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THE PARLIAMENTARY JOINT STANDING COMMITTEE ON INTEGRITY MET IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART ON MONDAY 29 SEPTEMBER 2014.

Mr ANTHONY MIHAL, PRESIDENT, LAW SOCIETY OF TASMANIA, WAS CALLED,
MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR (Mr Dean) - Welcome. Before you begin giving your evidence have you received and read the guide sent to you by the committee secretary?

Mr MIHAL - Yes.

CHAIR - I will reiterate some of the important aspects of that document, which I need to do. A committee hearing is a proceedings of parliament which means it receives the protection of parliamentary privilege. This is an important legal protection that allows individuals giving evidence to a parliamentary committee to speak with complete freedom without the fear of being sued or questioned in any court or place out of the Parliament. It applies to ensure that Parliament receives the very best information when conducting its inquiry. It is important to be aware that this protection is not accorded to you if statements that may be defamatory are repeated or referred to by you outside the confines of the parliamentary proceedings, so if you leave this inquiry and are questioned and make statements, it is on you.

Mr MIHAL - Thank you.

CHAIR - This is a public hearing. Members of the public and journalists may be present and this means your evidence may be reported. It is important that should you wish all or parts of your evidence to be heard in private you make this request and give an explanation prior to giving the relevant evidence. If you get to that stage and you feel you would like to tell us something in camera if you make that request of the committee we will then make a decision on that and proceed accordingly.

I also remind you that the hearing is recorded by *Hansard* and will be on the website. Do you understand all of that?

Mr MIHAL - I do, thank you.

CHAIR - You made a submission to the committee some time ago now, 18 August 2014, and in that submission you set out a number of issues and made a number of recommendations for us to consider. You might want to refer to any of those matters or make a further statement to the committee before I open it up for questions.

Mr MIHAL - When considering an analysis of a piece of legislation like this - and I note that the committee is directed towards considering the powers of the commission, amongst other things - the Law Society analyses the legislation through the filter of what we call 'rule of law principles'. Those principles are directed towards constraining the exercise of state power or any power to ensure that the law is the highest authority and all power is exercised subject to it.

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There are a series of principles but the one that is of most application here and what the submission is directed towards is the principle that a person must have a fair trial. The submission is really directed towards providing protections in situations where an investigation of the commission might take on a criminal flavour or encompass matters that might be of interest to the criminal law and might ultimately result in criminal prosecution or that evidence being used in criminal prosecution.

The first recommendation we have made is that the right of silence be enshrined in the act. There are three ways in which constraints could have been put on the investigative powers of the commission. I think probably the least favoured position, from our point of view, is the one that exists now which is that there is no right to silence. A person called, a witness, is compelled to give evidence which can be used in a court against the person, but that person can claim privileges including the privilege not to incriminate him or herself but there is a complicated procedure for doing so. There is not a right for that person to have legal representation, that is subject to the discretion of the commission when, in reality, in order to exercise any of those privileges, a layperson would not be capable of doing so without any representation.

I am digressing now from the submission, but in my own practice I have come across people have come to me who have been witnesses in the commission who have come after the fact to get advice and I have told them it is too late for them to get advice now because they have given their evidence to the investigator. I note that the commission, generally, when serving the coercive notice will serve a document outlining some of the rights to the person. That is good, but I have come across situations in my own practice where people who have given evidence have felt they have been actively discouraged by the investigator from obtaining legal advice with words to the effect of, 'You're just a witness. We're here to investigate other matters not involving your conduct so there is no need for you to do that.' Whether or not that has occurred or is just the perception of the person only isn't really material to the problem I have in that witnesses aren't understanding, despite the information that is given to them, the importance of obtaining advice beforehand so those privileges can be taken advantage of by them.

CHAIR - As Anthony is going through, it might be more appropriate to ask questions as we go, so if members have a question of Anthony as he is moving through, please ask them.

Ms GIDDINGS - Have you looked at similar commissions around Australia in terms of ICACs and the like, and if you have, do any of those other investigative commissions have the right to silence as part of their powers or expectations?

Mr MIHAL - I haven't done a detailed analysis but my understanding is that there are three broad ways in which powers are constrained. One is the ability for there to be the right to remain silent and then for that evidence to be used against the person. The second is, and we are putting in the alternative, which is the ASIC-type model where a person is compelled, so there is no right to silence, but if evidence is given that is prejudicial to the person in a criminal proceeding that evidence is not admissible in the criminal proceeding. That does away with the need for a complicated procedure for privileges because the ultimate aim is to preserve a person's rights before a court and the court will make a decision about whether or not the evidence is admissible.

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The provisions in the Evidence Act containing the privileges are directed towards a situation in a court where the admissibility of evidence has been considered, so a judge can listen to the person giving evidence and say, 'I'll stop you there, I think we're straying into territory where you need to be aware that you have this right. I can issue you with a certificate so this evidence can't be used against you, for example. Do you claim that privilege?'. The witness will say yes, the certificate will be given and the person carries on giving evidence. That type of procedure allows the person before an investigator to give all the evidence without having to consider whether there is a privilege and then a court will consider whether the evidence is admissible because a privilege ought to have been afforded to the person.

Mr McKIM - That was the second option, Anthony. So there was the right to remain silent, the ASIC model and -

Mr MIHAL - Then there is the situation in the Crime Commission, for example, where there is no right to silence, no right to claim privilege, but the commission itself can prevent the publication of evidence that is contrary to a witness's interest in the manner I have spoken about. There is a High Court authority, a recent authority of this year - *Lee v the Queen* - in which the New South Wales ICAC made an order preventing the publication of particular material that was prejudicial to a person giving evidence before it. That material found its way into the hands of prosecuting authorities. It wasn't used in evidence in a trial but the High Court held that the fact the DPP had that material gave the DPP an unfair advantage that was inappropriate in the criminal prosecution. The High Court spoke about the importance of the right to remain silent and the importance of strictly complying with any provisions in legislation which derogate from that but provide controls. The controls, the court held, must be strictly complied with.

Mr McKIM - When you talk about the right to remain silent, are you just talking about in the context of self-incrimination or more broadly?

Mr MIHAL - I am talking in general.

Mr McKIM - An absolute right?

Mr MIHAL - Absolute. This is what occurs in police investigations. Police invite persons of interest to participate in interviews. That person then needs to make his or her own determination as to whether it is in the person's interest to do that, noting that the investigator might draw an adverse inference from any decision not to participate in such an interview. A court can't, but an investigating officer might, so a person might take into account that fact. They might also take into account that if there is exculpatory evidence to be given, the best time to do that for his or her defence is at that point in the investigation stage rather than in the witness box for the first time, for example, and giving it before a court.

I have read the commission's submission and what was said in the second reading speech and I don't accept the point that having the right to silence would prejudice a witness, so we shouldn't have it for that reason. It is up to the individual to make his or her own determination about whether it is in his or her interest to speak. In many situations it will be in the person's interest in perhaps a more narrow range of situations where the person is trying to preserve their right to a fair trial and have the prosecution make its case without

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assistance from the defendant. In that situation the person would exercise his or her right. Being prejudiced in somebody's employment or in the course of an investigation might be the effect of preserving that right in a trial, but we say it should be up to the individual to make that determination as to what is in his or her best interest, together with his or her legal advisers.

Mr MULDER - Don't we have to be a bit careful there. There are phase. Long before there is an adversarial court hearing there is an investigation phase and these sorts of things make findings that may or may not result in criminal prosecution.

Mr MIHAL - That's right. Exercising the right to silence for somebody in the employment of the Crown clearly would prejudice the person's employment so it would be a serious step and the person would need to think carefully before exercising that right so really it ought only be exercised where the person is advised that he or she needs to preserve that right. In a situation of an investigation where it's not likely that any sort of criminal matters would be uncovered or the investigation doesn't go that way, I don't see -

Mr MULDER - You never know until you ask the question. I speak from experience - and you get some shocks sometimes.

Mr MIHAL - I don't see in those situations that a person would exercise his or her right to silence.

Mr MULDER - What you're saying, though, is that even in the investigation phase that person should get access to professional advice about whether or not.

Mr MIHAL - Absolutely, and that part of the submission stands whether or not any of the constraints I am talking about are adopted. A person who is under investigation or taking part in an investigation as a witness must have a right to legal advice and to be represented by a lawyer.

Ms GIDDINGS - Which is the same in any investigative process outside.

Mr MIHAL - Yes.

Mr BARNETT - You said you had evidence through your practice of clients who had been witnesses and who then were in a meeting with the Integrity Commission and gave the impression, either in reality or in perception, that perhaps they did not need a lawyer. Can you expand on that?

Mr MIHAL - In terms of talking about specific situations, no. I raise it as an illustration perhaps of one of the dangers where somebody does not have a clear right to representation, that it is a right that is subject to somebody else's determination.

Mr BARNETT - It's clear in your mind, but not clear in the minds of the staff of the Integrity Commission that witnesses require or should have the option of the right to a lawyer?

Mr MIHAL - No, I don't think I can take it that far, I can only take it as far as saying people have a perception that that is the case.

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Mr BARNETT - Your advice to us is that at all times a witness should be entitled to legal representation when they are meeting with the Integrity Commission?

Mr MIHAL - In the scheme of the act as it exists now, if somebody is served with a coercive notice and required to answer questions that are being investigated that is the point at which the person ought to have a right and ought to be represented.

Mr BARNETT - And that is not in the act at the moment?

Mr MIHAL - No. At the moment the act says that a person may be subject to.

Mr McKIM - Is it your evidence that it is the form of the coercive notice that has ambiguity or potentially discourages people from seeking legal advice, or is it the actions of the interviewer, for example, after the coercive notice has been issued that is the problem? I think you said they were uncertain as to whether or not they had a right to legal advice, so is it the coercive notices that is the issue there or is it the behaviour of investigators? Are you able to say?

Mr MIHAL - If I received a notice of the nature that these people were served with I would immediately want to get legal advice. I don't think there is any difficulty with the notices or the material served by the commission together with the notice.

Ms GIDDINGS - Isn't there an issue here between a witness and the potential person who is being investigated? If you are a witness to misbehaviour in the workplace that is now being investigated and receive a coercive notice, I don't think the common person on the street would even think about advice from their own perspective. If you were the were the person in the hot seat you might well think, 'I think I need some legal advice here', but a witness to that problem may think, 'Well, I'm just the good, honest bloke turning up to give my side of the story'. Is the concern you have for that witness person?

Mr MIHAL - Yes, that's right. The impression being given is, 'We're not interested in your behaviour, you're just here to give evidence in respect of *x* matter.'. We know, for example, in relation to the North West THO investigation, that during the course of the investigation the subject matter continually became broader. Where somebody is required to answer questions, there is always the possibility that somebody is going to turn from witness to -

Ms GIDDINGS - Perpetrator, potentially, or a person of interest.

Mr MIHAL - I will say person of interest.

CHAIR - On the answer you gave to Guy's question about people having come to you in relation to legal advice, obviously you are not going to identify a particular case and I am not asking you to do that, but have there been any situations where it has been to the real detriment of a client in all of the circumstances? Has it created any real issue where that client has suffered a wrong as a result?

Mr MIHAL - In the sense of do I know of somebody who has been prosecuted as a result of any investigation?

CHAIR - Yes.

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Mr MIHAL - No, I am not aware of anybody who has been prosecuted.

CHAIR - As a result of evidence they have given without having received legal advice.

Mr MIHAL - No, but the potential remains there.

Mr BARNETT - I wanted to focus on the recent report into nepotism and two people within the department who will not be named. I am seeking your views and feedback on the process and whether you have a view as to whether that could be improved, specifically in terms of protecting the rights to natural justice and the report that was tabled in the Parliament which did not include the defence of the two people named. There were very high-profile findings that were then made public. Do you have a view as to whether they had adequate means to protect their interests and reputations or do you think the process was absolutely fine? I am interested to drill down a little bit on the Law Society's views in terms of process, whether we need to tighten that up to protect the rights of people who are named as to whether they should have their defence at least published so their side of the story can be put. I am interested in an overall question, big picture, and then drilling down on their rights to natural justice.

Mr MIHAL - Certainly I am troubled by the manner in which the findings of the commission were reported as findings after some sort of judicial process, when they clearly were not. Perhaps that is a communication problem rather than an actual problem with the way in which the process went forward. I have something of a concern about the way in which the published report dealt with witnesses' evidence and referred to witnesses in a de-identified way with their title and initial when anybody with any knowledge of the THOs and the people in them would be able to clearly identify those people. Those people were compelled to give evidence. There is a published report in which not very much investigation is required to determine parts of the evidence they gave. In that situation there is always the potential that that person could be prejudiced in legal proceedings down the track.

Mr BARNETT - We can't be too specific here because I understand there may be litigation in other places, but I am thinking of the process going forward and if you have any further recommendations to make in that regard. Do you have a view that if they are named they should have a right to express their views in such a report in terms of their defence?

Mr MIHAL - It goes to the purpose for which the report is prepared. It is not prepared for a prosecution of that person; it is prepared for the benefit of Parliament. For the purpose of completeness of the report I think it is important that all the material be contained in it, including what was put before the commission by the people under investigation.

Ms GIDDINGS - Should it be made public and, if so, when? Was this particular report made public at an appropriate time?

Mr MIHAL - You can tell it is something that does trouble me but it is something I don't have an answer for.

Mr BARNETT - If you subsequently considered it and wanted to advise the committee of your views or the Law Society's views, please feel free.

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Ms GIDDINGS - It is a fundamental issue as to how you protect someone's right to silence or right to natural justice when you have reports made public in the way they are appropriately done under the current legislation, but it can damage that person's reputation for evermore and yet there is no proper legal process, tribunal process or court process where those ideas can be tested in a public and open forum.

Mr MIHAL - Rather than most people going to the media to defend themselves, which seems to have happened.

Ms GIDDINGS - Yes, the media becomes the tribunal in the end.

Mr MIHAL - That is troubling.

Ms GIDDINGS - But I'm not quite sure how you get around it. If you have an ICAC style of process you are always going to have this happen.

CHAIR - It seems we are being restricted a bit on some of the evidence you might like to give openly and in a public forum. It may be appropriate if we considered going into camera to look at some of those issues that are on the minds of some members here. That may be a better way to address some of those important issues that members are concerned about. At this stage we will proceed and see where we go.

Mr MULDER - I have a couple of general questions and we can probably get the answers we seek without reference to the specific case. Is this not a problem where we have gone from what used to be a regulated society where you could be taken to court for breach of a regulation and moved ourselves into catch-all codes of practice with non-criminal sanctions but enormous sanctions with regard to a person's employment. We have an investigation report that says there probably hasn't been a breach of the law but a breach or misunderstanding of some code of conduct, so they never have their day in court where they get to fully explain their actions, all they are left with is a taint on their character saying there was an adverse finding in the investigation that has never been tested in a court of law. Isn't that the quandary you have with these sorts of inquiries that are being conducted by bodies in public?

Mr MIHAL - Where investigations don't lead to -

Mr MULDER - Breaches of the law but breaches of code.

Mr MIHAL - There are forums for that: there is the Industrial Commission that I understand probably will be a forum for at least one of the people we are thinking of. I understand the point you are making to me. After three years of the commission's operations I don't know that we're even in a position where we could perhaps judge that fully.

CHAIR - You drew a parallel with police and the warnings that are necessary by police. The Integrity Commission, though, is significantly different from that situation inasmuch as police are investigating criminality generally and it is for the purpose of gaining evidence or information for the purposes of substantiating or supporting a crime, whereas the Integrity Commission is not about that at all. It is about breaches of codes of conduct, other issues in that line and the report we have referred to identified with that as well, so I

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have difficulty with you drawing that parallel with the police and the necessity for warnings to be given to potential witnesses. Do you have a comment on that? As I understand it, where criminality does come out in a report that would then be referred to the proper authority whether it would be police or whatever.

Mr MIHAL - Yes, but it would be too late to preserve the person's right in the criminal sphere where the person has already been compelled to give evidence and given it in the commission, because that evidence could be used against the person.

CHAIR - So you are saying if that happened that evidence ought to be privileged and not be admissible in any proceedings that might come out of that inquiry?

Mr MIHAL - Yes, I'm saying that that is one way of dealing with the problem.

CHAIR - In other words, evidence could be given but would be protected?

Mr MIHAL - Yes, precisely.

Mr McKIM - Sorry to interrupt, but that would deal with the Law Society's major concerns, would it not? I understand it is not your preferred position in terms of the right to remain silent but if evidence was inadmissible that would deal with the majority of your concerns on this issue?

Mr MIHAL - Yes, I think that is fair to say.

Ms GIDDINGS - It would be good to be able to go through each of the recommendations of the Law Society.

CHAIR - We will do that. I interrupted Anthony on his way through what he was telling us. Anthony, if there is nothing further you would like to say on that we will proceed through each of the recommendations.

Mr MIHAL - I have spoken in some detail about the first recommendation so really the recommendations that follow are directed towards the situation as it is now without the right to silence.

CHAIR - We will go through them and any questions members might have on each recommendation, please bring them out.

Mr MIHAL - Recommendations two, three and four really go together and they are about the issuing of a coercive notice. We are against the position where a coercive notice is issued to a person who speaks to an investigator as a matter of course. We think there ought to be a detailed analysis each time of the need to coerce somebody to give evidence and to derogate from a person's right to remain silent, that exists at common law. We think there should be a proper analysis each time that is done to force the commission to consider whether or not, in order the gather the evidence that it needs, it needs to require somebody to give that evidence. That would require an investigator speaking to somebody and asking somebody to speak to them and answer their questions without the need for the person to be compelled to do so.

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Second, if in order to gather the evidence the commission feels the person does need to be compelled, there needs to be a consideration of the importance of the matters under investigation and whether it outweighs the right of the person to remain silent. Is it necessary and is it important? They are the two things that need to happen and we think the best person to do that would be the chief commissioner, who is a senior legal practitioner. That would make it special. It would mean that this is not an operational matter, this is something we are dealing with at a higher level because of the importance.

CHAIR - The position there would be that you would have the investigator coming to the chief commissioner and saying, 'This is why this needs to be done because of the evidence we have gained and because of what has been said'. The chief commissioner would, I would think, be relying very heavily on what the investigator was passing onto them. I am trying to figure out why and how that would make it a better process. Can you explain how it would make it a more robust process?

Mr MIHAL - The investigator would have to go to the commissioner and say -

CHAIR - The same as you do when you go to get a warrant, to a magistrate or judge?

Mr MIHAL - Precisely - 'This is an important issue I'm investigating. I think Mr Smith can give this evidence to me in respect of it because of *a*, *b* and *c*. Mr Smith won't talk to me about those things, so I'd like to compel him to do so'. Then the chief commissioner can undertake an analysis to determine whether or not it is appropriate.

Mr BARNETT - Who issues the coercive notice at the moment, the CEO or the investigator?

Mr MIHAL - The investigator.

Mr BARNETT - Not the CEO or the board chairman?

Mr MIHAL - No. I understand that the commission's submission is that it ought to be the CEO who issues the notices. We say that to take it to a higher level, beyond the ordinary operational matters of the commission, would give it the necessary importance as well as the fact that the chief commissioner is the senior legal practitioner with the skills and knowledge.

Mr BARNETT - Do you mean the chief commissioner as in the police or the chair of the board you are referring to?

Mr MIHAL - Yes, the chair of the board.

CHAIR - Is it because they have a legal background your main reasoning behind that, because of their expertise in that area?

Mr MIHAL - Yes. Number one, it takes it out of the operational sphere and number two, the person's expertise is a senior level practitioner.

Mr BARNETT - You are not looking for another independent entity, though?

Mr MIHAL - No.

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CHAIR - Another, are there any examples of where you believe there has been a flawed process because of the way it is currently operating within the act? Are there any examples of where it hasn't worked?

Mr MIHAL - In my view, any witness who is served with the notice understands to some degree that his or her rights are being interfered with by the fact of the notice and that is something of concern in itself.

CHAIR - If there are no other questions on these recommendations we can move on to recommendation 5.

Mr MIHAL - I covered this in what I said before and we've held up the ASIC model. This is directed towards the difficulty of an individual understanding that he or she has these privileges in the Evidence Act and then making a determination whether to answer a question. If in the answer to a particular question by an investigator the person could claim a privilege then there is a process whereby if the commission takes the point then the witness can take the matter to the Supreme Court. That has never happened, and for good reason. It would be extremely expensive and difficult for somebody to understand who isn't represented by a lawyer. If it did happen often, it would unreasonably interfere with investigations. If there were a lot of claims of privilege being made by witnesses in a situation where people did lawyer-up and decided this existed, it would impede the operation of the commission unreasonably. We don't think having the Supreme Court involved at this stage of an investigation is an appropriate mechanism for protecting people's rights.

Mr BARNETT - Is the exact form of the less complex procedure set out in your submission?

Mr MIHAL - If you look at the annexure at the back of the submission you will see ASIC's procedure set out quite nicely in its notice.

Mr BARNETT - So you're happy to follow that procedure?

Mr MIHAL - Yes, absolutely. If the person is compelled to give evidence there is no right to claim privilege but in the event a person is prosecuted the court then determines whether that evidence should be admitted and if it has prejudiced the person, the court shouldn't admit it into evidence. That takes away some of the harm. In the Lee v the Queen situation I talked about before, giving the prosecution an unfair advantage potentially still applies there. The prosecution would have access and understand the evidence the person gave potentially under privilege, so perhaps there could be a provision similar to the ICAC provision preventing publication of material that was provided where a privilege could have been claimed but for the fact they are required to give evidence.

Mr McKIM - Can I follow that through, Anthony? If we went down the line of creating that ban on publication, how would the process go? The Integrity Commission goes through a process and makes a report with findings in it. The system at the moment is that that report is able to be provided to various other people who could decide whether -

Ms GIDDINGS - It must be provided to Parliament.

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Mr McKIM - Yes, but it can also be provided to other people. Ultimately the commission doesn't charge anybody, that is other people's job. Would publication include providing it to, for example, the DPP?

Mr MIHAL - No, specifically not.

Mr McKIM - Could the commission still provide all the evidence it had garnered to the DPP?

Mr MIHAL - It could. Under the ICAC model, ICAC determines whether or not material should be published because a person, but for the act, could have claimed privilege, so in that situation the High Court has found that ICAC should not be giving that material to the DPP, so any report could not include any material where the commission determines that somebody could have claimed privilege but for being compelled.

Mr McKIM - So the DPP then does not have all the information that is in the hands of the commission in that circumstance in order to determine whether or not charges should be laid?

Mr MIHAL - Yes.

CHAIR - You have said that in relation to recommendation five you believe it is an oversight that they have not included compliance with the Evidence Act in relation to warnings and so on.

Mr MIHAL - I think that partly the commission has taken the point because together with the coercive notice a statement about a person's right is also served. We say that anybody in the matter of a police investigation ought to be told about their rights at the beginning of any interview where evidence is gathered.

CHAIR - If there are no other questions on that, Anthony, maybe we can go to recommendation six, that investigators and the investigators be bound by the provisions of the Evidence Act 2001 in relation to cautions and warnings and the procedure for the conduct of records of interview. I just make the comment there that it is significantly different the way police carry out an investigation to that of the Integrity Commission. I will leave that open to you, Anthony - is there anything else you want to say in relation to recommendation six?

Mr MIHAL - I think I have answered your point on that. We are concerned about the situation where an investigation takes on a criminal flavour and those protections are necessary.

CHAIR - Are there any other questions around recommendation six and, if not, recommendation seven?

Mr MIHAL - We have covered that.

CHAIR - Recommendation eight?

Mr MIHAL - Recommendation eight is probably the only operational-type matter that our submissions are directed towards because we have particular expertise in relation to taxation to the Supreme Court. At the moment witnesses' costs can be paid but before the commission can pay those costs the Supreme Court has to tax the legal practitioner's bill

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and that involves a witness's legal practitioner having to prepare a bill in the proper form and then take his or her file off to the Supreme Court, attend a taxation hearing conducted by the deputy registrar of the court who sits there and goes through each line and says, 'Right, tell me why you charged \$20 to write this letter? What's the letter about?', et cetera. It would be more appropriate for the commission itself to be able to look at a practitioner's bill of cost where it is determined that costs will be paid and agree as to the costs in an appropriation situation where, on the face of it, it is uncontroversial, and that would be the case in most situations. Only where there is a dispute between a witness and his or her legal practitioner will the commission or Supreme Court become involved in taxing a bill.

CHAIR - Anthony, how do you see the Integrity Commission? Is there a need for one in this state in the way it is currently functioning and the duties it is currently undertaking? Its main role is in bringing that to the attention of all departments and working through that. What is your view in relation to existence of the Integrity Commission?

Mr MIHAL - I have read the submissions of Professor Malpas, the Police Association and Tasmania Police. This goes beyond the Law Society's remit of considering rule of law-type issues but my personal view is to tend towards those submissions to the committee. Professor Malpas's view, for example, is that there isn't so much a need for an integrity commission as there is for an ethics commission for those issues that you raised, Chair. Then for the more serious matters we have Tasmania Police to investigate in the usual way. So there is a need, but perhaps with a different focus.

Mr BARNETT - On the important role of education and awareness of ethics and integrity, do you see that as a separate function to the investigation-prosecutorial approach? They seem to be different functions. At the moment they are combined into the one entity but do you think they should be in separate entities?

Mr MIHAL - I don't. It's commonly seen in other spheres, for example, the Antidiscrimination Commission. Our own legal profession board combines discipline in the profession with education of the profession in respect of disciplinary matters. It makes sense to have the people who are the experts in those matters also being the teachers, in my view.

Mr BARNETT - The role of the board, I am interested in your thoughts on this. I think there are four board members. The last report said it was \$130 000 for board fees and I presume there would related and incidental expenses for travel and accommodation and all the rest of it. Do you see there is a need for a board? I understand the merit of an arm's-length approach for oversight of the CEO, the staff and operations but do you think there is a need for a board, particularly in these tight budgetary times? Are there ways to streamline the checks and balances on the operational matters of the Integrity Commission?

Mr MIHAL - No. There are good, skilled people including practitioners in the Justice department, but the skill set on the board of the Integrity Commission is far beyond what could be realistically provided with the resources of the Justice department. The separation issue is an important one and the current structure provides that appropriately.

Mr BARNETT - Finally, in terms of the cost and cost-cutting, do you have a view on how the commission could reduce its costs in terms of operations?

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Mr MIHAL - I don't. That is beyond my expertise and understanding. I could not comment on that. The budget is about \$1 million.

Mr BARNETT - I appreciate that, thank you.

Mr McKIM - Anthony, you said you tend towards Professor Malpas's submission and I think you mentioned an ethics-style body and relying on the investigative authority and powers of Tasmania Police. Who investigates police under that model?

Mr MIHAL - I personally don't have a lot of understanding and experience of investigation of complaints made against police officers. It's not something I have come across in my practice in the same way I have with ordinary public servants.

Mr McKIM - That's the tension and the issue, or one of them, is it not? Otherwise you simply have the police investigating themselves through an internal complaints investigation body within Tasmania Police or you rely on the DPP who is ultimately under the authority of the Attorney-General, and therefore it becomes at least in part potentially a political decision as to whether to ask the DPP to investigate something.

Mr MIHAL - I take your point. I think it has always been an issue of cost in Tasmania, having a separate body to investigate police. A cost-benefit analysis would ask what are the risks, is there a problem in Tasmania Police? Currently, probably not. Is there a risk? Yes, there is always a risk where the exercise of power is involved.

Mr MULDER - The thing is that internal investigations inside Police - and as an aside, I would much rather be investigated by the Integrity Commission or the Ombudsman than I would by Internal Investigations - are a little more rigorous than you may want them to be and lack a bit of objectivity on those things. Any investigations conducted by the police or any complaints about police misconduct are in the first instance referred to the police commissioner who arranges for a review by Internal Investigations. If that doesn't satisfy the complainant, the complainant can then take it to the Ombudsman. The Ombudsman must be made aware of all these complaints. If he think one is of sufficient gravity, he can take over that investigation. Do we need an integrity commission when we have other oversight bodies such as the Ombudsman who we could empower to take up special investigations? Do we need a stand-alone investigative body in addition to the other investigative bodies we already have?

Mr MIHAL - I have questioned the need for the investigative side of the commission's work. The legal profession took a view a few years ago in Tasmania, but it's a view that is proffered in most states now, that law societies don't conduct disciplinary matters any more. We have separate bodies for the purposes of that oversight. Perhaps one of the reasons for that might be the one you articulated, but I don't think it is.

Mr MULDER - The media would be quite keen to refer internal complaints to an outside body, I'm sure.

Ms GIDDINGS - If you didn't have an integrity commission, would you follow a similar model to the Law Society in that perhaps the State Service Management Office needs to have the role of investigator on its own but there is a separate independent tribunal where any complaints then go for a more formal process of testing that information. Then a

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disciplinary action is taken at the end, but at least there has been a process and that is when it becomes public, as it does with lawyers. If a lawyer is deregistered it is a public issue, so perhaps the same should happen with a public servant if they are stepped down and it is a public thing as to why such and such is no longer in their job. Should we be considering that bigger question of whether we even need the Integrity Commission at all?

Mr MIHAL - I think it is fairly clear from the answers I have given that my view generally would be yes.

Ms GIDDINGS - If you did not have it, though, you would still need to have some form of body that can investigate issues within the public service.

Mr MIHAL - Yes.

Ms GIDDINGS - Do you think it should be an internal body like a State Service Management Office taking on that role of investigator?

Mr MIHAL - That is a possibility and in terms of a tribunal-type body the Tasmanian Industrial Commission could be the tribunal in that sort of model.

Ms GIDDINGS - Again, it goes back to the old model really, doesn't it?

CHAIR - Each head of department has a responsibility to ensure his or her department is complying with all of the requirements and codes of conduct and all of that, so they have that responsibility themselves. It has been suggested that there is a double-up in some of these situations with a head of department who may well be undertaking an inquiry or investigation and the Integrity Commission on the other side also becoming involved and undertaking an investigation and the two of them at times not knowing what is really going on and that the other is involved. Have you addressed that at all?

Mr MIHAL - No, and it has not been something that has been brought to my attention.

CHAIR - Because of the secrecy around the whole thing?

Mr MIHAL - Yes. At least one of the investigations has showed a head of department has not been aware of particular issues covered by this process and I think it is probably fair to say it is unlikely that it would have been uncovered in that way with simply a head of department dealing with it.

CHAIR - The other question I had was on the board as well but I think you have just about covered it. With the involvement of the Ombudsman and the Auditor-General and I am not quite sure else, it would seem that there is a real conflict of interest there and it is being raised all the time that they ought not be there because of their functions and responsibilities. Do you have a view on whether or not it is appropriate for the Auditor-General and the Ombudsman, for instance, to be there with the board?

Mr MIHAL - I suppose I am torn on this because those people bring particular skills and knowledge that might be difficult to obtain elsewhere. I think their contribution is valuable in that sense. Is it good to maintain separation between these types of bodies? Probably yes but I suppose it is a balance between the two.

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CHAIR - Thanks, Anthony. Are there any other questions?

Mr BARNETT - Do you know much about what Ms Giddings referred to, the State Service Management Office, and how they operate?

Mr MIHAL - No, I do not, I confess.

Ms GIDDINGS - The big issue with that, of course, is that you have the same perception for us as the police on that one.

CHAIR - Are there any other questions? Anthony, is there anything else you would like to say in closing or any further information or comment you would like to make?

Mr MIHAL - I hope I have been of some use to you here.

CHAIR - We appreciate very much your coming here. We appreciate very much the submission we have received and the committee will be taking all of that into account plus your evidence here today in formulating our position which we hope to be able to do this year and get it before Parliament. That is what we are aiming for but it is going to be a tough ask because time is running by quickly.

THE WITNESS WITHDREW.

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Mr TOM LYNCH, GENERAL SECRETARY, CPSU, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR - This committee hearing is a proceedings of the Parliament which means it receives parliamentary privilege. This is an important protection that allows individuals giving evidence to parliamentary committees to speak with complete freedom without the fear of being sued. It is important to be aware that protection is not afforded to you if statements that may be defamatory are repeated or referred to by you outside the confines the parliamentary proceedings.

This is a public hearing. Members of the public and journalists may be present and this means your evidence may be reported. It is important that, should you wish all or part of your evidence to be heard in private, you make this request and give an explanation prior to giving the relevant evidence. If we reach such a stage, you need to make an application to us that it should be taken in confidence and the committee will make that determination. The information and evidence provided is recorded for *Hansard*. Do you understand that?

Mr LYNCH - Yes, comfortable, thank you.

CHAIR - You provided the committee with a submission on 22 January of this year. I would like to provide you with an opportunity to go through and summarise or add to some of the evidence you have given. Perhaps, on your way through that, it might be appropriate to take questions from members rather than revisit areas, if you do not mind.

Mr LYNCH - Yes. I would like to thank the committee for the opportunity to present both our submissions and to be available today to go over that in further detail and provide any clarifications. It was laid out in the submission who the CPSU is. We represent public sector workers in Tasmania in government business enterprises, statutory authorities and the University of Tasmania. A lot of the people we represent are covered by the scope of the Integrity Commission Act and that makes it something of great interest to us. We have also been very strong supporters through the process of arriving at the Integrity Commission Act. We believe a very important aspect of our civil society is that public officers are open to maintaining high standards and the act is a very important part of that overall process.

Most of our dealings with the Integrity Commission are as representative of people who have been asked to appear before the commission, sometimes as witnesses, sometimes as the subject of an investigation and we sometimes provide advice to complainants. A whole range of people come to us seeking assistance. That sets up the view of how we have looked at this review, to make sure we have an act that is effective and fair and offers people, as far as possible, a transparent, procedurally fair process.

The first area we have gone to in our submission is education. The way the act was constructed around the Integrity Commission having an important role to play in education and also placing responsibilities on employers in regard to educating people about their rights and responsibilities we think is critical. We would like to see this area tightened further. We believe that for public sector workers in particular education around their responsibilities should be mandatory and should occur as part of that induction process so that from the first day somebody comes into the public sector they are clear about the role

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of the commission and their own responsibilities as to ethical behaviour. Our experience has shown that that sort of training should be followed up fairly regularly to make sure people are refreshed. We strongly believe that a lot of issues that arise are dealt with best at that very early stage by peer pressure, by people having a common understanding about the right and wrong thing to do. If everybody has the same message around that through training, that is a very good way of going.

CHAIR - Are you aware whether your members have had that training at this present time? Are there repeat sessions occurring?

Mr LYNCH - It is very mixed. In some agencies it happens routinely and in others it doesn't. Some of it comes down to a funding issue and whether there are resources available. One of the things we would like to see included this review is much clearer reporting on compliance. We would like to see agencies reporting on what percentage of new employees have undertaken the appropriate induction training. The training is there, the commission does a great job at providing modular training, but it is about making sure that happens, what percentage of employees have had follow-up training - every year, two years, three years, or whatever is considered appropriate - and that should be reported and seen as part of an agency's annual responsibilities and performance of that agency.

CHAIR - Do you see that as only the responsibility of the Integrity Commission or do you see that as a responsibility of the organisation or the department?

Mr LYNCH - I see it solely as a responsibility of the employer. The Integrity Commission establishes the framework but it is the employer's responsibility under section 32 to make sure people are aware of their responsibilities. They need to build that into their normal operations because that gives us the highest standard of protection.

Mr BARNETT - Are you saying it's not happening at the moment or only in part?

Mr LYNCH - I am saying it is very mixed. Whether every agency sees it as a key part of the induction training is a bit hit and miss. As to the degree and quality of that training and certainly the follow-up, I think we can do better on that.

Mr BARNETT - You're talking about training in terms of ethics and integrity - what are you referring to specifically?

Mr LYNCH - I am talking in this case about the training around understanding your rights and responsibilities under the act and, more broadly, under the State Service Act in regard to ethical behaviour.

Mr BARNETT - Under the code of conduct or just ethical behaviour generally?

Mr LYNCH - The principles of the State Service Act are built around making sure that people understand their responsibilities under those principles, whether you have breached a code of conduct or not.

Mr BARNETT - Do they know about the code of conduct and are they educated on it?

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Mr LYNCH - I would say that was mixed as well. I think it is a little hit and miss and I would like to see that more formally conducted and followed up and reported on.

CHAIR - When they undergo the briefing sessions or whatever they go through, do they have to sign off on that to say they have attended an ethics session and understand the principles of it or whatever?

Mr LYNCH - It seems to be increasing that people going through those sorts of modules do sign off on something but I must admit I am a bit cynical about sign-off processes because I think sometimes it is about giving people a whole wad of things and you feel as though you have discharged your responsibility as an employer by getting them to sign it and putting it on their personal file. I would rather people actually had a really good knowledge and understanding of those processes and were confident when they saw something that they believed were not appropriate that they could stand up and say, 'Hang on, somebody should look at this', and know that their agency was going to back them in that because that is the message the agency has always put out to them.

CHAIR - My concern is that if the agency has a responsibility to ensure that this training occurs, how can they later say that so-and-so did receive that training, they were at the session and here is a document to identify that they were there, if that person happens to get themselves into a bit of strife and that is a very important part of where they currently find themselves? How can it be demonstrated that they have had that training?

Mr LYNCH - I think what you're saying is that it should be done but I'm just saying don't replace proper training and someone having an understanding of their responsibilities with tick-a-box training where people simply initial that they understand all of that. We all do it with agreements online, such as the Apple update I did last night that has pages and pages, nobody actually reads it but you just agree and Apple is perfectly happy but I do I actually understand what my rights and obligations are?

CHAIR - I understand that.

Mr MULDER - That comes to my point. Are you talking about training here or talking about attendance at awareness seminars? I am just wondering what your view was on whether we really need to get an assessment component into these things to make sure people have actually understood what is being delivered rather than just attending.

Mr LYNCH - I think we do. I think all training we deliver should have an assessment tool and increasingly they do but it is not being able to then come back and say to somebody, 'Aha, I've caught you because you did know this'. I think it is about genuinely finding out whether people did understand it, whether they got the key messages and -

Mr MULDER - That becomes the responsibility of the employer in that sense to make sure that their people understand the various issues in their workplace rather than discharging your obligation by giving them a couple of hours off.

Mr LYNCH - I can be very cynical about this. If you go to some employers these days, particularly with young people starting in a call centre or something, on day one they get a manual this thick and by the end of the day they are expected to have signed off on all that

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information and really all it is is a transfer of legal responsibilities, it is not about actually equipping or training somebody -

Mr MULDER - But they are quite good because they actually do you a favour by highlighting the bits in the text that you have to write in the box at the end of it.

Mr LYNCH - That's right.

The other issue I have highlighted here is probably the biggest concern we have with the act or the State Service Act in its current construct and the employment directions that hang off that. There are two distinctly different approaches undertaken by the Integrity Commission and heads of agencies, given their responsibilities under those two pieces of legislation. This is from the Integrity Commission report to the standing committee around the assessment of complaints, and they say:

Once appointed to conduct an assessment an assessor may, if they consider it appropriate, give written notice of their intention to conduct the assessment to the principal officer of the relevant public authority and the complainant and any public officer to whom the complaint relates. The written notice may be made confidential in accordance with section 98. Of the complaints that have been assessed by the commission, 21.6 per cent have been notified to the principal officer, 48.6 per cent have been notified to the complainant and 8.1 per cent have been notified to the subject officer.

There are varying reasons why the principal officer may not be notified of the assessment. For example, the allegations may assert the principal officer's involvement in the alleged misconduct. The complainant may not be notified of the assessment process - for example, if further inquiries or evidence gathering is required. There would need to be exceptional circumstances justifying notification to the subject officer, particularly where the alleged misconduct is current and ongoing. Assessment is usually done covertly and control of evidence can be more difficult if multiple persons are involved or advised of the assessment process. In addition, notification may cause unnecessary and unwarranted worry and anxiety to the subject officer, particularly where the allegations are unsupported.

That is one sort of investigation. If you compare that to employment direction 5, the procedures for the investigation and determination of whether an employee has breached the code of conduct, it is quite different. This is initiated by a head of agency having reasonable grounds to believe that a breach of conduct has occurred. That is an interesting process at the moment in that many heads of agencies now conduct an investigation to determine whether *prima facie* they have reasonable grounds, and that investigation process itself is unregulated so in many cases now we are seeing an investigator appointed and what we would consider to be the full investigation done as the *prima facie* investigation in an unregulated space and then that being relied upon as part of the investigation.

In the case of a code of conduct investigation, it says:

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Prior to the commencement of the investigation or in circumstances outlined in clause 7(7), the head of agency must inform, in writing, the employee suspected of committing a breach of code of the substance of the alleged breach of the code; of the intention to investigate the alleged breach; who will investigate the alleged breach; that the person may seek his or her own advice and can be assisted by a person of the employee's choice throughout the process; and of the possible implications for the employee if the matter proceeds to a determination by the head of agency that the employee has breached the code.

That is a completely different process, one where the allegations are put to the person very clearly and all the evidence is there to back up those allegations. I am not commenting on either process; they are both as they are for a particular reason. What we find is that a head of agency begins an investigation and at the time they are beginning the investigation they may or may not know whether the same complaint has gone to the Integrity Commission and they are conducting an investigation, and then we have this confused space of backwards and forwards.

CHAIR - That's the point I raised with the people speaking to us this morning.

Mr LYNCH - You have a completely different set of rights. I have outlined some questions in my submission I would like to see addressed. What we all really need is clarity. Rather than it necessarily being clarity that arises from changes to the Integrity Commission Act, I think it is the employment direction 5 process which needs to be addressed here. The role and function of the investigation process within the Integrity Commission needs to be built in there. It shouldn't be at the discretion of somebody, everybody should know exactly what happens when it gets to that point. That is going to require a lot more notification by agencies to the Integrity Commission of matters that are subject to potential investigations around code of conduct.

Mr McKIM - And vice versa?

Mr LYNCH - Yes, and I think vice versa must occur as well because if the Integrity Commission investigation process is then becoming the code of conduct process, people still need to have the procedural fairness that is shown in that process. I think there needs to be a lot more communication between the two and one pathway followed, not multiple pathways.

CHAIR - Are you saying that if a department is involved in a code of conduct investigation or inquiry, it does not matter how insignificant the matter is, it ought to at least be brought to the attention of the Integrity Commission? When you start to look at levels of seriousness it becomes very vague and shaded as to what organisations should pass on to one another?

Mr LYNCH - It is complex because, in some of these cases the head of agency should be getting on and determining the matter and getting it out of the way, but if that is the only way you can deal with this issue that is probably the right way to go. I think there needs to be a level of maturity where it is clear when the commission itself undertakes the investigation role, when the commission uses its power to delegate that investigation to the head of agency and when the head of agency is responsible for the process outside the scope of the Integrity Commission. Those things are not clear at the moment.

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Mr McKIM - You have posed a series of question in your submission. Can I test a possible resolution to this with you, that whenever a head of agency determines they are going to undertake a code of conduct investigation they notify the Integrity Commission of that fact and, in broad terms, the matters being investigated? The commission then has the opportunity to assess whether that matches any of its current or potential investigations. If so, the commission could then notify the head of agency and say, 'Stop, we're doing something in this space', and if not, the commission simply notifies the head of agency that the commission has no current interest in those matters and the way forward is a matter for the head of agency. Is that a kind of framework that may address some or all of your issues?

Mr LYNCH - I think it does. The problem it still leaves is this prima facie investigation that is occurring beforehand and that needs to be addressed, because if the head of agency was not advising the Integrity Commission of their intention to conduct of code of conduct investigation until after they had conducted quite an extensive prima facie investigation, they may be trampling in space that will cause the Integrity Commission some concerns when it does come to them. We need to go back and redefine what this process is around a head of agency satisfying themselves that there are reasonable grounds.

Mr McKIM - Before an investigation?

Mr LYNCH - Yes. To me, that is quite a small process. In the majority of cases it is clear - evidence is presented to you as a head of agency that there are reasonable grounds to suspect a breach has occurred and then you do what you have to do, including notifying the commission. If you are not convinced, if you get an allegation and there is no evidence and you have to collect some evidence to satisfy yourself, that should be to be minimal. At the moment the process seems to be going all the way and that is so that heads of agency can operate outside the regulation of the E5.

Mr McKIM - To follow up on that, because it is open to this committee potentially to recommend amendments to other acts, not just the act that covers the operations of the Integrity Commission, you would be looking for more detail to be inserted in the State Service Act to deal with those preliminary investigations and to constrain the process that is undertaken which does the bare minimum necessary for the head of agency to form a view about whether an official investigation in relation to code of conduct breach should take place?

Mr LYNCH - That is correct, whether it needs to be in the act or whether it can be dealt with through employment direction.

Mr McKIM - Do you have a view on that?

Mr LYNCH - Employment directions are instruments of the employer that can be changed at any time. That is my concern with it just being an employment direction. It clearly needs to be part of that process but maybe it needs to be backed up in the act to say this is the minimal part of the process rather than usurping the investigation part.

Mr BARNETT - Are you talking about the State Service Act?

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Mr LYNCH - Yes.

Mr McKIM - If that were done, hypothetically, and there was a framework established around those preliminary investigations and if we were going to go down the path of amendments to the Integrity Commission Act that required heads of agencies to let the commission know that an investigation was underway, you would suggest that happen at the start of any preliminary investigation rather than if and when the head of agency has determined prima facie that an investigation is necessary?

Mr LYNCH - I don't know that it actually can. I think some sort of preliminary investigation may need to occur first because with some of these things an agency receives an email from a member of the public saying, 'This happened', and if it did happen it is potentially a breach of the code of conduct but before you kick off a code of conduct process you need to satisfy yourself that there is some likelihood that it did actually happen. We need a fair process but also one that doesn't have everybody running around because you do see some fairly bizarre things coming in.

Mr McKIM - So just to be clear, you are suggesting that the heads of agencies could then go through the confined preliminary process, if you like, and if they then form a prima facie view that an investigation is necessary that will be the trigger point for the notification to the Integrity Commission?

Mr LYNCH - That is correct, and then a decision will be made between the commission and the head of agency on where the process would occur, because one of the things that happens now is that people are notified that there is an investigation under the potential breach of the code of conduct, that investigation gets underway and then either the Integrity Commission is advised, I'm not sure how they become aware, and they effectively take the investigation up and from an employee perspective suddenly it has gone into a black hole. The agency is then frightened to communicate with them in any way, the commission doesn't have any obligation to communicate with them and that is the area where people get really stressed. The same goes if the Integrity Commission is involved and conducts an investigation whether the original code of conduct comes back onto train again at the end, so two years later suddenly the conversations we were having two years ago start again, so there needs to be greater clarity for people around that.

CHAIR - Any further questions on this point?

Mr LYNCH - I have mentioned confidentiality there and whilst we accept that there is a need in particular cases for inquiries to operate covertly, I think in a lot more cases there is no reason for them to be operating covertly and it is much better that people know where things are at and they are far more out in the open. We find often that people come to us and they really have absolutely no idea what is going on. They have had a string of letters and are quite frightened because they have been told that they can't talk to anybody and you have to try to put that into a context. I think history would show that in the vast majority of cases that is probably not necessary. I know it is hard to determine the cases where that is necessary at the start of the process but I think we should be looking at the use of section 98 less regularly because it is causing confusion and unnecessary stress to people.

Mr BARNETT - Are they allowed to talk to you as the union?

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Mr LYNCH - We have interpreted the act that they can but I would like to see that made explicit in the act. It says that you can seek advice and we advise our organisers involved in this process that they must also maintain that confidentiality, but I would like to see the act explicit about that.

CHAIR - Just so I am clear on that, when they are served with a notice they are able to go to you for advice?

Mr LYNCH - Yes. That has been our interpretation of the clause because it talks about seeking legal advice in relation to the notice or an offence against subsection (1) or in obtaining information in order to comply with the notice. We interpret the advice we provide but the person you inform also must acknowledge they have a non-disclosure obligation. I know of people who haven't sought advice - members of ours - who have interpreted that clause as saying they can't talk to anyone and when it has finally come to our attention we find a very stressed family group trying to deal with the situation without the information they require. I think it is better that the act be explicit about organisations such as ours and also any obligations that places on organisations such as ours should we be providing people with information and advice.

CHAIR - So you're saying absolutely clear lines?

Mr LYNCH - I would prefer that, yes.

Ms GIDDINGS - I understand the problems with the current process but how do you balance that against prejudging somebody's guilt or innocence when potentially there is an internet article that says Lara Giddings is being investigated for blah, blah, blah? If at the end of the process the investigation goes no further -

Mr LYNCH - That's not newsworthy then, is it?

Ms GIDDINGS - No, but my concern is that that documentation can live for evermore on the internet and when I apply for another job in five years' time and in the Google Search resume process, as is normal practice nowadays, that comes up and immediately it is, 'Oh, she wasn't found guilty but there's a bit of a cloud over Lara Giddings because she had an investigation into her'. It is a natural human thing to assume guilt to some extent even when there is no further action taken, so how can you balance the protection of an individual if an investigation is found to be unwarranted so that the public element of it doesn't damage them regardless?

Mr LYNCH - I don't think you can, you just need to try to find the right balance. It is my submission that the balance we have at the moment is too far one way and is causing people a lot of unnecessary stress along the way. I also take on board what you're saying, that should that then be reported publicly it is there for evermore in the social media world.

CHAIR - Should there not be some requirement that that be expunged from any of the records and be an offence if it was disclosed? If a person is found not to be involved or guilty of an offence, is there some other protection a person ought to be provided? It does remain there and is a cloud of people's heads. Mine is a good example; it still remains in some of the records and has never been expunged and it should be.

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Mr LYNCH - I don't know whether anyone can do that these days. I am not sure who would have the ability to take something off the worldwide web. Our submission is to try to find that better balance where matters are not controversial. A lot of the things we're talking about are not sensational and are not going to attract attention, and even with the confidentiality that has surrounded some of the matters that have gone to the Integrity Commission, they have still been out there in the media world so I don't know that we are necessarily being successful but I do know we are causing a lot of people a lot of stress.

We take particular interest in the replacement for the State Service commissioner on the board. We support the submission from the Integrity Commission for an amendment to section 14(d) that would specifically put someone in there with experience in public sector human resources and industrial relations. We think that is a core set of skills to have on that board and are strongly supportive of that.

Ms GIDDINGS - I am interested in the issue of the board because, with the budget cuts that have been put forward for the Integrity Commission, one of the options - although I do not think it is final option as yet - is to remove one of the positions of the board to create some savings. Do you have an opinion about that? Which role would you think was no longer required?

Mr LYNCH - I am at a loss to see who you could take out of that board the way it is currently constituted. It is finely balanced. You have the commissioner, the Auditor-General and Ombudsman clearly need to be there as people with other than a local government background for the credibility of the board and given the scope of its responsibilities, a person with experience in law enforcement to conduct investigations needs to be there and someone who has those skills that the State Service Commissioner brought to that. It is a different area and you could have quite a few of those people not having that background. If you then remove the generalist person, I think you take away an opportunity for somebody with a another range of skills to come to that table.

It is a relatively small board given its important function and this is one of these areas where, if we are going to genuinely say we want to have this process in place, we need to invest the money in having an appropriate board. I would advocate all of those positions are needed, including the skills in regard to industrial relations with public sector human resource management.

CHAIR - It has been suggested that the commission could probably operate without the board and that function could be taken on I am not quite sure where.

Mr LYNCH - It is my view that this act was constructed around this board. It is at the heart of this act and what gives it its credibility and what gives people confidence in it. If people do not have confidence that integrity entities are truly independent and operating for the wider good of the good the community it is a very dangerous thing. It is my belief that if you were to remove the board from this bill, you would need to go back and look at the construct of the bill completely. I do not think you can just trim a piece off like that.

Ms GIDDINGS - The issue raised in the last discussion was around the process that currently exists where a complaint is made and an investigation is conducted and that information is presented to the Parliament. So far we have only had one example of that process. We

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are interested to know if you have any thoughts on that process, particularly around natural justice for the person who is being investigated. In the one example we have seen, a report was provided to Parliament with no opportunity for the person at the heart of it to be able to respond publicly to that report. Have you had a look at the process in terms of the completion of the investigation and what happens next?

Mr LYNCH - I have, and I think the way the act requires things to be done is the way things were done, so I think we need some change here. One of the principles of this act is procedural fairness. We have written into the act, through its construct, breaches of procedural fairness. I would like to see the Integrity Commission have a greater ability to communicate where matters are at from a process point of view so that people could understand that and there is not this void of information that tends to get filled in with rumour and innuendo. I believe that when any sort of final report is arrived at the person who is the subject of that report should be seeing it first and having an opportunity to provide feedback on it. I think it is a fairly common process in many other areas. The final report that is going to be on the record should either be an amended version of that initial report if there is evidence put forward that refutes some of the findings or should at least include any feedback from that subject so that the person reading that report can read the determination but also the criticism the person had about that and the reasons why.

Mr BARNETT - So their feedback and defence to the allegations or the finding that have been made should be included in the report that would then become public?

Mr LYNCH - I think that is procedural fairness and I can't see any circumstances why you wouldn't.

CHAIR - That is before the release of the report to anybody? In other words, once the Integrity Commission completes their report and before it is released to the Parliament, as has occurred, that person or the persons named in it ought to be given the option of being able to report their situation back for inclusion within the report?

Mr LYNCH - That is my view. I don't think it is actually a report until that has occurred. I think it is a draft report at that stage and there has to be an opportunity to make sure that if there are errors of fact that can then be substantiated they are addressed in the report or issues the respondent wants to raise also become a part of that report.

Ms GIDDINGS - Essentially the same process that the Auditor-General goes through right now.

CHAIR - That is exactly how it is now; it goes to the organisations and they report back before the report is released.

Ms GIDDINGS - And he does incorporate their view. Even when it is contrary to his own conclusion he reports it but says regardless, the Auditor-General has not changed its point of view in relation to this.

Mr LYNCH - The last issue we covered off on was around mandatory notifications. It is a difficult space but I would just say if the committee decides that mandatory notifications should be occurring it needs to be clear what the responsibility of individual public sector workers are in regard to that. I don't want to create a whole group of people categorising

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themselves as whistleblowers. There should be mechanisms within the agencies for people to be able to fulfil this obligation if it is included in the act. I think there are arguments both for and against mandatory reporting. If agency structures are working properly your internal processes should deal with this but it only takes a blockage at any stage through the chain and things then don't get notified that perhaps should, so I think it has its arguments both ways.

CHAIR - Just on that, you were saying that state sector workers will need to be provided with information on the circumstances and they must be protected, et cetera, so if, for instance, somebody lower down in the department is aware of some corrupt practice or misconduct it should be mandatory that they report it to the Integrity Commission? I am just trying to get clarification on that.

Mr LYNCH - I understand there is a debate around mandatory notifications and whether public officers who are aware of certain things should be automatically notifying the Integrity Commission, whereas within an agency if you were a lowly-ranked public sector worker and became aware of some inappropriate behaviour I think the expectation is that you would report it to your line manager and there should be a chain of command that then deals with that. You should not even be required to put it up as a grievance because you are not aggrieved, you are just letting somebody know about something. If we are going to say, 'You shouldn't just be reporting it to your line manager, you have an obligation to report it to the Integrity Commission', we need to put a safety net around those people so they know what they must do but we also need to make sure there is no reprisal for them operating outside a chain of command. There is a balance that has to be achieved.

Mr BARNETT - What does the code of conduct say they should do? What do you think they should do, just advise the line manager up the line?

Mr LYNCH - Normally you would report up the chain of command but if I suspect the person above me or the person above them is part of a corrupt process, do we want to deal with it or do we want someone to protect themselves? I can protect myself by sending an email to the person above me, even though I know they're going to ignore it, but did I do the best thing by the people of Tasmania? Have we dealt with the issue by making sure the Integrity Commission is aware of this? I believe people are in a difficult situation there.

CHAIR - I think within organisations, as a person employed in that agency, if you are aware of an issue and the information you have is that line managers may well be part of that, you go to the next person or to the head of agency, or if you think the whole agency is involved you blow the whistle and come outside of that organisation - in this case you'd go to the Integrity Commission or somebody else.

Mr LYNCH - I hear what you're saying. It is a very big thing for some people to go past their line management or senior management or even the whole of their organisation and take something outside. If we want that to occur we need to make sure those people feel confident, so it is back to the training and education thing. If you have a message from your head of agency that unacceptable behaviour is not going to be protected in this organisation at all, you can make a bit of a call on this a bit more comfortably because you know you're going to be backed up from the top down. I have known a lot of situations where people have genuinely raised issues further up the line than their direct management

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and that has come back and bitten them because their managers have said, 'You're implying that I'm part of this because you didn't raise it with me'.

Ms GIDDINGS - We have an issue with a report that has been presented to Parliament and we have gone over that lack of procedural fairness issue for the person at the centre of the report, but what is the next step? Moving away from that example, if a person is clearly in breach of a code of conduct and there should be a penalty put in place for their behaviour, at the moment that goes back to the minister - the Government - to act on. I am not sure what the process is there. We have the danger of a minister reacting quickly because it is now a public issue and he or she wants to look decisive and act on it without there being any process for any further investigation or ability for the two sides of the story to be heard. Do you see there could be a role for the Industrial Relations Commission to be a formal tribunal that accepts that final report from the Integrity Commission? The Integrity Commission, in that sense, is the police service in one way, investigating, and yet we don't seem to have a magistrates court or supreme court or tribunal process as the next step to receive the report and follow through with it. Where do you see the process currently and how could it be improved?

Mr LYNCH - I agree with you that there is a void. I sort of cringe a little about that being the Industrial Commission because we are thinking quite narrowly about the sorts of things that could come out in reports that certainly wouldn't be things that would fit within the expertise of the Integrity Commission. I also agree that not having a clear process leaves it open to over-reaction, under-reaction and all the rest of it. I think there needs to be a process where the Integrity Commission makes a finding, a bit the same way as the code of conduct process, where there is a scope put around it. There has been a finding made now. There are possible repercussions of that finding and now we need to have a proper process around how the appropriate penalty is decided and applied.

Mr BARNETT - And by whom.

Mr LYNCH - And by whom.

Mr BARNETT - To educate me a little more, in terms of breaches of the code of conduct, where do they ultimately end up?

Mr LYNCH - The head of agency receives a report and quite often a recommendation from an investigator. The head of agency then takes that into consideration and provide that to the employer who would provide their response on that. The head of agency would then make a determination. There is a list of possible -

Mr MULDER - Someone has to show cause. You get the report and the recommendations and then it goes back to the employer to show cause.

Mr BARNETT - Is there an appeal process there?

Mr LYNCH - Yes, after the head of agency has made a determination there is an appeal process through the State Service Act which is now carried out by the Industrial Commission, not under the IR Act but the State Service Act.

Mr BARNETT - It is carried out by the Industrial Commission?

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Mr LYNCH - Yes, that would be done through that process unless the determination has been for dismissal, in which case an unfair dismissal would be the possible remedy if it goes through the Industrial Commission.

Mr BARNETT - Where does the State Service Management Office fit in, if at all? Do they have a role?

Mr LYNCH - Not formally. They would generally provide advice to agencies. It is almost like a precedent developing in that you are getting the same sorts of penalties applying for the same sorts of breaches.

Mr BARNETT - What happens if there is an incident at the higher level or the highest level?

Mr LYNCH - These investigations are the responsibility of the Integrity Commission, I believe, from the start. If it is a breach of the code of conduct by a head of agency that is in the Integrity Commission's space and then I think it probably falls into the void.

Mr BARNETT - But before the Integrity Commission Act, where did it go?

Mr LYNCH - The State Service Commission was responsible for conducting that. Now we don't have a State Service Commission that function went to the Integrity Commission. I think there needs to be a process there for where it went.

Mr BARNETT - Yes, because you see where we got to - we had the report in the Parliament, it has been tabled. I think Ms Giddings' question was a very good one as to what is the next step? Where do we go? What happens at the moment? We won't go into the current report but it can go back to the department and the head of agency in terms of going back to a code of conduct or it might go to the DPP in terms of some sort of prosecution.

Ms GIDDINGS - I guess the issue is should the finding be made public as it has been in that sense, in the first instance, or should it be treated with the utmost confidentiality while you go through the other process? If you change the process where the final report has already been presented to the person directly affected and given an opportunity to respond as part of that report, does that then mean it is okay to go public with the final report? If that opportunity is not presented to the affected party you have to keep the final report confidential until another process has occurred that enables that procedural fairness.

Mr LYNCH - Yes, and at what stage through him does the possible penalty come in? We find that if somebody is aware of the scope of penalties from a process they are perhaps more accepting of an outcome. If an investigation is conducted into my potentially breaching the code of conduct and the process says if I am found to have breached it I will get counselling through to dismissal, as the process goes on I am then made aware I am more in the counselling end of things as an appropriate penalty, then I think people respond differently.

It is the same with this. If the report then goes to Parliament maybe the thing we need to be looking at here is that the commission has a role in recommending what the next step is, whether there seems to be evidence that this should be referred to the DPP, this is more of an employment matter and we believe it is a breach of the code of conduct and therefore

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should be going back to a head of agency to make a determination or some space in between there. Providing that report to the subject of an inquiry and also the range of penalties that could apply, I think is a positive thing.

If somebody thinks there is a potential in the code of conduct for them to be terminated, from my experience people will not accept anything and that is not constructive to the process. If somebody believes they have done something wrong and it would be inappropriate for it to be a hanging offence, they can more readily accept they have done something wrong if they realise it is going to involve them being counselled or demoted or one of those other penalties.

Mr BARNETT - The question linked to that is at what point do you identify the relevant person being investigated, or not identify them? That is a key issue.

Mr LYNCH - I depends at what stage the report becomes public. One of the arguments that has been put is that if you are then going to go to a subsequent process, it should not be being made public until that process has been finalised.

Mr BARNETT - The Integrity Commission will be here tomorrow and I hope they have a response to some of those questions because in terms of the process and confusion and gaining better clarity, there are some good questions there.

Mr LYNCH - The Integrity Commission has a role there but the SSMO also has a role and they have to get these two processes lined up.

Mr MULDER - If someone thinks one of their colleagues is doing the wrong thing and may not be inclined to report it up the chain, I am wondering whether, as occurs in others areas, it would be possible to say that complaints in the first instance should be reported to an outside reviewing officer for that officer to then make a determination as to whether the matter ought to be conducted outside the normal processes as an investigation or make a determination that this is a local one and they flick it back to the heads of agency so that the heads of agency do not ever get any internal reports.

If, for example, you are my manager and I have something I want to complain about and I want to take it up with you, not the person, you then have an obligation to refer it if you think there might be something in it and then leave it to the Integrity Commission to decide whether to send it back to the agency or whether to take it on your own volition. It touches on the whistleblower thing, it touches on virtually everything. Everyone has a right to make an anonymous complaint to an outside person and that complaint must be assessed and will be treated with confidentiality until such time as it moves into its [inaudible].

Mr LYNCH - I think that's a solution to all those issues, but I would be a bit concerned about the resources. Is this the Integrity Commission or something sitting free of the Integrity Commission and outside head of agency? If somebody puts something to you before you can make a determination as to where it should go, it can be quite an intensive process to find out whether there is any substance to it.

Mr MULDER - It may not be as difficult as you imagine if you have simple assessment criteria, such as whether there is likely to be any substance to this complaint, which gets rid of those serial pests who start the day by making a complaint.

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The other area I would like to explore with you is trying to separate different functions so they are performed by different people. The other thing is that question of after it's all over, should they be able to make some findings without giving someone else a comeback? Would a better process for that be if the Integrity Commission does the inquiry that they make some recommendations and maybe it is for the head of agency or someone else to make a determination at the serious end of the scale rather than having a report with all findings locked in which have never been and can't be subject to a review? It's like a police investigation. The investigation can absolutely convince itself it has a strong case, but nothing happens until you take it through an independent process such as the courts. There is a body outside the head of agency to make some of those decisions.

Mr LYNCH - You have the investigators doing what they do but first of all they test at the DPP level and then you have the test at the court level.

Mr MULDER - I am trying to get your feel as to whether there is a role for the Integrity Commission as an investigative body, and then there is another role altogether which is the initial assessment, which happens now. I am wondering whether we should take that assessment out of the hands of the head of agency?

Mr LYNCH - That is a hard one because in a lot of cases things are clearly a breach of the code of conduct and not matters of integrity. We want to deal with them quickly and efficiently and with as limited resources as possible.

Mr MULDER - The board comprises of people such as the Auditor-General, who has his own integrity and ethical issues to deal with, and the Ombudsman who has his own integrity and ethical issues to deal with, and there they are sitting on a board oversighting someone else who has integrity and ethical issues themselves. For me the parallel seems a bit like putting the police commissioner on the appeals court.

Mr LYNCH - You're talking about fairly senior statutory officeholders there. I believe they bring a degree of knowledge that is very valuable to the role they have on the board. We are a small state and matters do cross over from one to the other.

CHAIR - Should the Integrity Commission have the right to prefer charges? In their investigations should they have the right to charge people?

Mr LYNCH - That is probably outside my scope of experience to comment on.

CHAIR - Have any of your members raised with you the Evidence Act procedures in relation to incriminating evidence and the fact that they are obliged to answer the questions that are put to them, even though those answers may well incriminate them?

Mr LYNCH - It has been raised, particularly in the context of the matter going from being a code of conduct investigation where people don't have to answer questions should they choose not to, to the Integrity Commission process where there are a lot more requirements on them. That is really the space it has been raised in. If one head of agency decides to undertake a code of conduct investigation about a particular issue using the ED5 process and determine it themselves and another head of agency decides they want to refer it to the Integrity Commission and the commission does the same investigation but using a

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different set of powers, are these two people being treated in the same way? I would argue they are not.

CHAIR - I was just looking at point 4, and you have covered it to some degree, where you raised concerns about a head of agency being able to use the findings of the Integrity Commission for the purposes of taking an action and you said the Integrity Commission has much more power than a head of agency to gather information and evidence.

Mr LYNCH - That is effectively what I was alluding to. At the moment if a head of agency is conducting an investigation into a breach of a code of conduct matter that becomes a criminal matter they will stop their investigation and allow the police investigation to take place and then make their determination based on the findings from the police investigation. I don't know if that is appropriate, but it would also be inappropriate for the head of agency to continue their investigation when a police investigation or an integrity investigation was underway.

CHAIR - Tom, thank you very much for your time. We appreciate your submission and the issues you've raised. It will assist the committee in making a decision in relation to this review. We are hopeful of providing a report to the Parliament by the end of this year.

THE WITNESS WITHDREW.