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Committee on the Independent Commission Against Corruption

Review of the 2007-2008 Annual Report of the Inspector of
the Independent Commission Against Corruption

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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

The current review is the final Annual Report review conducted by the Committee during the term of the first Inspector of the Independent Commission Against Corruption, Mr Graham Kelly, whose term expired on 30 September 2008. During the final months of his term, Mr Kelly tabled two special reports in addition to his 2007-2008 Annual Report. The Committee has examined the Inspector's special reports in a separate report.

As part of the Annual Report review, the Committee has examined several issues raised by Mr Kelly, including the Inspectorate's role and functions, the definition of corrupt conduct, and the reporting provisions in the *Independent Commission Against Corruption Act 1988* (ICAC Act).

During the review, Mr Kelly expressed the view that, in addition to the Office's audit and complaints role, the Inspectorate's performance assessment function would be enhanced if the Inspector were to be empowered to carry out performance reviews of the Commission. The Committee's view is that broadening the Inspector's functions in this way may have the effect of creating an overlap with aspects of the Committee's role of monitoring and reviewing the exercise of the Commission's functions. The Committee has concluded that the current accountability regime for monitoring the ICAC's performance is adequate. The Committee has also expressed the view that the Inspector's audit program plays a significant role in terms of overseeing the ICAC's compliance with the ICAC Act, and that the Inspector should place a greater emphasis on this aspect of his role. The Committee will discuss the Inspectorate's audit program with the current Inspector, the Honourable Harvey Cooper AM.

Mr Kelly raised the issue of the definition of corrupt conduct, as provided for in ss 8 and 9 of the ICAC Act. The former Inspector argued that, if the definition were to be amended, the Commission's resources could be better directed to enable it to focus on serious and systemic corruption. Mr Kelly proposed a more stringent initial test for complaints so as to minimise the number of trivial and unsubstantiated complaints that the Commission receives and assesses. Mr Kelly also suggested that the definition of corrupt conduct be narrowed to exclude matters that would more appropriately be dealt with by the NSW Ombudsman. The Committee has noted its concern in relation to any amendment to the definition of corrupt conduct that may limit the investigative jurisdiction of the Commission. However, the Committee can see that there may be some merit in simplifying or narrowing the definition, if it were to assist the Commission in fulfilling its functions more effectively. The Committee is intending to conduct a review of the ICAC and the ICAC Act in 2009. The review will provide the Committee with an opportunity to examine some of these issues in greater detail.

The issue of the reporting provisions in the ICAC Act was raised by Mr Kelly during the Committee's review. The Committee notes that this matter, which has also been raised by the Inspector of the Police Integrity Commission in relation to the mirror reporting provisions in the *Police Integrity Commission Act 1996*, was the subject of a recommendation in a report of the previous Committee on the Office of the Ombudsman and PIC.¹ The Committee will seek the views of the current ICAC Inspector and the Commissioner on

¹ See 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, Parliament of NSW, November 2006.

whether there is a need for an amendment to the reporting provisions in the ICAC Act to clarify that the Inspector and the Commission can report to Parliament on any appropriate matter.

I wish to express the Committee's appreciation to Mr Kelly and his staff for their co-operation throughout the Committee's review, and during his term as the Inspector of the ICAC. I also wish to thank my fellow Committee members for their contribution to the review, and for their commitment and bipartisanship. Finally, I want to thank the staff of the Secretariat for their support and assistance during the review.

Frank Terenzini MP
Chair

Commentary

Introduction

- 1.1 One of the functions of the Committee on the Independent Commission Against Corruption (the Committee) is to examine each annual report and other report of the Inspector of the ICAC and report to both Houses of Parliament on any matter appearing in, or arising out of, such reports.
- 1.2 The *Annual Report 2007-2008* is the third Annual Report on the operations of the Inspectorate. It is also the final Annual Report tabled by Mr Graham Kelly prior to the end of his term as Inspector, on 30 September 2008. The Committee held a public hearing on 1 December 2008 at which Mr Kelly gave evidence as the former Inspector. The current Inspector, Mr Harvey Cooper AM, was present at the hearing, in addition to the Inspectorate's executive officer, Ms Seema Srivastava. During the hearing the Committee examined the Inspector's *Annual Report 2007-2008*.² The Committee also examined the Inspector's special reports on issues relating to the investigation by the Independent Commission Against Corruption of certain allegations against the Hon Peter Breen MLC, and the ICAC's compliance with the *Listening Devices Act 1984*. The Committee's comments on the Breen and Listening Devices special reports are contained in a separate report.
- 1.3 Following the hearing, the Inspectorate provided answers to indicative questions that had been provided to the office before the hearing. The former Inspector's answers and the transcript of proceedings from the public hearing are reproduced at Appendices 1 and 2 of this report.
- 1.4 Many of the issues outlined in this report relate directly to significant issues that the Committee intends to examine in greater detail during an upcoming, broad ranging review of the ICAC and the ICAC Act, following 20 years of its operation. As part of the review, the Committee will undertake consultation with relevant stakeholders to aid its consideration of issues including the definition of corrupt conduct, the current accountability framework and proposals to amend the ICAC Act. The Committee will commence the review during 2009.

i. Accountability mechanisms

The Inspector's role and functions

- 1.5 The Office of the ICAC Inspector was established, on the recommendation of the previous Committee and Bruce McClintock SC, to fill a perceived gap in the accountability of the ICAC. In his second reading speech on the Independent Commission Against Corruption Amendment Bill, the Hon Frank Sartor MP outlined the complaints handling and audit role that the Inspector would have, and its place in the broader accountability structure provided for in the ICAC Act:

The reforms will improve the operation and accountability of the Independent Commission Against Corruption [the ICAC], without detracting from its independence. ... One of the key changes proposed by the bill is to strengthen the accountability of the ICAC by establishing an independent Inspector of the ICAC, modelled on the Inspector of the Police Integrity Commission. The Inspector is needed to address a gap in the accountability of the ICAC. While the parliamentary joint committee on the ICAC is

² The Annual Report was tabled in Parliament on 23 September 2008, see Votes and Proceedings No 83, 23 September 2008, p. 897, item 36.

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responsible for monitoring and reviewing the exercise of the ICAC's functions, it is prohibited from examining particular decisions made by the ICAC.

The limited scope of the parliamentary committee's jurisdiction is appropriate, given that committee members fall within the investigative jurisdiction of the ICAC. The result, however, is that there is no person or body with responsibility for investigating complaints that the ICAC or its officers have misused powers. ... The proposed inspector will address this gap.

...

The Inspector will audit the operations of the ICAC, deal with complaints of abuse of power and other forms of misconduct or maladministration on the part of its employees, and report on matters affecting the ICAC, including its operational effectiveness. ...³

The former Inspector's view

- 1.6 In the final annual report of his term, the former Inspector, Mr Graham Kelly, expressed the view that the current accountability regime would be enhanced by the Inspector taking a greater role in performance reviews of the Commission. Mr Kelly indicated that while complaints handling is an important aspect of the accountability structure, 'the real long-term value of an Inspectorate is, I believe, likely to be found in its performance-monitoring role'.⁴ While the former Inspector acknowledged that the Committee reviews the performance of the Commission as part of its functions, he noted that the Committee is not able to examine individual cases, and expressed the view that the Inspector should be empowered to carry out regular performance reviews of the Commission:

Nevertheless, the performance-assessment function would, I believe, be enhanced from an accountability perspective if there were a legislative basis for the Inspector to carry out organisational reviews of the ICAC's performance against agreed performance benchmarks. Some might argue that this role is, first, a matter for the Commission's management and, second, in any event, better suited to an external management consultancy type body or the Parliamentary Joint Committee. My responses to this are that, first, effective externally based accountability should not be just about ensuring a narrow focus on compliance with the law and, second, that the complaint and audit functions of the Inspector place the Inspectorate in a unique position to understand what issues affect the Commission's performance (including having regard to experience in individual cases).

What this would mean is that there would be a real emphasis in ensuring, as part of the overall accountability regime, an alignment of resources, structure and competencies with the statutory objectives of the Commission.⁵

- 1.7 In answers to indicative questions taken on notice, Mr Kelly further commented that, although the Office of the Inspector currently does not have the expertise to carry out a performance review function, it is 'the appropriate vehicle to supervise any such review as the Office is the only body with experience in reviewing the operations of the ICAC and has developed a body of knowledge about the ICAC'.⁶ Mr Kelly stated that, in order to conduct such a review, the Office could employ staff with relevant qualifications to assist the Inspector. In response to the Committee's question on whether this proposed performance review function would create an overlap with the

³ The Hon Frank Sartor MP, Second reading speech, Legislative Assembly, Hansard, 23 February 2005, p. 14134.

⁴ Office of the Inspector of the ICAC, *Annual Report 2007-2008*, p. 2.

⁵ *Ibid*, p. 2.

⁶ Mr Graham Kelly, Answers to indicative questions taken on notice, question 2b, p. 2 (see Appendix 1).

Committee's jurisdiction, the former Inspector commented that the Committee does not have the capacity to undertake specific performance reviews of the Commission.⁷

Committee comment

- 1.8 In the Committee's view, the Inspector's role is a vital part of the accountability structure established under the Act. While the Committee's jurisdiction is to monitor and review the exercise of the ICAC's functions, it is not empowered to examine individual cases or to audit the Commission's compliance with the provisions of the Act. The Inspector's jurisdiction is necessarily separate to that of the Committee, and, in the Committee's view, it is not unduly narrow. Broadening the Inspector's role to include performance reviews of the Commission would create an overlap with aspects of the Committee's role, which may result in a lack of clarity in terms of the respective roles of the Committee and the Inspector.
- 1.9 The Committee is also mindful of the importance of maintaining the Commission's independence to set management and performance targets.⁸ The ICAC reports on the performance of its Divisions against set performance targets in its annual reports. The Committee currently reviews the Commission's performance through regular meetings and public hearings, at which the Committee examines the ICAC senior executive on matters arising out of its annual reports and other reports. The Committee is satisfied that its oversight of the Commission's performance, combined with the Inspector's audit and complaints role, provides an accountability regime with clearly delineated and appropriate jurisdictions.
- 1.10 The Committee also notes that, in addition to its regular reviews of the Commission's performance, it would be possible to commission an independent management review of the Commission, should the Committee deem it to be necessary. As part of a three stage review of the Commission, a previous ICAC Committee recommended that the Audit Office conduct a performance audit of the ICAC. The previous Committee noted that precedents existed for it to arrange an independent review of the Commission's performance:
- As the ICAC is an independent statutory body, accountable to Parliament, it would be most appropriate for the Committee to play a key role in validating the Commission's performance reporting. The Committee could engage expert assistance for this purpose and a number of precedents exist for such an arrangement. For example, the Committee on the Office of the Ombudsman included a review of the performance measures used by the NSW Ombudsman's Office during the management review of the Office in 1992. The assessment of performance measures was conducted by KPMG Peat Marwick who were the consultants engaged by the Committee to undertake the management review.⁹
- 1.11 The Committee therefore considers that the current regime for the monitoring of the ICAC's performance is adequate. In the Committee's view, the Inspectorate should instead place a greater emphasis on its audit role. The former Inspector noted that he had received few complaints alleging abuse of coercive powers by the Commission.¹⁰ This places even greater importance on the role of audits in

⁷ Ibid, question 3b, p. 3.

⁸ In 2007-2008, the Commission's five divisions developed individual operational plans against which they reported to the Executive Management Group, which consists of the Commissioner, Deputy Commissioner and Executive Directors. The Annual Report details results for each division's performance against set targets, see ICAC, *Annual Report 2007-2008*, p. 3.

⁹ Committee on the ICAC, *The ICAC - Accounting for Extraordinary Powers*, May 2000, p. 82.

¹⁰ Office of the Inspector of the ICAC, *Annual Report 2007-2008*, p. 1.

monitoring the ICAC's compliance with the Act. Members of the public are unlikely to be aware of the statutory requirements relating to the ICAC's use of its powers, and would therefore be unlikely to complain of a lack of compliance with the relevant statutory provisions. The Inspector's audit program therefore has a significant role in terms of oversight of the Commission's compliance with the Act. The Committee will raise the Inspectorate's audit program with the current Inspector, Mr Harvey Cooper AM. The Committee discusses its previous recommendation that the Inspectorate seek supplementation for its audit program at paragraph 1.44.

The need for an Inspector

The former Inspector's view

1.12 In the final annual report of his term, Mr Kelly expressed the view that, given the nature of complaints received by his office, a 'sunset clause' review of the Office should be held following the end of the current Inspector's term:

Secondly, what has stood out is that the vast majority of complaints I have received:

- (a) relate to decisions by the Commission not to pursue complaints made to it for one reason or another; and
- (b) do not involve any measure of maladministration, unreasonableness or unlawfulness on the part of the Commission.¹¹

In view of the disjunction between the expectations that existed when the Inspector's role was created and what has turned out to be the actual experience, it is my recommendation that, towards the end of the term of the next Inspector, a 'sunset clause' review of the Inspector's function should be carried out.¹²

1.13 The Committee asked the former Inspector what factors, in his view, should be considered in assessing the ongoing need for, and value of, the Inspectorate. Mr Kelly identified the following factors for consideration, noting that it was not an exhaustive list:

- Improved accountability, including improved understanding of the criteria the Commission uses in fulfilling its statutory objectives;
- The impact on the ICAC in terms of how much care is taken in its use of its wide powers; and
- The value for money that is seen to be provided by the Inspectorate.¹³

1.14 In terms of measuring the value of the Inspectorate, Mr Kelly told the Committee that it 'should be measured both in qualitative and quantitative terms as appropriate to different factors being weighed up.'¹⁴

Committee comment

1.15 In its review of the Inspector of the ICAC's 2006-2007 Annual Report, the Committee concluded that the reasons for the creation of the Office of the Inspector remain valid.¹⁵ In the Committee's view, the Office of the Inspector fulfils an important role in terms of the accountability of the ICAC, given the Commission's broad coercive powers.

¹¹ Ibid, p. 1.

¹² Ibid, p. 3.

¹³ Mr Kelly, Answers to indicative questions taken on notice, question 5a, p. 3.

¹⁴ Ibid, question 5b, p. 3

¹⁵ See ICAC Committee, *Review of the 2006-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption*, Report 4/54, October 2008, p. 10.

- 1.16 In recommending the establishment of the Inspectorate, Mr Bruce McClintock SC noted that scrutiny of the Commission 'enhances the public's confidence in ICAC and helps to ensure that ICAC is properly responsive to the public interest'.¹⁶ The Committee notes that the ICAC also supported the establishment of the Inspectorate, acknowledging that there was 'a serious gap in its accountability'.¹⁷ In the Committee's view, the nature of the complaints received by the Inspector does not affect or diminish the need for the Office. The necessity of providing an accountability body such as the Inspectorate is not negated by the type of complaints it receives.
- 1.17 The Committee concluded in its review of the Inspector's previous annual report that the Office should focus more proactively on its role of conducting audits to determine the ICAC's compliance with the law and the appropriateness of its procedures. In the Committee's view, a more targeted and specific program for conducting audits would enhance the effectiveness of the Inspector. The Committee notes that, in addition to assessing and investigating complaints, the new Inspector may focus on conducting more audits of the ICAC. As part of its review of the ICAC Inspector's next Annual Report, the Committee will seek the views of the current Inspector on his audit plans and any matters he intends to focus on in his term.

Implementation of the Inspector's recommendations to ICAC

- 1.18 In evidence to the Committee during a public hearing on 3 July 2008, the Inspector raised the issue of the Commission's implementation of his recommendations and the implications this has for the role of the Inspector:
- Mr KELLY:** ... Sooner or later I think there will be a crunch about the inspector's role because at the end of the day the only stick that the inspector has is a report to the Parliament. There is no capacity to require ICAC to do anything or to forbear from doing anything or any such thing as that. I have been fortunate in having a commissioner at ICAC who has always been prepared to take account of any recommendations that I have made, whether formally or simply in our monthly oral meetings. But in a different situation that could be quite different. So I think there really has to be some thought given to what the public wants out of this role.¹⁸
- 1.19 By way of illustration, the 2007-2008 Annual Report outlines a complaint received by the Inspector, which resulted in a recommendation being made to the Commission. The recommendation was considered by the Commissioner and he advised the Inspector that he would not be adopting it.
- In March 2008 the Inspector wrote to the ICAC and the named ICAC officer enclosing a draft report containing his investigation of and recommendations concerning the complaint. The ICAC and the named ICAC officer responded in April 2008. In summary, the ICAC and the named ICAC officer submitted that they did not agree with the Inspector's views as expressed in the draft report and contended that the email sent by the named officer had constituted an invitation at large to the complainant to respond to the issues raised. The ICAC advised that it would not be adopting the Inspector's recommendations, which were directed at firstly addressing the complainant's concerns about his reputation and secondly clarifying the application of s 111. The Commissioner advised he was of the view that current ICAC procedures for reminding ICAC officers of their obligations under s 111 were adequate.

¹⁶ B McClintock SC, *Independent review of the Independent Commission Against Corruption Act 1988*, Final report, January 2005, para 7.2.2, p. 115.

¹⁷ *Ibid*, para 7.1.3, p. 114.

¹⁸ Mr Kelly, *Transcript of evidence*, 3 July 2008, pp. 9-10: see ICAC Committee, Report 4/54, October 2008.

Commentary

In May 2008 the Inspector wrote to the complainant advising that he had not made a finding of maladministration against the named ICAC officer. However, the Inspector also indicated that his view was that it had been illadvised of the named ICAC officer to write to the complainant in the terms in which he had. The Inspector further advised the complainant that his recommendations to the ICAC had not been accepted and that as he did not have the power to enforce the recommendations he was not able to progress with the complaint any further.¹⁹

- 1.20 In answers to indicative questions taken on notice, Mr Kelly indicated that while he was not satisfied with the Commission's response to his recommendations in relation to this complaint, monitoring of the implementation of the Inspectorate's recommendations was not part of the Inspector's role or functions.²⁰

Committee comment

- 1.21 The ICAC Act provides that the Inspector's principal functions include dealing with complaints of abuse of power, impropriety or other misconduct by the Commission, and conduct amounting to maladministration by the Commission, by way of report or recommendation.²¹ While the Inspector has no power to enforce any recommendations resulting out of complaints, s 57C(g) of the Act provides that the Inspector may recommend disciplinary action or criminal prosecution against an officer of the Commission. Therefore, if the Inspector investigates a complaint alleging misconduct by a Commission officer and finds the complaint to be substantiated, he is able to recommend disciplinary action, or criminal prosecution under the Act.
- 1.22 If a situation were to arise where a complaint made to the Inspector revealed a systemic issue, for example in relation to Commission procedures, the Inspector could raise his concerns in relation to a recommendation that was not acted upon by the ICAC with the Committee. While the provisions of the Act prevent the Committee from investigating or reconsidering decisions in relation to particular investigations or complaints,²² as part of its monitoring role the Committee could seek an account in general terms from the Commission on its response to any systemic issues raised by the Inspector. The Inspector may also report on any such matters to Parliament, pursuant to s 57B(1)(b) and (c) and ss 77A and 77B.
- 1.23 The Committee notes that the Office of the Inspector was created with the intention of closing a perceived gap in the accountability regime provided for by the ICAC Act, 'without detracting from [the Commission's] independence'²³. The Committee is mindful that any move to make the Inspector's recommendations binding on the Commission may reduce its independence. During its forthcoming review of the Act, the Committee will consider ways of increasing transparency around the ICAC's responses to the Inspector's recommendations, without diminishing the Commission's independence. In considering this matter the Committee may, for example, seek stakeholder views on whether the Commission should be required to

¹⁹ The Inspector's recommendations to ICAC were that a written assurance to the complainant should be made in relation to relevant issues raised by them, and that the ICAC clarify, in the form of guidelines, the scope and application of s 111: see Office of the Inspector of the ICAC, *Annual Report 2007-2008*, pp. 14-15 and Answers to indicative questions taken on notice, question 8a, p. 6.

²⁰ Mr Kelly, Answers to indicative questions taken on notice, questions 8b and 9a, p. 6.

²¹ ICAC Act 1988, s 57B(1)(b) and (c).

²² ICAC Act 1988, s 64(2).

²³ The Hon Frank Sartor MP, Second reading speech, Legislative Assembly, Hansard, 23 February 2005, p. 14133.

advise the Committee of any recommendations made by the Inspector that it elects not to take up.

ii. ICAC's jurisdiction

Definition of corrupt conduct

1.24 Corrupt conduct under the ICAC Act is conduct that meets both the general definitions contained in s 8 and the limitations provided for in s 9. Section 8 defines the general nature of corrupt conduct and specifies particular offences that could constitute corrupt conduct, while s 9 provides that, in order to amount to corrupt conduct, the conduct in question must constitute or involve a criminal offence or; a disciplinary offence or; reasonable grounds for dismissing or terminating the services of a public official or; in the case of a Minister or member of Parliament, a substantial breach of an applicable code of conduct.

The former Inspector's view

1.25 The former Inspector expressed the view in his final annual report that consideration should be given to restricting the current definition of corrupt conduct to enable the Commission to use its resources more effectively. Mr Kelly argued that much of the Commission's resources are taken up with the assessment of complaints that do not warrant investigation, with around one-third of the 2,000 complaints received by the ICAC each year consisting of local government issues related to building approval decisions.²⁴ In the former Inspector's view, 'this level of complaint to the Commission about issues that do not justify any further investigation under the Commission's statutory charter results in a waste of time and resources.'²⁵

1.26 Mr Kelly raised the following points in relation to the definition of corrupt conduct:

- If more of its resources were freed up to concentrate on serious and systemic corruption, the Commission may be able to produce better results.
- There should be a more stringent initial test for complaints in order to reduce the volume of complaints the ICAC assesses.
- The definition of corrupt conduct should not apply to matters that would solely constitute a disciplinary offence.²⁶

1.27 Mr Kelly proposed that, in light of the number of trivial and unsubstantiated complaints received by the Commission, the definition of corrupt conduct should be reconsidered:

With regard to the more general issue of the number of complaints to the ICAC that are technically within its jurisdiction but are not worthy of pursuing either:

(a) through a lack of real evidence (as opposed to the supposition or conjecture that often underlies complaints, both to the ICAC and to the Inspector); or

(b) because they do not meet the criteria in s 12A requiring the Commission to concentrate on serious and systemic corruption,

I believe there is a case for re-visiting the definition of "corrupt conduct" in s 8 of the Act.

I appreciate that the McClintock Review looked at this issue and ultimately made no recommendation for change. Nevertheless, in my view, the facts speak for themselves:

²⁴ Office of the Inspector of the ICAC, *Annual Report 2007-2008*, p. 1.

²⁵ *Ibid*, p. 1.

²⁶ Mr Kelly, *Transcript of evidence*, 1 December 2008, pp. 5-6 (see Appendix 2).

the current definition generates far too many trivial complaints which exhaust resources that could be better employed in the pursuit of more serious issues.²⁷

- 1.28 In answers to indicative questions taken on notice, Mr Kelly elaborated on his comments in relation to limiting the amount of complaints the ICAC receives from the general public, which do not relate to serious or systemic corrupt conduct. Mr Kelly proposed that complaints made to the ICAC by the general public should have to pass a more stringent test than complaints received from public servants:

... that there should be a 'tiered system' applied in respect of complaints permitted to be made to the ICAC by various classes of potential complainants.

Under this tiered system members of the public would only be allowed to make complaints to the ICAC if such complaints satisfied fairly high threshold criteria for serious or systemic corrupt conduct.

Public officials or public agencies would be able to make complaints to the ICAC under a broader scope as they would be expected to be in a more informed position on appropriate matters to be reported to the ICAC.

... The effect of this tiered system would be to reduce the pressure placed on the ICAC by having to deal with trivial or irrelevant complaints from members of the public, which comprise a significant proportion of the large number of complaints it receives each year. This approach would enable the ICAC to devote greater resources to effectively targeting potentially serious and systemic corrupt conduct.²⁸

- 1.29 In evidence to the Committee, Mr Kelly suggested that some complaints received by the Commission relate to matters that should be directed to the NSW Ombudsman. The former Inspector also expressed the view that narrowing the current test to exclude disciplinary offences from conduct that could amount to corrupt conduct under s 9 of the Act would provide the Commission with grounds to reject complaints that do not meet the general community's perception of corruption.

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? ...

Mr KELLY: Some of the complaints should go to the Ombudsman; they are generally complaints about administration ... 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.²⁹

²⁷ Office of the Inspector of the ICAC, *Annual Report 2007-2008*, p. 2.

²⁸ Mr Kelly, Answers to indicative questions taken on notice, question 1, pp. 1-2.

²⁹ Mr Kelly, *Transcript of evidence*, 1 December 2008, pp. 5-6.

Previous reviews of the definition of corrupt conduct

- 1.30 The definition of corrupt conduct was reviewed by a previous Committee, as part of the three stage review of the ICAC it conducted between 2000-2002. During the previous Committee's review, the Law Society of NSW and the NSW Bar Association argued for a narrowing of the definition to include only conduct that may amount to a criminal offence. The ICAC, however, rejected this proposal, arguing that 'notions of corrupt conduct are wider than the commission of a crime ... there is other conduct which, although not necessarily amounting to criminal conduct, is nevertheless no less corrupt.'³⁰ The Commission argued that restricting the definition to criminal offences would omit serious misconduct that would generally be considered to amount to corruption.³¹ The Commission instead proposed that the definition be reformulated into a single section, in order to emphasise the importance of considering the seriousness of the conduct in question. The Committee supported ICAC's proposal and recommended that the Act be amended so that the two part definition contained in ss 8 and 9 be provided for in a single section, 'with the aim of emphasising the seriousness of the conduct involved as the key feature of the definition and both the first and primary test to be applied in determining the application of the definition.'³² The Committee further recommended that some of the specific types of conduct provided for in s 8(2) of the Act be deleted in order to streamline the list, having noted that some were serious criminal offences not connected to the exercise of public sector functions, which would in any case attract the attention of other law enforcement bodies.³³
- 1.31 As Mr Kelly noted, McClintock also considered the definition of corrupt conduct as part of his 2005 independent review of the ICAC Act. McClintock concluded that, although the definition was broad and complex, he did not support substantial changes that would narrow the definition and alter the Commission's investigatory jurisdiction. McClintock did not support the exclusion of disciplinary offences from the definition, as it would remove some conduct that would generally be considered as corrupt.³⁴

Committee comment

- 1.32 The definition of corrupt conduct determines the investigatory jurisdiction of the Commission. The Committee notes that, while the adequacy of the current definition has been raised with the Committee on several occasions by the former Inspector, the Commission has not sought any changes to the definition. In the Committee's view, any change to the definition that serves to limit the Commission's jurisdiction would be undesirable, as public confidence in the Commission's work may be undermined by a perception that its powers and jurisdiction are being weakened.

³⁰ Committee on the ICAC, *Review of the ICAC Stage II – Jurisdictional Issues*, November 2001, p. 16.

³¹ The Commission gave several examples of such conduct, for example, employing a family member or friend in a public sector position where merit selection has been corrupted, see *ibid*.

³² *Ibid*, pp. 64-65.

³³ Specifically, the following subsections: (o) currency violations; (p) illegal drug dealings; (q) illegal gambling; (r) obtaining financial benefit by vice engaged in by others; (s) bankruptcy and company violations; (t) harbouring criminals; (u) forgery; (v) treason or other offences against the Sovereign; (w) homicide or violence, see *ibid*.

³⁴ McClintock recommended that a clearer distinction be made between corruption by public officials and corruption that adversely affects public official functions but does not involve official misconduct: see B McClintock SC, *Independent review of the Independent Commission Against Corruption Act 1988*, Final report, January 2005, pp. 49-52.

Commentary

However, the Committee considers that there may be some merit in simplifying the definition, without restricting its scope.

- 1.33 The Committee will review the relevant provisions of the ICAC Act during its forthcoming review of the ICAC and the Act, to consider whether simplifying or narrowing the definition would assist the Commission in fulfilling its functions more effectively. The Committee will seek the Commission's comments on the resources it expends on assessing complaints that are not within its jurisdiction. In seeking the ICAC's view, the Committee will consider the importance of maintaining effective use of the Commission's resources without unnecessarily restricting its investigatory jurisdiction.
- 1.34 As part of its review, the Committee will also seek the views of stakeholders on the current definition of corrupt conduct, and whether any narrowing of the definition would enable the Commission to devote more resources to investigating serious and systemic corrupt conduct. The Committee will also consider whether the definition provided for under sections 8 and 9 should be simplified and combined into one section of the Act.

iii. Reporting provisions

The former Inspector's view

- 1.35 The former Inspector referred in his Annual Report to a perceived ambiguity in the Act regarding the publishing of reports concerning complaints. Mr Kelly noted that the Inspector of the Police Integrity Commission (PIC), Mr Peter Moss QC, raised some perceived problems with publishing complaint reports under the provisions of the *Police Integrity Commission Act* (PIC Act) in his Annual Report.³⁵

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.³⁶

- 1.36 The former Inspector expressed the view that clarification was required in terms of the provisions relating to the publishing of reports produced by the Inspectorate. Mr Kelly told the Committee that he doubted whether the Inspector has the power to make a report public if the Parliament is not in session:

³⁵ ... First, the persons to whom reports are to be published are not specified in any way. The Inspector is not provided expressly with any power to do otherwise than to deal with relevant complaints by way of reports and recommendations. I do not read Section 89 as necessarily implying that the Inspector has power to publish his reports as to complaints against the Commission to the general public. ... Nor do I think the provisions of Section 101 and 102 of the legislation, referred to above, could be construed as covering the Inspector's reports dealing with complaints concerning the Commission. ... Thus, it seems to me, the legislation gives no guidance, expressly, as to who should be seen as the recipients of such reports. Nor any guidance as to the status that should be accorded to such reports. As I have said, in my opinion it is not clear that the Inspector has any power to publish the reports so that they become public reports. Nor does there appear to be any power in the legislation authorising the Inspector to present such reports to Parliament'. See Inspector of the PIC, *Annual Report 2007-2008*, pp. 30-31, paras 90-92.

³⁶ Office of the Inspector of the ICAC, *Annual Report 2007-2008*, p. 3.

Mr KELLY: ... It also takes me to the question that has been raised, and rightly so, about to whom you report. ...

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.³⁷

- 1.37 In answers to indicative questions taken on notice, Mr Kelly expressed the view that the ICAC Act 'should be amended so that it contains a specific and clear reference enabling the Inspector to publish reports concerning complaints.'³⁸

Legislative provisions

- 1.38 Section 77A of the ICAC Act provides that the Inspector may, at any time, make a special report to the Presiding Officer of each House on: matters affecting the Commission; and, any administrative or general policy matter relating to the functions of the Inspector.
- 1.39 Section 78 of the ICAC Act provides that:
- (1) A copy of a report furnished to the Presiding Officer of a House of Parliament under this Part shall be laid before that House within 15 sitting days of that House after it is received by the Presiding Officer.
- (1A) The Inspector may include in a report a recommendation that the report be made public forthwith.
- 1.40 In terms of publishing a report that has been tabled with the Presiding Officers, if the Inspector recommends that a report be made public, the Act provides that the report may be made public by a Presiding Officer, whether or not the House is in session, and whether or not the report has been laid before the House.³⁹ The Inspector therefore does not have the power to publish a report, but may recommend that it be made public. A Presiding Officer may then authorise the report to be made public.
- 1.41 In cases where the office of the Speaker or President is vacant - for example, during a Parliamentary recess when the Parliament has prorogued prior to an election - the Act provides that references to the Presiding Officers are taken as references to the Clerks of both Houses.⁴⁰ If the Speaker is absent from New South Wales, the *Constitution Act 1902* provides that the Deputy Speaker shall act in his place.⁴¹

³⁷ Mr Kelly, *Transcript of evidence*, 1 December 2008, p. 2.

³⁸ Mr Kelly, Answers to indicative questions taken on notice, question 6(d), p. 5.

³⁹ ICAC Act 1988, s 78(3).

⁴⁰ Section 79(3) of the ICAC Act provides that if there is a vacancy in the Speaker's office, the reference to the Speaker in the Act is to be taken as a reference to the Clerk of the Legislative Assembly while s 79(2) provides that, in case of a vacancy in the office of the President, a reference to the President is to be taken as a reference to the Clerk of the Legislative Council.

⁴¹ Section 31A(1) of the *Constitution Act 1902*: 'During the absence from New South Wales of the Speaker the Deputy Speaker of the Legislative Assembly shall act in his place, and for all purposes, whether of this Act or otherwise, shall have and may exercise and perform all the powers, authorities, duties and functions of the Speaker'. In the case of the Legislative Council, the Chair of Committees acts in place of the President: see s 22G(5) & (7).

Committee comment

Complaint reports

- 1.42 In the Committee's view, the Inspector should, as a matter of principle, report to Parliament on all significant complaint investigations. Therefore, the Committee does not support the proposal that the Inspector be able to make reports public, as this would potentially bypass the Parliament.
- 1.43 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'.⁴² 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.

Issues arising out of the Committee's previous report

Seeking additional audit funding

- 1.44 In its report on the Inspector's 2006-2007 Annual Report, the Committee recommended that the Inspector seek additional funding from Treasury, in order to more comprehensively and effectively fulfil the Inspectorate's audit role under s 57B(1) of the ICAC Act.⁴³ During the Committee's hearing with the former Inspector, the Committee sought an update on its recommendation and the former Inspector advised that he had not had an opportunity to seek additional funding:

Mr JONATHAN O'DEA: ... 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. ... 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. ... 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.⁴⁴

- 1.45 In the Committee's view, the Inspector's audit role is a vital part of the Office's functions. The Committee notes the former Inspector's previous evidence that his

⁴² Committee on the Office of the Ombudsman and Police Integrity Commission, Report 16/53, p. 145.

⁴³ See ICAC Committee, Report 4/54, October 2008, pp. 5-6.

⁴⁴ Mr Kelly, *Transcript of evidence*, 1 December 2008, p. 8.

office would have been able to undertake more audits, if more funding and resources had been available.⁴⁵ The Committee intends to discuss with the current Inspector, Mr Harvey Cooper AM, his planned audit program, to determine whether additional funding will be required by the Inspectorate.

Presentation of complaint statistics

- 1.46 During its review of the Inspector's 2006-2007 Annual Report, the Committee found that there were problems with the presentation of complaint statistics in the report, which resulted in difficulties in terms of the interpretation of the statistics. The Committee recommended that the Inspectorate revise its presentation of complaint statistics in line with a model suggested by the Committee.⁴⁶ During the review, the then Inspector had indicated in evidence to the Committee that he would consider the suggested model and raise the issue with the next Inspector.⁴⁷ The Committee notes that the statistical errors in the 2006-2007 Annual Report were corrected in part 4 of the current Annual Report.⁴⁸
- 1.47 The Inspectorate's 2007-2008 Annual Report presented complaint statistics in a more structured way. In the Committee's view, the breakdown of the statistics into three tables relating to outcomes, receipt and averages was an improvement, and the statistics were easier to interpret. However, while there was an improvement in the presentation of complaint statistics, the statistics were not as detailed as the model the Committee had recommended, and some statistics that had previously been reported, such as the method of receipt, were not reported on. The Committee is interested in more detailed reporting on outcomes, such as the number of complaints sustained and the number that resulted in systemic changes. In view of the former Inspector's comments on the amount of unsubstantiated complaints received by the Inspectorate that relate to the Commission's assessment of complaints, it may be instructive for the annual report to classify complaints according to the type of complaint, for example, whether they allege maladministration, or improper assessment of the complaint. Reporting on the types of complaints received would also aid the Committee in identifying trends in the nature of complaints received by the Inspectorate. In making these comments, the Committee notes that the current Inspector may develop a new model for presenting the Office's complaint statistics. The Committee will follow up its recommendation relating to the presentation of complaint statistics during its examination of the next annual report of the Inspectorate.
- 1.48 Finally, the Committee identified a problem with the total number of complaints received during 2007-2008, as reported in the Inspector's recent Annual Report. In answers to indicative questions taken on notice, the Inspectorate advised that the total of 57 as shown in table 1 of the report was incorrect, and the correct figure was

⁴⁵ Mr Kelly, *Transcript of evidence*, 3 July 2008, p. 19.

⁴⁶ See ICAC Committee, Report 4/54, October 2008, p. 5.

⁴⁷ See *ibid*, p. 3.

⁴⁸ See Office of the Inspector of the ICAC, *Annual Report 2007-2008*, p. 28.

Commentary

62. The Inspectorate advised the Committee that the Office would publish a correction note to clarify this issue in the 2008-2009 Annual Report.⁴⁹

⁴⁹ Mr Kelly, Answers to indicative questions taken on notice, question 7, p. 6.

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

Preliminary observations

1. The Annual Report outlines (p2) your view that the definition of corrupt conduct should be revisited, as it results in too many trivial complaints to the ICAC.

- a. What specific changes to the definition of corrupt conduct would you propose?*
- b. In his review of the ICAC Act Mr McClintock SC expressed concern that such a change would alter and possibly limit the Commission's investigatory jurisdiction. Do you share these concerns?*
- c. In your view, how could a narrower definition be drafted to avoid the exclusion of certain types of conduct from the ICAC'S jurisdiction?*
- d. Have you discussed these matters with the Commissioner, and, if so, does he concur with you?*

I will respond to sub-questions a. to d. collectively.

I note that my views on the issues raised by these questions were discussed during the course of my meeting with the Parliamentary Joint Committee (the PJC) on 1 December 2008. I have no further comments that I wish to make except to reiterate my view that there should be a 'tiered system' applied in respect of complaints permitted to be made to the ICAC by various classes of potential complainants.

Under this tiered system members of the public would only be allowed to make complaints to the ICAC if such complaints satisfied fairly high threshold criteria for serious or systemic corrupt conduct.

Public officials or public agencies would be able to make complaints to the ICAC under a broader scope as they would be expected to be in a more informed position on appropriate matters to be reported to the ICAC.

The ICAC itself should retain broad discretion to initiate its own enquiries and investigations into possible serious and systemic corrupt conduct as it sees fit. The

Appendix One – Indicative questions taken on notice

effect of this tiered system would be to reduce the pressure placed on the ICAC by having to deal with trivial or irrelevant complaints from members of the public, which comprise a significant proportion of the large number of complaints it receives each year. This approach would enable the ICAC to devote greater resources to effectively targeting potentially serious and systemic corrupt conduct.

2. Parliament's intention when creating the office of Inspector was to fill a gap in the accountability of the ICAC by establishing an office that would be responsible for investigating complaints about possible abuses by the ICAC of its powers. In the Annual Report you express the view that the Inspector's role should focus more on performance monitoring, rather than complaints handling (p2) and propose the ICAC Act be amended to enable the Inspector to carry out performance reviews of the ICAC against agreed benchmarks.

a. Why do you consider that the low level of complaints received to date about the abuse of power by the ICAC changes the need to have the Inspector primarily focused on assuring the ICAC's method of operations are proper and in compliance with legal requirements?

It is not being suggested that the Inspector's focus on assuring that the ICAC's method of operations are proper and in compliance with legal requirements should be removed. However, after three years of undertaking duties as Inspector, it appears to me that the Inspector's role could be enhanced by adding a performance monitoring function which would result in a report to the Parliament on management issues which affect the ICAC's operations.

This proposed function would complement the Inspector's current functions to enable the Inspector to better answer the key concern that appears to underlie the Parliament's intention in creating the Inspector's role, i.e. to ensure that the ICAC was discharging its statutory duties as effectively as possible.

b. Why do you consider the Inspector's office to be an appropriate vehicle for performance review of the ICAC?

I do not say that the Inspector's office currently has the expertise to personally undertake a performance review function itself or to the extent that it might in future, in all relevant areas. However, the Inspector's office is the appropriate vehicle to supervise any such review as the Office is the only body with experience in reviewing the operations of the ICAC and has developed a body of knowledge about the ICAC. The actual function of carrying out a performance review would be conducted by engaging suitably qualified personnel to assist the Inspector.

c. Do you see any potential for such a performance monitoring role to undermine the independence of the ICAC, including the independence of the Inspector?

No on both counts, as the Inspector's function in respect of performance monitoring would not be binding in any respect. Under my proposal, the purpose of this function would be to make comments to the New South Wales Parliament for its consideration.

3. You express the view that effective accountability is best served by a more integrated approach, instead of the current narrow focus on compliance with the law.

a. Is it your view that the existing accountability mechanisms for oversight of the ICAC should be completely restructured?

No, as stated in response to the above question, it is being suggested that the Inspector's existing functions should be added to, in order to improve accountability.

b. Given that under the ICAC Act the Committee has jurisdiction to monitor and review the Commission's exercise of its functions, would your proposal create an overlap in the jurisdiction of the Inspector and the Committee?

No, as the Committee does not have the capacity to undertake a specific performance review of the ICAC.

4. In previous evidence to the Committee you have indicated that you would undertake more audit work in relation to the ICAC's use of its own powers, if funds were available to facilitate more audit programs. Did you have an opportunity to formulate an enhanced audit program and seek supplementation for it prior to the end of your term?

No.

5. You recommend that a sunset clause review of the Inspector's function be undertaken towards the end of the current Inspector's three year term (p3). Presumably, the sunset clause review would be with an outlook to abolish the Office of the Inspector if it was no longer seen to be required.

a. What factors do you think should be weighed up in making a decision as to the value and ongoing need for the Office of the Inspector?

The following factors, listed in no particular order, could be considered and is not provided as an exhaustive list:

- Improved accountability of the ICAC including a better understanding of the criteria it uses to fulfil its statutory objectives;
- The overall 'cultural impact' on the ICAC in terms of care exercised in use of its extensive powers; and
- The Inspectorate being seen as providing value for money.

b. How do you measure the value of a specific accountability mechanism such as the Inspector provides?

The value of the Inspector's role should be measured both in qualitative and quantitative terms as appropriate to different factors being weighed up. Also see my response to clause (a) above.

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.

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.

Complaints received

- 7. The Committee is having difficulty interpreting the Inspectorate's statistics in relation to the total number of complaints received. Table 1 on page 11 of the Annual report states that a total of 57 complaints were received in 2007-2008. The following section of the report (pp15-27) outlines complaints received during the period. This section details a total of 43 complaints received in 2007-2008 that were finalised (p15-23) and 19 complaints received that are yet to be finalised (p24-27). Therefore, a total of 62 finalised and not finalised complaints are outlined in this section, while the total number of complaints received as per Table 1 is 57. How many complaints were received in total during 2007-2008?*

Appendix One – Indicative questions taken on notice

There is an error in the Table on page 11 with respect to the total number of complaints received in 2007-08 being stated as being 57. The correct number for the total number of complaints received in 2007-08 was 62. The error came about as a result of the number 57 as contained in the table on page 11 of the 2007-08 Annual Report not being updated prior to the Annual Report being finalised for publication.

A correction note on this issue will be contained in the Inspector's Annual Report 2008-09.

8. Page 14 of the report refers to a complaint made by a former ICAC employee. The report notes that the ICAC did not implement the Inspector's recommendations in relation to this matter.

a. What recommendations were made to the Commission in the draft report on the investigation of this matter?

Two recommendations were made. The first was that a written assurance to the complainant should be made in respect of relevant issues raised by the complaint. The second recommendation was that the ICAC could clarify, in the form of guidelines, the scope and application of s.111 of the ICAC Act.

b. Is the former Inspector satisfied with the Commission's response to his recommendations in relation to this matter?

No.

9. The report notes that the Inspector does not have the power to enforce the recommendations that he makes (p15).

a. Does the Inspector have any comments on the implementation of the Inspector's recommendations to the ICAC?

No, as the monitoring of any such implementation is not within the Inspector's role and functions.

b. Why should the Inspector's recommendations be binding on the ICAC?

I do not say that it should.

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 Ngunnawal 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.

Appendix Two – Questions without notice

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 – 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 Oravec, 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.

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 2009 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.