with the process.

**Ms UIBO:** Yes Madam Chair, my next question does mention Clause 93. Mr Lander noted that a declaration of protected communication of the kind provided for in Clause 93 would ordinarily be made in court rather than by an administrator decision-maker and that the power given to the ICAC in this clause ought to be reserved for the courts. Is there any particular reason why ICAC should be empowered in this manner?

**Ms HESKE:** So I would characterise Clause 93 as a procedural safeguard to cure a technical irregularity as opposed to – and it certainly does not allow any retrospective decision about a person's rights. What it does is that it confers protection going forward. So it is not what a court does which is litigate over a past-person's-rights. It is an administrative decision about how things proceed and how a person should be treated from this point forward.

It essentially does not come into operation until the ICAC actually makes a decision and communicates it to other people. So it is not a situation where someone has made a disclosure that is not quite right, like they have not followed the exact right process, and then someone else goes and does would be an Act of retaliation if the person was a whistleblower but because they have not done it correctly, then they are not.

So, sorry, if I can just explain what that is. The bill provides that you cannot take adverse Action against a person because they reported improper conduct. So it limits what you can do and in fact it makes it an offence and something for which you can be civilly and criminally liable. This would be a problem if the ICAC could then come in and say, 'No wait, we have decided that they were a whistleblower and you have done the wrong thing'. And that would indeed be something problematic in adjudicating people's rights. But what 93 actually does is allow ICAC to come in and say, 'Right, from this point forward, we believe they were making a genuine good faith disclosure. We are going to declare them to be treated as a whistleblower from this point forward'. So you cannot take adverse Action against them because they reported it to us.

You can take adverse Action against them for other reasons. For example, if they are a poor performing employee; or if they go and do something wrong, you can take Action. It is not like a blanket 'This person can now do anything they like'. It is just a protection to say, 'Right, you cannot sack that person because they reported this matter to the ICAC. Albeit, they did it through their supervisor first instead of going direct to the ICAC'.

**Madam Chair:** Any further questions?

**Ms UIBO:** Another question, thank you Madam Chair.

Where a person is charged with the offence of engaging in retaliation in course of management clause 100(5)(b) provides for a defence that the person believed that the conduct was a reasonable way of carrying out their role and responsibility as a public officer. Why does the bill not require that such a belief be reasonable?

**Ms HESKE:** This is the threshold for the criminal matter of retaliation. The bill provides a number of protections: one is the criminal offence charge; and some of the others are things like injunctions and directions to stop doing certain things that might interfere with the whistleblowers protection. You can make a simple claim for compensation.

This is just the criminal matter, and for that we set the threshold at malicious Action. If you took it down to reasonableness it would become negligence. Then you would find people criminally liable for negligent management. That is really problematic because managing a whistleblower is one of the most complicated management situations. You have a situation where people are taking different sides and there is a lot of tension in the workplace; trust has completely broken down; everyone is under a lot of pressure so it is easy to make a misstep. It would be pretty harsh if that misstep became criminal.

That does not stop the whistleblower from obtaining compensation. That is then handled in terms of looking at the Actions of all the parties that did anything wrong or whether they took steps to comply with guidelines.

**Madam CHAIR:** Are there any further questions or comments from the committee?

**Mrs FINOCCHIARO:** You mentioned earlier that if AGD staff were to be seconded to help out with ICAC, very robust and thorough checks would take place; although that is not in the legislation. Would it be a guideline?

**Ms HESKE:** The legislation gives the ICAC the power to do the checks – let me find the correct section.

**Mrs FINOCCHIARO:** If it has the power to look into staff, who is looking into the appointee and Inspector? Are those same powers – or is that same level of scrutiny placed on the people applying for the expression of interest, for example?

**Ms HESKE:** Is this about the ICAC staff or the Inspector's staff?

**Mrs FINOCCHIARO:** Sorry. You mentioned the ICAC staff, so there are powers to look into the staff. Following on from that, I was wondering if those same powers extend to the Inspector and the Commissioner. The expressions of interest come in and you have five wonderful applicants—is there provision in the Act for police investigation or biometrics, or all those other criteria for staff? Does that also apply for the Commissioner and Inspector?

**Ms HESKE:** No. The only limitations in relation to who can be employed by the Inspector are in section 141, which says the staff of the Inspector consist of persons who are made available under an arrangement with an agency, and persons engaged by the Inspector as consultants. That is all the Act provides.

**Mrs FINOCCHIARO:** Is there no provision for thorough scrutiny, like there is for the staff of the ICAC, for the Commissioner or the Inspector?

**Ms HESKE:** To be honest, the question was not considered during the development of the bill, and no, the bill does not provide for that.

**Mr SHANAHAN:** There is nothing stopping that happening on a voluntary basis, though.

**Mrs FINOCCHIARO:** It is an interesting question, though. You put your staff through a rigorous test; should you not be applying that to the top of the tree as well?

**Ms HESKE:** There was no consideration and rejection of it for some reason. It just was not considered.

**Mrs FINOCCHIARO:** Perhaps that can be something that we recommend.

**Madam CHAIR:** Are there any further questions from the committee?

Do our guests have any closing comments for the committee?

**Ms HESKE:** No, just that I refer to all the answers I have put in the document I handed you.

**Madam CHAIR:** I thank you all for appearing before the committee today and for providing the written answers to our questions.

That concludes the public hearing on the Independent Commission against Corruption Bill. On behalf of the Social Policy Scrutiny Committee, I thank all the people who provided submissions on the bill and participated in today's public hearing.

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The committee concluded.

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