PUBLIC

THE PARLIAMENTARY JOINT STANDING COMMITTEE ON INTEGRITY MET IN COMMITTEE ROOM 1, PARLIAMENT HOUSE, HOBART, ON MONDAY 17 NOVEMBER 2014.

THE HON. MURRAY KELLAM AO, CHIEF COMMISSIONER, INTEGRITY COMMISSION, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED; **Ms DIANE MERRYFULL**, CHIEF EXECUTIVE OFFICER, INTEGRITY COMMISSION, AND **Ms GAYLE JOHNSTON**, GENERAL COUNSEL, INTEGRITY COMMISSION, WERE RECALLED AND EXAMINED.

CHAIR (Mr Dean) - Welcome, Mr Kellam.

Mr KELLAM - Chair, thank you for the opportunity to respond to these matters. I should apologise for the lateness of the response but, as you will appreciate, it is my response and I have a fair number of other things I'm attending to right now.

The first thing I want to bring to the attention of the committee is something the CEO has already done, and that is that Parliament legislated for two reviews. The first review is this one, 26(1), very limited in compass. On the other hand, Parliament also - and I would argue with good sense - provided for what it called an 'independent' review of the act via section 106, which was a much broader review. Chair, I believe you're the only member of the committee who was here last year. Before all committees I have appeared before I have consistently said that the commission and the board would treat this review as an opportunity to deal with the practical ramifications the commission was finding under the act. I have consistently said, and I still say it now, although the government submission has changed the game plan a bit, it is not the business of the commission to say what the policy is. It is the business of the commission to say what's not working, and why it's not working. It is a matter for Parliament. We have accepted this legislation entirely as the legislation which governs us, subject to such necessary amendments. Accordingly, the 48 matters we brought to the attention of the committee were all designed to make the act more workable.

We would take the view that Parliament was quite right in saying that at a point of time the commission had been going long enough to be properly considered. I think the experience throughout Australia - and I have some understanding of other bodies of this description - I think it's on the public record that I've been asked by the Victorian Anti-Corruption Commission to undertake, as its commissioner, three matters. I have a fair understanding of what happens elsewhere. The experience in Australia demonstrates that bodies of this sort have difficulties over a period of time. It is new legislation; it is new to the stakeholders. The legislation often has to be worked through - and that's the experience in every jurisdiction in Australia that has legislation of this sort.

In the first year of the commission there were some issues, which I shan't go into. In reality the second CEO has been there two years. I believe she has done an outstanding job in very difficult circumstances. We would argue that five years is the appropriate time to assess this act and the way it's working. When one looks at section 106, it had a broad panoply. It was the operation of the act. Was it achieving its object? Was it achieving the objectives? The operation of the standards commissioner, the operation of this

committee, the effectiveness of orders and regulations made under the act. It was clearly, and I would argue correctly, the view of Parliament that that is the broad policy issues. I am not here to say this act was perfect in its governance.

There are very good arguments against and in favour of why there should be a board, but I am not here to debate policy of that sort. That was Parliament's determination and we have lived with it. There are a lot of pluses for a board of the type we have in Tasmania, and one is avoiding duplication. I know allegations have been made here but they are baseless. In fact, it does avoid duplication. On the other hand, there are issues about perceptions of conflict, and that's understandable. That is a matter I don't want to enter into debate about; that is a matter that should properly be the subject of a review at the five-year point, as Parliament intended. As Parliament intended, the five-year review was to be conducted independently; it was to be independent. The act sets out in detail the nature of that independence.

What has happened here - and I am not criticising this committee in any way - is that stakeholders, people who have an interest in how this act operates because it affects them in a variety of ways, have put forward various submissions. We say it is deeply disappointing and quite disturbing that the Government, in the response to the invitation of the committee to make a submission, made a submission that in effect proposes an absolutely fundamental change to this legislation. If Parliament decides there should be a change, then Parliament does so. What this Government's submission did was say, get rid of your investigative powers. This is not a commission. Let us be fair about this; let us not mislead the Tasmanian community. If this is an education body, it is not a commission. It is an absolutely fundamental change.

If it was a proposition or was fair to consider, it should have been brought at the five-year period. Nevertheless, no suggestion to the commission beforehand that that was the agenda. We got the material at the same time this committee did. Three years is simply not enough.

Furthermore, a judge, as contemplated by the legislation - and with respect I have some understanding of the life judges lead and how they operate - a judge would be in a position to have a look at the actual records of the commission, look at the investigations, examine how they were done. They would have access to judicial knowledge which would enable him or her to assess the arguments advanced before or the submissions made. What Parliament intended was a balanced independent review of the act.

I consider that the Government's submission is extremely disappointing in other ways. For instance, of the 48 amendments that we put forward to this committee in good faith in an endeavour to get an act that was workable, not one of those amendments was the subject of submission to this committee. To my mind, that absolutely beggars belief. It is not answered by saying, 'We're going to get rid of your investigative function, so we don't need any of these amendments'. There are other amendments. One, for instance, was the time this committee had to enable it to report to Parliament on receipt of our report. There is a series of amendments that are not related to the investigative function.

In my submission, had the Government submission had any intellectual rigour at all, rather than the case of assertion and not much evidence, it would have done this committee the courtesy of dealing with and assisting the committee with amendments that ought to be

made or ought not be made. That is in the context where the committee last year - not this committee in terms of personnel, but the committee - had approved in principle a significant number of the amendments we had and referred them to the then attorney-general who said, 'I think the best thing to do is with the review coming up'. I think we, and the Tasmanian community, were entitled to expect that. The committee itself having said, 'We think, in principle, these amendments have justification', or the ones the committee approved at that stage in principle, should have been the subject of submission by the government. Well, they are not. The committee is now left in this position that if it accepts the Government's position, you may as well wind the thing up, and there is no point even worrying about any amendments.

In essence, the committee has not been given the assistance it should have been given by the Government in response to those 48 amendments. I have seen a couple of comments like, 'They want more power'. If you analyse those amendments, there were two that dealt with power. One was access to the database, which every other similar body in Australia has, and the other related to telephone intercepts. In relation to that, I cannot imagine that in any investigation we would have done to date that we would have used telephone intercepts. The problem, however, is this: when a review has taken place of a police investigation, which might have involved telephone intercepts, then there are call records - maybe. The advice I gave to the previous CEO very early on was that we cannot touch call records because they are the product of the TI. That is the problem.

If the committee does not want to see those amendments through, then we are not arguing. We have endeavoured to put before the committee what we say are the amendments that make this act workable. As I say, I think the response of Government is disappointing. I urge the committee to consider very carefully the risk which it would be taking in supporting the radical step of removing the Commission's investigation function. I want to say something about the difficulties under which the Commission has laboured in operating under a very flawed piece of legislation. My good friend, Damien Bugg, gave evidence before this committee and one thing he said - I will disagree with some of the other things that he said shortly - was that it is a flawed piece of legislation. We do not disagree with that and, indeed, we have had to labour under that piece of legislation in the last few years with no assistance from Government to get it fixed.

It is now more than 18 months since we made submissions to this committee about amendments that needed to be made to make the act work. We submitted a very detailed document to the committee. It was apparently stated by somebody that people at the Commission are sitting around doing nothing. I can tell you that a very substantial part of the Commission's time over the last 18 months has been involved with this process rather than getting on with its own business. That said, we submitted a detailed document to the committee, setting out a large number of technical amendments.

The committee tabled its report and supported the vast majority in principle. Some were left for consideration but nothing has happened. That really means that up until this point, for the last four years, the Commission has been struggling on its own to try and make sense of a difficult piece of legislation. It is, as some of the witnesses have pointed out, confusing, contradictory, and imposes layers of unnecessary and time-consuming processes.

The Commission has gone to the Solicitor-General time after time seeking advice about various parts of the legislation. That is not a criticism of the Parliamentary draftsman. It is not a criticism of Parliament because experience shows they are exactly the issues that arise with complex legislation introducing a body of this sort. That is why I argue that Parliament was very wise in imposing the five-year independent review by a judge.

So here we are; the four years have gone past. We had hoped that this committee at this point and the report from the committee would give some impetus to fixing up this unsatisfactory situation. Instead, the Commission's struggles with its flawed legislative framework have been used as an excuse, in some cases for vested interests, to criticise the Commission and advocate for what can only be described as its dismantling. Make no mistake. If the investigative functions of the Commission are removed, it will not be an Integrity Commission. This Commission is recognised by interstate legislation - Victoria, Queensland, New South Wales - as a law enforcement body. That will get crossed out. It will not be an Integrity Commission. The Attorney-General has said, 'No, it will still be there'. It won't be; and frankly, the Tasmanian community will be misled into believing that they have a safeguard that in fact they do not have.

I urge the committee to look at what Parliament intended, and understand the wisdom of what it was that Parliament applied to that piece of legislation after an extensive review by Parliamentary committee.

I assume that members of the committee, although they might not have read our current submission - and there is no reason why they should have - have read our annual report. In that annual report I set out in my remarks some analysis of the Government submission. We are not going to go through that now. My annual report says it all. My statement in the annual report says how totally inadequate the submission is and, indeed, in some ways how fanciful it is. I said in the annual report that it was naive and based upon premises that do not exist. One of those premises, and perhaps the very first, is that all the departments have the capacity to investigate these things themselves. They simply do not. We can go in camera and we can tell you of a case - and I suspect at least one member of this committee knows about it - where the department in question had employed one of the big five accountancy firms. They came to us and said, 'Here is what we have. Can you now help us?'. It was the power we had to get hold of the bank accounts which demonstrated what had gone wrong. The department came to us - and it was a big department, not a small one. That is just one example.

The Government's submission concentrates on the departments. It ignores the councils, the government business enterprises, and other statutory bodies which do not have the capacity to conduct investigations. To my mind, that must have been clear to Parliament when it passed this legislation in the first place. I reject that premise.

We should also deal with this issue of ED5 which is a matter the Commission has been addressing for a considerable time. It is an executive direction. It is not an act. It is not a regulation. It could be changed overnight, and yet we are told by the Government, 'This is dreadful. We have to reinvestigate everything'. In fact, ED5 could be very easily amended. In other jurisdictions, if an integrity body like this has conducted an investigation, the process is pretty simple. It is: here is the evidence we have before us; show cause why you should remain in this job, why you should not be dismissed, or why you should not be disciplined. The appropriate steps of procedural fairness can be applied

there again too. You have a right to say what you like. That is how ED5 could be changed, in my submission. But we are told, 'No, ED5 is sacrosanct' as if it is the Constitution. I reject that. Even if that is so in relation to the public sector, it does not apply to parliamentarians, government businesses, or councils. It is irrelevant to those other bodies. I reject that, and no consideration or argument has been put to this committee about how or why ED5 is so sacrosanct. There has been nothing put to this committee about that by the Government. If that is the case, let us know why it is that we have not been told. Certainly, the Commission has not been told.

I urge the committee to be cautious in accepting the proposal of the Government in general for there is no independent, non-partisan evidence or demonstrated urgency to do what is proposed. The five-year review should provide any evidence that is necessary to change the act in a sensible way. Surely, the sensible and prudent course of action is to await that review before taking what might be the irrevocable step of contemplating the removal of the investigative function. In this regard, I think the CPSU, which is a body which you would think would have a fair interest in what the Commission does, made a entirely principled and correct second submission to this committee.

I urge the committee to focus on those steps which will improve the Commission's functions and practices and give it a proper chance to work.

There is one final matter before we move onto our submission. The suggestion that there be an inspector-general to oversight the Auditor-General, the Ombudsman, the Anti-Discrimination Commission and a so-called integrity commission that would have an educative function, as I understand the Government's submission, is absurd. It is hard to find any other word for it.

I am very familiar with what inspectorates do throughout Australia because of my other associations with other bodies. They are expensive bodies. You have an inspector who almost always is senior counsel or a retired judge. The inspectorate has a secretary; it has an office and all the paraphernalia attached with an oversight body of that kind. What has happened here is that the Government says, 'Let us create another level of oversight for the oversight bodies of the Anti-Discrimination Commissioner, the Ombudsman and the others'. That is an extraordinary submission when the submission, at the same time, says, 'Let us also make Tasmania the only state in Australia whereby police have no oversight.'. It's staggering, that's all I can say about it.

They're really the matters that I want to deal with, save to say that I have, through the CEO, raised the issue of the in camera evidence. That is not available to us to comment on and I hope the committee will understand that in relation our submissions. There are some matters I will turn to shortly for which we will go into camera, but I want to deal with this matter very briefly. We have not been afforded the opportunity to consider what has been said in camera in any way, and I submit to the committee that great care in this be taken about that issue. I was concerned to see in the transcript of the DPP that it was put to him that there was evidence that people were sitting around the commission with nothing to do. I couldn't find any reference to that in the public documents. I can only assume that if there was evidence about that it was given in camera and unless the committee is taking evidence from people we don't know about, neither of the three people who gave evidence in camera could give evidence about that matter. It might be speculation.

CHAIR - On that point, the evidence taken in camera wouldn't have been published under any circumstances and if it was identified to anybody by anybody - and that is what you are suggesting - that is an extremely serious matter.

Mr KELLAM - It was a question that was asked of the DPP and I don't understand there had been any public evidence about it. That's the point I'm making, except that it was put to one of the witnesses and we can't respond to it because we don't know what the evidence was. What I would say by way of commentary is that if such evidence was given it was more likely to have been speculation than evidence because as far as we know there was nobody with an internal understanding of our workings who gave evidence.

CHAIR - Murray, before you go into the submission, I will ask members if they think it would be appropriate to ask questions at this stage or want to wait until he goes through the submission.

Mr MULDER - I thought he was going through his submission.

CHAIR - No, he now wants to start on his submission. Is that right, Murray?

Mr KELLAM - They were opening remarks.

Ms GIDDINGS - I am happy to listen to the submission.

Mr KELLAM - I am not going to read the submission to you. There are a number of matters in it to which I will refer and some matters we would ask to discuss in camera.

CHAIR - You might refer to the pages too, Murray, if you don't mind, so we can keep up.

Mr KELLAM - Yes, certainly. As I said, I have known Mr Bugg for a very long time and regret that I have to disagree with some of the things he has said before the committee but I will deal with a couple of them, and others are set out in our documentation - I am referring to page 2.

You refer to a matter that was partly in camera and partly not, and we can deal with that, about the triage process turning into an investigation. Section 35 sets out very clearly what the triage process is and if I take the committee to it - obviously Parliament understood and the then Attorney-General in her second reading speech dealt with this triage process.

Section 35 says -

> 'Upon receipt of a complaint the chief executive officer may dismiss' -

That is step one of the triage:

> (2) accept for assessment;
> (3) refer it to an appropriate person; or
> (4) go to the board.

That is the triage process and the evidence given here was that the triage process was much more extensive than that. Section 35 governs it and I won't deal any further with that - it

is spelt out. You will see on page 3 we have given you a simple diagram and a chart which deals with that. As we have said there, ED5 and CD5 require amendment.

We were told by Mr Bugg that the assessment took too long and, again, we would be happy to deal with that in camera. It is dealt with in our written submissions but on page 4 you will see the steps that were taken.

Ms GIDDINGS - Can I ask some questions around that? The issues that were raised by some were to do with the fact that there is a confidentiality aspect around the initial complaint and that makes it very difficult for you as an individual when you have been told there is a complaint against somebody you work with and you're not allowed to talk to anybody about it. There are others who may well know and that individual may or may not know that they are subject to an investigation, and it is not necessarily that on face value but the time it can take. If it takes 12 months to two years to complete an investigation that is an awful long time to expect people not to be talking to anybody about the stress they may be going through due to this, other than the legal representation or the like that we did discuss.

CHAIR - Lara, there are other members who want to ask questions as well but we did have a position that we wanted to go right through with Murray's submission and then we will come back to you, if you don't mind.

Ms MERRYFULL - We will just make a note of that.

Ms GIDDINGS - That's fine.

Mr KELLAM - In any event, on page 4 you will see what was involved in that five months, and I don't intend to take that any further.

Mr Bugg spent a fair bit of time with section 38 and the 'or' business. Are we all familiar with that discussion? It seemed to go on forever.

CHAIR - It wasn't that long.

Mr KELLAM - It went on for a few pages in the transcript but I don't know how long that all took. With all due respect to Mr Bugg, he is wrong. In terms of statutory construction it is absolutely clear beyond any argument that 'or' can mean 'and/or', and I can produce cases here if the committee wants them that have been determined by superior court after superior court where 'or' is in them. In my notes here I have a list of about 15 sections in this act where 'or' is used. It depends on the context, of course, and in some cases it is quite clear it might be 'or, or, or' but in section 38 it can't, and there is no doubt about it, and in terms of rather than taking it as decisions let's use commonsense.

Let us go to section 98(1) of the act, the confidentiality section. This is a case where the Parliamentary Counsel - and I might say in section after section elsewhere but this is the obvious one - explains it in commonsense terms:

> A person on whom a notice that is confidential was served or to whom such a notice was given under this act must not disclose to another person -

(a) the existence of the notice or the contents of the notice or any matters relating to or arising from it.

It is obvious in terms of commonsense that a person who gets the notice doesn't say, 'I won't talk about the existence but because 'or' can be read differently I will talk about the contents'. That is a clear example and there are others throughout the act of 'or' meaning 'and' and, as I say, the superior courts dealt with that and I can give the committee case after case where that has been the case. I regret that my good friend Damian just got it wrong.

Nevertheless, he did not get what he said and what we refer to on page 6 wrong when he said the legislation was flawed. We don't disagree that there are flaws in the act and I repeat that I think it is highly regrettable the Government did not see fit to address those flaws, but another matter that raises in terms of the committee's examination is that a pretty significant overhaul of this act is required if the Government's submission is to be accepted. I don't know whether the committee has available parliamentary draftsmen to assist it but this is a pretty major task, and that is why no doubt Parliament said, 'We'll get a judge'. I might say that the matter I just referred to a minute ago would have taken 30 seconds had it been suggested to a judge that 'or' did not mean other than 'and'. I know what my response would have been and the debate wouldn't have gone more than about three seconds, but here is a good example of why Parliament in its wisdom said, 'After five years let's get an independent person, a judge, to sit down and have a look at this act; a judge who understands legislation and the way in which legislation can have flaws and can be the subject where courts end up interpreting it.' I agree with what Mr Bugg said to you. He referred to an inconsistency between sections 43 and 38, and we agree. Consistent with a number of other matters, that matter was specifically addressed by this committee at the time they agreed in principle and referred the matter to the then Attorney-General.

Heavy-handedness was referred to, which we will be happy to discuss in camera. There were issues raised about confidentiality of assessments, and it may be there can be an amendment to section 48. Section 48 falls into the investigation part of the act and all the powers under that section apply to the assessment. Maybe you could argue it is poorly drafted but we say it would be absurd to have a situation where the assessment is not subject to confidentiality but the investigation is. It's a nonsense and no fair reading of the act can come to that conclusion.

Mr Bugg had something to say about section 98. We agree the act is complex and accept it has legislative anomalies but I don't accept, and neither does the board, that the commission is confused as to what an assessment is. We consider we understand the legislation as it's drafted and have done the best we can to comply with it. We have been at the doorstep of the Solicitor-General on a fairly regular basis over the last few years endeavouring to work our way through a complex act.

On page 4 of his evidence Mr Bugg asked what the governance mechanisms were within the commission. With respect, it's not about governance; this is an independent body. It is not for the Government, it is for the board. I want to repeat that, irrespective of whether it's the best governance model or not, Parliament determined that this was a board that should have the Auditor-General, the Ombudsman, at that time the public service commissioner, a high-level representative of police - the assistant commissioner in this case - and persons with experience in local government and the public sector. That is what

Parliament said should be the qualifications of the persons on this board and, frankly, I think it's an insult to the board to say that a board with so much experience in writing public reports and experience of the public sector was unable to ensure the CEO and commission staff perform their functions appropriately.

The commission investigates matters that should be dealt with by the agency - and Mr Bugg referred to two matters. We are prepared to go into camera to deal with those matters.

I want to deal very briefly with page 10. On the one hand in his evidence Mr Bugg might have said there was no need for an offence of misconduct in public office, but I don't think the issue was addressed to him fully. Mr Bugg was the Commonwealth DPP at a time that that offence formed part of the Commonwealth Criminal Code, so I'd be surprised if he'd been asked about it fully that he wouldn't have supported it. Unfortunately the question that was asked - and this isn't a criticism - didn't deal with it being a public office. We don't consider there is any jurisdictional blurring between serious misconduct. In our view the act is clear, it is either a crime or misconduct - that is, misconduct of a nature that would provide reasonable grounds for terminating the public officer's appointment.

We reviewed Professor Malpas's evidence and I don't intend to say anything more here than was said in the submission. He has had a theoretical academic approach to this matter since before Parliament passed the act and I would argue upon a reading of his evidence he has maintained that, and whether that fits at the coalface is perhaps a different issue. That is a matter in the end for the Parliament so I'm not going to deal with that.

I do want to deal, however, in some brief detail with what is said to be the whole-of-government submission. The Attorney-General said to the committee it is important to acknowledge that there have been serious concerns expressed about how the Integrity Commission is currently operating. Well, first of all, those concerns with the exception of the half-dozen or so cases referred to the commission over the life of this committee - and I think it is six - five were basically from complainants who considered the commission should have investigated what they wanted investigated and the other was in relation to a solicitor and a matter of costs. The Government and no-one else has come to the board expressing any of these serious concerns. They are not matters that have been addressed to us. The serious concerns don't seem to have been outlined in the Government's submission, they just say there are serious concerns.

Mr MULDER - You said that had come to the board, so the Government had come to you. That is the clarification I seek because I understood you to say they had.

Mr KELLAM - No, they had not. The first we knew of this was in fact from that evidence. In any event, we've dealt with that matter somewhat further at the bottom of page 14-15.

At page 15 we deal with the assertion in the Government submission that the commission should only triage incoming complaints, so I take it that section 38 is really what they're envisaging except to cross out 'investigations'. The committee can form its own view on how that would go.

Evidence was given by Mr Overland that there is only a very small number of investigations. It's a bit of a dichotomy, this one. We have Mr Overland saying we don't

investigate much and others saying we investigate too much and investigate things that are minor. We say we refer out where we can. Of course if they're a very senior public servant, a DPO, we can't; we have to do the assessment ourselves and that could in fact be a fairly minor matter but the act tells us we have to do it. Mr Overland says it is a small number of investigations, which we agree with. We would argue that in fact we are dealing with the triage at the start and then after assessment pretty well.

I must say one thing, and this is a matter we raised some time ago. Once it is determined after an assessment that the matter proceed to an investigation, the act means it goes all the way. It has to go to the board. We have made a submission to the committee about that, that basically it should be capable of being discontinued. If you get halfway through an investigation and it's a nonsense, get out. The decision to investigate under the act is a significant one because it means you have to investigate it all and a report has to be provided to the CEO, who then has to provide a report to the board. We don't think of that but that's what's in the act and we are required to deal with the act. That, as I say, is another one of the 48 matters we raised with this committee over 18 months ago.

You will see at page 15 that the number of cases we investigate is entirely consistent with both my knowledge and the annual reports we have analysed of other integrity bodies. It is always going to be the case that it will be about 4 or 5 per cent. Traditionally if you look at ombudsmen it is under 5 per cent in most ombudsmen's offices. I expect that was clearly understood by Parliament when it passed this legislation.

We want to deal with a matter at the bottom of page 15 and it is dealt with on page 46 of our annual report. We would like to provide a suggestion that under the Government's proposal, we can triage but then we can have a look at what happens. It's not happening now. Some departments basically thumb their noses at us now because we don't have the power to deal with it further down the track. We want to deal with that in camera.

On page 16, commission investigations have to be redone by the head of agency - ED5 again. However, even if ED5 is there it doesn't apply to local government, businesses or statutory bodies, and the simple fact is that investigations have been conducted. One of the problems we have with this was something Damien Bugg remarked about when he said, 'I don't know anything they've done that's serious.' The media criticises us for being secretive. It's a very difficult balance between being secretive and what is in the public interest, as we saw in the debate of the last major report.

We have conducted investigations and when we have brought the person in question in and put the matters before them, they've resigned. That has happened in the course of our investigations. They're not interested in an ED5 process - 'You've got me with my hand in the till, thanks very much, I'm going', or, 'You've got me doing what you say I was doing, I'm off.'.

Mr MULDER - Or 'I'm so stressed out I can't be bothered with this anymore'.

Mr KELLAM - Perhaps so.

CHAIR - I am not sure what point that was clarifying.

Mr MULDER - It is clarifying there are three options.

Mr KELLAM - There are other options, and people take them.

We deal with the budget at the bottom of page 16 and when you look at the budget it is about what it is interstate.

Mr GAFFNEY - Could you address on page 16 the [inaudible].

Mr KELLAM - That is the ED5 issue again. ED5 can be pretty easily changed. The Government has basically said, 'We have ED5, it has a series of processes under the State Service Act that we should put into effect, so we'll chuck the baby out with the bathwater.'. That is how we see it. For serious matters where we have conducted an investigation, the commission isn't but the tribunal is allowed to say, 'This is misconduct.' Under the act, we can't but the tribunal can and that would involve public hearings, immense cost et cetera. It is a simple process to say ED5 needs changing and these are factual findings and what do you say about the factual findings, do you deny them or don't you? What do you want to say that puts them into context, that explains them? What has gone on here has been a complete re-investigation. Obviously it is not and it is easily dealt with. That is the duplication issue.

In terms of duplication by other bodies, I can see immediately there is forum-shopping; you get some complainants going to everybody, or they go to the Ombudsman, don't like what the Ombudsman says, so they come to us and then go to their parliamentarians. In terms of duplication one of the matters that was the subject of in camera evidence we can deal with and demonstrate how we made sure the Auditor-General was aware of what we were doing from the start. In fact the Auditor-General had his act amended early on to enable him to get information from us. We do everything we can to avoid duplication and I don't accept there is a considerable amount of duplication.

There are complaints made about the commission which cannot be appropriately dealt with and a watchdog is necessary as in such other jurisdictions and an entity like a parliamentary inspector is required. As I said, I'm pretty familiar with the way the inspectorate works in Victoria and in other places. Some of those bodies are crime commissions, remember; we're not and ICAC isn't, but there is a crime commission in New South Wales, and each of those bodies have an oversight mechanism of some type or another. Telephone tapping has to be reported; we don't have power to do that. With coercive measures such as issuing notices, in Victoria the inspectorate has to be notified every time a coercive notice is issued.

That is not the case here but, as I understand it, in the government submission in relation to our investigative powers going away, there was this extraordinary statement that the commission in future will be able to counsel and assist complainants. Well, that's not the job of a commission and whether it would be of the new commission that has no powers is another matter, but I can't see why a watchdog would be necessary for the education focus, and taking into account Tasmania and the way things operate here where you have an Auditor-General who reports to his own parliamentary committee, one would wonder why you'd want oversight over the Auditor-General as well as the Ombudsman. As I say, the simple absurdity of this submission that, 'Well, we'll create another oversight body' at the cost of the board - and I'm not arguing for the board; that is a matter we would have been very happy to discuss had we been dealing with policy but I have firmly said that it is not our job to talk about policy - irrespective of what you make of the board, last year it cost

$92 000 and there's no way you would get any sort of inspector with any sort of qualifications before you pay for his or her iPad, office desk and secretary, for $98 000. If it wasn't such a serious matter you'd, frankly, cack yourselves laughing.

Mr GAFFNEY - Did you say $92 000 or $98 000?

Mr KELLAM - It's $92 000 - sorry, I did say $98 000 but $92 000 is the cost of this current year. I think it was $130 000 or $132 000 or something last year.

To set up an oversight body of this description just simply couldn't be done and yet the Government is talking about making this more efficient and cost-effective. There might be reasons why, for instance, if we had telephone-tapping powers you would want to monitor it, and some of the organisations similar to us but with much more extensive powers do have monitors so that if you get a warrant for a TI or telephone intercept you have to report it. We have no problem with these oversight matters but what is proposed by the Government is absurd and, of course, contradictory. Page 17 spells out really what we want to say about that.

We've noted on page 18 that the Tasmanian Ombudsman has not conducted any coercive interviews in many, many years. I am confident that this committee will not be working on gut feelings and I don't intend to say any more about that.

On page 19 we deal with the audits. The remark we wish to make about that is in the last financial year Tasmania Police was the only police force in Australia that did not publish any data on handling of complaints, so we did the audit.

Mr MULDER - On a point of clarification there, they have in previous years and it could be suggested the only reason they didn't this year is because you guys did it.

Ms MERRYFULL - I don't think that is the reason. Last year they published a small amount simply about class 2 complaints. I understand that this year they removed that because they thought it didn't really go to their key performance indicators, so they haven't published in -

Mr MULDER - Have they told you that or -

Ms MERRYFULL - That's what they said in their annual report. If you go to their most recent annual report there is a footnote about why they removed that and that's what I'm referring to. I'm not making it up.

Mr KELLAM - I am not going to deal with Mr Tilyard's evidence. We've never proposed fishing so we'll leave that where it is.

As to the assertion from Mr Miller that we could be conducting an investigation when there is another investigation going on, to our knowledge that has never happened, either with Tasmania Police or any other agency. Our current practice is to notify the principal officer when we proceed. I think it's just speculation.

Mr Coates gave some evidence about Lee v the Queen and said it was ICAC or one of those bodies when it was in fact the New South Wales Crime Commission, not ICAC. I

have read Lee v the Queen and it has a number of consequences. It stands on its own facts to a large degree, which were that the New South Wales Crime Commission, which has power, as distinct from the Integrity Commission, to say, 'You can't take the privilege', but if they have that power all similar Australian bodies, crime commissions mostly, then have the power to say, 'The legislation says it's not admissible against you'. What happened in that case was that the transcript of what a person who had taken the fifth - to use the vernacular - said, was provided to the prosecution. That is absolutely wrong, and Lee v the Queen deals with that.

It might be arguable that some statements obtained by us coercively - that is, subject to a coercive notice - might not be admissible, but we've put in a quote from advice we obtained from the Solicitor-General. In any event, we take care about those matters. We have had one matter, which we can expand upon in camera, where we went to the DPP at an early stage and said, 'Here's what we've got'. The DPP said, 'I wouldn't be investigating that', so we proceeded with that matter, but had charges been laid we would have almost certainly said, 'Now it goes to the police', but in light of Lee it can't be assumed we would ignore Lee and not take great care about our processes. Those matters are dealt with on page 22.

As to Mr Coates' assertion that most people would accept they did the wrong thing, we've had a couple who resigned upon being presented with the evidence but it's not our experience that they willingly jump up and admit it.

Ms MERRYFULL - We would like to go into camera now.

CHAIR - Before we do that, I thought we might try to go through those questions that can be dealt with in the public domain. Then we will go into camera and see where we go from there. You have talked about the three-year review and the five-year review. Section 44 clearly sets out the responsibilities of this committee. The three-year review is important and it is an important report that we are required to provide to the Parliament, and that is exactly what this committee will do. It is required to review the functions, powers and operations of the Integrity Commission at the expiration of that period of three years.

Mr KELLAM - We understand that.

CHAIR - It is important to review this period, as well as the five year one. I just want to make that point.

Mr KELLAM - Well, let me make it very clear. We went to a lot of effort to prepare for the committee 18 months ago now, and we recognise that. The point I make is that Parliament made a distinction between the two reviews. This one is as to the functions, powers and operation of the Integrity Commission and the other one is to the operation of the act, so they are two distinct things. The approach we have had - and I am sure you will concede it - is that I have always said we will not come along here and talk about policy. This is Parliament. We will accept what Parliament says and we will talk about practical things.

CHAIR - There will be a certain crossing over quite obviously and that has to appear as well as part of that.

Mr MULDER - On that point, Chair, I hear what you said but to clarify my understanding of it, although the Government has made a submission which in broad terms talks about what

it sees as the future role of the commission, it is our job to review the past. I certainly won't be signing up to any recommendations that say what should become of the commission in the future other than its operations under the act as it stands at the moment. I just thought I'd make that clear. In fact, I think the Government needs to be chastised for making submissions that don't deal with the terms of reference.

CHAIR - It is a matter for this committee where it goes. I will open up for questions now. Lara, you had a question before.

Ms MERRYFULL - I think you asked a question about confidentiality and things going on for a while and people's concerns. We certainly understand that and that's one of the reasons that we try to get things done as quickly as we can. We've had no investigations go on for basically longer than 12 months. One of the reasons, for example, the health one went on as long as it did was because there was a long period of procedural fairness through the processes of the act and sending it out for comment to agencies and all of that kind of thing, so it went on longer than it needed to.

Unless we are investigating a head of agency, we make a point to let the head of agency know we are in their space and are talking to their people so they can allow their people to have someone to talk to in the agency. Employees can go to the EAP if they need to and while they need to keep it confidential, we try to limit the impact that confidentiality has on the individuals because they can talk to a legal practitioner and that kind of thing. One of the reasons for the confidentiality is to check the reputation of the person we are investigating and to protect the integrity of the evidence, because when people start talking to each other suddenly the evidence you're trying to get from them is contaminated. We hope that by notifying the head of agency so they know and can put arrangements in place if they need to leave the workplace, and making sure the person knows that they can go to their EAP provider if they are feeling a bit stressed et cetera, we can try to ameliorate that aspect of things.

Ms GIDDINGS - It falls into a public policy debate, I suppose, which is not what we are trying to get too involved in either. That concern about damaging people's reputation is a very real one which in the development of this original act we were trying to avoid, but in doing so you also accept that there is a level of stress that can also come into being not just for the person who is the object of the investigation but those around them as well.

Ms MERRYFULL - Yes, it is.

Ms GIDDINGS - Particularly if it takes a period of time that is an unfortunate consequence we need to consider whether or not we need to address or if that is just the way it's going to be. In police investigations, I suppose at times people know they're being investigated and other times they may not. It is a difficulty which has been raised around the human impact on people.

Ms MERRYFULL - Absolutely, and that is something we have tried to address. We have changed our processes, we have more information now about people who are going to be interviewed to try to reassure them, and we're taking different ways about how we initially approach people and what we tell them, all that kind of thing. It is a challenge. The main thing we try to do is streamline the process so we get it done as soon as we can. That's what we try to do.

CHAIR - On that point, you said you are trying to relieve the pressures that confidentiality creates. How can you do that when there has been evidence provided of these investigations going for what seems to be an excessive period of time? How can you relieve those pressures that confidentiality creates for a husband and wife situation, or an employee/employer situation? How do you go about relieving it?

Ms MERRYFULL - People think if an investigation goes for, say, 12 months, that there have been people who have been hanging on the edges of confidentiality for 12 months, but that's not the way it works. You often spend the first six months or whatever it is just gathering documentary evidence, so nobody necessarily knows what you're doing. We always try to push the interviews up towards the end of the investigation, so that even though you might think 12 months is a really long time, in fact the period of interviews where people are being exposed to us is quite short because it is right at the end, so it might only be a couple of months where people now know that they have been interviewed or whatever before the matter is finalised. When the matter is finalised we lift the confidentiality provisions so that people can then talk about it. Just because an investigation takes five months doesn't mean that people have been stressing out for five months about what they know. There probably might only be a month, or two months at the end.

The other thing is that the confidentiality applies unless you have a reasonable excuse so there are a number of excuses, so to speak, under the act that are specifically referred to, but that is not exclusive of all the reasonable excuses. People can come to their own conclusions about some of those things.

CHAIR - As an example then, what has been the longest period of confidentiality that has been required of a person in any investigation? Just an idea.

Ms MERRYFULL - I am wondering if it would be Delta.

Mr MULDER - The question was, what is the longest period of confidentiality.

Ms JOHNSTON - It would be Delta, the DHHS matter.

Ms MERRYFULL - But even though it started in March, when we had a lot of documentary evidence, we probably didn't start the interviews till November-December and they went on through to early February, and then the report was published in May. The reason for that delay was because we had to go through all the processes of an investigation which meant I had to give all the people procedural fairness. That took weeks and weeks and weeks. Then I had to go up to the board that needed time and then it had to go to the Premier and those people for comment. That dragged it out but it could have been finished much earlier if I hadn't had to go through those processes.

CHAIR - So it's only a two- or three-month period you're talking about?

Ms MERRYFULL - Yes, from about February through to May, those processes.

That is what we try to do. We are conscious of that so we try to push that. It might be a couple of months, but that one was longer because it was an investigation instead of an assessment which I can get done much more quickly.

Ms GIDDINGS - In relation to all this, another issue was raised by a person who had to be told that there was an investigation occurring within the body they were responsible for and it was frustrating to them not to know what that investigation might have been around. They were meant to be dealing with these people but all they were informed was that there was an investigation and nothing else. I wonder whether or not there needs to be within the act the ability to be able to inform, for example, a head of agency or head of organisation a little bit more so they have an element of comfort or understanding of what they are dealing with with their staff.

Ms MERRYFULL - We don't have a problem with that but that's not what the act says. This is another one of these practical operational difficulties that has emerged from our work and that has emerged as an issue. It was in the Delta investigation where people didn't know. I think that would be a useful amendment to the act and might alleviate some of those issues.

Ms JOHNSTON - One of the other issues is that there are some complex arrangements within independent statutory organisations which fall within an agency. There might be a board but the employees are State Service agencies. The board might not be responsible for disciplinary matters. At the end of our act we have the schedule of principal officers that tells us who we are able to tell and there are definitely some holes within that. It hasn't kept up with some of the amendments. We have tried to tell the board, for example, that THOs are not principal officers because they were State Service employees. In fact the principal officer, the CEO, was the Premier.

Ms MERRYFULL - But even then we couldn't say too much. I guess a useful amendment would be something that gave the CEO discretion. A bit of discretion around a lot of these things rather than the prescriptive processes in the act could really help us out in terms of being more quick and flexible in what we do because it is very inflexible legislation. Some discretion would be good.

Mr GAFFNEY - When people give you information their name is not used but their job position may be named up in the document and they may be the only one or two people in the state who have that role. That also has created considerable stress on their lifestyle and they believe they have been compromised in giving the information. In part of the 48 recommendations or whatever, has that been raised before with you?

Ms MERRYFULL - There are two things there. One is that that's probably not going to be an issue except in a public report in terms of putting it out in the public. Secondly, the act currently says that at the conclusion of an investigation or assessment we have to give 'the report'. We would rather say that we can given information, because we might have our reports and our internal investigators have all the stuff in it, but it may not be suitable to give that report over to everybody, but the act says to give the report to anybody you refer it to. What we said in our amendments was for the CEO to give relevant information over to the agencies, not the full investigation report that has come to the CEO. What I am talking about here is that a bit of discretion about what you provide would go a long way to solving some of these problems.

Mr MULDER - Throughout the report we keep getting tripped up. Some of the witnesses have got it wrong. This idea that there is triage, which I guess is a desk audit of the information and its likely outcome. Then there is an assessment which as you said is almost inseparable from a preliminary investigation.

Ms MERRYFULL - It is a preliminary investigation.

Mr MULDER - Then you have the full-blown investigation. I think one of the problems we have is that the common understanding of an assessment is slightly different to that. When I first read it without going into the full-blown intent of the act, I would have thought the assessment would have been part of the triage decision rather than the investigation decision, and I think this is where some of your difficulties are coming in. If you do an assessment and decide someone else is going to investigate it, it is not the investigation they have to redo, it is the assessment. I think that is where all this concept about muddy water comes from.

If we combined the assessment into the triage phase, so on the face of it without conducting inquiries, raids or demanding the production of documents and things, if we had that assessment phase and had a two-step instead of a three-step process, on the basis of a desk audit given possible public alarm or considerations, you might consider which to triage it to or to a further investigation so you're basically combining the assessment and the triage functions into one, which would cut out a lot of the issues you have with the suggestion of duplicating your own investigation when you investigate your assessment.

Mr KELLAM - I will make one comment about that. I always thought section 35 was clear in terms of triage. You're right, someone will get a letter and the complaint will be about somebody that we have no power over. Obviously those go out the door instantly. There are a series of things like that that are dealt with at the start, so that is dismissal. Then there is accepting for assessment or referral. Referral is what we do most of the time. There are some problems with the act and I suspect one of them is that once we make a decision to investigate, it is the whole hog. The act does not give the CEO any discretion to say stop. I think you could perhaps take the view that in fact you could accept the complaint for investigation and then move on as long, as the CEO can stay stop.

Ms MERRYFULL - Or else the CEO could say, 'I'm going to stop it here and refer it out but I'm going to make the decision to refer it out rather than give it to the board.' We have used assessment like mini-investigations, I'll be quite honest about that, but the process around the investigation makes it that much longer and convoluted. We think we can get it done quickly and get the same result really because the board is only going to refer it to somebody else at the end. We think we have a pretty good idea of what the issues are and what needs to happen. We do keep it in assessment because I am trying to make the act work.

Mr MULDER - I am suggesting that maybe if we made the assessment phase a desk audit and then gave you discretion, if you decided something needed to be investigated before you went out and gathered additional evidence which is not publicly available, you might then at that stage have the discretion to say, 'No, as we headed down the investigation path we decided this would be better off', and then - I won't say 'flick-pass' - move it on -

Ms MERRYFULL - That's not a word we like.

Mr KELLAM - We don't like that word.

Mr MULDER - I was only using -

Mr KELLAM - I know, you're quoting somebody.

Ms MERRYFULL - It would be good to be able to go get the information up to a head of agency. I try to save those things for the board - senior officers with systemic misconduct.

Mr MULDER - Because of the practicalities of investigation - and this is where I have some expertise - you get a report of a crime and some are automatically elevated to the CIB to investigate and others are sort of in the area and you ask questions like, 'Is this part of a series of events?', or 'Is this a one-off?', which decides who will have a look at it or whether it is looked at at all, and those sort of decisions are basically made overnight on just reading the initial complaint, and then if you refer it to the CIB and they go down the path and say, 'No, there's not really enough in this to warrant our time and attention', then it is just moved back again. There is this fluidity and flexibility -

Ms MERRYFULL - Flexibility is what we need.

Mr MULDER - If we can get that assessment point to doing basically a desk audit of the complaint and any information publicly available which would suggest where it should go, you can make that assessment then.

Ms MERRYFULL - We use the coercive powers for just a sheer assessment but sometimes it is only to get the emails, though - a few little bits of information. In camera I will tell you about one I have just done recently. I think if that is going to happen it would be good to have a little less process around the investigation side and how you get it when you do it at the other end and a bit more flexibility at that end, too.

Mr MULDER - This is the fundamental problem we see time and time again in any agencies doing any investigations. People try to build a process around what by its very nature has to be flexible and adaptable approach. As new tools and technologies come on board, you can't be too prescriptive about the rules you have around them.

Mr KELLAM - This act is very process-driven. It depends upon complaints. We have an own-motion power.

CHAIR - It's drafted by lawyers, what do you expect?

Mr KELLAM - Well, it depends mostly upon complaints. We have an own-motion power but really I have taken the firm view as chair of the board that we're not going to rush into an own motion until we have some evidence. I'm not going to say, 'I read the *Mercury* and I don't like the look of this, I'm going to conduct' -

Mr MULDER - What I'm saying is that the assessment perhaps should be time constrained and you don't have 12 months to conduct it because the information you get should be fairly readily available in a short time frame to do it. If an agency gets it wrong or you get

it wrong, as long as you have the flexibility to revisit it once the evidence starts to emerge, that -

Ms JOHNSTON - The committee might get some assistance just by looking at some of the jurisdictions interstate because some of them tip it into investigation when they tick off certain things, and one of them is that there are good reasons for the public to know about this investigation, so you sort of look at the public policy issues.

Mr MULDER - My point is if you need to do an assessment it needs to be short, sharp and capable of being overturned later on if you discover that the assessment did not reach -

Mr KELLAM - And you can get a situation where -

Mr MULDER - That's what assessment is, it's a guess act.

Mr KELLAM - Of course the act does not quite say that. You can get a situation where you get an anonymous complaint, a bit of fluff, and out it goes, but on the other hand you can get an anonymous complaint that does not have too much substance to it but it doesn't look good and then you say, 'Well, let's have a look at this. This man says he knows whoever took a bribe, let's have a look at it', and then you might say, 'There's nothing in it'.

Mr MULDER - That is the subjective nature of assessment. If the serious allegation was that somebody extremely high up committed an act of murder, even on no evidence you would commence an investigation.

Ms JOHNSTON - We are in fact required to do so. If it is a designated public officer we have legal advice from the Solicitor-General's office that we cannot send it to somebody else to investigate, we must keep it.

Mr MULDER - If someone complains that someone is tickling the tea money in the coffee room, an overnight assessment could say, 'Irrespective of whether we've got anything material, this really isn't a matter [inaudible]'.

Mr KELLAM - Exactly.

Ms MERRYFULL - I draw the committee's attention to one of the amendments we put up, which was when we refer a matter we completely lose jurisdiction over it so we can't pull it back. That is one of the matters that we put up in our amendments, and now the jurisdictions have that too, so if you refer a matter and are not happy with what the agency has done, you retain jurisdiction, so you can take it back and do something with it. At the moment if I refer something to an agency and I don't like what they have done, there is nothing I can do about that. There is a matter I would like tell you about as an example if we go into camera.

Mr MULDER - Perhaps there should be criteria around that too. If it is a frivolous matter you might not like the way it's being investigated but you really don't want to be caught in that situation.

Ms MERRYFULL - No, not necessarily.

Mr KELLAM - If it is a frivolous matter but the allegations are against a senior officer, the act says we still have to investigate. There are those issues as well.

CHAIR - We need to move on because I am conscious of the time. You said once you assess it and send it out or back to the department you then lose control of it, so if the act was written in such a way that even if you got further information after you have done that -

Ms MERRYFULL - I would have to have another complaint.

CHAIR - That is the point I am making. If you had another complaint on that same issue you could then ask for it to come back and you can then bring it back - is that right?

Ms MERRYFULL - No, I can't bring it back, I have to start again. It is gone and my jurisdiction is exhausted.

CHAIR - We talked about the dual investigation before and that is the point I am trying to make. So the department could then continue with that complaint you forwarded to them, you could get a second complaint on exactly that same matter, you could then commence your investigation identifying if it was a serious matter that fell within your ambit, so you could be carrying out that investigation while the department was carrying out its own investigation as well.

Ms MERRYFULL - Theoretically, but I would of course talk to the department before I would do anything. If it was the same matter that I had referred to them, we are sensible, we would get in touch with the department and say, 'What have you done with that matter?', or 'I've got another one - are you doing anything about it?'. We do communicate with the agencies because if I have referred something to them and get another thing that is exactly the same I'm not going to go running off investigating it until I find out what they are doing, obviously.

Ms JOHNSTON - If we are able to go into camera, Operation Alpha is our perfect example of a matter where we did some work and referred it to the agency because we knew they were conducting their own work. The person resigned and that was the end of it but 12 months later we have received exactly the same complaint about exactly the same officer from a different complainant because clearly they don't understand that we have already dealt with it because we have to deal with everything in private and it is not a public report and they don't see any change in the workplace, so that can be a real issue. If the agency dealing with it deals with it quite privately it is not necessarily well-known around the workplace that there may have been problems that have been dealt with, and I guess that goes to the culture of an organisation.

CHAIR - Should there be some requirement that where a department is undertaking an investigation of a misconduct matter that matter is seen as having some seriousness about it, even though I am not talking about a very minor issue, and they should have to notify the Integrity Commission that they are undertaking that inquiry so there cannot be -

Ms JOHNSTON - That is a recommendation we made when we put in our first submission.

CHAIR - I have read the recommendations but it has been a while.

Ms MERRYFULL - In the submission we put to this committee in October last year we said we should be notified of serious misconduct. All of the other commissions and the other jurisdictions' agencies are required to notify the ICAC that they doing the serious misconduct, not only so we don't tread around in the same space but so we build up a picture of what is going on in the state sector. We have already put that in front of the committee.

Mr KELLAM - I think it would be fair to add that some departments, voluntarily, have taken us up on that, and that is really important for education.

Mr McKIM - Murray, when you gave your oral evidence you talked about the risks inherent in what you described as a radical step of the Government proposing to abolish the powers of the commission. Can you, in overview, inform the committee what risks you think are inherent there for Tasmania and for integrity and ethics in Tasmania?

Mr KELLAM - Well, you'll go back to where you were before the bill was introduced in Parliament. There is no oversight of a variety of bodies. For instance, in the absence of the offence of misconduct in public office, if there was a complaint about a minister and it was not a criminal complaint, who investigates it? The minister's department. That is one example. As to oversight of police, I won't speak on behalf of the commissioner but a lot of commissioners I have spoken to in other states say they are very pleased to have an independent body to say they are getting it right. To be frank, most of the time we've been saying that Tas Police are getting it right. Our audits demonstrate some issues. Wouldn't the public be a lot more satisfied about their police force to know that if something arises there is independent oversight? Surely the public is better serviced by that?

As to the recent Health department matter that has been the subject of so much debate, we know nothing was happening and we know the press got involved and were basically fobbed off. We also know that people inside that major department were telling us they didn't feel they could make a complaint. In fact since it has all been resolved more things have come out of the woodwork. People inside departments, especially if they are misconducts of a high level, surely aren't going to deal with it in the hierarchy if they are scared about their job, but they can come anonymously to an organisation such as ours.

I know the Attorney used something I said in year one and I don't resile from it. I was misquoted slightly but I said that the commission has no evidence of systemic serious corruption but we have plenty of evidence of misconduct and serious misconduct. One of the problems is that we don't do much about it publicly. I understand very much the collision between a private interest and a public interest. One of the things these sorts of organisations are always attacked about is being too secret; certainly that is the accusation that has been levelled at us. We have been a lot more secret and careful about publicising our investigations into serious misconduct than is the case in other states.

We consider we have taken a balanced, sensible and responsible approach in the public interest about this. The public is entitled to know from time to time if serious misconduct takes place but under the Government's proposal that won't happen, so there will be less people prepared to make complaints to us and I doubt you will get the whistleblowers they way we have. Our serious investigations have either been from an internal whistleblower, sometimes an anonymous one, or somebody close to the action, somebody contracting with a government department. It rarely comes from somebody reading the *Mercury* and

saying, 'I'd better make a complaint to the Integrity Commission'. We get those sorts of complains. There is a big risk we will go back to the days of, 'I'm too scared to make a complaint. I know what's happening, but what can I do about it?' I see that as a serious risk.

I have a fair understanding of things that went wrong in Vic Pol. I was sitting on the Court of Appeal dealing with the drug squad that went west in Victoria and I was seeing the Wood Royal Commission et cetera. This isn't Victoria or New South Wales. I am satisfied that Tas Police is well managed, but you've seen a recent ICAC in South Australia established. It has been going 35 seconds and what happens? In one particular police station very serious allegations have arisen. Whether they would have arisen without ICAC there, I don't know. ICAC investigated it and used powers beyond that of the South Australian police. A very serious situation has developed in a small state with a small population.

I think we would be naive to say there is no misconduct in this state; we have seen misconduct. As much as I have great respect for the police commissioner - and I give lectures to the Tasmania Police sergeants course - it would be simply naive to say there is not a rotten apple in there.

Ms MERRYFULL - There may not be.

Mr KELLAM - There may not be, but they're the risks we're talking about.

Mr McKIM - That leads me into another question about police investigating themselves if the commission had its investigative powers removed. The committee has heard some glaring inconsistencies and evidence from the Attorney-General. Referring to the integrity authorities she said, 'I am not sure it builds confidence in these bodies in that if they make a complaint they are effectively dealt with by the body that has been complained about.', while at the same time saying she is comfortable with Tasmania Police investigating complaints that are made about Tasmania Police officers. You are an expert in this area, Murray. What do you think about bodies investigating complaints or accusations made against members of those bodies, any body at all?

Mr KELLAM - Obviously you wouldn't want a body like us investigating every complaint made against police, although there are police integrity commissions that do do that in Australia. I don't think that is a body this state needs. In respect to a serious matter, I think the public is better served - and frankly, I think Tasmania Police is better served - by being able to say, 'This is being looked at by somebody entirely independent of us, we're at arm's length from it, we will cooperate with it.'. Frankly, seven times out of ten, they're going to get a tick.

Who investigates the investigator? I think it is a bad look, and that has been recognised in every state in Australia, including here. Once you remove that, Tasmania will be the only state in Australia, and the Commonwealth, that does not have an integrity body looking at its police force. This is not to assign malice or bad motives to those conducting the investigations. One of our earlier investigations was into an internal matter and, to his great credit, the commissioner provided assistance to the commission. We had police officers come into the commission to assist us with a review of the way that had been done. This was very early on in the piece, and the end result was it was a pretty poor internal

investigation. I think there was real confidence about it the second time and I found it a very cooperative thing to be dealing with police, but nevertheless, it was us making the call about it.

Mr McKIM - If the Integrity Commission was not able to make that call presumably nobody could have in that circumstance.

Mr KELLAM - No.

CHAIR - One of the issues that has been raised is the capacity within the Integrity Commission to investigate a serious complaint against [inaudible] as to who would conduct that investigation. Obviously you would bring in the right people which you are able to do. It is reasonable to assume that you would bring in to that body police with the required experience because police have inordinate ability and experience in investigation. For criminal investigation police personnel attend course after course. I don't think anyone can challenge the background investigative ability of a good detective, a good senior officer in the CIB. How would that operate?

Mr KELLAM - If we were conducting such an investigation? It depends on the issue of course. We have two full-time investigators. One spent a very significant part of his life with the Wood Royal Commission, a police officer, and the other was with the Metropolitan Police.

Ms MERRYFULL - He was with the British transport police. There are a couple of options: we could either second somebody from another integrity agency like ICAC or the ACCC or one of those other agencies where they have very experienced investigators, or we could approach another police force for assistance. Depending on the matter we might get somebody from Tas Police but it would depend on the matter. We have a really good network with the other integrity agencies and there is a lot of expertise out there which we could take advantage of.

Ms JOHNSTON - We have in the past. We have had matters where we have brought in, through the commissioner who has nominated an officer that he had confidence in, and they assisted us. We have had officers from the then Office of Police Integrity in Victoria and we have a good relationship with IVAC now in Victoria and we know they have the capacity to assist and they certainly helped South Australia recently in their matter. We've brought in other people too under section 21, not necessarily with police, but with other matters, people who are very experienced in recruitment policies and procedures within the public service. We do opt in as required.

CHAIR - Are these people you have referred up to date with their investigative capacity and ability, because that has changed?

Ms MERRYFULL - Is that our people?

CHAIR - Yes, the two that you referred to.

Ms MERRYFULL - Indeed they are. For example, our investigators all do a cert IV in government investigations but recently we've had some very up-to-the-minute interview and investigative training delivered in-house from those two who provide the same kind of

training across all of the police force intelligence agencies. We buy in expertise to keep our people up to date and they also network with their counterparts. In November there is a meeting of people who are involved in investigation surveillance and all of the agencies are involved in that. Our people go along to that as well. We keep them up to date.

CHAIR - You said there is no oversight of the police system. Police argue strongly against that and say that is just not right. They say they have the media watching over them, the DPP, the courts, the people themselves and they go through a whole raft of organisations, et cetera, that are oversighting them - the Ombudsman, the Auditor-General, a whole raft of bodies that are oversighting police investigations.

Ms MERRYFULL - But they cannot investigate misconduct. The Ombudsman can only deal with administrative actions of the police. The DPP is not an investigator. The DPP prosecutes. The Auditor-General is not going to conduct an investigation of police conduct. The only people who can investigate police misconduct are Professional Standards and us. The media is not going to conduct an investigation of a policeman's conduct. When we are talking about a specific kind of oversight, we are the only organisation that can have an investigative capacity in that regard.

CHAIR - I doubt you could convince a policeman that the media don't oversight them.

Ms MERRYFULL - They do oversight them, I'm not saying they don't. What I am saying is there are different levels of oversight and what we have is the capacity to do the investigation.

Mr McKIM - I know you wanted to go into camera. Just to flag it, I am happy to move an extension of time for the commission because we did only agree on two hours but they have indicated both in writing and verbally that -

Ms MERRYFULL - Murray has a plane to catch at 5.20 p.m.

CHAIR - If the other members are happy, I am quite happy to stay on.

Mr McKIM - I have one more question. It may be outside your area of expertise, Murray, but do you have a view on whether Tasmania Police are independent from government?

Mr KELLAM - I have seen this debate and I don't think it's one I want to enter into. Mr Ellis gave an opinion about it, didn't he, at one stage?

Mr McKIM - Yes, but Mr Coates has given us a contrary opinion.

Laughter.

Ms JOHNSTON - We think it has been very well canvassed. We do not think constantly debating it is really going to change the original reasons why [inaudible].

Mr MULDER - Getting back to the issue about the oversight, I don't think it has been put as evidence but it has certainly been put to me privately by some fairly senior people that we will need to change the act and part of one was the assessment thing which we have already canvassed quite well but the other one was this business about oversighting investigations,

but there was also the capacity to empower a tribunal to have those coercive powers that are not available. You have referred a number of times to where agencies have come to you because you have powers they do not. Maybe you could get up investigations and oversight these investigations, which is more appropriate. You do some of the original triaging, some of the original assessments. In cases where it is beyond the capacity or is not appropriate for an agency to investigate its leader, you could perhaps consider evoking the powers that that investigation is conducted by seconding the very people you talk about to work to a tribunal that conducts those inquiries and hearings and manages the investigation that way. I was wondering whether there is a role for a tribunal doing those serious investigations rather than pushing it down the line where people are investigating misconduct as well?

Mr KELLAM - I think it would be another bureaucratic body, another level of oversight.

Mr MULDER - What I am talking about is condensing some of your current roles into making the investigative powers of your Integrity Commission those that are appropriate to a tribunal level investigation rather than an individual -

Mr KELLAM - It is a pretty big step. How would you manage that tribunal, what are you going to do about legal representation, what are the rules that apply to it? I'm not putting the idea down but it would need careful analysis as to how you do that.

Mr MULDER - The model is to get it to that level of conditions against corruption rather than investigations.

Ms MERRYFULL - Something like an ICAC has a pool of investigators who get the material together for the public hearings. If you're going to push it up to a public hearing, a public hearing is a big deal so you don't convene public hearings unless you have some really good evidence, and who is going to make the decision about that? That is part of the problem. Who is going to make the decision to convene a tribunal? You can't leave it to the Government. it has to be an independent thing. In places like ICAC they have investigators who gather all the evidence and you don't have to convene a tribunal and then go looking for evidence.

Mr MULDER - I am getting at this model because there are issues with organisations that have that. I'm trying to suggest that if you're talking about serious misconduct, senior people involved in minor misconduct, and the real crunch to it is that in those high-profile cases where things go wrong - and don't get me wrong, having the entire resources of an ICAC bringing down a minister because he breached some minor section by taking $1 500 in a declared donation, I am not sure that is the level at which we need that sort of investigation, but I'm talking about these issues like the one in South Australia.

I was seconded to the National Crime Authority in the post-Costigan Royal Commission days and was also involved in some of those early National Crime Authority investigations into the South Australian Police Service. I can see from the inside that sometimes it doesn't matter about the independence, you still meet these obstacles and in that case the National Crime Authority had powers that weren't available to the local police, particularly in those days in the areas of taxation. It did perform a useful function, like in the South Australia one, to work with the agency, not to conduct a completely outside inquiry.

Ms MERRYFULL - One of the difficulties is that our legislation is the only one that refers to a tribunal and a tribunal has a legalistic term that doesn't exist anywhere else.

Mr MULDER - That is why I tried to ask you step outside the current legal framework and suggest a different framework where the tribunal acted as a commission of inquiry initiated by the people who are doing the assessments or the triaging and the auditing.

Mr KELLAM - That would mean a significant change to the act and it raises one issue, another example we can give to the committee. We have not conducted a tribunal hearing. I have had a firm view that we would not go to a tribunal hearing, with all the cost and the rest of it, unless there was something really systemic and high level. Looking at it from a practical viewpoint - and I think this swings into what you are saying - the way the act is structured, we have to assess it. Then we have to investigate it. Then it goes to the board and one of the options the board has is to say, after the thing has been investigated uphill and down dale, now we will go to a tribunal and conduct a further investigation. I see some issues about that. Whether it should not be that the board - and this would be a significant change - can bring a tribunal in much earlier in that process, is another consideration. That is a terrifically big change to our current structure.

Mr MULDER - Yes, I know.

Ms JOHNSTON - It would be better to refer it as a hearing to perhaps look at the way they do hearings in other jurisdictions as opposed to that full-blown legalistic tribunal.

Mr MULDER - What I am suggesting though is, as part of the oversight functions, you might be able to leapfrog some of those steps once you have done the initial thing. Or, if you have the capacity, having referred it to someone else, oversighting that then watching and saying 'hang on, this is a bit bigger, we need the power to pull this back' and send it to the board in order to continue the investigation, not to redo it.

Ms MERRYFULL - If we go in camera we will be able to give you some examples. Nothing that is as high level as what you are talking about, but where the work that we did, which was across agencies, is something that would not necessarily [inaudible] but where we added value and we were the only people who could do it. There is that kind of thing, or where we had to use coercive powers even though it would not have necessarily warranted a tribunal. It is really about having a continuum, which is kind of what we have at the moment, but it is an inflexible continuum as opposed to a flexible continuum.

Ms GIDDINGS - We did discuss in some other evidence with others around the sort of legal profession board style of model where they have a tribunal they can send their matters to.

Mr MULDER - Speaking of investigating their own?

Ms GIDDINGS - Exactly, but whether or not a full-blown tribunal in the sense that I think you are speaking about, Gayle, it is a smaller style of process. I am cognisant of the fact that we want to go into camera.

CHAIR - We do. Are there any other questions in the public domain at this stage?

Mr McKIM - Just one. I am sorry. I did say I only had only one more, but this will be the last one in public.

There has been evidence given to us that at least there is the capacity when the commission is investigating serious matters that may be breaches of the Criminal Code, that there are issues around the way your investigations are conducted because (a) they take time, obviously, and (b) you are not bound by the laws of evidence in the way you conduct investigations. I hasten to say that the Acting DPP was one of the people who raised this and he did say that neither should you be bound by the rules of evidence. Is there a way you can see, Murray, where any of those issues could be addressed by an amendment to the act?

Mr KELLAM - I need to think about an amendment. The DPP referred to Leigh. Leigh raised that issue around it own circumstances where people had taken the fifth. We have to be very careful obviously in a criminal matter that we do not embark on a route where we are producing material that cannot be admitted into evidence. We do not have the situation where people can take it. They can exercise the privilege here and that's it.

Mr McKIM - Yes, but this issue is not just limited to self-incrimination.

Mr KELLAM - I think you will see on page 22 of today's submission the advice that we have had from the Solicitor-General in relation to that. I would have to think about an amendment. Frankly, I think good management, proper discretion; make sure that we do not cross the boundary. We have one we will discuss in camera but I struggle to think of an amendment.

Ms MERRYFULL - Most of the evidence would be admissible. That is the point. Most of the evidence would be - documentary evidence, for example.

Ms JOHNSTON - Financial records, emails, they are all admissible.

CHAIR - Once again, it depends on how they are obtained and produced as to whether they would be admissible. If they are produced on the requirement that you tell them they must produce them and no other alternatives, it depends how that is acquired as to whether it is admissible.

Ms MERRYFULL - But we do not require the person who is the subject of the criminal charge to produce these. We require T&D to produce them. It is just like a subpoena or search warrant.

Ms JOHNSTON - The business records from the actual agencies.

Ms MERRYFULL - They are the kind of things that would be admissible.

Mr KELLAM - The common law principle is that the person is not required to self-incriminate. Putting out a notice to the ANZ Bank to produce a document does not affect that at all. It is a completely different issue.

Ms MERRYFULL - Page 22, the Solicitor-General has said most of our evidence would be admissible. That is a legal opinion from the Solicitor-General.

Mr KELLAM - If we went to the person who we were confident had committed a criminal offence, they have the privilege before us and they would be able to exercise that privilege in relation to a document. But if we said, 'Here is the notice, you produce those documents', and they didn't in our case, they could say 'I don't have to'. If we forced them along somehow and got hold of the documents, those documents might have been obtained from the suspect in a coercive manner, and that is what might breach the common law rule. If we go to the ANZ Bank or to the employer or wherever and get the documentary evidence, none of that is obtained in defiance of the suspect's legal right not to incriminate themselves. That is why the Solicitor-General has said there he doesn't see a problem.

Ms MERRYFULL - If we are going in camera, we might let Murray go at 4 p.m. because he has to catch a plane and we could go through some of that other stuff in camera.

Mr KELLAM - I regret to say, normally I would put the plane off, but I have a very serious obligation tomorrow at 10 a.m. to be hearing evidence elsewhere.

CHAIR - Murray doesn't need to be here for the in camera hearing. Is that what you are saying?

Ms MERRYFULL - That is what I am saying. We will go through some of our cases which we believe might have been raised in camera by some other parties and give a bit more detail, context and explanation around some of those matters.

Mr KELLAM WITHDREW.

Evidence taken in camera,

CHAIR - Are there any further questions or comments you would like to make, Diane or Gayle

Ms JOHNSTON - One of the problems is that people put submissions in complaining about us and you don't get submissions from people who actually like what we do because generally it is because we have found something wrong with the organisation. You do need to bear that in mind. We do good work. We have only been going for four years. The commission did start with some problems. I think they have overcome those. You need to understand some of the background to some of the submissions.

CHAIR - The committee will be looking at all of the work and operations in coming to a report that is needed to provide to the Parliament.

Ms MERRYFULL - We look forward to your assistance in trying to make it work. Thank you so much.

CHAIR - Thank you very much for coming here today. Thank you for the way in which you have given your evidence and answered the questions. We appreciate it very much.

Ms MERRYFULL - Thank you for giving us the extra time. We really appreciate it.

THE WITNESSES WITHDREW.