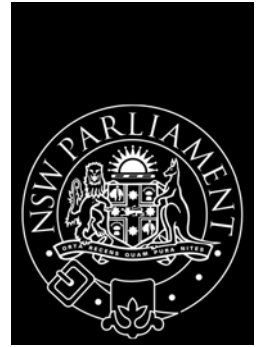


PARLIAMENT OF NEW SOUTH WALES



Committee on the Independent Commission Against Corruption

Review of special reports tabled in 2008 by the Inspector of
the Independent Commission Against Corruption

Incorporating transcript of evidence, indicative questions taken on
notice and minutes of proceedings

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Terms of reference

Independent Commission Against Corruption Act 1988

64 Functions

- (1) The functions of the Joint Committee are as follows:
 - (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
 - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
 - (c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
 - (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
 - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

- (2) Nothing in this Part authorises the Joint Committee:
 - (a) to investigate a matter relating to particular conduct, or
 - (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
 - (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

Chair's foreword

In 2008 the term of the first Inspector of the Independent Commission Against Corruption (ICAC), Mr Graham Kelly, expired, with the current Inspector, the Honourable Harvey Cooper AM, succeeding him. The Inspectorate tabled two special reports prior to the expiration of Mr Kelly's term and the Committee subsequently examined Mr Kelly on these reports. The first special report tabled, *Report of an audit of the ICAC's compliance with the Listening Devices Act 1984*, was also the third audit report tabled by the Inspectorate during Mr Kelly's term, and is reviewed in Part 2 of this report. As with the two previous audit reports¹ reviewed by the Committee the main issue that arose for the Committee relates to the need for the Inspector's office to seek further funding from treasury to enable it to undertake more in-depth audits.² This is an important issue because the Inspector's audit function is one of the key means by which the Inspectorate ensures that the ICAC is accountable to the NSW public.

The second special report tabled in 2008 was the Inspectorate's *Special Report of the Inspector of the Independent Commission Against Corruption to the Parliament of New South Wales Pursuant to Section 77A of the Independent Commission Against Corruption Act 1988 on Issues Relating to the Investigation by the Independent Commission Against Corruption of Certain Allegations Against the Honourable Peter Breen, MLC* (Breen report). This report is significant not only because of its length, at 174 pages plus appendices, but also because of its subject matter; a complaint from a former Member of the Legislative Council (MLC), Mr Peter Breen, in relation to the ICAC's execution of a search warrant on his parliamentary office. The execution of a search warrant on a parliamentary office is a serious matter because it raises issues of parliamentary privilege, one of the fundamental planks of parliamentary democracy inherited from Westminster. In the case of the Breen investigation there were also deficiencies in the application for the search warrant, and this formed the basis of Mr Breen's original complaint to the previous ICAC Committee. This complaint was subsequently referred to the Inspector for investigation.

Part 1 of this report addresses the issues raised by the Breen report, which are addressed in two sections. Section A looks at issues raised in the report that relate to the Inspector's office, specifically: the Inspector's reporting provisions; the definition of maladministration at s 57B of the ICAC Act; and, the jurisdiction/powers of the Inspector. The Committee intends to question the Inspector and the Commissioner on the first two matters when it next examines them on their annual reports. The Committee has also reiterated the support it has previously given to the role of the Inspector in its review of the Inspector's *2006-2007 Annual Report*.³

Section B of Part 1 addresses issues arising out of the Breen report in relation to the ICAC, namely: the ICAC's handling of parliamentary privilege; the ICAC's application for the search warrant in the Breen investigation; and, the ICAC's matrix management structure. The Committee's report outlines how the Inspector's investigation into the Breen complaint

¹ Office of the Inspector of the Independent Commission Against Corruption: *Report of an audit of the ICAC's compliance with section 12A of the ICAC Act 1988*, tabled on 28 June 2007; and the *Report of an audit of the ICAC's compliance with sections 21, 22, 23, 35 and 54 of the ICAC Act 1988*, tabled on 28 June 2007.

² Committee on the Independent Commission Against Corruption, *Review of the 2006-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption*, Report 4/54, Sydney, October 2008, pp. 5-6.

³ *Ibid*, p. 10.

brought to light problems in relation to all three issues, and details a number of matters that the Committee will raise when it next examines the Commissioner on the ICAC's 2007-2008 Annual Report.

I am grateful to the former Inspector, Mr Kelly, and to the staff of the Office of the Inspector of the ICAC for their co-operation throughout the Committee's review. I also wish to thank my fellow Committee members for their bi-partisan contribution to this review. Finally, I want to express the Committee's appreciation to the staff of the Secretariat for their support and assistance throughout this review.

Frank Terenzini MP
Chair

Commentary

Introduction

- 1.1 In 2008 the Inspector of the ICAC tabled two special reports pursuant to s 77A of the ICAC Act. The *Special Report of the Inspector of the Independent Commission Against Corruption to the Parliament of New South Wales Pursuant to Section 77A of the Independent Commission Against Corruption Act 1988 on Issues Relating to the Investigation by the Independent Commission Against Corruption of Certain Allegations Against the Honourable Peter Breen, MLC* was tabled in the Legislative Assembly on 23 September 2008. The Inspector's *Report of an audit of the ICAC's compliance with the Listening Devices Act 1984* was tabled in the Legislative Assembly on 29 July 2008. Part 1 of this report is concerned with the Inspector's report into the Breen complaint (the Breen report) and Part 2 with the Inspector's report of his audit of the ICAC's compliance with the *Listening Devices Act 1984* (LDA).
- 1.2 It should be noted that the term of the first Inspector of the ICAC, Mr Graham Kelly, expired on 30 September 2008, following which Mr Harvey Cooper AM began his term as Inspector. In view of the fact that it was during the term of Mr Kelly that the Breen and the listening devices reports were published, the Committee chose to examine the former Inspector on these reports. The Committee held a public hearing with Mr Kelly and the Executive Officer of the Office of the Inspector of the ICAC, Ms Seema Srivastava, on 1 December 2008 to examine the former Inspector on the contents of the two special reports. At this hearing the Committee also examined Mr Kelly on the Inspectorate's *Annual Report 2007-2008*, which is the subject of a separate Committee report.

Part 1: The Breen report

Background

- 1.3 The Breen report was produced in response to a referral to the Inspector of a complaint received by the previous Committee from Mr Breen, a former Member of the Legislative Council (MLC). The Committee referred this complaint to the Inspector on 12 December 2005. Mr Breen's letter, dated 7 June 2005, alleged that the application on 3 October 2003 by an ICAC officer for a warrant to search his Parliamentary office, and executed the same day, had been obtained under false pretences since it contained false and misleading information.⁴ The warrant had been sought and executed for the purpose of an ICAC investigation into allegations that Mr Breen had improperly claimed travel allowances and used parliamentary resources for non-parliamentary purposes. The ICAC's 2004 report into the allegations did not make any findings of corrupt conduct.⁵

⁴ See Office of the Inspector of the Independent Commission Against Corruption (ICAC), *Special Report of the Inspector of the Independent Commission Against Corruption to the Parliament of New South Wales Pursuant to Section 77A of the Independent Commission Against Corruption Act 1988 on Issues Relating to the Investigation by the Independent Commission Against Corruption of Certain Allegations Against the Honourable Peter Breen, MLC*, September 2008, pp. 7-8.

⁵ See Independent Commission Against Corruption (ICAC), *Report on investigation into the conduct of the Hon. Peter Breen MLC*, December 2004, pp. 43-44.

Section A: Issues arising out of the Breen report with regard to the Inspector

i. The Inspector's reporting of the Breen complaint

Reporting difficulties identified by the Inspector

- 1.4 When examined on 1 December 2008 Mr Kelly gave evidence that the reporting provisions had caused difficulties and delays with regard to the publication of the Breen report:

Mr KELLY: ...Let me just take this opportunity to show how that [the reporting provisions] impacts. Assume for the moment that the Parliament was not in session and assume for the moment that all this had occurred very recently and there was a need to move urgently. The obvious thing would have been to send a report to the commission and send a report to Mr Breen or his solicitor, and to make it public. As Inspector Moss⁶ has pointed out in connection with the comparable provisions in the Police Integrity Commission Act, there is a very great doubt whether the Inspector has power to make a report public in those circumstances, yet I would have thought it was the obvious thing to do.⁷

- 1.5 Mr Kelly's evidence refers to a problem that the Inspector of the Police Integrity Commission (PIC) has perceived in relation to his powers to report under s 89(1)(b), s 90, s 101 and s 102 of the *Police Integrity Commission Act 1996* (PIC Act). According to Mr Moss, the PIC Act does not specify to whom his reports are to be published; s 89 of the Act does not necessarily imply the power to publish his reports on complaints against the PIC to the general public; and, the provisions in s 101 and s 102 cannot be construed as covering reports dealing with complaints concerning the PIC. Consequently, in the PIC Inspector's view, the legislation gives no guidance as to the recipients of, and the status that should be accorded to, such reports. In the PIC Inspector's view there does not appear to be any provision in the legislation authorising the Inspector to present reports on complaint investigations to Parliament.

- 1.6 The PIC Inspector has also noted that the issues he perceives with regard to his reporting provisions are also relevant to the ICAC Inspector's parallel reporting provisions at s 57B(1)(b) and (c), s 57F, s 77A, s 77B, and s 78, and s 109 of the ICAC Act.⁸ The Inspectorate referred to this issue in its *Annual Report 2007-2008*:

Finally, I note that the Inspector of the Police Integrity Commission, Mr Peter Moss QC, states in his 2007-08 Annual Report that the legislation governing his role and functions, as well as that of the Inspector of the ICAC, is unclear on the issue of how and to whom reports concerning complaints can be published.

If such an uncertainty is thought to exist, I concur with Inspector Moss that it is in the public interest to amend the relevant legislation so that any uncertainty is removed. The legislation should make it clear that the Inspector has a discretion as to how and to whom reports concerning complaints can be published.⁹

- 1.7 Mr Kelly also indicated that there was a delay, though not significant, in the publication of the Breen report because the Inspectorate waited until the House was sitting before tabling the Breen report.¹⁰ It would appear from Mr Kelly's answers to

⁶ The Hon Peter Moss QC, current Inspector of the Police Integrity Commission.

⁷ Mr Graham Kelly, former Inspector of the ICAC, *Transcript of evidence*, 1 December 2008, p. 2 (see Appendix 2).

⁸ Office of the Inspector of the Police Integrity Commission, *Annual Report for the year ended 30 June 2008*, p. 31.

⁹ Office of the Inspector of the ICAC, *Annual Report 2007-2008*, p. 3.

¹⁰ Mr Graham Kelly, Answers to indicative questions taken on notice, question 6a, p. 4 (see Appendix 1).

indicative questions taken on notice that his suggested remedy to the problems he perceives with regard to the reporting provisions is to bring forward an amendment to enable the ICAC Inspector to publish reports without recourse to tabling them in Parliament, and for such reports to receive the absolute privilege currently afforded reports tabled in Parliament.¹¹

The Committee's view

- 1.8 Under the *Independent Commission Against Corruption Act 1988* (ICAC Act), the Inspector has the functions of dealing with complaints of abuse of power, impropriety and other forms of misconduct, and conduct amounting to maladministration, on the part of the ICAC or its officers, by way of reports and recommendations.¹² The reporting provisions found at s 77A and s 77B of the Act enable the Inspector to make special reports and annual reports to Parliament. Special reports concern:
- (a) any matters affecting the Commission, including, for example, its operational effectiveness or needs; and
 - (b) any administrative or general policy matter relating to the functions of the Inspector.¹³
- 1.9 The Committee considers that the Inspector should, as a matter of principle, report to Parliament on significant complaint investigations. The Committee does not, therefore, support any proposition that would enable the Inspectorate to publish reports under its own auspices, thereby bypassing Parliament.
- 1.10 The Committee notes, however, that the reporting provisions in the PIC Act have been the subject of debate for some time, with the Committee on the Office of the Ombudsman and Police Integrity Commission recommending in its *Report on the Ten Year Review of the Police Oversight System in New South Wales* that the PIC Act 'be amended to clarify that the Inspector is able to report to Parliament at his discretion in relation to any of his statutory functions'.¹⁴ It would appear that there is some degree of uncertainty in relation to the reporting provisions of the PIC Act, and ergo the reporting provisions of the ICAC Act. In view of this uncertainty, the Committee intends to seek the views of the new Inspector and the Commissioner on whether there is a need for an amendment to the reporting provisions in the ICAC Act to clarify that the Inspectorate and the Commission can report to Parliament on any appropriate matter.

ii. Definition of maladministration at s 57B of the ICAC Act

- 1.11 The Inspector is empowered at s 57B(1)(b) of the ICAC Act 'to deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission'. The definition of maladministration is further elucidated at s 57B(4):
- (4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:
 - (a) contrary to law, or
 - (b) unreasonable, unjust, oppressive or improperly discriminatory, or
 - (c) based wholly or partly on improper motives.

¹¹ Ibid, question 6b.

¹² Sections 57B(1)(b) & (c) of the *Independent Commission Against Corruption Act 1988* (ICAC Act).

¹³ Section 77A of the ICAC Act.

¹⁴ Committee on the Office of the Ombudsman and Police Integrity Commission, *Report on the Ten Year Review of the Police Oversight System in New South Wales*, Report 16/53, November 2006, p. 145.

Commentary

- 1.12 When examined on 1 December 2008 in relation to the Breen report, Mr Kelly indicated that the above mentioned definition of maladministration at s 57B is difficult to apply in practice due to its technical nature:

A finding of maladministration is a serious finding and is based on pretty technical legal principles. It would be very easy for an inspector to make a mistake unknowingly and end up before the court over such a finding. I also have to say that at the end of the day what amounts to maladministration and what does not quite amount to maladministration involves a very fine line and one that I think turns, despite what the courts might say, highly upon one's impression and one's predilection and one's view of precision or lack of precision. In this case even it was a very close call. I do not think that that is a productive way for effective supervision of an otherwise independent and extremely powerful organisation like ICAC to be executed.¹⁵

- 1.13 In the Committee's view if maladministration is likely to have occurred in the conduct of an investigation the ICAC Inspector should not be constrained in making a finding of maladministration due to an overly technical definition in the Act. The Committee intends to question the Commissioner and the new Inspector on this issue when it examines them in 2009 on their annual reports.

iii. Jurisdiction/powers of the Inspector

- 1.14 Following on from his evidence in relation to the definition of maladministration, the former Inspector indicated that his investigation of the Breen complaint raised the issue of whether the jurisdiction and powers of the Inspector should be re-considered:

The inspector does have an audit power but that audit power is also arguably similarly circumscribed by very narrow concepts such as with the way in which ICAC exercises its powers is in accordance with the law, instead of saying, for example, should they have issued the search warrants in the Breen case rather than whether they were legally entitled to do so.

...My recommendation to the Committee would be that you should over the period of the next two or three years really start to think through what kind of jurisdiction there should be for ICAC and then what kind of general supervisory powers there should be for the inspector.¹⁶

- 1.15 The Inspector of the ICAC has been in place since 2005. Since the inception of the Inspectorate, the Inspector of the ICAC has conducted and reported on three audits of the ICAC's compliance with applicable legislation, and published two annual reports. The Inspectorate has also conducted a significant investigation and produced a substantial report into a complaint relating to an investigation of a parliamentarian, the Hon. Peter Breen MLC. Drawing on the results and methodologies used in these reports, the Committee will question the new Inspector on the approach he will take to future audits when it examines him in 2009 on his annual report for 2008-2009.
- 1.16 The Committee does not, however, intend to consider in this review whether the Office of the Inspector is needed. The Committee indicated clearly in its report on the Inspector's 2006-2007 annual report that it considers that the Inspector of the ICAC performs a critical function in ensuring that the ICAC is accountable to the NSW

¹⁵ Mr Kelly, *Transcript of evidence*, 1 December 2008, p. 2.

¹⁶ *Ibid.*

public.¹⁷ The Inspector's Breen report, with its indications of inadequacies in the application for, and execution of, the search warrant, and of clear deficiencies in the understanding of parliamentary privilege on the part of ICAC officers, has further underscored the need for an Inspector of the ICAC.

Section B: Issues arising out of the Breen report with regard to the ICAC

i. Parliamentary privilege

The ICAC's handling of parliamentary privilege

1.17 One of the areas of particular concern for the Committee in relation to the Breen report is the way in which the issue of parliamentary privilege was handled by the ICAC before, during and after the execution of the search warrant on Mr Breen's parliamentary office. The ICAC Act clearly preserves the privileges conferred on Parliament by Article 9 of the Bill of Rights 1689.¹⁸ Section 122 of the Act (as it was in force on 3 October 2003 and still is today) provides:

Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

1.18 Evidence presented in the Breen report indicates that the ICAC did not give adequate consideration to the issue of parliamentary privilege prior to the execution of the search warrant, and the grasp of parliamentary privilege on the part of ICAC officers was insufficient. According to the report:

Evidence given to the OIICAC staff [Office of the Inspector of the Independent Commission Against Corruption] by current and former ICAC staff who were interviewed for the purpose of this investigation indicates that prior to October 2003 the ICAC had little or no experience in applying section 122 of the ICAC Act. This was largely due to the rare and exceptional cases in which questions of parliamentary privilege arose.¹⁹

1.19 Evidence from those who were employed by the ICAC prior to October 2003, including senior legal officers at the time, the former Executive Officer and former Commissioner, indicates that at that point in time no training was provided to ICAC officers on parliamentary privilege.²⁰ The report notes that 'in October 2003, the ICAC's written procedures for search warrants did not address Parliamentary privilege at all and in particular did not address how to deal with claims of Parliamentary privilege'.²¹ A briefing given to ICAC officers just prior to the execution of the warrant did not address the fact that the seizure of documents might be affected by parliamentary privilege. The Inspector concludes that:

There is nothing to suggest that the investigators executing the search warrant on Mr Breen's Parliamentary office had the benefit of any guidelines, protocols or procedures for dealing with any claims of Parliamentary privilege.²²

This view finds support from Ms Lynn Lovelock, the then Deputy Clerk of the Legislative Council, who was in attendance when the warrant was executed on Mr Breen's office. Ms Lovelock indicated that in her view the officers executing the

¹⁷ Committee on the ICAC, *Review of the 2006-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption*, Report 4/54, Sydney, October 2008, pp. 8-10.

¹⁸ Article 9 of the Bill of Rights 1689 reads: 'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.

¹⁹ Breen report, p. 42.

²⁰ *Ibid.*, p. 44.

²¹ *Ibid.*

²² *Ibid.*, p. 47.

Commentary

search warrant had a limited understanding of parliamentary privilege, with their understanding of proceedings in Parliament being confined to things said in Parliament rather than things created for the purpose of a proceeding in Parliament.²³

1.20 According to the Breen report, the ICAC's consideration of parliamentary privilege was confined to the issue of whether a warrant could be legally obtained and executed, and did not address how the ICAC would deal with claims of parliamentary privilege when executing the warrant.²⁴ Legal advices produced to the Inspectorate by the ICAC in relation to parliamentary privilege did not address the issue of the effect of parliamentary privilege on an application for, and execution of, a search warrant.²⁵ 'There is nothing to suggest that the question of what to do about any claims of Parliamentary privilege was considered', the Breen report concludes.²⁶

1.21 Moreover, senior managers in the ICAC could not recall whether they had considered the operation and application of the *Parliamentary Precincts Act 1997*, which vests control of the parliamentary precincts with the Presiding Officers of the Legislative Assembly and the Legislative Council.²⁷ Evidence from Ms Lovelock, indicated that notification of the ICAC's intention to execute the warrant was only given at short notice, when the ICAC officers were five minutes away from the building.²⁸

1.22 When examined on 1 December, Mr Kelly reiterated the conclusions made in the Breen report with regard to the decision to apply for the search warrant:

Mr KELLY:...The incursion that is necessarily involved in a search warrant must be carried out properly and with due regard to the rights of the Parliament. That was the problem in the Breen case because, as I said in the report, it was done with a rush of blood to the head without thinking about the significant competing interests, without thinking about whether there would be seriously privileged documents in Mr Breen's office, and without thinking about whether that would inhibit the capacity of a member of the Parliament to represent the people in the Parliament....²⁹

1.23 In what could be seen as an indication of the ICAC's inadequate grasp of parliamentary privilege at the time of the Breen investigation, the report reproduced a comment from the Solicitor to the ICAC at the time of the investigation to the effect that *Crane v Gething* is an authority for the proposition that the ICAC could execute a search warrant over material that may fall within the definition of proceedings in Parliament.³⁰ In this case Senator Crane's challenge to the validity of Australian Federal Police warrants was abandoned and the Court declined to decide whether or not certain documents were privileged, ordering their return to the Senate. Enid Campbell, an academic expert on parliamentary privilege, has commented that *Crane v Gething* did not resolve the extent to which statutory powers to grant search and seizure warrants are constrained by privilege.³¹ At the hearing on 1 December the Chair questioned Mr Kelly on this matter:

CHAIR: Just on parliamentary privilege, one matter that concerns me is that in your report you set out an opinion of a solicitor in the ICAC who, turning their mind to

²³ *Ibid.*, p. 121.

²⁴ *Ibid.*, p. 169.

²⁵ *Ibid.*, p. 43.

²⁶ *Ibid.*, p. 47.

²⁷ *Ibid.*, p. 41.

²⁸ *Ibid.*, pp. 112-113.

²⁹ Mr Kelly, *Transcript of evidence*, 1 December 2008, p. 3.

³⁰ *Ibid.*, p. 39.

³¹ Enid Campbell, *Parliamentary Privilege*, The Federation Press, Sydney, 2003, p. 38.

parliamentary privilege cited a well-known case of *Crane v Gething* for authority that they were able to enter the Parliament and that that case dealt with parliamentary privilege and authorised them to do so, whereas we all know that is not the case. In that case that claim was abandoned and it was not decided either way. There is no authority in that case for the proposition. That to me showed an inadequate grasp of this topic and that area. Have there been any moves or any training there to educate these solicitors or bring them more in tune with the idea of parliamentary privilege and the law pertaining to it?

Mr KELLY: Chairman, as usual that is a very searching and good question and consistent with my affirmation I cannot give you an unqualified yes. I think it will be plain from the report either in terms or by inference that my view is that at the time sufficient consideration simply was not given to the fact that this was an incursion into the Parliament of the people of New South Wales, and that that necessarily involved most fundamental issues that should have been dealt with with utmost care, and that care was not exercised. Ex post facto there was a certain amount of justification given, but it does not really matter. The fact of the matter is that there was not sufficient care given beforehand, in my view.

...What I can say in a more positive vein is that I do not think this will occur again because I think if there were a proposition to seek a search warrant on Parliament, first off, it would go very, very clearly and explicitly to the Commissioner. I am confident the current Commissioner would say, "Look, this commission has been there once before. There was a very adverse report on it and this time we had better make sure that every "i" is dotted, every "t" is crossed and, by the way, do you really need to do this?" That frame of decision-making or framework for decision-making would permeate the organisation.³²

- 1.24 Mr Kelly notes then that while in his view the issue of parliamentary privilege was not dealt with adequately by the ICAC at the time of the Breen investigation the situation has since greatly improved and the problems with the Breen investigation are unlikely to be repeated. The Breen report indicates that the situation with regard to knowledge of parliamentary privilege and its application to search warrants has been progressively remedied, with revised search warrant procedures approved in May 2005 having adopted specific practices in relation to the execution of a search warrant on a parliamentary office.³³ On 26 June 2006 the ICAC also adopted the Legislative Council Privileges Committee protocol for dealing with parliamentary privilege. Search warrant procedures were modified in a small number of respects on 7 August 2008 but are still based on the Legislative Council protocol. The Breen report concludes that the ICAC has now adopted appropriate procedures for dealing with claims of parliamentary privilege.³⁴ Section 10 of the ICAC's Procedures for Obtaining and Executing Search Warrants now addresses parliamentary privilege.³⁵

Committee observations

- 1.25 The apparent inadequate treatment of the issue of parliamentary privilege by the ICAC during its investigation of the allegations against Mr Breen is a matter of great concern to the Committee. The Committee intends to question the ICAC on matters of parliamentary privilege arising out of the Breen report when it examines the

³² Mr Kelly, *Transcript of evidence*, 1 December 2008, p. 3.

³³ For modifications of ICAC's search warrant procedures since the Breen investigation see Breen report, p. 47.

³⁴ *Ibid*, p. 173.

³⁵ ICAC, Operations Manual Procedure no.9 Procedures for Obtaining and Executing Search Warrants, Approved 7 August 2008, pp. 14-16 (see Appendix 3).

Commentary

Commissioner on the ICAC's 2007-2008 annual report. This examination will take place sometime in 2009 and areas of questioning may include:

- Training currently given to ICAC officers in relation to parliamentary privilege;
- Knowledge and understanding of parliamentary privilege on the part of senior management of the ICAC;
- ICAC search warrant procedures currently in place for searching parliamentary and electorate offices;
- The application of the Legislative Council Privileges Committee protocol to ICAC investigations of Members; and
- Knowledge and understanding by ICAC officers of the *Parliamentary Precincts Act 1997* as it applies to the execution of search warrants on parliamentary premises.

ii. The ICAC's application for the search warrant

Mistakes made in relation to the search warrant

- 1.26 The Breen report found that insufficient care was taken by the ICAC in preparing and checking its application for the search warrant, with the result that incorrect information was presented to the judicial officer who approved the application for the warrant. The warrant erroneously listed Mr Breen as the owner of 3 Lucia Crescent Lismore, an error that was not discovered until after the execution of the search warrant on Mr Breen's parliamentary office. Notwithstanding, the Breen report concluded that the error did not invalidate the search warrant.³⁶
- 1.27 The Breen report also noted a number of other concerns in relation to the Breen investigation:
- That was arguably imprudent to have served the occupier's notice required under the *Search Warrant Act 1985* [now the *Law Enforcement (Powers and Responsibilities) Act 2002*] on the person assisting the ICAC with its investigation and whose information had been the primary basis upon which the warrant had been obtained.
 - That although it was not a legal requirement it would have been prudent to have notified the issuing justice of the errors made in the application for the search warrant.
 - There was no documentary record of who in ICAC management had approved the application for the search warrant on a parliamentary office, or that it had been settled by a lawyer, although both steps did take place without any formal recording process.
 - That Mr Breen's complaint regarding the search warrant obtained and executed on his parliamentary office was not handled as well as it could have been given the fact that he had a genuine grievance regarding incorrect information being contained in the application for the search warrant.
 - When the ICAC applied for a search warrant in relation to 3 Lucia Crescent, Lismore its s 21 report did not correct the earlier error in the search warrant application.³⁷

³⁶ Breen report, pp. 134, 160, 168-172.

³⁷ *Ibid*, pp. 169-170.

1.28 The report concluded with regard to the search warrant:

In the Inspector's view, the mistakes that were made in connection with the search warrant application of 3 October 2003 should never have happened, nor ever be allowed to happen again. Sloppiness of this kind has no place in an organisation with such important compulsory powers as the ICAC has.

...Nevertheless, in the absence of any evidence of lack of good faith or the like, this sloppiness (which the current Commissioner Cripps described to Mr Marsden as an "honest mistake") does not appear to the Inspector to amount to maladministration or misconduct on the part of either the Commission as such or of any of the current or former officers involved.³⁸

1.29 Notwithstanding his conclusion as to the ICAC's apparent "sloppiness" with regard to the search warrant application, when examined by the Committee the former Inspector indicated that he was confident that the current Commissioner would ensure that such problems would not reoccur:

CHAIR: I turn firstly to the Breen report. You have indicated in the report that the procedures and protocols of the Independent Commission Against Corruption have been revised and changed as a result of this investigation and report. Do you feel confident that the Independent Commission Against Corruption now has the correct and appropriate processes within its procedures and staff to ensure that something such as this does not reoccur?... You indicated that in August 2008 there was a new revised procedure, which was still based on the original protocol. Can you tell us what the nature of that procedure is and are you able to provide the committee with a copy of that information?

Mr KELLY: If I can deal with the questions in the order in which they were asked. I cannot sit here and fulfil my affirmation by giving you an unqualified Yes answer to your question. That is because I do not think any procedures will prevent the reoccurrence of Breen-type mistakes. What will prevent the reoccurrence of those kinds of mistakes is the care and attention given by the people administering the procedures. I am confident from my dealings with the current commissioner that he would be stringently alert to ensure that those kinds of mistakes did not occur again. In other words, as usual, these things depend upon the people and the people have changed and the people have learnt lessons I think.³⁹

1.30 Since October 2003 the ICAC has revised its procedures with regard to obtaining and executing search warrants on at least three occasions.⁴⁰ In relation to the ICAC's most recent procedures the Breen report indicates that 'the search warrant checklist in the ICAC procedures has now been downgraded to a guideline and that the mandatory component is confined to recording who has made the decision to obtain a search warrant and who has settled the formal paper work'.⁴¹

Committee comment

1.31 The Committee intends to question the Commissioner and the new Inspector on this issue when it examines them in 2009 as part of its review of their annual reports. In particular, the Committee will seek assurance from the ICAC that the change noted at paragraph 1.30 will not increase the risk of any repetition of the errors made in relation to the application and execution of search warrants during the Breen investigation.

³⁸ Ibid, pp. 172-173.

³⁹ Mr Kelly, *Transcript of evidence*, 1 December 2008, p. 1.

⁴⁰ Breen report, p. 158.

⁴¹ Ibid, p. 174.

Commentary

1.32 At the hearing on 1 December 2008 it was suggested by Mr Greg Smith MP that in light of the Breen investigation, consideration should perhaps be given to making it a requirement that search warrants involving certain classes of person should be made to a Supreme Court judge, as happens with listening device warrants.⁴² In response Mr Kelly indicated:

Mr KELLY:...I can see the merit in what you are suggesting. Whether that should be the case generally is perhaps an open question, and I certainly feel significantly guided by the commission's view on that, but I can certainly see that in a specified range of cases there would be a very, very good case to be made for requiring the warrant to be issued by a judge having the status of a Supreme Court judge.⁴³

1.33 In 2009, as part of its examination of the Inspector and Commissioner on their annual reports the Committee will consider the issue of the granting of search warrants and whether in the case of certain categories of person, for example Members of Parliament, the ICAC should have to seek a Supreme Court warrant. Such a requirement could provide an extra check to ensure that issues such as parliamentary privilege are properly considered before a warrant is executed on parliamentary premises.

iii. The ICAC's matrix management structure

1.34 As far as the Committee understands the ICAC's multi-disciplinary team management is aimed at an integrated and efficient use of personnel, skills and expertise in the investigation and inquiry process. The Breen report suggests that this consensus style decision-making poses risks unless a senior executive independently takes responsibility and accountability.⁴⁴ In the case of the Breen investigation the Inspector concluded that the evidence suggested that the proposal to apply for a warrant was accepted without sufficient consideration being given as to whether or not it was the right decision.⁴⁵

1.35 In particular, the Inspector concluded that the ICAC sought a search warrant to search Mr Breen's parliamentary office without apparently considering whether critical information needed could have been obtained by other means. The report concludes that:

...in such an important case as an investigation involving the Parliament of New South Wales, including a search of Parliamentary premises, it seems surprising that, at some critical stages, the ICAC does not appear to have carefully considered relevant issues at a senior level with one senior officer clearly being identified as responsible and accountable for them. Matrix management (including multi-disciplinary team management) is, in the Inspector's view, no substitute for clear accountability in an agency with as extensive compulsory powers as the Commission has.

The Inspector is of the view that, in essence, before critical steps were taken, the whole process, including relevant factual issues, should have been reviewed with a clear head and in a calm manner by senior management in a manner commensurate with their accountabilities. The evidence seems to suggest that this did not occur at key stages leading up to the execution of the search warrant on Mr Breen's Parliamentary office.⁴⁶

⁴² Mr Greg Smith MP, *Transcript of evidence*, 1 December 2008, pp. 6-7.

⁴³ Mr Kelly, *ibid*, p. 7.

⁴⁴ Breen report, p. 89.

⁴⁵ *Ibid*, p. 88.

⁴⁶ *Ibid*, p. 168.

1.36 The Inspector recommended in the Breen report that, at the least, key personnel be conversant with parliamentary privilege and the procedures for dealing with claims of parliamentary privilege, and that the ICAC should ensure that privilege is fully and carefully considered before any search warrant is sought or executed on parliamentary premises.⁴⁷ The Inspector also recommended that a suitably senior person take responsibility for ensuring the accuracy of factual information used in the application for a search warrant.

Committee comment

1.37 In the Committee's view the Breen report raises some questions in relation to the ICAC's matrix management structure and its operational management of investigations. When the Committee examines the Commissioner in 2009 it will raise with the ICAC the issue of its current management structure and how it affects the conduct of investigations. Issues raised may include:

- any changes made to the ICAC's matrix management structure in light of the Breen investigation and the Inspector's report on the Breen complaint;
- risks associated with the ICAC's matrix management structure; and
- senior managerial oversight of ICAC investigations.

Part 2: The Listening Devices report

Background

ICAC's use of listening devices

1.38 As part of its investigations, the Commission may apply to a Supreme Court judge for a warrant to use a listening device, in order to listen to and record private conversations. Evidence gathered by the Commission through the use of a listening device is admissible in subsequent prosecutions of affected persons by the Director of Public Prosecutions (DPP). For example, the Commission obtained a warrant to use listening devices during its 2006 investigation into the cover-up of an assault on an inmate at Parramatta Correctional Centre. In its investigation report, ICAC noted that evidence obtained in lawfully recorded conversations made during the inquiry would be available to the DPP in assembling evidence for prosecution.⁴⁸

The Inspector's audit

1.39 The LDA audit was conducted by the Inspectorate in June 2008, pursuant to its audit functions under s 57B(1) of the ICAC Act. The aim of the audit was to report on the extent of the Commission's compliance with the LDA. The audit was based on a sample of warrants obtained by ICAC between 1 January 2004 and 31 May 2008 – approximately 30% of the total number of warrants granted to ICAC were assessed by the Inspectorate. Compliance with the LDA was based on assessment against the provisions of the LDA including, in summary, whether:

- warrants were in the specified form;
- devices remaining on premises after the warrant's expiry were retrieved as soon as practicable;

⁴⁷ Ibid, p. 174.

⁴⁸ ICAC, *Report on cover-up of an assault on an inmate at Parramatta Correctional Centre*, June 2006, pp. 10 and 48.

Commentary

- relevant reporting and notification requirements were met.⁴⁹
- 1.40 According to the audit report, the audit's scope also included an examination of the Commission's practices and procedures relating to applications for the use of listening devices, while the methodology entailed a review of procedures, guidelines or practices that were relevant to the Commission's exercise of powers pursuant to the LDA.⁵⁰ In answers to indicative questions taken on notice the Inspectorate clarified that this review of procedures was undertaken to inform the Inspector of the Commission's warrant application processes, not as an examination of the procedures themselves.⁵¹
- 1.41 The Inspectorate concluded that the audit demonstrated the Commission's compliance with the requirements of Part 4 of the LDA.

Committee comment

Resources available for audits

- 1.42 The Committee notes that while the desired outcome of the audit was to produce a report assessing the ICAC's compliance with the Act, the report focussed on the Commission's compliance with Part 4 of the Act, which dealt with applications for warrants under the Act. In indicative questions, the Committee asked the Inspectorate as to whether consideration was given to assessing the Commission's compliance with the provisions in Part 5 of the Act, relating to the destruction of irrelevant records made by the use of a listening device. The Inspectorate advised that, although compliance with Part 5 had been discussed with the ICAC, 'in terms of priority and available resources' it was decided that this issue would not be focussed on as part of the audit.⁵²
- 1.43 In the Committee's view, prioritising compliance with Part 4 of the LDA was an appropriate way of assessing compliance with the Act. However, the Committee notes that follow up procedures once a warrant has been granted, such as retrieval of devices and destruction of irrelevant material, are also important in terms of compliance with the Act. The Committee has previously recommended that the Inspectorate seek additional funding to enable it to expand its audit program.⁵³ In evidence to the Committee the former Inspector indicated that he had not had the opportunity to act on the Committee's recommendation to seek additional funding.⁵⁴ In the Committee's view, the Inspectorate's audits of the ICAC's compliance with the ICAC Act and other Acts should not be constrained by a lack of resources. The Committee will raise the issue of funding with the current Inspector, and seek his views on whether the current allocation is adequate for an expansion of the Inspectorate's audit program.

⁴⁹ Specifically, ss 16(6A), 16A(1) & (2); s 17(1); s 19(1), (2) and (4); and s 20(4) of the repealed *Listening Devices Act 1984* (LDA). The LDA was repealed with effect from 1 August 2008, the date at which the *Surveillance Devices Act 2007* commenced.

⁵⁰ Office of the Inspector of the ICAC, *Report of an audit of the ICAC's compliance with the Listening Devices Act 1984*, p. 8.

⁵¹ Mr Kelly, Answers to indicative questions taken on notice, question 8, p. 9.

⁵² *Ibid*, question 4, p. 8.

⁵³ Committee on the ICAC, Report 4/54, recommendation 3, p. 6.

⁵⁴ Mr Kelly, *Transcript of evidence*, 1 December 2008, p. 8.

Assessing ICAC procedures – s 57B(1)(d)

- 1.44 As noted above, the audit did not examine ICAC procedures in relation to listening device warrant applications. In terms of compliance with the relevant ICAC procedures for preparing warrant applications, the former Inspector indicated that discussions with ICAC officers led him to understand that procedures were complied with.⁵⁵
- 1.45 The principal functions of the Inspector under s 57B of the Act include assessing the effectiveness and appropriateness of the Commission's procedures relating to the legality or propriety of its activities. The former Inspector indicated in his 2006-2007 Annual Report that this function was carried out as part of the Inspectorate's conduct of its audit function under s 57B(1)(a), while later noting in answers to questions on notice that it may be appropriately undertaken as a 'separate exercise' from the audit function.⁵⁶ The Committee is interested in the current Inspector's views on the performance of this principal function, including whether he has any plans to assess particular ICAC procedures, or to incorporate such assessments into future audits of the Commission's operations. The Committee will discuss this issue with Mr Cooper during its review of the Inspectorate's next annual report.

Compliance with retrieval provisions

- 1.46 Under the provisions of the LDA, warrants authorising devices to be used and installed also authorised and required their retrieval.⁵⁷ Section 16A of the LDA provided that devices remaining on premises after the expiry of the warrant that authorised their installation and use should be retrieved as soon as practicable. The LDA provided that, if a warrant expired before a device was removed, the warrant continued to be in force for 10 days to allow for retrieval of the device.
- 1.47 The Inspector's audit report noted that information on the retrieval of devices was not provided to the Inspector by the Commission:
- There was no specific information provided to the OIICAC about when a listening device was retrieved which would allow the Inspector to gain an understanding as to whether:
- (1) any listening devices had remained on premises after the expiry of an authorising warrant;
- (2) in such a situation, the listening device was retrieved as soon as practicable in accordance with requirements of s16A; and
- (3) any applications were made by the ICAC pursuant to s16A.
- The ICAC was asked to advise on this issue.⁵⁸
- 1.48 The ICAC advised the Inspector that, of the audited warrants, one device was not retrieved during the period for which the warrant was valid, nor during the subsequent 10 day period. However, the Commission indicated that 'prior to the expiry of the

⁵⁵ Office of the Inspector of the ICAC, *Report of an audit of the ICAC's compliance with the Listening Devices Act 1984*, p. 10.

⁵⁶ Mr Kelly, Answers to questions on notice provided prior to 3 July hearing, question 3, p. 1: see Committee on the ICAC, Report 4/54, p. 31.

⁵⁷ LDA, Sch 2 (repealed).

⁵⁸ Office of the Inspector of the ICAC, *Report of an audit of the ICAC's compliance with the Listening Devices Act 1984*, pp. 13-14.

Commentary

period allowed by s 16A it applied for and obtained an order from the Supreme Court authorising the retrieval period'.⁵⁹

1.49 The Committee notes that the records inspected by the Inspectorate were incomplete in that they did not include records relating to the retrieval of devices. The former Inspector therefore relied on the Commission's advice in relation to this aspect of the audit. In answers to indicative questions taken on notice, Mr Kelly indicated that he was satisfied with the material provided by ICAC, and that:

The ICAC's advice and the examination of reports made by the ICAC pursuant to s19(1) on the execution or non-execution of the warrant, led me to conclude that all listening devices for warrants audited had been retrieved in accordance with the requirements of the *Listening Devices Act 1984*.⁶⁰

1.50 While the former Inspector was satisfied with the advice provided by the Commission in relation to the retrieval of listening devices, the Committee intends to question the ICAC on its record keeping processes in relation to the retrieval of devices during the forthcoming review of the Commission's 2007-2008 Annual Report.

Surveillance Devices Act 2007

1.51 The Committee notes that, at the time of the Inspectorate's audit, the *Surveillance Devices Act 2007*, which repeals the LDA, had been assented to and was awaiting commencement. The LDA was repealed with effect from 1 August 2008.

1.52 The Surveillance Devices Act provides for:

- Expansion of the application of the Act to include data surveillance devices, optical surveillance devices and tracking devices;
- Use of surveillance device warrants in cross-border operations and for the recognition in New South Wales of warrants from other states;
- Authorisation of the emergency use of devices without a warrant under certain circumstances;
- Extension of the period for which warrants can be granted from 21 days to 90 days;
- Applications for all devices except tracking devices to be granted by Supreme Court judges, while tracking device applications are granted by magistrates in a Local Court;
- Separate warrants for the retrieval of devices.⁶¹

1.53 In addition, ss 48 and 49 of the Act provide for the inspection of law enforcement agencies'⁶² records by the Ombudsman to assess compliance with the Act, and to report to Parliament on the results of inspections at six monthly intervals. The Ombudsman currently audits law enforcement agencies' records in relation to their use of telephone intercepts and controlled operations and tables reports on the results of the audits.⁶³ The Committee notes that in terms of the efficient allocation of public sector resources, it is unlikely that any further audits to assess the

⁵⁹ Ibid, p. 14.

⁶⁰ Mr Kelly, Answers to indicative questions taken on notice, question 6, p. 9.

⁶¹ The Hon David Campbell MP, second reading speech, Legislative Assembly Hansard, 6 November 2007, pp. 3578-3581.

⁶² ICAC is defined as a law enforcement agency under s 4 of the Surveillance Devices Act.

⁶³ The *Telecommunications (Interception and Access) Act 1987* prevents the Ombudsman from reporting about its activities relevant to that Act: see NSW Ombudsman, *Annual Report 2007-2008*, p. 61.

Commission's compliance with the new Act will be conducted by the Inspectorate, given the inspection and auditing regime provided for under the Act. The Committee will discuss with the Inspector any planned audits of ICAC's compliance with other laws.

Appendix One – Indicative questions taken on notice

**PUBLIC HEARING OF THE PARLIAMENTARY JOINT COMMITTEE ON
THE INDEPENDENT COMMISSION AGAINST CORRUPTION (THE ICAC)
WITH FORMER INSPECTOR OF THE ICAC, MR GRAHAM KELLY.**

RESPONSES TO INDICATIVE QUESTIONS ON NOTICE

Inspector of the ICAC 2007-08 Annual Report

6. You comment that the legislation should make clear the Inspector's discretion to decide how and to whom the Inspector's complaint reports can be published (p3).

a. Given that the ICAC Act is silent on the extent of the Inspector's discretion to report, why do you consider there to be a need to expressly provide for such discretion?

In his Annual Report 2007-08 to the Parliament of New South Wales, the Inspector of the Police Integrity Commission, His Honour Peter Moss QC, expressed his view that the legislation which governs his role and functions, namely, the *Police Integrity Commission Act 1996*, was unclear on whether he, as Inspector, could publish reports concerning complaints. Mr Moss noted in his Annual Report that the legislation governing the Inspector of the ICAC in respect of publication of reports concerning complaints was identical to his on this issue and therefore it was also unclear as to whether the Inspector of the ICAC had the power to publish reports concerning complaints.

To date I have taken the view that the Inspector of the ICAC has a discretion to publish reports, and have done so where I have considered it appropriate. However, I note the comments made by such an eminent and experienced judicial officer such as Mr Moss.

Whether my approach to date on this issue has been correct or not, in any event it is highly unsatisfactory that the legislation should be silent on the issue and leave open any scope for ambiguity. The power to publish reports concerning complaints is, in effect, a key mechanism for holding the ICAC accountable. It is likely that any ambiguity will be tested in the most heated of circumstances through litigation, for example, where the Inspector wishes to publish a report concerning a complaint which the ICAC may not want to have published because the report contains comments adverse to the ICAC and its officers.

It is also likely that parties to such litigation will not accept a single decision and that a first instance decision will be appealed to higher courts in order to decisively determine a very important and sensitive issue, i.e. does the Inspector have the right to publish reports concerning complaints?

Such litigation will be a burden on the public purse and would inevitably delay the publication of the particular report which has triggered the litigation. Such delay may have the effect of denying justice to those who may have been adversely affected by the ICAC's conduct and for whom the timely substantiation of their complaint is a significant issue.

Additionally, if the final outcome of any such litigation is that the Inspector is found by a court not to have the power to publish reports, such a finding would make nonsense of a key purpose of the Inspector's role which is to hold the ICAC accountable by making public comments on its conduct. From a policy perspective, it is also highly unsatisfactory that this issue should be left to the courts to determine rather than the Parliament itself.

4

Note: The former Inspector's answers to indicative questions taken on notice are reproduced in full on the Committee's website at www.parliament.nsw.gov.au/icac.

I note that in respect of the report concerning the complaint made by Mr Breen in order to avoid any uncertainty arising from this issue I took the step of ensuring that the report was published pursuant to s77A of the ICAC Act.

- b. You have reported on the Breen matter utilising the reporting provision under s.77A. Did you encounter any particular problems when reporting on this complaint investigation?*

The uncertainty surrounding whether or not the Inspector could publish the 'Breen Report' contributed to a delay in the publication of the report, albeit not a significant one so that the report could be presented when Parliament was sitting, pursuant to s 77A. Although the delay did not affect the issue of accountability in this instance, it may well do so in other circumstances where the issues contained in such a report are more contemporary and relevant to ongoing events.

- c. In what circumstances do you envisage that your ability to report on complaint investigations would be fettered in any way under the current legislation?*

Please see my response to clauses (a) and (b) above.

- d. Reports to and by the Inspector of the ICAC are covered by the provisions of the Defamation Act. Do you see a need for any other protections?*

The key protection that needs to be provided to the Inspector is to remove any ambiguity about the Inspector's power to publish reports concerning complaints.

The ICAC Act should be amended so that it contains a specific and clear reference enabling the Inspector to publish reports concerning complaints. The amendment should not restrict the Inspector's discretion as to whom such reports can be published.

There is a real question as to whether the Defamation Act provides protection to the Inspector if the Inspector is found by a court to have acted beyond power, i.e. if the Inspector has published a report concerning a complaint, particularly one containing adverse comments, and there is a subsequent judicial ruling that the publication of such a report by the Inspector was beyond the Inspector's power.

Inspector of the ICAC's report of an audit of the ICAC's compliance with the Listening Devices Act 1984 (June 2008)

Framing the terms for audit

1. In your report you noted that the draft terms of reference for the audit were amended following discussions with the Commission and a preliminary review of the relevant files (p6). The amendments clarified the scope of the audit, the methodology to be used and the outcome of the assessment.

a. Can you please indicate to the Committee what clarifying amendments were made to the audit's scope and methodology?

The amendments were of a minor nature in the following respects, firstly to add that the Inspector would examine any other relevant or applicable laws and second stating that the Inspector or the Office of the Inspector of the ICAC (the OIICAC) would hold discussions with ICAC officers where it was considered relevant or appropriate to do so.

b. How was the outcome of the assessment amended?

This was a minor clarifying amendment.

The draft terms of reference did not indicate what would be the outcome of the audit. The final terms of reference stated that the outcome of the audit would be to assess the extent to which the ICAC complied with the *Listening Devices Act 1984*.

Methodology and results

2. How did you determine which warrants were to be included in the audit?

The nature and type of warrant applications made by the ICAC over a three year time period from January 2004 to the relevant current period at the time of consultation with the ICAC in 2008, which was April 2008, was discussed between the OIICAC and relevant ICAC staff.

Views expressed from these discussions led the Inspector to form the view that approximately 30% of warrants applied for each year from 2004 would constitute a fair audit sample, reflecting a diverse number of complaints investigated in which such warrants were applied for and obtained.

3. The audit sought to establish the ICAC's compliance with the requirements of the Act by assessing applications for listening device warrants that were granted by judicial officers.

a. Were any applications refused?

No.

b. If so, would the consideration of refused applications have aided the audit process?

Not applicable.

4. The audit only focussed on the ICAC's compliance with part 4 of the Act (p13) Did you consider assessing whether the Commission complied with the provisions in part 5 relating to the destruction of irrelevant records made by the use of a listening device?

Yes, this was considered and the process of compliance with part 5 was discussed with the ICAC. It was decided, however, not to focus on this issue in terms of priority and available resources.

5. The report states that the audit included a review of the Commission's 'compliance with other laws, relevant to an exercise of powers pursuant to the Listening devices Act'.

a. Was ICAC's compliance with any other laws assessed as part of the audit?

No.

b. If so, what were the results of the assessment?

Not applicable.

6. In relation to section 16A, which deals with the retrieval of devices after a warrant has expired, your report states (p13) that there was no specific information in relation to the retrieval of a listening device.

a. Does this refer to a particular device, or to all devices for which for which warrants were granted and audited by the Inspector?

All devices. The above statement is a reference to the fact that there was no specific information available as to when listening devices were retrieved by the ICAC, i.e. no dates and times were given.

b. How were you able to assess the Commission's compliance with this section if no material or information was provided by the ICAC to indicate whether listening devices were retrieved?

I refer to my comments made in the first paragraph on page 14 of the report which, in summary, states that the ICAC advised that in respect of all the warrants audited, only one warrant was not retrieved during the period authorised the warrant or in accordance with the exceptions permitted under s16A (1) and (2).

My comments in the audit report also note that the ICAC had advised that in respect of that one warrant, that prior to the expiry of the 10 day period (permitted under s16(2)) it had applied to the Supreme Court for an extension of time in which to retrieve the

Appendix One – Indicative questions taken on notice

listening device and had been granted the extension. The audit report notes that the ICAC advised that it had subsequently provided a report to the Supreme Court on the retrieval of this particular listening device pursuant to s19(4).

The ICAC's advice and the examination of reports made by the ICAC pursuant to s19(1) on the execution or non-execution of the warrant, led me to conclude that all listening devices for warrants audited had been retrieved in accordance with the requirements of the *Listening Devices Act 1984*.

- c. Were you satisfied with the material provided by the Commission, in terms of its compliance with this section, given that the Commission did not provide you with its report regarding the retrieval of a device under section 19(4)?*

Yes. I accepted that the ICAC provided me with truthful and correct advice.

Publication of final audit report

7. In terms of subsection 19(2), which allows for a judge to direct that the record of evidence or information obtained through the use of a listening device be brought before the Court, the audit states that no documentation was available to indicate whether any of the audited warrants were the subject of such a direction. Your audit indicates (p16) that the ICAC undertook to advise on this issue and that its advice would be included in the final audit report.

- a. Is it your intention to publish a final audit report?*

No. Page 16 of the Inspector's Annual Report 2007-08 reported on and finalised this issue.

- b. If so, when will you be publishing the final audit report?*

Please see answer referred to in clause (a) above.

- c. If not, how will you report on the ICAC's advice in relation to this issue?*

Please see answer referred to in clause (a) above.

Relevant ICAC policies and procedures

8. The report states that ICAC policies and procedures (listed on p10) on obtaining and executing listening device warrants were reviewed as part of the audit.

- a. What was the outcome of the review of these procedures?*

The procedures were reviewed to understand the process by which warrant applications were prepared and were not examined as a separate review of the procedures themselves.

- b. In terms of the warrants audited, did ICAC officers comply with the relevant ICAC policies and procedures?*

Discussions with ICAC officers led the OIICAC to understand the procedures were complied with in the preparation of warrant applications. I accepted this advice.

Repeal of Act

9. The Listening Devices Act 1984 was repealed pursuant to the Surveillances Devices Act 2007, which commenced on 1 August 2008. This superseding Act was assented to on 23 November 2007, before your audit commenced.

- a. Do you have any recommendations for your successor as Inspector, should he decide to undertake an audit of the ICAC's compliance with the new Act?*

I have had general discussions with Inspector Cooper about the audits, including about methodology. Beyond that I do not think it is appropriate for me to make any specific recommendations to him on any particular audit which he may wish to undertake unless he specifically invites me to do so.

- b. In particular, would you have any comments in terms of the methodology that could be used for assessing compliance with the provisions of the new Act?*

No. See my answer to clause (a) above.

Appendix Two – Questions without notice

This appendix contains a transcript of evidence taken at a public hearing held by the Committee on 1 December 2008. Page references cited in the commentary relate to the numbering of the original transcript, as found on the Committee's website.

MR GRAHAM JOHN KELLY, former Inspector of the Independent Commission Against Corruption, and

Ms SEEMA SRIVASTAVA, Executive Officer, Office of the Inspector of the Independent Commission Against Corruption, Level 7, Tower 1, Gibbons Street, Redfern, affirmed and examined:

CHAIR: The committee has received the report into the Breen matter, the annual report for the financial year 2007-2008, and the audit report with regard to the Listening Devices Act 1984. Before we commence questions do either of you wish to make an opening statement?

Mr KELLY: Yes. When one finishes a term of appointment one inevitably reflects on it. I have done that and there are a couple of things that stand out. Firstly, the support from a very small staff, and in particular Ms Srivastava, without which it would not have been possible to function not just at the level at which the office functions but frankly at all. I would like to record before the committee my appreciation of that support. Secondly—and I do not mean this in any inappropriate way at all—the general support of this committee, and the encouragement of the committee from the beginning of this office, has been vital to its success. The office has had to deal with some difficult issues both vis-a-vis the people who complain to it and, to some extent, with the commission itself and, certainly to a greater extent, with people in respect of whom the Inspectorate has found reason to be somewhat critical. If there had been a feeling that there was a lack of support or, even worse, hostility from this committee, it would have been more difficult to go forward. So without in any sense seeming to be ingratiating oneself, I would also like to put on record my thanks for the support of this committee during my term.

CHAIR: I turn firstly to the Breen report. You have indicated in the report that the procedures and protocols of the Independent Commission Against Corruption have been revised and changed as a result of this investigation and report. Do you feel confident that the Independent Commission Against Corruption now has the correct and appropriate processes within its procedures and staff to ensure that something such as this does not reoccur? Can I put it as broadly as that? You indicated that in August 2008 there was a new revised procedure, which was still based on the original protocol. Can you tell us what the nature of that procedure is and are you able to provide the committee with a copy of that information?

Mr KELLY: If I can deal with the questions in the order in which they were asked. I cannot sit here and fulfil my affirmation by giving you an unqualified Yes answer to your question. That is because I do not think any procedures will prevent the reoccurrence of Breen-type mistakes. What will prevent the reoccurrence of those kinds of mistakes is the care and attention given by the people administering the procedures. I am confident from my dealings with the current commissioner that he would be stringently alert to ensure that

those kinds of mistakes did not occur again. In other words, as usual, these things depend upon the people and the people have changed and the people have learnt lessons I think.

CHAIR: The final conclusion in your report is that the conduct of the Independent Commission Against Corruption and its officers did not amount to maladministration under the Act. Section 57B (1) (c) sets out the definition of "maladministration". Is the committee to infer from that conclusion that there is a need to change or widen the definition of "maladministration" under the Act? Would you consider that to be an appropriate matter to address, given the fact that you have indicated deficiency in the procedures and how they were adopted—you termed it "a rush of blood to the head" to quote your report.

Mr KELLY: Yes.

CHAIR: The Independent Commission Against Corruption has now updated those procedures and changed them—obviously they were deficient in some way back then. It is a very serious and important matter that we are dealing with—I will get to parliamentary privilege in a moment—but do you see the need now to revisit or look at the definition of "maladministration" in the Act?

Mr KELLY: The short answer is, yes: the long answer is more complicated and has a bit of history to it. The committee will recall on a number of occasions over the years I have effectively alluded to the complex nature of the provisions that govern the jurisdiction of the Inspectorate. Now that I am no longer inspector, I guess I have no particular obligation to support any particular state of the law and therefore I probably feel freer than otherwise to express a view to the committee about policy related matters, I think the Inspectorate would be much more effective if it had a broader jurisdiction and without a blunt meat axe in its hand.

A finding of maladministration is a serious finding and is based in pretty technical legal principles. It would be very easy for an inspector to make a mistake unknowingly and end up before the court over such a finding. I also have to say that at the end of the day what amounts to maladministration and what does not quite amount to maladministration involves a very fine line and one that I think turns, despite what the courts might say, highly upon one's impression and one's predilection and one's view of precision or lack of precision. In this case even it was a very close call. I do not think that that is a productive way for effective supervision of an otherwise independent and extremely powerful organisation like ICAC to be executed.

Your question, Chairman, also takes me to some of the outlying questions that were delivered before the meeting. I think there is a real case for a significant review of the Act, particularly the role of the inspector but also in terms of the jurisdiction of the commission. The experience of my term turned out, as everyone on the Committee knows, to be quite different from what was expected. It has been dominated by complaints by complainants to ICAC, to which ICAC did not respond and overwhelmingly did not respond for good or at least justifiable reasons, whereas it was generally expected that what would come primarily before the inspector would be accusations of excesses of power. They were very few and very few of them turned out to have any degree of substance at all.

The inspector does have an audit power but that audit power is also arguably similarly circumscribed by very narrow concepts such as whether the way in which ICAC exercises its powers is in accordance with the law, instead of saying, for example, should they have

issued the search warrants in the Breen case rather than whether they were legally entitled to do so. I think if an inspector had looked at the Breen case unconstrained by the provisions of the Act, the report probably would have said much the same thing. It would not have felt inhibited by whether it was a finding of maladministration or not and would have said that the case was not properly handled and that is the end of the story. It also takes me to the question that has been raised, and rightly so, about to whom you report. As this Committee knows only too well, we were delayed at various stages and for a variety of reasons in finalising the Breen report, but not least because of at least veiled threats of litigation against us if we proceeded in various directions. So there were continuous pressures to confine ourselves strictly according to the provisions of the Act.

Let me just take this opportunity to show how that impacts. Assume for the moment that the Parliament was not in session and assume for the moment that all this had occurred very recently and there was a need to move urgently. The obvious thing would have been to send a report to the commission and send a report to Mr Breen or his solicitor, and to make it public. As Inspector Moss has pointed out in connection with the comparable provisions in the Police Integrity Commission Act, there is a very great doubt whether the inspector has power to make a report public in those circumstances, yet I would have thought it was the obvious thing to do. My recommendation to the Committee would be that you should over the period of the next two or three years really start to think through what kind of jurisdiction there should be for ICAC and then what kind of general supervisory powers there should be for the inspector.

One of the issues that arises is the relationship between this Committee and the inspector. I see one big difference and that is that the inspector has the power, and should have the power, to go into ICAC and see its files and to see its individual cases, have a look at what happened in individual cases and then extrapolate the conclusions about the way processes are carried out, whereas it would be in my view completely inappropriate for the Parliament effectively to look at individual cases in ICAC. That is the very great difference and that is why one might answer that the office of the inspectorate is justifiable to do that. But you do not get maximum value for your money under these constrained powers. I am sorry for a very long answer but as I say that was the reflection after a few months' refreshment.

CHAIR: Thank you, Mr Kelly. Can I just bring you back to the realm of a question I asked you before about the definition of maladministration? Do you think it is worth investigating the possibility of perhaps adopting the definition of maladministration under the Ombudsman Act, which is wider? Do you think that would be a suitable course? It is wider and it has more provisions for different sorts of circumstances and factual scenarios. Do you think that would be worthwhile pursuing?

Mr KELLY: It probably would be but I think what I am struggling to formulate and advocate is that we ought to get away from technical legal concepts and we ought to make it plain that we are looking at the practical way in which these extraordinary powers are carried out. So although I can see that what is implicit in the question has merit, I do not think that really is the end of the story.

CHAIR: Just on parliamentary privilege, one matter that concerns me is that in your report you set out an opinion of a solicitor in the ICAC who, turning their mind to parliamentary privilege cited a well-known case of *Crane v Gething* for authority that they were able to enter the Parliament and that that case dealt with parliamentary privilege and authorised them to do so, whereas we all know that is not the case. In that case that claim

was abandoned and it was not decided either way. There is no authority in that case for the proposition. That to me showed an inadequate grasp of this topic and that area. Have there been any moves or any training there to educate these solicitors or bring them more in tune with the idea of parliamentary privilege and the law pertaining to it?

Mr KELLY: Chairman, as usual that is a very searching and good question and consistent with my affirmation I cannot give you an unqualified yes. I think it will be plain from the report either in terms or by inference that my view is that at the time sufficient consideration simply was not given to the fact that this was an incursion into the Parliament of the people of New South Wales, and that that necessarily involved most fundamental issues that should have been dealt with with utmost care, and that care was not exercised. Ex post facto there was a certain amount of justification given, but it does not really matter. The fact of the matter is that there was not sufficient care given beforehand, in my view.

Nor in a sense was there sufficient consideration given to whether it was necessary in the first place to undertake this adventure, particularly considering the very important issues of fundamental constitutional law that were going to be activated by it. What I can say in a more positive vein is that I do not think this will occur again because I think if there were a proposition to seek a search warrant on Parliament, first off, it would go very, very clearly and explicitly to the Commissioner. I am confident the current Commissioner would say, "Look, this commission has been there once before. There was a very adverse report on it and this time we had better make sure that every "i" is dotted, every "t" is crossed and, by the way, do you really need to do this?" That frame of decision-making or framework for decision-making would permeate the organisation.

CHAIR: You relied on some advice from counsel.

Mr KELLY: Yes.

CHAIR: One of those you used was Tom Hughes, QC, and also Bret Walker, SC, both eminent counsel.

Mr KELLY: Yes.

CHAIR: As I remember, Mr Hughes gave an opinion that the office of a parliamentarian in Parliament was basically a privileged area and that it was inviolate, to use an expression that has been used for centuries. Then Mr Walker, talking about documents, said that most of those documents would probably not be protected under parliamentary privilege. You relied on Mr Walker. They seemed to be looking at two different issues, and you relied on Mr Walker. How did you approach those two pieces of advice? How did one take sway over the other in this case?

Mr KELLY: They were quite different issues and therefore it was correct for both to be right. Mr Hughes we accepted entirely. I should just disclose to the Committee so that there is no doubt about it, I am a very long-term colleague of Mr Hughes from when I was a very junior officer in the Federal Attorney-General's Department and Mr Hughes was Attorney-General. So I should say that I have the utmost respect for him personally and professionally and particularly for his views in public law areas. I have no difficulty whatsoever in adopting his views in relation to the issues that he expressed them on. My recollection is, and I have just verified it with Ms Srivastava, we did not brief Mr Walker. Mr Walker was briefed by the Legislative Council on issues specifically on parliamentary

privilege. I think everyone is at one about parliamentary privilege. At the end of the day it is for the Parliament to determine the extent of parliamentary privilege. The courts do have some measure of a review role but inherent in the notion of parliamentary privilege, the Parliament itself can determine it. Mr Walker was briefed by the Parliament and gave that advice and we, in a sense, had no option but to accept that advice. I am not saying it is wrong, by the way.

CHAIR: You briefed Mr Hughes?

Mr KELLY: Yes, but on a slightly different issue—a somewhat considerably different issue. Mr Hughes focused very intensely on the Search Warrants Act.

CHAIR: Mr Walker did not address the parliamentary precinct, as such?

Mr KELLY: No.

CHAIR: On this particular topic you based what you said on Mr Walker's advice, would that be fair to say?

Mr KELLY: No, I do not think that is a completely accurate characterisation that we did that. We did not ultimately seek to express a view about parliamentary privilege as such because we came to the conclusion that that was for the Parliament, not for us. Then to the extent that the Parliament had relied on Mr Walker, well so be it.

CHAIR: Mr Kelly, would you be willing to provide us with a copy of Mr Hughes's advice?

Mr KELLY: Yes. We have provided it to ICAC. We do not have any particular privilege about it. I think as a matter of courtesy I would like to make sure that Mr Hughes does not have any difficulty, but I would be surprised if he does.

CHAIR: And would it be a problem to provide Mr Walker's advice as well?

Mr KELLY: That is within the control of the Parliament, I think. Ms Srivastava has brought my attention to the precise details. It was advice on 9 October 2003 to the President of the Legislative Council. So I guess I should not volunteer.

CHAIR: Now that you have mentioned it, Mr Kelly, I think I have seen it in the material. It is about two or three pages long.

Mr KELLY: Yes.

Mr DAVID HARRIS: At page 172 of the report you conclude that the Parliamentary Precincts Act 1997 affects the approach to be taken to the execution of a search warrant on a parliamentary office but does not confer any general immunity from the execution of a warrant on such an office. What is the jurisdictional basis for the inclusion of such a pronouncement on the extent of the Parliament's immunities in your report?

Mr KELLY: That follows effectively from Mr Hughes's advice. I suppose a simplistic way of putting it is that the Parliamentary Precincts Act at the end of the day in a sense is

based in courtesy and procedure, whereas immunity is a more general proposition based on parliamentary privilege.

Mr DAVID HARRIS: I think you have just answered my question about the extent of parliamentary privilege being a matter for the Parliament's respective Houses.

Reverend the Hon. FRED NILE: In your investigation into the Breen case have you noted, and I assume you have, the tension that ICAC faces in that it has to ensure that the members' code is observed by members? The ICAC has been given that power, rightly or wrongly, by the Parliament. So that the ICAC, if it believes there has been an action by a member such as over-claiming allowances, has an obligation to investigate. Obviously it has to investigate the member's records, which are in the member's office. How do we resolve that tension, if the Parliament has given the authority to the ICAC to enforce the operation of the members' code of conduct?

Mr KELLY: Thank you, Reverend. I think, in effect, it is a procedural issue but behind the procedural point there is a very great principle. The principle is that at the end of the day the Parliament has a right through parliamentary privilege to assert its exclusive occupation of the building. It will not in fact do that if there is a very good reason not to do so, but it is Parliament's call. As you were asking your question—and I do not mean this to be in any way a facetious kind of answer—it reminded me of an experience that I had yesterday. I was at the opening ceremony of the Pacific School Games in Canberra. An elder of the Nggunawal tribe did a welcome to country ceremony. She did that by explaining its cultural background: that it should not be seen as exclusion—rather, in Aboriginal cultural terms, it should be seen as protection of the spirit of the person coming to the country.

In a sense that is what we are talking about here. The incursion that is necessarily involved in a search warrant must be carried out properly and with due regard to the rights of the Parliament. That was the problem in the Breen case because, as I said in the report, it was done with a rush of blood to the head without thinking about the significant competing interests, without thinking about whether there would be seriously privileged documents in Mr Breen's office, and without thinking about whether that would inhibit the capacity of a member of the Parliament to represent the people in the Parliament, or whatever. I think the real answer to your question is: It is a procedural issue, but it is a procedural issue that is intended and calculated to guard the important rights of the Parliament.

Reverend the Hon. FRED NILE: Behind that question was an implication about whether the ICAC should have the power to investigate members at all. Was that an error in the initial legislation and should there be some other procedure for investigating the actions of members, for example, a privileges and ethics committee? Do you have any comment on that?

Mr KELLY: I beg the indulgence of the Committee to answer, effectively, as a private citizen. I do not want this answer attached to the Office of the Inspector. I think it was a mistake. I think it is for the Parliament—and this is my constitutional point of view—to police the conduct of its own members. That is consistent with the responsibility that is placed on members of Parliament as representatives of the community. To put it bluntly, in trying to subcontract that out, it is avoiding its own responsibility. I think that was a mistake, but I emphasise that I answered that question from a personal perspective and I do not want that answer attributed to the Office of the Inspector.

Reverend the Hon. FRED NILE: Does the inspector have a view on that?

Mr KELLY: No.

Reverend the Hon. FRED NILE: I cannot extract a view from you?

Mr KELLY: I think you should ask the current Inspector if you want an answer from the Office of the Inspector. You have my clear answer as a citizen.

Mr RICHARD AMERY: How long were you an inspector with the ICAC?

Mr KELLY: Three years and three months.

Mr RICHARD AMERY: When did that end?

Mr KELLY: On 30 September.

Mr RICHARD AMERY: I was encouraged to hear you say that things depended on people. Operations at the ICAC have improved parallel to that. You said earlier that you believed there should be some sort of significant review of the ICAC legislation and the jurisdiction of the ICAC. Of course, that is an all-embracing statement. We have had the Breen case and I could refer to a number of cases over the years involving members of Parliament. How prescriptive do you think the legislation should be? For example, some actions have been criticised and the courts have overturned some cases.

How prescriptive do you think the legislation should be in defining the jurisdiction of the ICAC and in setting out what it cannot do? I pick up the point made earlier by Reverend the Hon. Fred Nile. In your view, what is the appropriate body to deal with members of Parliament? How prescriptive should the ICAC legislation be in solving these problems, or do these things depend on people?

Mr KELLY: In light of foreshadowed general questions I prepared some dot points, or an aide memoire. Your question takes me to an issue that arose as a result of that. My problem with defining the jurisdiction of the ICAC is that the budget commits about \$16 million to the ICAC. Over the past few years it can only be concluded that the ICAC has done a wonderful job in exposing major areas of corruption, and it has done that fearlessly and thoroughly. If there were a difficulty at that level it would be that prosecutions had not followed.

I have previously expressed views about how I think that difficulty should be solved. At the other end of the spectrum the ICAC gets over 2000 complaints a year and, overwhelmingly, most of them are not worth investigating. As you know, that is what generates the majority of the Inspector's work. That strikes me as a diversion of resources that could be better employed at the higher and more important end of the spectrum. With all this experience—20 years with the ICAC and three years of the inspectorate—I think it is time to sit back and to ask, "How can we deal with that?" It strikes me that there are three levels. First, there should be a very narrow gateway through which complaints off the street have to pass, and that should be quite a stringent test.

While I was the Inspector many of the complaints were based on suspicion and supposition and they had no real evidentiary foundation. Those complaints are very hard to deal with satisfactorily, in particular, by the ICAC, and they take up a lot of the time of its assessments division. I have no way of quantifying how many resources are devoted to that, but I am sure that if those resources were devoted to the more important things you would find that the ICAC produced even more important results about important corruption. The second category relates to issues referred to the commission by what I will call a public official, but I will include in that in particular a Minister.

We should be able to rely on public officials referring only important things to the ICAC. I realise that in the hurly-burly of party political controversies, party political consideration effectively would have to be given to those things that should go to the ICAC. That is a whole different debate, but we live with that and we get on with it. If an issue is important enough for a public official, including a Minister or the parliamentary Committee, to refer a matter to the ICAC, prima facie the ICAC should have a decent look at it. I again add the footnote that it should not be based merely on supposition or suspicion—it should have some factual basis.

Then the third category is where ICAC of its own initiative can take up issues. I would give ICAC very broad discretion to do that because I think you will find that ICAC will have even more of a salutary effect on public sector administration if it can of its own initiative review an agency—a bit like the Auditor-General. I remember in the old days, of course, when the auditor turned up in town to audit a bank branch everyone was absolutely paranoid. That is what we need to encourage.

Mr RICHARD AMERY: Going back to that first point about the large number of complaints that are lodged based on suspicion, not evidence, et cetera, and the resources that ICAC is required to divert to that sort of process of sorting out what complaints do not require investigation, are you suggesting that some other agency or some panel that is probably not directly involved with the ICAC or funded by the ICAC should vet these sorts of operations and forward them on? What was in your mind when you made that comment?

Mr KELLY: Some of the complaints should go to the Ombudsman; they are generally complaints about administration or they are complaints from people who, frankly, think the world is against them, but they are not appropriate to take up the time of the corruption commission; they are not really founded in corruption—not as ordinary people know that in ordinary parlance. That does lead me on to the point that I think I alluded to earlier, but I have certainly alluded to in the past, and that is that I think the concept of corrupt conduct that extends to a mere disciplinary offence should be removed. It is a disciplinary matter, it is a good administration matter; it is not a corruption matter in the ordinary parlance, and if you took that out then you would give the commission an immediate reason to say this is not an allegation of corrupt conduct because it does not involve an allegation that there was a breach of the basic laws relating to corruption, bribery, et cetera.

Mr GREG SMITH: You said during your evidence that you had some veiled threats of litigation against you. Who were they from?

Mr KELLY: I am not prepared to say that in open session.

Mr GREG SMITH: I wonder if we can go into a closed session to ask that question?

CHAIR: Maybe at the end.

Mr GREG SMITH: Perhaps I will come back to it. In view of the alternatives that ICAC have for search warrants, either the commissioner can issue one or a justice such as a clerk of a local court, and that is what happened here, I gather, and in view of this case, do you think it would be more appropriate if applications for search warrants involving certain classes of persons should be made to a Supreme Court judge?

Mr KELLY: To be frank, I had not thought of that before. At the risk of saying something off the top of my head that turns out to be wrong, I think probably yes.

Mr GREG SMITH: Because to get a listening device warrant you have to go to a Supreme Court judge. To get a telephone intercept warrant you have to go to a Federal Court judge, or perhaps a Supreme Court judge—I am not quite sure of where you go these days. I was a counsel assisting at ICAC some years ago so I have been there. It has probably changed quite a bit since then, but we got those sorts of warrants in my day and there was a practice then that the commissioner did not issue search warrants. Is that your understanding of the current practice?

Mr KELLY: Yes.

Mr GREG SMITH: Despite the fact he or she has the power to do it?

Mr KELLY: I am not aware of the commissioner issuing any search warrants.

Mr GREG SMITH: Do you think that that is a wise policy in view of the fact that they are an investigating agency themselves and that it might be said that they may not bring a completely objective mind to those decisions?

Mr KELLY: I do not want my answer to seem to be critical of the magistrates or the officers in this case. Had I thought that criticism was appropriate of them I would have made it even though they were probably technically outside my jurisdiction, but I can see the merit in what you are suggesting. Whether that should be the case generally is perhaps an open question, and I certainly feel significantly guided by the commission's view on that, but I can certainly see that in a specified range of cases there would be a very, very good case to be made for requiring the warrant to be issued by a judge having the status of a Supreme Court judge.

Mr GREG SMITH: You said something about whilst the ICAC has had a good success rate in exposing corruption, prosecutions have not followed and you have previously expressed views on that. What were your views on the prosecution aspect?

Mr KELLY: I think it was that on the last occasion, or at least the penultimate occasion, I appeared before the Committee and I said that I thought that there was a case for ICAC to have its own prosecution right. At the moment the Act circumscribes it so that it can only recommend that consideration be given to prosecution and the Office of the Director of Public Prosecutions of course is faced with its own menu of cases to digest with its own priorities, and in the range of things history has shown that there is often very substantial time lags and I think, in fairness to the Office of the Director of Public Prosecutions, the way in which the evidence is prepared has often been in a very different

way than the Director of Public Prosecutions would ordinarily require it. So I think there is merit in considering whether this should be broken by conferring on ICAC its own power to prosecute.

Mr GREG SMITH: Do you mean that they would actually conduct the prosecutions or just charge the people that they thought should be charged?

Mr KELLY: I think there is a case for them conducting the prosecution. I should say that I do not mean that they should assemble a group of in-house counsel; I think you can do it on a briefing-out basis.

Mr GREG SMITH: Have you examined the resources that the ICAC put into preparing prosecution briefs and the timeliness of those preparations?

Mr KELLY: Not directly, but I had had various discussions particularly with the commissioner and there is no question that there have been difficulties in the past. A couple of years ago I met with the director as well and he of course elaborated some of the difficulties. I think, under the new memorandum of understanding, or whatever it is called, there has been significant progress. But, sitting back and looking at it, there is perhaps a lack of timeliness, in a sense, between the finding of corrupt conduct and the implementation of the prosecution.

Mr GREG SMITH: The vast number of prosecutions are for false swearing, are they not, or other offences under the ICAC Act that are, for example, not complying with a notice or matters of that sort?

Mr KELLY: I do not have those figures with me, but I do say that when there is a finding of corrupt conduct that is usually a relatively clear issue. There are other cases where, for example, people have indicated their willingness to plead guilty, particularly where the person concerned may have given a privileged statement; in other words, following the procedure in the ICAC Act where you can effectively make a privileged statement and that cannot be used directly in evidence against you. Then, as I understand it, they have indicated their preparedness to plead guilty and still have not been prosecuted. That seems to me to be at least an unfortunate result.

CHAIR: Mr Smith—

Mr GREG SMITH: That is all I want to ask in open session.

CHAIR: —Mr O'Dea wants to ask a question before he leaves, and then you may continue, if that is all right.

Mr GREG SMITH: Yes.

Mr JONATHAN O'DEA: I apologise, Mr Kelly, but I do have to leave as I have a pressing appointment at 3.30 p.m. In previous evidence to the Committee you indicated that you would look for the office to undertake more audit work in relation to ICAC's use of its powers and some other areas if the funds were available to facilitate more audit programs. I am sure the new inspector will pick up a couple of suggested areas as per the transcript. Did you have an opportunity to formulate an enhanced audit program and seek any extra funds

prior to the end of your term? If so, are you aware whether the Government responded to that?

Mr KELLY: No, I did not have an opportunity, but it struck me that I should not circumscribe the new inspector. I should say, one of the reasons, apart from some personal reasons, that I did not want another term is that I thought it was time for a new person to look at a new way of going about it. It is just a good thing in an organisation if it suits. So, I did not want to circumscribe the new inspector in that way. Off the top of my head, I could think of four or five areas that would be appropriate, but it is a question of the resources. I should say that the Department of Premier and Cabinet has not been parsimonious with funding the office. The funding of the office is not I think technically on the most sound footing, but we have not ever been really prevented from doing something by funding.

Mr JONATHAN O'DEA: I might point out for the benefit of your former colleague at least and perhaps the new inspector that when your report was tabled in Parliament I raised the issue of additional funding. It would be opportune perhaps, if it has not been made, for such a request to be made forthwith.

CHAIR: We will now move to an in-camera session. Mr Smith has one or two questions for you.

Mr KELLY: Mr Chairman, I am not sure about the Committee, but I am perfectly happy for the current occupant of the role of inspector to remain.

CHAIR: I have no difficulty with that. As the Committee has no objection, under the rules that is permissible.

(Evidence continued in camera)

(Public hearing resumed)

CHAIR: Mr Kelly, I know we are pressed for time. I refer to the annual report. Are you prepared to provide the Committee with a copy of the new ICAC procedures? Can we deal with that very quickly?

Mr KELLY: Mr Chairman, we would have no difficulty, but I think the protocol would be that you ask ICAC.

CHAIR: I anticipated you would say that.

Mr KELLY: But if you cannot get it—

CHAIR: Mr Kelly, one issue that will come up as the Committee conducts its 20-year review in 2009 is the definition of corrupt conduct. You refer to a gateway and you are referring to more serious matters. Are you able to tell us how you would draft a definition? Would you like to make a contribution about how you would draft that definition? There has been plenty of discussion about it. What changes would you make?

Mr KELLY: Can I put before you an anecdotal response before I decline? Over many years of drafting many things, including three of the only amendments that have ever been

made to the Constitution, I learnt a long while ago that you do not make drafting changes off the top of your head. I think it could be quite a technical exercise. Given some concepts, one is that I think the concept of extending corrupt conduct to disciplinary offences should be removed; in other words, that should be taken out, and I think that is relatively easy. That is a question of taking some things out.

Then, rather than change the definition of corrupt conduct too much, it is a question of erecting a different structure around the way in which the jurisdiction is activated, if I may speak relatively technically. I do not have a particular set of words that I can suggest to the Committee. I would be very reluctant to do so without a lot of work with an expert.

CHAIR: All right. They are all the questions I have, Mr Kelly.

Mr KELLY: I should say, Chairman, that in the indicative questions there was a number of other quite precise questions on both the annual report and the Listening Devices Act. I have spoken with my successor. The office would be happy to provide some of those answers in writing.

CHAIR: Good, Mr Kelly. That would be very helpful, thank you, for both that and the Listening Devices Act. That would be of great assistance.

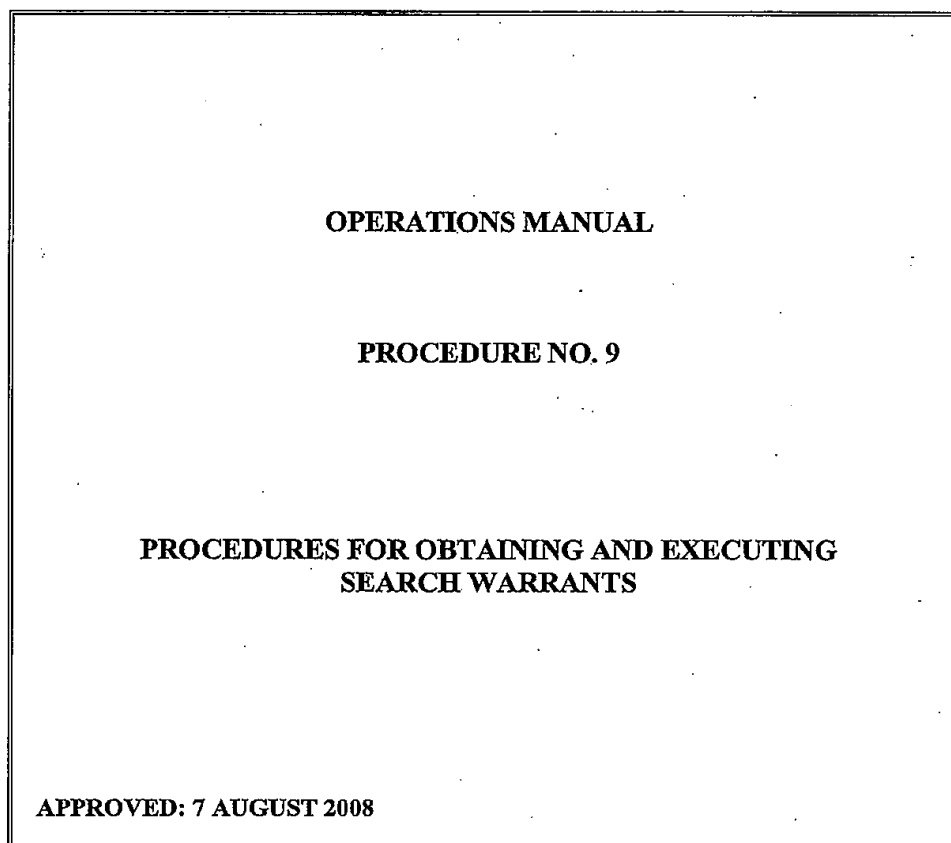
Mr KELLY: Yes.

CHAIR: There being no further questions in relation to the annual report or the listening devices report, I thank very much Mr Kelly and Ms Srivastava for their attendance.

(The witnesses withdrew)

Committee adjourned at 3.25 p.m.

Appendix Three – ICAC procedures for obtaining and executing search warrants



D10136372

10 EXECUTION ON PARLIAMENTARY OFFICE

In executing a warrant on the office of a Member of Parliament, care must be taken regarding any claim of parliamentary privilege. Parliamentary privilege attaches to any document which falls within the scope of proceedings in Parliament. Proceedings in Parliament includes all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or committee.

Parliamentary privilege belongs to the Parliament as a whole, not individual members.

D10136372

This procedure is based on the protocol recommended by the Legislative Council Privileges Committee in February 2006 (Report 33).

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.
2. If the premises to be searched are in Parliament House the Executive Director, Legal will contact the relevant Presiding Officer prior to execution and notify that officer of the proposed search. If the Presiding Officer is not available the Executive Director, Legal will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.
3. To minimise the potential interference with the performance of the Member's duties the Executive Director, Legal should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the Member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.
4. The Commission will allow the Member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the Member to arrange for a legal adviser to be present during the execution of the warrant.
5. The Executive Director, Legal will assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.
6. On arrival at Parliament House the Search Team Leader and assigned lawyer should meet with the Clerk of the House and Member or the Member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the Member's office and the relevance of that material to the investigation.
7. The Search Team Leader is to allow the Member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.
8. The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.
9. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the executing officer with assistance

from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.

10. The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.
11. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the Member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.
12. The Search Team Leader should inform the Member that the Commission will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the Member's duties.
13. Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Executive Director, ID, the Deputy Commissioner and the Commissioner for the purpose of determining whether the Commission will object to such a claim.
14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the Member, the Clerk and a representative of the Commission will jointly be present at the examination of the material. The Member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.
15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the Member and the Commission's representative.
16. Any material not listed as falling within the cope of proceedings in Parliament will immediately be made available to the Commission.
17. In the event the Commission disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

Appendix Four – Minutes

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 19)

Thursday, 13 November 2008 at 9.30 am
Room 814-5, Parliament House

1. Attendance:

Members present

Mr Terenzini (Chair), Mr Amery, Mr Donnelly, Mr Harris, Mr Khan, Mr Khoshaba, Ms Beamer, Revd Nile, Mr O'Dea (from 10.55am), Mr Smith, Mr Stokes.

In attendance Helen Minnican, Jasen Burgess, Dora Oravecz, Emma Wood and Jacqueline Isles.

2. ***

3. ***

4. ***

5. ***

6. Examination of the former Inspector of the ICAC

The Committee discussed holding a hearing with the former Inspector of the ICAC, Mr Graham Kelly, regarding his report on the Breen matter, Annual Report for 2007-08 and the listening devices audit report.

Resolved on the motion of Revd Nile, seconded Ms Beamer, that:

- a. the Committee hold a public hearing on 1 December 2008 with the former Inspector of the ICAC, Mr Graham Kelly, to examine him on the Breen report (tabled in the House on 23 September 2008), Annual Report for 2007-08 and the listening devices audit report.
- b. this hearing and any indicative questions sent to Mr Kelly prior to the hearing, focus on, but not be restricted to, the following issues:

The Breen report

- parliamentary privilege - ICAC procedures for assessing claims, breaches during the execution of the warrant, and the report's discussion of the issue;
- the definition of maladministration at 57B(1)(c) of the ICAC Act;
- the search warrant – adequacy of ICAC procedures, errors/defects in the application for/execution of the Breen search warrant, and the status of the ICAC search warrant checklist;
- policy or procedural implications of the Inspector's findings and recommendations for ICAC operational systems, including for its matrix management structure.

Listening Devices audit report

Annual Report for 2007-08

- c. indicative questions on the aforementioned three reports be sent to Mr Kelly (questions to be circulated in advance of the deliberative meeting).

7. ***

There being no further General Business, deliberations concluded and the meeting adjourned at 10.58am until Monday 24 November 2008 at 10.00am.

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 21)

Monday, 1 December 2008 at 10.00 am
Jubilee Room, Parliament House

1. Attendance:

Members present

Mr Terenzini (Chair), Mr Amery, Mr Harris, Mr Khan, Mr Khoshaba, Revd Nile, Mr O’Dea, Mr Smith, Mr Stokes.

Apologies

Ms Beamer, Mr Donnelly

In attendance Helen Minnican, Jasen Burgess, Dora Oravec, Emma Wood and Jacqueline Isles.

PUBLIC HEARING - Examination of Inspector of the ICAC on the following reports:

- **Review of the 2007-2008 Annual Report of the Inspector of the Independent Commission Against Corruption**
- **Review of the Inspector of the ICAC’s audit report of the ICAC’s compliance with the Listening Devices Act 1984**
- **Review of the Inspector of the ICAC’s special report on issues relating to the investigation by the ICAC of certain allegations against the Hon Peter Breen MLC**

Mr Graham Kelly, former Inspector of the Independent Commission Against Corruption, and Ms Seema Srivastava, Executive Officer, Office of the Inspector of the Independent Commission Against Corruption, affirmed and examined.

Mr Harvey Cooper AM, Inspector of the ICAC, present to observe proceedings.

The Chair commenced questioning of the witnesses followed by other members of the Committee.

Appendix Four – Minutes

The Committee went in camera at 3.05pm (Mr O’Dea left the meeting). The Committee continued to question the witnesses. The Committee agreed that Mr Cooper be permitted to stay as an observer during the in camera proceedings.

Questioning concluded, the Chair thanked the witnesses and the witnesses withdrew.

In camera evidence concluded at 3.23pm and the public hearing resumed.

DELIBERATIVE MEETING

- i. **Publication of transcripts of evidence** – Resolved on the motion of Revd. Nile, seconded Mr Khan, that the corrected transcripts of evidence for the public hearings held on 24 November and 1 December 2008 be authorised for publication.
- ii. ***
- iii. ***
- iv. ***
- v. ***
- vi. ***

Deliberations concluded, the Committee adjourned at 5.00pm sine die.

Draft Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 23)

Thursday, 12 March 2008 at 9.37 am
Room 814/815, Parliament House

1. Attendance:

Members present

Mr Terenzini (Chair), Mr Harris, Mr Khoshaba, Mr Amery, Mr Khan, Mr O’Dea, Mr Donnelly, Mr Smith, and Mr Stokes.

Apologies

Revd Nile
Ms Beamer

In attendance Jasen Burgess, Les Gonye, Dora Oravec, Amy Bauder, and Emma Wood.

2. Minutes

Resolved, on the motion of Mr Donnelly, seconded Mr Harris, that the minutes of the meeting of 5 March 2009 be confirmed.

3. ***

4. ***

5. Statutory review of the 2007-2008 annual and special reports of the Inspector of the ICAC

i. Publication of documents

Resolved, on the motion of Mr Khoshaba, seconded Mr Amery, that the following correspondence be published:

- answers to indicative questions taken on notice from the Office of the Inspector of the ICAC, received 17 December 2008;
- section 10 of the ICAC warrant procedures dealing with the execution of search warrants on parliamentary premises.

ii. Consideration of the Chair's draft reports

The Chair spoke to the proposed schedule of amendments to the two draft reports being considered and to a summary of the legal advice received by the Clerk of the Legislative Assembly from the Crown Solicitor in relation to the Police Integrity Commissioner's reporting provisions in the PIC Act, which mirror the reporting provisions of the ICAC Inspector in the ICAC Act. The Chair noted that this issue has been the subject of previous reports and recommendations by the Committee on the Ombudsman and Police Integrity Commission and remains an issue for this Committee.

The Chair indicated that, as amended, the draft reports state that the Committee will question the Commissioner and the ICAC Inspector on the issue of the reporting provisions contained in the ICAC Act when they are next examined on their respective annual reports.

Discussion ensued.

Resolved, on the motion of Mr Donnelly, seconded Mr Amery, that:

- The draft report *Review of the 2007 – 2008 Annual Report of the Inspector of the Independent Commission Against Corruption*, as amended, be the report of the Committee and that it be signed by the Chair and presented to the House.
- The draft report *Review of the special reports tabled in 2008 by the Inspector of the Independent Commission Against Corruption*, as amended, be the report of the Committee and that it be signed by the Chair and presented to the House.

Resolved, on the motion of Mr Donnelly, seconded Mr Stokes that the Chair, the Committee Manager and the Senior Committee Officer be permitted to correct stylistic, typographical and grammatical errors.

6. ***

Deliberations concluded, the meeting adjourned at 10.09 am.