



Parliament of New South Wales

# Committee on the Independent Commission Against Corruption

Report 6/56 – October 2018

Review of the 2016-2017 Annual Reports of the Independent Commission  
Against Corruption and the Inspector of the Independent Commission  
Against Corruption



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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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# Membership

|                        |   |
|------------------------|---|
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| <b>Deputy Chair</b>    | Mr Geoff Provest MP   |
| <b>Members</b>         | Mr Austin Evans MP (from 20 September 2018)<br>Mr Ron Hoenig MP<br>Mr Kevin Humphries MP<br>Mr Paul Lynch MP<br>Ms Tania Mihailuk MP<br>Mr Chris Patterson MP (until 24 May 2018)<br>Mr Mark Taylor MP (until 14 August 2018)<br>The Hon Trevor Khan MLC<br>Revd the Hon Fred Nile MLC<br>The Hon Lynda Voltz MLC |
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## Chair's Foreword

The Committee on the Independent Commission Against Corruption (the ICAC) has reviewed the annual reports of the ICAC and its Inspector for the 2016-2017 reporting year.

As with the last annual report review it conducted, the Committee has examined the ICAC's functioning following the restructure wrought by the *Independent Commission Against Corruption (Amendment) Act 2016*. The ICAC is clearly operating well under the new model and the three Commissioners, and the ICAC staff, are to be commended for this smooth transition.

It is an exciting time for the ICAC in other ways also, with a recent \$3.6 million funding boost providing it with greater capacity to perform its important work. Additional investigators, strategic data analysts and surveillance and corruption prevention staff have been deployed across the organisation, and the ICAC is now able to conduct concurrent public inquiries whilst keeping abreast of its investigative caseload.

The increased funding has also enabled the ICAC to establish a Strategic Intelligence Research Unit as it continues to develop its proactive investigative capacity. In addition, a \$500,000 capital funding boost will allow the upgrade of various information, communication and technological equipment to meet the new unit's operational requirements. This is an area that the Committee will continue to monitor with particular interest.

With regard to the Inspector's annual report, the Committee was pleased to find that arrangements are in place to promote a productive working relationship between the Inspector and the ICAC. Further, the Committee was satisfied that resourcing levels and arrangements are currently appropriate to enable the Inspector to carry out his vital role effectively.

In particular, the Committee has highlighted the importance of the Inspector's audit function, and has made a recommendation aimed at addressing an ongoing issue that prevents the Inspector accessing telephone intercept material for audit purposes.

I would like to thank the Commissioners and their Executive Team, and the Inspector, for their contributions at public hearings for the review. I would also like to take this opportunity to thank my fellow Committee members for their constructive input into the review process. Finally, I would like to thank the Committee staff for their assistance in the conduct of the review.

I commend the report.



**Damien Tudehope MP**  
Chair

## Findings and Recommendations

### Recommendation 1 \_\_\_\_\_ 12

That in its future annual reports, the Independent Commission Against Corruption (ICAC) include details of:

- the specific areas of the public sector found by the ICAC to be at high risk of corruption as a result of the proactive exercise of ICAC's jurisdiction;
- any areas of emerging and potential public sector corruption risk, identified by the ICAC as a result of proactive exercise of its jurisdiction; and
- the high level details of the methodologies, systems and processes used by the ICAC in proactively exercising its jurisdiction.

### Recommendation 2 \_\_\_\_\_ 35

That the NSW Attorney General write to the Commonwealth Attorney General:

- Re-affirming the NSW Government's support for an amendment to the *Telecommunications (Interception and Access) Act 1979 (Cth)* to enable Inspectors of law enforcement and integrity agencies to access telecommunications material for audit purposes;
- Seeking an update on this issue.

# Commentary

## Introduction

- 1.1 This report fulfils one of the Committee's obligations under its establishing legislation, the *Independent Commission Against Corruption Act 1988* (the ICAC Act). The Committee's functions include examining each annual and other report of the ICAC, and of the Inspector of the ICAC, and reporting to Parliament on any matter appearing in or arising out of those reports. This report is the result of the Committee's review of the ICAC and the Inspector's 2016-2017 annual reports.
- 1.2 Under section 76(1) of the ICAC Act, the ICAC is required to prepare, within the period of four months after each 30 June, a report of its operations during the year ended on that 30 June and to furnish the report to the Presiding Officer of each House of Parliament.
- 1.3 Under section 77B of the ICAC Act, the Inspector is required to prepare, within the period of four months after each 30 June, a report of the Inspector's operations during the year ended on that 30 June and to furnish the report to the Presiding Officer of each House of Parliament.
- 1.4 The ICAC investigates, exposes and prevents public sector corruption and educates the community and the public sector about corruption. Its principal functions include investigating complaints of corrupt conduct; examining laws, practices and procedures to detect corrupt conduct and to secure changes in work methods or procedures that may be conducive to corrupt conduct; advising and instructing public authorities and officials about changes in practices and procedures to reduce the likelihood of corrupt conduct; and educating the public and providing information about the detrimental effects of corrupt conduct and the importance of maintaining integrity in public administration.<sup>1</sup>
- 1.5 The Inspector oversees the ICAC's work and his or her principal functions are:
- auditing the ICAC's operations to monitor compliance with the law of the State;
  - dealing with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct by the ICAC or its officers;
  - dealing with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the ICAC or its officers; and
  - assessing the effectiveness and appropriateness of the ICAC's procedures relating to the legality or propriety of its activities.<sup>2</sup>

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<sup>1</sup> *Independent Commission Against Corruption Act 1988*, s13.

<sup>2</sup> *Independent Commission Against Corruption Act 1988*, s 57B.

- 1.6 As part of its review of the ICAC and Inspector's 2016-2017 annual reports, the Committee conducted a public hearing on 1 June 2018. Two of the ICAC's three Commissioners gave evidence at the hearing: the Chief Commissioner, the Hon Peter Hall QC, and Mr Stephen Rushton, SC; along with members of the ICAC's executive team. The Inspector, Mr Bruce McClintock SC, also gave evidence at the hearing. The transcript from the public hearing is reproduced at Appendix Two.
- 1.7 The Committee's report has focussed on the following areas relating to the ICAC:
- The ICAC's structure and functioning including a discussion of:
    - The implementation of 2016 amendments to the ICAC Act
    - A recent funding boost for the ICAC
    - The establishment by the ICAC of a proactive investigation strategy
  - The ICAC's liaison with the Office of the Director of Public Prosecutions (ODPP)
  - Public perceptions of the ICAC
  - Recent complaint figures
  - The ICAC's corruption prevention work
  - Establishment within the ICAC of a professional development program.
- 1.8 The Committee's report has focussed on the following areas relating to the Inspector:
- Liaison between the Inspector and the ICAC.
  - Resourcing of the ICAC Inspectorate.
  - The Inspector's complaint-handling function.
  - The Inspector's audit function.

## The ICAC

### The ICAC's Structure and Functioning

***The Committee will continue to monitor the ICAC's functioning in light of changes made by the Independent Commission Against Corruption (Amendment) Act 2016***

- 1.9 In November 2016, the NSW Parliament passed the *Independent Commission Against Corruption (Amendment) Act 2016*, which came into force on 7 August 2017. The Amendment Act re-structured the ICAC. It abolished the sole Commissioner model and introduced a three-member panel of Commissioners ('the three member Commission') to head the ICAC. It also made provision for a



Chief Executive Officer (CEO) to manage its day-to-day affairs.<sup>3</sup> The three member Commission consists of a full time Chief Commissioner (currently the Hon Peter Hall QC) and two part time Commissioners (currently Mr Stephen Rushton SC and Ms Patricia McDonald SC).<sup>4</sup>

1.10 All three Commissioners are able to exercise the ICAC's functions and powers, for example, holding public inquiries and conducting compulsory examinations. If there are inconsistencies in the decisions of the Commissioners, the Chief Commissioner's decision will prevail. The exception is decisions about the conduct of the ICAC's public inquiries. To authorise the conduct of such an inquiry, agreement between the Chief Commissioner and at least one other Commissioner is necessary.<sup>5</sup>

1.11 The Amendment Act also made the following further changes:

- The Commissioners were required to issue procedural guidelines for the conduct of public inquiries, which were to be tabled in both Houses of Parliament and published on the ICAC's website. The guidelines were to cover:
  - the investigation of evidence that might exculpate 'affected persons' (that is persons against whom substantial allegations have been made in the course of, or in connection with the public inquiry concerned);
  - the disclosure of exculpatory and other relevant evidence to 'affected persons';
  - cross-examination of witnesses regarding their credibility;
  - provision of access to relevant documents for 'affected persons' and witnesses, and reasonable time to prepare before giving evidence;
  - any other matter the ICAC considered necessary to ensure procedural fairness.<sup>6</sup>
- The ICAC was no longer authorised to include an adverse finding against a person in a report unless:
  - the ICAC had given the person a reasonable opportunity to respond to the proposed adverse finding; and
  - the ICAC included in the report a summary of the substance of the person's response that disputed the adverse finding if the person requested the ICAC to do so within the time specified by the ICAC.<sup>7</sup>

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<sup>3</sup> *Independent Commission Against Corruption Act 1988*, ss5 & 104.

<sup>4</sup> *Independent Commission Against Corruption Act 1988*, schedule 1, clause 4.

<sup>5</sup> *Independent Commission Against Corruption Act 1988*, s6.

<sup>6</sup> *Independent Commission Against Corruption Act 1988*, s31B.

<sup>7</sup> *Independent Commission Against Corruption Act 1988*, s79A.

- The ICAC was authorised to continue to exercise certain investigative powers after the completion of its investigations for the purposes of gathering and assembling admissible evidence for a criminal prosecution, where requested to do so by the NSW Director of Public Prosecutions (the DPP) or the NSW Electoral Commission.<sup>8</sup>

- 1.12 The Amendment Act implemented many of the recommendations made in the Committee's 2016 report to Parliament: *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports* ('the Committee's 2016 report'). The Committee made these recommendations in response to concerns raised by a number of stakeholders that reputational damage and other serious consequences can flow from the ICAC's public inquiries and findings, in circumstances where affected individuals have limited opportunity for judicial review of those findings.<sup>9</sup>
- 1.13 These included recommendations for changes to decision-making requirements for the ICAC to proceed to a public inquiry; for the three-member Commission to develop procedural fairness guidelines for the conduct of public inquiries; and for people to be given a reasonable opportunity to publicly respond to adverse ICAC findings made against them.<sup>10</sup>
- 1.14 The Committee has been monitoring, and will continue to monitor, whether the changes made by the Amendment Act have adequately resolved the concerns that were raised by stakeholders and, more generally, whether the ICAC is operating well following the changes. Accordingly, as part of its current inquiry, the Committee sought and received the following updates on the implementation of the changes.

#### *Three Member Commission*

- 1.15 At the Committee's public hearing on 1 June 2018, the Chief Commissioner indicated that the three member Commissioner model is operating well. In particular, he indicated that this model allows the ICAC to conduct concurrent public inquiries whilst keeping up to date on its other investigative work.<sup>11</sup>
- 1.16 The Chief Commissioner explained that, at the time of the Committee's public hearing, the ICAC was conducting three public inquiries at once: Operation Skyline, over which he was presiding; Operation Dasha, presided over by Commissioner McDonald; and Operation Estry, presided over by Commissioner Rushton.<sup>12</sup> The Chief Commissioner stated further:

<sup>8</sup> *Independent Commission Against Corruption Act 1988*, s52A.

<sup>9</sup> See for example, Hon David Levine AO RFD QC, Inspector of the ICAC, *Report to the Premier: The Inspector's Review of the ICAC*, 12 May 2016, in particular para 51, p20 & para 78, p28, Inspector's website: <https://www.oicac.nsw.gov.au/assets/oicac/reports/other-reports/Report-to-Premier-Inspectors-Review-of-the-ICAC.pdf>, viewed 24 August 2018.

<sup>10</sup> Committee on the ICAC, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports*, Report 2/56, October 2016, recommendations 2 & 14-20.

<sup>11</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p12.

<sup>12</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, pp11-12.

The three-Commissioner ICAC model has made it possible for the Commission, as necessary, to prepare and conduct back-to-back public inquiries whilst also maintaining ongoing covert investigations in other matters, including one major investigation for which special funding has been provided. This would not have been possible but for the very impressive dedication and the application of the staff across all divisions of the Commission.<sup>13</sup>

- 1.17 The Chief Commissioner also indicated that decision-making has proceeded smoothly under the three member Commission, noting in particular that the agreement of the Chief Commissioner and at least one other Commissioner is now required to authorise the conduct of a public inquiry. He stated:

We have regular meetings – monthly – in relation to all current investigations. We receive detailed reports before we meet so that we all develop a good understanding of the facts, issues and matters concerning individual investigations. When they reach a stage where there is enough information to be able to make a judgment call, we – Commissioner McDonald, Mr Rushton and I – meet to discuss and identify whether or not the material, which by this stage we are well familiar with, warrants a public inquiry.

In doing so we are mindful of the provisions of the Act and seek to apply and identify the benefits, disadvantages, repercussions and implications of conducting a public inquiry. We have done that on three occasions. We have kept a record of the decisions made. In each case, that has been the procedure. In each case the decision was unanimous that there should be a public inquiry and that it met the criteria under the Act.<sup>14</sup>

- 1.18 The Inspector also told the Committee that, in his view, the three member Commission model will assist the ICAC with sound decision making, especially given the requirement for the agreement of the Chief Commissioner and at least one other Commissioner if a public inquiry is to be held:

...the real point about organisations such as the Commission is that they are heavily influenced by the character of the Chief Commissioner and the Commissioners...That was the consideration of the adoption of the three Commissioner model, which dilutes the possibility of a zealot running the Commission. The real protection is the model that is now adopted and the necessary brakes on the decision. Of course, you are aware because you passed the legislation, that one of the important changes as a result of the three Commissioner model was...in relation to public hearings which, again, can act as a brake.<sup>15</sup>

- 1.19 In addition, the Inspector indicated that he has observed proceedings at the ICAC since the three member Commission came into play, and that it appears that the ICAC is operating well under the model:

I took it upon myself, without giving the Commission any notice, to go and sit in one of the hearings...I think I was there for about an hour; I appreciate that the hearings are much longer. On my observation, it was being conducted in a calm and civil manner. Again, this is all anecdotal, except for what I saw when I was observing. I have spoken to Counsel involved in the inquiries, not on any official basis, so to

<sup>13</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p12.

<sup>14</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, pp13-14.

<sup>15</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p6.

speak, but because I know them, and I have heard no complaints of the sort one used to hear regularly, as you know. There has been nothing like that. As I said, it was the Commission getting on with the job. As I said, I thought it was being conducted conspicuously fairly and without the degree of emotion that sometimes has been the subject of these hearings.<sup>16</sup>

### *Chief Executive Officer Position*

1.20 As above, as part of the ICAC's restructure, the Amendment Act also provided that the Chief Commissioner may appoint a CEO.<sup>17</sup> This change followed findings contained in the Committee's 2016 report, that the creation of a CEO position would benefit the ICAC's governance and decision-making capacity. Day-to-day decision-making could be taken care of by a person with specialist management and administrative skills, freeing the Commissioners to focus on higher level decision-making.<sup>18</sup>

1.21 At the Committee's public hearing on 1 June 2018, the Chief Commissioner confirmed that an interview panel had been convened and a unanimous recommendation made that Mr Philip Reid be made CEO of the ICAC.<sup>19</sup> Mr Reid was then formally appointed to the position on 2 July 2018 on a full time basis.<sup>20</sup> The Chief Commissioner told the Committee about the process the ICAC undertook to recruit Mr Reid:

The Commission engaged an executive firm – Watermark – to undertake an executive search for the position of Chief Executive Officer. The role was widely advertised in the press and online, and 49 candidates applied for the position. Following a series of interviews, a shortlist of five candidates was put forward to the Commission.

The interview panel was convened by myself, Commissioner Rushton and Ms Williams, who is the chief executive officer of the Law Enforcement Conduct Commission...Commissioner McDonald was...unable to be on the interview panel [owing to other professional commitments]. Following the assessment through the interview panel, the panel was unanimous in recommending Mr Philip Reid for appointment to the chief executive officer...position.<sup>21</sup>

1.22 The Chief Commissioner also provided a brief account of Mr Reid's background and qualifications:

He is a Bachelor of Science with first class honours. He is a member of the Australian Institute of Company Directors. I note that in the period from June 2014 to March 2018 Mr Reid was the Chief Executive Officer of the Royal Commission into Institutional responses to Child Sexual Abuse. Prior to that time he has held a

<sup>16</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p6.

<sup>17</sup> *Independent Commission Against Corruption Act 1988*, s104.

<sup>18</sup> Committee on the ICAC, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports*, Report 2/56, October 2016, p8.

<sup>19</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p10.

<sup>20</sup> Letter from ICAC Chief Commissioner to ICAC Committee Chair dated 6 September 2018, p1; see also ICAC website: <https://www.icac.nsw.gov.au/about-the-icac/organisational-structure/executive-team>, viewed 24 August 2018.

<sup>21</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p10.

number of senior executive positions in public administration in Victoria, Queensland and the position I referred to in New South Wales. From April 2013 to September 2013 he was Chief Executive Officer of the Public Service Commission in Queensland.

Predating that, he was the Director General of the Department of Science, Information Technology, Innovation and the Arts, the Director General of the Department of Justice and Attorney-General, both in Queensland, and the Deputy Secretary of the Department of Premier and Cabinet in Victoria. The references for Mr Reid were quite outstanding. We are confident that he has got the necessary background to fit in very well, understanding how Commissions of inquiry work and interfacing with Government as necessary. We are very confident that he brings to bare all of the background. He has what is commonly referred to by my assessment, emotional intelligence. That means he is a people person. He is going to work well, as he did with the Royal Commission, and we are looking forward to him starting next month.<sup>22</sup>

### *Procedural Fairness Guidelines*

- 1.23 The change to the ICAC Act requiring the Commissioners to issue procedural guidelines for the conduct of public inquiries is particularly important to address concerns that the ICAC's procedures in reaching its findings are optimal, and that people who give evidence to the ICAC are treated fairly. The Committee was satisfied with the update it received in this area at the hearing on 1 June 2018, and it is one that the Committee will continue to monitor particularly closely.
- 1.24 The ICAC developed the guidelines in consultation with the Inspector and they were tabled in Parliament on 13 February 2018.<sup>23</sup> As required by the Amendment Act, and as foreshadowed above, matters covered by the guidelines include:
- the investigation of evidence that might exculpate 'affected persons';
  - the disclosure of exculpatory and other relevant evidence to 'affected persons';
  - cross-examination of witnesses regarding their credibility;
  - provision of access to relevant documents for 'affected persons' and witnesses, and reasonable time to prepare before giving evidence;
  - any other matter the ICAC considers necessary to ensure procedural fairness.<sup>24</sup>

<sup>22</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p10.

<sup>23</sup> See ICAC, *Public Inquiry Procedural Guidelines*, ICAC website: <https://www.icac.nsw.gov.au/docman/investigations/5047-section-31b-guidelines-february-2018-final/file>, viewed 24 August 2018; see also *Tabled Papers*, 13 February 2018, NSW Parliament website: <https://www.parliament.nsw.gov.au/hansard/pages/home.aspx?tab=Browse&s=1>, viewed 24 September 2018.

<sup>24</sup> *Independent Commission Against Corruption Act 1988*, s31B.

- 1.25 At the Committee's public hearing on 1 June 2018, the Chief Commissioner emphasised the role of the guidelines in addressing concerns that people who give evidence at the ICAC's public inquiries are treated fairly:
- ...the guidelines and the application of them to date have, I think, gone a good way towards ameliorating some of the concerns which by, demonstrably, application of fair principle in the course of a public hearing, people can perhaps have greater comfort that this is not some form of Nazi interrogation system, but that it is still required to comply with some rules of fairness as well as being an effective investigation agency.<sup>25</sup>
- 1.26 Commissioner Rushton also gave evidence about the way in which the guidelines are being implemented by the ICAC. He told the Committee that all relevant staff are aware that they must be applied:
- It is certainly my belief and my observation that the amendments introduced by section 31B in terms of procedural fairness are now understood as of extreme importance to both the workings and the reputation of the Commission. All staff involved in the investigation of possible corrupt conduct and the conduct of those hearings are aware that those guidelines must be implemented. From the current inquiry that I am doing, Operation Estry, I can tell all of you that those guidelines have been rigorously applied.<sup>26</sup>
- 1.27 The Committee also heard detailed evidence about the implementation of the guidelines as they relate to the investigation of exculpatory evidence and disclosure of exculpatory evidence to affected persons. The guidelines relevantly state:
- 3.1 A key consideration in determining what evidence to obtain during the course of an investigation is the extent to which it will enhance the ability of the Commission to establish the truth. Relevant evidence includes exculpatory evidence.
- 3.2 ...Commission staff involved in [an] investigation should bring to the attention of the investigation case manager exculpatory evidence of which they are aware and investigative leads that suggest to them, on reasonable grounds, that exculpatory evidence may exist...
- 4.1 The Commission's duty to afford procedural fairness to an affected person requires it to provide the affected person with material that is adverse to that person and upon which the Commission may rely. The affected person should be given a reasonable opportunity to consider and respond to that material. Where the Commission's investigation includes a public inquiry, it will make available to an affected person exculpatory evidence in its possession. The timing of the disclosure of any such evidence, and the form in which disclosure will be made, are matters for the presiding Commissioner.<sup>27</sup>

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<sup>25</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p15.

<sup>26</sup> Mr Stephen Rushton SC, *Transcript of Evidence*, 1 June 2018, p15.

<sup>27</sup> ICAC, *Public Inquiry Procedural Guidelines*, ICAC website:

<https://www.icac.nsw.gov.au/docman/investigations/5047-section-31b-guidelines-february-2018-final/file>, viewed 24 August 2018.

- 1.28 Commissioner Rushton told the Committee that the ICAC had established a Committee to develop policies and procedures to ensure that exculpatory material is identified, investigated, monitored and disclosed:

...a committee has been established which will be chaired by Commissioner McDonald to develop policies and procedures to ensure that exculpatory material will be identified, investigated, monitored and disclosed to affected persons and, in the case of referrals to the Director of Public Prosecutions, to the Director.<sup>28</sup>

- 1.29 Commissioner Rushton emphasised the importance of monitoring material on an ongoing basis during an ICAC investigation, and indicated that Commissioner McDonald's committee will facilitate this:

You might appreciate, the Commission often receives vast amounts of material, and as an investigation progresses, material not thought to be relevant, including exculpatory evidence, becomes relevant. The challenge is to monitor that material, to monitor its relevance and to ensure that in due course and at an appropriate time it is disclosed. I can confirm that that is what this committee will be designed to do, and these policies and procedures will be developed with that in mind, so that we do not miss anything and that evidence that should be disclosed will be disclosed in a timely manner.<sup>29</sup>

- 1.30 Commissioner Rushton further indicated that, subject to human error, this would mean that exculpatory evidence given by a witness during a compulsory examination (and therefore not publicly), would be made available to affected people at an appropriate time. This follows concerns raised earlier in the year that this had not always taken place in the past.<sup>30</sup> Commissioner Rushton stated:

...subject to human error, of course, you can never discount that entirely, but the approach of the Commission now in its public inquiries is to ensure that there is a proper review of what is relevant to the inquiry and we bend over backwards to ensure that at an appropriate time, consistent with maintaining the forensic integrity of the investigation, material is released. It may be, for example, that in a compulsory examination we ultimately release to the affected people there could be material in there that we would not necessarily regard as exculpatory but, because of the knowledge held by witnesses, it may be. So we have to take a cautious approach.<sup>31</sup>

- 1.31 The Committee also heard detailed evidence about the implementation of the guidelines as they relate to witness access to relevant documents and a reasonable time to prepare before giving evidence. In particular, the guidelines state:

6.2 The rules of procedural fairness, as they apply to the Commission, do not require the Commission to provide a witness with access to any evidence before the witness is examined.

<sup>28</sup> Mr Stephen Rushton SC, *Transcript of Evidence*, 1 June 2018, p16.

<sup>29</sup> Mr Stephen Rushton SC, *Transcript of Evidence*, 1 June 2018, p16.

<sup>30</sup> Merritt, C. 'ICAC should be investigated over flawed reports' *The Australian*, 16 March 2018, p27.

<sup>31</sup> Mr Stephen Rushton SC, *Transcript of Evidence*, 1 June 2018, p16.

6.3 Where to do so would not prejudice the investigation, the Commission may provide a witness with access to relevant documents before the public inquiry or before the witness is examined. A decision as to whether relevant documents will be disclosed to a witness before the witness is required to give evidence in a public inquiry, the extent of the disclosure, and the method of disclosure will be determined by the presiding Commissioner.<sup>32</sup>

- 1.32 Commissioner Rushton explained that in practice there is a restricted portal, allowing 'affected persons' and their legal representatives to access relevant material before appearing at a public inquiry. However, where necessary to protect the forensic integrity of the investigation, not all material will be released on this portal prior to the public inquiry. Commissioner Rushton stated:

So as to protect the forensic integrity of the investigation, not all material is published on the restricted portal before the public inquiry begins, and the timing is a matter which is discussed and was discussed in this particular inquiry [Operation Estry] before it commenced, with Counsel Assisting myself and investigation staff. Perhaps the most common example where material is sometimes not published in advance is the transcript of what a witness has said during the previous private compulsory examination. You can well imagine, I am sure, that this is entirely appropriate in the case where there are allegations of collusion. To publish transcripts of compulsory examinations in advance might lead those against whom the allegations were made to put their heads together, so to speak.<sup>33</sup>

- 1.33 Notwithstanding this, Commissioner Rushton provided examples of steps that he had taken to ensure access to relevant documents and reasonable time to prepare, without compromising the investigation in Operation Estry:

The procedure I adopted was to ensure that, immediately following and sometimes prior to a witness giving evidence, that the witness that had previously been examined in a compulsory examination, their transcript was put up on the restricted website so that various legal practitioners that appear for affected people – and their clients, the affected people – could consider it before commencing cross-examination of the witness. On a number of occasions I indicated to the legal representatives that if they needed more time to consider that material then more time would be granted.<sup>34</sup>

- 1.34 The procedural fairness guidelines also provide that the presiding Commissioner can give leave for persons to cross-examine witnesses at public inquiries as to their credibility. Clause 5.3 of the procedural fairness guidelines states:

Leave will be given to cross-examine a witness as to his or her credibility where the presiding Commissioner considers that the credibility of the witness is of sufficient relevance to the investigation.<sup>35</sup>

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<sup>32</sup> ICAC, *Public Inquiry Procedural Guidelines*, ICAC website:

<https://www.icac.nsw.gov.au/docman/investigations/5047-section-31b-guidelines-february-2018-final/file>, viewed 24 August 2018.

<sup>33</sup> Mr Stephen Rushton SC, *Transcript of Evidence*, 1 June 2018, p15.

<sup>34</sup> Mr Stephen Rushton SC, *Transcript of Evidence*, 1 June 2018, pp15-16.

<sup>35</sup> ICAC, *Public Inquiry Procedural Guidelines*, ICAC website:

<https://www.icac.nsw.gov.au/docman/investigations/5047-section-31b-guidelines-february-2018-final/file>, viewed 24 August 2018.



- 1.35 Commissioner Rushton indicated that during Operation Estry he had not limited anyone's ability to cross-examine witnesses as to credit, credit being a critical issue in the context of this particular operation.<sup>36</sup>

***The Committee will continue to monitor the ICAC's functioning in light of recent funding increases***

- 1.36 The Committee is pleased at evidence discussed below that the recent funding boost to the ICAC has provided the ICAC with greater capacity to perform its important work, and will continue to monitor the ICAC's functioning as it relates to its resourcing.

- 1.37 As detailed in the Committee's review of the ICAC's 2014-15 and 2015-16 annual reports, in 2017 the ICAC engaged KPMG to assess the ICAC's resources and undertake a review as to the adequacy of its systems. In particular, the Committee heard that as part of that review the ICAC had identified a need for a better match between demand and resources in its assessments and investigations divisions.<sup>37</sup>

- 1.38 At the Committee's hearing on 1 June 2018, the Chief Commissioner told the Committee that KPMG's assessment resulted in a report recommending enhancements to the ICAC's capabilities. The ICAC presented these findings as a business case to Government in February 2018 and, as a result was awarded a funding increase. The Chief Commissioner told the Committee:

Recently, the Commission was advised that an additional amount of \$3.6 million was approved on a recurrent basis to enable the Commission to effectively and efficiently carry out its functions. This has resulted in the Commission's total expenses budget rising to \$27 million and it represents a 14 per cent increase on its revised expenses budget for the 2017-18 financial year.<sup>38</sup>

- 1.39 The Chief Commissioner indicated that the additional funding would allow the ICAC to operate at or close to its maximum potential, strengthening functional capabilities in the ICAC's legal, investigations, complaints assessment and corruption prevention areas.<sup>39</sup>

- 1.40 Further, the Chief Commissioner told the Committee that the funding would allow for increased resources to be deployed across the ICAC including for the recruitment of additional investigators, strategic data analysts, and surveillance and corruption prevention staff.<sup>40</sup> The Chief Commissioner indicated that the ICAC had often been reliant on temporary staff to accommodate peaks and troughs in its investigative workload, but that the funding increases would allow further permanent officers to be employed. He stated:

There will be an additional nine permanent investigators, an additional two officers in corruption prevention, and an additional officer in the assessment section, which

<sup>36</sup> Mr Stephen Rushton SC, *Transcript of Evidence*, 1 June 2018, p16.

<sup>37</sup> See Committee on the ICAC, *Review of the 2014-2015 and 2015-2016 Annual Reports of the Independent Commission Against Corruption*, p12; see also Hon Peter Hall QC, *Transcript of Evidence*, 20 November 2017, p4.

<sup>38</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p11.

<sup>39</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p11.

<sup>40</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p11.

assesses the matter at the outset...Some of the...temporary, short-term contract people have enabled us at least to get on with building up the investigations that have now turned into public inquiries. It would not have been possible without all that temporary staff being taken on over the last few months. But going forward, the intention is to have permanent officers. The importance of that of course is that they build up corporate knowledge and understanding of systems and methods, which short-term employees are not fully versed in or cannot be sometimes fully versed in. So it is important to replace short-term employees with permanent employees and that is going to happen in the numbers I have mentioned.<sup>41</sup>

- 1.41 The Chief Commissioner also stated that the ICAC had been granted additional capital funding of \$500,000 per annum over the forward estimates period to 2021-22. He said that this will allow the upgrade or replacement of various information, communication and technological equipment to meet operational requirements.<sup>42</sup>
- 1.42 The Chief Commissioner further told the Committee that while he was confident that the increased budget provides capacity for the ICAC to undertake its core activities, '...budget challenges may arise as a consequence of unforeseen events and these will be appropriately addressed if and when they occur'.<sup>43</sup>
- 1.43 As mentioned earlier, the Chief Commissioner also told the Committee that the move to the three member Commission model has allowed the ICAC to run concurrent public inquiries and he also stated that the funding increases will make this increased workload more feasible into the future. Where necessary, the ICAC has also borrowed hearing rooms from the Law Enforcement Conduct Commission (LECC) to accommodate concurrent public inquiries.<sup>44</sup>

***The Committee will continue to monitor the ICAC's progress in developing its proactive assessment and investigation capacity***

### **Recommendation 1**

**That in its future annual reports, the Independent Commission Against Corruption (ICAC) include details of:**

- **the specific areas of the public sector found by the ICAC to be at high risk of corruption as a result of the proactive exercise of ICAC's jurisdiction;**
- **any areas of emerging and potential public sector corruption risk, identified by the ICAC as a result of proactive exercise of its jurisdiction; and**
- **the high level details of the methodologies, systems and processes used by the ICAC in proactively exercising its jurisdiction.**

<sup>41</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p17.

<sup>42</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p11.

<sup>43</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p11.

<sup>44</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p18.

- 1.44 As detailed in the Committee's review of the ICAC's 2014-15 and 2015-16 annual reports, the ICAC has been developing a more proactive approach to the way in which it assesses corruption risks and pursues its investigative functions. Until now, the ICAC has pursued these functions based on a reactive model, with investigations being launched on the basis of complaints of corrupt conduct. The ICAC considers the time has come to complement this model with a proactive, intelligence-driven approach.<sup>45</sup>
- 1.45 Therefore, the Chief Commissioner told the Committee at its hearings for the review of the 2014-15 and 2015-16 annual reports in November 2017 that steps were being taken to establish a strategic intelligence unit within the ICAC. This unit would use the ICAC's 'own motion power' found in section 20(1) of the ICAC Act, to analyse relevant data to assist with its corruption prevention and investigation activities.<sup>46</sup> At the Committee's hearing on 1 June 2018, the Chief Commissioner provided an update on the establishment of this unit, indicating that he expected a 'Strategic Intelligence Research Unit' (SIRU) to be fully operational by 1 July 2018.<sup>47</sup>
- 1.46 In its review of the ICAC's 2014-15 and 2015-16 annual reports, to help foster oversight of the new proactive approach, the Committee recommended that in its future annual reports, the ICAC include details about the number of inquiries it had commenced on its own initiative during the reporting year, versus the number activated on the basis of complaints and notifications of alleged corrupt conduct.<sup>48</sup>
- 1.47 To foster further oversight and transparency, and given evidence discussed below that under the new proactive approach the ICAC will develop and use new systems, processes and methodologies to identify emerging trends and corruption risks; the Committee considers the ICAC should also publish the following details in its annual reports:
- the specific areas of the public sector found to be at high risk of corruption by the ICAC as a result of the proactive exercise of its jurisdiction;
  - any areas of emerging and potential public sector corruption risk, identified by the ICAC as result of the proactive exercise of its jurisdiction; and
  - the high level details of the methodologies, systems and processes used by the ICAC in proactively exercising its jurisdiction.
- 1.48 The Chief Commissioner told the Committee about the ongoing objectives of the SIRU following its establishment. He indicated that it would:

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<sup>45</sup> See Committee on the ICAC, *Review of the 2014-2015 and 2015-2016 Annual Reports of the Independent Commission Against Corruption*, p14; see also Hon Peter Hall QC, *Transcript of Evidence*, 20 November 2017, p2.

<sup>46</sup> Hon Peter Hall QC, *Transcript of Evidence*, 20 November 2018, p6.

<sup>47</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, pp10-11.

<sup>48</sup> Committee on the ICAC, *Review of the 2014-2015 and 2015-2016 Annual Reports of the Independent Commission Against Corruption*, p13, recommendation 1.

- Use strategic intelligence methodologies to identify individuals, organisations, departments or other entities who are involved in corrupt activities, so that they can be referred to the investigation division.
- Develop strategic intelligence products that will inform and guide the ICAC's senior executive in the allocation of the ICAC's resources.
- Develop a system of strategic intelligence products which may help to identify emerging trends, issues, hotspots, corruption risks or threats to be referred to the ICAC's corruption prevention division.
- Assist the ICAC's assessments section to produce regular strategic intelligence products for distribution within the ICAC to inform and guide staff on emergent risks and patterns or trends.<sup>49</sup>

1.49 The Chief Commissioner also stressed that the SIRU would interface with the investigations *and* corruption prevention divisions of the ICAC and it would not be subsumed into one or the other because its work is important to both:

I have taken the view that it is better to have this unit interfacing with both investigations and corruption prevention...because...it is equally important for both investigations and corruption prevent that they are keeping pace with known organisations and known persons whom we suspect are engaged in corrupt activities. The gaps in the corruption controls are identified as of direct relevance to corruption prevention work. If it is left as part of corruption prevention...I fear it would not feed into investigations...to ensure that the strategic intelligence can be used in an operational sense in directing and facilitating investigations and lines of investigation; in other words, it is an agency that sits in the middle.<sup>50</sup>

1.50 On the subject of resourcing, the Chief Commissioner had also told the Committee in November 2017 that extra resources would be needed to develop the ICAC's proactive investigation capacity, including two specialist intelligence analysts and new computer-based capability.<sup>51</sup> At the Committee's hearing on 1 June 2018, the Chief Commissioner confirmed that as a result of the budget increases discussed above, the two specialist intelligence analysts have now been recruited, and that the additional capital funding of \$500,000 over the forward estimates period to 2021-22 will allow the upgrade or replacement of various information, communication and technological equipment to meet operational requirements.<sup>52</sup>

1.51 The Chief Commissioner also provided more concrete details about what these resources will enable the SIRU to do to assist in the ICAC's investigations. He told the Committee:

Our databases are immense. Names become very familiar to us over time and different investigations. Those names are sometimes disguised behind, if you like, corporate entities. To be able to mine and take hold of all this disparate information

<sup>49</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p11.

<sup>50</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p18.

<sup>51</sup> Hon Peter Hall QC, *Transcript of Evidence*, 20 November 2017, p5.

<sup>52</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, pp11&16.

involving familiar entities is a formidable task. The idea of this strategic intelligence approach is to be able to, through sophisticated data systems, which we are acquiring or have already acquired, will facilitate the cross-referencing and identifying patterns...which will inform our investigations.<sup>53</sup>

- 1.52 Following from this, the Chair asked what the SIRU would do once it had identified such a pattern and Mr John Hoitink, Executive Director, Investigations Division indicated that the SIRU would refer the information to the ICAC's Assessment Panel, like any other complaint within the ICAC's jurisdiction, for a decision about whether further investigation is warranted:

...Their role will be to gather the data that is required to assess the information they have got and then that information will go through the normal assessment processes the same as any other complaint that comes in.<sup>54</sup>

- 1.53 The Chief Commissioner also indicated that at the time of the Committee's hearing, the ICAC was already trialling new intelligence-led methods in its investigations:

The Investigation Division is currently trialling intelligence-led investigation theory on a preliminary investigation referred to the Division from the Assessment Panel. This process requires the operational intelligence analysts to gather intelligence in relation to the matter to allow the chief investigator to be better informed when deciding to move forward or not in relation to the matter. The process also allows for better allocation of investigative resources.<sup>55</sup>

## **Prosecutions and the ICAC's Liaison with the Office of the Director of Public Prosecutions**

### ***The Committee will continue to monitor prosecution timelines***

- 1.54 Liaison between the ICAC and the ODPP is conducted in accordance with a Memorandum of Understanding (MoU).<sup>56</sup> In cases where the ICAC considers that there may be grounds to prosecute a person for a criminal offence, a brief of evidence is prepared for consideration by the ODPP. In the 2016-2017 reporting period, the ICAC recommended the advice of the ODPP be obtained about the possible prosecution of 17 people for various criminal offences.<sup>57</sup>
- 1.55 There is considerable public interest in timely prosecutions following ICAC investigations. However, there have been issues in the past regarding the time taken for the ICAC to furnish briefs of evidence to the ODPP and the time taken by the ODPP to provide decisions on briefs of evidence referred by the ICAC.
- 1.56 The Committee is satisfied, based on evidence from the ICAC and the Inspector, discussed below, that unacceptable delay in this area is not currently an issue. In addition, the Committee accepts that timelines will vary according to the matters

<sup>53</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p19.

<sup>54</sup> Mr John Hoitink, *Transcript of Evidence*, 1 June 2018, p19; see also ICAC, *Annual Report 2016-2017*, p14, ICAC website: <https://www.icac.nsw.gov.au/docman/about-the-icac/corporate-reporting/5023-icac-annual-report-2016-17/file>, for an account of the ICAC's assessment process.

<sup>55</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p19.

<sup>56</sup> ICAC and ODPP, *Memorandum of Understanding*, 22 March 2018; copy provided to the Committee on 6 September 2018.

<sup>57</sup> ICAC, *Annual Report 2016-2017*, p51.

being considered, for example, the complexity of the legal and factual issues involved, the bulk of the material, and whether related matters are currently before the courts.

1.57 In this context, the Committee considers that timeline figures provided by the ICAC, and discussed below, are reasonable. The Committee is also pleased that the ICAC is taking steps to further expedite processes with the introduction of an electronic briefing system. The Committee will continue to monitor this area.

1.58 At its hearing on 1 June 2018, the Committee asked the ICAC about current timeframes for the provision of briefs and decisions on briefs. The Chief Commissioner responded that, while time lags were a problem historically, this is no longer the case:

In terms of the history of matters referred to the DPP, there was a history of long time lags...Those days are over. There are much more efficient systems.<sup>58</sup>

1.59 Further, Mr Roy Waldon, Executive Director of the ICAC's Legal Division, told the Committee that the ICAC has recently renewed its MoU with the ODPP. This facilitates close liaison between the parties and if delay does emerge, they communicate about how to remedy it. Mr Waldon also stated that the ICAC is going to move from paper to electronic briefs to speed up processes.<sup>59</sup>

1.60 In response to a question about whether targets are set for the time taken for the ICAC to furnish briefs of evidence to the ODPP, and for the ODPP to provide decisions on those briefs, Mr Waldon also indicated that these would be hard to set because of the varying complexity of matters:

It is a little bit difficult because some briefs we send are fairly straightforward and they are not complex and certainly they should be dealt with quite speedily. Other matters have quite a large degree of complexity about them. For example, the mining matters would fall within that category...It rather depends on the nature of the matter and whether we are talking about a complex brief, how many people might be involved and possible offences.<sup>60</sup>

1.61 The ICAC also provided a document setting out timelines that had been achieved for briefs that were with the ODPP for advice as at June 2018; and prosecution timeframes for various ICAC investigations concluded between 2011 and 2017. The document confirms that timeframes vary according to the matter. The timeframe for the ICAC to forward a brief to the ODPP following the conclusion of an ICAC investigation varied from anywhere between a couple of weeks to over one year. Similarly, the time taken for the ODPP to provide the ICAC with a decision on a brief took anywhere from seven months to two years.<sup>61</sup>

1.62 For his part, the Inspector agreed with the ICAC that while there was an historical problem with prosecution timelines, the position has now improved:

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<sup>58</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p19.

<sup>59</sup> Mr Roy Waldon, *Transcript of Evidence*, 1 June 2018, p20.

<sup>60</sup> Mr Roy Waldon, *Transcript of Evidence*, 1 June 2018, p20.

<sup>61</sup> ICAC, *Answers to Questions Taken on Notice*, 1 June 2018, 'Attachment - Prosecution Timelines'.

That was an issue way back in 2004-05...[T]he issue then was the significant and disturbing delays in deciding prosecution or no prosecution by the DPP. My observation is that that issue has been materially improved under the present regime and the relations between the DPP and the Commission seem to be working satisfactorily.<sup>62</sup>

***The ICAC must provide all disclosable evidence to the Director of Public Prosecutions***

1.63 In cases where the ICAC has referred a matter to the ODPP to consider whether a person should be prosecuted for a criminal offence, it is essential that the ICAC provides the ODPP with all disclosable evidence about the matter, to ensure that the person is dealt with appropriately and fairly.

1.64 At the Committee's hearing on 1 June 2018, the ICAC confirmed that it takes these requirements very seriously and that it is working with the ODPP to ensure optimal performance in this area. The Committee will continue to monitor this and it notes the Inspector's advice that the appropriateness of the ICAC's procedures in this area are a suitable matter about which he could conduct an assessment.<sup>63</sup>

1.65 Under the MoU that exists between the ODPP and the ICAC, the ICAC is not required to provide the ODPP with all evidence that it has collected in a matter. Rather, it is to provide admissible evidence (that is, evidence that could be used to prosecute a person), and disclosable material, for the ODPP to consider.<sup>64</sup> The DPP, Mr Lloyd Babb SC has previously explained to the Committee the difference between admissible evidence and disclosable material:

They are not necessarily the same thing because there is a need to disclose material that may assist an accused person or lead to a line of inquiry that may assist an accused person.<sup>65</sup>

1.66 As discussed above, the ICAC has recently established a committee, chaired by Commissioner McDonald, to develop policies and procedures to ensure that exculpatory material is disclosed, and the ICAC has confirmed that part of this committee's role is to ensure that the ICAC's disclosure requirements to the ODPP are met.<sup>66</sup> The Chief Commissioner told the Committee:

...we met with the DPP. He came to our offices possibly about six weeks ago from recollection. We all discussed issues of importance which include...the questions of disclosure. Like us, he is very concerned to ensure that everything is done so that information does not get overlooked – I am talking about inadvertent overlooking of material that his office needs. We discussed the question of needing to constantly update our database systems...to ensure that we are able to utilise technology to the

<sup>62</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p9.

<sup>63</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p9.

<sup>64</sup> ICAC and ODPP, *Memorandum of Understanding*, 22 March 2018; copy provided to the Committee on 6 September 2018.

<sup>65</sup> Mr Lloyd Babb SC, *Transcript of Evidence: ICAC Committee's Review of the Inspector's Report to the Premier: The Inspector's Review of the ICAC*, 8 September 2016, p8.

<sup>66</sup> Mr Stephen Rushton SC, *Transcript of Evidence*, 1 June 2018, p16.

best advantage to minimise human error. It was at that meeting that we discussed and decided upon establishing the committee...<sup>67</sup>

- 1.67 The Chair also asked the Inspector whether proper disclosure of material to the ODPP is an issue that he would examine, noting that it is one of the Inspector's statutory functions to assess the effectiveness and appropriateness of the procedures of the ICAC relating to the legality or propriety of its activities:

**The CHAIR:** Is it not an issue for you in terms of the process of the ICAC, that you identify what the process is for the purpose of deciding which material goes up to the DPP? Is that not a process which you would be interested to ensure is proper for the DPP to be able to make a determination on?

**Mr McClINTOCK:** Absolutely...that is on my roughly notional list of the things I am going to look at.<sup>68</sup>

## Public Perceptions of the ICAC

### *The ICAC must be held to account but must also be able to respond to criticism*

- 1.68 During the Committee's hearing on 1 June 2018, the Chief Commissioner raised concerns that sometimes ill-informed public criticism is levelled at the ICAC, and that this can adversely affect public confidence in the organisation. The Chief Commissioner stated:

Like any other entity the Commission and its work is open to informed critical analysis: In particular, should it fail to meet the expected standards set for it...However, that said, when ill-informed criticism is directed at the Commission and its staff, I see it as my responsibility to correct the record lest public confidence in the Commission be improperly undermined.<sup>69</sup>

- 1.69 The ICAC has formidable covert and coercive powers and the Committee agrees with the Chief Commissioner that it must be held accountable should it not meet the high standards required of it. However, the Committee also accepts that criticism of the ICAC will not always be well informed, not least because its role is sometimes confused with that of criminal justice agencies, when its statutory functions are quite different.<sup>70</sup> Where ill-informed criticism does occur it can have an unfair adverse impact on public perceptions of the ICAC.

- 1.70 There are various avenues for the ICAC to respond to criticism. One of these is through the Inspector. The Inspector can publish reports about complaints made to him or her about the ICAC and can also report on investigations s/he has started on his/her own initiative (e.g. where there are public allegations concerning the ICAC's conduct, but no complaint has been lodged with the Inspector).<sup>71</sup> Importantly, the Inspector cannot include an adverse finding or

<sup>67</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p19.

<sup>68</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p9; see also *Independent Commission Against Corruption Act 1988*, s57B(1)(d).

<sup>69</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p12.

<sup>70</sup> See for example the ICAC's submission to the Committee's 2016 Review of the Inspector's Report to the Premier: *The Inspector's Review of the ICAC*, Submission 2, ICAC, pp21-23, for an account of the difference between the ICAC's functions and criminal justice functions.

<sup>71</sup> See *Independent Commission Against Corruption Act 1988*, ss57B and 77A.



opinion about the ICAC in such a report without giving the ICAC a reasonable opportunity to respond, and the Inspector must include within the report a summary of the ICAC's response that disputes the adverse finding, if the ICAC so requests.<sup>72</sup>

- 1.71 Similarly, although it is not the role of the Committee to investigate or reconsider individual matters, at the Committee's public hearing on 1 June 2018 the Chief Commissioner had the opportunity to put the ICAC's position regarding criticism it had received about one of its operations, Operation Dewar. The Chief Commissioner told the Committee:

We have considered whether or not issuing responses to media articles or putting something on the website would suffice or go a long way to properly informing the public about what the situation is. We are not convinced that engaging with, for example, the media in a dialogue and a debate about issues is going to be effective...[M]y ability to respond to a complaint when asked by the Inspector and the Parliamentary oversight mechanism does provide, I think, a good forum, a proper forum where these matters can be dealt with and well-informed information or explanation is given. The problem is, however, that much time goes by before we can get before you or the Inspector.<sup>73</sup>

- 1.72 Operation Dewar was an ICAC investigation involving a former State Emergency Service Commissioner, Mr Murray Kear. In May 2014, the ICAC found that Mr Kear had engaged in corrupt conduct by dismissing an employee substantially in reprisal for her making allegations to the ICAC about a third person.<sup>74</sup> Following Operation Dewar, Mr Kear was prosecuted in the NSW Local Court for taking detrimental action against a whistle blower under section 20(1) of the *Public Interest Disclosure Act 1994*, but this prosecution was unsuccessful.

- 1.73 The magistrate who acquitted Mr Kear raised concerns that the ICAC had not provided the DPP or Mr Kear with certain records of interview taken by the ICAC that contained relevant exculpatory material. As a result, the magistrate found that the investigation into the alleged offence was conducted in an unreasonable and improper manner and ordered the DPP to pay Mr Kear's costs pursuant to section 213 of the *Criminal Procedure Act 1986*.<sup>75</sup> These events gave rise to significant public criticism of the ICAC. It is understood that this decision has not been appealed and that the DPP has since paid the costs.<sup>76</sup>

- 1.74 At the Committee's hearing, the Chief Commissioner put the ICAC's position in relation to the matter:

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<sup>72</sup> *Independent Commission Against Corruption Act 1988*, s79A.

<sup>73</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p14; see also *Independent Commission Against Corruption Act 1988*, s64(2).

<sup>74</sup> ICAC, *Investigation into the conduct of the Commissioner of the NSW State Emergency Service – Operation Dewar*, May 2014, p5, ICAC website: <http://www.icac.nsw.gov.au/docman/investigations/reports/4378-investigation-into-the-conduct-of-the-commissioner-of-the-nsw-state-emergency-service-operation-dewar/file>, viewed 5 September 2018.

<sup>75</sup> Magistrate Grogin, *Application for Costs Judgment*, Local Court of NSW, 25 May 2016, copy provided to the Committee on 30 May 2016.

<sup>76</sup> See Mr Roy Waldon, *Transcript of Evidence*, 1 June 2018, p20.

First, there had been no improper withholding of any evidence in the public inquiry or at all that could in any way be considered to have constituted exculpatory evidence; secondly...the evidence in support of the corrupt conduct findings made by the Commission was both cogent and compelling, and there was no basis for the conclusion that investigators improperly chose not to serve evidence on witnesses or improperly withheld relevant evidence from the former Commissioner of the SES because the evidence was contrary to the prosecution case; thirdly...the investigation in Operation Dewar and the conduct of the public inquiry in it met the highest ethical and professional standards; and, fourthly...the analysis of the decision of the learned magistrate, including criticisms of the Commission and criticisms of the Office of the Director of Public Prosecutions was, with the greatest respect to him, both misconceived and wholly erroneous.<sup>77</sup>

- 1.75 This matter was also the subject of a complaint to the Inspector, lodged by Mr Kear on 1 June 2016. In particular, Mr Kear complained that the ICAC did not disclose or lead as evidence in its public inquiry for Operation Dewar, material that it possessed that was exculpatory of him. Similarly, Mr Kear complained that because of the failure to consider the exculpatory material, the findings of corrupt conduct against him were wrongly made. In addition, Mr Kear complained that the ICAC failed to provide the exculpatory material to the DPP and stated that the prosecution should not have been commenced.<sup>78</sup>
- 1.76 In a report furnished to the Presiding Officers in June 2018, the Inspector dismissed Mr Kear's complaint, stating that Mr Kear had failed to establish that the ICAC had engaged in abuse of power, impropriety, other forms of misconduct or maladministration, being the matters the Inspector is able to determine in response to a complaint as per section 57B of the ICAC Act.<sup>79</sup>
- 1.77 As noted above, the ICAC's new procedural fairness guidelines will play an important role in addressing concerns that people who appear before the ICAC are treated fairly and that the ICAC's procedures in reaching its findings are optimal.

### Recent Complaint Figures

#### ***The Committee will continue to monitor figures around complaints made to the ICAC***

##### *Matters reported to the ICAC*

- 1.78 During its last review of the ICAC's annual reports, the Committee noted that there was a decline in the number of matters reported to the ICAC over the 2014-2015 and 2015-2016 reporting periods.<sup>80</sup> The ICAC stated that one possible reason for the decline was a lower number of high profile public inquiries

<sup>77</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p12.

<sup>78</sup> Inspector of the ICAC, *Report concerning a complaint by Mr Murray Kear about the conduct of the ICAC in Operation Dewar*, June 2018, p2, Inspector's website: <https://www.oicac.nsw.gov.au/assets/oicac/reports/special-reports/Report-concerning-a-Complaint-by-Mr-Murray-Kear-about-the-conduct-of-the-ICAC-in-Operation-Dewar-1804-Anon.pdf>, viewed 5 September 2018.

<sup>79</sup> Inspector of the ICAC, *Report concerning a complaint by Mr Murray Kear about the conduct of the ICAC in Operation Dewar*, June 2018, p2.

<sup>80</sup> Committee on the ICAC, *Review of the 2014-2015 and 2015-2016 Annual Reports of the Independent Commission Against Corruption*, p18.

conducted by the ICAC in 2015-2016.<sup>81</sup> Figures for 2016-2017, show a slight increase on those for the previous reporting year as demonstrated by the following table:

| Year      | Number of matters reported |
|-----------|----------------------------|
| 2016-2017 | 2,489                      |
| 2015-2016 | 2,436                      |
| 2014-2015 | 3,146                      |
| 2013-2014 | 3,386 <sup>82</sup>        |

*Time taken to finalise a complaint*

- 1.79 Another area of interest for the Committee is the amount of time that the ICAC would generally expect to take to finalise a complaint from first receiving it, to preliminary investigation, to full investigation, if applicable. The Committee considers that targets are important in providing complainants, persons subject to investigations, and the public (where relevant) with an idea of when the results of an investigation can be expected. The Committee commends the ICAC for exceeding its targets in this area for the 2016-2017 reporting period.
- 1.80 All complaints and reports of corrupt conduct received by the ICAC are evaluated by the Assessments Section to determine whether they are within the ICAC's jurisdiction and whether further investigation is warranted. The Assessments section reports matters within jurisdiction to the Assessment Panel, made up of members of the ICAC's senior executive, with a recommendation for action to be taken. The Assessment Panel makes a final determination about the appropriate action to take.<sup>83</sup>
- 1.81 Options include referring the complaint to another agency; requesting that another agency conduct an investigation and report the outcome to the ICAC in writing; requesting further information; providing corruption prevention analysis or advice; or undertaking a preliminary investigation.<sup>84</sup>
- 1.82 The Assessments Section aims to provide straightforward matters to the Assessment Panel within an average of 28 days of receipt, and complex matters within an average of 42 days of receipt. In 2016-2017, the ICAC exceeded these targets:

<sup>81</sup> ICAC, *Annual Report 2015-2016*, p15, ICAC website, <https://www.icac.nsw.gov.au/docman/about-the-icac/corporate-reporting/4901-annual-report-2015-16-final/file>, viewed 25 September 2018.

<sup>82</sup> See ICAC, *Annual Report 2015-2016*, p15; and ICAC, *Annual Report 2016-2017*, pp14-15, noting also that during the 2016-2017 reporting period, the ICAC changed the manner in which it calculates the number of matters received.

<sup>83</sup> See ICAC, *Annual Report 2016-2017*, pp14&20-23.

<sup>84</sup> ICAC, *Annual Report 2016-2017*, pp20-23.

| Measure  | Target | Achievement |
|--|--------|-------------|
| Average days to present straightforward matter to Assessment Panel | 28     | 17          |
| Average days to present a complex matter to the Assessment Panel   | 42     | 40          |

1.83 Should a matter progress to preliminary investigation, the ICAC's target is to complete 80 per cent of preliminary investigations within 120 days of the decision to commence the investigation. The ICAC exceeded this target in 2016-2017, completing 83 per cent of its preliminary investigations within 120 days.<sup>85</sup>

1.84 If a matter is escalated to a full investigation or 'operation' the time target for completing the confidential phase of the investigation is extended to 16 months and the ICAC aims to complete 80 per cent of matters within that period. The ICAC exceeded this target in 2016-2017, completing 89 per cent of operations within 16 months.<sup>86</sup>

### The ICAC's Corruption Prevention Work

#### *The Committee will continue to monitor the ICAC's corruption prevention work*

1.85 While the wider community often focusses on the ICAC's role of investigating and exposing public sector corruption, the ICAC also has important statutory functions to prevent corruption including through educating public officials and the public about strategies to combat corruption, and about its detrimental effects.<sup>87</sup> In its 2016-2017 annual report, the ICAC highlighted the work that its Corruption Prevention Division was undertaking around corruption prevention projects; the provision of corruption prevention advice; and education.

#### *Corruption prevention projects*

1.86 In 2016-2017, the ICAC released three significant corruption prevention publications in the following areas:

- Facilities maintenance: The ICAC advised that each year it receives many complaints alleging corrupt conduct in the provision of maintenance services. To address the surrounding issues, the ICAC released a major corruption prevention publication on this topic in February 2017, entitled *Controlling corruption opportunities in the provision of maintenance services*. The

<sup>85</sup> ICAC, 2016-2017 Annual Report, p26.

<sup>86</sup> ICAC, 2016-2017 Annual Report, p26.

<sup>87</sup> *Independent Commission Against Corruption Act 1988*, s13(d)-(k).

publication included case studies, better practice tips and design principles aimed at minimising corruption in this area.<sup>88</sup>

- Corrupt conduct and organisational change: The ICAC advised that it has identified failed or mismanaged organisational change initiatives as a possible trigger for corrupt conduct. Hence, in March 2017, the ICAC released *Keeping it together: systems and structures in organisational change*. This publication encourages agencies to consider the corruption implications of change projects, incorporating a number of case studies and suggestions.<sup>89</sup>
- Aboriginal land council governance: Partly in response to corrupt conduct findings the ICAC made in 2016-2017 against public officials at two Local Aboriginal Land Councils (LALCs), the ICAC released a publication in May 2017 entitled *Governance and regulation in the NSW Aboriginal land council network*. It contains 11 suggestions to improve the governance of LALCs and to strengthen regulatory frameworks, also highlighting a number of good practices that have been adopted by some LALCs.<sup>90</sup>

1.87 At the Committee's hearing on 1 June 2018, members noted the importance of the Corruption Prevention Division's work, in particular, undertaking general, proactive reviews in areas of high risk for corruption, so that it might produce corruption prevention recommendations for broader application (i.e. not in response to a more specific operation conducted in accordance with the ICAC's investigative functions). Lobbying was identified as a particularly important area.<sup>91</sup>

1.88 In response, the Chief Commissioner indicated that in future the Corruption Prevention Division intends to undertake one major project a year, in addition to its usual activities, for which it will engage with stakeholders to obtain evidence. The Chief Commissioner indicated that procurement was an area being considered for such a project:

We are considering whether that special project should be in respect of procurement. We keep getting complaints and notifications about procurement abuse. It seems to me that there is a place for a more general review. All the agencies have the requisite database systems and so on to detect and to prevent procurement abuse, yet we still receive complaints. There is something wrong, either with the system or the human factors that go with the system, that accounts for the continued unhappy story of procurement abuses, which cost the State dearly over time.<sup>92</sup>

1.89 On the subject of lobbying, the Chief Commissioner also advised that this is a very important topic for the ICAC and that it was considering whether it should be made the subject of a special project:

<sup>88</sup> ICAC, *2016-2017 Annual Report*, p31.

<sup>89</sup> ICAC, *2016-2017 Annual Report*, p31.

<sup>90</sup> ICAC, *2016-2017 Annual Report*, p32.

<sup>91</sup> See *Transcript of Evidence*, 1 June 2018, pp21-22.

<sup>92</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p22.

[L]obbying...was last examined by the Commission 10 years ago. It is time for us to consider whether we should have another look at that area. Whether it should be a special project is yet to be determined. As we speak, work is being done on examining areas such as lobbying by way of a comparative exercise to see what the standard is in other States and other countries and jurisdictions to determine whether that should be the special project for the next 12 months.<sup>93</sup>

1.90 The Chief Commissioner also told the Committee that were the ICAC to conduct a special project on lobbying, the approach would probably differ from that taken in the past:

That would involve engaging, on a consultancy basis, two esteemed and highly regarded experts in the field. One might be a professor of law and one might be someone familiar with, for example, lobbying, to undertake the interfacing with stakeholders, politicians and others, and then to work with our Corruption Prevention Division. The outcome would have the authority of recognised experts in the field and of the Commission itself.<sup>94</sup>

*Corruption prevention advice*

1.91 The ICAC provides advice on ways to prevent and combat corrupt conduct. The advice spans minor issues dealt with over the telephone, to major issues involving detailed discussions with public authorities.<sup>95</sup> The ICAC's website states that the ICAC's prevention advice line is 'intended as an advisory service to assist public officials to reduce the risk of corruption occurring in their organisations'.<sup>96</sup> In the last five years there have been fluctuations in the number of requests for advice, although numbers have remained relatively steady:

| Requests for Advice |                    |
|---------------------|--------------------|
| Reporting period    | Number of requests |
| 2012-2013           | 106                |
| 2013-2014           | 102                |
| 2014-2015           | 134                |
| 2015-2016           | 94                 |
| 2016-2017           | 105 <sup>97</sup>  |

<sup>93</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p22.

<sup>94</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p22.

<sup>95</sup> ICAC, *2016-2017 Annual Report*, p32.

<sup>96</sup> ICAC website, <https://www.icac.nsw.gov.au/preventing-corruption/faqs-about-preventing-corruption?view=icefaq>, viewed 6 September 2018.

<sup>97</sup> See ICAC, *Annual Report 2016-2017*, p32; ICAC, *Annual Report 2015-2016*, p36; and ICAC, *Annual Report 2014-2015*, p39, ICAC website, <http://www.icac.nsw.gov.au/documents/about-the-icac/corporate-reporting/4675-annual-report-2014-15/file>, viewed 24 September 2018.

*Education*

- 1.92 The ICAC also delivers corruption prevention workshops free of charge to the public sector and delivers corruption prevention presentations at speaking engagements. The Committee noted a marked decline in the number of workshops and speaking engagements delivered over the 2016-2017 reporting period, which the ICAC advised was partly due to resourcing constraints (see below). The Committee will continue to monitor this area in light of the recent funding increases to the ICAC, discussed earlier.
- 1.93 Over the 2016-2017 reporting period the ICAC delivered 74 training workshops to over 1,300 people. This was a substantial reduction from the previous reporting year, during which 107 workshops were delivered. The ICAC advised that this was partly due to a large number of cancellations and postponements received during the reporting year – 22 compared with 8 in the previous reporting year, and that these were largely due to internal restructures and council mergers.<sup>98</sup> The number of ICAC-initiated workshops also decreased from 34 in 2015-2016, to 23 in 2016-2017, and the ICAC advised that this was due to staffing constraints.<sup>99</sup>
- 1.94 The number of workshops delivered over the last five reporting years appears in the following table. While there were fluctuations over that period, figures for 2016-2017 were particularly low:

| <b>Corruption prevention workshops delivered</b> |                    |
|--|--------------------|
| <b>Reporting period</b>                          | <b>Number</b>      |
| 2016-2017  | 74                 |
| 2015-2016  | 107                |
| 2014-2015  | 85                 |
| 2013-2014  | 90                 |
| 2012-2013  | 107 <sup>100</sup> |

- 1.95 The ICAC also advised of a decline in the number of corruption prevention speaking engagements delivered during the 2016-2017 reporting year. Over that time, the ICAC delivered 32 speaking engagements to approximately 1,200 attendees. This was a significant reduction on the 68 speaking engagements delivered in 2015-2016 and the ICAC advised that the reduction was mainly due to staff vacancies and resource constraints that applied during 2016-2017. A table outlining the number of speaking engagements delivered over the last five

<sup>98</sup> ICAC, *Annual Report 2016-2017*, p33.

<sup>99</sup> ICAC, *Annual Report 2016-2017*, pp33-34.

<sup>100</sup> ICAC, *Annual Report 2016-2017*, p34; and ICAC, *Annual Report 2014-2015*, p41.

years follows. While the table shows fluctuations over the five year period, figures for 2016-2017 were again particularly low:

| Corruption prevention speaking engagements delivered |                   |
|--|-------------------|
| Reporting period                                     | Number            |
| 2016-2017  | 32                |
| 2015-2016  | 68                |
| 2014-2015  | 108               |
| 2013-2014  | 79                |
| 2012-2013  | 69 <sup>101</sup> |

1.96 Since 2001, the ICAC has also operated a Rural and Regional Outreach Program, visiting regional centres in NSW to provide corruption prevention information and advice to the wider NSW community. During the 2016-2017 reporting period the ICAC visited the North Coast region of NSW to deliver a range of workshops and a community leaders' lunch. The ICAC's workshop and speaking offerings are also made available to the staff of non-metropolitan agencies.<sup>102</sup>

1.97 At the Committee's hearing on 1 June 2018, the Chief Commissioner provided an update regarding this regional outreach, advising that the ICAC had visited Orange, Dubbo, Forbes and other regional centres to interface with community leaders, explain the ICAC's role and provide workshops. The Chief Commissioner advised that the NSW Ombudsman had also been involved in this regional outreach and that he and the Ombudsman had addressed those in attendance at Orange. In addition, the Chief Commissioner stated that further regional outreach was planned for Wollongong later in 2018 and he stressed the importance of the ICAC's regional work:

I believe it is important that the Commission has a presence in regional areas. I think the ICAC – and I mean no criticism of this – has been very Sydney-centric in its operations. There is no reason to believe that the sort of problems we uncover stop at the boundaries of Sydney, and we know from the reports of investigations interstate that corrupt activity, of course, does occur in small, closed communities sometimes, in regional cities, and it is important that they are on our radar as well as the city of Sydney.<sup>103</sup>

<sup>101</sup> ICAC, *Annual Report 2016-2017*, p35; and ICAC, *Annual Report 2014-2015*, p40. Note that the 2016-2017 annual report lists 108 speaking engagements delivered in 2014-2015, updated from the 2014-2015 report which states that 109 speaking engagements were delivered in 2014-2015.

<sup>102</sup> ICAC, *Annual Report 2016-2017*, p36.

<sup>103</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p17.



## Professional Development Program

### *The ICAC is establishing a professional development program for its staff*

- 1.98 During its hearing on 1 June 2018, the Committee was interested to hear that the ICAC had begun establishing a professional development program. The Committee commends the ICAC's efforts in this area, noting that knowledgeable, well-trained staff are an essential resource if the ICAC is to carry out its important functions successfully.
- 1.99 The Chief Commissioner told the Committee that earlier in 2018, he had appointed a committee headed by him and consisting of the Executive Directors of the ICAC's Corruption Prevention, Investigation and Legal Divisions, and a principal lawyer from the Legal Division. The aim of the committee is to provide ICAC staff with training programs that address a number of areas including ethical, legal, statutory, procedural and corruption prevention.<sup>104</sup>
- 1.100 The Chief Commissioner further stated that ICAC staff had already had the benefit of the following presentations as a result of the new program:
- On 21 February 2018, the Hon Keith Mason QC, AO, formerly the President of the NSW Court of Appeal, and Mr Simon Longstaff AO of the Ethics Centre delivered a presentation covering public trust principles essential to the work of the ICAC.
  - On 9 May 2018, Ms Jill Kiely, Managing Director of the ICAC referral unit of the ODPP delivered a presentation discussing disclosure, electronic service of briefs, and the early appropriate guilty pleas reform.<sup>105</sup>
- 1.101 In addition, the Chief Commissioner advised that a further presentation by one of the ICAC's senior forensic accountants on forensic accounting principles had been scheduled for 3 July 2018.<sup>106</sup>

## Inspector of the ICAC

### Liaison between the Inspector and the ICAC

#### *Arrangements are in place to promote a productive working relationship between the ICAC and the Inspector*

- 1.102 As detailed earlier in this report, the Inspector has an important role overseeing the ICAC's work, and a productive working relationship between the Inspector and the ICAC is essential to allow them to perform their respective functions efficiently and effectively.<sup>107</sup> The Committee understands that the working relationship between the ICAC and Inspector is proceeding well and it will continue to monitor this area.

<sup>104</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p13.

<sup>105</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p13.

<sup>106</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p13.

<sup>107</sup> See *Independent Commission Against Corruption Act 1988*, s57B which outlines the Inspector's principal functions.

- 1.103 Liaison between the Inspector and the ICAC is conducted in accordance with a memorandum of understanding (MoU). In September 2017, immediately following the appointment of a new Inspector, Mr Bruce McClintock SC (on 1 July 2017), and the new three member Commission (on 7 August 2017), the Committee recommended a review of the MoU to ensure that it promoted a workable relationship between the Inspector and the ICAC.<sup>108</sup> A new MoU has since been struck, signed on 2 November 2017.<sup>109</sup>
- 1.104 Following from this, the Committee was pleased to hear evidence at its 1 June 2018 hearing that the working relationship between the ICAC and the Inspector is proceeding well, with the Inspector confirming that the parties are complying with the new MoU.<sup>110</sup>
- 1.105 Similarly, the Chief Commissioner told the Committee that the working relationship between the ICAC and Inspector is very effective, incorporating appropriate levels of communication, prompt attention by the ICAC to the Inspector's requests for information, and a mutual regard by both parties' for their respective roles in promoting the public interest. The Chief Commissioner stated:

We have had two meetings with [the Inspector], as I recall, since we started simply to review any outstanding matters that he was working on that needed assistance or more information and we would make available...whatever information he was requiring... Speaking for myself, I think we have a view that although we have very different roles, at the end of the day we are working in the same direction in terms of public interest. Mr McClintock is a very experienced lawyer, very intelligent and very proactive...We commend him as a person who is obviously ideal for the role.<sup>111</sup>

### Resourcing of the ICAC Inspectorate

***The Committee will continue to monitor the resourcing of the ICAC Inspectorate to ensure that it is adequate***

- 1.106 In conducting his or her vital oversight role to ensure that the ICAC's extraordinary powers are properly exercised and adequately supervised, it is essential that the ICAC Inspector is provided with adequate resources. The Committee is satisfied that resourcing levels and arrangements are currently appropriate, and will continue to monitor this area.
- 1.107 The Inspector has been appointed to his position on a part-time basis.<sup>112</sup> In conducting its 2016 review of the ICAC, the Committee specifically considered the resourcing of the Inspectorate and recommended that the Inspector role

<sup>108</sup> Committee on the ICAC, *Review of the 2014-2015 and 2015-2016 Annual Reports of the ICAC Inspector*, Report 3/56, September 2017, p8.

<sup>109</sup> Hon Peter Hall QC, *Transcript of Evidence*, 20 November 2017, p12; see also Committee on the ICAC, *Review of the 2014-2015 and 2015-2016 Annual Reports of the Independent Commission Against Corruption*, Report 5/56, March 2018, Appendix 4.

<sup>110</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p3.

<sup>111</sup> Hon Peter Hall QC, *Transcript of Evidence*, 1 June 2018, p19.

<sup>112</sup> Inspector of the ICAC, *Annual Report for the period ending 30 June 2017*, p1, Inspectors website: <https://www.oiac.nsw.gov.au/assets/oiac/reports/annual-reports/Annual-Report-2016-2017.pdf>, viewed 24 September 2018.

continue to be part-time, with provision for an Assistant Inspector as necessary to accommodate peaks and troughs in the Inspector's workload.<sup>113</sup>

- 1.108 At present, nobody is occupying the role of Assistant Inspector and at the Committee's hearing on 1 June 2018, the Inspector indicated that he is managing his workload under current arrangements, expressing no current need for an Assistant Inspector to be appointed. A further discussion of the progress that the Inspector has made with regard to his complaint-handling and auditing functions appears below.
- 1.109 In conducting its 2016 review of the ICAC, the Committee also recommended that consideration be given to resource-sharing arrangements between the ICAC Inspectorate and LECC Inspectorate. That is, a single shared public service agency providing administrative support to both Inspectors, headed by a professional executive manager. The Committee found that this would increase the overall size of the joint administrative support available to each Inspector thereby attaining a critical mass of staff and work.<sup>114</sup> At the Committee's hearing on 1 June 2018, the Inspector told the Committee that such arrangements have now been made, and that they too are working well:

I share the resources of my office with the Inspector of the Law Enforcement Conduct Commission, Mr Terry Buddin QC. The staff is Ms Zekanovic, my principal legal advisor, and Mr Buddin's principal legal advisor, and a business coordinator, Ms Armstrong. To my observation, that arrangement has been working well. We are in the course of being about to move offices but that is not because of me. It is because Mr Buddin has inherited some functions from the Ombudsman that include a secure monitoring unit and he needs to have a place to put the two employees who will be doing that in secure circumstances, which cannot be accommodated in our existing offices.<sup>115</sup>

### **The Inspector's Complaint Handling Function**

#### ***The Committee will continue to monitor the exercise of the Inspector's complaint handling function***

- 1.110 As discussed earlier, one of the Inspector's principal functions is to deal with complaints of abuse of power, impropriety and other forms of misconduct by the ICAC or its officers.<sup>116</sup> As the current Inspector was not appointed to the position until 1 July 2017, complaint figures for the 2016-2017 reporting period relate to a time prior to his commencement as Inspector.
- 1.111 Notwithstanding this, it is clear from the Inspector's evidence, discussed below, that he has made significant progress on the carryover of complaints from previous reporting periods, having resolved most, and that he is managing his

<sup>113</sup> Committee on the ICAC, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports*, see recommendations 27 & 29, and pp33-34.

<sup>114</sup> Committee on the ICAC, *Review of the Independent Commission Against Corruption: Consideration of the Inspector's Reports*, see recommendation 25 and pp31-33.

<sup>115</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p3.

<sup>116</sup> *Independent Commission Against Corruption Act 1988*, s57B.

complaints workload well under the current part-time arrangements. The Committee will continue to monitor this area.

1.112 A table setting out complaint-handling figures for the last six reporting years appears below.<sup>117</sup>

**Table: Complaints to the ICAC Inspectorate 2011-2012 to 2016-2017**

|   | 2011-12   | 2012-13    | 2013-14    | 2014-15          | 2015-16    | 2016-17  |
|---|-----------|------------|------------|------------------|------------|--|
| <b>Total complaints under consideration in reporting period</b> | 32        | 21         | 28         | 69               | 71         | 59   |
| <b>Complaints carried over from previous reporting periods</b>  | 1         | 0          | 1          | 9 <sup>118</sup> | 38         | 43   |
| <b>New complaints received in reporting period</b>              | 31        | 20         | 27         | 60               | 33         | 16   |
| <b>Complaints finalised within current reporting period</b>     | 32 (100%) | 20 (95.2%) | 19 (67.85) | 31 (44.9%)       | 28 (39.4%) | 37 (62.7%)   |
| <b>Complaints open at end of reporting period</b>               | 0         | 1          | 9          | 38               | 43         | 22 (total) <sup>119</sup><br><br>6 (from 2016-17)<br>4 (from 2015-16)<br>12 (from 2014-15) |

<sup>117</sup> The table is based on figures contained in the annual reports of the Inspector of the ICAC for relevant reporting years. See Inspector of the ICAC, *Annual Report 2012-2013*, p14, Table 1; Inspector of the ICAC, *Annual Report 2013-2014*, pp10-12; Inspector of the ICAC, *Annual Report 2014-2015*, pp16&18; Inspector of the ICAC, *Annual Report 2015-2016*, pp14-15; Inspector of the ICAC *Annual Report for the period ending 30 June 2017*, pp10-12. All annual reports are available at the Inspector's website, <http://www.oiac.nsw.gov.au/reports/>, viewed 12 September 2018.

<sup>118</sup> The Inspector's 2014-2015 Annual Report states that eight matters were carried over from the previous reporting period, see p18, para 5.7. In contrast, the Inspector's 2013-2014 Annual Report indicates that nine complaints were carried over to the 2014-2015 reporting period, see pp11-12 and in particular para 7.2. Informal advice from the Inspectorate confirms that nine complaints were carried over from the 2013-2014 reporting period to the 2014-2015 reporting period. Of those nine complaints, the Inspectorate informally advised the Committee secretariat that one was withdrawn by the complainant and the other eight closed in the 2014-2015 reporting period: ICAC Inspectorate, email to ICAC Committee secretariat dated 17 August 2017.

<sup>119</sup> The Inspector referred to 23 complaints in his annual report, not 22, see Inspector of the ICAC *Annual Report for the period ending 30 June 2017*, p13; and in his evidence to the Committee, see Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p2. Informal advice from the Inspectorate explained that the discrepancy is because one complaint has been counted as two as it was sent to the Inspectorate twice, one year apart: ICAC Inspectorate, email to ICAC Committee secretariat dated 18 September 2018.

- 1.113 The table shows that complaint numbers for the 2016-2017 reporting year were lower than usual. This contrasts with the 2014-2015 reporting year when there was a marked increase in the number of new complaints, and confirms that peaks and troughs do occur in the Inspector's workload.
- 1.114 Another noticeable feature of the statistics is that the percentage of complaints finalised within the reporting period steadily decreased from the 2011-2012 to 2015-2016 reporting periods, but rose again in 2016-2017. While 100 per cent of matters were finalised within the 2011-2012 reporting year, this steadily decreased to 39.4 per cent in 2015-2016, before climbing to 62.7 per cent in 2016-2017.
- 1.115 As at 30 June 2017, there were 22 outstanding matters that the new Inspector inherited upon his appointment the following day. At a 7 August 2017 appearance before the Committee, for its inquiry into protections for people who make voluntary disclosures to the ICAC, Mr McClintock told the Committee that he expected to be able to manage this carryover on a part-time basis.<sup>120</sup> As foreshadowed above, in an update to the Committee on 1 June 2018, the Inspector gave evidence indicating that this was the case – he had resolved all but five of the 22 complaints.<sup>121</sup> At the time of writing further progress had been made:
- The majority of the 22 complaints had been dismissed by the Inspector, and dealt with by letter to the complainant.<sup>122</sup>
  - Some had been discontinued following advice from complainants that they did not wish to continue with their complaint.<sup>123</sup>
  - Five had been dealt with via Inspector's report, furnished to the Presiding Officers.<sup>124</sup>
  - Two were outstanding, and the Inspector indicated that these would be the subject of a report furnished to the Presiding Officers.<sup>125</sup>

<sup>120</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 7 August 2017, p37.

<sup>121</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p2.

<sup>122</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p2.

<sup>123</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p2.

<sup>124</sup> See: Inspector of the ICAC, *Report (and Supplementary Report) concerning a complaint by Mr John Atkinson about the conduct of the ICAC in Operation Jasper – 12 April 2018; Report concerning a complaint by Mr Geoffrey McCloy about the Conduct of the ICAC in Operation Spicer – 12 April 2018; Report concerning a complaint by NuCoal Resources Ltd about the conduct of the ICAC in Operation Acacia – 13 June 2018; Report concerning a complaint by Mr Murray Kear about the conduct of the ICAC in Operation Dewar – 13 June 2018; and Report concerning a complaint by Mr John McGuigan, Mr Richard Poole, Cascade Coal Pty Ltd, Mount Penny Coal Pty Ltd and Glendon Brook – 26 June 2018*, available at Inspector's website: <https://www.oicac.nsw.gov.au/reports/>, viewed 12 September 2018.

<sup>125</sup> See Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p2 where the Inspector mentioned five outstanding reports. At the time of writing, three of these had since been furnished: *Report concerning a complaint by NuCoal Resources Ltd about the conduct of the ICAC in Operation Acacia – 13 June 2018; Report concerning a complaint by Mr Murray Kear about the conduct of the ICAC in Operation Dewar – 13 June 2018; and Report concerning a complaint by Mr John McGuigan, Mr Richard Poole, Cascade Coal Pty Ltd, Mount Penny Coal Pty Ltd and Glendon Brook – 26 June 2018*, available at Inspector's website: <https://www.oicac.nsw.gov.au/reports/>, viewed 12 September 2018.

***There are limits to the Inspector's complaint handling function***

- 1.116 At the Committee's hearing on 1 June 2018, the Inspector noted that there are limits to his complaint handling function under the ICAC Act. The Inspector also indicated that in future he may exercise his discretion not to deal with a complaint in detail (that is, by furnishing a report to the Presiding Officers) where that complaint has already been dealt with, or substantially dealt with, by the Supreme Court of NSW. The Committee accepts the Inspector's evidence on these matters which are discussed further below.
- 1.117 The Inspector told the Committee about the way in which he approaches his role, noting that his complaint handling function is limited by the ICAC Act and that many people make complaints based on a misconception that it is broader:
- ...I think that there is a public misperception of my role. It is reflected in the complaints because people come to me and people make complaints saying that the Commission is wrong. That may or may not be the case, but I cannot investigate that. I can only determine whether it is, in effect, misconduct by the Commissioner or Commission officers...which under the definition in the Act is the abuse of power, impropriety, misconduct or maladministration.<sup>126</sup>
- 1.118 The Inspector also noted that he has no direct jurisdiction over Counsel Assisting an ICAC inquiry:
- I am also limited in that, because for example, the Counsel Assisting an inquiry is not a Commission officer so I cannot investigate alleged misconduct on the part of Counsel Assisting unless, for example, there is a wrongful failure on the part of the Commissioner or Chief Commissioner...to supervise and control Counsel Assisting.<sup>127</sup>
- 1.119 The Inspector's comments are borne out by the complaint figures, indicating the Inspector does receive complaints from complainants who are aggrieved by an ICAC decision not to investigate but where there has been no misconduct on the part of the ICAC; and complaints that are not within his jurisdiction. For example, of the 16 new complaints received in 2016-2017, 10 were closed in that reporting year. Of these 10 complaints:
- Seven were complaints about the ICAC deciding not to investigate a matter. In each case the then Inspector decided that there were insufficient details to support allegations of corrupt conduct, and that the ICAC had made its determination within a reasonable period. The then Inspector also '...noted that whilst the complainants may feel aggrieved by the ICAC's decision not to investigate or that the complainant does not agree with it, [this] is not sufficient for the Inspector to make an adverse recommendation or report about the ICAC or its officers'.
  - Two did not invoke the Inspector's jurisdiction and no action was taken beyond informing the complainants of this.

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<sup>126</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, pp4-5.

<sup>127</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p4.

- One invoked the Inspector's jurisdiction but the complainant withdrew his complaint.<sup>128</sup>

1.120 The Inspector also provided evidence about the circumstances under which he considers it appropriate to deal with a complaint in detail by furnishing a report to the Presiding Officers. As discussed above, since being appointed to the role, the Inspector has furnished five of these reports. However, the Inspector indicated that in future he may exercise his discretion not to furnish reports about matters that have already been dealt with, or substantially dealt with, by the Supreme Court of NSW:

...as a general matter...as a matter of economy of resources in future I would regard myself as having a discretion not to deal in detail with a complaint if it has been the subject of a determination by the Supreme Court dealing with precisely or substantially the same matters. I am conscious that I am expending public resources and that the...more I spend the more resources I have exhausted.<sup>129</sup>

1.121 The Supreme Court of NSW has jurisdiction to review findings made by the ICAC on the following limited grounds:

- material error of law on the face of the record (which includes the reasons given for the decision)
- the reasoning is not objectively reasonable and the decision could not have been reached by a reasonable person acquainted with all material facts and having a proper understanding of the statutory function, or was not based on a process of logical reasoning from proven facts or proper inferences
- a finding is not supported by any evidence whatsoever
- relevant matters have not been taken into account, or irrelevant matters have been taken into account
- a material denial of natural justice.<sup>130</sup>

***The Inspector must provide complainants with sufficient opportunity to state their case***

1.122 The Inspector has also indicated to the Committee that, unlike his predecessors, he does not meet face-to-face with complainants, instead relying on written material that they have provided in determining complaints.<sup>131</sup> The Committee considers that this is a reasonable approach to take as long as the Inspector continues his current practice of providing a draft of any report he is preparing on the complaint to the complainant for comment (see below), and as long as he varies his approach in appropriate circumstances, for example, were there to be a case in which a complainant could not write.

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<sup>128</sup> Inspector of the ICAC, *Annual Report for the period ending 30 June 2017*, p11.

<sup>129</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p5.

<sup>130</sup> *Duncan v ICAC* [2014] NSWSC 1018 (29 July 2014) [35].

<sup>131</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p7.

- 1.123 At the Committee's hearing on 1 June 2018, the Inspector explained his approach:

I tend to feel that one-on-one meetings between the Inspector and a complainant and the complainant's lawyers is ill advised because I am drawing a balance between the rights of the Commission on the one hand, and the rights of the complainant on the other. I do not believe it is appropriate to hear from one side and one side only at one time...I have to give procedural fairness to the Commission as well...Just as a judge would not hear from one side in a litigious dispute without the other being present, I think I should approach it on the same basis.<sup>132</sup>

- 1.124 The Inspector stated that he provides every complainant with ample opportunity to state his or her case in writing, and that where he is furnishing a report concerning the complaint, he provides every complainant with a draft of the report upon which to comment:

Of course, I have given every one of them ample opportunity to say whatever they want in writing. In every case where I have presented a report, I have given them a draft report to comment on and tell me that they think I am wrong. I have included in every report the response that they have given me, if they have given me a response.<sup>133</sup>

- 1.125 In response to a question from Revd the Hon Fred Nile MLC, the Inspector also indicated that if there were a reason that a complainant could not state, or fully state, his or her case in writing, for example, if he or she could not write, he would consider meeting them face-to-face:

...most of the complaints have been prepared by lawyers. One complaint was not prepared by a lawyer, but clearly the man who did prepare it is very able and intelligent...If someone came to me with a good reason, I would certainly consider [meeting with him or her face-to-face]. The reason you have given would be a good reason. If I felt there was something they had not or could not articulate, I would consider that.<sup>134</sup>

- 1.126 The Committee notes further that under the ICAC Act, the Inspector cannot include an adverse finding about a person in a report without first giving the person reasonable opportunity to respond, and including in the report a summary of the substance of the person's response that disputes the adverse finding if the person so requests.<sup>135</sup>

### **The Inspector's Audit Function**

#### ***Ongoing exercise of the Inspector's audit function is important for effective oversight of the ICAC***

- 1.127 As outlined above, in addition to handling complaints, one of the Inspector's principal functions is to audit the ICAC's operations to monitor compliance with the law of the State.<sup>136</sup> Both functions are important in ensuring appropriate

<sup>132</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p7.

<sup>133</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p7.

<sup>134</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, p7.

<sup>135</sup> *Independent Commission Against Corruption Act 1988*, s79A.

<sup>136</sup> *Independent Commission Against Corruption Act 1988*, s57B(1)(a).



oversight of the ICAC's formidable covert and coercive powers. The Committee will continue to monitor the exercise of the audit function, in addition to monitoring the resourcing of the Inspectorate, to ensure that it is being carried out on an ongoing basis.

1.128 As noted earlier, upon being appointed as Inspector on 1 July 2017, the current Inspector inherited 22 matters about which he had finalised the vast majority at the time of writing. At the Committee's hearing on 1 June 2018, the Inspector indicated that once he had dealt with this backlog, he would be in a position to begin auditing the ICAC's operations:

The complaints were obviously more pressing so I wanted to get them out of the way, indeed have to get them out of the way, so I can then turn to the auditing function...I have a number of things in mind to audit when I finalise the complaints; I propose to keep my eye on a number of things.<sup>137</sup>

1.129 At his 7 August 2017 appearance before the Committee, the Inspector also stressed the importance of the audit function for the good governance of the ICAC, stating 'That is done by the auditing function, not by dealing with the complaints function, important as that is'.<sup>138</sup>

### ***The Inspector must be able to access telephone intercept material for audit purposes***

#### **Recommendation 2**

**That the NSW Attorney General write to the Commonwealth Attorney General:**

- **Re-affirming the NSW Government's support for an amendment to the *Telecommunications (Interception and Access) Act 1979 (Cth)* to enable Inspectors of law enforcement and integrity agencies to access telecommunications material for audit purposes;**
- **Seeking an update on this issue.**

1.130 The ability of the Inspector to fully perform his audit function is hampered by the provisions governing access to telecommunication interception material held by the ICAC, set out in the *Telecommunications (Interception and Access) Act 1979 (Cth)* (the TIA Act). The Committee considers that the Inspector must have access to all necessary material to thoroughly oversight the exercise by the ICAC of its extraordinary powers.

1.131 The Committee therefore recommends that the NSW Attorney General write to the Commonwealth Attorney General seeking an amendment to the TIA Act to enable Inspectors of law enforcement and integrity agencies to access telecommunications material for audit purposes; and seeking an update on the issue. The Inspector has also offered to write to the Commonwealth about this issue, which is discussed further below, and the Committee would support him doing so.

<sup>137</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, pp2&8.

<sup>138</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 7 August 2017, p37.

- 1.132 The TIA Act empowers law enforcement and integrity agencies such as the ICAC to apply for telecommunications interception warrants where they believe a warrant would assist in the investigation of a serious offence. However, despite the fact that it is the Inspector's role to assess whether the ICAC is exercising its coercive and covert powers appropriately, the Inspector has very limited authority under the TIA Act to inspect telecommunications interception material that is in the ICAC's possession to assess whether the ICAC is exercising its powers appropriately in this area. In short, the TIA Act only allows the Inspector to access interception material held by the ICAC to a limited extent, that is, for targeted inspection but not for general audits.
- 1.133 This has been an issue for some years. In his 2008-2009 Annual Report, the then Inspector the Hon Harvey Cooper AM noted that in seeking to conduct an audit of the ICAC's applications for and use of warrants and intercepts made under the TIA Act, he was unable to access telecommunications interception material. Mr Cooper noted that advice obtained by the ICAC from the Commonwealth Attorney General indicated that the TIA Act would allow the Inspector to examine telecommunications interception material for a targeted inspection, but not for a general audit:
- The advice concluded that the TIA Act would enable the Commission to provide the Inspector with applications for telecommunications interception warrants where there is a targeted inspection into an allegation of misconduct or corruption but not for undertaking a general audit to ascertain if misconduct has occurred.<sup>139</sup>
- 1.134 Further, in April 2014, the then Inspector the Hon David Levine AO RFD QC made a submission to the Senate Legal and Constitutional Affairs References Committee which was inquiring into the revision of the TIA Act. Mr Levine recommended that the TIA Act be amended to allow the ICAC Inspector to access interception material for targeted inspection and audits.<sup>140</sup>
- 1.135 By March 2016, this was still an issue and as part of its review of the 2013-2014 annual reports of the ICAC and Inspector, the Committee recommended that the NSW Attorney General write to the Commonwealth Attorney General seeking an amendment to the TIA Act to enable Inspectors of law enforcement and integrity agencies to access telecommunications interception material for audit purposes.<sup>141</sup> The Committee understands that the NSW Government has since raised the issue with the Commonwealth.<sup>142</sup> However, at the Committee's hearing on 1 June 2018, the Inspector made it clear that this issue is still to be resolved, and offered to make a submission to the Commonwealth dealing with the issue:

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<sup>139</sup> Inspector of the ICAC, *2008-2009 Annual Report*, pp5-6, Inspector's website: <https://www.oiac.nsw.gov.au/assets/oiac/reports/annual-reports/Annual-Report-2008-2009.pdf>, viewed 13 September 2018.

<sup>140</sup> Inspector of the ICAC, *2013-2014 Annual Report*, pp9-10.

<sup>141</sup> Committee on the ICAC, *Review of the 2013-2014 Annual Reports of the ICAC and Inspector of the ICAC*, recommendation 2.

<sup>142</sup> See NSW Government, *Government Response to Review of the 2013-2014 Annual Reports of the ICAC and Inspector of the ICAC*, pp1-2.

It has not been resolved in favour of the Inspector getting the material for audit purposes. I do not understand why there is a difference...I can get it for complaints but not for audits. The issue is that it might very well be the case that the Commission use of intercepts would be a matter that should be the subject of auditing...I understand that Mr Levine made a request for an amendment to the legislation that seems to have been buried. If the Committee wished, I would be more than happy to make a submission dealing with that issue.<sup>143</sup>

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<sup>143</sup> Mr Bruce McClintock SC, *Transcript of Evidence*, 1 June 2018, pp7-8.

## Appendix One – Committee's Functions

Under section 64 of the *Independent Commission Against Corruption Act 1988*, the functions of the Committee are to:

- monitor and review the exercise by the ICAC and the Inspector of the ICAC of their functions
- report to Parliament, with such comments as it thinks fit, on any matter appertaining to the ICAC or the Inspector or connected with the exercise of its functions to which, in the Committee's opinion, the attention of Parliament should be directed
- examine each annual and other report of the ICAC and the Inspector and report to Parliament on any matter appearing in, or arising out of, any such report
- examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to Parliament any change which the Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector
- 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.

Nothing in the ICAC Act authorises the Committee to:

- investigate a matter relating to particular conduct
- reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint
- reconsider the findings, recommendations, determinations or other decisions of the ICAC in relation to a particular investigation or complaint.

## Appendix Two – Transcript of Evidence

This appendix contains a transcript of evidence taken at a public hearing held by the Committee on 1 June 2018. Page references cited in the 'commentary' section of the report relate to the numbering of the original transcript, as found on the Committee's webpage.

**The CHAIR:** Good morning and thank you for attending this public hearing of the Joint Committee on the Independent Commission Against Corruption [ICAC]. Today's hearing is to review the 2016-17 annual reports of the ICAC and Inspector of the ICAC. This morning the Committee will hear from the Inspector of the ICAC, Mr Bruce McClintock. The Committee will then break for morning tea and after that will hear evidence from the New South Wales ICAC, including the Chief Commissioner, the Hon. Peter Hall, QC, Mr Stephen Rushton, SC, and members of the ICAC's executive. At the outset, I thank the witnesses for making themselves available to appear today. I remind everyone to switch off their mobile phones as they interfere with the Hansard recording equipment. For the benefit of members in the gallery, I note that the Committee has resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines relating to broadcast of proceedings are available. I now declare the hearing open.

**BRUCE McCLINTOCK SC**, Inspector, Independent Commission Against Corruption, affirmed and examined

**The CHAIR:** I welcome Mr Bruce McClintock. Thank you for appearing before the Committee today. Before we proceed, do you have any questions regarding the procedural information sent to you in relation to witnesses and the hearing process?

**Mr McCLINTOCK:** None whatever. I should perhaps say that I also have with me my Principal Legal Advisor, Ms Angela Zekanovic.

**The CHAIR:** Would you like to make an opening statement?

**Mr McCLINTOCK:** I am more than happy to do so, Mr Chairman. I am well aware that the purpose of the hearing is to formally review last year's annual reports. What had happened, of course, was that I took over on 1 July after the end of the year as to which I was reporting, so of course I had no personal knowledge then, as I said in the actual annual report. Probably it would be worthwhile updating the Committee on what has occurred since I last gave evidence in August last year. When I took over there were 23 outstanding complaints which had been received by the Inspector's office. Some of those complaints had been received in 2015. Some in fact had not even been acknowledged by the previous Inspector and Acting Inspector. I regarded it as my role first to do something, if I could put it like that, in relation to every one of those complaints.

I set myself the target of doing so by the end of August. I missed that target by four days but by 4 September I had written to every complainant asking what they wanted me to do with the complaint because some of them were so old that I thought they may not wish me to continue; in fact that did occur with some. In relation to one of those there was a statement that the complainant did not wish to go ahead but there was an issue that I regarded as of importance that I decided it was worth investigating of my own motion because I am empowered to do it under legislation so I undertook an investigation into that. I have not yet completed that for reasons I will also explain later.

As a result, a number of complaints just dropped away. There were some also that were plainly not within my jurisdiction or where plainly there was nothing for the ICAC to investigate. Since then I have resolved all of the outstanding complaints subject to this: There are three that I have not yet actually prepared reports in relation to; there are two that I will be presenting to the Presiding Officers next Wednesday. They are finalised subject to minor editorial changes. There are a couple of issues about anonymisation of some people in relation to them. I would be happy to talk about those if you wish me to but of course it seems a little perhaps inappropriate before I actually present the reports to the Presiding Officers, but I am in the Committee's hands about that.

As to the resolution of the other complaints, I have presented two reports to the Presiding Officers, which of course are now tabled and are public and I am perfectly happy to talk about that. As to the remainder, I took the view that the Presiding Officers would not welcome me trotting up Martin Place and bothering them every second week. Partly for that reason and partly because it is appropriate to do so, I have dealt with the majority of the complaints by letter to the complainant, as it happens in every case, dismissing the complaint. I will give full reports about each of those in my annual report, which of course is due by the end of October this year. But again I am happy to answer any questions about the particular matters if any member of the Committee wishes to ask me. The formal reports that I have submitted to the Presiding Officers so far are in relation to complaints by Mr Jeff McCloy, who you will be aware was the Mayor of Newcastle. You will also be aware of the inquiry in which he was giving evidence. There is another one in relation to a gentleman called Atkinson, who was a director of NuCoal. The Committee will also be aware of the inquiry in relation to that. He was a director of NuCoal.

I had hoped to deal with all the complaints by the end of the financial year, which is obviously in a month's time. Unfortunately I had three months sick leave, three months where I was unable to work. I will relieve the Committee of any concern about my health and say the issues are completely resolved. It was the kind of back surgery that men of my age frequently have, but I did lose three months, unfortunately. I am not where I was, where I wanted to be. The reason why I mention that is I said to the Committee in August last year that I regard, in a sense, my most important ongoing role the role that the legislation gives me to audit the operations of the Commission to ensure that it is complying with the law.

The complaints were obviously more pressing so I wanted to get them out of the way, indeed have to get them out of the way, so I can then turn to the auditing function. That is not to say I have done nothing in relation to the auditing, I have, and I will explain my interactions with the Commission. I wanted to say one other thing: The Committee will be aware of the material written by Mr Merritt of the Australian. There was one matter which he mentioned last week in his column, which has been mentioned previously. I have not come to a decision about this but I am considering taking it up as an investigation of my own initiative as I am entitled to under the legislation.

It is something that is of obvious public interest and the repeated nature of the complaints mean that the criticisms of the Commission should be resolved either way: either by being upheld and steps being taken or by being dismissed and the reasons for that conclusion being expressed. As I said I have not come to any conclusion about that. There was one matter which he mentioned last week which is the subject of one of the reports I will be presenting to the presiding officers on Wednesday next week as well.

Turning then to the Commission itself—I hope my remarks are not going too long—I have to say that I am extremely satisfied with the way the Commission is operating now. There seemed, to my observation, to have been a number of distinct improvements. Undoubtedly you

will ask Mr Hall and Mr Rushton about their perceptions of how the three Commissioner model is working. You may remember the evidence I gave before I became Inspector supporting that model, I think it was in the first half of last year. I regard myself, and for that matter the Committee in Parliament, as having been vindicated by what happened. I believe that Chief Commissioner Hall will say the same thing.

There are a number of observable factors, for example, they now have three simultaneous inquiries going into potential corruption. That could not have happened under the previous model with one Commissioner, although there was the power to appoint acting Commissioners. It spreads the workload and the two Commissioners, who I have known for many years, are people of considerable ability. The model itself I think is working very well. Secondly, it is observable that the morale of the Commission staff has increased. That enhances the effectiveness of the organisation. I understand from talking to them, and we have been having relatively regular meetings, interrupted by my ill health, with the Chief Commissioner and whichever of the Commissioners are available, the Chief Commissioner has made it his business to talk to singly or in small groups every member of the Commission staff. That is obviously the sort of thing that enhances the ability to operate.

The other issue of course is the recent appointment of a Chief Executive Officer, which is something I supported. Again, because that has only just happened it is too early to talk about the actual effect. The announcement was only made late last week or early this week. I have reviewed the qualifications of the person appointed and having seen that he seems to me to be a perfectly appropriate choice. Again, I can say that the interactions we have had with the Commission itself have been positive. We executed last year, I think in mid August, it may have been a little later, a Memorandum of Understanding between the Inspector and the Commission and we have been complying with that.

It imposes obligations, for example, on the Commission to inform my office if they find an example of, I will not say corruption, potential misconduct amongst Commission staff members. That has occurred on one occasion and the Commissioner has resolved the matter internally satisfactorily from my point of view without my intervention. I share the resources of my office with the Inspector of the Law Enforcement Conduct Commission, Mr Terry Buddin, SC. The staff is Ms Zekanovic, my Principal Legal Advisor, and Mr Buddin's Principal Legal Advisor, and a Business Coordinator, Ms Armstrong. To my observation, that arrangement has been working well. We are in the course of being about to move offices but that is not because of me. It is because Mr Buddin has inherited some functions from the Ombudsman that include a secure monitoring unit and he needs to have place to put the two employees who will be doing that in secure circumstances, which cannot be accommodated in our existing offices.

I will just go back to the two matters that I am resolving next week by presenting the reports to the Presiding Officers. They relate to Operation Dewar, which the Chief Commissioner I think may be talking about. The other one is in relation to the complaints made by NuCoal. I only raise that one because it has been the subject of debate or questions in the Legislative Council. It is entirely a matter for the Committee obviously how the Committee proceeds, but if the Committee wanted a heads-up I am prepared to give it. It may be thought appropriate to do it in closed session so what I say to the Presiding Officers next week is not pre-empted, but again that is entirely up to the Committee. That is all I wanted to say by opening remarks. I hope I have not taken too long. Thank you.

**The Hon. LYNDIA VOLTZ:** I did not catch the figure of the cases that had not been dealt with when you came in. What was that figure again?

**Mr McCLINTOCK:** It was 23. There is a slight rubberiness in that because there are some that were overlapping. But there are 23 and, as I said, some of them had not been acknowledged since they had been received in 2015.

**The Hon. LYNDIA VOLTZ:** How many had not been acknowledged?

**Mr McCLINTOCK:** I cannot give you a precise answer to that. I think it was two or three.

**The CHAIR:** I will accept your offer of giving us a heads-up in relation to it and we will do that in closed session. Before we do that, I have only seen the McCloy and Atkinson reports to the House this morning. Can you give us a summary of the complaint and your findings in relation to both those matters? I do not think members are across them. If specifically you are making any recommendations to us or to the Commission arising from those complaints I would be interested in that as well.

**Mr McCLINTOCK:** I am more than happy to do that. In doing so I will be saying some of the things I would say in closed session. I will focus simply on those two reports but, because Mr Atkinson was a Director of NuCoal, there is an overlap. Mr Atkinson's complaint was that the findings of corruption against him in effect made by the Commission had not been justified. He had been a director along with a number of other people against whom corruption findings had been made. It was in effect an allegation—I should be absolutely precise about this. I am sorry, I do not have a copy.

**The CHAIR:** I can give it to you.

**Mr McCLINTOCK:** All I need is the material at the end just because it is important in fairness to them. I should also say while am just turning up the relevant parts of the material that one other thing I have done is the Committee will be aware that one of the recent amendments to the legislation involved an imposition of a requirement on the Commission but also as a result an obligation—because in that respect I have the same obligations—to give notice of any proposed adverse finding to people who may be the subject of adverse findings and an obligation to incorporate their response. In relation to both these findings in both these reports I took the view that I was not making any adverse findings but that, simply because there is no decision that is not improved by hearing what the person the subject of the decision says about it, they should all be given a copy of my report in draft and I would incorporate any response they wished to make in the final report. I did that in relation to both of these. Mr Atkinson did send in a response. As a result I put in a supplementary report and I attached Atkinson's response of 9 March.

The complaint made by Mr Atkinson was in effect twofold. The first was related to the fact of the legislation passed by Parliament that terminated the mining rights which were the subject of the inquiry made by the Commission. The second complaint was the inappropriate interactions between the Commission and the then Premier. The reason why I reported on this one rather than dealing with it by letter was I principally thought the second matter was of sufficient importance for an immediately public resolution. The point I made in the report—and it is a point that I have made twice before in the 2005 report I did on the legislation and the 2015 report I did with Mr Murray Gleeson—is that ICAC is not a court. People frequently mistake it for a court. It is a specialist arm of the Executive—a specialist investigative agency which has had added to it the power to conduct public hearings and make findings of corruption.

**Mr RON HOENIG:** Maybe we should make it not look like a court. Maybe it should just be in a room like this.



**Mr McCLINTOCK:** That is something that I addressed in 2015 with Mr Gleeson. We have considered every available method of trying not to make it look like a court and trying to get across public understanding that it is not. Frankly, I think there is now nothing really that can be done. It is an issue but not for me, although I am happy to express views about it although probably not now. It is a matter for Parliament whether the ICAC hearings should be conducted in closed session. That is the model they have in some other States, but that is not for me to talk about now. The point about that is when one sees ICAC in the way I have said there is nothing wrong with the Commissioner of ICAC coming along to the Premier and expressing views about a matter of concern that he has come across. It is no different in terms of principle from, say, the Commissioner of Police informing the Premier of something that would be relevant to the Premier's performance of his duties or her duties as Premier. That was the point that I made. I also made the point in the report as to the problem of the Commission being seen as a court. I will not expand on the reasons. But those were the two matters.

I dismissed the complaint because I could not see on the basis of the matters that Mr Atkinson complained about that there had been any abuse of power, impropriety, misconduct or maladministration, which are the only things that I am empowered to inquire into. I might also say I think there is a public misperception of my role. It is reflected in the complaints because people come to me and people make complaints saying that the Commission was wrong. That may or may not be the case, but I cannot investigate that.

I can only determine whether it is, in effect, misconduct by the Commissioner or Commission officers. I am also limited in that because, for example, Counsel Assisting an inquiry is not a Commission officer so I cannot investigate alleged misconduct on the part of Counsel Assisting unless, for example, there is a wrongful failure on the part of the Commissioner or Chief Commissioner, as he is now, to supervise and control Counsel Assisting. I also take the view that unless it is directly relevant to what I am doing in my function, I should not express views about whether the Commissioner was right or wrong. I do not have the power to do so unless I am determining misconduct, which under the definition in the Act is the abuse of power, impropriety, misconduct or maladministration. That was Mr Atkinson. I expanded upon that and I am sorry.

In the case of Mr McCloy, I reported on that publicly to the Presiding Officers because there had been a considerable degree of publicity. I did not think that the complaint, which was essentially about the conduct of the then Commissioner and the treatment of witnesses and the Counsel Assisting in that particular inquiry, was justified. One of the reasons why I decided to report publicly was that the very same matters had been the subject of litigation by Mr McCloy in the Supreme Court and had been rejected by Justice McDougall of the Supreme Court. I wanted to say there as a general matter other than the general importance of the particular complaint that as a matter of economy of resources in future I would regard myself as having a discretion to not deal in detail with a complaint if it has been the subject of a determination by the Supreme Court dealing with precisely or substantially the same matters. I am conscious that I am expending public resources and that the time more I spend the more resources I have exhausted.

In this case, it was precisely the same matters. It had been dealt with by a very able Supreme Court Judge in an extremely competent and comprehensive way. That is the point I made in paragraph 12 and 13 of the report. I made that point, but because it was the first time I had done that, I did determine Mr McCloy's complaints on the merits and decided that, again, there was no abuse of power, impropriety, misconduct or maladministration. As I said, his complaint was about the conduct of the inquiries, the Counsel Assisting, the Commissioner and the treatment of witnesses. Justice McDougall said that the hearings were heated and that is

undoubtedly the case. But he found that there was not any relevant impropriety and, as I said, I agreed. Thank you for that opportunity. Is there anything else the Committee wants to ask about those two reports?

**Mr RON HOENIG:** First, your view about the two organs of the Executive branch is clearly right.

**Mr McCLINTOCK:** Probably the best analogy of that is if you think about the FBI. Imagine an FBI with a specialist job of investigating corruption, which could hold public hearings and make findings, and then the FBI went along with the President and said, "We have just found out that Senator X has been engaging in a bit of corruption". Would there be something wrong with that? Of course not. It is the same situation.

**Mr RON HOENIG:** The second issue probably goes further because imputing motives into the Parliament that enacted the Act is an assertion that goes far further than just a conversation with the Premier.

**Mr McCLINTOCK:** It is. It was Parliament's decision; not the Premier's decision. In our constitutional system, as you all know, the decisions of the Parliament as passed in legislation are, in effect, sacrosanct. It is the supreme law of the State and it would be completely wrong and inappropriate for me to even embark on the consideration of whether that was right or wrong. That is not my job and, in fact, is not anybody's job. Parliament has spoken. That is it—full stop.

**Mr RON HOENIG:** The issue I raise arising from your conclusions about where the matter has been considered by the Supreme Court is that administrative law tests are so high that it is virtually impossible to succeed unless there is something that is so over the top that it attracts the involvement of the court. Is there not a gap between what the court may say and what you might conclude is improper conduct within your jurisdiction?

**Mr McCLINTOCK:** If I were to identify such a gap, I would determine the matter myself on my view of the merits of the complaint. That gives me the opportunity to be a little bit more precise. In saying that—and the McCloy report provides a good example—there was a finding of fact made by the judge that there had been no unfairness and there was nothing wrong with the way that the hearing was conducted.

**Mr RON HOENIG:** It is like an issue of estoppel then is it not?

**Mr McCLINTOCK:** In a sense, yes. It is a bit like that. If he had gone further and said something like, "The Supreme Court has no jurisdiction", I would not have taken account of that. It was simply because there was a factual finding on precisely the same material by a judge who said "No, there is nothing in this complaint about unfairness in relation to the conduct of the Commissioner and the conduct of the hearings." It is that kind of thing. As I said, if there was gap because, as you said perfectly correctly, the administrative remedy laws can be very hard to establish, there is no merits review of the Commissioner's decision—which is something that has been considered repeatedly by this Committee and its predecessors and which I have given evidence on. I accept what you say but I have that in mind and I would not let that stop me investigating. As it happens, there have been others like that and I have undertaken my own consideration of the complaint, even though there have been findings by judges of the Supreme Court and the Court of Appeal in relation to the matters.

**The CHAIR:** Are you of the view that the rules relating to procedural fairness, which the Commissioner adopts, would in fact dissipate some of the complaints that McCloy may have had?

**Mr McCLINTOCK:** Absolutely, although—I can recall the Chair asking me some of these questions and I was coy on the previous occasions—the real point about organisations such as the Commission is that they are heavily influenced by the character of the Chief Commissioner and the Commissioners. I think it was the Hon. Trevor Khan who mentioned to me on a previous occasion the word "zealotry" and said that if you had a zealot in charge of the Commission there would always be problems. That was in the consideration of the adoption of the three Commissioner model, which dilutes the possibility of a zealot running the Commission. The real protection is the model that is now adopted and the necessary brakes on the decision. Of course, you are aware, because you passed the legislation, that one of important changes as a result of the three Commissioner model was that the majority of decisions are in relation to public hearings, which, again, can act as a brake. I hope I have answered your questions.

**Mr RON HOENIG:** Arising from that, I was going to ask later but I will do it now: Anecdotally, senior members of the Bar Association are engaged in some public hearings now.

**Mr McCLINTOCK:** Yes.

**Mr RON HOENIG:** The anecdotal normal complaints that one gets from senior members of the Bar seem to have stopped. My cursory inquiries have indicated a completely different atmosphere. A cursory examination of some parts of the transcript have indicated what appear to be very fair, unemotive and precise proceedings. They are the public hearings; I do not know what goes on behind closed doors. Is that because of the amendments to the legislation, or is that because of the nature of the appointments?

**Mr McCLINTOCK:** I would say both. I may say that I agree with you, Mr Hoenig. I took it upon myself, without giving the Commission any notice, to go and sit in one of the hearings—the one in relation to Canterbury Council—because I have been meaning to do that just to see—essentially, to consider—the issue that you have just raised, Mr Hoenig. I think I was there for about an hour; I appreciate that the hearings are much longer. On my observation, it was being conducted in a calm and civil manner. Again, this is all anecdotal, except for what I saw when I was observing. I have spoken to Counsel involved in the inquiries, not on any official basis, so to speak, but because I know them, and I have heard no complaints of the sort one used to hear regularly, as you know. There has been nothing like that. As I said, it was the Commission getting on with the job. As I said, I thought it was being conducted conspicuously fairly and without the degree of emotion that sometimes has been the subject of these hearings.

**Mr RON HOENIG:** The 2015 amendments to the Bar Rules would seem to govern in a more prescriptive way the way how Counsel Assisting needs to conduct themselves.

**Mr McCLINTOCK:** Yes.

**Mr RON HOENIG:** So that area that is beyond your jurisdiction but is certainly within the jurisdiction of the Bar to enforce?

**Mr McCLINTOCK:** It is. I do have outstanding complaints about the issue of conduct of Counsel. They have a degree of age to them now, unfortunately. Two of the ones I am going to resolve—which I have not yet resolved, as of three outstanding ones—involves that issue of conduct of Counsel. As I said, there are difficulties in dealing with it directly because Counsel Assisting is not an officer of the Commission, where my only power is. That was something addressed in the 2015 report because there is no question that the presiding Commissioner has a duty as Commissioner to keep Counsel under control, so to speak, and should do so. I would regard any wrongful failure on the part of the Commissioner to do that as misconduct on the part of the Commission, which of course I do have jurisdiction in relation to. But there are things that Counsel can do without the active sanction, so to speak, of the Commission that you could not possibly say reflected upon the Commission.

**Mr RON HOENIG:** What probably was not widely understood, except for those people at the Bar, is that so much of the direction of a matter is vested in Counsel Assisting. I do not know what the procedure is at ICAC, but in any of the other Commissions, generally, the discretion, knowledge and detail is all vested in Counsel Assisting as part of the checks and balances of the Royal Commissions and Commissions.

**Mr McCLINTOCK:** That is true. It all depends upon the particular investigation, the particular inquiry, the particular Commissioner and the particular Counsel. I was Counsel Assisting myself at ICAC in the early 1990s in an inquiry into Randwick Council and the planning department of Randwick Council back then. I do not think what you said would have been an accurate description of what I was doing. There was a special purpose Commissioner. An Acting Commissioner appointed this inquiry. It was very much a Commission, so to speak, investigation inquiry. It was very like a case you were briefed right at the end in, Mr Hoenig, where the stuff has all been done and you are there to present it to the court—in this case, to present it to the Acting Commissioner of the ICAC.

**The CHAIR:** You have told us that you have three hangover complaints. What is the complaint rate like at the moment? Have you got a number of other matters?

**Mr McCLINTOCK:** I cannot give you the precise figures, although Ms Zekanovic might be able to, of the number that have come in since 1 July, all of which I have resolved—it is 16. Many of them were very easy because clearly I had my jurisdiction. For example, there was one complaint that ICAC had failed to do things under Federal law. Of course, ICAC has no jurisdiction. That was vexatious, and I dismissed that. But there has been a whole series of ones like that, in which either clearly I had no jurisdiction or where the complaint could not—

**The CHAIR:** However, we have the three that you are yet to make a determination on. As of now, other than those three, are there others that you still have?

**Mr McCLINTOCK:** Other than the two I am presenting next week as yet.

**The CHAIR:** You will tell us about those, potentially, in a moment.

**Mr McCLINTOCK:** Yes.

**Reverend the Hon. FRED NILE:** I have two quick questions. One is that there has been a dramatic decrease in complaints, with 16 in this new period. It was 33 in the previous one. Secondly, you said you were dealing with all of them by correspondence. Did any of the complainants feel that they should have had an interview and presented their complaints to you in person?

**Mr McCLINTOCK:** Some of them have, Reverend Nile. That is a difficult question for me because my predecessors did meet with some of the complainants. I tend to feel that one-on-one meetings between the Inspector and a complainant and the complainant's lawyers is ill advised because I am drawing a balance between the rights of the Commission on the one hand, and the rights of the complainant on the other. I do not believe it is appropriate to hear from one side and one side only at one time. It is elementary. I have to give procedural fairness to the Commission as well. If I were to make an adverse finding against the Commission, I must give it notice as well. I have an obligation. Just as a judge would not hear from one side in a litigious dispute without the other being present, I think I should approach it on the same basis. I am completely willing to be told by the Committee or any member of the Committee that they think I am wrong and debate it. That is the approach I have adopted—right or wrong.

Of course, I have given every one of them ample opportunity to say whatever they want in writing. In every case where I have presented a report, I have given them a draft report to comment on and tell me that they think I am wrong. I have included in every report the response

that they have given me, if they have given me a response. I do not think I should do more than that by way of actually seeing them face to face. When I have said that to them, I do not think there is anyone who has come back and said, "You're treating us unfairly." I have said to them all that I do not wish to meet them face-to-face—some of them have asked me. But none of them have said, "You're engaging in impropriety yourself in refusing to meet us." I hope that answers your question, Reverend Nile.

**Reverend the Hon. FRED NILE:** Some people may not be able to put matters in writing or explain their complaints.

**Mr McCLINTOCK:** I understand that, but most of the complaints have been prepared by lawyers. One complaint was not prepared by a lawyer, but clearly the man who did prepare it is very able and intelligent. I understand that and, like so many things, I am still in a way learning the ropes. I have been in the position for 11 months and there are some things I have done that I would probably do a bit differently now. I am perfectly prepared to listen. If someone came to me with a good reason, I would certainly consider it. The reason you have given would be a good reason. If I felt there was something they had not or could not articulate, I would consider that. So far I have not.

**Mr MARK TAYLOR:** I think you said you have not had an opportunity to do any audits at this stage. There was an issue about your access to telephone intercept material. Has that issue been resolved?

**Mr McCLINTOCK:** It has not been resolved in favour of the Inspector getting the material for audit purposes. I do not understand why there is a difference.

**Mr RON HOENIG:** Nor do I.

**Mr McCLINTOCK:** I can get it for complaints but not for audits. The issue is that it might very well be the case that the Commission's use of intercepts would be a matter that should be the subject of auditing. One of the matters has been the subject of auditing, not by my two predecessors but by Mr Harvey Cooper, who was the Inspector before Mr Levine. He regularly carried out a series of audits into how the Commission was dealing with search warrants. I will do that. But one can see the similarity between interest in warrants, telephone intercepts and so on. I understand that Mr Levine made a request for an amendment to the legislation that seems to have been buried. If the Committee wished and thought it was appropriate, I would be more than happy to make a submission dealing with that issue.

**The CHAIR:** That would be helpful.

**Mr McCLINTOCK:** It would give me a chance to review it properly and update any issues raised by Mr Levine. I think it was in the first half of 2016, but I stand to be corrected. I would probably be informed, in a sense, by the overlap of my staff with the Law Enforcement Conduct Commission [LECC] Inspector. Of course, a very substantial part of what happens with the LECC begins with such matters, hence the secure moving of offices.

**Mr GEOFF PROVEST:** At its public hearing in November 2017, the ICAC told the Committee it had on foot a project to develop a proactive investigation capacity. Do you have any comments to make about the project? Will a move to a more proactive approach have other implications for how you carry out your oversight role as the Inspector?

**Mr McCLINTOCK:** I am not in a position to say directly what has happened to the proactive investigation capacity. Of course, members know about the increase in the Commission's budget, and I know you will be asking Mr Hall about that. My understanding is that that was one of the issues involved in that budget increase. My assumption is that that is something that will go ahead. The answer to the second question is yes, it will; there is no

question about that. Mine is an oversight role and I must bear in mind that the Commission has things to do other than answer my questions.

Some of the questions I have asked have required extremely detailed investigations by the Commission. In addition, some of the personnel who are answering them were not there at the time in question. That is not entirely or completely true; Mr Waldon, the Chief Counsel, has been there for a very long time but others have not. As I said, I must balance my need to know with too much interference in the Commission's operations. However, I have a number of things in mind to audit when I finalise the complaints; I propose to keep my eye on a number of things. I will be very interested to know, in my capacity as Inspector, what is happening with that capacity.

**Mr RON HOENIG:** The application of the guidelines for procedural fairness that have been tabled can have a significant impact in an individual public hearing. For example, I refer to the guidelines for the Commission's duty of disclosure and exculpatory evidence. There is no statutory definition of exculpatory evidence. For the purpose of the guidelines it means "credible, relevant and significant evidence that tends to establish that a person is not engaged in corrupt conduct". That is a relatively high bar that can easily justify not disclosing. What is the person's remedy at the end of the day? Is reliance really upon the current Commissioner's good sense?

**Mr McCLINTOCK:** If a complaint is that exculpatory evidence has not been disclosed, given the legislation and the guidelines, and if I thought that it was credible, relevant and significant, I would take action. However, I am not saying what it would be.

**Mr RON HOENIG:** There is a difference between relevant and significant.

**Mr McCLINTOCK:** I appreciate that.

**The CHAIR:** It is a question for the Commissioner.

**Mr McCLINTOCK:** "Credible" simply means believable. "Relevant" means it can rationally affect the outcome. In relation to "significant", if it can rationally affect the outcome of the inquiry, it is significant. It may appear to be a high bar, but I do not think it is. Again, it all comes down to the quality of the people administering the legislation and applying the guidelines. I would imagine that the Chief Commissioner, the Commissioners and the Commission staff would ask, "Can this rationally affect the outcome of this inquiry?" If it can, it should be handed over. That is the test I would apply. That leads into an article in the Australian last Friday, which was about the Jasper and Acacia inquiries that involved, as you know, the conduct of Mr Obeid and Mr Macdonald. The allegation is that the characteristics of a particular witness were concealed, or not disclosed, and exculpatory is not the right word, but we are in the same universe.

**The CHAIR:** It may give rise to credibility issues.

**Mr McCLINTOCK:** Exactly. In appropriate circumstances, if it had not been disclosed I would consider it, in effect, to be a breach of the guidelines. If a person's credibility is worthless, it will obviously affect the outcome. It is that matter that I have in mind the possibility—as I said, I have not made any decision about it—of undertaking my own motion, because it has been the subject of repeated references in the press. My thoughts are that it is possible this matter should be dealt with either way.

**The CHAIR:** The other matter which is a repeated issue in the press is the failure to provide the Department of Public Prosecutions with material, which impacted significantly in relation to a decision by the DPP to prosecute.

**Mr McCLINTOCK:** Yes. That is an issue that I have raised directly with the Chief Commissioner—that is, the relationship between the DPP and the Commission. That was an issue way back in 2004-05 when I did the first report. Although the issue then was the significant and disturbing delays in deciding prosecution or no prosecution by the DPP. My observation is that that issue has been materially improved under the present regime and the relations between the DPP and the Commission seem to be working satisfactorily.

**The CHAIR:** Is it not an issue for you in terms of the process of the ICAC, that you identify what the process is for the purpose of deciding which material goes up to the DPP? Is that not a process which you would be interested to ensure is proper for the DPP to be able to make a determination on?

**Mr McCLINTOCK:** Absolutely, and as soon as the complaints are out of the way that is on my roughly notional list of the things I am going to look at.

**The CHAIR:** Because human beings make decisions.

**Mr McCLINTOCK:** Absolutely.

**The CHAIR:** In relation to whether that material is seen by the DPP, and in one specific case I am sure you are aware of, if in fact that material was there the DPP probably would not have proceeded, and it was the subject of an adverse criticism by a magistrate.

**Mr McCLINTOCK:** That was the matter I wish to deal with in closed session. Perfectly happy to do so.

**The CHAIR:** Thank you. We are about to have a closed session where the Inspector will brief the Committee on some matters on which he is about to release a report but has not yet. In those circumstances it is a briefing for this Committee. We will take that briefing and clear the gallery.

**(The witness withdrew)**

**(Short adjournment)**

**PETER HALL**, Chief Commissioner, Independent Commission Against Corruption, sworn and examined

**STEPHEN RUSHTON**, Commissioner, Independent Commission Against Corruption, sworn and examined

**ROY WALDON**, Executive Director, Legal Division, Independent Commission Against Corruption, sworn and examined

**LEWIS RANGOTT**, Executive Director, Corruption Prevention Division, Independent Commission Against Corruption, affirmed and examined

**JOHN HOITINK**, Executive Director, Investigations Division, Independent Commission Against Corruption, sworn and examined

**ANDREW KOUREAS**, Executive Director, Corporate Services Division, Independent Commission Against Corruption, sworn and examined

**The CHAIR:** Good morning. I welcome witnesses from the New South Wales ICAC. I apologise for the delay. The Committee spent a lot longer taking evidence from Inspector of the ICAC than I anticipated. It was very informative.

**Mr HALL:** It was no inconvenience.

**The CHAIR:** Do you have any questions regarding the procedural information sent to you?

**Mr HALL:** No.

**The CHAIR:** Do you wish to make an opening statement?

**Mr HALL:** Since we last appeared before the Committee there have been a number of developments in the Commission. Accordingly, I have decided to briefly refer to those developments so that the Committee is informed about what is happening at the Commission. The first matter is the appointment of a Chief Executive Officer. The Commission engaged an executive search firm—Watermark—to undertake an executive search for the position of chief executive officer. The role was widely advertised in the press and online, and 49 candidates applied for the position. Following a series of interviews, a shortlist of five candidates was put forward to the Commission.

The interview panel was convened by myself, Commissioner Rushton and Ms Williams, who is the Chief Executive Officer of the Law Enforcement Conduct Commission. I tender the apologies of Commissioner McDonald, who is currently involved in a criminal trial and is unable to be here today. Commissioner McDonald was also unable to be on the interview panel for the same reason. Following the assessment through the interview panel, the panel was unanimous in recommending Mr Philip Reid for appointment to the chief executive officer [CEO] position. Briefly, a summary of Mr Reid's background and qualifications. He is a Bachelor of Science with first class honours. He is a member of the Australian Institute of Company Directors. I note that in the period from June 2014 to March 2018 Mr Reid was the Chief Executive Officer of the Royal Commission into Institutional Responses to Child Sexual Abuse. Prior to that time he has held a number of senior executive positions in public administration in Victoria, Queensland and the position I referred to in New South Wales. From April 2013 to September 2013 he was Chief Executive Officer of the Public Service Commission in Queensland.

Predating that, he was the Director General of the Department of Science, Information Technology, Innovation and the Arts, the Director General of the Department of Justice and Attorney-General, both in Queensland, and the Deputy Secretary of the Department of Premier and Cabinet in Victoria. The references for Mr Reid were quite outstanding. We are confident that he has got the necessary background to fit in very well, understanding how Commissions of inquiry work and interfacing with Government as necessary. We are very confident that he brings to bare all of the background. He has what is commonly referred to by my assessment, emotional intelligence. That means he is a people person. He is going to work well, as he did with the Royal Commission, and we are looking forward to him starting next month.

The next matter to report on is the establishment by the ICAC of its proactive investigative strategy. I have on a previous occasion advised the Committee that a determination was made that the Commission should, in addition to its long-standing reactive jurisdiction, also develop a proactive approach in the assessment of corruption risks and the investigation of corrupt conduct. In doing so I am satisfied that the Commission has always had the statutory basis for a proactive exercise of its jurisdiction. In that respect I refer to the provisions of section 20 subsection (1) of the ICAC Act 1988. The Commission has accordingly since early this year been establishing a unit to be known as the Strategic Intelligence and Research Unit or SIRU. The intention is to have the unit fully operational by 1 July this year.

Once established the ongoing objectives of the SIRU include the development and use of systems, processes and methodologies, the objectives of which are to enhance the Commission's capability: first, to identify through the use of strategic intelligence methodologies, individuals, organisations, departments or other entities who are involved,



either as the principal or associate of the principal, in corrupt activities for referral to the investigation division; secondly, to develop strategic intelligence products that will inform and will guide, and in some cases recommend, courses of action to the senior executive in the allocation of the Commission's resources; thirdly, to develop a system of strategic intelligence products as a result of research which may help in the identification of emerging trends, issues, hot spots, corruption risks or threats to be referred to the Corruption Prevention Division.

It will also effectively liaise and assist the assessment section in the Commission of reporting various types of complaints and to produce regular strategic intelligence products for distribution within the Commission to inform and guide all staff on emergent risks and patterns or trends. The Investigation Division is currently trialling intelligence-led investigation theory on a preliminary investigation referred to the Division from the Assessment Panel. This process requires the operational intelligence analysts to gather intelligence in relation to the matter to allow the chief investigator to be better informed when deciding to move forward or not in relation to the matter. The process also allows for better allocation of investigative resources. There are presently two highly qualified officers who will staff this unit.

The budget position is the next matter to report on. Following my appointment as Chief Commissioner and the appointment of Commissioners McDonald and Rushton of Senior Counsel last August, the Commission decided to engage an independent external consultancy, namely KPMG, to conduct an independent analysis of its investigative and other resources and resource requirements and also to carry out a review of its operational systems. The evaluation and the review conducted by KPMG entailed exhaustive liaison with Commission staff and it resulted in an evaluation report with recommendations directed to enhancement of the Commission's capabilities. The report will form the basis for change, some of which has already been initiated, and it did provide the basis for the Commission's business case for additional recurrent funding, which was provided to the New South Wales Treasurer in February of this year.

Recently, the Commission was advised that an additional amount of \$3.6 million was approved on a recurrent basis to enable the Commission to effectively and efficiently carry out its functions. This has resulted in the Commission's total expense budget rising to \$27 million and it represents a 14 per cent increase on its revised expenses budget for the 2017-18 financial year. The additional funding will provide the means for increased resources to be deployed across the Commission, including, amongst others, the two part-time Commissioners, the recruitment of additional investigators, strategic data analysts and surveillance and corruption prevention staff. The additional funding will enable the Commission to operate at or close to its maximum potential. It will strengthen the functional capabilities in the key operating areas, namely legal, investigations, complaints assessment, and corruption prevention. The Commission was also provided with an additional capital funding of \$500,000 per annum over the forward estimates period to 2021-22. It will enable the upgrade or replacement of various information, communication and technology equipment to meet the operational requirements. Whilst the budget does provide the capacity to the Commission to effectively undertake its core activities, it is recognised that budget challenges may arise as a consequence of unforeseen events and these will be appropriately addressed if and when they occur.

The next matter to report upon is the current public inquiries being conducted by the Commission. The Commission is currently conducting three public inquiries, operations Skyline, Dasha and Estry. Commissioner Rushton is conducting Operation Estry. Operation Skyline is primarily concerned with a scheme that involves proposals developed in the period 2014 to 2016 for the sale and development of the Awabakal Local Aboriginal Land Council's properties. The Commission is examining whether any Awabakal Council board director acted dishonestly and/or in breach of his or her duty as a board member and whether any other persons, including

non-Indigenous persons, encouraged or induced any director to dishonestly or partially exercise any official functions in respect to the scheme. I am presiding at the Operation Skyline public inquiry which was conducted between 3 and 13 April and 14 and 17 May. It is scheduled to continue one week in July, and then from 6 August until it concludes.

Operation Dasha is examining allegations concerning the former Canterbury City Council, including whether between 2013 and 2016 certain public officials improperly exercised their official functions in relation to planning proposals and/or applications under the Environmental Planning and Assessment Act 1979 concerning particular properties in the Canterbury City Council area. Other matters under investigation include the circumstances surrounding the appointment of a former director of city planning and whether certain councillors engaged in conduct that, or could have, adversely affected the honest or impartial exercise of the then general manager's official functions by expressly and impliedly threatening to cause the termination of his employment unless he appointed a particular person as director of city planning.

Commissioner McDonald is presiding at the Dasha public inquiry. Evidence was taken between 16 and 27 April. The public inquiry resumes on 12 June and is scheduled to continue until early August. Operation Estry, to which I have already referred, concerns whether in early 2014 Corrective Services officers based at the Lithgow Correctional Centre dishonestly exercised their official functions in relation to an assault on a prisoner, including by colluding to provide a false and misleading information, destroying or maintaining closed-circuit television [CCTV] footage and falsely representing that a quantity of buprenorphine was recovered from the prisoner's personal belongings during a search of the prisoner's cell. As I have said, Commissioner Rushton is presiding at the public inquiry, which commenced 21 May and is due to conclude during the first week of June.

The three-Commissioner ICAC model has made it possible for the Commission, as necessary, to prepare and conduct back-to-back public inquiries whilst also maintaining ongoing covert investigations in other matters, including one major investigation for which special funding has been provided. This would not have been possible but for the very impressive dedication and the application of the staff across all divisions of the Commission. I am conscious of the need to ensure that whilst the Commission's staff are ever ready to operate at such high levels of performance, the volume and the timing of work must be carefully controlled in their best interests as well as that of the Commission.

Members of the Committee, I would like to move to another matter, which involves public critical analysis of the Commission and its work. The ICAC at all times must operate to the highest standards in advancing and in protecting the public interest. I have in mind in saying that the provisions of section 12 of the Independent Commission Against Corruption Act. Like any other entity the Commission and its work is open to informed critical analysis: In particular, should it fail to meet the expected standards set for it. Specific oversight functions, of course, are also exercised by the Inspector and this Committee respectively under the provisions of parts 5A and 6 of the ICAC Act. However, that said, when ill-informed criticism is directed at the Commission and its staff, I see it is my responsibility to correct the record lest public confidence in the Commission be improperly undermined. That brings me to a matter upon which I wish to make some observations.

That concerns an operation undertaken by the Commission, Operation Dewar, involving a former Commissioner of the State Emergency Service [SES], Mr Murray Kear. There has been a number of media articles in relation to Operation Dewar which involved an investigation into the former Commissioner of the SES. The public inquiry in that investigation was presided over by former Commissioner Ipp. Assertions have been made to the effect that the investigation did

not meet appropriate standards. These included a contention that the Commission withheld exculpatory evidence during the public inquiry. In fairness to commentators, including those in the media on this matter, it appears that they, in making these assertions, have relied upon or founded them upon certain observations that were made by a magistrate in the Kear prosecution that was brought under the Public Interest Disclosures Act, or the PID Act as it is often referred to, which followed the public inquiry.

I will avoid reference to the facts of Operation Dewar in which the Commission made corrupt conduct findings in relation, firstly, to the failure by the former Commissioner of the SES to investigate complaints that had been made against another senior officer of the SES, with whom he, the former commissioner, shared a friendship and, secondly, in relation to the termination of the officer who had brought forward the complaints and who pressed unsuccessfully for them to be investigated. I have closely examined Operation Dewar. I have provided a response to the Inspector in relation to a complaint that was made by the former SES Commissioner. It is my understanding that the Inspector, Mr Bruce McClintock, SC, will shortly furnish a report on the matter for tabling in the Parliament.

I wish only here today to say that in my response concerning the matter I have concluded, and I have submitted to the Inspector, to the following effect: First, there had been no improper withholding of any evidence in the public inquiry or at all that could in any way be considered to have constituted exculpatory evidence; secondly, that the evidence in support of the corrupt conduct findings made by the Commission was both cogent and compelling, and there was no basis for the conclusion that investigators improperly chose not to serve evidence on witnesses or improperly withheld relevant evidence from the former Commissioner of the SES because the evidence was contrary to the prosecution case; thirdly, that the investigation in Operation Dewar and the conduct of the public inquiry in it met the highest ethical and professional standards; and, fourthly, that the analysis of the decision of the learned magistrate, including criticisms of the Commission and criticisms of the Office of the Director of Public Prosecutions, was, with the greatest respect to him, both misconceived and wholly erroneous. The basis and the reasons for my conclusions and my submissions on this matter were of course included in my response to the Inspector.

Members of the Committee, that concludes my address on that aspect of the matter. I wish to move onto the next, which concerns the development within the Commission of its professional development program. Earlier this year I have pointed a committee to establish a performance development program within the Commission. The committee is headed by myself and consists of the Executive Directors of the Corruption Prevention, Investigation and Legal Divisions as well as one Principal Lawyer from the Legal Division. The objective is to provide the staff of the Commission with the benefit of ongoing programs that address ethical, legal, statutory, procedural, corruption prevention and other functions. On 21 February 2018 a joint presentation was delivered at the Commission by two highly esteemed speakers: The first, the Hon. Keith Mason, QC, AO, formerly President of the New South Wales Court of Appeal, and Dr Simon Longstaff, AO, of the Ethics Centre. Each addressed public trust principles that are central to the work of the Commission, the former from the viewpoint of an esteemed lawyer and the latter from the viewpoint of an authoritative ethicist and philosopher.

On 9 May 2018 the second program was delivered by Jill Kiely, who is the Managing Director of the ICAC referral unit of the Office of the Director of Public Prosecutions. The presentation discussed disclosure, electronic service of briefs, and the early appropriate guilty pleas reform. A further presentation is scheduled for 3 July to be delivered by one of the Commission's Senior Forensic Accountants on forensic accounting principles. In passing I note that I have met with the Director of Public Prosecutions, and we have agreed to establish a small

committee to ensure that all disclosure requirements that are required by the Commission are handled appropriately, and that all the necessary systems are in place to ensure that disclosure operations are fully complied with. That small committee, it is anticipated, will meet from time to time.

Finally, I wish to raise one further matter. That concerns a recent media article. In that recent media article, allegations were variously expressed, but in essence asserted that the Commission deliberately suppressed the contents of a medical report concerning a Mr Brook, who was called as a witness in the public inquiry in Operation Jasper, the suggestion being in this media report, that the medical report's contents were relevant to the witness's capacity and reliability. The most appropriate course for dealing with an allegation of that kind, if truly believed, would be to report it to the Inspector, who of course has ample powers to investigate such an allegation in an objective and independent manner.

**The CHAIR:** I will stop you there for a moment. I note that there is a cameraman who wishes to take photographs. A general provision of these committees is that you should not take photographs of papers. I can see that you understand.

**Mr HALL:** I understand that no complaint about this matter had been lodged with the Inspector. I understand that the Inspector is aware of the allegation. I wish it to be recorded that should the Inspector decide to investigate it the Commission is ready to supply all relevant information and material that he may require.

**The CHAIR:** Thank you. I take it that you have already conducted an internal investigation in relation to that matter.

**Mr HALL:** I have commenced an investigation of it in consultation with Mr Waldon. I cannot say I have done a complete investigation of it but we are well advanced. We have located material that could be available to the Inspector. I thought it inappropriate for me to otherwise publicly deal with this matter at this stage for two reasons. One, as I have indicated, is that the appropriate forum is that of the Inspector. The second is that there are criminal trials outstanding, to be heard next year. It is important that this space not be entered in a way which could, in some way, transgress the fair trial principle. But, in answer to your question, yes I have undertaken some investigations. I do not say that they have been completed but we are substantially on top of it.

**The CHAIR:** The three-Commissioner model appears to be working well in terms of allowing you to fulfil the workload requirements. You now have back-to-back inquiries running. How does it work in terms of making a decision about a public inquiry? What do the discussions look like around the meeting of the three minds with a view to taking those decisions? Following from that, have you had a disagreement about whether to proceed with a public inquiry? What prevailed upon your minds in relation to that?

**Mr HALL:** I am happy to address all of those points. We have regular meetings—monthly—in relation to all current investigations. We receive detailed reports before we meet so that we all develop a good understanding of the facts, issues and matters concerning individual investigations. When they reach a stage where there is enough information to be able to make a judgment call, we—Commissioner McDonald, Mr Rushton and I—meet to discuss and identify whether or not the material, which by this stage we are well familiar with, warrants a public inquiry.

In doing so we are mindful of the provisions of the Act and seek to apply and identify the benefits, disadvantages, repercussions and implications of conducting a public inquiry. We have done that on three occasions. We have kept a record of the decisions made. In each case,

that has been the procedure. In each case the decision was unanimous that there should be a public inquiry and that it met the criteria under the Act.

**The CHAIR:** So there has been no inquiry yet where you have had a disagreement.

**Mr HALL:** Correct. That is so.

**Mr RON HOENIG:** Chief Commissioner, have you been made aware of the evidence given by the Inspector at the public hearing and the nature of some of the questions I asked?

**Mr HALL:** Sorry, I did not hear.

**Mr RON HOENIG:** Were you made aware of the nature of the evidence that the Inspector made to the Committee publicly prior to your arriving?

**Mr HALL:** No.

**Mr RON HOENIG:** I do not want to be repetitive. I want to save time. The effect of his evidence is that the Commission is going very well. Anecdotally, the material he has received—and I have—is that the Commission is operating in a very fair way. His view is that that is because of the nature of the legislation that has been amended and because of the nature of the appointments that have been made. I accept that. He gave us some evidence, in the absence of the public, in relation to some of the matters to which you referred so I cannot ask you a specific question lest I disclose what he told us and what is going to be in his report.

**Mr HALL:** Yes, I understand that.

**Mr RON HOENIG:** I am going to try to be relatively vague if I can. Some of the legacy matters involved criticism of the Commission, and therefore impacted upon the Commission's reputation in the past. It may not have been accurate criticism or may well have been criticism fostered by the way in which the Commission in the past had done things, but would not do it now because of the amendments to the legislation. Nevertheless, there is a disconnect between the criminal justice function and the Commission's statutory function and the evidence which you rely upon and the evidence that the court can rely upon. How, in the future, do you address that sort of information to the public to avoid that misunderstanding, which can impact upon the public confidence in the Commission?

**The CHAIR:** Other than through addressing this Committee as you have today, is there any other mechanism which you may be able to use to dispel this public perception?

**Mr HALL:** That is a very important issue. We have considered and discussed such matters. When we first took up our positions and consulted with staff we wanted them to put on the table anything they wanted to raise with us—problems they saw or how things could be done differently.

In the course of that there was voiced the question of dealing with ill-informed comment in the community—perhaps in the media or elsewhere—and was the Commission going to stand up for its staff when allegations were made and they seemed to be ill-advised? We have considered whether or not issuing responses to media articles or putting something on the website would suffice or go a long way to properly informing the public about what the situation is. We are not convinced that engaging with, for example, the media in a dialogue and a debate about issues is going to be effective. I have taken the view that we Commissioners do have a responsibility—firstly to the community but also to the staff, including investigators who are at the cutting edge of these things—to, where it is appropriate, stand up and make it known in an appropriate forum what the true position is. Hence my reference to the Operation Dewar matter here today.

And also in my ability to respond to a complaint when asked by the Inspector, the Parliamentary oversight mechanism and the Inspector's mechanism does provide, I think, a good forum, a proper forum where these matters can be dealt with and well-informed information or explanation is given. The problem is, however, that much time goes by before we can get before you or before the Inspector. The very rationale for establishing the Commission was to help restore and support public confidence in public administration—and Government, for that matter. If the Commission is undermined, as it is, in a sense, the guardian of the public interest to try and restore trust and confidence, but it is undermined itself in terms of the public's trust and confidence in it, then the public perception of this Commission could be irreparably damaged.

People, for example, are saying in some of the media that they are a cowboy outfit, they have got these enormous powers, and they do not exercise them responsibly. All of that is completely untrue. So we have not—or I certainly have not come up with any other magic formula whereby these matters can be dealt with on an informed basis. We would dearly like to think we could—beyond, as I say, the existing mechanisms in the public interest—be able to inform the public that the criticism is ill-informed for reasons which sometimes can be complex and hard to explain. Nonetheless, it is a concern of mine. As I have said, if we do not meet our own standards or the standards expected of us then it is important that people can criticise us.

**Mr RON HOENIG:** Hypothetically, a judicial officer makes a comment and it is published in the newspaper and a newspaper editorial is written, I as a politician read it, I know that there is this arm of the Executive with this extraordinary power, which is determinative, and I say, "Not again. Somebody else being treated unfairly that should not be treated like that in a democracy that has the presumption of innocence." I draw an inference in respect of what I have read, and two years go by. It takes two years before someone gives an account that is reliable and trustworthy.

I could have been advocating a position in the Parliament and in public for the last year and a half and protected the Commission's reputation, as could all my colleagues here. But we draw the adverse inference, add it to one other error that we judge the Commission might have made, and we say, "This organisation is out of control. We have got to do something about it." So there needs to be some sort of mechanism. The Parliament has gone a long way now in amending the Act, making eminent appointments to try and have the organisation trustworthy. Like any investigator, you need people coming forward. You do not want people in morbid fear of going to give evidence before the Commission, who go there to assist the Commission, either. There are a number of things that I do not have the answers to but we need the answers to, to try to give the organisation—enhance its reputation in the public's mind, but also public trust so that people come forward and have confidence in every aspect of it.

**Mr HALL:** Could I just raise two points, one of which I will ask Mr Rushton to deal with. That is the actual experience to date with the implementation of the guidelines, which are designed to ensure that procedures are carried out in a way which does ensure fairness. The first, which I will deal with, is our use of the compulsory examination power. Properly used, that can have at least two benefits. One is it can give us access to information which we otherwise would not be able to obtain. The second is that it gives us an opportunity, and should be used as an opportunity, to evaluate the witnesses as to whether or not they are reliable—whether what they are saying is sufficiently reliable to put out in the public domain if there is a public inquiry. It can operate as a filter to guard against the public inquiry being conducted on a basis which attracts enormous publicity, but the evidence being given may be wholly unreliable and unfair for the person affected. I think the compulsory examination power, properly used, can

assist in that way and ameliorate concerns that people's reputations may be trashed by unfounded evidence.

The second, if I might, the guidelines and the application to them to date have, I think, gone a good way towards ameliorating some of the concerns which by, demonstrably, application of fair principle in the course of a public hearing, people can perhaps have greater comfort that this is not some form of Nazi interrogation system, but that it is still required to comply with some rules of fairness as well as being an effective investigation agency. If I might, with your leave, ask Commissioner Rushton to deal with the second of those two issues, and that is the application of the guidelines.

**Mr RUSHTON:** It is certainly my belief and my observation that the amendments introduced by section 31B in terms of procedural fairness are now well understood as of extreme importance to both the workings and the reputation of the Commission. All staff involved in the investigation of possible corrupt conduct and the conduct of hearings are aware that those guidelines must be implemented. From the current inquiry that I am doing, Operation Estry, I can tell all of you that those guidelines have been rigorously applied. The Chief Commissioner has already indicated to you that the matter involves allegations of an alleged serious assault on a prison inmate and the subsequent collusion between corrections officers, including very senior corrections officers, to cover it up.

The Commission's website, as you probably know, includes a restricted portal where practitioners who would be seeking authorisation to appear for affected persons can gain access to relevant material in advance. That is what happened in this inquiry. So as to protect the forensic integrity of the investigation, not all material is published on the restricted portal before the public inquiry begins, and the timing is a matter which is discussed and was discussed in this particular inquiry before it commenced, with Counsel Assisting myself and investigation staff. Perhaps the most common example where material is sometimes not published in advance is the transcript of what a witness has said during the previous private compulsory examination. You can well imagine, I am sure, that this is entirely appropriate in the case where there are allegations of collusion. To publish transcripts of compulsory examinations in advance might lead those against whom the allegations were made to put their heads together, so to speak.

The procedure I adopted was to ensure that, immediately following and sometimes prior to a witness giving evidence, that the witnesses that had previously been examined in a compulsory examination, their transcript was put up on the restricted website so that various legal practitioners that appear for affected people—and their clients, the affected people—could consider it before commencing their cross-examination of the witness. On a number of occasions I indicated to the legal representatives that if they needed more time to consider that material then time would be granted. As I recall, no-one has sought additional time. Can I also say that in Operation Estry, in accordance with section 31B, I have not limited cross-examination of witnesses as to their credit. The credit of various witnesses in this particular matter, including two inmates, is a critical issue.

Could I say more generally, in terms of disclosure, a committee has been established which will be chaired by Commissioner McDonald to develop policies and procedures to ensure that exculpatory material will be identified, investigated, monitored and disclosed to affected persons and, in the case of referrals to the Director of Public Prosecutions, to the director. You might appreciate, the Commission often receives vast amounts of material, and as an investigation progresses, material not thought to be relevant, including exculpatory evidence, becomes relevant. The challenge is to monitor that material, to monitor its relevance and to ensure that in due course and at an appropriate time it is disclosed. I can confirm that that is what this committee will be designed to do, and these policies and procedures will be developed

with that in mind, so that we do not miss anything and that evidence that should be disclosed will be disclosed in a timely manner.

**The CHAIR:** You will be aware—again, it is in the public domain—of a situation which was alleged to have occurred in relation to evidence given by a former Premier of this State, which appeared to contradict what was said in the public arena. Are you saying to me that that is either wrong or it would not occur again?

**Mr RUSHTON:** As far as I am concerned—I am not quite sure which matter you are referring to—I can tell you, subject to human error, of course, you can never discount that entirely, but the approach of the Commission now in its public inquiries is to ensure that there is a proper review of what is relevant to the inquiry and we bend over backwards to ensure that at an appropriate time, consistent with maintaining the forensic integrity of the investigation, material is released. It may be, for example, that in a compulsory examination we ultimately release to the affected people there could be material in there that we would not necessarily regard as exculpatory but, because of the knowledge held by witnesses, it may be. So we have to take a very cautious approach. I can tell you in Operation Estry I think it is the case, and if it is not the case presently, because there are still some examinations to go, they will have, by and large, all the material we have got.

**The Hon. LYNDA VOLTZ:** Just a comment on that. I suppose one of the problems is that papers can make any inference they like to some regard and it is very difficult unless you are in a forum such as this to present an alternative view. It must be extraordinarily difficult when you are dealing with some of the mainstream press that have had some recent Press Council rulings against them in regards to what they say about people. I just want to go back to the budget issues that you raised. You have got an additional \$3.6 million, and that brings you back to \$27 million, is that right, because you did have some cuts?

**Mr HALL:** Yes, we did—the cuts in 2016.

**The Hon. LYNDA VOLTZ:** Will you get the full \$27 million for all of the 2018-19 financial year?

**Mr HALL:** Yes, we will. I have Mr Koureas here, who can confirm that. He manages our corporate governance.

**Mr KOUREAS:** Yes.

**The Hon. LYNDA VOLTZ:** You have got the proactive, strategic intelligence—the two people that you wanted to put in—that you raised in the November meeting last year.

**Mr HALL:** Yes.

**The Hon. LYNDA VOLTZ:** Does that \$27 million and the \$3.6 million deal with the extra \$2.5 million that you were talking about at the last hearing? Has it allowed you, for example, to go from three investigation teams back up to four?

**Mr HALL:** It will enable us to get back to four teams. There will be an additional nine permanent investigators, an additional two officers in corruption prevention, and an additional officer in the assessment section, which assesses the matter at the outset.

**The Hon. LYNDA VOLTZ:** And that will mean that you will not have to rely anymore on temporary investigators, because I think that last year you spent \$800,000 on temporary investigators?



**Mr HALL:** Yes, that is true. I have in mind at the moment two particular officers—one of whom is on secondment and another one, who I think is on a temporary contract—have both proven to be outstanding and they have been approached to stay on.

**The Hon. LYNDA VOLTZ:** You are trying to steal them off someone?

**Mr HALL:** I am sure those agencies that have released them on secondment to us will not be happy if they do not return. Some of the, as it were, temporary, short-term contract people have enabled us at least to get on with building up the investigations that have now turned into public inquiries. It would not have been possible without all that temporary staff being taken on over the last few months. But going forward, the intention is to have permanent officers. The importance of that, of course, is they build up corporate knowledge and understanding of systems and methods, which short-term employees are not fully versed in or cannot be sometimes fully versed in. So it is important to replace short-term employees with permanent employees and that is going to happen in the numbers I have mentioned.

**The Hon. LYNDA VOLTZ:** You got KPMG in to do a report. Part of that, I assume, was the restructure, but was part of that also because of the budget cuts and you needed to look at what your actual needs were?

**Mr HALL:** Yes. It was primarily done as an exercise both to assess our resources, as I said, and also to undertake a review as to the adequacy of our systems. That was the primary motivation. But it became apparent, as we went, that it would become the evidence-based business case that we could present and did present to Government, simply because it had been thoroughly researched by an external consultancy rather than us assessing it ourselves.

**The Hon. LYNDA VOLTZ:** As a result of that report you then got the recurrent increase, the \$3.6 million, back.

**Mr HALL:** Correct.

**The Hon. LYNDA VOLTZ:** How much did the KPMG report cost, the consultancy report, do you know?

**Mr KOUREAS:** That cost \$63,000 excluding GST.

**Reverend the Hon. FRED NILE:** Is it possible for a copy of the KPMG report to be given to the Committee?

**Mr HALL:** Yes. There would be no reason not to. I have a copy here; we can make it readily available during the course of today or next week.

**The CHAIR:** I notice you have been doing a fair bit of country work.

**Mr HALL:** I have been to Orange this week. We have had a team from our corruption prevention people spreading out from Orange, Dubbo, Forbes and other centres to interface with community leaders, to explain to them what we do, but also to provide workshops. I went down on Tuesday, Wednesday with the new Ombudsman, Mr Michael Barnes. We both addressed those in attendance. Two things came out of it. We were impressed by the way in which the local people appreciated Sydney people coming to meet them and discussing these issues. Secondly, there were people in various positions, one of which, for example, is the fairly new position of Internal Ombudsman within councils. That is, apparently, a growing field and, as a result of the contact that I had with one of those officers, we are now going to follow-up to see whether or not perhaps we should have an ongoing dialogue with that group. Somebody within council said to be independent could be a very valuable source for us going forward.

These outreach programs, as we call them, seem to have grown in interest. We have another one scheduled for Wollongong later this year and the team we engage are extremely good at organising it, getting together the materials used and those conducting the workshops. I believe it is important that the Commission has a presence in regional areas. I think the ICAC—and I mean no criticism of this—has been very Sydney-centric in its operations. There is no reason to believe that the sort of problems we uncover stop at the boundaries of Sydney, and we know from the reports of investigations interstate that corrupt activity, of course, does occur in small, close communities sometimes, in regional cities, and it is important that they are on our radar as well as the city of Sydney.

**The CHAIR:** I think it is an excellent initiative.

**Reverend the Hon. FRED NILE:** Now that there are three Commissioners, as you know, and you are the Chief Commissioner, I gather from the Inspector that you plan to hold simultaneous inquiries and each of those Commissioners will conduct an inquiry?

**Mr HALL:** Yes, the present position is that there is overlapping of the three mentioned proceedings. That does require quite a bit of planning and organisation work. However, I am mindful of the fact, having conducted these three inquiries, it has put very heavy demands on the staff.

**Reverend the Hon. FRED NILE:** That is a question I was going to ask you: How are you staffing that and where do you have the premises to conduct three inquiries?

**Mr HALL:** Yes. There are two things about that. Each of these inquiries has basically had its own separate team working on them—investigators, lawyers, support people and others. It is very resource-intensive work. Where possible we avoid having a clash between the inquiries. However, there has been necessity for us to, as it were, borrow the hearing room from the Law Enforcement Conduct Commission to conduct some compulsory examinations, which we have done, and in July I will be spending a week at the LECC's premises to conduct a further public hearing there while Operation Dasha is proceeding in our main hearing room on our premises.

With the goodwill and cooperation from the LECC we have been able to, as it were, overcome these double booking arrangements but I am mindful there is a limit, as I indicated before, beyond which I should not push the staff to be operating too many inquiries at any one time or in any one period but I think that with the increased resources I discussed earlier, it will become somewhat more feasible to do what we have done thus far with using a mix of part-time and permanent employees. I think it has given the Commission greater capacity to get through its workload being able to proceed in this way.

**The CHAIR:** Has there been a decline in complaints?

**Mr HALL:** No, an increase, I am told. I will ask Mr Hoitink to answer as he is closer to the action.

**Mr HOITINK:** At the moment we are probably carrying close to double what we were last year as far as ongoing investigations.

**The CHAIR:** What is the response time for a complaint? You generally set yourself 28 days, I think.

**Mr HOITINK:** I understand it is 28 days for the assessments—I might have to be corrected by our assessment's manager on that fact. We have 120 days for a preliminary investigation and then 16 months all up for a major investigation.

**The CHAIR:** Are you meeting those targets?

**Mr HOITINK:** At this stage, yes. The only change would be in relation to some of the preliminary investigations that we have got in. Because there are so many at the moment I have had to stagger sending those out to the teams because they are carrying quite heavy workloads, so some of the key performance indicators—

**The CHAIR:** As to complaint patterns, are you able to identify any particular public sector area where complaints are coming from?

**Mr GEOFF PROVEST:** Hotspots?

**The Hon. LYNDA VOLTZ:** Trends.

**Mr RON HOENIG:** I guess local government might be one?

**Mr HOITINK:** I think from recollection of the report certainly local government is well up there—corrections, transport and I cannot recall the other one.

**Mr HALL:** Generally procurement.

**Mr HOITINK:** Procurement certainly.

**The CHAIR:** Will the Strategic Intelligence and Research Unit be a valuable tool in being proactively able to address hotspot complaint areas and to perhaps put in place mechanisms to more adequately deal with corruption issues?

**Mr HALL:** The answer is yes. Similar units have been established in Queensland, Western Australia and Victoria, although Queensland is a bit different because its crime jurisdiction is a very extensive one. In those other Commissions their similar unit has been absorbed into the corruption prevention divisions. I have taken the view that it is better to have this unit interfacing with both investigations and corruption prevention—CP as we call it because, for the very reason you mentioned, in terms of identifying emerging risks and trends, it is equally important from both investigations and corruption prevention that they are keeping pace with known organisations and known persons whom we suspect are engaged in corrupt activities. The gaps in the corruption controls are identified as of direct relevance to corruption prevention work. If it is left as part of corruption prevention, as is the situation in at least two other agencies I am aware of, I fear it would not feed into investigations whereas it is Mr Hoitink's role to ensure that the strategic intelligence can be used in an operational sense in directing and facilitating investigations and lines of investigation; in other words, it is an agency that sits in the middle.

Our databases are immense. Names become very familiar to us over time and different investigations. Those names are sometimes disguised behind, if you like, corporate entities. To be able to mine and take hold of all this disparate information involving familiar entities is a formidable task. The idea of this strategic intelligence approach is to be able to, through sophisticated data systems, which we have are acquiring or have already acquired, will facilitate the cross-referencing and identifying patterns, so on and so forth, which will inform our investigations. We are optimistic that it is going to enhance our capabilities and it is in line with modern investigative methodology.

**The CHAIR:** If in fact we are identifying a particular trend, will the model you use mean that the SIRU will start knocking on doors?

**Mr HALL:** Not really. I might invite Mr Hoitink, with your leave, to address that question.

**The CHAIR:** Yes.

**Mr HOITINK:** It is not so much knocking on doors. Their role will be to gather the data that is required to assess the information they have got and then that information will go through the normal assessment processes the same as any other complaint that comes in. Once they put all that together it will be referred via the assessment process either to the corruption prevention—

**The CHAIR:** So the complainant effectively is the SIRU?

**Mr HOITINK:** That is correct.

**Mr GEOFF PROVEST:** I have a couple of questions and they are a bit varied. The Committee noted that in November 2017 a memorandum of understanding [MOU] was concluded with the ICAC and its Inspector. Is the MOU operating well in practice and could you please comment on the ICAC's working relationship to date with the Inspector?

**Mr HALL:** Yes, I am happy to do that. I think I advised the Committee at the outset that we met with Inspector to ensure that we would be able to work well and effectively together and that has proven to be the case. He has, in a number of matters now, requested information. We endeavour wherever possible to have a very quick turnaround in providing him with information. I think I can say in the main that has happened. We have had no problems from his end or complaints that we have not provided him with what he wanted. We have had two meetings with him, as I recall it, since we started simply to review any outstanding matters that he was working on that needed assistance or more information and we would make available within our staff whatever information he was requiring to be identified so that it could be supplied. Speaking for myself, I think we have a view that although we have two very different roles, at the end of the day we are working in the same direction in terms of public interest. Mr McClintock is a very experienced lawyer, very intelligent and very proactive so far as I can see. We three Commissioners fortunately have a good personal relationship with him. We commend him as a person who is obviously ideal for the role. He exhibits also to us enormous efficiency notwithstanding the fact that he is also a busy practitioner at the Bar. His staff have also been excellent to deal with, so no problems thus far.

**Mr GEOFF PROVEST:** My second question has two parts to it. You touched on various components of this when you were talking about the public or community's perception on the role of ICAC and how you are intending to improve that. One of the areas—I being a politician out in the community—was about the relationship between the Commission and the DPP in terms of the speed of cases and that they tend to go into the never-never. How would you describe your relationship with the DPP—you touched on going out in the community—in terms of the speed of dealing with some of those cases?

**Mr HALL:** I earlier mentioned that we met with the DPP. He came to our offices possibly about six weeks ago from recollection. We all discussed issues of importance which include, as Commissioner Rushton has referred to, the questions of disclosure. Like us, he is very concerned to ensure that everything is done so that information does not get overlooked—I am talking about inadvertent overlooking of material that his office needs. We discussed the question of needing to constantly update our database systems in order to ensure that we are able to utilise technology to the best advantage to minimise human error. It was at that meeting that we discussed and decided upon establishing the committee that Commissioner Rushton referred to.

Commissioner McDonald, who is engaged to do prosecution work in the criminal area, has a particular interest in disclosure requirements. Of course, it is part and parcel of what she does. She has volunteered to steer that committee from our point of view. In terms of the history of matters referred to the DPP, there was a history of long time lags. I am not quite sure of the

reasons for that occurring. Those days are over. There are much more efficient systems. In terms of time and the like, I am not in a position—but I can get the information if the Committee requires it—to give you updated figures. I think, however, Mr Hoitink may have some overview. He may be in a position to address the question of time delays, or Mr Waldon perhaps might be better.

**The CHAIR:** It is buck-passing.

**Mr WALDON:** We have recently renewed our memorandum of understanding with the DPP and that sets out ideal time line for, once we get a brief to the DPP, how long it takes them to assign a lawyer to it, letting us know who the lawyer is, and have we got a contact person. There is meant to be a meeting within a period of time with the DPP then to discuss the brief. Then if there are requisitions then we need to respond to those. We have not quite started this, but we are going to start to move to electronic briefs. So instead of sending the DPP basically cartloads of hard copy information, it will be the same information but it will be in electronic form—you just have to press the button and it will appear at the other end. All of this is being designed to help speed up the process. It does rather depend on resources both at our end and at the end of the DPP. Sometimes those time lines are not always met but we have established close liaison with the two groups who in the DPP deal with ICAC matters. The idea is that if there seems to be any delay emerging then we communicate with one another about those delays and see what we can do to remedy them.

**Mr GEOFF PROVEST:** Is there a benchmark that you are looking at, to do more than 70 per cent or 60 per cent? What I am referring to is the way we do our emergency departments in our hospitals and our triage times and things like that.

**Mr WALDON:** It is a little bit difficult because some briefs we send are fairly straightforward and they are not complex and certainly they should be dealt with quite speedily. Other matters have quite a large degree of complexity about them. For example, the mining matters would fall within that category. Some of those matters are currently before the courts. Some of those matters are still with the DPP at the stage of assessing whether there is sufficient evidence to recommend prosecution or not. It rather depends on the nature of the matter and whether we are talking about a complex brief, how many people might be involved and the possible offences.

**The CHAIR:** Can I take you back to Dewar? A cost order was made in relation to that matter.

**Mr HALL:** Yes, that is right.

**The CHAIR:** No appeal was made in relation to that. Was your advice sought in relation to it?

**Mr HALL:** Again Mr Waldon was closer to the action at the time than I was. I was not there at that time but my understanding is that the DPP did consider the question of an appeal. It is not the practice of the DPP to provide us with their advice if it is in writing. The matter was considered and for reasons that I have been not been able to ascertain the DPP decided not to—

**Mr RON HOENIG:** There would be restrictions on the DPP himself as to when he would decide to appeal against an acquittal like that too.

**The CHAIR:** Not the acquittal; the cost order. In terms of the process of this, as I understand it, the relevant DPP officer—I might be wrong on this—made a recommendation that the costs should have been paid by ICAC.

**Mr HALL:** I cannot help you on that. I do not know if Mr Waldon has anything.

**Mr WALDON:** I do not know about that but they certainly were not paid by ICAC. The costs order was against the DPP and as far as I am aware the DPP paid it.

**Mr RON HOENIG:** Can I ask a corruption prevention question in relation to a local government speech I gave in Parliament last week. The Local Government Act requires open meetings of councils and council committee meetings. I suppose as part of the sunlight, the disinfectant against corruption, a practice has developed in local government relatively recently whereby councils abandon their committee meetings and give councillor briefing session behind closed doors. Then they produce a sanitised report that just sails through the council with minimum dispute and discussion. Even the independent planning and assessment panels which replaced councillors because of corruption risks are getting their reports to them. Development applications are public, but they are getting these private briefings from the council planners before they even turn up into a public forum. So the public that are impacted have no idea what they have been told behind closed doors.

That seems to me to be probably an unlawful way of going about it—certainly improper—but it is now so widespread. I have called for the Office of the Local Government to involve themselves, but they are a tiny little organisation in Nowra. Does the Commission have any role? I am not suggesting anything improper or corrupt is going on now but it looks to me like it is going to be the classic recipe for nobbling councillors and someone is going to slip stuff through. Does the Commission have any proactive function like that?

**Mr HALL:** With your leave, I might ask Mr Rangott, who heads up our Corruption Prevention Division, to respond.

**Mr RANGOTT:** Mr Hoenig, the short answer is yes. We would be very interested to read your speech and even discuss your concerns with you in a private session, if you do not mind me saying that. I am aware that that practice is going on. I am interested in your comments that that seems to be an area that is growing. These developments that were brought in with the independent hearing and assessment panels are sound, and other forms of decision-making should seek to adopt the logic of those IHAPs. Private briefings about matters that are meant to be for the ears of the public is a concern. We are quite keen to hear from you and investigate that further.

**Ms TANIA MIHAILUK:** Canterbury-Bankstown Council would have about four meetings a month, of which three are private briefings. That is exactly what Mr Hoenig is talking about. That pattern is a problem over time. When I was the Mayor of Bankstown about five or six years ago the reverse occurred; there might be one briefing a month and the rest were public meetings.

**The CHAIR:** Is the process involving IHAPs approving development applications a good one?

**Ms TANIA MIHAILUK:** There is still a role for councils.

**Mr RANGOTT:** I think the logic is that councillors are making decisions based on the papers presented to the public and not other information. All the information they need should be in those papers.

**Ms TANIA MIHAILUK:** I agree.

**Mr RANGOTT:** I accept that there are some situations where information is commercial-in-confidence.

**Mr RON HOENIG:** One council had an entire budget briefing behind closed doors. A \$100 million budget sailed through after three minutes of discussion. That is what is happening. I am not suggesting that anything corrupt is occurring, but it seems—

**Ms TANIA MIHAILUK:** It is a recipe for disaster.

**The Hon. LYNDIA VOLTZ:** This gets back to the fundamental argument of public disclosure of information and how you get organisations to put information in the public domain before a decision is made. That is true whether it is a development application at a council level or a decision made by a government to build a stadium over public parklands. I am meeting with the Information and Privacy Commissioner next week. There is a systemic withholding of information, whether it involves a local government decision or a State Government decision, to such an extent that there is no public knowledge of what is happening in the public domain. A good example is the Allianz Stadium.

There has been a community consultation process involving three meetings at which no plans or designs were presented to the community so they know what is being proposed while that is part of an environmental impact statement process. As we saw in Parramatta, the community did not see the designs and their concerns were confirmed when their swimming pool was ripped out with no consultation. The problem for ICAC is that people cannot necessarily tell what is going on because of the withholding of information. It seems to be more systemic in local government areas where councillors are not making decisions. Many of the decisions are being taken out of their hands.

**Mr HALL:** Of course, it is true that the less information available to the public, the less accountability there is. Many development applications do impact on the public in various ways, not only neighbours or the property owner. In general terms, the public should have enough information about any development that could impact on the environment or on the proposed development area. People should be informed and they should be able to determine for themselves whether there are good arguments for or against it rather than it being done in a closed fashion. That raises suspicions and, again, public trust and confidence are diminished. In the longer term, I agree with the sentiments you are expressing; that is, privacy can be conducive to corruption risk. If it is done in a private fashion, the chances of identifying and putting in place corruption risk management strategies are diminished.

**Mr RON HOENIG:** A number of years ago the ICAC conducted a public inquiry in relation to, I think, consultants or lobbyists.

**Mr HALL:** Yes, it did.

**Mr RON HOENIG:** There were no persons of interest; no-one was being fingered as doing anything wrong. The Commission received a variety of evidence and investigated a variety of sources, and it was able to make some recommendations based upon a non-adversarial system. When the Commission embarks on an investigation involving persons of interest and it is looking down a particular path, it then makes recommendations. However, that is not the purpose of its investigations. Local government operates in a particular way.

I know from politicians who have been charged with offences, I have appeared for alleged murderers and I have seen from Royal Commissions that the Bar and judiciary do not know what is in politicians' minds when they are making decisions, so it can look strange. If an investigation or inquiry does not involve a person of interest and information is being gathered from every source, the Commission may well, if it has the resources, be able to make meaningful recommendations that could be adopted across the board.

**The CHAIR:** Like a guideline judgment.

**Mr HALL:** Yes. Commissioner Rushton reminds me that we are planning to have one major project a year undertaken by our Corruption Prevention Division in addition to its other prevention activities and the reports it produces in relation to other matters. There are areas that need to be the subject of special projects. Such a system will enable the Commission to engage with stakeholders to obtain evidence. We are considering whether that special project should be in respect of procurement. We keep getting complaints and notifications about procurement abuse. It seems to me that there is a place for a more general review. All the agencies have the requisite database systems and so on to detect and to prevent procurement abuse, yet we still receive complaints. There is something wrong, either with the system or the human factors that go with the system, that accounts for the continued unhappy story of procurement abuses, which cost the State dearly over time.

Reference was made to lobbying. It was last examined by the Commission 10 years ago. It is time for us to consider whether we should have another look at that area. Whether that should be a special project is yet to be determined. As we speak, work is being done on examining areas such as lobbying by way of a comparative exercise to see what the standard is in other States and other countries and jurisdictions to determine whether that should be the special project for the next 12 months. I envisage that we might approach it in a somewhat different fashion from the approach taken in the past.

That would involve engaging, on a consultancy basis, two esteemed and highly regarded experts in the field. One might be a professor of law and one might be someone familiar with, for example, lobbying, to undertake the interfacing with stakeholders, politicians and others, and then to work with our Corruption Prevention Division. The outcome would have the authority of recognised experts in the field and of the Commission itself. The problems you have identified are not one-off situations. It is an ongoing systemic issue that I agree needs to be approached, examined and investigated, perhaps not in the traditional way but by using a process such as the one I have just outlined.

**Mr RON HOENIG:** Public sector organisations must guard against going through a process for the sake of it and then providing a substandard service. One of my four councils requires three quotes, but the quality of the quotes does not matter. The same service provider keeps getting all the work, but they have three quotes. There are always mechanisms available to use the Commission's recommendations to get around what it might have wanted to achieve. More significantly, they might adopt a lower quality service or not provide a service simply on the basis of complying with some Commission recommendation, which actually does not go to the integrity of the decision-making process. You do not want people fearful of making decisions because somehow or other it is contrary to the Commission's recommendation. You just want to make sure these public sector organisations do not throw the baby out with the bathwater.

**Mr HALL:** Yes, I understand the point you are raising.

**Mr RON HOENIG:** I would like to have some discussions with your Corruption Prevention Head because that is something that probably needs to be addressed.

**Mr HALL:** We would welcome that engagement.

**The CHAIR:** Thank you very much for being here this morning, Commissioners, and your staff. It has been very productive. If we need to put any additional questions to you I take it you are happy to answer those questions.

**Mr HALL:** We are, of course. Thank you.

**(The witnesses withdrew)**

**(The Committee adjourned at 12.30 p.m.)**



## Appendix Three – Extracts from Minutes

### **MINUTES OF MEETING No 33**

1:03pm, 8 March 2018  
Room 1136, Parliament House

#### **Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Hoenig, Ms Mihailuk, Revd Nile, Mr Patterson and Ms Voltz.

#### **Officers in Attendance**

Jonathan Elliott, Elspeth Dyer, Jacqueline Linnane and Millie Yeoh.

#### **1. Apologies**

An apology was received from Mr Humphries.

2. \*\*\*

3. \*\*\*

4. \*\*\*

#### **5. Inquiry to review the 2016-17 Annual Reports of the ICAC and ICAC Inspector**

The Chair raised the issue of setting aside a date to conduct public hearings for its review of the 2016-17 Annual Reports of the ICAC and ICAC Inspector.

Resolved, on the motion of Revd Nile, seconded by Mr Provest:

- That the Committee conduct an inquiry to review the 2016-17 Annual Reports of the ICAC and the ICAC Inspector;
- That the Committee conduct public hearings for the inquiry on suitable dates to be confirmed by the Secretariat;
- That the Chair issue a media release announcing public hearings for the inquiry.

6. \*\*\*

#### **7. Next meeting**

The Committee adjourned at 1:08pm until a date and time to be determined.

### **MINUTES OF MEETING No 34**

9.05am, 1 June 2018  
Room 814-815, Parliament House

#### **Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Hoenig, Revd Nile, Mr Taylor, and Ms Voltz.

**Officers in Attendance**

Jonathan Elliott, Elspeth Dyer, Jacqueline Linnane and Millie Yeoh.

**1. Apologies**

Apologies were received from Mr Khan, Mr Humphries and Mr Lynch.

The Committee noted that Mr Patterson was appointed a Parliamentary Secretary, effective 24 May 2018, and that by virtue of section 66(1) of the *Independent Commission Against Corruption Act 1988*, his membership of the ICAC Committee has ceased.

**2. Confirmation of Minutes**

Resolved, on the motion Revd Nile, seconded by Mr Taylor:

That the draft minutes of meeting no 33, held on 8 March 2018, be confirmed.

**3. \*\*\***

**4. \*\*\***

**5. Inquiry to review the 2016-17 Annual Reports of the ICAC and Inspector of the ICAC**

The Committee considered standard resolutions for the conduct of its public hearing on 1 June 2018, for the inquiry.

Resolved, on the motion of Mr Provest, seconded by Revd Nile:

- That the Committee conduct a public hearing on 1 June 2018, for its inquiry to review the 2016-17 Annual Reports of the ICAC and of the Inspector of the ICAC;
- That the Committee permit audio-visual recording, photography and broadcasting of the public hearing on 1 June 2018;
- That the Chair send questions on notice to witnesses following the public hearing on 1 June 2018 as required;
- That the Committee secretariat publish the answers to any questions taken on notice at the public hearing on 1 June 2018 on the Committee's webpage;
- That the Committee secretariat publish the transcript of evidence taken at the public hearing on 1 June 2018, after making corrections for recording inaccuracy, on the Committee's webpage.

**6. \*\*\***

**7. \*\*\***

Ms Mihailuk arrived at 9:14am.

**8. Public hearing – Inquiry to Review the 2016-17 Annual Reports of the ICAC and Inspector of the ICAC**

At 9:16am Chair declared the public hearing open, and witnesses and the public were admitted.

Mr Bruce McClintock SC, Inspector of the Independent Commission Against Corruption (ICAC) was affirmed and examined.

The Inspector made an opening statement.

At 10:12am, the Committee agreed to resume its deliberative meeting to consider hearing further evidence from the Inspector *in camera*. The public hearing was adjourned and the public withdrew. The witness and Ms Angela Zekanovic, Principal Legal Advisor, Office of the Inspector of the ICAC remained.

#### **9. Resumption of Deliberative Meeting**

The Committee considered whether to hear from the Inspector *in camera*.

Resolved, on the motion of Ms Voltz:

That the Committee hear further evidence from Mr Bruce McClintock SC, Inspector of the ICAC, for its Review of the 2016-17 Annual Reports of the ICAC and Inspector of the ICAC *in camera*.

#### **10. In Camera Hearing – Inquiry into review the 2016-17 Annual Reports of the ICAC and Inspector of the ICAC**

The Committee heard evidence from the Inspector *in camera*.

At 10:51am, the Inspector's evidence concluded and the witness and Ms Zekanovic withdrew. The Committee took the morning tea adjournment.

#### **11. Resumption of Public Hearing – Inquiry into review the 2016-17 Annual Reports of the ICAC and Inspector of the ICAC**

At 11:03am, the public hearing resumed and witnesses and the public were admitted.

Hon Peter Hall QC, Chief Commissioner, ICAC, was sworn and examined.

Mr Stephen Rushton SC, Commissioner, ICAC, was sworn and examined.

Mr Roy Waldon, Executive Director, Legal Division, ICAC was sworn and examined.

Mr Lewis Rangott, Executive Director, Corruption Prevention Division, ICAC was affirmed and examined.

Mr John Hoitink, Executive Director, Investigations Division, ICAC was sworn and examined.

Mr Andrew Koureas, Executive Director, Corporate Services Division, ICAC was sworn and examined.

The Chief Commissioner made an opening statement.

At 12:30pm, the evidence of the witnesses concluded, and the witnesses withdrew.

The public hearing concluded at 12:30pm and the public withdrew.

12. \*\*\*

**13. Next meeting**

The Committee adjourned at 12:31pm until a date and time to be determined.

**MINUTES OF MEETING No 35**

1:22pm, 17 October 2018

Room 1254, Parliament House

**Members Present**

Mr Tudehope (Chair), Mr Provest (Deputy Chair), Mr Evans, Mr Hoenig, Mr Khan, and Ms Voltz.

**Officers in Attendance**

Clara Hawker, Elspeth Dyer, Jacqueline Linnane and Jennifer Gallagher.

**1. Apologies**

Apologies were received from Mr Humphries, Mr Lynch, Ms Mihailuk and Revd Nile.

**2. Membership Changes**

The Committee noted that:

- On 14 August 2018, Mr Taylor was appointed a Parliamentary Secretary and by virtue of section 66(1)(b) of the ICAC Act, he ceased to be a member of the Committee.
- On 20 September 2018, Mr Austin Evans was appointed a member of the Committee in place of Mr Taylor.

The Chair welcomed Mr Evans.

**3. Confirmation of Minutes**

Resolved, on the motion of Mr Hoenig, seconded by Mr Provest:

That the draft minutes of meeting no 34, held on 1 June 2018, be confirmed.

**4. Correspondence**

The Committee considered the following items of correspondence sent:

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- e. Hon Peter Hall QC, Chief Commissioner, ICAC, dated 5 September 2018, requesting further information following the Committee's hearing on 1 June 2018 for its review of the 2016-17 annual reports of the ICAC and Inspector (*N.B. The Committee agreed to send the letter out of session, by email, on 5 September 2018*).

The Committee considered the following items of correspondence received \*\*\*

- g. Hon Peter Hall QC, Chief Commissioner of the ICAC, dated 6 September 2018, responding to the Committee's request for further information following the Committee's hearing on 1 June 2018 for its review of the 2016-17 annual reports of the ICAC and Inspector.

Resolved on the motion of Mr Khan, seconded by Mr Hoenig:

- That the correspondence be noted.

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**5. Review of the 2016-2017 Annual Reports of the ICAC and Inspector – Consideration of Chair's Draft Report**

The Committee agreed to consider the Chair's draft report, distributed to members by email on 10 October 2018, *in globo*.

Resolved, on the motion of Mr Khan, seconded by Mr Provest:

- That the Committee adopt the Chair's draft report and that it be signed by the Chair and presented to the House;
- That the Committee authorise the Secretariat to make appropriate final editing and stylistic changes as required;
- That once tabled the report be published on the Committee's webpage;
- That the Chair issue a media release announcing the tabling of the Committee's report, for dissemination by the Committee Secretariat.

6. \*\*\*

7. The Committee adjourned at 1:30pm until a date and time to be determined.