

**THE PARLIAMENTARY JOINT SELECT COMMITTEE ON ETHICAL CONDUCT
MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART, ON
THURSDAY 11 SEPTEMBER 2008.**

Sir MAX BINGHAM AND Prof. JEFF MALPAS, PROFESSOR OF THE SCHOOL OF PHILOSOPHY, UNIVERSITY OF TASMANIA, WERE CALLED AND WERE EXAMINED.

CHAIR (Mr Wilkinson) - Sir Max and Jeff, welcome back again. I was going to say take two after last Friday when we had some teething problems with the electrical equipment but everything is working now, touch wood, so thank you for coming back. There is no need to either affirm or swear because that has already been done. We will leave it to you to prosecute your submission as you wish and then we will ask some questions either as we go along or, alternatively, at the end of your opening.

Sir MAX BINGHAM - Thank you, Mr Chairman, it is nice to have another invitation. What I would like to do, if it is convenient, is to make just a couple of very brief points and then let the submission speak for itself.

The first thing is I would like to make it clear that nothing that I have submitted is in any way intended to disparage the Tasmanian Police Service and I would like it known that I have been associated with the police service in one way or another since the middle of last century.

Ms THORP - That is impressive.

Sir MAX BINGHAM - Yes, but it is justifiable because I was prosecuting back in the 1950s and then I was a magistrate, and later a minister, and so on. Under Angus Bethune I had the opportunity to begin some substantial changes in the police service and over the last 10 years I have been delighted to see how Richard McCreadie and Jack Johnston - supported by Minister Llewellyn, I must say, for the bulk of that time - have been able to, as it were, realise the dreams that I had for the service back in those early years. I think it's got the stage where you can honestly say it's the best in Australia, and I would be very keen for it to be able to continue its developmental course. That is the first thing, so I am not suggesting that it particularly needs to be supervised any more than anybody else in public life.

The second thing is that I was prompted by the reported concerns of the DPP to put forward another suggestion that I thought you might think worthwhile, especially in the light of what I hear about restoring the number of members of parliament. If this occurs there will be many matters, it seems to me, of process - the kind of thing the DPP was worried about - that will need to be addressed. In private conversations with my friend Jack Johnston the idea arose that some oversight of this process might be necessary, and I know other names have been kicked around, but perhaps there's a need for a governance and ethics commission.

Peter was talking about integrity. I don't know how you wrap them all up together, but it does seem to me that it is going to be necessary for somebody - and I can't think of

anybody better than yourselves - to have a look at the holistic kind of system supervision that is going to be needed, not only on our experience to date, but looking forward as far as you reasonably can into the future. With those comments, I remember what the police prosecutors who were also witnesses used to say - 'I submit myself for cross-examination'.

Laughter.

CHAIR - I've got no conflict. In relation to that, the issue of the number of members in parliament has arisen yesterday and today. Can you see any correlation at all in the matters that have arisen over the last couple of years and the decrease in the numbers of members of parliament? Alternatively, we have had the types of allegations that have been manifesting themselves in the media over the last couple of years that this has always been a part of Tasmanian life.

Sir MAX BINGHAM - I hope you asked Peter Boyce that question because he'd probably be better placed to express a view on it. As a practising politician and somebody who was interested in things like Westminster tradition and so on, yes, I think there's a link. I think it has been a parallel process, the reducing of members and the changing of the roles of ministers and backbenchers that has come out of that, along with the politicisation of the public service and a whole bundle of similar probably minor but incremental changes. I think it is related. I think if you had a healthy parliament in which ministers relied on the advice of bureaucrats who served successive governments, whatever their colour - to paraphrase Bob Menzies, an independent public service is really the best guarantee of probity in government.

Mr MARTIN - Sir Max, it has been raised in evidence a few times in the last two days and you have just mentioned again the impact of politicisation of the public service. We haven't really gone into great depth on that, and you are probably a good person to ask if you could expand on that a little bit more. How do you think that has happened and why is it a problem?

Sir MAX BINGHAM - I think there are two comments I can make. One is that what we have seen is the increasing reliance by ministers on the advice of their personal retinue - the minders, as people seem to be calling them - and I think I noticed the process beginning back in the Whitlam days of putting heads of departments on contract rather than having the old style of the 'Sir Humphrey' kind of public service.

Mr MARTIN - What problems does that create?

Sir MAX BINGHAM - I think it generates an atmosphere, along with all these other things that I see, of people not providing the advice that ought to be given but the advice they think the Government of the day wants to get.

Mr MARTIN - Has it changed a lot since your time in Parliament?

Sir MAX BINGHAM - Yes. I think the trend to put departmental heads on contracts began under the Gray Government. One case, I remember, was the Director-General of Education. I was minister at the time and I expressed a strong preference for him staying on the permanent footing he was on. I think we had a pretty good working relationship

but we did not agree about everything. I think for a minister to have the opportunity to test the wishes of the Government or his wishes in relation to his department with somebody who does not have an axe to grind has to help. It has to promote better government, and I link that in with what I was saying about a governance branch of the commission.

CHAIR - So, in short, really what we are saying is that the contracts create the 'yes' person mentality as opposed to somebody who is willing to test the minister to see what they are doing is in fact correct or not?

Mr McKIM - Yes, *Minister* are the words you are looking for, Mr Chairman.

Prof. MALPAS - Could I add something to that because there is one very clear way of specifying what the problem is with those appointments and that is that there is a potential conflict of interest. The conflict of interest there is the personal interest of the individual concerned, whose own interest is perhaps best served by providing advice that is congenial to the minister who is requesting it, rather than the interest of the service as a whole or the interest of good governance or whatever. I see that as a straightforward conflict.

Mr MARTIN - Their futures depend on it.

Prof. MALPAS - Their futures become dependant, yes, so I would say it is a conflict of interest.

Ms THORP - The same issue about contract appointments to the upper levels of the public service could be expanded across, I suppose - and I would be interested in your thoughts on this - to board appointments? My understanding is that there are some hundreds of board appointments around the State that are direct government appointments that add up to a whole level of governance, really. There does not seem to be much examination of them. Do you have any feelings about that?

Sir MAX BINGHAM - I think it is a matter of degree, isn't it? Going down the path of traditional appointment, for instance, it is difficult to know how best to do it. In a State the size of Tasmania I do not think there are all that many people who are qualified to be on boards of the kind you are talking about and I think you probably need to set aside the political affiliation aspect as far as you possibly can and get the best people for the job.

Ms THORP - Would you see any merit in a register of interest for people who would be prepared to go on different boards?

Sir MAX BINGHAM - I do not see why they should not, if they want to undertake public service. What I have advocated about this commission or whatever applies to everybody on the public payroll.

Ms THORP - Thanks.

Mr McKIM - Just as a point of process, I do have a number of questions, Mr Chairman, but maybe we should give Professor Malpas the opportunity to give an opening statement, if he wishes, so that time does not preclude him getting the opportunity to speak to us.

Prof. MALPAS - I certainly think it is important that that submission we have given to you is a joint submission. Sir Max and I have talked about a number of these issues together and we are pretty much in agreement on all of them. I cannot remember anything on which we have real disagreement. But there is a difference on emphasis and what I would like to focus attention on is this notion of ethics.

The way that I and Sir Max have been talking about it and a lot of our material has been in terms of an ethics commission or an ethics in government commission or whatever. I actually think that focus on ethics is absolutely crucial. I think it is important because this is not a commission that ought to be primarily concerned with simple illegality in any narrowly defined sense. I think there is a fundamental challenge for us, if we are to have good and effective government, that we also have ethical government.

So when I talk about ethics I am not talking about the particular commitments that people have on questions like euthanasia or any of those well-established issues of moral or ethical dispute. I am actually talking about absolutely fundamental concepts - like trust, respect, honesty - the sorts of things that you find in statements of values and codes of conduct across the board, across public and private sectors around the world but which unfortunately very often do not get much further than the pieces of paper on which they figure. I think that is particularly true within government. We have a State Service Act which has a code of conduct which sets out various principles - various ethical principles, I emphasise. I was involved in promulgating that legislation within the State Service. It was very clear that that was to be understood at setting out an ethical basis for conduct in the State Service.

One of the things that has greatly disappointed me is that it does not seem to have worked in that way. Instead it is seen primarily as a disciplinary document. The commitment to things like the apolitical character of the State Service, which is a value that is enshrined in the act itself, seems to carry very little weight in the way the State Service actually operates. That is not to say that State Service employees do not believe it is important but they find it very difficult to see how that can be carried through. I think that is very worrying. I do not think that it is just characteristic of the Tasmanian State Service; I think that it is true of the Commonwealth public service as well. The apolitical nature of public service advice is supposed to be one of the values to which the service is committed. But in fact it is a commitment that is invariably not realised, not kept.

So when I talk about ethics it is about absolutely fundamental things. They are actually the principles and commitments that make possible a functioning society, community and government. Within the private sector this is being recognised more and more. Look at any of the business ethics literature over the last five years or even 10 years and you will see the concepts that have been figuring at the centre of discussions of what counts as good business are increasingly concepts like the concept of trust - which is actually the most important one.

There is also the absolute necessity of developing adequate systems of consultation, the building of confidence within organisations, systems that allow people to communicate or to dissent when that is necessary. I actually think that one of the things that we have done within our public service, and to some extent within our political domain, is to cut

down on some of those basic commitments. Certainly I think that is so within the State Service.

When I talk about ethics I am not talking about quality assurance structures or risk management structures; I am not talking about political correctness. I am talking about the basic commitments that enable us to operate as members of the community, as members of an organisation, as members of a government if that be the case. I think that is an absolutely central point, particularly when one of the issues that ought to be concerning us is how we actually rebuild trust in government. We all know that one of the features of public life in societies like ours over the last 20 to 25 years has been that people increasingly say they have less and less trust in government and in public organisations generally.

So I want to put ethics at the very centre of this. I think that it has to be at the centre and I think that it has to be a conception of ethics understood in this fundamental sense. That means this is not just about icing on top of the cake. Ethics is not some luxury you buy in when everything else is satisfied. It is actually at the heart of good and effective government, just as it is at the heart of good and effective business and at the heart of good and effective organisational structure. I am not just saying that on the basis of a philosopher who has his head in the clouds and likes to theorise about these things. I am saying that on the basis of clear empirical evidence that suggests that, for instance, in the private sector the most effective organisations are actually those that maintain high levels of trust internally and high levels of trust externally, and there is a very close relationship between the two.

Sir Max and I have a structure that we have put to you and, as I say, what I want to emphasise is the ethical orientation of that structure. There is a lot more we can say about that. One thing that I would add is that it means that I am probably more in favour, and perhaps this might be some point we disagree on, of talking about an ethics commission than, for instance, an integrity commission. The reason for that is perhaps a little nuanced. Sometimes the notion of integrity and the notion of integrity systems have come to be associated with a set of what are essentially quality assurance measures, risk management measures and other measures for instilling certain sorts of structures within organisations. My view, and it is a view shared by some of my colleagues, particularly in philosophy - and probably the most notable is Baroness Onora O'Neill, who is the President of the British Academy at the moment - is that those sorts of structures, quality assurance structures generally, are often antagonistic towards ethical conduct. I can say more about why I think that is so, but it is very important both in terms of practice and I think in terms of public perception, because I think there is a great deal of public distrust of quality assurance mechanisms. Therefore the commission that we are talking about should be seen as a commission that focuses on the importance of maintaining strong ethical commitments and strong ethical judgment in a way that is not reducible simply to any code or any quality assurance mechanism.

Mr McKIM - There is an appendix to your submission and you have prepared an outline structure for a commission for ethics in government. You have suggested that the powers be as for royal commissions and boards of inquiry, and obviously in the Tasmanian context that would actually be commissions of inquiry, including electronic surveillance with a check and balance similar to the one that Tasmania Police are currently required to go through. Could you confirm that is your intention there.

Secondly, you have suggested that staff be appointed, as required, by secondment or otherwise from the Public Service and Tasmania Police. There are two matters that I would like to ask you about there. Firstly, are you suggesting that there be no permanent staff and that they only be seconded as required? Secondly, what would your recommendation be in the event that there was an allegation made against Tasmania Police in relation to who ought to conduct that particular investigation?

Sir MAX BINGHAM - I guess my proposal was coloured by my Queensland experience where we did in fact borrow a number of police from the Queensland Police Service. Then they were mostly people who had served through the Fitzgerald Commission years before the CJC came into being and took over that work, so they were pretty well known around the Queensland Police Service. We had to take special care when those people went back to the service to make sure that, as far as we could, they were put into an environment that was going to be congenial to them.

The Queensland Police Service of course is a lot bigger than the Tasmanian but the same principle, I think, needs to apply. You would have to be very careful about where you put ex-CMC officers so that they were not victimised by other members of the service, especially if they had been efficient in the carrying out of their duties in investigating police.

Mr McKIM - So you do not see an actual or even potential ethical issue arising from Tasmania Police officers investigating someone who may, until very recently, have been their boss in Tasmania Police and who may actually be their boss or a subordinate to them again in the future? Do you see an actual or ethical issue with that circumstance?

Sir MAX BINGHAM - There are some difficulties about it, and I remember in my early days as the Leader of the Opposition back then there were some allegations against prominent political figures. Tasmania Police borrowed a couple of detectives from Victoria to carry out the necessary investigations, and we did that sort of thing in Queensland, too. The National Crime Authority of course has people seconded from all around the place, and by recognising that these problems do exist you can go somewhere to ameliorate them. It is my view that if you have a commission of the kind I've suggested, then that will provide a capsule of insulation within which seconded police officers and public servants can work, and which will protect them against the wickedness of their enemies when they get back to their home department, to dramatise the language of it.

Prof. MALPAS - I think it is important to distinguish between different sorts of complaints that might be made. There are many issues that are probably best investigated by an internal affairs body within a police service. That is a model that operates in many jurisdictions and for very good reason, because in some cases you actually need a certain amount of inside knowledge in order to be able to investigate those matters. So I don't see a problem in terms of there being either an ethical or a practical problem in terms of having some complaints investigated internally within a police service.

But there are some complaints that it would be inappropriate ethically and probably imprudent to have investigated in that way, and certainly where issues concern, for instance, the commissioner, it seems to me extremely sensible to have another body to

handle those sorts of investigations, and also to have another body to deal with problems that might come up with respect to internal investigations normally. But I do think it is important to distinguish between the different sorts of complaints that might be made.

On the issue of the staffing that might be required for the sort of commission that we are envisaging, we accept that there is going to have to be a small number of permanent staff, but in terms of the staff that are brought in when a particular investigation is under way, or when particular educative activities are being undertaken, it doesn't seem to me that all of those should be staff who are permanently located within the commission. I think that is Max's view as well. We are talking really about a small skeleton staff that maintain the ongoing work of the commission who are then supplemented by people brought in with specialist expertise to undertake some of the investigative and educative activities.

Mr HALL - Sir Max and Jeff, when we heard the last submission, we talked with Professor Boyce about the fact that in Queensland and WA there are now watchdogs in fact over the actual crime commissions themselves on issues they have had. I am making a presumption here that point number 6, supervision by a parliamentary committee, is really a watchdog committee. Is that what you are saying?

Sir MAX BINGHAM - Absolutely, yes.

Mr HALL - Okay, that answers that. Jeff, you made comment in regard to QA systems that are antagonistic towards good ethics. Would you mind explaining that to me? I'm having difficulty getting my head around that one.

Prof. MALPAS - One of the features of ethical practice and expertise is that it depends on judgment, and it is not judgment that is easily reducible to a single set of codes or rules. It is not a tick-a-box system. Read any philosopher or ethicist you like, and you can get that message, whether it is Aristotle or Kant. One of the problems with quality assurance measures - and there are some very interesting developments of this in relation to ethics as it operates in relation to research practice where we have very well established mechanisms to regulate research practice in hospitals and universities, and so on - is that has actually degenerated in many cases into, first of all, a tick-a-box or a quality assessment mechanism, or a risk management system.

Risk is an interesting concept because it's a concept that allows you to quantify things. It allows you to do tick-a-box stuff, but risk and ethics are very different concepts. Sometimes in fact ethical conduct might require that you undertake certain risks in extreme cases, so ethics and risk are actually distinct concepts that ought not to be conflated, but certainly within some quality assurance and management systems they are because the aim of ethical review is very often to reduce risk. When that happens you are in danger.

But to go back to the issue of judgment, ethics is fundamentally about judgment. It is about being able to exercise judgment in all sorts of cases and, as I say, it is not reducible to the tick-a-box or the usual sorts of mechanisms that we use when we talk about quality assurance. One of the ways in which that has been brought out in the UK is through the work I mentioned, Onora O'Neill's work. Onora is probably one of the most if not the most respected philosopher and public ethicist in the UK. She has been involved in many

bioethics inquiries, she is a baroness and so she is in the House of Lords. She is a major public figure. She has made a number of claims about the way in which on the one hand we seem to have lost trust in public organisations and, in some cases, in professions as well and yet, on the other hand, we continue to have to trust in them.

So, for instance, if you fall ill tomorrow and have to have surgery, in the end you are going to have to trust the skill and expertise of the surgeon to carry out the operation in a way that is not guaranteeable or certifiable by any quality assurance measure. Judgment is something that we cannot deal with in that way but more than that, one of the problems with quality assurance measures is precisely that they try to quantify what are essentially qualitative issues. Judgment is a qualitative issue. The quality assurance mechanisms typically try to focus on things like excellence and quality, but they do it in a quantitative fashion. That means, for instance, in a university context, I do not know of a single academic who has any confidence in any of the quality assurance mechanisms that operate within universities - and I mean working academics, not mean vice-chancellors and chancellors.

Why? Because, for the most part, we know that they do not connect at all with the things that we really do, so what you have is a hollowing out. A term like 'excellence' comes to function within a quality assurance system but the meaning that it has in terms of excellence in teaching, which are all matters of judgment, do not connect up with it at all. So not only do you have a corrosion of the capacity to judge and a reduction of judgment down to a tick-a-box arrangement but you also have a hollowing-out of terms. I think that has happened within aspects of the State Service in which many State servants and public servants no longer view, for instance, ethical notions like trust, honesty, apolitical judgment and so on, as meaning anything significant because they are simply viewed as part of a quality assurance mechanism which you tick off that is to do with reducing risk, managing and controlling difficulties rather than meaning anything substantive.

I think what we have to do is find a way of getting back to real meaning that is attached to concepts like trust and honesty and that is not just a matter of going through the motions and ticking the boxes and being willing to sign off on a piece of paper that says everything is okay. I want to shift us back. I think we need to shift back to a substantive conception of ethics based, if you like, on principle, not based in procedure. Interestingly enough, when the State Service Act was first introduced and I was involved in the discussions and meetings within the State service in presenting the act, one of the ideas we were using to promote it was that it represented a shift away from a narrowly conceived process-oriented structure in which all that mattered was getting the form right - that you had to meet, as it were, outward measures - and instead shifting to a notion of principle that put the emphasis on the ability to develop and exercise expert judgment.

There is a lot of literature on this. For instance, there is a very important set of books by a guy called Mark Powers on the Audit Society, there is Onora O'Neill's work. I have been involved in trying to do some work in that area as well. I think it is indicative of the problem here that within the latest work on business ethics in the private sector quality assurance mechanisms are not seen as effective ways of promoting good management or ethical conduct but as barriers to that because of the way they set up excessive bureaucratic structures, take away the emphasis from judgment and hollow out key terms.

Mr HALL - Thank you for that explanation and I understand where you are coming from. Without being derogatory at all toward academic ethicists, we did have the statement that academic ethicists are not always capable of understanding the real life circumstances in governments which can give rise to ethical problems or dilemmas. It might be one for Sir Max.

Sir MAX BINGHAM - Really? I'd have thought it was for my partner.

Laughter.

Prof. MALPAS - I think it depends on the ethicist. I think that is a widespread view. When I was first involved, years ago, with NH&MRC work, National Health and Medical Research Council, oversight of ethical projects, one of the issues I raised - and it might have been in a session that Don Chalmers was at - if you look at the old composition of ethics committees, and I do not think it has changed much, the people you had to have on an ethics committee include usually a lawyer, usually a doctor, a chair and then normally a couple of lay people and a priest or somebody from a religious background. I can remember sticking my hand up and saying, 'Hang on, why should we have somebody from a religious background, why not have a philosopher?' Response, 'Because philosophers just complicate matters'. I am willing to bet that in very few cases where that claim is made have the people concerned engaged with a philosopher or with a philosopher who knows their stuff. So I think it very much depends on the philosopher and the emphasis.

My work and the sort of claims, the evidence, I want to put to you today is not based purely on a theoretical examination of or, say, a reading of Aristotle or a reading of Kant. It is based on the work that I do with private sector companies. Three weeks ago I did a seminar with Pitt and Sherry who invited me along because they were interested in improving the operation of their company through looking at instilling stronger ethical commitment within the organisation, through many years of talking to public servants and State servants. So the concerns I have about ethics within the public and State service reflects the concerns of ordinary public servants and State servants as well as people in senior positions.

The issues about politicisation that Max alluded to I can confirm on the basis of conversations I have had over many years in a professional capacity with people in senior as well as junior roles. So I am not talking to you on the basis purely of theoretical considerations alone but on the basis of a set of theoretical considerations that are informed by practical experience and practical involvement. Of course, I have not been a politician. I am not sure I would want to be. But I do think I have spent a great deal of time trying to listen to the advice and experience of people like Max. I have spent a lot of time talking and working with other people within government and with other people involved in different sorts of government because it is not only State government that is at issue here, it is local government with whom we do a lot of work. It is also, as I say, State servants, including police officers and police cadets. We do the ethical training down at the academy.

So the account of ethics that I am giving you is one that we have aimed to develop in a way that is based on people's practical experience and can engage with the commitments and the values that they see as important.

Ms THORP - Why would you not want to be a politician?

Laughter.

Sir MAX BINGHAM - Just before you go on with that one, could I add a little to the Jeff's answer to the previous question. So far as his accreditation to the real world is concerned, we met when he invited me to come and join him on the board of a body that he was setting up in the School of Philosophy called the Centre for Applied Philosophy and Ethics. I had already had some contact with the organisation in Sydney, St James. We had a kind of joint vision at that stage of creating a Tasmanian model of that kind of institute. For one reason or another, it has not been successfully publicised in the way that the Sydney outfit has, but I do assure you that his feet have been fairly firmly based on the ground.

Prof. MALPAS - In terms of the training we do for nurses alone, we are training somewhere around 1 000 nurses a year. As I say, we are doing the training for the police cadets down at the academy. I have not kept up to date with how many we are putting through there each year. We are just now establishing an agreement to do further teaching down in the Medical School. I also do work with a very distinguished professor of medicine from the University of Sydney, Narelle Likus. We have been working with an international group around concepts of human dignity, human suffering. I have actually been involved with Narelle. We did a tour of some Chinese hospitals, talking to cancer patients and looking at the ways in which you put into place concepts of ethics that actually address the diagnostic issues that doctors have in those sorts of situations. So there is a strong leavening of practical experience that is at issue here.

CHAIR - If we were in a courtroom we would be accepting your expertise, no question about that.

Mr BEST - I am really interested in this quality assurance aspect - the bear pit of parliament. Since I have been in Parliament, I must admit going back most of the debate was about policy. It has now become more, it seems to me, of a blurring or a shading of boundaries and it has been more about accusations and so forth. Some motions that are put up are put up, I believe, not necessarily in the knowledge of anything that is substantiated by it but see what shakes out and this sort of thing. Unless you are going to rewrite parliamentary procedure, I am not sure how you are going to change that. You are talking about a whole ethical approach.

Prof. MALPAS - It is an ethical approach that most of us are familiar with.

Mr BEST - Parliament itself may have to change in the way that it deals with it.

Prof. MALPAS - Parliament has changed over the years. I am not sure that what I am suggesting is a change in parliamentary procedures. It might be a change in political culture and I think that is actually the important level. When I talk about organisational ethics in a professional context, I usually talk about three different levels at which you can try to engineer ethical practice within an organisation. One is the structural level and that is the stuff you can write down on paper. It is the lines of communication within an

organisation; it is the particular roles that you have; it is some of your processes and procedures. That is the structural level.

There is another level, which is the behavioural level. It is the character of individuals. One of the things that we tend to do with organisations, certainly in private sector organisations as well as public sector, is when there is a problem usually we try to address that problem structurally, we restructure an organisation, we create some new body, or else we fire the person who was the problem.

When it comes to real unethical behaviour within organisations, usually neither of those are very effective. Certainly they are not effective on their own because the real level at which ethical behaviour is determined is what I call the cultural level. By that I mean sets of behaviours that are promulgated within the organisations exemplary, that are accepted, modes of behaviour that are exemplified by leading figures within the organisation, things of that sort; expectations on the part of individuals within the organisation and within the wider community.

Our proposal is initially at least to look at a structural change within Tasmanian Government - that is institute a new body. That will not work, however, if it is not coupled with a move toward some cultural changes as well. The behavioural changes usually do not make much difference. You can fire a few people. Sometimes that changes things for a bit.

Mr BEST - Who is actually involved in this proposal? Is it just the Government? Or when you say 'government' are you talking about advisers giving advice, minders giving advice. Government has access obviously to people from departments more so than opposition parties but is it upon all of us?

Prof. MALPAS - It would mean, for instance, educating politicians. When we first introduced the State Service Act the Office of the State Service Commissioner then was operating in a slightly different way. The State Service Commissioner and I both took the view that it was not going to work to simply educate members of the State Service about the act. We had to actually get politicians to understand the nature of the act. The reason for that is that the biggest problem that we identified in interviews with senior State servants was a failure on the part of ministers and other politicians to understand their obligations and the limits of their powers in relation to members of the State Service.

Mr BEST - Are you proposing to educate everybody?

Prof. MALPAS - I think you have to educate everybody.

Mr ROCKLIFF - Ongoing education, not just when they arrive in Parliament, not just when they become a minister, but ongoing.

Prof. MALPAS - Ongoing.

Mr BEST - And for all advisers?

Prof. MALPAS - The thing is that if you get the key people then you're going to get a lot of other people as well. Within most organisations the ethical character of the organisation is established by the CEO - in the private sector; it is established by the leaders within the organisation. Those people have to exemplify the right sort of conduct. If they don't then they will encourage other forms of conduct within the organisation.

Mr BEST - So is it the Speaker of the House?

Prof. MALPAS - The Speaker of the House is particularly important, but probably the Premier is very important as well, and so are the ministers.

Mr BEST - And the leaders of each party.

Prof. MALPAS - Yes. And there has to be an understanding of what the proper relations are between those people and the senior servants and senior figures within the State Service, and I think that's been lacking. I am saying that again on the basis of interviews and conversations I have had in a formal role in a professional capacity with members of the Tasmanian State Service in particular.

Mr MARTIN - One of the debating points in relation to all of this is whether a body should have retrospective powers. There was a view expressed that there should be a line in the sand drawn now and it shouldn't be able to look back. Do you have a view on that?

Sir Max BINGHAM - Yes. One of the skills that this body is going to have to acquire is the ability to assess very quickly whether a matter is worth investigating or not. That was certainly the Queensland experience. I'd have thought there would be a very good case for saying that any body you decide to establish should be able to look at whatever matters are put before it and make up its mind whether it thinks they are worth pursuing or not. I can't make any better suggestion than that about what I know is the problem of retrospectivity.

Prof. MALPAS - I would agree. There are problems about retrospectivity but I think in the end you are going to have to rely on the judgment of the commissioner in some of those areas. The danger in drawing a line in the sand is that there might well be issues that a commissioner might find need to be investigated that go back earlier than the establishment of the commission. So I think there are dangers about simply drawing a line in the sand and saying before this you cannot look.

Sir Max BINGHAM - The Queensland legislation specifically provides for retrospectivity.

CHAIR - It could only be the way to deal with a matter, though, couldn't it, because the only way you can find out what's happened now is by understanding what happened before. Therefore if you're unable to be retrospective in your investigations, you'd be unable to properly carry out many investigations properly.

Sir Max BINGHAM - I think what we're both saying is that the idea of a separate royal commission, or whatever, is just not sensible. If you create the sort of body that we've been talking about, one of the things it is going to have to start off with is what is on the table at the time of its creation and then decide whether it wants to do anything about them or not.

Mr MARTIN - One of the criticisms often thrown up by opponents to an ethics commission is the fact that in some of the current examples, like WA, people were, because of publicity, basically tarred and found guilty without ever having a day in court. In other words, the publicity during the hearing really deprived them of natural justice. What is your view on that plus how do you prevent that from happening?

Sir MAX BINGHAM - I do not know that you can prevent it entirely but there are a number of factors that can be used to reduce it. The first thing again is one of exercising this early skill that the commission has to employ. It has to decide whether this particular investigation is going to be an educative one or a quasi-criminal investigative one. If it is going to be investigating some stuff that needs to be reported on as a matter of public education or public information then its hearings should be public and the whole process should be public. If it is a quasi-criminal investigation a different set of principles apply and it ought to be investigated privately until the investigation is concluded.

Mr MARTIN - What is the Queensland experience there?

Sir MAX BINGHAM - That was the way we operated.

Mr MARTIN - So the sort of criticism of the WA body did not happen in Queensland?

Sir MAX BINGHAM - No.

Mr MARTIN - Because the guidelines are very similar.

Sir MAX BINGHAM - There were all sorts of other criticisms but not that one.

Prof. MALPAS - I would also add that one of the problems we have now is that we have cases where often unsubstantiated rumours or allegations are raised in the media or elsewhere and under our current procedures there is often no adequate way of being able to deal with those things. So, on the one hand, it is not the case that you can completely prevent damage to reputation that might ensue from an inquiry, but on the other hand it is already the case that damage to reputation often occurs in a way that is completely uncontrolled. So I do not think we are looking at a situation where suddenly we are going to institute a new body that will in some cases damage reputations. There is already damage occurring in a way that we cannot manage very effectively. At least with this sort of procedure there is the opportunity in some cases for clearing of people's names and certainly a way of managing some of these issues.

Sir MAX BINGHAM - I think as a last resort you have to depend on the people you choose and their judgment. Human institutions are fallible and people do make mistakes from time to time.

Mr MARTIN - Yes. Whatever guidelines and structures you put in place it comes down to the human beings who are involved.

Prof. MALPAS - The other thing I would emphasise, too, is that no matter what system you put in place it will make mistakes. You do not put a system in place assuming that it is going to get everything right. There is no such system.

The second thing is that I did hear Peter talking about the need for a commission or a body of this sort to be engaged with the community. I think that is very important. In fact the effectiveness of a body like this will depend on its ability to retain community support and be seen by the community as, generally speaking, operating in a fair and above-board fashion. So it is actually very important for the commission that it makes the right judgments and not be seen to be pursuing people unfairly or acting improperly in any way. As soon as a commission of this sort loses public support then it loses the capacity to do its job properly. That means it is very important to get the right people on the commission itself.

Mr MARTIN - One of the other issues that has been debated is whether a body should have the power to investigate police.

Sir MAX BINGHAM - Yes.

Prof. MALPAS - It should.

Sir MAX BINGHAM - Yes, anybody on the public payroll.

Mr McKIM - We have heard evidence from the Director of Public Prosecutions that in his view Tasmania Police lacks statutory independence. In making that argument he is relying on the -

Sir MAX BINGHAM - Under the direction of the minister.

Mr McKIM - Yes; the Police Service Act which says that the commissioner discharges his responsibilities under the direction of the minister - that is section 7(1). In the view of the DPP the minister in this case is the Premier under the relevant administrative arrangements order and therefore he makes the argument that as the police is a hierarchal organisation under the control of the commissioner, it therefore is in its entirety under the control of the Premier. He also refers to a New South Wales parliamentary committee which found that a very similar provision of the New South Wales act in the view of the committee meant that power extended to operational matters, and you have experience at the coalface in this area. Just to be clear, the Solicitor-General has a contrary view, although we have not seen his advice yet. But the Attorney-General has, in parliamentary Estimates Committee in response to questioning by me, made it very clear that the Solicitor-General has a contrary view. I wondered if you had a view about whether you thought that the police were independent, whether there were any separation of powers between the Government and the police and if it is not independent, does that lack of independence extend to operational matters?

Sir MAX BINGHAM - There is no statutory basis for independence of the police. I think to understand that, you need to go back to the origins of the British Police Service. People who talk about independence of constables in their decision-making and so on are basing themselves on the English experience which is of a police service built up on a neighbourhood footing where every citizen is, in effect, a police officer, but only those specially appointed can exercise police powers. It is this sort of chummy family neighbourhood kind of arrangement that has led the English always to resist the creation

of a national police force in England and so they have dozens of police services dotted around their countryside.

The Australian model for each of the colonies was based on the British experience in Ireland which was an occupied country in the nineteenth century and it had a police service of a paramilitary kind run by a series of police magistrates around the country. I was a police magistrate in Tasmania and it was not until I took the magistrates out of the public service that word 'police' was dropped out of their title. Historically, the picture is perfectly plain, I think. The police service was an arm of the executive government subject to the direction of the minister like any other department. There has been some confusion of thought about that. Sooner or later there are judicial decisions both ways across the country. Sooner or later the penny is going to drop, I think, and people will recognise that our history is not the English police one but the Irish paramilitary one. So I do not have any difficulty in reasoning that when the act says, 'under the control of the minister', historically it is simply referring to what all the previous acts said, back to the middle of the nineteenth century.

The AFP has a different provision which endeavours to draw a line between policy matters and operational matters, and it is not bad. I have not been able to improve upon it but I am not a draftsman. But if the committee is interested in this matter then certainly the Australian Federal Police Act ought to be looked at because it does have an attempt to deal with the justice problem.

Mr McKIM - In your view, and this is a supplementary question, Mr Chairman, should the committee consider recommending an amendment to the act to address this issue?

Sir MAX BINGHAM - I think that is a matter for the committee to decide and a matter for its judgment. I simply warn that, in my experience, trying to define, on the one hand, matters of policy and, on the other hand, matters of operational concern is likely to lead to a certain amount of difficulty. That is why I say I do not know that the AFP provision is a perfect one but it is probably the best you could do and if the committee decides to try to clear up this - I think it is a bit unclear - then that legislation might be a good thing to copy. Until then, I am with the DPP.

Laughter.

Mr McKIM - Thank you, Sir Max, I appreciate that answer. The second question is certainly to both of you gentlemen -

Ms THORP - Is this part one or part two?

Mr McKIM - This is the second question and I will put both parts in one, just to avoid confusion, Lin. We have spoken a lot about a particular body which the committee may recommend but of course our charter is far wider than just consideration of any new body. We are charged with reviewing existing mechanisms currently available to support ethical and open government and making recommendations in relation to any mechanisms which might promote those aims. So my question to you both is firstly, do you have a view on whether it would promote ethical and open government in Tasmania if we had State-based political donations disclosure laws? That is the first part of my question. The second part is do you think it would promote ethical and open government

in Tasmania if people who advertise politically were required to disclose firstly their identities and secondly the source of their funds?

Sir MAX BINGHAM - Yes to both.

Prof. MALPAS - I would say yes to both.

CHAIR - I could talk with you for quite some time, but the time doesn't allow, in relation to the comment that people now are not as trusting in their professionals as they used to be. You have only got to go back and read documents in the Second World War. There was this blind trust in the lieutenants and the colonels and whatever they said they would do, without even thinking whether it was right or not right. The books now, Kokoda, et cetera show how crazy a lot of that was. Do you think we have got to a situation now where the community is becoming, I believe, more informed as to the day-by-day lives of parliament because of the press because of the TV, it always in your fact so to speak, that it is a situation of the more that you know the more that you realise that you do not know and therefore the more you mistrust?

Prof. MALPAS - There is certainly interesting sociological work on the effect of the media on the way in which people understand the roles, particularly the roles of people in public life. There is an interesting question about whether or not we actually trust less or whether we simply say we trust less. This is the distinction that Onora O'Neill makes.

I actually think, though, that this is not primarily about increased information. There is certainly additional pressure on people in public life; there is additional scrutiny. But I think that it is more due to something that I think a very famous social theorist has called the 'corrosion of character' and which I think of as the corrosion of commitment. I think that across our society there has been a decline, if you like, in the idea that regarding ethics, and when I use 'ethics' I use it in a very general sense, there is any set of universal commitments or base level commitments that we all adhere to. I think that has been a product of a whole range of things, one of which is actually the decline of organised religion. I do not have any religious commitment myself. But it has meant that for many people, I think, there has actually been a loss of the idea that there are basic commitments that we share and I think that has been exacerbated by an increasing pragmatism or instrumentalism, particularly in politics. For instance, earlier the question 'What is truth?' was asked. It is a question that always pricks up a philosopher's ears. I think we have actually lost any sense that there are some really basic truths.

I am a very old-fashioned philosopher in way. I think truth is a very important concept and one that should not be lost and should not be displaced by notions of spin and that when we lose a sense of truth that means losing a sense of the facts, the evidence, the real world things on which our decisions are based. If our decisions are not based on the reality of things, we are going to get things wrong.

Ms THORP - Most unpopular political decisions on occasion.

Prof. MALPAS - Yes. But when it comes to unpopular political decisions, one of the crucial things for instance about process within government is not just that it has to be seen that the process is fair and equitable but it has to be seen to be credible. One of the things that has happened over the last 10 or 20 years, partly because of the development of an

audit and quality assurance mentality that attacks professional judgment, is that it is no longer the case, for instance, that experts in particular areas are seen as having some better access to the truth of the matter than anybody else does.

I think that is a real worry. We saw that I think particularly at a Federal level during the period of the last Federal Government when it was quite common for academics on matters like climate change to be attacked and ridiculed, irrespective of their credentials, and it was almost as if anybody could have a view on these matters because it was all a matter of opinion and spin.

There have been a number of factors that have led to this unwillingness for people to say they trust any more. Part of it is a loss of clear moral orientation for people, which is not necessarily a bad thing because in the end ethics ought to be about our ability to make our own judgments. At the same time there has been the development of a sense of pluralism - relativism, according to which there really are no judgments that are sound anyway - and the development of a cynicism and scepticism about there being anything on which you can found things.

Those are broad social movements and they are very hard to address. Obviously I am not suggesting you can address them here but I do think that when it comes to matters of government, and where we do have some ability to set up structures and to develop different sorts of culture, one of the things we ought to be doing, one of the areas where we should be leading opinion, is trying to return attention to sets of very basic ethical commitments that in fact we all have. Onora O'Neill says we have not stopped trusting, we have just said we have stopped trusting. We do still trust, we do still in fact have a commitment to honesty and a commitment to respect, because if we did not our ordinary social interactions would fall apart.

I am suggesting the possibility of going back to those sorts of basic commitments, reinstating notions of evidence in judgment, reinstating notions of credibility, making clear, when government decisions are made, the evidence on which they are based and making it clear that those decisions are indeed evidentially based. I think we have lost sight of some of that, partly because of a reliance on notions of spin, partly because we are not sure that the community really is that concerned about ethics anyway. I think they are. Our job ought to be to reinforce those sorts of concerns and to raise the expectations of the community about what politicians and what government can and should be doing.

Ms THORP - My concern is twofold, one of which you have addressed to a certain degree: how do you protect innocent people from being dragged through the media just by the simple fact of being asked to appear within a commission like this? Also, what consequences should there be for people who use this system, if you like, to try to get at somebody? How do we avoid that?

Sir MAX BINGHAM - Taking the second part first about people who make false accusations to the CMC or whatever it is called. I think the law has to provide for that to be an offence and I think it is in Queensland.

CHAIR - It is here under the Police Offences Act if it is a statutory declaration.

Sir MAX BINGHAM - Yes, quite so. I am sorry, the other bit of the question?

Ms THORP - It concerns the protection of innocent people - the civil liberties side of it. I think it is a good quest, if you like, to make sure that good behaviour is paramount and if people do the wrong thing that there are going to be consequences. That is how it should be, but in our eagerness we should not lose other valuable things.

Prof. MALPAS - This is something we have touched on a little bit already. Certainly you cannot put absolute protections in place, we know that, so there may well be cases where innocent people still suffer some harm. That is always a possibility. But one of the key elements here is the judgment of the commissioners. It is going to be very important that they be able to look at complaints as they are received and that they then judge whether or not those complaints are prima facie worth pursuing. It is going to be very important that those judgments are soundly based. Where there is an instance where a complaint is pursued on the basis of prima facie evidence that suggests it might be worth pursuing, obviously there have to be mechanisms that will ensure the matter can be fairly heard. In a lot of cases that may be a way of minimising damage to some reputations because it is very much the case at the moment that allegations are made and accusations fly around and rumours abound about what people may or may not have done. That can sometimes be more harmful to a reputation than the ability to go through some more formal process. I would not expect a commission of this sort to be publicly pursuing anything that is clearly a vexatious or frivolous complaint. I would expect that where a complaint was falsely made on evidence that was falsely declared it would, indeed, be subject to all of the normal consequences that would follow.

Mr BEST - What if, for example, I wanted to put in a complaint about you and I had a bit of evidence but really, though, I just want to slur your name? So I am going to put this complaint in, knowing that there is probably enough there to be investigated but really what you have done is not that bad. So, after I do that, I go out to the media and paint it up bigger than Texas. That, to me, is unethical behaviour. Do you think then that the role of this watchdog might be to pull me in and say, 'We have this complaint and we are just cautioning you to not comment in the way you have'? Depending on how it was dealt with, maybe they could even to say to the press, 'We have cautioned this person and therefore do not comment because we intend to investigate'. How do we keep it in balance so it is not used unethically?

Sir MAX BINGHAM - I think, again, you have to rely on the good sense of the commission. That is why I have proposed that, while it might be headed by a lawyer, the two part-time commissioners are not lawyers. In fact I would go so far as to say that one of them should be a lady and the other should be a businessman who has the reputation as a good businessman in the community. I have been thinking about these people and could name a few good examples. That is the first thing; you have to choose the right people and the non-lawyers in the commission are there to help keep the lawyer's feet on the ground. It is not only the philosophers who have this difficulty sometimes.

Further, I have proposed that there should be a parliamentary committee to oversee the operation of the commission. I had experience of such a thing with the National Crime Authority first, and then in Queensland. The operation of the parliamentary committee and the commission can best be described - as it was by one Federal MP - as a matter of creative tension. The politicians will always be looking to keep the bureaucrats, in this

case, on their toes and it works pretty well. Peter Beattie was the chairman of the Queensland committee when I was the chairman of the CJC and we had, I think, a good working relationship. He is overseas now, so you perhaps cannot ask him, but I think it was a good relationship and I think that does work.

Finally, if people think they are not getting a fair go, they can go to the court.

Prof. MALPAS - Some of the difficulties that one can envisage in these cases look more worrying in the abstract than in the concrete. If you start to think about concrete examples where this might happen, if the person making the complaint is a member of the Government, a political party or a member of the State Service, and the complaint is vexatious, then it might well be the case the commission might consider taking action against that individual or at least indicating that mode of behaviour is improper. Where it is a member of the public who has no connection with the Government, then it is a little bit more complicated. It very much depends on the position of that person within the society. If they have a certain status so that they are likely to get media attention then probably the attention they will receive would be no different from the attention that they would get if they had made those sorts of allegations independently of the commission anyway. We already have mechanisms to adjudicate on some of that.

Mr BEST - I am sorry but I have challenge you on that. We have heard from Professor Boyce about this perception and the need for us to restore trust. What we need is something for people to go to rather than just say whatever they want to say and keep making these accusations.

Prof. MALPAS - I agree.

Mr BEST - And then everyone says, 'Well how come this is not being addressed?'. Either we address it or it is decided that we do not address it because there is no need.

Prof. MALPAS - I was focusing on the issue of potential damage. That is already an issue. If somebody has the capacity to get media attention now then within the libel laws as they exist they can make allegations and statements that may well damage people. And that happens. What we are proposing is a body that would enable us to take up complaints, when those complaints are well founded, and then to deal with those complaints in a fair and in some cases open fashion. It seems to me that has to be an improvement over a situation where somebody, if they can get the media to listen to them, can make allegations and nobody can investigate them because nobody has the power.

Mr BEST - Exactly. That is the problem that we have at the moment.

Prof. MALPAS - Yes. So it seems to me that what we are proposing can only be an improvement on the present situation.

Mr BEST - Absolutely.

Ms THORP - You were talking earlier about cynicism replacing people's faith and trust in certain individuals and institutions. I spent many years as a teacher and during that whole time never had to stop and think whether or not the community supported or

respected what I did. Overnight I became a pariah, a new politician, and all of a sudden all your ethics, values and everything you had ever done is devalued. A very strange feeling.

Mr MARTIN - Just about everyone today has talked about an oversight committee, parliamentary committee et cetera. I understand the need for that and basically support it. But something has been nagging me all day: how they are set up and who is appointed are probably the factors concerning me. Is there a chance, in having a parliamentary committee overseeing it, of politicising the commission and taking away its independence?

Sir MAX BINGHAM - I think if you have a look at the National Crime Authority Act, and it is now the National Crime Commission, the provisions are much the same. In the Queensland Criminal Justice Act there has been a lot of thought given to how you appoint people to these committees and the kind of relationship that you need to develop among the political parties in order to get this up.

Mr MARTIN - So there is no chance of the government of the day dictating the appointments?

Sir MAX BINGHAM - The acts preclude that.

We were talking about how serious it is when things go wrong. For a while after the CJC was created, every drunk who got picked in Brisbane said to the copper, 'I will report you to the CJC'.

Ms THORP - And then they woke up the next morning and forgot.

Laughter.

CHAIR - Thank you both very much for coming.

THE WITNESSES WITHDREW.