

REPORT OF PROCEEDINGS BEFORE

**COMMITTEE ON THE INDEPENDENT COMMISSION
AGAINST CORRUPTION**

**REVIEW OF THE REPORT OF THE INSPECTOR OF THE NSW
INDEPENDENT COMMISSION AGAINST CORRUPTION
REGARDING OPERATION HALE**

At Sydney on 18 March 2016

The Committee met at 10.00 a.m.

PRESENT

Mr D. F. Tudehope (Chair)

Legislative Council

Hon. T. J. Khan
Reverend the Hon. F. J. Nile
The Hon. L. J. Voltz

Legislative Assembly

Mr R. Hoenig
Mr K. J. Humphries
Mr A. J. Marshall (Deputy Chair)
Ms T. Mihailuk
Mr C. S. Patterson
Ms K. Smith
Mr M. O. Taylor

CHAIR: Thank you for attending the public hearing of the Joint Committee on the Independent Commission Against Corruption to review the report of the Inspector of the Independent Commission Against Corruption [ICAC] regarding Operation Hale.

I know it might sound tedious but I will go through this again, although I know that everyone here is familiar with this routine. My name is Damien Tudehope, I am the Chair of the Joint Committee and the Member for Epping. With me today are my colleagues from the Legislative Assembly: The Deputy Chair, Mr Adam Marshall, who is the Member for Armidale; Mr Chris Patterson, the Member for Camden; Mr Mark Taylor, the Member for Seven Hills; Mr Ron Hoenig, the Member for Heffron; Ms Tania Mihailuk, the Member for Bankstown; and Ms Kathy Smith, the Member for Gosford. Also joining us are Committee members from the Legislative Council, the Hon. Trevor Khan, Reverend the Hon. Fred Nile and the Hon. Linda Voltz.

This is a resumption of the hearing that commenced on 11 February. The witnesses who are appearing today on behalf of the Independent Commission Against Corruption are: the Hon. Megan Latham, Commissioner; Mr Roy Waldon, Solicitor for the Commission; Mr Andrew Koureas, Executive Director; Ms Sharon Loder, Executive Director, Investigation Division; and Dr Robert Waldersee, Executive Director, Corruption Prevention Division. After the luncheon adjournment, the Committee will hear from the Director of Public Prosecutions, Mr Lloyd Babb. I again thank everyone for appearing here today. All mobile phones are to be turned off or turned to silent.

The Committee has authorised the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines concerning coverage of proceedings are available. Please note that any filming is to be as unobtrusive as possible and should not disrupt Committee proceedings or focus on Committee documents. In addition, filming of individuals in the public gallery should be avoided.

I now declare the hearing open. I welcome the representatives from the Independent Commission Against Corruption to resume the evidence which they commenced on 11 February. The Hon. Megan Latham, the Commissioner; Mr Roy Waldon, the Solicitor for the Commission; Ms Sharon Loder, the Executive Director Investigation Division; Dr Robert Waldersee and Mr Andrew Koureas. Thank you for appearing before the Joint Committee today to give evidence.

MEGAN FAY LATHAM, Commissioner, Independent Commission Against Corruption,

ROY ALFRED WALDON, Solicitor to the Commission and Executive Director Legal Division, Independent Commission Against Corruption, and

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

SHARON LEIGH LODER, Executive Director, Investigation Division, Independent Commission Against Corruption, and

ROBERT WILLIAM WALDERSEE, Executive Director, Corruption Prevention Division, Independent Commission Against Corruption, affirmed and examined:

CHAIR: Before we proceed, do you have any questions concerning the procedural information sent to you in relation to the witnesses to these proceedings?

Ms LATHAM: No.

CHAIR: Commissioner, in the event that you or your staff require any of these proceedings to be held in camera—and I will come to that shortly—it is open to you to make that application. I advise members of the public that they may be asked to leave the room in the event of such an application. Before going to the Commissioner, and I would indicate that the Committee has resolved to accept an opening statement from you, Commissioner, on the last occasion when this matter was before the Committee, that is 11 February, we adjourned the proceedings for the purpose of obtaining legal advice in respect of the submission of telephone intercept material which had been submitted by you, Commissioner, in relation to the manner in which you formed the view that this Committee ought treat the report of the Inspector. We have obtained that advice from the Crown Solicitor's Office. The Crown Solicitor's Office has advised this Committee, and the Committee has resolved to accept that advice, which is that we do not publish the material which was submitted to us and which was listened to by members of the Committee.

In addition to the audio transcripts which you provided to us, and the audio material, you also provided us with an advice from Counsel, Anna Mitchelmore, supporting the contention that the Committee was not prohibited from hearing the advice pursuant to the Telecommunications (Interception and Access) Act. The advice did not deal with whether the Committee should be receiving the material pursuant to your own Act—namely, the Independent Commission Against Corruption Act. The advice which has been provided to us by the Crown Solicitor explicitly states that this Committee is prohibited by section 64 (2) of the Act from publishing that material. I have received advice from the Clerk in relation to that advice. I can advise the Commissioner that the advice, which is in two parts, says:

I note that in its written submissions the ICAC submits that the Committee is able to assess the reasonableness of the findings and recommendations in the Inspector's report provided it does not engage in an investigation or reconsideration of the type prohibited by section 64 (2), which relates only to findings et cetera of the ICAC or its officers. The ICAC submits that the Committee is able to have regard to the TI material, amongst other reasons for the limited purpose of assessing the reasonableness of the findings and recommendations in the report.

Commissioner, in your letter the Committee on 15 March you reiterated that position. In answer to that, the Crown Solicitor's advice says:

In my view, it would not be possible for the Committee to make use of the TI material in the manner identified by the ICAC in its written submissions and in the Commissioner's opening statement. In circumstances where the Inspector in his report made findings critical of various decisions et cetera of the ICAC, inviting the Committee to conclude, based in part on the TI material, that those findings were infected by error or made without reasonable grounds would I think involve the Committee in reconsidering the reasonableness or merits of the ICAC's conduct. That is, it seems to me, what section 64 (2) was intended by the Legislature to prevent. I do not think, as outlined above, that these legislative requirements could be evaded merely by claiming that the Committee's only purpose is to assess the reasonableness or merits of the Inspector's report and by disclaiming any purpose of reconsidering decisions et cetera of the ICAC.

Commissioner, your submission that the Committee can form a view as to the reasonableness of the Inspector's report only by listening to and publishing the material is clearly contrary to the advice that the Committee has now received. Today we will not be reviewing any of the material relating to your investigation of the Cunneen matter. To the extent that you or any witnesses appearing here today on behalf of the ICAC says that it is

necessary for the Committee to review material relating to Cunneen, my view would be that, subject to the views of any other members of the Committee, we would hear from you a submission as to why we should hear it but if we are to hear it we will be doing so in camera and making a decision about whether it is received having heard it in camera. That is the only position that is consistent with the advice that the Committee has received. I make it absolutely clear that this Committee is not about reinvestigating the material relating to Margaret Cunneen. The inquiry is specifically related to the Inspector's report and the observations which the Inspector makes in his report.

I have to say, Commissioner, that the submission of the TI material to the Committee on the day of the hearing and in circumstances where the Committee needed to obtain advice was in one sense worthwhile—in that the Committee was able to obtain the advice—but in one sense it was also an ambush of this Committee in many respects and probably something that should not have happened.

Ms TANIA MIHAILUK: We do not all agree with that.

CHAIR: In any event, Commissioner, the Committee has resolved to receive an opening statement from you. I note that you have advised that it will be a short opening statement.

Mr RON HOENIG: Does that mean that if the Commission wants to make a submission about what it considers to be the Committee's function that is different from the view of the Crown Solicitor it would need to be made in camera?

CHAIR: Yes, that would be my view, subject to the views of any other Committee members.

Mr RON HOENIG: Then, Chair, you should ask the Commissioner whether she wants to be heard in relation to that question.

Ms LATHAM: Thank you, Chair, for indicating the Committee's position, but I seek a point of clarification. It was never the Commission's position that we produced the transcript and the audio of the TI material for the purposes of publishing that material or for the purposes of asking this Committee to reconsider the merits of the decisions that the Commission took in embarking upon the investigation. I tendered the material to the Committee on the basis that it was essential to at least look at the material for the purposes of determining whether some of the bases for the Inspector's findings in the report could be sustained. I thought I made it clear that the question of publication of that material was a matter solely for the Committee.

I am seeking clarification as to what the current position is. Is the Committee suggesting that it will not even use the transcript of the intercept for the purposes of determining whether the Inspector's findings were reasonable findings or am I simply forced into the position of having to make submissions that essentially leave all of that material to one side? If it is the latter then I and the Commission are put in a very invidious position. I say that because there were further statements made by the Inspector on Monday about the trivial nature of the allegation. Realistically, if this Committee is doing what it apparently says it is going to do, which is inquire into the Inspector's report, then that inquiry cannot proceed to determine whether the Inspector's characterisation is accurate or fair without taking into account the transcript of the intercept material, because that is the basis upon which he makes that assessment. That is my dilemma, and that is why I seek clarification.

The Hon. TREVOR KHAN: There will be matters that this Committee considers in its deliberative. It will be the collective mind of the Committee that will come to a conclusion about what the Committee does. The Commissioner is before us. She has indicated that she wishes to make an opening statement. Once we have heard the evidence from the Commissioner, along with other evidence, we will deliberate and come to a conclusion. I submit that now is not the time for this Committee, through you, Chair, to give a determined view on what it does with the evidence.

The Hon. LYNDA VOLTZ: Can I just clarify that there may be matters raised in the opening statement that go to the crux of this issue.

The Hon. TREVOR KHAN: Indeed.

The Hon. LYNDA VOLTZ: That is part of the issue that the Commissioner is putting forward.

The Hon. TREVOR KHAN: I am simply saying that the Chair cannot give a conclusive view of the Committee's position because that position will be determined in the deliberative. The Commissioner is entitled to make an opening statement. I invite her to throw her arm over.

Ms LATHAM: I was not meaning to cavil with what you have said, Chair. I was simply saying that the position in relation to the Crown Solicitor's advice remains somewhat unclear because we have not seen the entirety of that advice. That is the point I am making.

CHAIR: It is not my advice.

Ms LATHAM: I understand that, but the point I am making is that there is an important distinction between use of the material and publication of the material. I simply wanted to make it clear that the Commission has never taken the view that it had any control over the publication of material. It was simply a question of asking the Committee to look at the material for the purposes of the inquiry. I am happy to make the opening statement now.

CHAIR: Thank you.

Ms LATHAM: Thank you, members of the Committee and Chair, for allowing me to make this further statement. It will be relatively brief. I wish to highlight the following matters that arise out of the Inspector's evidence on Monday. Firstly, there can now be no dispute that the Commission was denied procedural fairness by the Inspector. The Inspector does not refute it; in fact he reinforced that denial in the course of his evidence, and I quote:

... it is not my intention to engage with the ICAC in a tit-for-tat debate about every alleged flaw, wart, factual deficiency, legal error, "mis-understanding" or "non-understanding".

He also said:

... the information given to me by Ms Cunneen was of such a benign and trivial nature that I thought it could hardly be false and could hardly be denied.

He also said:

... more assiduously attending to what the ICAC asserts his duty to be, could, thirdly, result in the same engraved outcomes.

Further he said:

Even if the doctrine and principles and practice of procedural fairness were applied at the purest level ... the outcome would still be carved in granite.

The Inspector's evidence on Monday disclosed actual bias—that is, a partial and prejudiced approach to the assessment of the Commission's conduct and my conduct. Some of the language that was employed in the course of his evidence included: "shenanigans", to describe the Commission's procedures; "grotesquerie"; "obsession with power"; and that the ICAC's response to the report was naive, simplistic and superficial. He said that my responses included an "incomprehensible statement" which was "made out of desperation and not out of the exercise of reason", and that my denials and explanations lacked cogency and integrity.

Before the Committee accepts the findings in the Inspector's report and the allegations advanced in the Inspector's evidence on Monday, because it is the Commission's position that the Inspector went a lot further on Monday than he had in the report, the Committee should take into account the following matters. Firstly, there is now no dispute that the Commission was entitled to hold a preliminary investigation. The Inspector conceded as much on Monday. Secondly, the Inspector acknowledges that legal advice is not declaratory of a law in any given circumstance; the law is determined by the courts. The full Federal Court has determined that a notice to produce forthwith is lawful—that is the decision of Egglishaw.

There is no evidence to support the assertion that the notice to produce was used as an alternative to a search warrant to enter the premises and there is no evidence to support the assertion that the invitation from Ms Cunneen to the ICAC officers to enter her home was induced by reference to the penalty for non-compliance with the notice. In fact the evidence is that the ICAC officers informed Ms Cunneen of the penalty for non-compliance after they had entered the premises at Ms Cunneen's invitation. I would also reinforce to the Committee part of our submission on a prior occasion which drew attention to the fact that Messrs Blackburn

and Kulevski, when providing the advice to the Inspector, were told nothing about the circumstances under which the ICAC officers entered Ms Cunneen's home and they were told nothing about what happened whilst the ICAC officers were on the premises. That material was before the Inspector but was not provided to counsel.

Thirdly, the production of the phones revealed further evidence which was capable of advancing the scope and purpose of the investigation. The application for the search warrant was made on the basis that Ms Cunneen claimed privilege over the contents of the phones, as she was entitled to do. The search warrant was granted by a judicial officer independent of the Commission who was satisfied of the legitimacy of the grounds for the warrant.

Fourthly, the allegation being investigated cannot reasonably be described as legless, of fundamental and relative triviality, or no more than what an ordinary member of the community as a mother would do in the circumstances. Ms Cunneen's office in the administration of justice was significant in the Commission's assessment of the gravity of the alleged conduct, and the Inspector acknowledged as much in his report.

In the light of the Inspector's personal criticisms of me and his characterisation of the allegation as trivial I invite the members of this Committee to consider whether I would be thought fit to occupy the office of Commissioner if I advised my son to feign a physical symptom at the scene of a car accident because I believed or suspected that he had consumed alcohol before driving and I knew that such a symptom would result in his transfer to hospital with the consequent delay in the administration of a blood alcohol test. The answer to that question largely determines the gravity of the allegation that the Commission was investigating.

Fifthly, the Commission's powers under the Act are appropriate and necessary to the investigation and exposure of corrupt conduct, which most often occurs in circumstances where individuals in positions of authority exercise power and influence over others. It is that power and influence which facilitates corrupt conduct and inhibits its discovery. The Commission's officers apply the Act and the policies and procedures uniformly and consistently to every investigation regardless of the status, office or seniority of the persons under investigation. The intrusion of an element of what the Inspector referred to as legal, political and social sensitivity on the part of the Commission's officers would undermine the public's confidence in the independence of the Commission and its capacity to investigate without fear or favour.

Finally, for the above reasons it is important that this Committee produces a report on this inquiry as soon as practicable. In the Commission's submission there is no utility in waiting for an unspecified time for a further report from the Inspector which may well result in a further hearing of this Committee. This is particularly so in circumstances where the denial of procedural fairness is uncontested. I indicate to members of the Committee that I have a further short 15-page submission which simply amplifies some of the matters that I have referred to.

The Hon. TREVOR KHAN: I have real difficulty with further material being received in this manner—there has been opportunity during this week, and indeed prior to the Committee commencing this hearing today. I am making a point. I have real difficulty now in material again being produced during a hearing—

The Hon. LYNDA VOLTZ: Point of order: Matters to do with whether or not tabled documents are accepted are matters for the whole Committee and its procedural process and should be considered by the Committee in the whole. As a point of order I think that if the Commissioner wants to table a document and the Committee considers it in a procedural manner then we should do that. But to have a debate here is not the role of the Committee at this point in a public hearing.

Mr CHRIS PATTERSON: To the point of order: This should have been discussed at 9.30 a.m. this morning in our deliberative meeting and we should have had this 15-page submission prior to the public debate which occurred last time. I support the Hon. Trevor Khan in his point.

The Hon. LYNDA VOLTZ: To the point of order: It is very common practice for submissions to be tabled at Committee hearings—

The Hon. TREVOR KHAN: Rubbish

The Hon. LYNDA VOLTZ: The Hon. Trevor Khan is a member of the Upper House. He knows it is not rubbish. They are then considered by the Committee as Committee of the whole in a procedural meeting.

and I would ask that the normal procedures be followed in that way. I have never heard of someone not being allowed to table a submission.

Ms LATHAM: I indicate, through the chair, that this is just material which, as I said, arises from the Inspector's evidence on Monday. It is not material that we could have provided any sooner because in the period of time between Monday and yesterday afternoon I was fully engaged in a public inquiry. I apologise.

CHAIR: I am aware of that, Commissioner; and that is a public inquiry which has received some publicity. I propose that the Committee receive the material without it being tabled. So it is not a document that is part of our deliberations until we have an opportunity to review it at a later time.

The Hon. TREVOR KHAN: Good, that is fine.

CHAIR: So we will receive the submission, Commissioner, and we will consider it. I invite questions from the Committee. Does anybody have any questions?

The Hon. LYNDA VOLTZ: Yes. Commissioner, the Inspector stated, and you have gone to this in your opening statement but I would like to explore this a bit more, that it was a trivial matter and it is what any normal mother would do. But Ms Cunneen is not any ordinary mother, is she? She is a senior member of the legal fraternity employed by the State.

Ms LATHAM: That was in fact the point I was attempting to make. When one occupies an office in the administration of justice you occupy that office 24/7. You do not simply abandon any responsibilities that you have as a representative of the administration of justice outside of working hours, and that was why I drew the analogy with my own office in these particular circumstances.

The Hon. LYNDA VOLTZ: For example, would an ordinary mother expect that the Attorney General would contact witnesses in regard to a matter?

Ms LATHAM: I do not know what the circumstances were. I am afraid I know as much about that as was published in the newspaper. I do not have any reason to think that there was any attempt to interfere with the witness. The witness was ultimately referred to us and provided information to us.

The Hon. LYNDA VOLTZ: Do you think it is normal procedure for an Attorney General to contact a witness and refer them to a target of ICAC?

Ms LATHAM: No, my understanding was that the witness, in fact, contacted the Attorney General because the Attorney General was the witness's local member. I think that is how the Attorney General came across the name and the reasons for the person's interest in the proceedings.

The Hon. LYNDA VOLTZ: But the Attorney General said in the Lower House—

The Hon. TREVOR KHAN: Point of order: This is an inquiry into the Inspector's report. Either the Member is going to take this matter seriously or she is not. I would ask that you rule this line of questioning out of order.

The Hon. LYNDA VOLTZ: To the point of order: The Inspector has made the point that this is an insignificant, trivial matter, and it is what any normal mother would do. I have never heard—and someone can correct me if they can find otherwise—that an Attorney General has ever provided a witness who has contacted him a phone number of the person who is under investigation by ICAC and told them to contact him. In fact, the Commissioner has raised the position of authority in the exercise—

The Hon. TREVOR KHAN: You are making a mockery of this, Lynda.

The Hon. LYNDA VOLTZ: No, I am not making a mockery of this; you are making a mockery of this. You are the person who will not let information out there.

CHAIR: Order! All comments should be directed through me rather than across the table.

The Hon. LYNDA VOLTZ: The Commissioner has made the point—

CHAIR: I will cut you short there. This is not something that arises from the Inspector's report; this is something that was raised in the House. The Attorney General has had an opportunity to answer those allegations. I do not think that it is material that you should be putting to the Commissioner.

The Hon. LYNDA VOLTZ: I refer to the Inspector's comments about your relationship, and your personal relationship. I put to you the Inspector's comments that you had a close personal relationship with Ms Cunneen yet last week he stated to the Committee that that related to your professional relationship, essentially. Do you think it was fair of the Inspector to put those comments in the report without contacting you in regard to them?

Ms LATHAM: That is the very point that the Commission is making about procedural fairness. Procedural fairness is about the procedure that is followed in terms of resolving any disputes in relation to the material that requires a resolution for the purposes of a factual finding. Can I just say in relation to that, I did address that in the original submission. I am somewhat confused now because in the Inspector's report he described my relationship with Ms Cunneen as a "close personal relationship". He seems to be retreating from that somehow and asserting that it was a relationship born of professional association.

I think I pointed out in my original submission that had the Inspector spoken to me about it, I would have pointed out that Ms Cunneen was appointed a Crown Prosecutor, I think, in 1992 or thereabouts, possibly 1991. I was appointed in 1987. From 1994 onwards, I was not at the DPP. For a period of something like two or three years, more than 20 years ago, I was a colleague in the same building, albeit not on the same floor. From 1994 onwards I left the DPP. I was in the Office of the Attorney General from 1994 onwards, until my appointment as Crown Advocate and then District Court Judge. Even on a professional level, what the Inspector has assumed from his information from Ms Cunneen is not actually borne out by the objective facts.

The Hon. LYNDA VOLTZ: That kind of goes to the heart of the problem with the report and the fact that ICAC was not shown the report before it was released, and the adverse findings. Because there are factual errors within it that would have been clarified and perhaps put differently if ICAC had been able to respond.

Ms LATHAM: I do not think that the Inspector knows chapter and verse as much of my professional development as I do, and if he had asked me then I would have given him the response I have just given you.

The Hon. LYNDA VOLTZ: When Mr Levine made his original comments, before he had heard the tapes about the matter being referred to the police, he was doing that without the full knowledge of what evidence was before the ICAC?

CHAIR: Can I understand that question?

Ms LATHAM: I am not quite sure about the timing of that assertion.

The Hon. LYNDA VOLTZ: I will have to go back to the transcripts but I do recall he said at the time of your media release that he had stated that it should have been referred to the police.

Ms LATHAM: There was another problem in relation to that, which I again highlighted in the original submission. The TI material was disseminated to the Commission by the Australian Crime Commission. It was not lawful of us, under the terms of the TI Act, to distribute that material to anyone else—whether it be the New South Wales Police or the DPP or anyone. That dissemination when it came to us had to remain with us or be returned to the Australian Crime Commission after we had formed the view about whether it was something within our jurisdiction. The Inspector has now said that we were entitled to hold a preliminary investigation and determine that it was within our jurisdiction, as it was then understood. So the short answer is: It could never have been referred to the New South Wales Police.

CHAIR: That is not true though, is it?

The Hon. LYNDA VOLTZ: That is the dilemma for you, to some extent. You have a senior member of the legal fraternity; it has been referred to you by a Federal Government agency. There would have to be a public test about if you decided not to do an investigation in those circumstances what the public would assume if you had not. There is a wide range of public comments from politicians, lawyers and everybody about what you should have done, but at no point you could actually release the basis of your investigation.

Ms LATHAM: No.

The Hon. LYNDY VOLTZ: So to an extent the only one who cannot comment is ICAC itself?

Ms LATHAM: Certainly at that stage, as I have said, the dissemination was to us and we were not at liberty to disseminate it to anyone else.

CHAIR: It is just not true to say that you could not have done anything else with it. You could have assessed the material and written to the Australian Crime Commission and said, "I think this is a matter for the police"?

Ms LATHAM: Yes, we could have done that.

CHAIR: And you did not?

Ms LATHAM: No, we did not. We did not do that for other operational reasons.

CHAIR: That is the thrust of what the Inspector was saying, is it not?

Ms LATHAM: No, here I come back again to the point of confusion. I do not know what it is that the Inspector is now saying because in the original report the Inspector suggested that as soon as we received the material we simply should have sent it straight on to the police or to the DPP and not worried about it any further. He now seems to be saying that we were entitled to conduct a preliminary investigation, which is what we did. My point, Mr Chair, is: Yes, we could have decided that we did not want to deal with it, even though on its face it came within our jurisdiction and we could have—

CHAIR: That is not true either.

Ms LATHAM: Mr Chair, may I finish? As our jurisdiction was then understood, it came within our jurisdiction and even the Inspector does not dispute that.

The Hon. LYNDY VOLTZ: Indeed, when the Committee asked the Inspector whether he sought an answer from the Crime Commission about why it had gone to ICAC rather than the police, he said that he had sought an answer—

Ms LATHAM: That is right.

The Hon. LYNDY VOLTZ: —but he could not elaborate on that for possibly the same reasons you are not going to—operational reasons.

Ms LATHAM: That is right. And there are reasons why that material was not disseminated to the New South Wales Police. I am happy to tell the Committee what that is at some appropriate time if the Committee thinks that it should be done in private session.

Mr MARK TAYLOR: Commissioner, you said at the time you received it you picked up the matter for the jurisdiction that you understood at the time to be?

Ms LATHAM: Yes.

Mr MARK TAYLOR: In your opening comments you spoke about it involving a public official. You gave a description of yourself if you were in that situation with your son. It is the case though with interfering—if I can use the word interfering rather than perverting the course of justice—in a drink-driving matter, the evidence that was before you certainly did not disclose any systemic conduct, did it?

Ms LATHAM: No.

Mr MARK TAYLOR: It was a one-off incident, was it not; the information that you had?

Ms LATHAM: No, actually, I would cavil with that suggestion when you suggest it is a one-off incident. What I was indicating—

Mr MARK TAYLOR: Are you suggesting that you had evidence that Ms Cunneen had been involved in a series of perverting the course of justice in drink-driving matters?

Ms LATHAM: No, I did not say that. But what I am trying to point out is that preliminary investigation provided us with material which was capable of supporting the scope and purpose of the investigation. The TI material was one thing. The subsequent material that we uncovered in the preliminary investigation tended to confirm the scope and purpose of the investigation. That is all I am saying.

Mr MARK TAYLOR: But there was certainly nothing to indicate there were systemic acts of corruption by a public official?

Ms LATHAM: No, of course not.

Mr MARK TAYLOR: You agree with that?

Ms LATHAM: I agree with that.

Mr MARK TAYLOR: Is it the case that you would not take up the investigation of a matter of a public official who was alleged to have committed shoplifting? It is not related to their office, is it?

Ms LATHAM: I suppose it would depend upon the circumstances and the particular powers and responsibilities of the—

Mr MARK TAYLOR: But it would be unusual, would it not, for ICAC back then even, when you talk about what you understood its jurisdiction to be? A public official involved in an alleged one-off criminal act, ICAC would not pick up those matters. You would not pick up a matter of domestic violence involving a public official.

Ms LATHAM: Can I just try to indicate what the relevant nexus is here, because this is important. In the example that you give of a public official who is involved in an act of shoplifting, if that public official was a person of some seniority, of some notoriety, of some power and influence, and that person was in fact discovered within the shop shoplifting and upon the constables that are usually employed by those department stores arriving at the room and seeing who the person was and there was some exchange of conversation to the effect of, "Do you know who I am?", and on the basis of that kind of information there was a refusal to prosecute or the person was allowed to leave the premises without any further action being taken, yes, that would come within our jurisdiction because it indicates the abuse of power and authority for the purposes of avoiding a criminal charge. That is the kind of nexus that I am referring to.

CHAIR: Even now? Even now with the definition which is contained in the amended Act?

Ms LATHAM: No, because the jurisdiction as it was then was quite different to what it is now but it just depends on whether or not we can ascertain whether the public official who appears to have engaged in corrupt conduct has influenced another public official who has also then become, as it were, corrupted.

The Hon. TREVOR KHAN: But you did not have that at the start.

The Hon. LYNDA VOLTZ: You cannot say that, Trevor, because you cannot put the evidence out there on what she had.

The Hon. TREVOR KHAN: The Commissioner is putting certain propositions that—

The Hon. LYNDA VOLTZ: Point of order: First, in relation to someone telling the witness that they cannot say something, the witness can say whatever they like. The other point is that we have already been to the issue of section 64 (2) and we have discussed the fact that the Commissioner cannot release all the details. If someone wants to say something is not true when the Commissioner may have evidence to the contrary, it really cuts across the constraints that have been put on this Committee in regards to section 64 (2). I would ask that you ask members to desist from doing that.

CHAIR: I do not think that was the case. I think Mr Khan's question was going to the understanding of jurisdiction.

Ms LATHAM: Sorry, I did not think it was Mr Khan's question; I think it was his comment.

The Hon. TREVOR KHAN: No, it was an interjection. I am quite happy to make that concession.

CHAIR: Can I ask you, you keep using the expression "the jurisdiction as it was then".

Ms LATHAM: This is an inquiry into the Inspector's report and that is because the Inspector accepted that the question of whether or not the Commission officers were guilty of misconduct or maladministration had to be assessed in terms of the jurisdiction as it was then understood. As at the time that we took certain decisions and carried out certain actions in pursuit of the preliminary investigation, all of those actions and decisions were taken in the understanding that we had jurisdiction. Can I just point out that, as I said in my original submission, the concepts of misconduct and maladministration go further than just carelessness or negligence. What the Inspector has found is that the officers of the Commission deliberately and wilfully subverted the purposes of the Act. All I am pointing out is that we did not do that because as at the time we took those actions the jurisdiction allowed us to pursue that investigation.

CHAIR: But the High Court has found that you did not have that jurisdiction. Is that not the case?

Ms LATHAM: The High Court embarked upon an exercise in statutory construction and determined that all of the jurisdiction that related to subsection (2) of section 8 had been wrongly exercised and everybody was under a misapprehension about what jurisdiction meant.

CHAIR: So that is the correct position, is it not?

Ms LATHAM: That is the position now.

CHAIR: But it was then.

Ms LATHAM: It was the position as and when the High Court declared it. Prior to that, in all of the time that the ICAC had been operating over a period of 25 years—

CHAIR: It had been wrongly operating.

The Hon. LYNDA VOLTZ: Point of order—

Ms LATHAM: We had operated on the basis that section 8 (2) allowed us to conduct those kinds of preliminary investigations. So post the decision of the High Court the New South Wales Parliament validated all of those previous findings and the reception and possession of all evidence that had been obtained under that jurisdiction as it was then understood.

To answer your question, Mr Chair, yes, we accept that the High Court declared the law to be different to what it was understood over the previous 25 years, but I come back to my original point—that is, for the purposes of the Inspector's report he accepted that the steps that we took and the procedures that we followed were taken on the basis that we had jurisdiction and he made no point about that. He did not say that we should never have undertaken it because we ought to have known that we did not have jurisdiction. He made the finding on the basis that we did have jurisdiction but we were nonetheless guilty of misconduct and maladministration. That is the only point I am making.

The Hon. TREVOR KHAN: I go to page 19 of the Inspector's report. I know there is an issue with regards to where Dr Waldersee ended up in terms of whether it should move on from a preliminary investigation, but you will see in what I think can be said to be the first paragraph there is reference to a statement made by Dr Waldersee where he says, "I struggle to see that it is of a seriousness to meet the intent of our act, and it is certainly not systemic." I am not going to go into the question of whether that is the final position and how Dr Waldersee might or might not have changed his position, but wasn't Dr Waldersee applying his mind to the sort of test that is supposed to be applied under the Act as to what matters you investigate?

Ms LATHAM: He was applying his mind to the test, albeit he, as I understood it, at that stage, did not have all of the information that he subsequently came into possession of.

The Hon. TREVOR KHAN: I understand you are going to advance that, but what I am dealing with is Dr Waldersee seems to have had in his mind the sort of considerations that you were required to take under the Act—that is, serious and systemic.

Ms LATHAM: I think there is a misunderstanding here and I would like to clarify it. Whilst the Commission is enjoined by the legislation to have regard to corrupt conduct that is serious and systemic, that means in principle that the Commission should have regard to corrupt conduct if it is serious or if it is systemic. It is not as though we have to be satisfied that it is both serious and systemic before we investigate. We have to be satisfied that it is serious and warranting our attention. In other circumstances we might decide, for example—let me just try to explain what systemic might mean in that situation. It might mean that there are individual corrupt acts in an organisation which, taken by themselves, are quite trivial, but because it has become a uniform practice within the organisation therefore it is of a systemic nature.

The Hon. TREVOR KHAN: Some of the IT investigations that you undertake fall into that category, do they not?

Ms LATHAM: Yes. But when you look at it after you have done a proper investigation you see that in fact this is spread throughout the entire organisation, therefore it becomes both systemic and much more serious. The only point I am wishing to make is that if we get a complaint that looks to us as though it falls within our jurisdiction and we commence an investigation, there is a point at which we can decide that it is not serious enough to warrant an investigation or to take the matter further, and we cannot see any evidence of any systemic corruption, so we would decide to discontinue it. Sometimes those decisions cannot be made until you have at least conducted a preliminary investigation because very often all you get is a complaint that looks, on its face, sometimes very trivial, and I can give you examples of that.

The Hon. TREVOR KHAN: Commissioner, let us just assume for my purposes—and I am sorry to cut across—that having had this telephone intercept lobbed on you, that I might think, well, it is worth a bit of a poke around—a preliminary investigation. Dr Waldersee's comments are not at that preliminary investigation, it seems, it is when we are going to the next hurdle, I think. But let us suppose that is the case. What is the sort of test that you would apply to determine it? You were talking about the systemic, and maybe we do or do not disagree on whether this was the sort of level of seriousness that warranted investigation. Let us assume that I am not being entirely unreasonable. What I am interested in, though, is that when Dr Waldersee looked at this, he clearly had in his mind, it would seem—and I am happy to address him if you think it is appropriate—an interaction between seriousness and systemic.

Ms LATHAM: I suppose you are going to have to ask Dr Waldersee that. But I am not suggesting that this fell into the systemic category at that stage. I am saying that on the Commission's assessment of all of the information that we had we regarded it as sufficiently serious to warrant further inquiry. That is my answer. You might need to ask Dr Waldersee what was in his mind.

Reverend the Hon. FRED NILE: I think we should.

CHAIR: The Act does not say "and/or", it says "and serious and systemic". It is not an "or".

Ms LATHAM: It says "serious corrupt conduct and systemic corrupt conduct"; it does not say "serious and systemic corrupt conduct".

CHAIR: It is your view that if it was serious—

Ms LATHAM: That has always been the way it has been interpreted and that has always been the way that the courts have regarded it, and that has never been questioned by anyone, that there should be both serious and systemic.

The Hon. TREVOR KHAN: Nobody had the money to go all the way up, I suppose.

CHAIR: Reverend Nile, you were going to invite Dr Waldersee to explain.

The Hon. LYNDA VOLTZ: We do not need to do that here.

Reverend the Hon. FRED NILE: Yes, we do, just to clarify what was in his mind.

Dr WALDERSEE: Being cognisant of not wanting to revisit the actual investigation, I think what was in my mind was essentially what is in that report. But I think it is very important to recognise that we act, effectively, as a board. A healthy board will have differing views—that is what should happen—and ultimately there will be a decision made. As we said in our submission, there is an element of a value judgement in this. You cannot set absolute concrete criteria that will work in every circumstance. My value judgement at the time was what is stated there; that was not my colleagues' view, and, in the end that is how it should work, I would have thought.

The Hon. TREVOR KHAN: I am not being critical of you. From that reasoning do I take that, perhaps like being in a party room, sometimes you have a position that is different from the majority of your colleagues and, essentially, you put your head down and just accept that the majority rules. Is that, essentially, the position you got to in terms of this?

Dr WALDERSEE: I think that is how any board works.

Ms LATHAM: No, I am sorry, I do not mean to cut across Robert, but if you are suggesting that once somebody realises that they are in the minority then they just basically give up the ghost that is not the case. We have very robust and lengthy discussions when we sit as a strategic investigations group and when we make decisions about what we take forward and what we do not. Everybody's views are taken into account and it is a very robust discussion. I do not want you to think that Robert was overborne.

The Hon. TREVOR KHAN: I am not suggesting that. Some of the people here would know that I am not easily overborne but I am often, sometimes, in the minority. There is a point that you reach in a boardlike or in a partylike environment, I think we all agree, where it is not a question of being overborne, you have just been unsuccessful in convincing your colleagues. I am not being critical. If it is suggested that I am saying Dr Waldersee went to water I am not suggesting that at all. In fact, it seems to be quite the opposite.

Dr WALDERSEE: But I would have thought that is actually a sign of a healthy executive, that people are willing to put their views forward without being afraid of the consequences.

The Hon. TREVOR KHAN: As I say, I am not being critical of you in any shape or form in that regard.

Dr WALDERSEE: But I am speaking of the executive as a whole. We are not under pressure to conform.

Mr MARK TAYLOR: Commissioner, when the healthy board makes a judgement call that results in an inquiry, New South Wales court matters, High Court matters, an Inspector's report and here we are today with a parliamentary committee where the Inspector on page 63 calls it a low point in the history of the organisation, have you taken any steps or is there in chain any steps to change the process and practice of that board that makes those judgement calls?

Ms LATHAM: No. The composition of the board, of that body that makes those decisions is the executive and I do not propose to change that feature of the decision-making process. Our policies and procedures, however, undergo constant review. In fact, we have an executive planning day coming up shortly in April and we will look over the previous year, we will take stock of the investigations that we have done and we will examine whether or not any of our practices and procedures need to be changed in the light of any problems that have emerged. We are doing that on a constant basis. As I said on the previous occasion, the expertise I have around me is first-class and I am absolutely confident that the practices and procedures that we follow give us the best possible outcome.

Mr MARK TAYLOR: So are you discounting any change to the structural make-up of that strategic investigation at this group meeting?

Ms LATHAM: As it currently stands there can be no change because, as I said, it is the executive, and, for the purposes of making those decisions, they are made at an executive level; it includes myself and every

director in the organisation. There comes a point where, essentially, the executive takes responsibility for those decisions.

The Hon. TREVOR KHAN: Before we go any further, Reverend Nile has been trying to ask some questions for a while.

Reverend the Hon. FRED NILE: Commissioner, I understand how boards work because I am involved with lots of board. Did you, as the Commissioner, take a leading role in that decision? Did you have a strong opinion that would influence the rest of the board members?

Ms LATHAM: No. I do not take a leading role in any of those decisions; I take account of the views of all of the executive, and there are very few occasions when there is any real dissension. But I do not have any greater casting vote, I do not think, than anyone else, and there has not been an occasion where the executive has been split in that fashion. Ultimately the decisions that we make are the decisions of the Commissioner because decisions have to be made by an individual, they cannot be made by an organisation; but I am making those decisions on the advice of the executive

Reverend the Hon. FRED NILE: Going back to that personal acquaintance question, in some of the media reporting there was a suggestion that you had a personal animosity towards Ms Cuneen.

Ms LATHAM: I honestly do not know where that suggestion came from. I struggle to understand how I can have a close personal relationship with her and be somehow antagonistic towards her. I did not see any reference in the Inspector's report to me being personally disposed adversely to Ms Cuneen. In fact I thought the point the Inspector was making was the opposite, which again does not make quite a lot of sense, frankly. All I can say is that I did not have any reason whatsoever to feel personally disposed towards or against Ms Cuneen.

Mr RON HOENIG: I think there is a lack of understanding that Crown Prosecutors might be Crown Prosecutors but they are on different floors, they have completely different practices. When you were there with Ms Cuneen there would have been 40 or 50 Crown Prosecutors?

Ms LATHAM: That is right.

Mr RON HOENIG: They are spread throughout the State, throughout different courts and you may not see another Crown Prosecutor for months, if at all.

Ms LATHAM: That is right.

Reverend the Hon. FRED NILE: There was a point where you were her superior in those years, is that correct?

Ms LATHAM: There was a period of approximately nine months in 1986—so you are stretching my memory here—when I was the head of the child sexual assault prosecution section of the Office of the Director of Public Prosecutions [DPP] and the Clerk of the Peace.

The Hon. TREVOR KHAN: That is going back.

Ms LATHAM: That is going back, yes. In fact it was before the creation of the DPP, and there was a period of nine months when Ms Cuneen worked in my division. And that is the only point in time when I can say there was any kind of supervisory relationship.

Ms TANIA MIHAILUK: How many were in that division?

Ms LATHAM: There was myself and about six other lawyers.

Reverend the Hon. FRED NILE: Was there any conflict during that time with Ms Cuneen, seeking leave and so on?

Ms LATHAM: No, nothing, not that I am aware of. No, not at all.

Mr RON HOENIG: The operational reasons to which you referred that the matter was referred to the Commission, which you cannot tell us about publicly, are you satisfied those operational reasons were of substance?

Ms LATHAM: Absolutely.

Mr RON HOENIG: You should not assume that the rest of the Committee agree, but you have probably gleaned that my preliminary view is from the transcript. Say the Committee agree that they do not accept the Inspector's view of the relative triviality, what should we then do, do you submit?

Ms LATHAM: I return to my substantive submission, which is that where there is a denial of procedural fairness then the law generally dictates that no weight should be placed on the findings. And the reason for that is that if the process is not fair then the conclusions cannot be relied upon. And that was the submission that I made in the original submission.

Mr RON HOENIG: Your submission is that if we reach that conclusion we should reject all the findings?

Ms LATHAM: Essentially that is the position that the Committee is going to be in, because if you cannot place any weight on the findings then they do not have any force or effect.

Mr RON HOENIG: You received this material from the Australian Crime Commission, you embarked upon a preliminary investigation. This is probably before our time, but I ask this question; the contents of the phone can be obtained from telephone companies?

Ms LATHAM: I am sorry Mr Hoenig, they cannot.

Mr RON HOENIG: They cannot?

Ms LATHAM: No. Under the Telecommunications (Interception and Access) Act there are various chapters that deal with the kinds of information that can be accessed by warrants. In relation to telephone content that is other than the audio travelling through the system, so in relation to things like text messages, the telco companies do not keep that material for much longer than a week. The only thing that you can access historically, if you want to access text messages from someone's phone that might be a year or six months old, you are not going to get it from the telcos. You actually have to physically have the phone in order to retrieve the messages from the phone. The only thing you can get from the telcos is the metadata, which is the information that lies behind the actual content.

The Hon. LYNDY VOLTZ: And that would need to be translated with software to get anything meaningful out of it?

Ms LATHAM: All you would get from the metadata is the kind of information about two numbers communicating with each other, but you actually would not get the content of the message.

Mr RON HOENIG: So all that material I have seen over the years has been extracted reasonably quickly by way of warrant?

Ms LATHAM: That is right.

Mr RON HOENIG: There were operational reasons that the matter was referred to you, you regarded the matter as serious. You concluded—in my view not unreasonably and even in the Inspector's view not unreasonably—that you were not precluded from your jurisdiction of conducting an investigation. You then had an option to go and get a warrant to do what you proposed to do. You proceeded by way of notice—and you are not the only agency that utilises these notices—and there is an argument whether it is lawful or unlawful, but had you got a warrant it would have been lawful. In view of the fact that you are proceeding for operational reasons down a particular path and you come to a view, why would not the Commission in terms of its procedures ensure that there was never going to be an argument as to the admissibility of any material you may have found with a warrant?

Ms LATHAM: Can I just go back a step and make a point in relation to the use of the notice to produce—and you are correct in saying that other agencies use them. In 2014-15 the Police Integrity Commission [PIC] issued five notices to produce and they were all—

The Hon. TREVOR KHAN: Can you assume that we have got the letter from the Police Integrity Commission. Can you assume that at least I sat on the inquiry and I was asking the questions.

Mr RON HOENIG: But that is only a letter. That is not the law the Commissioner referred to.

The Hon. TREVOR KHAN: No, but what the Commissioner is going on to, and I am happy, between the Hon. Lynda Voltz and I, I am sure we can tender the letter.

Ms LATHAM: I accept you have that information. Let me go back to the point I am trying to make; when the Commission decided that the matter was worthy of a preliminary investigation, at that point we only had the telephone intercepts [TI] product. And so it seemed to us that it was important to confirm or deny whether or not there was other information on the phones that were used at the time of the car accident and either the days after the car accident that, as I said, would either confirm or deny that material, or possibly offer some other explanation that would then determine whether or not we were going to take it further.

I am not meaning to be facetious when I say this, but mobile phones travel with the person. They go all over the place. You are not going to necessarily be able to find a mobile phone if you execute a search warrant on premises. Search warrants cannot be executed on a person, they have to be executed on premises. What that search warrant does—I am sorry Mr Hoenig, I am saying this for everyone's benefit, not just yours.

Mr RON HOENIG: You need to do that.

Ms LATHAM: The point about a search warrant is that it allows you to enter and seize without consent. So, the whole basis of the search warrant is that it assumes non-consent. On the other hand, a notice to produce is simply a notice that is served on the person for production of an item. It can be for production of an item forthwith, as the full Federal Court has said. In this particular case I need to inform the Committee that we made an operational decision that the notice to produce in relation to the phones was the correct way to go, because the alternative was that if we sought a search warrant members of the community and neighbours of Ms Cuneen would have had the unedifying sight of five or six Independent Commission Against Corruption [ICAC] officers wearing ICAC vests at her premises at six o'clock in the morning, issuing a search warrant for the purposes of going through and effectively searching every room.

The Hon. TREVOR KHAN: Why was that necessary?

Ms LATHAM: I am sorry but it would have been incredibly more disruptive and more embarrassing, and frankly from our point of view a complete overkill in the circumstances.

The Hon. TREVOR KHAN: Commissioner, I am asking this: You have given a description of five or six people turning up in ICAC vests at five or six in the morning. Why does it follow that that is the procedure that you would adopt, even armed with a search warrant, when you had two officers turn up, I assume without ICAC vests on, armed with a notice that sought entry to premises. They were granted entry. There was a discussion and phones were produced. You could have done precisely that in the circumstance with a search warrant, surely?

Ms LATHAM: No I am sorry, Mr Khan, but that is not the case. The point I am trying to make is that our procedures—we have policies and procedures that govern the execution of a search warrant, in any circumstance. And one of the reasons why ICAC officers, when they are executing the search warrant, attend premises at six o'clock in the morning or 6.30 or seven o'clock, you can assume that it has to be early in the morning because what you want to do is to ensure that the items that you are actually after are on the premises. And, as I said before, phones travel with the individual. So if, as was in fact the case, one member of Ms Cunneen's household was not there at seven o'clock and had a mobile phone on his or her person, then we would have missed the opportunity to seize the item.

The second point I want to make is this: ICAC officers identify themselves in the way that I have described because when we execute search warrants on premises—and, as I said, it is often at an hour of the morning which is inconvenient and rather intrusive—we want to avoid the situation where someone in the street

thinks that there is in fact some kind of unauthorised armed entry into premises. And I am just trying to indicate why it is that they identify themselves, because we do not want to put our officers in danger if someone makes the wrong assumption about who it is and what they are doing there. Essentially, the point I am trying to make is that the notice to produce was a very low-key, unobtrusive way of obtaining the phones and making sure that we had access to the content of the phones and when we had access to the content of the phones, we could determine whether or not there was anything that we needed to pursue.

The Hon. TREVOR KHAN: I get that.

Ms LATHAM: So it was a choice of methodology that we thought was much less intrusive, less embarrassing and less open to embarrassment from Ms Cunneen's point of view, because all it was was a couple of people knocking on the door and being invited to walk in.

The Hon. TREVOR KHAN: When your officers returned, I think it was Ms Loder returned to the premises armed with a search warrant and, I take it, a briefcase and plastic bags with mobile phones in. Were there five of them and were they dressed in ICAC vests?

Ms LATHAM: No but there was no need to do that then because we were in possession of the phones and as Mr Hoenig has pointed out, the execution of the search warrant for the purposes of being able to use the information on the phone, was necessary to overcome the privilege that Ms Cunneen had claimed. So there was a legal basis for executing the search warrant after we had verified for ourselves that there was, in fact, material on the phone that was worthy of being pursued. So that was the rationale.

The Hon. TREVOR KHAN: I get all that, I get why you did things at particular times but you have given a description of how you execute a search warrant. What I am simply asking is, when the officers attended on the second occasion, at the premises of Ms Cunneen, armed with a search warrant, were there five of them, were they dressed in vests, and did they arrive at six o'clock in the morning?

Ms LATHAM: No, because we did not—

The Hon. TREVOR KHAN: The answer is no.

Ms LATHAM: No, because we did not need to do that because we had the items that we wanted for the purposes of the search warrant.

Ms TANIA MIHAILUK: That's the whole point—they had them.

The Hon. TREVOR KHAN: The one thing you can be sure of, Tania, is that I have read this up and down, so I know that they had them.

The Hon. LYNDA VOLTZ: Point of order: Can we move on, rather than have this grandstanding?

CHAIR: Let us move on.

Ms LODER: Can I just correct something? I was not at the search.

The Hon. TREVOR KHAN: I am sorry.

Mr RON HOENIG: I want to word this carefully, otherwise it will be objected to. If we leave the admissibility of what you subsequently discovered aside, when you obtained that material, you collected the preliminary investigation, the uncontroversial material if I could say. You could have then referred the matter to the Director of Public Prosecutions [DPP], rather than decide to go down the further path which then involved the Commission in litigation. You were sufficiently advanced to do that, were you not? And I am asking this question because one, I have not seen the Solicitor-General's advice or Mr Silbert's advice and I have not reviewed the material as I would if I was embarked upon litigation. You had better say "yes" or "no"—am I missing something?

Ms LATHAM: I am trying to clarify: Do you mean to say that, with nothing more than the telephone intercept [TI] and the information on the phone and without conducting any further inquiry of Ms Cunneen or anybody else, that we should have then just sent that material to the DPP?

Mr RON HOENIG: You had, I assume, witnesses available to be interviewed—

Ms LATHAM: That is right.

Mr RON HOENIG: A chronology in respect of the accident; what various people had said at the accident; the police had attended.

Ms LATHAM: That is right.

Mr RON HOENIG: If you add that, together with the contents of the phone and the TI, which you invited us to hear because the probative value of that is quite high. Would you then sufficiently advance to then refer the matter to the DPP rather than proceed to public hearings? I am asking you this because I have not viewed it as you would normally view it if you were counsel and I have not seen the advice. Am I missing something?

Ms LATHAM: No, all I wanted to point out is that, as you will know, the DPP had its own problems in relation to conflict, because he would not have been able to conduct any prosecution, given that Ms Cunneen was a senior Crown Prosecutor under his direction.

The Hon. TREVOR KHAN: That is not the question.

The Hon. LYNDA VOLTZ: That is the question.

Mr RON HOENIG: If you could let Ms Latham answer, because this is probably the crux of my concern.

Reverend the Hon. FRED NILE: Let the Commissioner finish her sentence.

Ms LATHAM: Well, there was a problem in relation to that because, as I said, she was from that organisation and that presented the DPP with a particular problem. The further problem though, is this: The DPP is a prosecutorial agency; it does not investigate. To the extent that we could, at some stage, have passed on what we had, there certainly were a lot of other lines of inquiry that could have been pursued and indeed, that was one of the things the Commission was hoping to do, in the course of the public inquiry. So I anticipate that what we handed to the DPP would not have been complete for the purposes of an entire investigation. What the DPP would have done, he would have asked the police to conduct some further investigation and then we are back to the original problem.

Mr RON HOENIG: So the DPP is not your only avenue. I suppose I am specifically talking to the principal matter that I do not regard as trivial. So it could have gone, say, to the Crown Advocate and the Solicitor-General to make a determination as to whether it was appropriate to present the indictment. What I am getting at is, whatever you make of this material is a Jury question, isn't it?

Ms LATHAM: Well, ultimately it would have been, yes.

Mr RON HOENIG: So if we look at the principal matter, I want to know, without disclosing anything publicly, that in respect of the principal matter, at the time you decided to proceed to a public inquiry, was there anything missing that would prevent, say, the Solicitor-General from determining whether to present the indictment?

Ms LATHAM: Well, that is a highly hypothetical question because, I think the point is really—and this is a point that is often missed—there seems to be an assumption, not just in relation to this matter but in matters generally that the Commission investigates, that at some point in time we have a complete understanding and a complete picture of everything that would support a prosecution, and that is actually not the case. The public inquiry process is not a hearing that assumes any finality in terms of the information that we have. The public inquiry process is actually part of the investigation.

I will provide an example outside the terms of Operation Hale. We have to adjourn many investigations to a later date—the one we are conducting at the moment we have had to adjourn to a later date in June—because as the inquiry proceeds we come into possession of more and more information. It is the public inquiry

process that prompts the production of other documents and the appearance of other witnesses. It is difficult to say that we would have had everything that necessarily constituted the entirety of the relevant material. A point that needs to be made quite often is that the public inquiry is a dynamic process. We do not know what is going to happen or what kind of evidence is going to come forward. That is the purpose of the public inquiry.

Reverend the Hon. FRED NILE: Can I clarify one aspect? You did not want to send material to the DPP, but in fact you did send material to the DPP in the form of some transcripts.

Ms LATHAM: That was the text content of the phone call that was relevant to the disciplinary matters that came under sections 53 and 54.

Reverend the Hon. FRED NILE: I have not seen it, of course, but Ms Cunneen apparently made a critical comment about the DPP which caused further embarrassment to her. Why was that done?

Ms LATHAM: The ICAC Act allows us, under sections 53 and 54, to refer material to a public agency if disciplinary matters are raised by the material. That is, we might discontinue an investigation and decide that it does not come within our jurisdiction or is not sufficient for our purposes as serious and/or systemic conduct but, in order to do something with the information, if it falls within the category of disciplinary behaviour we have the power to refer it to the relevant agency. The DPP Code of Conduct contains provisions in relation to the relationship of officers of the DPP with the press, the confidentiality of information that officers of the DPP have at any given time and their responsibilities in relation to that kind of information.

The Hon. TREVOR KHAN: Do you have a copy of the Code of Conduct?

Ms LATHAM: It is available on the DPP's website. I am sure the Director would make it available to you.

The Hon. TREVOR KHAN: You referred to it. I just wondered if you had a copy with you.

Ms LATHAM: We accessed what was on the website to make sure that we understood what the Code of Conduct said. The material that we obtained from the phone appeared to us to fall within some of those categories, so we referred it simply so that the Director himself could determine whether it was something that he wanted to pursue. That was not a decision for us.

Reverend the Hon. FRED NILE: Did you realise that it would cause a major disruption to their relationship because of the way it was used?

Ms LATHAM: I do not think that disciplinary proceedings are ever welcomed by anybody. I want to clarify one point. The information on the phones did not relate only to whether she was critical of the DPP; the information on the phones was broader than that. It was not just about whether she was critical. It had to do with the confidentiality of the information that she was transmitting. We could not determine the relevant time frame that applied to the confidentiality of the material, which is why it was sent to the Director.

Mr RON HOENIG: The Crown Prosecutor is independent and appointed with tenure. There are limited reasons to remove a Crown Prosecutor, usually involving misconduct or prison.

Ms LATHAM: Yes.

Mr RON HOENIG: Tenure usually exists for statutory officers, whether the DPP, the Crown Prosecutor or the Public Defender, to enable them to speak out on matters without fear or favour.

Ms LATHAM: Yes.

Mr RON HOENIG: We might prefer them to speak out publicly but it is not always the case. People speak privately to the media. Are you suggesting that, by considering disciplinary proceedings, it was beyond publicly communicating with the journalist that she did not agree with certain decisions? Was it more than that?

Ms LATHAM: I keep saying that, on the face of it, it appeared to be more than that. I say that because the nature of the information she was communicating appeared to relate to matters that were then not public knowledge. We were not in a position to determine precisely what the limits of those communications ought to

have been. For example, if she was the Crown Prosecutor in a particular trial we were not in a position to determine at the relevant time what was and was not within the public domain, so we had to refer it to the Director for him to make that decision. It appeared to be broader than what you are suggesting.

The Hon. TREVOR KHAN: Let us suppose that what was done there was correct. I am not being critical, but you are being somewhat equivocal about how important or unimportant that material was—that being a decision for the Director of Public Prosecutions. Why did you then issue the media release, which I have previously referred to as the 622-word media release, which made specific reference to potential disciplinary proceedings?

Ms LATHAM: Because, as I have said before in answer to the question, Mr Khan, that was a release which was, in the Commission's opinion, necessary for the purposes of explaining publicly what we were doing with the information and why we were doing it. I can point to a number of other media releases of a similar length and nature in other circumstances which we issue, as I said, for the purposes of being accountable for the decisions that we take—

The Hon. TREVOR KHAN: I am sorry to cut across you, but this is not the same as other matters. This was an investigation that was aborted partway through because of a High Court proceeding. You had not had any public hearings. There had been a good deal of publicity, but there had been no public hearing and yet you proceeded to issue a media release that, might I suggest, could be described as a public shaming.

Ms LATHAM: I do not agree with that.

Reverend the Hon. FRED NILE: Or an indictment of the people involved.

The Hon. TREVOR KHAN: Yes.

Ms LATHAM: As I said, I do not agree with that. I think if you read the press release—

The Hon. TREVOR KHAN: I have.

Mr KEVIN HUMPHRIES: That goes to questions about a sense of judgement and proportion. That is what interests me.

Ms LATHAM: Can I just finish my answer, which was that if you read the media release objectively it refers to the alleged conduct in precisely those terms. It refers to it as allegations and nothing more. There was nothing in that press release that asserted that the Commission had reached a final view about anything. As I said, it was simply an indication of why we did what we did and the basis for doing it. It was also prompted by the fact that, as a result of the passage of legislation following the High Court decision, we were legislatively bound to refer it. We could not do anything else with it. So we decided that it was important that, in the interests of transparency and accountability, we explained our decision.

Reverend the Hon. FRED NILE: Did you help draft that media release?

Ms LATHAM: That media release was drafted by a number of people. I have a media liaison officer who routinely drafts media releases with the assistance of the team.

The Hon. TREVOR KHAN: But you approved it, Commissioner, I take it. I think we have been through that before.

Ms LATHAM: As I have said before, Mr Khan, it was a media release of the Commission. There are numerous examples of media releases like that.

The Hon. TREVOR KHAN: I am asking: you approved it, did you not?

Ms LATHAM: As I said before, Mr Khan, I am the Commissioner. The buck stops with me. I do not resile from the responsibility for the decisions that the Commission makes.

The Hon. TREVOR KHAN: Commissioner, I am not trying to argue, but I did ask a question. You approved, did you not?

Ms LATHAM: I approve every decision, ultimately, that the Commission makes. Yes, that is right.

CHAIR: The Committee will take a short break.

(Short adjournment)

CHAIR: Commissioner, we were asking questions in relation to the search warrant. You will recall that the search warrant was issued by Mr Stephen Lister.

Ms LATHAM: Yes.

CHAIR: Was Mr Lister a registrar of the local court at Newtown at the time?

Ms LATHAM: No, we never obtained a search warrant in this matter from Newtown; we obtained the search warrant from the Downing Centre Local Court.

CHAIR: Was Mr Lister at that court for some time?

Ms LATHAM: At which court?

CHAIR: The Downing Centre Local Court.

Ms LATHAM: Yes, that is where he is regularly.

CHAIR: Is it a misunderstanding to say that he was at Newtown Local Court at the time when he issued this particular one?

Ms LATHAM: It is quite wrong. It did not involve issuing a warrant from Newtown.

CHAIR: Is he someone who had issued previous search warrants on behalf of the Commission?

Ms LATHAM: Yes, he had, because he is the nominated registrar at the Downing Centre for the purposes of agencies like us when we apply for search warrants.

CHAIR: And you only ever apply for search warrants at the Downing Centre; is that the case?

Ms LATHAM: That is because it is the closest court.

CHAIR: Is that the only place that you would apply for a search warrant?

Ms LATHAM: Only because it is the closest court, yes. It is a matter of practice, yes.

CHAIR: Is it the only court?

Ms LATHAM: Yes, as far as I know. There may have been others in the past before my time. But, as I understand it, since I have been there, because it is the closest court, that is where we go.

CHAIR: So in your time as the Commissioner, and I have no idea how many search warrants have been issued in your time as the Commissioner, have all those applications for search warrants been made to Mr Lister?

Ms LATHAM: No, they have not.

CHAIR: So there are other registrars who have made them?

Ms LATHAM: From time to time. Could I just indicate that the administrative practice at the Downing Centre is that the Independent Commission Against Corruption, the Police Integrity Commission and a range of other agencies have been given this information by the search warrant protocol which is issued from the Downing Centre—that is, the first port of call is that we make an appointment with Registrar Lister. That is an administrative arrangement that the Downing Centre makes for the purposes of convenience—that is, having someone available at all times for the search warrant applications.

CHAIR: That makes sense.

The Hon. TREVOR KHAN: Are you able to provide us with a copy of that protocol? It does not have to be done right now.

Ms LATHAM: We can make that inquiry, yes.

Reverend the Hon. FRED NILE: But he could not be available at all times; it is only during working hours.

Ms LATHAM: Yes, but all I am saying is that Mr Lister is the nominated contact point for the purposes of search warrant applications.

Reverend the Hon. FRED NILE: What about when he is not there?

Ms LATHAM: When he is not there someone else will step into the breach.

Mr ADAM MARSHALL: Commissioner, you do not seem to get on very well with the Inspector, do you? What is the nature of your relationship with the Inspector?

The Hon. LYNDA VOLTZ: Is Mr Marshall asking if she has a close and personal relationship?

Mr ADAM MARSHALL: No, I am not; and the Hon. Lynda Voltz knows better than that of me.

Mr CHRIS PATTERSON: He described it as acrimonious. It is a fair question.

Mr ADAM MARSHALL: I am asking about the nature of the relationship. From my perspective the two of you do not seem to get on very well.

Ms LATHAM: It has been a matter of some bemusement to me, to be honest with the Committee. I have always communicated with the Inspector in professional terms. The correspondence between the Inspector and I has been referred to and tabled, largely as part of his report. Also, as the Committee knows, there was further correspondence that I attached to the submissions that we made on the previous occasion. All I can say is that if the members of the Committee wish to look at that correspondence, I am absolutely confident that there is nothing in the correspondence from me that evinces any disrespect or any sullen resentment at oversight. The Commission has responded promptly and professionally at all times to the Inspector's requests, and we have given him every piece of information that he has ever requested.

Mr ADAM MARSHALL: Commissioner, I do not want to cut across you but, with all due respect, that was not what I asked. How would you characterise the relationship between yourself and the Inspector?

Ms LATHAM: That is what I am trying to say—I am trying to answer the question. What I am saying is that from my point of view I do not understand what the problem is. I have never had it explained to me why it is that he considers that I am sullenly resentful or why he thinks that the relationship is acrimonious. I am trying to convey that from the point of view of my side of the equation I do not have any antagonism towards the Inspector. It seems to be the other way. So I am sorry but I cannot explain to you why he thinks that.

Mr ADAM MARSHALL: I am not asking you to explain why he thinks that; I am asking if you have a professional, cordial, close and good relationship with him?

Ms TANIA MIHAILUK: The Commissioner has just answered that.

Mr ADAM MARSHALL: Okay, I am just wondering. You have a memorandum of understanding, which both of you are signatories to, between the Inspectorate and the ICAC Commissioner, do you not?

Ms LATHAM: Yes.

Mr ADAM MARSHALL: Clause 4.2, which you are aware of, talks about meeting periodically. So my question is: if in your view that is how you characterise your relationship then why have you not met?

Ms LATHAM: In fact there has never been any request for a meeting and there has never really been a need for a meeting, and I will tell you why. We provide the Inspector on a regular basis with a running commentary, if you like, of all the investigations that we have on foot and the stage which those investigations have reached. We also provide to the Inspector complete electronic access to our recordkeeping system and our

document tracking system—that is through MOCCA and TRIM. The Inspector's office can access all of that information electronically at any time. So the Inspector has full access to the information that the Commission has at any given time in relation to any given matter under its jurisdiction. There has not been an occasion when the Inspector has ever suggested that a meeting is necessary in order to furnish any of that information; it is simply provided.

Mr ADAM MARSHALL: And you have never requested a meeting or sought a meeting with the Inspector either?

Ms LATHAM: I have not had the need to request a meeting.

Reverend the Hon. FRED NILE: The Inspector though has requested meetings with you?

Ms LATHAM: There has been one occasion when the Inspector wrote to me, which was shortly after the New South Wales Parliament passed legislation following the High Court decision. That legislation as I said before only allowed the Commission to refer material in relation to Operation Hale; it did not allow us to pursue any further investigation. The Inspector wrote to me and essentially asked me what the Commission was going to do in relation to that material and said that he would be happy to meet with me to discuss that issue—namely, what we were going to do about the referral.

I simply responded and took the view at the relevant time that a meeting at that stage would be inappropriate, and it would be inappropriate because it was public knowledge that Ms Cunneen had made a complaint about various aspects of the investigation and it was public knowledge that the Inspector was conducting an audit or an investigation into Operation Hale. I took the view that any meeting between us at that stage would have the appearance of bias if at some stage Ms Cunneen wished to pursue her complaint to the Inspector. It may well have compromised the independence of the Inspector in dealing with that complaint—

CHAIR: But you never said that to him, did you? Did you ever say that to him?

Ms LATHAM: I did say that. I can produce the correspondence, Mr Chair.

CHAIR: You said to him that any meeting that you had with him may, in fact, constitute a perception of bias?

Ms LATHAM: I said to him that it would compromise any complaint that he subsequently needed to deal with—yes, I did. And I can take you to the correspondence.

CHAIR: You might do that.

Ms LATHAM: Do you want me to do that?

CHAIR: No.

Ms TANIA MIHAILUK: Do you have that here, Commissioner?

The Hon. TREVOR KHAN: I think it is in his report. There is a whole series—

Mr ADAM MARSHALL: Yes, pages 46 and 47.

Ms LATHAM: We might need to do that.

Mr ADAM MARSHALL: Just to give my question context, I apologise I do not have the vast legal mind of others in this room, but from my perspective we have a memorandum of understanding [MOU] that is signed between you as Commissioner and Mr Levine as Inspector. One of the clauses is you are supposed to meet periodically and what is plainly obvious is, for whatever reason—and I am not seeking to attribute blame—you clearly do not meet. Why do you not meet? What is the point of having an MOU that says you should if you do not? Maybe we need to strengthen it. I would have thought it would have been in the interests of both parties to have a close relationship where you do talk and communicate, and part of that is meeting.

Reverend the Hon. FRED NILE: Just to have a cup of coffee together.

Ms LATHAM: That may well be true, and I do not dispute that that would probably be advantageous. My point is: How is it that I sit down to have a cup of coffee with someone who has used grossly personal pejorative terms and impugned my integrity? Part of the problem is if you are going to have a meaningful, professional relationship with someone it should be born of professional trust and mutual professional respect. Regrettably, for reasons I do not understand, the Inspector does not have any professional respect for me. I find it difficult to explain to you or to understand what it is I am going to do about that because, as I said, it is coming from the Inspector; it is not something that I have ever evinced towards him.

The Hon. TREVOR KHAN: Commissioner, that sounds like a broken-down marriage where both parties say it is the other person's fault and hold that view quite vehemently. He would say precisely the opposite. You have heard his evidence. It seems to us if we are overseeing you we are left with two parties that are at war with each other.

Ms LATHAM: With respect, Mr Khan, all I can say is that I have never impugned the Inspector's integrity. I have never called him "incomprehensible". I have never said that he has acted out of desperation rather than reason. I have never accused him of a lack of courage. I have never accused him of myriad other things that are littered through his report and his evidence to this Committee on Monday. All I can say to you—

The Hon. TREVOR KHAN: That is on Monday, Commissioner. If we go back a bit—

Mr ADAM MARSHALL: You have not met for 12 months or more.

The Hon. LYNDA VOLTZ: Point of order—

Mr ADAM MARSHALL: What is your point of order? What is the standing order?

The Hon. LYNDA VOLTZ: We are going to the Inspector's report.

Mr ADAM MARSHALL: What is the standing order, Mr Chairman?

The Hon. LYNDA VOLTZ: I am allowed to take a full point of order.

The Hon. TREVOR KHAN: Yes, she is. Get on with it.

The Hon. LYNDA VOLTZ: The Commissioner has already raised her letter in the Inspector's report in which she clearly stated—

The Hon. TREVOR KHAN: That is not a point of order.

The Hon. LYNDA VOLTZ: She clearly stated that had such an invitation been extended by the Inspector—

Mr ADAM MARSHALL: What is the standing order? This is not a point of order. You are being argumentative now.

Reverend the Hon. FRED NILE: You are debating the issue, not the point of order.

The Hon. LYNDA VOLTZ: Where in the Inspector's report are the matters you are raising?

CHAIR: This arises out of a discussion about the breakdown of a marriage.

Mr KEVIN HUMPHRIES: Commissioner, at what point did you become aware that the Inspector was going to write a pretty damning report?

Ms LATHAM: When it was published on 4 December. We had absolutely no knowledge of any of the matters that were raised in that report before that day.

Mr KEVIN HUMPHRIES: You had not really met—

Ms LATHAM: In fact, I take that back. There had been a meeting in our new premises. So I think at some point—was it after October, November?

The Hon. TREVOR KHAN: Was that when he was first appointed?

Ms LATHAM: No, it was after he was appointed and after we had moved premises there was an occasion when he came to view our new premises. From that point onwards what we received from time to time was correspondence requesting access to certain information, which we provided at every step of the way. I had absolutely no inkling of the kinds of criticisms that were going to be levelled at me personally and the Commission until the report was published on 4 December.

Mr KEVIN HUMPHRIES: I refer to the MOU about which Mr Marshall commented. I suppose this Committee needs to respond to the Inspector's report, to be honest, and where we go to from here. If there are suggestions on how we improve or can improve the process, we need to do that.

Ms LATHAM: Yes.

Mr KEVIN HUMPHRIES: Is there value in pursuing a strengthening of the relationship between the Inspector and the Commission through you, as the Commissioner, to make sure that you are reasonably on the same page and aware of some of these operations as they progress?

Ms LATHAM: As I said before—and we have said this in our submission—the Commission not only welcomes but benefits from consistent, professional and regular oversight. I am not saying for one minute that we do not want that oversight. What I am trying to explain is if the Inspector can work with someone in whom he has no professional confidence or respect, well I am quite prepared to come to the table. But all I am pointing out is that the objective evidence is that he has that attitude and I, frankly, do not know what I can do to change it. I will do whatever I can—

Mr KEVIN HUMPHRIES: Further to that, there is no mechanism that currently exists in the form of some internal dispute resolution for you and the Inspector to meet and try to resolve—even if you agree to disagree—some of these issues on operational procedure?

Ms LATHAM: As I have said, I have always remained open to communication. I do not understand the Inspector to have ever complained that when there was a request for information, or access to information, he did not receive it.

The Hon. TREVOR KHAN: I can point to one at least.

Mr KEVIN HUMPHRIES: Can I pursue my question? The Inspector made a comment, which you also alluded to, going back to Ms Cunneen behaving as any normal mother would. I do not think any mother is normal but that is another issue; some of them are quite special.

The Hon. LYNDA VOLTZ: Thank you on behalf of all mothers.

Mr KEVIN HUMPHRIES: Special—Mother's Day. I am not questioning your parenthood. Your comment was that a leading public official, a Crown Prosecutor, should be upholding the law 24/7. You have both made value judgements that do not necessarily line up, and this gets to this sense of proportion. When did you have that view? Have you always held the view that the Crown Prosecutor should be on duty 24/7 and should be upholding the law to the nth degree? When were you aware that the Inspector had a differing view on the sense of what happened following the car accident?

Ms LATHAM: It is not a view of mine; it is a principle that applies, and has always applied, in relation to what I refer to as officers in the administration of justice. Anyone who holds a position in the administration of justice is accountable 24/7 in terms of upholding the principles that they enforce. That is not a view; it is something that I have always professionally operated on.

Mr KEVIN HUMPHRIES: Were you aware that the Inspector may not necessarily agree with your view on that?

Ms LATHAM: I am not aware whether the Inspector does or does not agree with my view on that.

Mr KEVIN HUMPHRIES: He clearly does not.

Ms LATHAM: As I indicated before, it is not just a personal view—in fact, it is one of the principal pronouncements by the Court of Criminal Appeal in New South Wales in the decision of Einfeld. As you might recall, Mr Einfeld at that time was a retired judge. He was, in fact, a senior member of the bar; he was not even a judge. But the Court of Criminal Appeal in the course of that decision made some statements about the gravity of a person who is responsible, or was responsible, for upholding the administration of justice being involved in the type of activity that was apparent in that case—that is, lying on a statutory declaration.

Mr KEVIN HUMPHRIES: There is alleged corruption and there is breaking the law.

Ms LATHAM: Yes, I know.

Mr KEVIN HUMPHRIES: He lied.

CHAIR: You sat on that case, did you not?

Ms LATHAM: I was a member of the Court of Criminal Appeal but that does not change the principle. The principle stretches back long before Einfeld. But the point I am making is that that was just a principle; it was not a view that I had. I do not know whether the Inspector agrees or disagrees with that. All I am saying is that is the law. I only became aware that the Inspector had a different view about the nature of the conduct when I saw his characterisation of it in the report of 4 December.

The Hon. TREVOR KHAN: Could you just say that again?

Ms LATHAM: I only became aware that the Inspector had a different view about the gravity of that conduct when I saw his characterisation of it in the report of 4 December.

The Hon. TREVOR KHAN: Would you like to look at his letter of 30 or 31 October?

Ms LATHAM: He may have said something then.

The Hon. TREVOR KHAN: On or about the day that you announced the public hearing, I think—again, there have been so many dates in this exercise—he says essentially something like this is a matter that should not be dealt with by ICAC, it should be dealt with by the cops.

Ms LATHAM: But that does not say anything about the gravity of the conduct, Mr Khan, with respect. That just simply says that we were not the agency that should have been doing it.

CHAIR: But was that not something that would put you on notice of the fact that you perhaps ought to have had a meeting with him about it?

Ms LATHAM: I am sorry, I just did not think at the time that that was going to be necessary.

The Hon. LYNDA VOLTZ: Because he did not have access to the information.

Ms LATHAM: That is right.

Mr KEVIN HUMPHRIES: If I may finish my line of questioning. Sometimes you come to a fork in the road. I accept in the work that you do you have got to go down one way or the other and you chose to go down one line. In lieu of the whole discussion on proportionality and judgement and the like, would you do the same again or would you recommend another course of action?

Ms LATHAM: You mean do what the same again?

Mr KEVIN HUMPHRIES: Would you follow the same operational procedure in lieu of the conduct of ICAC, which is really what we are reviewing following the Inspector's report? Would you follow the same process again in the Cunneen matter?

Ms LATHAM: Assuming that the jurisdiction remained the same, yes, we would have followed the same process because, as I pointed out in my opening statement, we follow processes and procedures regardless of the status or the office or the seniority of the person who is involved in the investigation.

Mr KEVIN HUMPHRIES: You would never consider—given ICAC's role is about corruption prevention as much as it is dealing with it if it takes place, and I refer back to the Code of Conduct, whether it is with the DPP or any other agency—that perhaps a recommendation by ICAC could have been that the DPP does review their Code of Conduct, it is referred back there and you would pursue a line down that avenue. Was that ever discussed?

Ms LATHAM: I am sorry. I am not sure I understand.

Mr KEVIN HUMPHRIES: Rather than further proceed with the investigation of Cunneen—

Ms LATHAM: It should have all gone to the DPP?

Mr KEVIN HUMPHRIES: It could have gone to the DPP, it could have been a code of conduct issue. Was that ever pursued?

Ms LATHAM: I do not see how it could have been a code of conduct issue. Can I just point out that at no point during all the litigation was there ever any contest about the nature of the alleged conduct if proven constituting an attempt to pervert the course of justice. There was never any challenge to the jurisdiction on that basis. The court simply made—

Mr KEVIN HUMPHRIES: That is largely founded on the Act and the fact that you have some pretty broad parameters that you can deal with. I accept that and that is fair and reasonable. You have got some options that you can pursue.

Ms LATHAM: Yes.

Mr KEVIN HUMPHRIES: And there is a broad degree of discretion there. That is all I am saying.

Ms LATHAM: Yes.

Mr KEVIN HUMPHRIES: Do you think the discretion could have been used another way in terms of going down a preventable line and a code of conduct line, given that Ms Cunneen's behaviour was not systemic?

Ms LATHAM: I do not think it was just a code of conduct issue. I think it was an issue that required further investigation because of the potential for the Commission of a serious criminal offence by a public official. I do not think it was a code of conduct issue. We were, as I said, limited in what we could do because the Federal legislation prevented us from disseminating that material to anyone else. So there was a limit to what we could do.

The Hon. TREVOR KHAN: With regards to Mr MacSporran, he was Commissioned on about 2 October?

Ms LATHAM: Yes, he was given a Commission as a temporary Assistant Commissioner.

The Hon. TREVOR KHAN: There had been some process that had occurred, I assume, in the month or so before to decide to appoint him?

Ms LATHAM: Yes.

The Hon. TREVOR KHAN: Why appoint him or have him appointed?

Ms LATHAM: He was appointed because the investigation involved a senior official in the administration of justice and in similar circumstances, had it been any other judicial or quasi-judicial figure, we would have done the same thing.

The Hon. TREVOR KHAN: He was to take over the operation of the investigation from commissioners who otherwise might be seen as tainted in the process. Is that right?

Ms LATHAM: No. He was appointed because when any judicial or quasi-judicial figure is under scrutiny the practice is to make sure that the proceedings are at arm's length and so you appoint someone from out of State. That procedure is followed even in the courts. If there is a retired judicial officer who is involved in litigation, because that person is well known within the legal fraternity, it is quite common to appoint someone from out of State.

The Hon. TREVOR KHAN: So you put the proceedings at arm's length?

Ms LATHAM: That is right.

The Hon. TREVOR KHAN: Can you explain to me, putting the proceedings at arm's length, when Deputy Commissioner Hamilton and you, after having appointed Assistant Commissioner MacSporran, then undertake compulsory examinations of various of the witnesses, how is that keeping it at arm's length?

Ms LATHAM: Because at the point in time when Mr MacSporran was given the Assistant Commissioner role he was a senior member of the Queensland bar. He had commitments that he could not avoid. We decided that for the purposes of some compulsory examinations [CEs] that did not involve directly Ms Cunneen or any member of her family and involved—if I could put it this way—peripheral witnesses such as other people who attended at the scene who had no other connection with Ms Cunneen at all, in relation to those CEs Commissioner Hamilton and I could conduct some of those CEs to essentially meet the convenience of Mr MacSporran. When it became necessary to embark upon the preliminary inquiry in relation to Ms Cunneen and members of her family we made sure that Mr MacSporran was available.

The Hon. TREVOR KHAN: Let me put to you—and you can go away and check the dates—that the compulsory examination of what we will call the supplementary witnesses was on 28 and 29 October. There were eight or nine. Some were done by you, some were done by Deputy Commissioner Hamilton and some were done by Assistant Commissioner MacSporran, all in the course of two days.

Ms LATHAM: That may be right.

The Hon. TREVOR KHAN: That means that Assistant Commissioner MacSporran was physically available to undertake the examinations on those days.

Ms LATHAM: I do not know that that is right without checking it, Mr Khan.

The Hon. TREVOR KHAN: If that were the case that would be inconsistent, would it not, with your answer that this was being done because Mr MacSporran was not available, for instance?

Ms LATHAM: No, that is not inconsistent with the whole of my answer, which was that insofar as—

The Hon. TREVOR KHAN: I did not put the whole of your answer; I put with regards to his unavailability.

Ms LATHAM: I come back to the point that in relation to what we call peripheral witnesses, there was no impediment to either Deputy Commissioner Hamilton or me simply presiding at a compulsory examination where it was just a case of asking a member of the public who happened to—for example, the first person on the scene who arrived as soon as the accident occurred and was the first person to speak to Ms Tilley. There were people who were simply considered peripheral in the sense that we wanted to know what they saw and heard but there was no direct conflict or even indirect conflict in relation to either Commissioner Hamilton or me presiding over the compulsory examination.

The Hon. TREVOR KHAN: But would you not agree with me that, taking into account that you do not know when you get into a public examination precisely where it will go, having already determined to keep the matter at arm's length, you questioning those witnesses is entirely inconsistent with that approach?

Ms LATHAM: I did not question any of those witnesses. I simply presided at the inquiry—

The Hon. TREVOR KHAN: Sorry, I withdraw that. You presided at the inquiry where questions were asked of those witnesses.

Ms LATHAM: That is right.

The Hon. TREVOR KHAN: And you say that is consistent with being at arm's length?

Ms LATHAM: I am saying it is not inconsistent. What I am saying is that I cannot understand what the reason would be for me not simply presiding at an inquiry and allowing counsel assisting to ask questions.

The Hon. TREVOR KHAN: On that basis you would remain in the public inquiry.

Ms LATHAM: No, I certainly would not for the reason that it involved a senior official in the administration of justice. The compulsory examinations I conducted did not involve Ms Cunneen or any member of her family and I would never have done that.

The Hon. TREVOR KHAN: Having taken the view on or before 2 October that because of perception or otherwise you should not be directly involved in it, why was it appropriate for you then to be directly involved in decisions as to, for instance, what should happen with the accumulated evidence after the High Court decision?

Ms LATHAM: Because at that stage, there being no inquiry or investigation, Mr MacSporran played no role; in fact, he returned to Queensland and we simply did not see him again.

The Hon. TREVOR KHAN: I know that.

Ms LATHAM: So the Commission had to make a decision as to what it was that we were to do and, as I said before, organisations do not make decisions, people do, and at the end of the day I, as Commissioner—

The Hon. TREVOR KHAN: Had the buck stop with you.

Ms LATHAM: —had to make a decision on behalf of the Commission. So that was what I did.

The Hon. TREVOR KHAN: But having made an earlier determination that it was inappropriate to be involved, how did it suddenly become appropriate for you to be involved?

Ms LATHAM: It was inappropriate to be involved in the investigation. At the time at which we made the decision to refer, the investigation was no longer on foot—it was simply not in existence.

The Hon. TREVOR KHAN: That is your answer?

Ms LATHAM: That is my answer.

CHAIR: The difficulty is that the perception is—I think you put it—that you need to conduct the inquiry at arm's length because it involved a senior member of the legal profession.

Ms LATHAM: Yes.

CHAIR: That is just another way of saying that in the public perception there would be a conflict of interest. Is that not the case?

Ms LATHAM: No, it is not the case, I am sorry. A conflict of interest is quite different from the considerations that apply to what is called apprehended bias, because the reason why judicial officers from out of State are appointed when there are proceedings involving judicial officers from within the State is that it is important from the point of view of the public's confidence in the administration of justice that even the notional, theoretical appearance of any kind of bias should be avoided by that means. So that is not the same thing as a conflict of interest.

CHAIR: We agree with that.

The Hon. LYNDA VOLTZ: That is the point, is it not, that the Inspector made in his report when he said that there might be or appear to be bias or a predisposition to bias one way or another? It is the appearance of it.

CHAIR: The Inspector complains that, and you reject the suggestion that there was any conflict of interest—

Ms LATHAM: I do.

CHAIR: —on either a professional or personal level.

Ms LATHAM: I do.

CHAIR: But do you reject the suggestion that there may well have been apprehended bias?

Ms LATHAM: No.

CHAIR: Or a perception of apprehended bias?

Ms LATHAM: No, I do not reject that insofar as, as I said before, apprehended bias is about ensuring that from the perspective of the reasonable observer there is nothing about the relationship of any kind—professional, personal, fleeting happenstance, any of those things, or even by dint of the fact that you happen to both be engaged in the same profession. It is about ensuring that the appearance from the point of view of the reasonable bystander is that the process has been scrupulously fair and objective.

CHAIR: In your case that was a bit closer because you would agree with me that in fact you had a closer relationship with this particular person than another person and if the fact of having had a professional relationship with Ms Cunneen was put into the public arena that apprehension of bias would be greater, would it not?

Ms LATHAM: No, I do not agree with that, and I do not agree with it for the reasons that I have already stated. I had had absolutely nothing whatsoever to do with Ms Cunneen professionally since—

CHAIR: That is in your view, but in the mind of a person in a public—

Ms LATHAM: I am sorry, Mr Chair, as a matter of objective fact I had nothing whatsoever to do with Ms Cunneen since 1994. I had absolutely no contact with her other than what we might have had at the occasional professional function where there might have been 50, 60 other people.

The Hon. LYNDA VOLTZ: It comes back to the pub test, does it not? It comes back to the idea that if people in the public perceived you as sitting in judgement of someone else from the legal fraternity, they would have a view about if she got off there would be a perceived view, if she was convicted it would be whatever. So it is about what the pub test would be.

Ms LATHAM: Yes, because, in effect, the problem is that whichever way the result goes, there is a tendency to think, as you have said, well she might have gotten off because I was doing her a favour or she might have actually been condemned because I did not like her, whichever way it went.

The Hon. TREVOR KHAN: And that is precisely what has occurred, Commissioner, has it not?

Ms LATHAM: Sorry, what has occurred?

The Hon. TREVOR KHAN: The allegations, essentially, that have been flying backwards and forwards in the media, arise from the very fact that there has been an appearance that, because of whether it be the closeness of your relationship or because you are members of the legal profession, you have been at war with each other.

Ms LATHAM: Who has been at war with each other?

The Hon. TREVOR KHAN: Cunneen and Latham.

Ms LATHAM: I said before I have absolutely no reason to be in the slightest antagonistic towards Ms Cunneen and I do not even understand Ms Cunneen to have said that.

The Hon. TREVOR KHAN: Well, all right.

Ms LATHAM: Well I do not, I am sorry. If you can point me to any statement that Ms Cunneen has made that objectively demonstrates that I have ever been antagonistic towards her I would be happy to see it.

The Hon. LYNDA VOLTZ: It goes back to your complaint against the Inspector's report, that he portrayed it as a close and personal relationship and then becomes a view.

The Hon. TREVOR KHAN: That is a different matter.

Mr ADAM MARSHALL: I am trying to get my head around some of your answers and your evidence. Just to clarify my mind: you appoint Mr MacSporran because of the reasonable bystander test and Ms Cunneen is a member of the legal fraternity. So in a sense in the investigation part of it you are staying at arm's length and that is the intent. The reasonable bystander, in your mind, you are judging would potentially see some issues so you are at arm's length for that process. But then you do not have an issue, in your mind, with the reasonable bystander test—the same test—to then be back involved in making a decision about what happens after the High Court issues a press release and all of that. You do not see that there is conflict between those two positions?

Ms LATHAM: No, there is not for this reason, as I said on the prior occasion: because of the legislation we could only refer it, we could not do anything else—it was either refer or, as I said, short of making it disappear into the ether, there was nothing else we could do. So the referral was simply the decision that was authorised by the legislation that was passed after the High Court decision.

CHAIR: Do you not think that is something you could have consulted Mr MacSporran about, rather than you do it?

Ms LATHAM: Mr MacSporran was no longer part of the investigation.

CHAIR: To the extent that you thought at the time that he should have conducted the public inquiry, if there was to be one, this was a public component because you were issuing a press release about it.

Ms LATHAM: But Mr MacSporran was not an officer of the Commission. He held no authority in relation to what we did, and as I said, it was mandated by the legislation.

CHAIR: Do you think it would have been good, for example, to have run it past the Inspector?

Ms LATHAM: No, I do not. And I do not for the reasons I have given before, and that is that the Inspector was known publicly to be conducting an audit or an investigation into Operation Hale and if he was directly involved in a decision of that kind that would immediately compromise his independence in terms of being able to deal with any subsequent complaint.

Mr ADAM MARSHALL: One final question then I am done, Mr Chairman. Taking you back to your answers to some questions from my colleague Mr Taylor, I have one question; following the High Court decision and the way that dramatically changes the way the Independent Commission against Corruption understands its scope, have you as Commissioner made any changes to your practice, to your procedures in the way that your special executive branch—I am not sure of the right terminology, excuse me—makes its decisions about how to proceed with preliminary investigations and moving forward from there? Have you made any changes to what you were doing before the High Court decision, to what you are doing after?

Ms LATHAM: Yes, because not only the High Court decision but also the legislation brought a number of changes. So we have changed our practices and procedures to reflect the fact that we have an additional jurisdiction, which is represented by section 8, subsection 2A. We have changed our practices and procedures to reflect those inclusions. And we have changed our practices and procedures in relation to considerations of findings of serious corrupt conduct, because that is an additional criterion. The extent that the legislation made changes to our jurisdiction, those changes are reflected in our practices and procedures.

Mr MARK TAYLOR: Do I understand from that, that the structure or the components of the strategic investigation group have not changed, the personnel in that group or the structure?

Ms LATHAM: No, the personnel have not changed, that is correct.

Ms TANIA MIHAILUK: You stated earlier that the Commission was denied procedural fairness by the Inspector, is that correct?

Ms LATHAM: Yes.

Ms TANIA MIHAILUK: That is what you stated earlier. Is that because the Inspector failed to interview anybody from the Commission itself, the executive, in relation to his final audit and inquiry?

Ms LATHAM: Essentially, yes. He failed to speak to anyone who may have been able to provide information that was relevant for the purposes of his findings.

Ms TANIA MIHAILUK: I am trying to understand why there is what appears to be an acrimonious relationship. And I must say my own view of that, in listening to the Inspector the other day, I do not see any acrimony coming from yourself towards the Inspector. I wanted to ask; when you became the Commissioner was there any discussion with the former Commissioner or with the then Inspector that there was a requirement to have coffees and lunches? The Inspector seemed to make a comment on Monday that all of this could be resolved by way of a lunch.

Ms LATHAM: Sorry, are you asking whether—

Ms TANIA MIHAILUK: I am asking have you ever heard of any past relationships between the former Commissioner and Inspectors where there is a need to have lunches or coffees?

The Hon. TREVOR KHAN: Some people leave the Family Court and have a lunch to try and sort it out.

Ms TANIA MIHAILUK: My point being that I think the point that you made earlier that you have always conducted your relationship with the Inspector through professional terms and by way of correspondence seems to me the manner that it should be undertaken. I am just wondering why there is an expectation, perhaps by the Inspector, that there is a need for coffees or lunches?

Ms LATHAM: I cannot speak about the way in which or the frequency with which previous Commissioners met with previous Inspectors. By the time I was appointed, the previous Inspector, Mr Cooper, was finishing his term and the present Inspector had only just come on board. So, no, I cannot indicate what the practices might have been in the past.

Ms TANIA MIHAILUK: Certainly nobody suggested to you that there would be a need to have that type of—

Ms LATHAM: No. As I said, there was the occasion when the Inspector came to look at our new premises and since then there has been no further visit to the premises.

Mr RON HOENIG: Can I ask you this—I put this to the Inspector—if you look at the tone of the exchange of correspondence as contained in the Inspector's report and the exchanges between yourself and members of the Government last year when we were reviewing the annual report, in fact you wrote a letter to the Committee following that.

The Hon. TREVOR KHAN: I did not get a Christmas card either.

Mr RON HOENIG: You could infer, and in fact I am asking you because there is an inference available to people sitting around the table that there is a reluctance or resistance to any form of oversight. Is there a reluctance for oversight of the Commission, either by the Inspector or this Committee?

Ms LATHAM: No, not at all. In fact, I have to say that on the occasion of which you speak, Mr Hoenig, you would be aware that was my first appearance before the Parliamentary Committee since I had become the Commissioner. The occasion for that hearing was the Commission's annual report; I think it was the 2013-14 annual report. I was perhaps somewhat politically naive, I have to say I have never really been a political animal. I was somewhat taken aback because when I came to the Committee hearing I thought we were going to be talking about the annual report, and instead I received a fairly sustained line of questioning in relation to Operation Hale, and that caught me somewhat off guard.

The Hon. TREVOR KHAN: That is not where it started.

Ms LATHAM: I do not know what you are referring to, Mr Khan.

Mr RON HOENIG: Can you let the Commissioner answer?

Ms LATHAM: I am responding to Mr Hoenig's question. So, I invoked on that occasion section 64, subsection (2) and in spite of invoking that section the questions seemed to persist. Perhaps, unfortunately from my perspective, I became a bit defensive because I could not understand what the Committee's position was in relation to that. Can I say, it seems to me that as a result of the Crown Solicitor's advice the Committee now takes the view that the position I took then was correct.

The Hon. TREVOR KHAN: No, that is not correct.

CHAIR: No.

Ms LATHAM: That is why I am somewhat confused. But, in any event, if and when I see the full text of the Crown Solicitor's advice I might be able to work out what the difference is. But coming back to your main point, I am not resentful and nor is any Commission officer resentful of oversight. As I said, we welcome consistent, professional and competent oversight. We always have, we always will. We have benefited in the past from audits that have been carried out by the Inspector in relation to search warrant procedures.

There have been occasions, particularly under Inspector Cooper, when he conducted an audit of search warrants that the Commission had applied for and we identified some aspects of our procedures that could be improved as a result of those audits. We have always welcomed that, as we did the Review Panel. We welcomed the opportunity to make submissions to the Review Panel and we agreed wholeheartedly with the results of that review. I value the views of the Parliamentary Committee as well, because ultimately we are accountable to the public and that has to be expressed in a public forum.

Not only that, but it was in fact the Commission itself that welcomed the establishment of the Inspectorate when the 2005 review was undertaken by Mr McClintock, and it was only as a result of that review that the Inspectorate was created over the Commission and we supported that. So the answer to your question is; we are quite happy with the oversight structure we have got and the Review Panel, the Hon. Murray Gleeson and Mr McClintock. The Review Panel essentially looked at all of our powers and the structure that we currently had and recommended that the oversight that we currently had was sufficient and productive and that there was no need to change it.

Mr RON HOENIG: When the Act was first enacted, I asked the Inspector this, it was before his time, there was an operational review committee established which, although it was not a binding decision, it was a hurdle that the Commission had to get through when it was established, to provide some check and balance to the coercive powers that the Commissioner had. The Crime Commission has a Management Committee that the police Minister used to chair. As I understand it from the previous police Minister, before the police could access the Crime Commission, they had to go through this hurdle to say that it was necessary for them to use their extensive powers. Once the civilian oversight disappeared, that is when the Crime Commission seemed to have got into some difficulty.

I wonder whether or not a similar structure should be in existence to an organisation like yours that has this enormous statutory coercive power, as a check and balance to ensure that at least there is some monitoring before you go down a process at some stage? Because ultimately, when it goes to the Inspector, the horse has bolted and the media get involved, politicians get wedged, and an issue like this, everybody goes back to their corner. I wonder whether that might solve the oversight problem.

Ms LATHAM: The panel that you are referring to was an advisory one anyway, so it did not bind the decisions that the Commission took. In fact, there was a specific submission to the Review Panel last year that recommended the reinstatement of that kind of review process and the Panel considered it and rejected it and rejected it for the reasons that it was basically ineffectual and also rejected it for the reasons that it was not always effective because the individuals involved really had a limited capacity to make an assessment of the information and determine whether or not it was proper for the Commission to go down one path or another.

But can I just say this: There is no reason to think that we should create another model, if the model that we have is seen to be working effectively and the Review Panel thought that the model is working effectively. In relation to your comments about once it has gone to the Inspector the horse has bolted. I would prefer to look at it in these terms: That if a complaint goes to the Inspector, then there is an independent office that can evaluate the complaint and dealt with it effectively, because the office of the Inspector has very broad powers as well and they are broad powers that no advisory committee will ever have. So, in fact, the kind of oversight we have now is much better than what we had in the past.

Reverend the Hon. FRED NILE: I want to get the Commissioner's response to this quote from the Inspector's report, on page 4, which states:

On 24 July 2015 the New South Wales Solicitor General Mr Sexton issued a media release stating that the New South Wales Solicitor General, after considering the advice of Mr Silbert ...

Queens Counsel [QC], Chief Crown Prosecutor for the State of Victoria—

... had determined that an indictment should not be found in relation to charges against Ms Cunneen ...

or her son—

... Mr Wylie or ...

his girlfriend—

... Ms Sophia Tilley for attempting to pervert the course of justice or giving false evidence to the ICAC.

What was your response to that decision?

CHAIR: It may require the Commissioner to review—it is a fact that the DPP's advice is there. Everyone around this table knows what it says.

The Hon. TREVOR KHAN: Well, no. We know what the outcome is; we do not know what it said.

CHAIR: Sorry, we do not know what it said. But to ask the Commissioner to review the DPP's advice—

Reverend the Hon. FRED NILE: I am not asking her to review the advice, I am just asking, what was her reaction to that decision—was she disappointed or surprised?

CHAIR: I will ask the Commissioner. To answer that question, would you need to traverse the material which we have ruled cannot be made public?

Reverend the Hon. FRED NILE: I am just simply referring to that decision, that is all.

Ms LATHAM: I don't see it as part of my role to be disappointed or otherwise in relation to decisions that are made of that nature. I do not have to go into unchartered territory here, but the decision made by the Solicitor-General was a discretionary decision not to lay an indictment, and that is all that really matters. It is a matter of fact that that decision was taken by him.

The Hon. LYNDA VOLTZ: Point of order: Can I get some clarification on what time we are finishing, because it is now 12.35 and we were due to finish at 12.15.

CHAIR: Is it an issue?

The Hon. LYNDY VOLTZ: It is an issue for some of us who had meetings booked in and the Commissioner may have other issues.

CHAIR: Commissioner, are you happy to take a few more questions?

Ms LATHAM: Yes.

Mr MARK TAYLOR: Commissioner, following on from Mr Hoenig's questions, leaving aside the jurisdictional issues which have changed, or the jurisdiction that has changed as a result of the High Court decision, what would you say if the Committee asked you what you see are the lessons learnt by ICAC that have come out of Operation Hale, from your perspective? How would you summarise those?

Ms LATHAM: I cannot really say that we formed a view that any great lessons had been learnt. Can I just say that, at the end of every investigation, no matter how it is resolved, we always conduct a debrief and we talk about what went right and what went wrong. Our summary in relation to Operation Hale was that it provided an opportunity for the limits of our jurisdiction to be tested. As I pointed out previously, when Mr McClintock did a review in 2005 he, in fact, raised that issue, that is, the broad scope of the jurisdiction under subsection 8 (2). And he, in fact, made a recommendation that that jurisdiction should be clarified and it was one of the things that the then New South Wales Government did not progress. And so it was perhaps inevitable that, at some point, someone was going to test the limits of that subsection and it happened to be in relation to this particular operation.

But, in summary, we are quite content with the way in which our jurisdiction has been clarified and as you will no doubt have noticed, we have got lots of investigations in the pipeline and we are getting on with the job at hand. So I do not think I can add anything more to it.

Mr MARK TAYLOR: So, as I said, leaving aside the jurisdictional issues, from your perspective as the Commissioner is it not the case that there has been a discussion about maybe decision-making processes and procedures or strategic group structure, et cetera? You do not see any changes necessary in those types of things?

Ms LATHAM: No. We have had a discussion about the procedures that we adopted. We reviewed them and we were content that we had followed the appropriate procedures. So no, we have not changed them.

CHAIR: In terms of lessons learnt, would you agree with this: That there has been some considerable damage done to the effectiveness of ICAC arising out of Operation Hale?

Ms LATHAM: I suppose that is in the eye of the beholder because it really depends on who you speak to. We regularly receive many communications from members of the public that express confidence in ICAC.

CHAIR: So you do not accept that, as a general proposition, Operation Hale has diminished the credibility or reputation of ICAC in the mind of the public?

Ms LATHAM: No, I do not accept that. I am sure that in some quarters there are some people who think that ICAC has lost some standing as an institution, but you cannot please all of the people all of the time. I do not think it is true as a general proposition.

CHAIR: One of those perceptions is that ICAC has used its extraordinary powers, which are not given to many other organisations, to pursue a person in circumstances where it was acting outside its jurisdiction and where—as you rightly referred to it, at the discretion of the Victorian DPP—there was no case to answer.

Ms LATHAM: It was at the discretion of the Solicitor-General.

CHAIR: As a result of the advice that he received from the Victorian DPP. Do you agree that the pursuit of a person in those circumstances by an organisation with the powers that your organisation has appears to diminish the reputation of the organisation?

The Hon. LYNDY VOLTZ: Can I take a point of order?

CHAIR: No.

The Hon. LYNDA VOLTZ: Point of order: My point of order relates to section 64 (2). I am concerned that we are going to a decision of the Commission as opposed to looking at the report.

Reverend the Hon. FRED NILE: It is about the reputation of the Commission.

CHAIR: I am the last person who wants to do that.

The Hon. LYNDA VOLTZ: We are meant to deal with procedures and policies.

CHAIR: I am trying to protect the reputation of the Commission. This committee's sole purpose is to ensure that the organisation is robust. Everyone around this table wants to see ICAC be an effective anti-corruption organisation. We are very concerned to make sure that its reputation is maintained.

The Hon. LYNDA VOLTZ: You are going to a decision of the Commission that it took based on certain evidence that is not in the public domain and now you are asking whether the Commission's pursuit of that decision has reflected on that organisation.

Reverend the Hon. FRED NILE: In the public domain.

The Hon. LYNDA VOLTZ: Yes. The Commission formed a view based on the evidence before it. We are prohibited from dealing with that, under section 64 (2). I am not sure how this question does not go outside that area.

CHAIR: I put the question.

Ms LATHAM: I will address one issue before I answer the question. The discretionary decision by the Solicitor-General not to lay an indictment was taken on the basis of his consideration of Mr Silbert's advice and his consideration of representations made to him by Ms Cunneen's legal representatives. That is an important factor, in my view.

CHAIR: That has nothing to do with the reputation.

Ms LATHAM: I just wanted to correct a misunderstanding.

CHAIR: Okay. Thank you.

Ms LATHAM: To answer your question, no, I do not agree that, as far as the public is concerned, what was essentially a dispute about the jurisdiction of the Commission—accepting that we were exercising our considerable powers—has in any way damaged the standing of the Commission in the eyes of the public.

Mr KEVIN HUMPHRIES: That will do, won't it?

The Hon. TREVOR KHAN: That will do.

CHAIR: I want to put to you a couple of further questions.

The Hon. TREVOR KHAN: If that is a view, we can place such weight on it as we think is appropriate.

CHAIR: The Inspector raised one issue, part of which goes to the reputation of ICAC, and it is the manner in which it exercises procedural fairness. Do you agree that people who are questioned by ICAC in relation to alleged corrupt activity should be shown some degree of procedural fairness?

Ms LATHAM: They are.

CHAIR: Was the audio ever played to Ms Cunneen, to ask her to answer?

Ms LATHAM: We never started the hearing.

The Hon. LYNDA VOLTZ: Point of order—

The Hon. TREVOR KHAN: Even I have to say that that is transgressing section 64 (2) territory.

CHAIR: The Inspector raised—

The Hon. TREVOR KHAN: That is a statement of fact in the report. It does not have to go any further than that, with respect.

Ms LATHAM: Mr Chair, I indicate that, in order to answer that question, I would have to reveal the contents of an inquiry that is subject to secrecy provisions. I could not do it in open session.

The Hon. TREVOR KHAN: We are in agreement.

Ms LATHAM: I make one other general point. Procedural fairness, as I said, is something that the Commission always applies. The content of procedural fairness, as far as the Commission is concerned, is to make it clear to every person who may be the subject of adverse findings what the substance of those findings might be and to allow the person an opportunity to respond to them. When we serve a summons on any person who is brought before the Commission, whether in a compulsory examination or a public inquiry, on the face of the summons it sets out the scope and purpose, which articulates for the person what it is that is being alleged.

When the person comes to give evidence before the Commission, the nature of the allegation and what it is that we are investigating is spelled out. It is also repeated to the person at the beginning of the inquiry. We make sure that they understand what it is about. Insofar as that is a requirement of procedural fairness, that is observed. When we get to the end of an investigation, the further requirement of procedural fairness is observed by way of submissions going from counsel assisting to all the relevant parties and the opportunity being given for all the relevant parties to respond to those submissions.

CHAIR: I will go to that. One of the suggestions made by the Inspector is that there be an opportunity to advertise any exoneration. Do you agree with the suggestion?

Ms LATHAM: No, I do not, for this reason: when we make a corrupt conduct finding, which is defined under our Act, it does not necessarily accord with any criminal offence. There are circumstances where we might make a corrupt conduct finding because it relates to a disciplinary offence or perhaps where the criminal offence that is attached to the corrupt conduct is in fact out of time. So we make corrupt conduct findings in circumstances where the person may never be prosecuted. That is an entirely apposite jurisdiction for us to exercise. I will go one step further and say this. There are hundreds, if not thousands, of people in New South Wales who are prosecuted every year for a range of criminal offences and a proportion of them will be acquitted. That is the way in which our administration of justice works.

The Hon. TREVOR KHAN: Quite properly.

Ms LATHAM: Quite properly. I absolutely agree with that. All I am pointing out is that there is no protocol in place as far as I am aware from New South Wales Police or the DPP to issue some kind of exoneration when someone is acquitted of a criminal offence.

CHAIR: The perception is that the mere fact of people appearing before the Commission is accompanied by significant reputational damage in circumstances where they may subsequently be acquitted of the corruption finding. The Inspector gave the example of a person who was the subject of a corrupt finding where, if one googles the person's name, the first thing that appears in the Google search is your finding. In fairness to that person or persons, should there not be some process for advertising or letting the world at large know that they have been acquitted of that finding?

Ms LATHAM: The first thing is that they are not acquitted of the corrupt conduct finding; what they are acquitted of is the relevant criminal offence that the DPP has decided to prosecute, and that is a decision for the DPP, not for the Commission. What we do is we refer to the DPP material which may be or may not be in an admissible form. We refer it on the basis that the DPP may consider it appropriate to lay a criminal charge. Sometimes the DPP declines to do so, and that is an acceptable position from our point of view.

The second thing is that corrupt conduct findings, as I said, go well beyond the notion of just whether or not someone has been able to be found guilty of a criminal offence based on a beyond reasonable doubt standard. We make corrupt conduct findings on a standard of balance of probabilities to what is called the Briginshaw standard. Criminal prosecutions often fail because the elements of the offence are not proved beyond reasonable doubt. They are two quite separate processes with two quite separate outcomes.

CHAIR: My question really is in terms of protecting people against reputational damage.

Ms LATHAM: Can I add to that that when someone is either convicted or acquitted of a criminal offence arising out of our inquiries, we publish that fact on our website. We have a link on our website which keeps the public up to date in relation to the carriage of prosecutions and whether the prosecutions have resulted in convictions or acquittals. So the person can in fact check whether or not there has been any successful outcome.

CHAIR: I take it your position is that there is nothing further that the legislature ought to be doing to ensure that procedural fairness is promoted or that reputational damage is protected against?

Ms LATHAM: I do not think there is anything else the legislature needs to do. On a significant number of occasions when the Commission's findings in a report have been challenged in the Supreme Court and one of the challenges has been that we have denied procedural fairness we have never been found by any court in New South Wales to have denied procedural fairness.

CHAIR: Within the ambit of the way your Act operates.

Ms LATHAM: Yes.

The Hon. LYNDA VOLTZ: Well that is what they are operating under.

CHAIR: And that may well be the problem. I note that the Hon. Lynda Voltz is trying to wind up.

The Hon. LYNDA VOLTZ: We are now 15 minutes past the last point.

Reverend the Hon. FRED NILE: There could be legislative amendments—

CHAIR: I thank the Commissioner and members of the ICAC for attending today. If there are any matters which we think we would like to address afterwards, Commissioner, I assume that you would be happy to receive those in writing.

Ms LATHAM: Yes, we will take any questions on notice. Can I just raise one matter?

CHAIR: Yes, sure.

Ms LATHAM: I know that the Committee has yet to decide whether it will receive the supplementary submission. Could I also ask the Committee to consider, if it does receive the supplementary submission, that it might publish it, because the previous submission was published. I will leave that with the Committee.

CHAIR: That concludes today's public hearing. Again I place on the record my thanks to all the witnesses who appeared today. I thank also all the Committee members for their contributions and all the parliamentary staff, who do a fantastic job looking after this Committee.

(The witnesses withdrew)

(The Committee adjourned at 12.53 p.m.)