

THIRD WRITTEN SUBMISSION OF THE **INTEGRITY COMMISSION**

November 2014

The three year review of the
functions, powers and
operations of the Integrity
Commission



The objectives of the Integrity Commission are to –

- improve the standard of conduct, propriety and ethics in public authorities in Tasmania;
- enhance public confidence that misconduct by public officers will be appropriately investigated and dealt with; and
- enhance the quality of, and commitment to, ethical conduct by adopting a strong, educative, preventative and advisory role.

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This report and further information about the Commission can be found on the website

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Third written submission of the Integrity Commission to the Joint Standing Committee on Integrity

Introduction

Under s 24(1)(e) of the *Integrity Commission Act 2009* (the Act), the Joint Standing Committee on Integrity (the Committee) is required to review the functions, powers and operations of the Integrity Commission (the Commission), at the expiration of the period of three years, and to table in both houses of Parliament a report regarding any action that should be taken in relation to the Act or the functions, powers and operations of the Commission.

The Commission has provided two previous written submissions to the Committee, both of which have been made publicly available.¹

On 30 October 2014 the Committee formally requested the CEO, Ms Merryfull, and the Chief Commissioner, the Hon. Murray Kellam AO, provide a written submission summarising the Commission's responses to the evidence given.

The Committee has determined that it is not appropriate for the in camera evidence to be disclosed to the Commission in any way. The Committee has advised that there are no substantive issues raised in the in camera evidence that are not already on the record as part of the public hearings. Accordingly, the following summary response from the Commission does not deal with any specific matters which may have been raised in camera.

The submission therefore deals only with the oral evidence given before the Committee since its first appearance before the Committee on 22 September 2014.

¹ The public version of the second written submission had some parts redacted. The full version is before the Committee.

Mr Damien Bugg

Mr Bugg has acknowledged publicly that he has first-hand experience of a matter, which was put into assessment and for which he received a report from the Commission, which report of assessment was also referred to the Auditor-General and the head of a department.²

Assertion: The Commission hasn't dealt with any serious misconduct

Mr Bugg - My feeling is, because there hasn't been any publicity of any serious matter, as I would call 'serious', that the commission has not had referred to it anything of the type that I think was always at the background of government's intention to pass that legislation. [page 1]

Response: With the greatest respect to Mr Bugg, there has been publicity of serious matters. The Committee is referred to the Commission's Reports No 1 of 2013 and No 1 of 2014, each tabled in Parliament. Serious misconduct is defined in the Act; s 4. The Commission disagrees with Mr Bugg's assertion that the matter he had direct knowledge of did not involve serious misconduct.

Further information about that particular assessment will be provided in camera.

The Commission can only make public matters that it tables in Parliament or through its annual reports. In the Annual Report 2013-14, the case studies for Assessment Golf, Hotel and Operation Alpha all involved allegations of serious misconduct as defined in the Act.

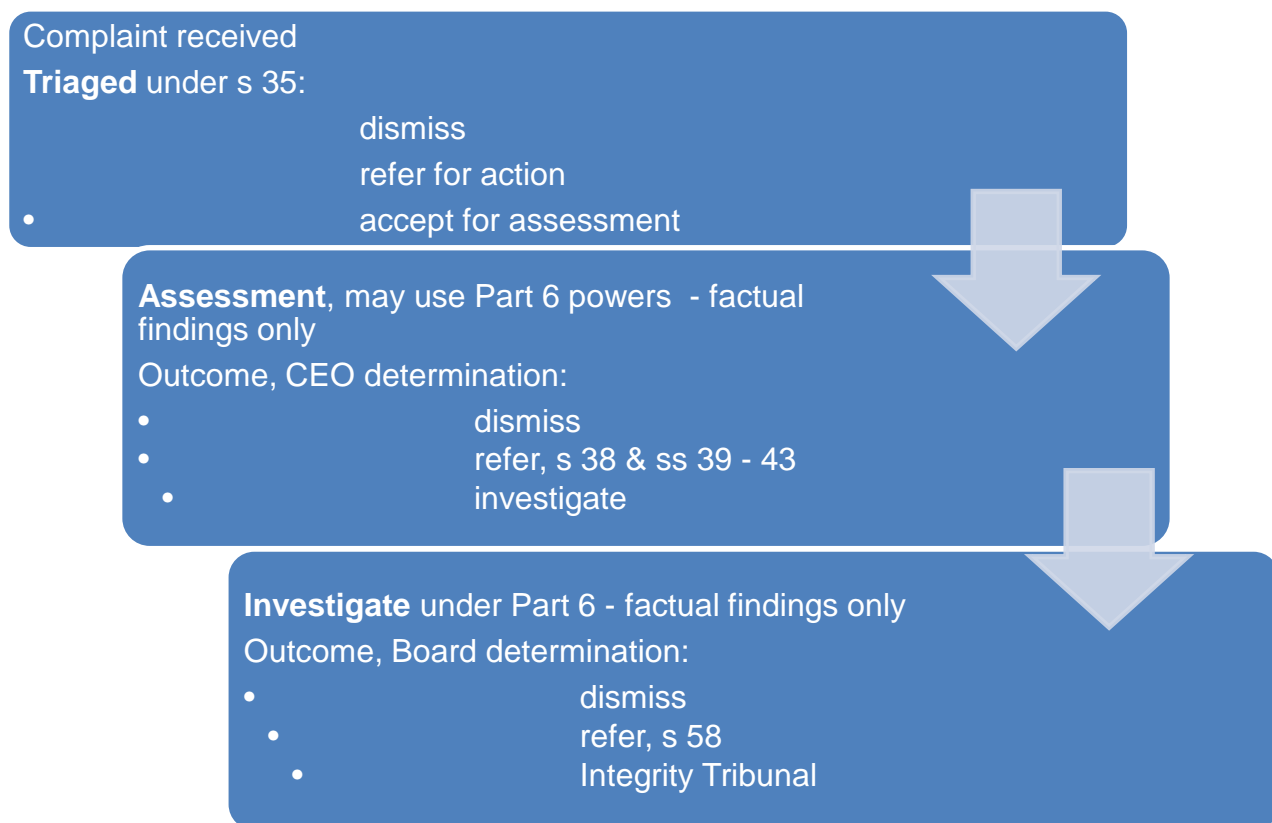
Assertion: An assessment is done as part of the triage of a complaint

Mr Bugg - The triage process turned into an investigation in reality because the assessor has that power under the act. [page 2]

Response: Mr Bugg appears to have misunderstood the complaint framework set up by the legislation. The triage function is performed as soon as a complaint is received under s 35, not during the assessment process.

² Page 6. Mr Bugg earlier refers to the CEO referring the report to one other person to investigate and take action, at page 2.

A simple diagrammatic chart is:



The assessment process is almost exactly the same as the investigation process, the only difference being that it is the Board who determines to dismiss, refer etc, not the CEO. Contrary to Mr Bugg's assertion, had the matter he has knowledge of been subject to an investigation (as opposed to an assessment) the result would have been the same: a referral to one or more agencies.

At the conclusion of an investigation, a Board determination to refer to a head of agency, where conduct involves a breach of the state service code of conduct, would still require the head of agency to commence an investigation, because of the wording of Employment Direction 5 (ED 5).

It is ED 5 which requires amendment, as previously submitted by the Commission.

Assertion: The assessment took too long and then it was just referred to others to deal with

Mr Bugg - ... yet it took five months to meander through what was euphemistically called an assessment ... [page 4]

Response: In relation to this matter, the time frames were:

- the complaint was made by a deputy secretary of a state service agency (not the agency where the alleged misconduct took place);
- the complaint concerned allegations about a state servant, employed by another state service agency, but working in a statutory authority, governed by a board;
- the matter was triaged and the CEO determined to put it into assessment 8 days after receipt of the complaint;
- the assessor determined it was appropriate to exercise the powers of an investigator under Part 6;
- the relevant assessor served 17 notices under s 47 of the Act for relevant material, including to compel attendance at interview;
- the 17 notices are not all served at once: the first was served 8 days after the matter was put into assessment; the last was served 111 days later;
- thirty days after the last interview, a draft assessment report had been completed and the assessor commenced the procedural fairness process;
- it took a further 20 days for the relevant officers involved to provide their comments on the draft assessment report;
- the CEO determination to refer under s 38 was 169 days after commencement of the assessment; that period included the procedural fairness process.

Mr Bugg - An assessment referred to more than one entity potentially has a number of investigations 'muddies' the pool. [page 20]

Mr Bugg - It is referred out to three and you suddenly have potentially three investigations into the one matter with people treading on one another's toes as they try to get their gumboots into a pool that is already muddy. [page 2]

Response: Further information about that particular assessment will be provided in camera.

However, as a matter of public record, the Commission does not agree that the pool is muddied or that there is a potential to interfere with other agencies.

As a matter of common sense, agencies to which matters are referred have different functions. For example the functions of the Auditor-General are separate and distinct to those of a head of agency. The head of a state service agency is the only entity who can discipline a state servant. That is not the function of the Auditor-General, nor is it the function of a board, which should be concerned with strategic oversight, particularly governance issues, rather than individual disciplinary issues.

A matter involving a crime will not be dealt with by a head of agency. Complaints can and do involve more than one officer and more than one allegation of misconduct or serious misconduct. To say that the Commission can only refer to one agency is simply illogical. For example if a complaint involved allegations of serious misconduct against a member of Parliament and a state servant, following Mr Bugg's line of reasoning, the Commission would only be able to refer the complaint to one agency. A parliamentary integrity entity cannot deal with the allegations about a state servant and a head of agency cannot deal with allegations about a member of Parliament.

Mr Bugg - The other requirement is that these matters are dealt with expeditiously. I question five months to assess the matter and then, pardon my common language, flick pass it to three different people for them to investigate and take action. Further information about that particular assessment will be provided in camera. [page 4]

Response: Further information about that particular assessment will be provided in camera.

However, as a matter of public record, the Commission takes exception to the assertion that it 'flicked' the assessment to three different people. On the contrary, the Commission took a considered view of the whole of the information. The referral to the Auditor-General was for him to consider the financial arrangements in the agency. The referral to the head of agency was for disciplinary proceedings under ED 5, if the head of agency thought that appropriate. The referral to the other person (Chair of the Board of the statutory authority) was so that they could take whatever governance action considered necessary as well as inform the Board.

The framework of the Act requires the Commission to refer for investigation and action, even if the relevant entity does not have an investigative function. It is an inconsistency in the Act.

The Commission is not able to partition off, or separate parts of a complaint on referral. The sections of the Act that Mr Bugg refers to with respect to s 38 and ss 39 – 43 have already been canvassed by the Commission in its s 13(c) report to the Committee.

Assertion: The CEO should not have referred the assessment to different entities – the Act does not allow that

Mr Bugg - Section 38 is the CEO. When the CEO gets the report, the CEO can do those same - or, or, or. What the CEO did was and, and, and - referred it to the Auditor- General and the head of the department and another person. I raised the question in an email: it's 'or', not 'and'. You've referred it to three people for them to investigate and take action. The section doesn't say that, it says or, or or. There is a misunderstanding, in my submission, of the provisions of the act.' [page 6]

Response: With the greatest respect to Mr Bugg, 'or' can be read as 'and': *Statutory Interpretation in Australia*, 7th Ed, D C Pearce and R S Geddes.

Mr Bugg later refers to s 78 to support his interpretation of the Act. [It is not until an Integrity Tribunal that a finding of misconduct can occur, that is, the Board when making a determination under s 58 does not determine that there has been misconduct.] Section 78 however does not refer solely to a complaint, it also refers to a 'matter' that was the subject of the inquiry and the Tribunal may specifically deal with one or more matters.

There is a significant body of case law which supports the interpretation that the use of the word 'or' is conjunctive and can be read as 'and', especially if that gives effect to a provisions underlying purpose.³ The use of the word 'or' in a number of sections of the Act, if interpreted as suggested by Mr Bugg, would clearly result in an outcome that does not support the objects and functions of the Commission.

³ *Statutory Interpretation in Australia*, 7th Ed, D C Pearce and R S Geddes [2.30].

The use of 'or' has already been brought to the attention of the Committee in the s 13(c) report of the Board in April 2013, and was considered and supported in principle by the Committee.

Assertion: The legislation is flawed

Mr Bugg - There are also some flaws in the drafting of the legislation which I think need to be examined, whatever this committee's view of it is. [page 3]

Response: The Commission agrees there are flaws in the Act.

This is clearly demonstrated by the s 13(c) report of the Board to this Committee in April 2013. Of the 48 technical issues flagged for amendment, the Committee in its own tabled report supported 35 in principle and indicated it would consider 12 in the scope of this review. One further amendment was supported in principle with a request to the Attorney-General to introduce legislation as soon as possible. None of the amendments supported in principle have been progressed to date by the government.

Mr Bugg 'There is an internal inconsistency between the two sections - I cannot remember now which one it was - section 38 and section 45 I think, I would need to look at that. Section 38(1)(f) says that if the matter is referred to another person, 'to refer the complaint to which the report relates, any relevant material and the report to any person who the chief executive officer considers appropriate for action'. It just says 'for action'. [page 9]

Then if you go to the reporting provision, section 43, ... I emphasise 'of the investigation' because 38(1)(f) does not talk about an investigation and the matter can be referred to a person, which I can say in this particular instance it was, for investigation and that person has no investigative power. The section for the referral, section 38(1)(f), just says 'to take action' but section 43(1) says 'investigation including any action taken'. That needs to be tidied up...' [page 10]

Response: The Commission agrees that there is inconsistency between s 38 and s 45. This has already been considered by the Committee in dealing with the s 13(c) report of the Board.

Assertion: Commission doesn't help agencies/is heavy handed

Mr Bugg - ... subsection (3) says that the Integrity Commission will endeavour to achieve the objectives which are listed in subsection (2) by educating and by assisting public authority to deal with misconduct. There is not a lot of assistance in the matter that I have experience of. It was, quite candidly, heavy-handed stuff that upset a number of people. [page 3]

Response: Further information about that particular assessment will be provided in camera.

However, as a matter of public record, the Commission rejects the assertion that there was no assistance in the matter of which he has experience. It is not clear to the Commission who are the 'number of people' who were upset.

Reasonably one would expect that the officers involved in the alleged misconduct would be upset. Beyond that, apart from Mr Bugg, no one else has expressed concern. To the

contrary, the relevant head of agency found the referral very helpful (evidence of this will be provided in camera).

Mr Bugg - Then the question of the principles of the operation of the commission under section 9 is that it is to work cooperatively with public authorities and integrity entities. I must say I would have expected a better level of cooperation in the situation that I had that I have mentioned and will retain the level of anonymity about it. [page 4]

Response: Further information about that particular assessment will be provided in camera.

However, as a matter of public record, the Commission rejects the assertion that there should have been a better level of cooperation in the situation he was involved in. Mr Bugg was informed appropriately, in accordance with the Act, as to the Commission's actions. A full copy of the Assessment Report was provided to him. It was completely transparent. Mr Bugg has clearly interpreted the Act differently to the Commission. We acknowledge there are issues with it, but we work with it every day. The Commission has obtained numerous legal opinions from the Solicitor-General as to how the Act works. Mr Bugg is viewing the Act through the prism of his involvement in a single matter, where the outcome showed significant issues in the agency which needed to be addressed.

Assertion: Issues around confidentiality of assessments

Mr Bugg - I could gain no indication or information about it. When I telephoned after three months to find out what it was about I was told it was confidential and I had recommended to me, to quote the words of the CEO, 'section 48 of the act'. I knew the provisions of section 48 because I had looked. That gave me the impression that what was confronting us was an investigation because section 48 applies to investigations. Two months later when the report was provided it turned out to be an assessment. Section 48 has no relevance to an assessment under the act. The confidentiality provisions in relation to an assessment relate to the written notices given by the assessor, not the chief executive officer, so there seems to be a misunderstanding and a confusion between what is an assessment, what is an investigation and what the roles of the various parties are. [page 3]

Response: Section 48 - Secrecy provisions are essential and of central importance to the fair and rigorous conduct of assessments and investigations. They are central to maintaining the integrity of the work undertaken by the Commission and protecting the welfare and reputation of the involved persons, particularly those subject to untested allegations.

In conducting an assessment, an assessor can exercise any of the powers of an investigator under Part 6. Part 6 of the Act includes ss 44 – 59. Section 48 (which falls within Part 6) requires an investigation to be conducted in private unless otherwise authorised by the CEO. A matter cannot proceed to an investigation until it has been assessed. If the assessor has all the powers of an investigator under Part 6 then self-evidently the requirement for confidentiality of an investigation under Part 6 applies to an assessment. It would be ridiculous to construe the Act to mean that assessments can be conducted in public and that it is only when a matter gets to an investigation that it is required to be conducted in private.

Further, s 94 requires assessors and investigators (and all employees of the Commission) to maintain confidentiality. There are significant penalties for breaching confidentiality, including imprisonment.

It is only when a matter is before a Tribunal that the Act requires hearings of a Tribunal to be in public; Schedule 6 of the Act.

The Commission disagrees with Mr Bugg that confidentiality does not apply to assessments conducted in accordance with Part 6.

Confidentiality provisions, s 98 – Section 98 extends to the existence of a Notice, the contents of a notice or any matters relating to or arising from the notice be kept confidential; s 98(1A).

The Act is complex and the Commission accepts that it has legislative anomalies, but rejects Mr Bugg's evidence that the Commission is confused as to what is an assessment and what is an investigation. It further rejects the assertion that it does not know the roles of the various parties. The Commission (neither its CEO or assessors or investigators) had any obligation to advise Mr Bugg as to the circumstances of its assessment, simply because he requested that information.

Assertion: inadequate mechanisms to oversight the Commission

Mr Bugg - What are the government's mechanisms within the commission to ensure that this important piece of legislation is being properly applied by the officers within the commission?
[page 4]

Response: With respect, it is the Board's role to ensure that the CEO and Commission staff perform their functions and exercise their powers appropriately; s 13. It is not a function of the government. The Board is the mechanism by which the government decided to oversight the Commission's work. Further, the Board is obligated to report to the Minister and the Committee, or both, on the effectiveness and operations of the Act, and has done so.

Insofar as there are other government mechanisms, the Committee is of course required to monitor and review the performance of the functions of integrity entities in accordance with s 24 of the Act.

Assertion: The Commission investigates matters that should be dealt with by the agency concerned

Mr Bugg - For the two matters I am aware of, one more closely than the other, they were not matters for which there was not the capacity within the public sector, and the mechanisms there for the investigation, to do them. So I question what are the mechanisms in place? [page 5]

Response: The Commission is unable to comment on the second matter that Mr Bugg refers to as it has not been informed what matter he is referring to. Further information about the particular assessment of which he has first-hand knowledge will be provided in camera.

However, as a matter of public record, the Commission does not agree that there was capacity within the relevant agency to undertake that particular assessment, and Mr Bugg has provided no evidence that it did, other than assertion.

Assertion: The Commission expanded its investigation beyond the original complaint

Mr Bugg - I would suggest the drafting of the act as it currently is doesn't permit the commission to do that which it purported to do in this particular case. In this particular instance, a matter of complaint was referred to the commission; five months later the investigation into it - not the assessment - had expanded beyond the matter of complaint to a number of other issues. If you look at the act, the focus of the assessor is on the complaint - your triage point: what do I have here, a serious matter or not? If it's not a serious matter, off it goes. It didn't happen; it took five months. It expanded dramatically and in the end, out it went.' [page 7]

Response: Further information about that particular assessment will be provided in camera.

However, as a matter of public record, the Commission does not agree that an assessment or an investigation cannot expand beyond the original complaint. The Commission follows the evidence, which of necessity means that it may come across misconduct which was not anticipated or alleged in the original complaint. This occurs in all integrity jurisdictions. Like all integrity agencies, the Commission has documented internal procedures to capture the additional issues.

Assertion: Investigation not needed for education

Mr Bugg - I raise the question: do you need an integrity commission with coercive powers to educate your public sector into establishing integrity frameworks and maintaining them to a level to give the public and Parliament a high level of assurance that integrity standards are being maintained in the public sector?' [page 9]

Response: Education without investigation will be ineffective. The Commission has already given significant oral evidence on this point. As a matter of public record, it is the Commission's experience generally that an agency which has been subject to an investigation is much more proactive about education than an agency which is not.

Assertion: Role of Ombudsman and Auditor-General is questionable

Mr Bugg - It seems strange to me that if they ought to be the first port of call for some matters of complaint but because of an advertising campaign, for example, people are bringing matters to the Integrity Commission which should either be going to the Ombudsman or the Auditor-General, and you've got those two persons sitting on the board, and then the matter is triaged through an assessment and it comes out to the Auditor-General or the Ombudsman, the objective onlooker is going to say, 'This is a bit interesting. These people are sitting up there' –' [page 12]

Response: Board members are not involved in triage of matters under s 35, nor with assessments. It is only when an investigation has concluded that any Board member has input to the matter and then only in relation to the outcome of the investigation report.

Forum shopping by complainants is something that happens in all jurisdictions, across all complaint agencies. The Commission does refer matters to the Auditor-General or the Ombudsman if it is more appropriately within their jurisdiction. That is not because they are on the Board. It would happen irrespective of them being a Board member.

Mr Bugg refers to the Commission having an 'advertising campaign'. It is completely appropriate for the Commission to make its processes for complaint available, rather than secretive. It is an objective of the Commission to enhance public confidence, one way to do that is to ensure the community knows about its functions, objectives and processes.

Assertion: No need for an offence of misconduct in public office

Mr Bugg - In relation to the public document 'Prosecuting serious misconduct in Tasmania: the missing link'; 'just looking at it in terms of how this act was set up, I suspect the Government felt that matters of serious misconduct were those which might in any forum be regarded as criminal conduct and therefore we had a commission with some coercive powers and a tribunal process set up to deal with it. How do you define it? In light of what I've said, I think it probably needs better definition within the act to ensure there isn't this jurisdictional blurring that seems to be going on.' [page 13]

Response: The Commission disputes the assertion that there is jurisdictional blurring 'going on'. Serious misconduct is not confined to criminal conduct, it includes conduct which could result in termination of employment. It is defined under the Act, s 4:

serious misconduct means misconduct by any public officer that could, if proved, be –

- a) a crime or an offence of a serious nature; or
- b) misconduct providing reasonable grounds for terminating the public officer's appointment.

Professor Jeff Malpas

Assertion: Commission exacerbates problems

Professor Malpas – 'I have said here that I do not think the commission as it is currently constituted works. I think in some ways it exacerbates some of the problems we were trying to address. I have a number of reasons for thinking that.' [page 16 and 17]

Response: The Commission agrees that legislative change is required. It has put a range of recommended amendments to the Committee in the past, but they have not been progressed by government.

However, there was no evidence presented by Professor Malpas as to what problems the Commission is exacerbating. In fact, it is the Commission's experience that the agencies it deals with are grateful for its assistance, in both the operational and educative area. While it is appropriate to consider improvements to the Act on an ongoing basis, there is a legislated independent 5 year review, which is now only 14 months away, and which is required to call for public submissions. That independent review is able to look at the Commission's work in depth, including the exercise of its powers, and the investigation of complaints.

Assertion: Tasmania doesn't have the level of problems of other jurisdictions so the Integrity Commission is not required

Professor Malpas – 'We were not envisaging an ICAC; we were not envisaging that sort of large body, the sort we have seen in other states. Those bodies do have some problems of their own of course, but we did not think Tasmania needed that sort of body and we did not think Tasmania could afford that sort of body. We were really trying to tailor it to what we thought the needs of this state were. I would concur with the comments Damien made that we probably need a much leaner, smaller body than the one we have.' [page 17],

Response: The Commission is an appropriate size for Tasmania. Information on the size and cost of other integrity agencies interstate is included in Volume 1 of the Commission's first submission. This is also addressed in its response to evidence from the Attorney-General.

It is the Commission's experience that it would be almost impossible for a body of three people to maintain appropriate independence and expertise. There are real issues around locating appropriately trained personnel for matters. It is a problem experienced interstate by much larger organisations, and is compounded in Tasmania.

Assertion: Commission is not raising the profile of ethical conduct in Tasmania/doesn't have a public profile

Professor Malpas – 'I would like to see a much more proactive commission that was much more ready to speak out on matter of ethics in the public domain. That is one of the shortcomings of this commission. It sees itself as a sort of code-and-compliance body rather than a body that is proactively committed to trying to raise the profile of ethical conduct within the public domain. I believe that is the most important task.' [page 18]

Response: With the greatest respect to Professor Malpas, he does not see the types of conduct that the Commission sees, nor is he interacting with employees and managers in the public sector to understand the state of their ethical knowledge and the real challenges they face on a day to day basis making ethical decisions. It takes time to build credibility, so the Commission simply opening its doors and then speaking out on matters of which it had no knowledge would have been counterproductive. After four years of operation, the Commission is confident that it now knows many of the issues that confront public officers. The reality is that much of it needs to be dealt with on a code and compliance basis, that is the base that we are starting from. The type of high level ethical education that Professor Malpas is referring to is currently inappropriate in the real world environment that the Commission is dealing with in Tasmania.

Professor Malpas - Again, part of the problem is that the commission has not been able create for itself a public profile that communicates to the public what it's about and what it does. As a result, of course people aren't going to be quite sure what goes to the commission and what doesn't. It's a complicated set of issues and I don't think there is a simple answer.' [page 22]

Response: The Commission is in the process of creating its public profile – it is an evolutionary process. That is aided by its investigations. Generally, the community is confused where and when and why they can make a complaint to relevant agencies. The

Commission is aware that this is a problem across other jurisdictions interstate – it is not just a Tasmanian problem, nor an isolated one. As noted, there is no simple answer and the Commission is working hard to address those issues. Throwing doubt on the Commission's future (as the Government submission does) hardly assists the public to have certainty and confidence in this regard.

Assertion: Commission is involved in matters already dealt with under the State Service Act

Professor Malpas - We talked about it as a small body because we did not envisage there being very many investigations because we did not envisage this body being one that was going to focus on small complaints or disciplinary issues within the public service. It seemed to us we already had a framework to deal with many of those issues within the State Service Act. One of the issues I have thought about over the last few years has been to some extent the lack of integration between the State Service Act and the operation of the commission. Sometimes it seemed to me that the commission was actually duplicating tasks - for instance, the formulation of codes of conduct that are already well covered by the State Service Act. [page 21]

Response: The Commission is not formulating codes of conduct that are already covered by the *State Service Act 2000*. Professor Malpas has not provided any evidence that this is occurring. However, the Commission's jurisdiction is much wider than state servants. It includes GBE's, SOCs, local government, the University of Tasmania and other statutory authorities. Many of the agencies the Commission deals with do not have codes of conduct, nor basic induction processes. The Commission does seek to help those agencies.

Assertion: The Commission doesn't need a standing capacity to investigate

Professor Malpas - First, on the investigative side of things, it was certainly Max's view that within the public service there was already significant expertise to be able to undertake an investigation.

Mr Barnett - So they would co-opt them?

Professor Malpas - They would co-opt them, they would second them from other agencies. They might come from the Police Service or any number of other places within the public service. We did not think it was necessary to have those sorts of investigative officers permanently as part of the budget as part of the salary of the commission. That is the first thing.' [page 22]

Response: The Commission has and does co-opt expertise as required. Its investigative staff are limited in number. There is a complaints assessor, who manages the simple administration of the complaints received. There are two senior investigators, one of whom works 0.6 FTE. There is a Manager's position. Each of the senior investigators have significant experience: one is a former police officer from the UK and another has worked with the then NCA. This is not a large standing capacity by any stretch; nor is it particularly costly.

In the past financial year the Commission co-opted persons to assist in providing expertise on recruitment in the state service for its DHHS investigation. In the past it has also co-opted a financial analyst from another integrity entity and serving police officers.

Despite that, there must be some standing expertise within the Commission. It would be unable to function effectively if every time there was an investigation, investigators had to be co-opted.

With the greatest respect to Sir Max Bingham and his views about the expertise available in Tasmania, he has not had experience in the Tasmanian state service for many years. It is the Commission's experience that there is not a great depth of investigative expertise in the public sector – even some large state service agencies contract out their ED 5 investigations to private sector investigators; smaller agencies and councils rarely have the capacity to undertake even simple investigations. Capacity building in agencies in this regard is a key focus for the Commission going forward.

Police certainly have investigative expertise – but, in the Commission's experience, not necessarily suitable for all of the kinds of investigations it undertakes.

Assertion: The Commission doesn't need full time education staff

Professor Malpas – 'On the educative side, our view is also that the commission should not be seen as having a large body of people who are there all the time undertaking the educative work. We had a number of reasons for thinking that. One is the budgetary issue because we were looking at ways of trying to keep the budget under control. Second, we did not believe the commission would necessarily be capable of maintaining that expertise. One of the problems with bodies like this is they can very easily develop their own internal ethos and way of doing things.' [page 22]

Response: The Commission has three full time staff managing the prevention and education function. Although Professor Malpas might disagree with the work they do, it is well received by agencies and is widely sought after.

The Commission has used expertise at the University for its training for members of Parliament. It is not opposed to contracting with outside bodies for expertise in prevention and education when appropriate.

The Commission rejects the implied assertion that its budget in prevention and education is not under control.

The clear implication from Professor Malpas' evidence and his earlier submission is that the key source of education expertise and services would be the University of Tasmania – which is where he works.

Assertion: The Commission isn't working to build an ethical culture in the public sector

Professor Malpas – 'The first task has to be building a stronger ethical culture within the public service and within government. I don't think the Integrity Commission can do that and I don't think it is doing that. My view on that is partly a reflection of anecdotal evidence I have but also a reflection of the mode of approach. I have both theoretical and empirical reasons

for thinking that mode of approach is one we can show is not only ineffective but actually operates against some of the key elements that underpin ethical culture. I don't think it works.' [page 23]

Response: With respect, Professor Malpas has experience in academic research and teaching of ethics. He does not have experience with integrity agencies, he is not an investigator, and he does not have first-hand experience of the Commission. Anecdotal evidence is not substantive evidence.

The Commission refutes that it is not building a stronger ethical culture within the public sector. Theoretical and empirical analysis might work in academia, but they are not of great assistance in tackling the issues the Commission sees and hears about from the public sector every day.

Assertion: Sir Max Bingham would know what is required based on his Queensland experience

Mr Mulder - A general comment. In case members were not aware, Sir Max was the chair of the Queensland Crime and Misconduct Commission post-Fitzgerald, so if anyone had an idea about how these bodies should work, it was Sir Max.' [page 24]

Response: While not denying the experience of Sir Max Bingham with the Criminal Justice Commission in Queensland, that was over 20 years ago. Since that time the Crime and Corruption Commission has been established in WA as has the Police Integrity Commission in NSW, the Independent Commissioner Against Corruption in SA, the Independent Broad-based Anti-corruption Commission in Victoria, the Australian Commission for Law Enforcement Integrity at the Commonwealth, and of course the Tasmanian Integrity Commission. All of these jurisdictions have taken the view that they need an independent anti-corruption/misconduct body with strong investigative powers to ensure the highest standard of ethics and integrity in their public sector.

Attorney-General (Dr Goodwin); Secretary of the Department of Justice (Mr Overland)

Assertion: The Commission is not working appropriately and now is the time to look at this

Dr Goodwin - ... It is important to acknowledge there have been serious concerns expressed at how the Integrity Commission is currently operating.

... We do not believe the current process is delivering good outcomes for the community and it is an opportune time to try to get it right for the future. [page 29]

Response: Prior to the Government submission, the submissions received by the Committee had not raised 'serious' concerns about how the Commission is operating. There were

- dissatisfactions expressed by complainants that the Commission did not investigate their complaint to their satisfaction (Allen, Parker, Etter, Smith, Weiner);

- the legislative regime in relation to the Commissions coercive powers that should be amended (Law Society);
- calls for better integration with disciplinary provisions of ED 5;
- attention to needs of witnesses – e.g. welfare; legal representation (Law Society; CPSU);
- disagreement with any increase in powers (Tasmania Police; Police Association);
- reiteration of a model proposed earlier/preferable to focus on a particular mode of ethics education (Malpas; UTAS).

Both the Police Association and Tasmania Police said that the Commission was effectively meeting its own objectives

Parliament intended that the five year review would deal with the fundamental policy issues around Commission's powers and functions. The three year review is not the appropriate time.

Assertion: The Commission should only triage incoming complaints, refer to agencies and quality assure agencies' investigation/the Commission refers the vast majority of its complaints to other agencies to deal with anyway

Dr Goodwin - The vast majority of the complaints received by the Integrity Commission are referred back to the relevant agency after triage. The Government believes this triage function should remain and that the Integrity Commission should continue to quality assure investigations by other agencies and ensure they address misconduct concerns. [page 30]

Mr Overland – There is a very small number of investigations that the Integrity Commission itself runs. [page 39]

Response: The Commission's investigation/assessment rate is not inconsistent with other integrity agencies – which all only investigate a small proportion of the complaints they receive. The Commission is operating just as similar agencies operate.

For example – NSW ICAC investigates or assesses 4.8% of complaints received; the Commission investigates 3.6%. Victoria's IBAC refers 36.7% of complaints received; the Integrity Commission refers 35.5%.

The triage function is unnecessary and useless without an investigation function. It is not credible to believe that persons will continue to complain to the Commission if they know that the Commission does not have any power to investigate their complaint. Every complainant who comes to the Commission does so in the hope that it – not the agency about whom they are complaining – will investigate. The main cause of dissatisfaction from complainants is that the Commission has referred or dismissed their complaint.

The Commission's current quality assurance function does not prompt agencies to properly conduct investigations or even respond to issues raised by the Commission.

The Committee is referred to page 46 of the 2013-14 Annual Report of the Integrity Commission – further detail of the actions of the Secretary of the Department of Justice in this regard can be provided in camera.

Assertion: Commission investigations have to be re-done by head of agency/can't use Integrity Commission evidence

Mr Overland - In general the experience seems to be that you have to redo the investigation. You can make almost no use of the Integrity Commission investigation and you then have to completely redo an investigation under employment direction 5. [page 39]

Response: No evidence at all has been presented, at least in the public hearings, about why ED 5 cannot be amended to clarify and facilitate the use of Integrity Commission investigations and the evidence they generate. ED 5 is simply an instrument signed by the Premier (as the Employer) and can be amended quickly and simply. But rather than pursue this option, the Government's answer is to remove the Commission's investigative functions altogether – which would require extensive legislative amendment.

The Commission has repeatedly sought an amendment to ED 5 from the State Service Management Office, to no avail.

ED 5 is not an issue for other public sector employees in any event (councils, GBE's, UTAS etc.). The Government submission in general ignores the wider jurisdiction which the Commission has.

Assertion: Commission investigations are not value for money because of duplication

Dr Goodwin - It is about value for money and avoiding duplication. What we have seen with some of the investigations that have been held to date is that quite some time has been spent investigating a matter. In the Health case it was over 12 months and then we have seen the need to go down the code of conduct investigation path. It has taken a long time to deal with a matter of misconduct. [page 41]

Response: No evidence has been presented, at least in the public hearings, about why a separate investigation was convened in relation to the then CEO of THO-NW (who was employed under contract); no code of conduct investigation was convened in relation to the CEO of THO-S (whose employment was ended). If there are issues in relation to the use that can be made of Commission evidence to support disciplinary proceedings, then those issues should be dealt with. The Government submission and evidence to date has not explained why the answer should be to remove the Commission's investigative functions rather than removing whatever blockages there might be to making better use of those investigations.

The Commission's investigative capacity is value for money and proportionate to the size of the jurisdiction. This year the budget for its investigations team is approximately \$450,000 which works out to only \$11.25 per public sector employee per year.

The overall budget for the Commission going forward will be approximately \$2.2 million dollars or \$4.30 per person in Tasmania. This is hardly disproportionate to what other integrity bodies cost their community (for example ICAC NSW costs approximately \$3.45 per person; Victoria's IBAC costs \$4.69 per person; South Australia's ICAC \$5.70 per person).

Assertion: There are complaints made about the Commission which cannot be appropriately dealt with/ a watchdog is necessary such as in other jurisdictions. An entity like a Parliamentary Inspector is required

Dr Goodwin but it is quite common in other jurisdictions for there to be a body overseeing bodies like the Integrity Commission, such as ICACs, crime and misconduct commissions and those sorts of bodies. The concern is that they can be very powerful bodies. We have seen the sorts of work they do and the sorts of reports that can be published about people who are the subject of investigations, and there needs to be some sort of oversight mechanism for them, in my view. That is why other jurisdictions have gone down that path. [page 48]

Dr Goodwin - I am purely raising a concern that I have had as a previous member of this committee when complaints have come in and we have been relatively powerless to do anything about them. I'm not sure it builds confidence in these bodies in that if they make a complaint, they are effectively dealt with by the body that has been complained about, which in this case is an integrity entity that often has quite strong legislative powers to do all manner of things, particularly in the Integrity Commission's case. I think there is a need to give consideration to a watchdog for those integrity entities. [page 48]

Response: The Government submission is contradictory – on the one hand it proposes removing the Commission's investigative functions but, on the other hand, it wants to establish an oversight entity for it on the basis that 'very powerful bodies' in other jurisdictions have them. The Commission has no issue with the establishment of a Parliamentary inspector or other oversight entity but it will be completely unnecessary (and a poor use of public money) if the Commission has no investigative functions to oversight.

The Commission's second submission to the review set out the number of complaints made to this Committee since 2010. There are only six in four years of which we are aware. Five were from people who had made a complaint to the Commission; their principal issue was that the Commission did not investigate their complaints to their satisfaction. The other complaint to the Committee was from a solicitor who represented a public body who sued the Commission (and lost) who was unhappy that the Commission pursued the costs from his client which the Court had awarded.

A further six complaints were made directly to the Commission (two from the same person who was also one of those who complained to the Committee). Two of those complaints were about the way that the complainant had been spoken to by Commission officers (hardly meriting an independent external reviewer). Only two were substantive complaints about the way the Commission conducted its investigations as it concerned the persons complaining. The Commission responded to these in a substantive way, including changing its procedures.

Twelve complaints in four years do not provide any justification for creating an expensive oversight mechanism (if there are to be no coercive powers to oversight).

The Commission's second submission provided some information on how these Inspectorates work in other jurisdictions. The most significant part of their workload is reviewing the use of coercive powers. For example, in the last financial year the Victorian Inspectorate received 251 coercive examinations to review (44 from IBAC; 40 from the Chief

Examiner; 167 from the Ombudsman). It should be noted that there is no equivalent to the Chief Examiner in Tasmania. The Tasmanian Ombudsman has not conducted any coercive interviews in years.

In respect of complaints – last year the Victorian Inspectorate received 38 complaints about IBAC and 17 about the Ombudsman – all of these were assessed as being not within the jurisdiction of the Inspector to investigate or as not meriting investigation.

Any consideration of an Inspectorate in Tasmania should be very carefully considered in terms of need and effective use of scarce public resources.

Assertion: There are delays in investigations/matters could have been dealt with earlier

Dr Goodwin - Is there a streamlined process around that where it could have been dealt with sooner in the process by the relevant agency concerned? I do not know the full details of that investigation. I do not know what it involved. I do not know at what point potentially it could have been referred back to the agency to be dealt with, but my gut feeling is that there was probably a point in time where it could have gone back to the agency and we could have got faster resolution of that matter.[page 49]

Response: The Attorney-General admits to having no direct knowledge of the particular investigation but provides her opinion on the basis of a 'gut feeling'. This is not substantive evidence – it is speculation.

The investigation referred to was very complex and the evidence gathered could not have been gathered by a departmental investigation alone. Additional time was consumed by the convoluted processes established by the legislation which the Commission had hoped that the three year review might address. However these issues have not been focused upon to date.

Assertion: Tasmania Police does not require the Commission to oversight its conduct of internal investigations.

Mr McKim - Are you comfortable with an organisation investigating itself?

Dr Goodwin - I am comfortable with the police service and what the ethical standards area within the police service does. They have been conducting internal investigations for a very long time. There is oversight of their internal investigations, as I understand it, at least to some extent, by the Ombudsman and the DPP. I am comfortable with Tasmania Police being able to conduct investigations. [page 51]

Response: Tasmania Police provides no external information about how it manages its internal investigations – the only public information is provided by the Integrity Commission annual audit (see later).

The Ombudsman only has jurisdiction over administrative actions by the police not operational matters. The DPP only gets involved if the conduct might constitute a criminal offence and the matter is referred to the DPP by the police. The only body which has the jurisdiction to investigate police misconduct and serious misconduct is the Integrity Commission.

Assertion: The Integrity Tribunal could be convened to conduct investigations as required.

Mr Mulder - Is the need for government officials or senior people involved in serious misconduct that needs to be investigated, preferably by brought in investigative capacity, but there needs to be a body that coordinates that. I am wondering whether an integrity tribunal would fill that middle range gap just short of a full-blown commission of inquiry.

Dr Goodwin - Yes, and integrity tribunal could be an option. [page 51]

Response: The procedure for convening an Integrity Tribunal is:

- the Commission gets a complaint and decides to put it into assessment; then
- an assessment is conducted and an assessment report prepared for the CEO; then
- the CEO, after considering the assessment report, determines to put the matter into investigation; then
- an investigation is conducted and an investigation report prepared for the CEO; then
- the CEO, after considering the investigation report, makes a recommendation to the Board; then
- the Board considers the investigation report and the CEO's recommendation and determines that an Integrity Tribunal should conduct an inquiry.

The proposal to have an Integrity Tribunal 'convene' on an as needs basis ignores the critical issue of who will decide this? At present, the Commission (which is independent of government) conducts an investigation to make an informed recommendation to the Board (which is also independent of government) and the Board decides. To convene a public hearing mechanism in the absence of substantive information justifying this step would be very risky.

Tasmania Police

Assertion: The Commission does not need to conduct annual audits of police complaints

Mr Tilyard - ... I don't think it is necessary to conduct a 100 per cent audit every year, particularly when there have been no systemic cultural or organisational issues identified. Any criticism that has flowed from the process has been more around administrative matters - for example, the time limits to resolve complaints and those sorts of things. In that environment my personal view is that perhaps a full audit could be done once every two or three years and then a bit of a random audit in the alternate years, but that is a matter for them. We have cooperated fully with that audit function and we will continue to do so. [page 52]

Response: In the last financial year, Tasmania Police was the only police force in Australia that did not publish any data on either its handling of complaints against police or disciplinary proceedings arising from complaints against police. Some jurisdictions publish more information than others but none as little as Tasmania Police (which only publishes the number of police dismissed as one of the causes of separation from agency).

The only information that is provided to the Tasmanian community about police complaints and the outcomes from complaints, including disciplinary outcomes, comes from our annual audit reports. The Integrity Commission performs the vital function of providing a public assurance about how well or not Tasmania Police deals with complaints about its own officers.

Re: findings about 'administrative matters' - the last audit noted '(i)f the organisation is not maintaining adequate records, for example, it is difficult – if not impossible – to tell if decisions about misconduct allegations are soundly based.

A key finding of this year's audit was that record keeping was inadequate and the management of complaints was inconsistent. The Tasmania Police response was that in relation to 'the findings and recommendations relating to record keeping, inconsistency and timeliness in registration and finalisation of complaints, it is agreed in principle that these are areas of organisational improvement to be achieved by Tasmania Police.'

Assertion: The Integrity Commission might use access to Tasmania Police systems just to go looking or fishing

Mr Tilyard – (re access to IAPro) ... but if access was granted it could only be used for specific matters that they have a mandate to investigate. It couldn't be used as a general fishing expedition - 'Let's see what's in there and see if we can find anything that looks like something that might be interesting'. We have specific legal advice that says that would not be permitted. [page 56]

Response: The Integrity Commission has never proposed 'fishing' through any police system. Any access would only be for the purposes of a specific investigation, assessment or audit. Appropriate records would be kept and access audited by Tasmania Police (consistent with the arrangements in other jurisdictions).

The s 13(c) report on legislative amendments provided by the Board to the Committee, noted the need for legislative amendment to get around the legal issue identified.

Assertion: The Commission put inaccurate information in its audit report of police complaints finalised in 2012 and did not correct this when it was questioned by Tasmania Police

Mr Tilyard - I wish I could explain that. In fact this is something that to this day has never actually been reconciled between us and the commission. They made that claim about four sustained class 2 allegations of crime. We said, 'What are you talking about?', and they have never been able to come back and say they are referring to these ones. So it is still out there and unresolved. [page 59]

Response: The Integrity Commission provided a draft of that report to Tasmania Police and allowed six weeks for it to provide comments or corrections. Tasmania Police did provide a detailed response of 19 pages. That response did not take issue with the finding referred to by Mr Tilyard; it did not refer to it. If Tasmania Police had questioned this finding in its response, then the Commission would have had the opportunity to correct it if necessary before the report was finalised and published.

It was only after the report was published that the issue was (informally) raised and Tasmania Police was advised of the particular matters that the Commission was referring to, however the Commission has never been asked to reconsider its findings. The files were returned after the audit was completed and so further comment cannot be provided on this issue.

Assertion: The Integrity Commission could be conducting an investigation when there is another investigation going on.

Mr Miller - The other fear, of course, with secrecy is the situation you have in American movies where you end up, and it happens in fact, that we have had investigations underway in Tasmania not knowing federal colleagues have had investigations underway. There is always the potential for that as well.

Chair - That is a good point you raise there, and it has been raised through this committee, of a department being engaged in an investigation of misconduct and so on not knowing that the Integrity Commission was going down the same path. Is there any evidence of that having happened within the police service, for instance? [page 73]

Response: To the Commission's knowledge this has never occurred – either with Tasmania Police or any other agency. The Commission's current practice is to notify the principal officer of an agency of any assessment it undertakes; it is obliged under its legislation to notify a principal officer of any investigation.

This is an example of speculation about hypothetical situations being taken as substantive evidence of a problem.

Acting Director of Public Prosecutions Mr Coates

Assertion: A High Court case means that evidence gathered by the Commission cannot be used in prosecutions/Commission not bound by the rules of evidence – this means that investigation has to be done again

Mr Coates – I don't know far Lee v the Queen will go - that not only much of the material gathered by the Integrity Commission would be inadmissible in a criminal proceedings, it may even be improper to provide it to the prosecution. [page 7]

...

Mr Coates - Because Lee v the Queen found that a fundamental common law right -

Mr Barnett - That is the High Court case this year?

Mr Coates - Yes - is the right of silence and the right of the accused not to assist the prosecution. In that case the prosecutor was provided with a transcript of what the accused had said at ICAC, or one of those bodies, and it was found that it was given to the prosecutor unlawfully. We don't have a single provision in this act, but the High Court went on further to say it is a common law right that the prosecution is not assisted by compulsion by the accused and that breaches the fundamental right to a fair trial. [page 7]

Response: In *Lee v The Queen*⁴ (known as Lee #2), a High Court bench of five judges quashed convictions on the basis that the trial Crown Prosecutor, and his instructing solicitor, had access to transcripts of compulsory examinations of the accused undertaken by the NSW Crime Commission (not ICAC).

The basis for the decision was that while Parliament can abrogate the right to silence for non-prosecutorial purposes (by compelling a person to answer questions via coercive powers) the right to a fair trial must be protected and the product of these other processes ought not be disclosed to the prosecution.

This decision relates to transcripts of the evidence of the person charged. It is a matter that all integrity agencies are aware of and which is being dealt with by them – for example by not providing prosecutors with the relevant transcripts.

The Acting DPP acknowledges that he has no direct experience in dealing with any matters like this. However, this issue can be handled appropriately and the Commission knows that similar agencies in the other jurisdictions are doing so. It has not stopped such interviews taking place and it has not stopped prosecutions.

The court decision does not mean that any evidence obtained during an investigation by a body such as the Integrity Commission cannot be disclosed to or used by any prosecution authority.

Much of the evidence that bodies such as the Commission will obtain is admissible and able to be used in prosecutions (e.g. documentary evidence). In relation to oral evidence – the Commission is in the same position as any other investigator. When a police officer questions someone, the person will still be required to give evidence in court. If the Commission questions someone, if a matter is to be dealt with by a court, testimony will still need to be given. The Integrity Commission has in fact obtained legal opinion about this very issue from the Solicitor-General, who stated in part⁵:

Evidence law is complex – it is not possible to consider all of the factors that might make hypothetical evidence inadmissible; each instance will turn on its own facts. Nevertheless, in the general circumstances described, I am aware of no rule of evidence that will allow us to say with any certainty, that in all (or even most) cases, evidence of the s 47 information will be inadmissible.

Assertion: Police would still have to do an investigation if a matter is referred by the Commission

Mr Coates - if it is forwarded to me, the likely result would be I would be either saying there is no suggestion of criminal conduct here at all, so I would not forward it to anyone, or if there is, I would be forwarding it to the police for a proper criminal investigation. [page 2]

Response: The vast majority of the matters that the Commission deals with do not involve criminal conduct. The Acting DPP's comments only relate to the issue of criminal offences. The Commission is aware that the police would need to investigate criminal conduct and will take that into account undertaking its work.

⁴ [Lee v The Queen \[2014\] HCA 20.](#)

⁵ Advice from the Office of the Solicitor-General 19 July 2012.

Assertion: Most of the matters that the Commission deals with are not serious enough to warrant the use of coercive powers

Mr Coates - For people who are the subject of these investigations who may have done nothing wrong or done something that is very minor, it is a very lengthy and stressful process. [page 5]

They're (code of conduct provisions) very broad and can be very minor at times. [page 7]

Response: The Acting DPP acknowledged that he had no direct knowledge of any matter that the Commission had investigated so he has no basis to provide any substantive evidence about the level of seriousness of matters which the Commission has investigated.

The Commission does not waste its limited investigative capacity on minor matters. In its view, all of the allegations it has investigated are ones that might warrant the termination of the employment of the officer concerned – thus are serious misconduct in the terms of the Act.

Examples of Commission investigative work in this regard can be provided in camera.

Assertion: Commission is unnecessary as people will admit misconduct

Mr Coates - ...most of the time people are going to accept that they did the wrong thing, get a rap over the knuckles and that's it. You only need a mechanism in place for the rare cases where someone's employment is terminated or whatever where they're not going to be happy with the secretary's decision. [page 11]

Response: The Acting DPP acknowledged that he had no direct knowledge of any matter that the Commission had investigated. He has had no involvement in any interviews conducted by the Commission. The Acting DPP therefore has no basis to provide any substantive evidence in relation to what the attitude is of persons the subject of Commission misconduct investigations.

The Commission's experience in interviewing subject officers over the last four years is that the vast majority do not acknowledge that they have done anything wrong at all.

In camera examples of Commission investigative work in this regard can be provided.

Assertion: Acting DPP was asked to respond to 'evidence' given to the Committee that the Commission has 'a number of people who sit there waiting for something to do'.

Chair - There has been evidence provided to this committee of a number of personnel within the Integrity Commission who sit there and wait for something to do. If the model was developed as you are saying there that would obviously impact on that and satisfy those concerns so it would not require the number of people currently working in that organisation. You would see that as a benefit in that regard, and cost, very clearly. [page 10]

Response: The Acting DPP cannot possibly have any direct knowledge of this – no person giving evidence to the Committee can have any direct knowledge of this. Any statements to

this effect that have been provided to the Committee are pure speculation and not substantive evidence.

For the public record – there are no Commission staff sitting there waiting for something to do. All staff, including investigative staff, are fully occupied with their duties.

The Hon Murray Kellam AO QC
Chief Commissioner
On behalf of the Board and the Integrity Commission

17 November 2014