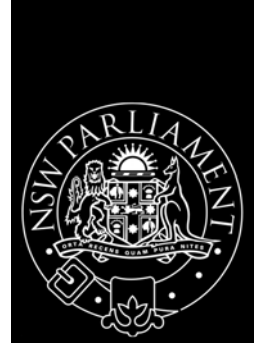


PARLIAMENT OF NEW SOUTH WALES



Committee on the Independent Commission Against Corruption

Review of the 2006-2007 Annual Report and audit reports of
the Inspector of the Independent Commission Against
Corruption

Incorporating transcript of evidence, answers to questions on notice
and minutes of proceedings

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Table of contents

Membership and staff	iii
Terms of reference	v
Chair's foreword.....	vii
List of recommendations	ix
COMMENTARY	1
INTRODUCTION	1
SECTION 1: FUNCTIONS AND ADMINISTRATION	1
Relocation of office	1
Complaint statistics	2
Audits of the ICAC.....	5
Succession planning	6
Role of the Office of Inspector of the ICAC	7
The Inspector's view	7
Reasoning behind the establishment of the Office of the Inspector of the ICAC..	8
The Committee's conclusions.....	10
SECTION 2: INSPECTOR'S COMMENTS ON THE ICAC	10
Divesting the ICAC of its corruption prevention and education role.....	10
The Inspector's view	10
The ICAC's view	11
The Committee's conclusions.....	14
Giving the ICAC a prosecutorial role	15
The Inspector's views	15
The ICAC's view	17
The Committee's conclusions.....	21
Restructuring the ICAC as a law-enforcement body.....	23
The Inspector's view	23
The Hong Kong ICAC	24
The Committee's conclusions.....	25
Narrowing the definition of corrupt conduct	26
The Inspector's view	26
Previous reviews of the definition of corrupt conduct	27
The Committee's conclusions.....	28
APPENDIX ONE - QUESTIONS ON NOTICE	31
APPENDIX TWO - QUESTIONS WITHOUT NOTICE	49
INDEX TO TRANSCRIPT OF PROCEEDINGS.....	76
APPENDIX THREE – MINUTES	77

Membership and staff

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Terms of reference

Independent Commission Against Corruption Act 1988

64 Functions

- (1) The functions of the Joint Committee are as follows:
 - (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
 - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,
 - (c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,
 - (d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,
 - (e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.
- (2) Nothing in this Part authorises the Joint Committee:
 - (a) to investigate a matter relating to particular conduct, or
 - (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
 - (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

Chair's foreword

This is the Committee's second review report on the operations of the Office of the Inspector of the Independent Commission Against Corruption (ICAC) undertaken pursuant to s. 64(1)(c) of the Independent Commission Against Corruption Act 1988 (the ICAC Act). The report is an examination of the Office's Annual Report 2006-2007, the second annual report since the Inspectorate's inception, as well as two other reports, namely the Report of an audit of the ICAC's compliance with section 12A of the ICAC Act 1988 and the Report of an audit of the ICAC's compliance with sections 21, 22, 23, 35 and 54 of the ICAC Act 1988. The Inspector was examined on the contents of these reports at a public hearing held on 3 July 2008.

The recommendations in the report focus on three issues that arose in the Committee's examination of the above mentioned reports: the relocation of the Inspectorate; complaint statistics; and the audits of the ICAC undertaken by the Inspector.

Recommendation 1 re-iterates the support given previously by the Committee for the relocation of the Inspectorate to a more central location. This recommendation suggests relocating the Office to the McKell Building in the central business district of Sydney, which the former Premier indicated was available space in a government building. This location would provide the Inspectorate with much needed security of tenure.

Recommendation 2 flows from the fact that there were problems with the compilation of complaint statistics as presented in the Inspectorate's Annual Report 2006-2007, which the Committee found difficult to interpret. The Committee has suggested an alternative model for the presentation of complaint statistics based on the manner in which statutory bodies such as the ICAC and the NSW Ombudsman present their statistics. The Inspector's Annual Report 2007-2008 has issued a correction noting errors in the complaint statistics in the previous annual report and clarifying the way the statistics had been compiled.¹

Recommendation 3 reflects the fact that, in the Committee's view, the audits of the ICAC operations undertaken by the Inspector could be more comprehensive. To this end, the Committee has recommended that the Inspector seek from Treasury additional funding to enable the Inspectorate to conduct more in-depth and wide-ranging audits of the ICAC.

With the term of the Inspector, Mr Graham Kelly, expiring on 1 October 2008, the public hearing on 3 July 2008 was the last occasion for the Committee to examine Mr Kelly while in his role as Inspector. It provided the Committee with an opportunity to seek Mr Kelly's comments on the role of the Inspector of the ICAC and on the operations of the ICAC. This report includes analysis of, and comment on, his views.

Reflecting on his tenure as Inspector, Mr Kelly expressed the view that the Inspectorate was not needed in its current form, a view which the Committee does not accept, owing to the fact that the role of the Inspector is fundamental to keeping the ICAC accountable. This has been made particularly clear with the release in recent weeks of the Inspector's report on the ICAC's investigation into allegations concerning a former member of the Legislative

¹ See the Office of the Inspector of the Independent Commission Against Corruption, *Annual Report 2007-2008*, September 2008, p. 28.

Council, the Honourable Peter Breen MLC. The Inspector's report identified significant problems with the ICAC's investigation of allegations of corrupt conduct made against Mr Breen. For example, the Inspector concluded that the decision taken to conduct a search of Mr Breen's parliamentary office resulted from 'a "rush of blood" to the head by the ICAC, rather than a careful and thoughtful exercise of important compulsory powers in a highly sensitive environment.'² The Inspector's investigation underlines the need for his role and the work of the Inspectorate.

The Inspector made a number of proposals for changes to the ICAC Act and to the operations and structure of the ICAC. The Committee has assessed these proposals in light of the available evidence, including evidence presented at the Committee's examination of the Commission on 9 July 2008. The Committee does not support the Inspector's proposal to divest the ICAC of its education and corruption prevention functions as it is of the view that these functions are inextricably linked to, and inform, the ICAC's investigative function. Furthermore, the Committee does not support the Inspector's proposal to restructure the ICAC as a law-enforcement body, along the lines of the Hong Kong ICAC. Such a body would be inappropriate to NSW given current law-enforcement arrangements and the already extensive powers available to the ICAC. The Inspector's proposals to remove the privilege against self-incrimination, to give the ICAC a prosecutorial role and to narrow the definition of corrupt conduct are significant issues that require further examination and discussion. The Committee intends to explore and debate these issues as part of its planned review of the ICAC and the ICAC Act in 2009.

I am grateful to the Inspector and his staff for their co-operation throughout the Committee's review. I thank the outgoing Inspector, Mr Kelly, for his efforts over the past two years and I look forward to working with the newly appointed Inspector, Mr Harvey Cooper AM. I also wish to thank my fellow Committee members for their contributions to this review and for the commitment and bipartisanship they have demonstrated in approaching the work of the Committee in 2008. Finally, I wish to express the Committee's appreciation to the staff of the secretariat for their support and assistance throughout the year.

Frank Terenzini MP
Committee Chair

² Office of the Inspector of the Independent Commission Against Corruption, *Special Report of the Inspector of the Independent Commission Against corruption to the Parliament of New South Wales Pursuant to Section 77A of the Independent Commission Against Corruption Act 1988 on Issues Relating to the Investigation by the Independent Commission Against Corruption of Certain Allegations Against the Honourable Peter Breen, MLC*, September 2008, p. 168.

List of recommendations

RECOMMENDATION 1: That the Office of the Inspector of the Independent Commission Against Corruption be relocated to the McKell building in the central business district of Sydney, and if this location is not available, that the Inspector arrange for a move to another appropriate site as soon as is practicable. 2

RECOMMENDATION 2: That the Office of the Inspector of the Independent Commission Against Corruption revise its format for the presentation of complaint statistics, as outlined at paragraph 1.11 of this report. 5

RECOMMENDATION 3: That the Inspector of the Independent Commission Against Corruption put forward a submission to Treasury for an increase in funding to enable his Office to undertake more in-depth and wide-ranging audits of the Independent Commission Against Corruption, pursuant to s.57B(1) of the Independent Commission Against Corruption Act 1988. 6

Commentary

INTRODUCTION

- 1.1 The *Annual Report 2006-2007* of the Inspector of the ICAC, tabled in the NSW Legislative Assembly on 24 October 2007, is the second Annual Report on the operations of the Inspectorate. The Committee examined this report at a public hearing on 3 July 2008. At this hearing the Committee also examined two other reports from the Office of the Inspector, namely: *Report of an audit of the ICAC's compliance with section 12A of the ICAC Act 1988* (tabled on 28 June 2007); and the *Report of an audit of the ICAC's compliance with sections 21, 22, 23, 35 and 54 of the ICAC Act 1988* (tabled on 28 June 2007).
- 1.2 Subsequent to the public hearing, on 29 July 2008, the Office of the Inspector of the ICAC tabled its report entitled *Report of an audit of the ICAC's compliance with the Listening Devices Act 1984*. This report, along with the Inspectorate's *Annual Report 2007-2008*, will be examined following the Committee's current inquiry into the protection of public sector whistleblower employees.
- 1.3 Section 1 of the commentary focuses on the functions and administration of the Office of the Inspector, including relocation of the Office, complaint statistics, audits conducted by the Inspector, succession planning, and the role of the Inspector.
- 1.4 The term of office for the current Inspector, Mr Graham Kelly, expires on 1 October 2008. Consequently, the Committee's examination of the Inspector on 3 July 2008 gave Mr Kelly an opportunity to reflect on his tenure as Inspector of the ICAC, and to give his views on the ICAC and how it should operate. Section 2 of the report comprises the Inspector's comments on the ICAC, the ICAC's response, and the Committee's analysis and conclusions in relation to the issues raised by the Inspector.
- 1.5 Appendix 1 of this report consists of answers to questions on notice to the Office of the Inspector of the ICAC and Appendix 2 the transcript of the public hearing held with the Inspector on 3 July 2008.

SECTION 1: FUNCTIONS AND ADMINISTRATION

Relocation of office

- 1.6 In its previous report on the *Annual Report 2005-2006* of the Inspector of the ICAC, the Committee recommended that the Inspector discuss with the Premier, as the relevant Minister, the feasibility of relocating the Office of the Inspector to a more appropriate, centrally located site. The Committee made this recommendation because the Inspector gave evidence that the Office's current location posed issues in terms of staff recruitment, amenity and safety. Compared to a more central location, the current location at Redfern was also found to be less convenient for complainants and for access to ICAC files. It was also hoped that the relocation would reduce staff turnover, leading to cost savings.³

³ See Parliament of New South Wales, Legislative Assembly, Committee on the Independent Commission Against Corruption, *Review of the 2005-2006 Annual Report of the Independent Commission Against*

Commentary

- 1.7 In answers to questions on notice the Inspector indicated that there is currently space in the McKell building, at the southern end of the central business district (CBD), where the Office might relocate.⁴ In his evidence to the Committee on 3 July 2008 the Inspector added that the Inspectorate is currently only a sub-tenant and this meant that the Office could be evicted from its current premises with virtually no notice.⁵ This has potential ramifications for the effective operation of the Office, as well as significant security implications.⁶
- 1.8 The Committee reiterates the view expressed in its last report regarding the desirability of the Office of the Inspector to relocate to a more central location. The Premier has indicated that there might be some space in the McKell Building, which is government owned and in the CBD. Relocation of the Office to the McKell building would provide security of tenure, an appropriate CBD location with ease of access for complainants, a congenial working environment for staff and ready access to the ICAC.

RECOMMENDATION 1: That the Office of the Inspector of the Independent Commission Against Corruption be relocated to the McKell building in the central business district of Sydney, and if this location is not available, that the Inspector arrange for a move to another appropriate site as soon as is practicable.

Complaint statistics

- 1.9 A number of questions on notice to the Inspector concerned complaint statistics. In part this reflected the fact that the Committee found there were problems with the compilation of complaint statistics as presented in the Inspectorate's *Annual Report 2006-2007*.⁷

COMPLAINTS HANDLING FUNCTION (S 57B(1)(B) AND (C))

Between 1 July 2006 and 30 June 2007, 37 complaints were received about the conduct of the ICAC and/or its officers. All complaints were dealt with by the OIICAC using administrative procedures and OIICAC policies and by the Inspector exercising his powers pursuant to ss 57B and 57C. The Inspector did not exercise his powers pursuant to s 57D of the Act to make or hold inquiries as a Royal Commissioner.

Further statistical detail on management of complaints during the reporting period is provided in the table below. A comparison with the previous reporting period is also provided.

The overwhelming majority of complaints concern the conduct of the ICAC in assessing complaints that it has declined to investigate. The main ground of complaint was alleged failure by the ICAC or its officers to properly assess evidence concerning alleged serious or systemic corrupt conduct.

Corruption Incorporating transcripts of evidence, answers to questions on notice and minutes of proceedings, Report no. 2/54, pp. ix, 3-5.

⁴ Office of the Inspector of the ICAC, Responses to Questions on Notice for the Public Hearing on 3 July 2008, Q. 1, p. 1 (see Appendix 1).

⁵ Mr Graham Kelly, Inspector of the Independent Commission Against Corruption, *Transcript of evidence*, 3 July 2008, p. 13 (see Appendix 2).

⁶ See *ibid*, including comments of Mr Jonathan O'Dea MP.

⁷ Office of the Inspector of ICAC, *Annual Report 2006-2007*, October 2007, pp. 11-12.

Results at a glance—Complaints

Complaints	2006–07	2005–06
Complaints received	37	35
Complaints not warranting investigation	29	21
Complaints referred back to the ICAC	8	3
Complaints concerning off-duty conduct by ICAC officers	1	0
Complaints still active as at 30 June 2007	7	11
Complaints not assessed	4	*
Complaints finalised within 6 months	31	19
Average time taken to finalise complaint (months)	2.3	4.6
Complaints received by mail	21	6
Complaints received by email	9	14
Complaints received by facsimile	3	1
Complaints received by telephone	16	9
Complaints referred to the Inspector by a third party	3	5
General enquiries received	12	7

* This category was not reported on in the previous annual report.

- 1.10 The Chair examined the Inspector on this issue on 3 July 2008, when the Inspector took on board the Chair's suggestions regarding possible improvements to the Inspectorate's presentation of complaint statistics:

CHAIR: I noticed in your report you set out a number of cases you have looked at, complaints not warranting investigation, et cetera. You just set out the general nature of the allegation. Would it be better to put those together in table form? For example, would it be better to put in a table of total complaints received, total finalised, ongoing complaints, and then another table which might indicate how the complaints were treated, for example, outside jurisdiction or not warranting an investigation, referred back to the ICAC, and another table with the outcomes—complaints sustained or not sustained—a further table, method of receipt of complaints—by email, facsimile, telephone, et cetera? On turnaround times, for example, would you envisage it would be favourable to put in a table with turnaround times for complaints finalised? What I am getting to is that the ICAC report itself sets out tables so we can look and get fairly quickly a general picture of how the Commission is operating—general statistics. You have a series of examples in there that do not really tell us anything, I think, and I know you have your reasons for that, and my view—and other Committee members might have a different view of this—is that it would be easier to comprehend if they were in table form.

Mr KELLY: I am totally happy to take that on board, Chairman. I am sure we can do something like that with the report ending 2008.⁸

- 1.11 In the Committee's view, the complaint statistics would be much easier to interpret if the Inspectorate was to set them out in a similar manner to statutory bodies such as the ICAC and the NSW Ombudsman.⁹ The Committee proposed to the Inspector the

⁸ See Mr Frank Terenzini MP (Chair) and Mr Kelly, *Transcript of evidence*, 3 July 2008, p.4.

⁹ See for example the NSW Ombudsman, *Annual Report 2006-2007*, October 2007, pp. 172-175, 177-182; the ICAC, *ICAC Annual report 2006-2007*, October 2007, pp. 15, 99.

following alternate model for representing statistics to that found on page 12 of the Inspector's *Annual Report 2006-2007*:

Table 1 - Matters received and finalised during reporting period

Total complaints received*

-

Total complaints finalised

=

Ongoing complaints (as at the end of the reporting period)

*broken into the number of ongoing matters from previous reporting period + the number of new matters received in current reporting period

Table 2 – Treatment of complaints finalised

Complaints outside jurisdiction

Complaints not warranting investigation

Complaints subject to preliminary or informal investigation

Complaints referred back to ICAC

Complaints formally investigated

Complaints not assessed

Table 3 – Outcomes for complaints finalised

Complaints sustained

Complaints not sustained

Number of complaints resulting in systemic changes

Table 4 – Method of receipt for complaints received

Complaints received by mail

Complaints received by e-mail

Complaints received by facsimile

Complaints received by telephone

Complaints referred to the Inspector by a third party

Table 5 – Turnaround times for complaints finalised

Average time taken to assess complaints

Complaints finalised within 6 months

Average time taken to finalise complaints (days)

Table 6 – Type of complaint/allegation**

Maladministration

Abuse of power

Improper assessment

Corruption

** a single complaint may contain more than one allegation.

- 1.12 In agreeing to consider using the above format for presenting complaint statistics the Inspector also indicated that he would raise this issue with his successor, should he have a handover briefing with him.¹⁰

RECOMMENDATION 2: That the Office of the Inspector of the Independent Commission Against Corruption revise its format for the presentation of complaint statistics, as outlined at paragraph 1.11 of this report.

Audits of the ICAC

- 1.13 A particular focus at the public hearing on 3 July 2008 was the Inspectorate's two audits of ICAC's operations (see reports named at paragraph 1.1). The first of these audits assessed the ICAC's compliance with s.12A of the Act, that is, the requirement that the ICAC direct its attention to serious and systemic corruption. The second audit report assessed the ICAC's compliance with ss.21 (power to obtain information), 22 (power to obtain documents), 23 (power to enter premises), 35 (power to summon witnesses and take evidence) and 54 (requiring an authority to report to the Commission) of the *Independent Commission Against Corruption Act 1988* (the ICAC Act).

- 1.14 When questioned as to whether the audits of the ICAC's compliance were sufficient in scope, the Inspector indicated that he was satisfied that, despite the low percentages of documents sampled, the audit of the ICAC's exercise of these two powers had been sufficient:

CHAIR: I pick out two from the break up—one is section 22 in relation to calls for documents and the other one is section 35 relating to the summonses of witnesses. You check 6 per cent for section 22 and 5 percent for section 35. They are low percentages. Are you satisfied with that low percentage and that when ICAC calls for documents or summonses witnesses that it does so properly and takes into account circumstances and procedures?

Mr KELLY: Chair, this is always an issue for auditors about what proportion you check. I am pretty comfortable that that proportion was enough. Sure, you are not going to get 100 per cent perfection unless you check 100 per cent. But in terms of getting an overall view, I was comfortable that those percentages were fine. It is a question of, to use the accounting kind of auditors' terms, materiality.

CHAIR: I believe this is very important because it goes to the core of what the ICAC is able to do and your job, as the only accountable mechanism that we have. When you check these files, do you spread the sample files across different kinds of complaints, different agencies and different procedures?

Mr KELLY: Effectively, yes. It was not concentrated in any particular way.¹¹

- 1.15 In the Committee's view the Inspector needs to take a more proactive role in fulfilling his obligations under s.57B(1) as they relate to the auditing of ICAC operations for the purpose of monitoring compliance with State laws, and for assessing the

¹⁰ Mr Graham Kelly, *Transcript of evidence*, 3 July 2008, p. 4.

¹¹ Mr Terenzini (Chair) and Mr Kelly, *Transcript of evidence*, 3 July 2008, p. 16. See also Office of the Inspector of ICAC, *Report on an audit of the ICAC's compliance with sections 21, 22, 35 and 54 of the ICAC Act 1988*, Jun 2007, p. 6.

effectiveness and appropriateness of ICAC procedures relating to the legality or propriety of its activities.¹²

- 1.16 In questioning the Inspector, the Chair ascertained that additional resources would enable the Inspectorate to undertake more comprehensive audits:

CHAIR: You have gone about doing the work in the way that you have because you work within your existing resources. Is that right?

Mr KELLY: Yes.

CHAIR: However, if you were to be more proactive in conducting continual checks and monitoring the Commission, you would need more resources. Is that a correct reflection of your tasks?

Mr KELLY: It follows just as night follows day.

...

CHAIR: If you had more time in the office, or you employed additional personnel—you might not need many; you might need only one or two additional people, or you and they might be required to work longer hours—would you be able to carry out more functions?

Mr KELLY: There is no question that we could have carried out more audits.¹³

- 1.17 Given that the Office of the Inspector is a small-scale operation, the Committee considers that an increase in resources would enable the Inspector to carry out more comprehensive audits. In this way the Office of the Inspector would be more effective in the discharge of its responsibilities under s.57B(1) of the ICAC Act.

RECOMMENDATION 3: That the Inspector of the Independent Commission Against Corruption put forward a submission to Treasury for an increase in funding to enable his Office to undertake more in-depth and wide-ranging audits of the Independent Commission Against Corruption, pursuant to s.57B(1) of the *Independent Commission Against Corruption Act 1988*.

Succession planning

- 1.18 The Committee also questioned the Inspector as to whether he would hold a formal handover with his successor before the end of his term on 30 September 2008. Committee members indicated that having the periods of office for the current and new Inspector overlap would be of assistance, as would the preparation of recommendations by the current Inspector for the new Inspector to consider.¹⁴ Mr Kelly indicated that he had in mind an informal meeting with the appointee; however, he was happy to give the new Inspector a briefing. Mr Kelly also indicated he would take on board the suggestion that he prepare a formal, written handover document.¹⁵

¹² See Mr Terenzini (Chair), *Transcript of evidence*, 3 July 2008, p. 18; *Independent Commission Against Corruption Act 1988* (ICAC Act), ss.57B(1) (a) and (d).

¹³ Mr Terenzini (Chair) and Mr Kelly, *Transcript of evidence*, 3 July 2008, p. 19.

¹⁴ See Mr David Harris MP, Revd the Hon. Fred Nile, and Mr Kelly, *Transcript evidence*, 3 July 2008, pp. 8-9.

¹⁵ Mr Kelly, *ibid*, p. 9.

- 1.19 Mr O’Dea spoke to the potential benefit that the tracking of the Inspectorate’s recommendations to the ICAC would have for the new Inspector, which Mr Kelly recognised:

Mr JONATHAN O’DEA: Just as I believe this Committee should track its recommendations to ICAC, ICAC should track its recommendations over the years in terms of government authorities or government agencies. Although it cannot compel them, it can keep throwing them up if there has not been an adequate answer. In the same way... over the course of your whole time as Inspector you have kept track of all your recommendations and, if you have not, I challenge you to go back and do a self audit before you leave so at least your successor has a history of what has not been done as well as what has been done. Can you comment on that?

Mr KELLY: Yes. We have informally done so but we have not done so systematically. If I might say so, I think it is a great idea and we will certainly take it on board and I will try to put that in some kind of report to you before my term runs out. This is a logistical thing I can take up with the Committee staff and the chairman later, but I would like to try to arrange one of these meetings in my very last week. There are some time constraints in that week but if we could reach a time, it would probably be useful.¹⁶

- 1.20 The Office of the Inspector of the ICAC has only been in operation for a short time and has had only one Inspector. The Committee, therefore, regards it as important for the current Inspector to give the new Inspector as comprehensive a handover as is possible. This could include Mr Kelly holding a formal handover meeting with the new Inspector and the preparation of handover documents indicating possible areas for future audits, the status of complaints, action taken by the ICAC on recommendations made to it, and other issues.

Role of the Office of Inspector of the ICAC

The Inspector’s view

- 1.21 The examination on 3 July 2008 was the last scheduled opportunity for the Committee to examine the Inspector in relation to the operations of his Office, and as such provided the Inspector with an opportunity to reflect on, and give his opinions in relation to, his role and functions under the ICAC Act:

Reverend the Hon. FRED NILE: Are you convinced about the value of having this Inspector’s position now that you have been in it? Do you see the role of Inspector as a practical value?

Mr KELLY: The short answer is no. The long answer is that I better explain myself. The starting point is that having lived with those statutory provisions the Chair mentioned, and the rest of the statutory provisions, they are altogether too complicated and too legalistic... I think the statutory framework itself needs significant simplification. Secondly, there is an issue about whether the various scrutiny agencies should be combined into one big agency. I actually do not think that is a very good idea because the kind of person that you want as the Inspector of the Police Integrity Commission is quite different to the kind of person you want as the Inspector of ICAC for a variety of reasons, not the least being status reasons and also because the issues that are thrown up I think are quite different.

Sooner or later I think there will be a crunch about the Inspector’s role because at the end of the day the only stick that the Inspector has is a report to the Parliament. There is no capacity to require ICAC to do anything or to forbear from doing anything or any

¹⁶ Mr Jonathan O’Dea MP and Mr Kelly, *ibid*, pp. 14-15.

such thing as that. I have been fortunate in having a Commissioner at ICAC who has always been prepared to take account of any recommendations that I have made, whether formally or simply in our monthly oral meetings. But in a different situation that could be quite different. So I think there really has to be some thought given to what the public wants out of this role.

The office does cost about \$500,000 a year. In the greater range of government budgets that is a pittance—as everyone in this room knows—but it is \$500,000 a year. Do you get value out of it? I do not know, to be honest with you. I think one of the good things probably has been that it has taken complaints about ICAC away from individual parliamentarians. You are in a position to know this much better than I am, but my impression is that it has freed an inappropriate burden from individual politicians who would otherwise have to deal with things that are often really very awkward for them to deal with. I will leave it to you to ask any supplementary questions in view of that response.¹⁷

- 1.22 The Inspector's comments raise several issues central to the accountability role envisaged for this office, which the Committee considers as warranting discussion and examination.

Reasoning behind the establishment of the Office of the Inspector of the ICAC

- 1.23 The Office of the Inspector of the ICAC was established to rectify a perceived gap in the accountability of the ICAC arising from the statutory limitations on the Committee's oversight of the ICAC. Section 64(2) of the ICAC Act reads:

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

There is also a question mark over to the Committee's ability to view files.¹⁸

- 1.24 In 2000 a previous ICAC Committee considered the issue of the accountability of the ICAC as part of a major review. While the Committee found that the abovementioned statutory limitations on its oversight function were appropriate, it nevertheless concluded:

It is the Committee's opinion that the extraordinary powers possessed by the Independent Commission Against Corruption necessitate a corresponding level of accountability. The Committee believes that the Commission's current accountability regime does not provide an appropriate measure of oversight.¹⁹

- 1.25 This led the Committee to propose the establishment of an Inspector of the ICAC, wholly independent of the ICAC, whose key functions would include:
- receiving and investigating complaints of misconduct, impropriety or illegality by the ICAC or its officers;

¹⁷ Revd Nile and Mr Kelly, *Transcript of evidence*, 3 July 2008, pp. 9-10.

¹⁸ See for example the debate surrounding the Committee's attempts to gain access to the file of Justice David Yeldham, Parliament of New South Wales, Legislative Assembly, Committee on the ICAC, *Collation of Evidence of the Commissioner of the ICAC The Hon. B S J O'Keefe AM QC on the General Aspects of the Commission's Operations*, July 1997, pp. 2-31.

¹⁹ Parliament of New South Wales, Legislative Assembly, Committee on the ICAC, *The ICAC: Accounting for Extraordinary Powers*, Report no.2/52, May 2000, p. 38.

- auditing and monitoring the ICAC's compliance with the law; and
 - auditing and monitoring the reasonableness of the ICAC's decisions in relation to its investigations.²⁰
- 1.26 It was proposed that the Inspector have all the powers, authorities, protections, and immunities of a Royal Commissioner under the *Royal Commissions Act 1923*, which would include the power to call for and review all ICAC records.²¹ The Committee cited the Office of the Inspector of the Police Integrity Commission (PIC) as a model for the proposed Office of the Inspector of the ICAC.²²
- 1.27 In his review of the ICAC Act in 2005, Mr Bruce McClintock SC gave further support to the establishment of 'an Inspectorate whose role, powers and procedures are modelled on the provisions that apply to the Inspector of the Police Integrity Commission.'²³
- 1.28 In the wake of the McClintock review, the Government accepted the Committee's reasoning for establishing an Inspector of the ICAC, along with its proposed model. In the second reading speech for the Independent Commission Against Corruption Amendment Bill 2005, The Hon. Frank Sartor MP (on behalf of the Premier) stated:
- One of the key changes proposed by the bill is to strengthen the accountability of the ICAC by establishing an independent Inspector of the ICAC, modelled on the Inspector of the Police Integrity Commission. The Inspector is needed to address a gap in the accountability of the ICAC. While the parliamentary joint committee on the ICAC is responsible for monitoring and reviewing the exercise of the ICAC's functions, it is prohibited from examining particular decisions made by the ICAC.
- The limited scope of the parliamentary committee's jurisdiction is appropriate, given that committee members fall within the investigative jurisdiction of the ICAC. The result, however, is that there is no person or body with responsibility for investigating complaints that the ICAC or its officers have misused powers. The ICAC acknowledges the absence of adequate accountability mechanisms in the Act. The proposed Inspector will address this gap.²⁴
- 1.29 The ICAC has for some time supported the idea of having an Inspector of the ICAC. In 2000 the ICAC indicated to the Committee that the establishment of an Office of the Inspector of the ICAC was an appropriate accountability measure that would only add to the credibility of the ICAC.²⁵ In 2005 the ICAC wrote in its submission to the McClintock review that the establishment of an Inspectorate would 'fill a serious gap in accountability mechanisms that is a feature of the current regimes as provided for under the Act.'²⁶
- 1.30 The McClintock review was in fact commenced by the current Commissioner of the ICAC, the Hon Jerrold Cripps QC, and completed by Mr McClintock following Mr Cripps's appointment as Commissioner. In his evidence to the Committee as part of

²⁰ Ibid, pp. 63-65.

²¹ Ibid, pp. 67-69.

²² Ibid, pp. 45-47, 67.

²³ Bruce McClintock SC, *Independent Review of the Independent Commission Against Corruption Act 1988*, Final Report, January 2005, p. 130.

²⁴ Mr Frank Sartor MP (on behalf of the Hon. Mr Bob Carr MP), Independent Commission Against Corruption Amendment Bill 2005, Second Reading Speech, *Hansard*, 23 February 2005, p. 141133.

²⁵ Committee on the ICAC, *Accounting for Extraordinary Powers*, p. 40.

²⁶ McClintock, *Independent Review*, p. 130.

its examination of the *ICAC Annual report 2006-2007*, Mr Cripps reiterated his support for the Office of the Inspector of the ICAC:

I had the view [a reference to the McClintock review; see above] that the ICAC needed an Inspector, the institution needed an Inspector for three reasons. First to make sure the covert and coercive powers it had (which exceed the powers of the police) were being exercised properly. Secondly, if it did not defaulting people would be caught. Thirdly, to increase public confidence in the efficacy of the institution.²⁷

The Committee's conclusions

- 1.31 There has been no change to the statutory limitations on the functions of the Committee on the ICAC and such a change would not, in the Committee's opinion, be appropriate. Consequently, the reasons for establishing the Office of the Inspector of the ICAC that were advanced prior to, and at the time of, the establishment of the Inspectorate, and more recently by the Commissioner of the ICAC, remain valid. The Inspector plays a critical role in overseeing the ICAC and keeping it accountable, bearing in mind the ICAC's wide-ranging and invasive powers. The Inspector is able to receive and act on complaints in relation to the ICAC and review the ICAC's decisions to investigate or not investigate, functions the Committee is specifically (and rightly) prohibited from undertaking. There are no impediments to the Office of the Inspector inspecting ICAC files to determine whether the ICAC has acted appropriately in relation to a particular manner, whereas the Committee is only authorised to access and assess such information for limited purposes.
- 1.32 In the Committee's view the ICAC Act gives clear responsibilities and powers to the Inspector of the ICAC. If the current, or any future, Inspector of the ICAC has a view that legislative change is required to clarify or simplify the role of the Inspector, or to strengthen the Inspector's powers vis-à-vis the ICAC, then the Committee will consider any suggested amendments. For its part, the Committee will continue to monitor ICAC responses to the Inspector's reports. If in the future there appears to be a problem regarding the Inspector's powers in relation to the ICAC, the Committee can recommend legislative change to strengthen the position of the Inspector.

SECTION 2: INSPECTOR'S COMMENTS ON THE ICAC

- 1.33 The Inspector used the opportunity afforded by the last annual review of the Inspectorate during his tenure to make a number of proposals in relation to the operations of the ICAC. The Committee has considered and responded to these proposals.

Divesting the ICAC of its corruption prevention and education role

The Inspector's view

- 1.34 The Inspector expressed the view that the ICAC should concentrate its resources on investigating and exposing corruption:

MR KELLY: What I am about to say now is conjecture on my part and entirely impressionistic, but I do not see the corruption prevention function actually having much prominence or clearly measurable success. In fact I do not even know how you would

²⁷ See The Hon. Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption, *Transcript of evidence*, 9 July 2008, p. 11, footnote 1.

go about measuring success in the corruption prevention function. What is more, in my own reflections on this—and these are entirely personal views, I mean at the end of the day the policy view is for the Parliament and the Government, not for me—I think there is something to be said for having your corruption prevention functions embedded in a central government agency as a policy thing, so when new legislation is coming forward, for example, when new regulations are coming forward, there is someone from a pure policy point of view that looks at it and says, "What are we opening up here? What leverage are we giving to potentially corrupt people?"

...The reason I say that is if...you look at some of the countries that have the worst reputation for corruption, effectively everything is prohibited unless you get permission from someone, and it is that permission system that is used to extract corruption. Every time you put together another piece of regulation that has embodied in it some kind of discretion you are opening up the possibility of some measure of corrupt conduct. That seems to me to be a highly policy-driven issue. It is not just an advisory issue over there in an outside agency. So corruption prevention takes a lot of resources in ICAC and while ever it is there the Commissioner obviously has to devote those resources to it. If it was not part of ICAC then some of those resources would be devoted to the name and shame process and you would probably see ICAC taking up more cases and pursuing more cases through in a different kind of way.²⁸

- 1.35 When questioned by the Chair on the re-occurrence of the same corruption issues in agencies such as RailCorp and what this suggests about the ICAC's education and corruption prevention functions, the Inspector suggested that the ICAC's role of exposing corruption had greater potential as a deterrent:

CHAIR: From time to time the same issues keep recurring and the Commission continues to put forward recommendations that are not taken up, but the impact of those recommendations raises its head. Does the continual raising of those same issues with one or two government departments, for example, RailCorp and local government, tie in with what you have been saying about the education side of ICAC? Do you want to make any comments about ICAC's continuing role in educating government departments and using its resources for that side of its operations?

Mr KELLY: ...Taking the second way in which you formulated your question, I think there is a serious question mark over the effectiveness of education. I doubt whether a single person in our community does not realise that it is plainly illegal to bribe government officials. You will not get very far by educating them that it is illegal to bribe government officials, as that will not deter them. What will deter them is exposure of it—getting caught...²⁹

- 1.36 Instead of the ICAC having a corruption prevention and education role, the Inspector proposed that this function could be undertaken by a central government department, under the portfolio of a 'very senior Minister.'³⁰ Mr Kelly agreed with the suggestion from Mr O'Dea that under such a scenario the Committee on the ICAC could retain oversight of the corruption prevention and education role.³¹

The ICAC's view

- 1.37 The public hearing held on 9 July 2008 as part of the Committee's examination of the *ICAC Annual Report 2006-2007* provided an opportunity for the Committee to

²⁸ Mr Kelly, *Transcript of evidence*, 3 July 2008, p. 6.

²⁹ Mr Terenzini and Mr Kelly, *ibid*, p. 7.

³⁰ Mr Kelly, *ibid*, p. 14.

³¹ Mr O'Dea and Mr Kelly, *ibid*, p. 14.

question the Commissioner and ICAC officers in relation to the Inspector's proposal to divest the ICAC of its education and corruption prevention functions. Dr Waldersee, the newly appointed Executive Director of Corruption Prevention, Education and Research, explained that education function is one part of, and integrated into, the corruption prevention division.³² This division provides ongoing advice to departments in relation to preventing corruption. Furthermore, on some occasions, complaints that are assessed as not warranting investigation but as raising corruption prevention issues are referred to the corruption prevention division to take any further action it considers appropriate.

- 1.38 Dr Waldersee gave the following response to the Inspector's comments in relation to the ICAC's education function:

Dr WALDERSEE: The role of education as part of corruption prevention—I noted in the transcript from last week of Inspector Kelly that the suggestion was that to place it in another agency may or may not be appropriate. The question was raised whether education would lose its ability to impact, or corruption prevention more broadly. His answer was that it essentially depended on the priority given to it by that other agency. That is how I remember the transcript. To some extent I agree with that but I also believe that the imprimatur of ICAC itself gets people's attention. I believe there is no conflict between the deterrent role and the education role because the people being educated are not those who are taking the little bribes and causing trouble, they are the managers responsible for the control of the organisation. It is in their interests as well as ours that they take this on board and implement it, otherwise they are likely to be answering to a hearing within ICAC. I believe there is an ICAC effect that is above and beyond that which is simply a prioritisation within a central agency that is able to get the effect across.

Put it this way: if RailCorp will not respond to us in corruption prevention, who on earth will it respond to, other than the Minister himself? I do not see there is a conflict. Just to finish the education issue, another point raised was that if the effect of ICAC is essentially through deterrence—as I said earlier, I am not convinced there is any evidence that deterrence works any better than prevention—the education function is taking resources from the exposure function. That was also one of the reasons why it should be moved out. Education is a very small part of corruption prevention. In terms of the total number of people in ICAC, it is around three per cent. Of that, at least half and possibly all the salary costs are covered by fees. At most we are talking 1.5 per cent of the budget, if it is taken out, can go into exposure and in the worst case the fees that are generated may in fact—we are still trying to work the costings on that. It is a bit rubbery.³³

- 1.39 The Commissioner was also questioned by the Chair in relation to the Inspector's proposal to divest the ICAC of its corruption prevention function:

CHAIR: As I recall it the Inspector expressed certain views about various parts of your operation, one of which was corruption prevention. As I remember his view was that the corruption prevention function does not have much prominence, and it is difficult to measure the success of that function. He was thinking about proposing that the function should be undertaken by a central government agency focussed on this issue which would give you the time to do investigation and exposing corruption. He suggested basically to allocate it to another agency and you can get on with investigating and

³² Dr Robert Waldersee, Executive Director, Corruption Prevention, Education and Research, Independent Commission Against Corruption, *Transcript of evidence*, 9 July 2008, p. 21.

³³ Dr Waldersee, *ibid*, pp. 20-21.

exposing corruption because of what he perceived to be the ineffectual nature of it. Do you have any comments on that?

Mr CRIPPS: I do. The first comment I would make is this that corruption prevention never stands alone anyway in our organisation, most of the work is dependent on what we discover in public inquiries and compulsory examinations where the precise issue of corruption is identified, and that precise issue is then dealt with. I do not really see the advantage of setting up yet another organisation to do this ...³⁴

1.40 Dr Waldersee gave further support to the notion that the corruption prevention and investigation functions of the ICAC are inextricably linked:

... I would like to add, as the Commissioner has pointed out, corruption prevention is not independent of investigation and exposure. Corruption prevention operates within investigations to understand the structural control systems, procedures—the failures that allowed the corruption to occur in the first place. Without that involvement in investigations we could not make recommendations and without our involvement in investigations they would find themselves short of the knowledge necessary to understand the structures, processes and controls needed to run the investigations.³⁵

1.41 In his questioning of the Inspector on 3 July 2008, the Chair had noted the apparent stability of ICAC complaint statistics from year to year, the significance of which he followed up with the ICAC.³⁶ Dr Waldersee explained that the apparent stability of complaint statistics did not necessarily suggest that the ICAC's corruption prevention function was ineffective:

Dr WALDERSEE: ... The stability argument I think is too broad because of the difficulty of measurement. The number of complaints could just as easily be taken to be an indication of the effectiveness of deterrence, and the argument that was woven through the testimony was that deterrence, exposure, is the core function. The ICAC does deterrence and it does prevention. The stability argument has to apply to both equally because you cannot say it is corruption prevention. Conversely, the stability argument could be said to be an indicator of great success because there are changes within the environment, such as the demographic shifts to sea changes that puts pressure on councils' development functions and planning functions; there is discretion contracting within government services, all increasing the risk of corrupt behaviour occurring.

So the environment is not stable; it is actually enhancing the probability of risk. Stability of complaints could therefore just as easily be taken as a great indication of success within a deteriorating corruption probability environment. So it makes sense.

CHAIR: Are you saying—

Dr WALDERSEE: I am saying we do not know. We do not know what this stability means. It could mean that corruption prevention is highly effective at raising reporting, which is one of the targets—to educate people on how to report corruption they see, while at the same time reducing the actual number of corrupt occurrences that would also produce stability or, as was presented last week, that there is no impact whatsoever of deterrence or corruption prevention, which is equally possible. So I am saying these numbers cannot be really used to make much of an evaluation of what is really happening ...

It looks like investigation produces a measurable outcome because you have a number of findings. The number of findings is not a measure of deterrence and the number of

³⁴ Mr Cripps, *ibid*, p. 8.

³⁵ Dr Waldersee, *ibid*, p. 9.

³⁶ Mr Terenzini (Chair), *Transcript of evidence*, 3 July 2008, p. 6.

Commentary

recommendations we make are not a measure of prevention effectiveness. So it has got to be very carefully thought out what that means ...³⁷

1.42 Dr Waldersee also warned against moving the corruption prevention function to a central government agency because corruption prevention is about risk management rather than policy advice:

So the issue is one of structures, processes, control systems, the way management is run, detection risks—exactly the same sort of management structural process issues that would be found in an insurance company or a bank. But it is most definitely more like management advice than it is policy advice. That is why I do not feel it should be moved on those grounds.³⁸

1.43 In underscoring the importance of educating public sector management in anti-corruption processes and structures, and instituting risk management and control systems, Dr Waldersee indicated that the ICAC's current level of resourcing for the corruption prevention division is adequate, with the ICAC currently moving toward a more focused approach that targets high-risk areas.³⁹ In this way the ICAC is currently working towards maximising the current resources it receives, with its corruption prevention and education functions focused on:

- education to raise community awareness;
- detection of risks through activities such as informing progress associations, external oversight bodies, and the general public as to what to look for when making a complaint;
- tailored management training for public sector organisations; and,
- research, to determine which areas to target.⁴⁰

The Committee's conclusions

1.44 Evidence given by the ICAC at the public hearing on 9 July 2008 indicates that the imprimatur of the ICAC enhances the impact of anti-corruption education. The education function essentially appears to be run on a cost-recovery basis, which means that it has minimal impact on the ICAC's operational budget. The Committee can appreciate that the ICAC's education function has an important role in educating public sector managers and employees, and the general community, in relation to the detection, and as a consequence, prevention of corruption.

1.45 The stability of complaint statistics and the reoccurrence of corrupt conduct in a number of agencies does raise questions in relation to the effectiveness of the ICAC's corruption prevention function. Nevertheless, the Committee accepts the evidence put forward by the ICAC as to the difficulties of measuring the effectiveness of corruption prevention activity.

1.46 In the Committee's view, combining the corruption prevention and education functions in a single body is a key aspect of having an integrated, multi-disciplinary approach to corruption investigation and prevention. The Committee also sees a risk that corruption prevention could lose its focus and effectiveness if embedded in a

³⁷ Dr Waldersee, *Transcript of evidence*, 9 July, p. 8.

³⁸ Dr Waldersee, *ibid*, p. 9.

³⁹ Dr Waldersee, *ibid*, p. 14, 21,

⁴⁰ Dr Waldersee, *ibid*, p. 14.

government department. Hence, the Committee considers that it would be counter-productive to separate the two functions of corruption prevention and investigation by locating them in different agencies.

- 1.47 While the Committee appreciates the logic of the Inspector's view that the ICAC could be more focused on exposing corruption, the Committee accepts the view of the ICAC that its investigation, corruption prevention and education functions are inextricably linked and should not therefore be separated. The views expressed by the Inspector are not borne out by empirical evidence and it is difficult to sustain his argument statistically. In the absence of empirical evidence to support the Inspector's claims, the Committee is reluctant to recommend any changes in relation to the ICAC's corruption prevention and education functions.
- 1.48 The Committee supports the moves by Dr Waldersee to increase the ICAC's focus on high-risk areas and to maximise its use of resources by focusing on the aforementioned areas. The Committee also supports Dr Waldersee's proposal to measure the effectiveness of mechanisms for the reduction of corruption, as one way to measure the effectiveness of the ICAC's education and corruption prevention functions.⁴¹

Giving the ICAC a prosecutorial role

The Inspector's views

Prosecutorial role

- 1.49 At the hearing with the Inspector, the Chair sought the Inspector's views on the proposition that the ICAC should have a prosecutorial role:

CHAIR: ...Do I understand you correctly, are you agreeing with the suggestion that the ICAC becomes a fully in-house investigatory and prosecutorial agency or are you simply happy for the ICAC to go down the path of only prosecuting matters under its own statute?...I want your comments on that, if you can briefly encapsulate it in comments.

Mr KELLY: I am personally in favour of ICAC becoming a prosecutorial body in relation to its findings of corrupt conduct. In the meantime I am certainly in favour of ICAC having the power to prosecute under its own Act. That is a very narrow proposition and one about which I doubt that there can be a great deal of controversy. In relation to the bigger issue, the first one that you raised, I accept that there is a much greater level of controversy, but for the reasons that I outlined earlier I am in favour of ICAC becoming not only an identifier of corruption but a prosecutor of corruption.⁴²

- 1.50 The Inspector expressed the view that giving the ICAC a prosecutorial function is a better way to overcome delays in prosecution rather than to concentrate on gathering admissible evidence, as suggested by the Chair:

CHAIR: You obviously agree with ICAC prosecuting matters under its own Act in the local court, for example, which is where the jurisdiction is, but what do you say about the proposition that ICAC should move more into making a priority the collection of admissible evidence, which it now does more than it ever did before, to investigate corruption, gather admissible evidence and refer that evidence to an organisation set up for prosecuting all types of offences, whilst at the same time having its own Act offences

⁴¹ Dr Waldersee, *Ibid*, p. 8.

⁴² Mr Terenzini (Chair) and Mr Kelly, *Transcript of evidence*, 3 July 2008, p. 17.

Commentary

to prosecute. Would that be a more practical, pragmatic and achievable objective than having a new giant organisation that is going to do everything?

Mr KELLY: I don't know about it being a giant organisation.

CHAIR: With the inherent conflicts that that would engender?⁴³

Mr KELLY: I readily accept that there are deeply rational views to the contrary, but my own view is that the way forward and the way to send the signal even more strongly is to move down the track of a Hong Kong style ICAC rather than what we have had, so that the delays and the disputes have no excuse.⁴⁴

Self-incrimination

1.51 The Inspector also expressed support for a reconsideration of the privilege against self-incrimination currently given to persons of interest appearing before the ICAC, so that admissions of corrupt conduct made during ICAC investigations could be used in civil and criminal proceedings:

Ms LYLEA McMAHON: In relation to the questions just asked and answered, if the ICAC were to have a prosecutorial role, what is your view as to how that sits with the ICAC's coercive powers to compel people to incriminate themselves versus their rights within criminal proceedings?

Mr KELLY: ... It really raises the question: What priority should be given to the right against self-incrimination? In the United States, of course, we would not be having this discussion at all. But I think in our society we have long since recognised that the right against self-incrimination is subject to a number of countervailing considerations. For what it is worth, I do not think that the existing provisions in the Independent Commission Against Corruption Act are at all suitable anymore. As I understand it, if the appropriate procedures are followed the evidence that is given cannot even be used in civil proceedings.

So you can have a situation where an agency has been deprived of money, its official has confessed, and it cannot even sue to get the money back, let alone prosecute the person. To me that seems to be completely contrary to the public interest. I am not a politician, so I cannot really speak for the people, but for the people I bump into at the supermarket or on the train, I think they would find it outrageous that someone could confess to having filched from a government body and the government body cannot get the money back. So those provisions in the Independent Commission Against Corruption Act, I think, certainly should be looked at again.

Whether you go so far as to further detract from the right against self-incrimination to enable the evidence extracted under compulsion to be used in a criminal prosecution is a fairly serious policy issue. To be honest, in this day and age I do not see many good reasons against that. If a person has confessed to criminality, that ought to be used against them, and the only thing that stands between it being used against them or not being used against them is a relatively technical formula. If a policeman arrests someone and gives them a perfunctory warning and they burst into tears and tell all the truth anyway, it is usable. But if they say the right words, it is not usable. Well, that seems to me to be an artifice, to be frank. But that is a very, very big policy issue, and it is for the Parliament.⁴⁵

1.52 In summary, the Inspector proposed that the ICAC, having been divested of its corruption prevention and education functions, be given a general prosecutorial role

⁴³ Mr Terenzini (Chair) and Mr Kelly, *ibid*, p. 17.

⁴⁴ Mr Kelly, *ibid*, p. 18.

⁴⁵ Ms Lylea McMahon MP and Mr Kelly, *ibid*, pp. 11-12.

for offences relating to its findings of corrupt conduct, or at the very least for offences under its own Act. Additionally, the Inspector suggested that the privilege against self-incrimination could be removed for people appearing before the ICAC, as a way of strengthening the ability of the ICAC to assemble evidence relating to, and prosecute offences arising from, corrupt conduct. As the Inspector notes, this suggestion has serious legal and policy implications.

The ICAC's view

Prosecutorial role

1.53 During the Committee's examination of the ICAC on 9 July 2008, Commissioner Cripps expressed support for the ICAC having a greater say in the prosecution of offences under the ICAC Act:

Mr CRIPPS: My personal view is we should have a much bigger say in prosecuting people who have committed offences under our legislation because we are very concerned that our legislation should function properly. As to the general criminal law, I do not know. We would have to see what it is that is causing the problems at the present time, and there are problems. Incidentally, I am not intending by these remarks to try to criticise the DPP. In fact, as you know, I have mentioned that I do not know what their priorities are. I have also mentioned that our prosecutions are very complicated. They require deep analysis and a lot of man-hours go into it, and they have their priorities. I do not know what the answer is. However, I would like to have a look, and maybe invite this Committee to have a look, at the Queensland legislation. I am told, and maybe Ms Hamilton can correct me, that they engage in some sort of independent prosecution. My own view at the present time is that it is a very big issue. It goes to the whole question of what the DPP is all about. However, that said, I like to put the view that so far as our legislation is concerned we should have control over people who break the law under our legislation.⁴⁶

1.54 The Chair questioned Commissioner Cripps further to clarify what sort of role the ICAC would like to have in relation to the prosecution of matters under the ICAC Act:

CHAIR: In relation to the proposal being put forward about you prosecuting matters or instituting proceedings, Mr McClintock said in his report, as I remember, to address the delay that you be able to institute proceedings without the advice of the DPP to get things going because then it comes under the control of the court.

Mr CRIPPS: Yes.

CHAIR: He was concerned to reduce the delay by that method. You have mentioned today that you need a clear-cut indication of what your role is. You have also mentioned the offences under your Act. As I understand it you are asking for control over instituting prosecution of offences under your Act?

Mr CRIPPS: Yes.

CHAIR: But you also want those offences now to be strictly indictable?

Mr CRIPPS: At least lying to the Commission.

CHAIR: That is right, so they are strictly indictable on indictment?

Mr CRIPPS: Yes.

CHAIR: When you say control of the prosecution are you saying that you want to be able to prosecute those matters?

⁴⁶ Mr Cripps, Transcript of evidence, 9 July 2008, p. 22.

Mr CRIPPS: I must say I have not really pursued this until I get an indication, I suppose, in a sense of what Parliament wants us to do. I suppose an issue could arise where I say a matter should be prosecuted but the DPP says "No". When that happens I know that I can lodge the CAN [court attendance notice] but the DPP can just simply withdraw it because he can take over the proceedings. I am not saying these sorts of things happen. I think we ought to have a greater say in who gets prosecuted and who does not. We have had a few examples, which I will go into in private if you want, but not publicly.

CHAIR: You mentioned those in your report.

Mr CRIPPS: Where I think we should have gone full bore but other views prevailed. Eventually the other view does prevail because we cannot do anything about.

CHAIR: The Inspector has made his view quite clear which is that you should be both an investigating and prosecuting authority.

Mr CRIPPS: Yes. He has got to think that one through I have to say.

Ms HAMILTON: Could I just point out from what I read what the Inspector was saying, and the recommendation you have referred to from the McClintock report, is that the Commission should be able to charge without the advice of the DPP. The second issue is I do not think the Commission or even Mr Kelly was suggesting that the Commission would be actually appearing to prosecute in the court, particularly not on indictment because the only body in this State that can prosecute on indictment is, of course, the DPP's office as I understand it.

CHAIR: That is correct. I thought you are saying you are law enforcement.

Ms HAMILTON: As the Commissioner mentioned before, the sort of half-way house which is not quite that you are out there actually conducting the prosecutions, but it does affect timeliness, is what they have done in Queensland where the Commission can lay the charge without seeking the advice of the DPP. That was able to be achieved without legislative amendment because the Queensland Act says that after the Commission investigates it may refer a report to the DPP. So everybody took that to mean it may refer it, if it is a complex matter or it wants the advice of the DPP, but it does not have to refer every matter to the DPP, it can commence the charge itself. That would not be possible at the moment for the ICAC because the Act is clearer in requiring it at the moment to refer matters to the DPP at the end of an investigation.⁴⁷

- 1.55 The Commissioner explained further that what he envisaged was the ICAC having more control over instituting proceedings and, where there was a dispute with the DPP, for there to be alternative arrangements for the prosecution of matters:

CHAIR: When you say that you would like more control over offences under your Act, is that in relation to simply instituting proceedings without having to have word back from the DPP as whether you should or should not, or their advice?

Mr CRIPPS: That is certainly one of them but I am not sure I do not think it should not go further than that. I think we should have more control.

CHAIR: How far?

Mr CRIPPS: It would have to be worked out I suppose in conjunction with what the Government or the Parliament wants with respect to the role of the DPP and the role of us. For example, as an illustration, what happens when I think a recommendation someone should be prosecuted for telling lies. The DPP then looks at it and says "I do not think the evidence would lead a jury beyond reasonable doubt to conclude that"

⁴⁷ Mr Terenzini (Chair), Mr Cripps, and Ms Theresa Hamilton, Deputy Commissioner, Independent Commission Against Corruption, *Transcript of evidence*, 9 July 2008, pp. 27-28.

whereas I think it would or that "We have not got the wherewithal to do this. We have got other priorities on our plate" and that could well be right. The question is should there be an alternative? Maybe there should. Maybe one can get the Solicitor-General to do the prosecuting on behalf of the ICAC.⁴⁸

- 1.56 The Commissioner indicated to the Chair that he did not necessarily envisage the ICAC doing the prosecuting itself because of the potential conflicts for the Commission, as alluded by the Chair:

CHAIR: Do you see your office as having a prosecutorial role?

Mr CRIPPS: No, not unless you change the whole thing. Our Act now, people must bear in mind, any person who reads this Act and pays no attention to the way aspects of it have been administered would say "we have nothing to do with criminal prosecutions except assemble evidence. I would have thought that generally meant what evidence we had for our investigation, we just put it into an orderly form and send it off. But we do not do that and we do not do it because if we do not do it nobody does. And so there is a strong argument for the doing of it. I just want that regulated, that is all.

CHAIR: Again if I have it clear, you want more control and prosecutorial role to institute the proceedings?

Mr CRIPPS: Yes.

CHAIR: And perhaps have an agency prosecute until finality?

Mr CRIPPS: If there is a real dispute.

CHAIR: If there is a dispute with the DPP?

Mr CRIPPS: Yes.

CHAIR: And certain offences strictly indictable. That creates problems with the Office of the DPP?

Mr CRIPPS: Yes, it does.

CHAIR: Ms Hamilton referred to the control of indictable matters. Do you see yourself as a Commission prosecuting those matters in a Local Court like other agencies under their own Act?

Mr CRIPPS: I suppose one could but one would have to set it up so that people would be aware. You would have all these what they call Chinese walls. You have to be a bit careful about how you set this up to be exposing on the one hand and prosecuting on the other, bearing in mind the coercive powers. We have to take into account the powers we have, as you know, far exceed the powers of the police, and people may very well think you are getting into a police state if you are letting those people in the one organisation behave in that way.

CHAIR: I know because we had a discussion with the Inspector last week about this, and as I recall it, he wanted you to have your own prosecutorial role.

Mr CRIPPS: Yes. He has told me that privately.

CHAIR: Which creates the issues that you have highlighted. I just wanted to be clear on what it is you thought was appropriate ...⁴⁹

⁴⁸ Mr Terenzini (Chair) and Mr Cripps, *ibid*, p. 28.

⁴⁹ *Ibid*, pp. 28-29.

Self-incrimination

- 1.57 The Commissioner gave qualified support to the notion of removing the privilege against self-incrimination, at least in so far as making admissible in civil and disciplinary hearings admissions made to the ICAC under oath:

Mr CRIPPS: ... Answers given under oath, as everyone here knows, are not capable of being used in a prosecution for a criminal offence or indeed civil or criminal disciplinary proceedings. It has been said that the purpose of that section is to encourage people to be more honest and open when they talk to the Commission, in the belief that nothing they say will be used against them. I have spent nearly four years in the Commission and I have conducted all the public inquiries and most of the compulsory inquiries, and it has been my experience that that protection of itself does not cause people to tell the truth. People who tell the truth to ICAC usually tell the ICAC what they think it already knows, and even then they will put a gloss on what the truth is to make their conduct appear to be less culpable than would otherwise be the case. It is my belief, whether it is shared by other people or not, that they should be aware that if they tell lies they will be punished. What encourages people to tell the truth is to know that they will be jailed if they do not. This is necessary if ICAC is to function efficiently.

This brings me to section 37. I mention this because it was also mentioned, I think, to some extent by the Inspector whose meeting with the Committee I have had the advantage of seeing in the transcript. Section 37, as you know, provides that any evidence that is given, if someone takes an objection, cannot be used in any civil, criminal or disciplinary proceedings. There is an argument that the privilege against self-incrimination should be taken away, but I think the practical view is that that is so deeply ingrained in our judicial system that I do not think Parliament would get rid of the privilege against self-incrimination. What concerns me is that this evidence cannot be used in civil or disciplinary proceedings.

As to civil proceedings, it means that somebody can admit that they have defrauded the State of thousands of dollars, yet that admission can never be used against them if the State wishes to recover that money. As to disciplinary proceedings, there is no jail attached to disciplinary proceedings. The Commonwealth has comparable legislation to NSW. It does not give people any protection for disciplinary proceedings; nor, as I understand it, does the Police Integrity Commission. So I would suggest that serious consideration be given to amending the section to make it clear that at least civil and disciplinary proceedings are outside its ambit. If it turns out, as some people have said, that that will inhibit people from telling the truth (which I doubt because I think what inhibits them is knowing that they will go to jail if they do not tell the truth) then we will deal with it again. But my experience has been that they will still tell as much as they believe the ICAC knows; they will probably tell a little more if they think they will go to jail if they do not. In any event, they should be punished and at least the State should be able to recover from them what they have fraudulently taken from the State ...⁵⁰

- 1.58 In this way, the Commissioner's evidence echoes the frustration expressed by the Inspector in paragraph 1.51 with regard to the fact that where an admission is made under objection agencies cannot take legal action to recover public funds even where an individual has admitted defrauding the public. The Commissioner gave in principle support to the Inspector's proposal that the privilege against self-incrimination should even be removed in the case of criminal proceedings, but recognised that in practice the centrality of the privilege against self-incrimination to the criminal justice system meant that this was unlikely to happen:

⁵⁰ Mr Cripps, *ibid*, p. 3.

The Hon. JOHN AJAKA: A final question: Earlier you mentioned that at least in civil and disciplinary proceedings the evidence given should be admissible in those proceedings. Would you go so far as to say that that should also apply to criminal proceedings—in your personal view?

Mr CRIPPS: I think it should actually. Practically, I think it will not. If you have an understanding of the development of the criminal law in the Western world, at least for 150 years, privilege against self-incrimination is so deeply entrenched that it is almost impossible to get rid of it for the purpose of criminal prosecutions. We make people incriminate themselves and then we say "We can't use it against you criminally". But let me say what the argument is to not abolish it but at least modify it. Twenty years ago the New South Wales Parliament, for the first time under the Greiner Government, resolved that the problem of corruption in this State was so awful and it affected public confidence in the ability of the State to function properly that you needed to bring in an institution like the ICAC. That got through the Parliament and, as I said earlier, everyone seems to think it should remain that way because of the problem.

The fact is that if the only way you can deal with corruption is this way, the question is: Why not take the extra step and make sure that people who have in fact been guilty of serious corruption do not go to jail? Why should they get this protection? True it is, people may say, "Well, if you take that protection away from section 37 people will tell lies rather than incriminate themselves." And that is possible, but in that event they should know that if they do tell lies they will go to jail for that. That is my view, but I think if you took a view around the Law Society, the Council of Civil Liberties, those people who have not swooned away would come back and say, "Certainly not, the privilege against self-incrimination remains inviolable." I still have doubt about this; I suppose it is my background. I do not like the thought of a privilege against self-incrimination being totally got rid of because, after all, it is directed at ensuring that the power of the State is kept under control. That is the essence of the privilege against self-incrimination. I will just tell you what the argument is, but I do not know what my answer is.

The Committee's conclusions

Prosecutorial role

1.59 The ICAC Commissioner cited two examples as to how one could enhance the ability of the ICAC to prosecute corruption related offences. The first example was that of the Queensland Crime and Misconduct Commission (CMC), which can institute disciplinary proceedings. Section 50 of the *Crime and Misconduct Act 2001* enables the CMC to charge police officers and office holders in a unit of public administration (other than judges or judicial officers) with official misconduct.⁵¹ A disciplinary charge made by the CMC can only be dealt with by a misconduct tribunal.

⁵¹ Section 50 of the *Crime and Misconduct Commission Act 2002* reads as follows:

50 Commission may prosecute official misconduct

(1) This section applies if the Commission reports to the chief executive officer of a unit of public administration under section 49 that—

(a) a complaint, matter or information involves, or may involve, official misconduct by a prescribed person in the unit; and s 51 49 s 51 Crime and Misconduct Act 2001

(b) there is evidence supporting a charge of a disciplinary nature of official misconduct against the prescribed person.

(2) The Commission may charge the prescribed person with the relevant official misconduct by way of a disciplinary charge.

(3) The charge may be dealt with only by a misconduct tribunal.

(4) For the definition prescribed person, paragraph (b), a regulation may not declare a court or the police service to be a unit of public administration that is subject to the jurisdiction of a misconduct tribunal.

(5) In this section—prescribed person means—

(a) a member of the police service; or

(b) a person (other than a judge or holder of judicial office or a member of the police service) who holds an appointment in a unit of public administration, which appointment or unit is declared by regulation to be subject to the jurisdiction of a misconduct tribunal.

Commentary

- 1.60 The second example was that of the NSW Police Integrity Commission (PIC). Section 40(3) of the *Police Integrity Commission Act 1996* permits the use of any evidence given in a hearing, including answers given or documents or things produced, in disciplinary proceedings against police officers.⁵² These proceedings may lead to findings of misconduct, pursuant to s 173 of the *Police Act 1990* and Part 2.7 of the *Public Sector Employment and Management Act 2002*, or result in the dismissal of a police officer from the Police Force or the revocation of their promotion, pursuant to ss.181D and 183A of the *Police Act*.
- 1.61 In the Committee's view, the CMC and PIC do provide pointers as to what can be done to improve the deterrent effect of ICAC investigations. For example, making evidence gained under objection admissible for disciplinary proceedings would strengthen the ICAC's hand in its investigations and in doing so help to eliminate corrupt practices. Similarly, enabling the ICAC to institute prosecution of offences committed under the ICAC Act may result in proceedings for such offences being instituted more quickly. Both initiatives would send a clear message that the NSW community regards the issue of corruption as very serious and that related prosecutions should be initiated and concluded more expeditiously.
- 1.62 On the other hand, enabling an organisation with already extensive investigatory powers to prosecute its own investigations of criminal offences would create potential conflicts in the decision-making process when it came to making an objective judgement as to whether or not to prosecute a matter. It would also create a very powerful law enforcement body that lacks the inherent checks and balances present in the current system. In the Committee's view, it would be preferable to enable the ICAC to prosecute offences under its own Act and for the ICAC to take a firmer approach in relation to the findings and/or recommendations in its reports to agencies, including increased reporting to Ministers where an agency is uncooperative or intransigent in its response to the Commission's findings and recommendations.

Self-incrimination

- 1.63 As noted by the Inspector and the Commissioner, the issue of whether changes should be made to the ICAC Act provisions relating to self-incrimination has serious legal and policy implications, especially in the case of criminal proceedings. The privilege against self-incrimination is one of the fundamental common law rights and as a consequence the courts generally do not construe legislation as abrogating this privilege unless by express words or necessary implication.⁵³ At common law it means that a person cannot be compelled to answer a question or produce any document or thing if to do so would pose a risk that the person concerned would be exposed to prosecution and conviction for a crime.⁵⁴

⁵² Section 40(3) of the *Police Integrity Commission Act 1996* reads:

(3) An answer made, or document or other thing produced, by a witness at a hearing before the Commission is not (except as otherwise provided in this section) admissible in evidence against the person in any civil or criminal proceedings, but may be used in deciding whether to make an order under section 173 or 181D of the *Police Act 1990* and is admissible in any proceedings under Division 1A or 1C of Part 9 of that Act, an order under section 183A of that Act or any proceedings for the purposes of Division 2A of Part 9 of that Act with respect to an order under section 183A of that Act and in any disciplinary proceedings (including for the purposes of taking disciplinary action under Part 2.7 of the *Public Sector Employment and Management Act 2002*).

⁵³ See Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, Sydney, 2001, p. 94.

⁵⁴ *Ibid*, pp. 84-85.

- 1.64 In the case of the ICAC Act the removal of the common law right to remain silent is balanced by the right to object, with the corollary that answers given under objection cannot be used in civil, criminal or disciplinary proceedings.⁵⁵ Furthermore, in a situation where a witness is compelled to answer questions, the right to object also balances the fact that the Commission may draw inferences or even bring contempt proceedings where a witness refuses to answer a question.⁵⁶
- 1.65 It should also be noted that a witness appearing before the ICAC is in a sense in a weaker position than a witness appearing before a court in an inquisitorial system of justice, generally regarded as providing less protection to the accused than the common law adversarial system that prevails in Australia.⁵⁷ In an inquisitorial system the accused has the right to silence, even if it is rarely used in practice due to the fact that adverse inferences may be drawn from a refusal to answer questions.⁵⁸
- 1.66 It is clear, then, to the Committee that removing the prohibition against the use of evidence given under objection during an ICAC investigation has potentially profound implications because it goes to the heart of one of the central pillars of the common law. This proposal of the Inspector would need to be subject to public debate, and the Committee envisages that this issue will also form part of a future review into the ICAC and the ICAC Act.
- 1.67 The Committee intends to undertake a review of the ICAC and ICAC Act in 2009. This review will provide an opportunity to further explore proposals to make evidence gained under objection admissible for disciplinary and civil actions, and to enable the ICAC to institute prosecutions for offences committed under the ICAC Act.

Restructuring the ICAC as a law-enforcement body

The Inspector's view

- 1.68 The model that the Inspector envisaged for the ICAC was outlined when he was questioned on the matter by The Hon. John Ajaka MLC:

The Hon. JOHN AJAKA: If I can put this in the most simplified, general terms, do I understand that maybe one of the things we should be looking at to put recommendations in is a greater funded and better resourced ICAC that looks at the far bigger picture—if I may use that terminology—in far more serious and far more systemic corruption, and looks at completing the investigation and then in fact having the provision and the powers to lay charges and having then the provision and the powers to prosecute those charges? So that is kept in house to some finality without having to involve the police and the DPP unless they have been brought in under some secondment method. It would take away the educational aspect but have a body that deals with the very serious and the very systemic aspects of corruption within government departments from beginning to end. There is really no excuse as to why a report takes two to three years, a DPP briefing takes another two to three years and we suddenly find ourselves in a situation of five or six years having elapsed since the original investigation started. Is that something—I am not saying that you are recommending it—that we should have a close look at?

⁵⁵ See Peter M. Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, Lawbook Co., Sydney, 2004, p. 171.

⁵⁶ The ICAC, *Inquisitorial Systems of Criminal Justice and the ICAC: A Comparison*, November 1994, p. 32.

⁵⁷ *Ibid.*, pp. 7, 32.

⁵⁸ *Ibid.*, p. 7.

Commentary

Mr KELLY: That expresses my view almost perfectly, if I may say so. In other words—to speak in complete truncated terms—something much more like the Hong Kong ICAC than the ICAC we have.⁵⁹

- 1.69 The Inspector's reasoning for modelling the NSW ICAC along the lines of the Hong Kong ICAC is to give greater priority and effect to the enforcement of corruption laws, thereby conveying a stronger anti-corruption message:

Mr KELLY: The problem that we have seen in the last few years is that ICAC gets absolutely clear evidence of straight corruption—not the extended definition corruption but straight corruption. It has sometimes got it under the exercise of its compulsory power, but it has got it—and nothing happens. Out there in Peoplesville, but even worse in the public sector, people yawn. It would be a matter for the front page of the newspaper every day of the week if a murder were not prosecuted in this State, but the priority that is given or, to perhaps put it more accurately, the priority that is not given to the enforcement of corruption laws I think is one of the things that more than anything else allows us to end up in a culture where corruption—I don't want to be too flamboyant on this, I will not say "flourishes"—can exist.

How do you go about fixing that? It seems to me that you have an organisation that has clear power to do something about it. As soon as you get more than one agency involved, as sure as the sun rises tomorrow morning, you end up with interagency disputes. You end up with the police saying it is not their function to go and get the admissible evidence, you end up with the Director of Public Prosecutions saying that the brief is not in the right form, and both of them are right. Here you have a finding of corrupt conduct and nothing is done about it. So I think your only solution to give an appropriate level of priority to the enforcement of our anti-corruption laws is to have someone clearly focused on it and focused on the ultimate outcome of having people who engage in corrupt conduct properly dealt with by the legal system.⁶⁰

- 1.70 In summary, the Inspector proposed a more narrowly focused ICAC that would strongly resemble a law enforcement body, along the lines of the Hong Kong ICAC. It would see the ICAC divested of its education and corruption prevention function but given the power to prosecute its findings of corrupt conduct, or at least offences under its own Act.

The Hong Kong ICAC

- 1.71 The Hong Kong ICAC was established with a much more specific jurisdiction than its NSW counterpart, being restricted to making recommendations for prosecution in relation to three classes of offences only – bribery, illegal practices and blackmail by a crown servant.⁶¹ Like the NSW ICAC, the Hong Kong ICAC operates independently of the police force but unlike its NSW counterpart it is responsible to and supervised by the Executive Government.⁶² The separation of the Hong Kong ICAC from the police force reflects the fact that it was established against a background of widespread and high-level corruption within and outside the police force.⁶³

⁵⁹ The Hon. John Ajaka MLC and Mr Kelly, *Transcript of evidence*, 3 July 2008, pp. 10-11.

⁶⁰ Mr Kelly, *Ibid.*, p. 17.

⁶¹ Parliament of NSW, Legislative Assembly, Committee on the ICAC, *Review II: Jurisdictional Issues*, Issues Paper, June 2000, p. 22; and *Review of the ICAC: Stage II Jurisdictional Issues*, Parliament House, Sydney, November 2001, pp. 29-30.

⁶² Independent Commission Against Corruption Bill, Second Reading, Legislative Assembly 31 May 1988, *Hansard*, p. 824; http://www.icac.org.hk/en/checks_and_balances/bf/index.html, accessed 16 September 2008.

⁶³ http://www.icac.org.hk/en/about_icac/os/index.html, accessed 16 September 2008.

- 1.72 The Hong Kong ICAC is similar to the NSW ICAC in that it focuses on the investigation of corrupt conduct as well as corruption prevention and education. The Hong Kong ICAC has, alongside an administrative branch, three departments: the Operations Department, focused on law enforcement; the Corruption Prevention Department, focused on prevention; and the Community Relations Department, focused on education.⁶⁴ 'After completion of investigations, the power to prosecute is vested with the Secretary for Justice, and the separation of powers ensures that no case is brought to the courts solely on the judgement of the ICAC', states the Hong Kong ICAC's website.⁶⁵
- 1.73 Apart from the matter of Executive oversight, the NSW ICAC differs principally from the Hong Kong ICAC in the area of law enforcement. For example, the Hong Kong ICAC's website indicates that it has the 'power of arrest, detention and granting bail'.⁶⁶ As the Commissioner explained when examined by the Committee on 9 July 2008, as an enormously powerful law-enforcement body the Hong Kong ICAC is fundamentally distinct from the NSW ICAC:

... there is a view abroad that we are very similar to the Hong Kong ICAC. In fact, our similarities begin and end with the name. The Hong Kong ICAC is a law enforcement agency. People have the right of silence, they have privilege against self-incrimination, they have legal professional privilege, they call people and hold them incommunicado for 40 days or something—they have huge powers. They employ 1,400 people [compared with 111.5 full-time equivalent staff in 2006-2007 for the NSW ICAC⁶⁷] for a population of 7 million, which is about the population of New South Wales, and they have legislation which says, for example—this is the biggest thing in the public area—that if you, as a public servant, cannot account for your wealth by reference to your salary, and you fail to give a proper explanation to a judge, you can go to jail for 10 years. You tend to think: Who wants to remove privilege against self-incrimination if you have those powers?⁶⁸

The Committee's conclusions

- 1.74 A closer inspection of how the Hong Kong ICAC operates indicates that what the Inspector is in fact proposing is that the NSW ICAC takes on the law enforcement role that is currently part of the functions of the Hong Kong ICAC rather than be re-structured along the lines of its Hong Kong counterpart. His proposal to divest the NSW ICAC of its corruption prevention and education role is not consistent with the Hong Kong ICAC model, where an anti-corruption law enforcement role sits alongside corruption prevention and community education roles. It would also appear that his proposal for giving the NSW ICAC a prosecutorial function in relation to its findings of corrupt conduct would give the NSW ICAC a more wide-ranging prosecutorial role than is currently the case for the Hong Kong ICAC. What the Inspector is essentially proposing for the NSW ICAC is that it be re-structured as an anti-corruption law enforcement and prosecutorial body that is statutorily independent from the Executive but has wide-ranging and invasive powers that exceed those available to the NSW Police Force. This would make for an extremely powerful law-enforcement body with little precedent in Australia.

⁶⁴ http://www.icac.org.hk/en/about_icac/os/index.html, accessed 16 September 2008.

⁶⁵ http://www.icac.org.hk/en/checks_and_balances/bf/index.html, accessed 16 September 2008.

⁶⁶ http://www.icac.org.hk/en/law_enforcement/acl/icaco/index.html, accessed 29 August 2008.

⁶⁷ See ICAC, *Annual Report 2006-2007*, p. 14.

⁶⁸ Mr Cripps, *Transcript of evidence*, 9 July 2008, p. 17.

Commentary

- 1.75 The Hong Kong ICAC was established with extraordinary law enforcement powers against a backdrop of endemic corruption that permeated Hong Kong society, including the highest levels of authority in the police force.⁶⁹ Under such circumstances there was a strong desire from citizens of Hong Kong for the government to take drastic measures to root out corruption from all sectors and levels of society, hence the establishment of an ICAC with law enforcement powers. While it is doubtless that corruption remains a serious issue in NSW, it is not like the situation in Hong Kong where corruption approached being a national emergency at the time the Hong Kong ICAC was established, to the point where protestors took to the streets in anti-corruption demonstrations.⁷⁰
- 1.76 Moreover, NSW already has bodies such as the Police Integrity Commission and the Ombudsman's Office, which are responsible for dealing with police misconduct and public sector maladministration respectively. This means that while the NSW ICAC's anti-corruption brief is wider, its remit is narrower than its Hong Kong counterpart - the Hong Kong ICAC has jurisdiction over corrupt conduct in the police force and the private sector,⁷¹ whereas the NSW ICAC is confined to investigations of corrupt conduct and misconduct in the public sector, with exceptions in relation to the NSW Police Force and the NSW Crime Commission.⁷²
- 1.77 Thus, in the Committee's view providing the NSW ICAC with law enforcement powers would raise the possibility of the ICAC duplicating the role of other law enforcement agencies and integrity Commissions, not to mention issues relating to the civil liberties of NSW citizens, given the already extensive powers available to the NSW ICAC. The Hong Kong ICAC does not, in the Committee's opinion, provide an appropriate model for any proposed restructure or reform of the ICAC in NSW.

Narrowing the definition of corrupt conduct

The Inspector's view

- 1.78 The Inspector also proposed to the Committee that the definition of corrupt conduct be narrowed:

Mr KELLY: ... I think in some ways the name and shame jurisdiction is cast too widely. The definition of corrupt conduct is extraordinarily wide. That means that a whole bunch of things are brought forward—things in the nature of administrative complaints—that could equally go to the Ombudsman's office or be dealt with through some other process because the complaint is that the underlying agency has not dealt with the application properly, someone else has received preference, or whatever it is.

I have to be deferential to the current Commissioner who commenced the judicial review of the ICAC. In that judicial review process he sought various submissions on how the concept of corrupt conduct could or should be narrowed. Basically, no-one could come up with a satisfactory suggestion, so I find myself in a position where I say that I think the concept is too wide, but do I have an answer for how it should be narrowed?

⁶⁹ For a brief history behind the establishment of the Hong Kong ICAC see: http://www.icac.org.hk/new_icac/eng/abou/history/main_1.html, accessed 16 September 2008.

⁷⁰ Ibid.

⁷¹ Section 9 'Corrupt transactions with agents' of the Hong Kong *Prevention of Bribery Ordinance* applies to private sector workers, see http://www.icac.org.hk/en/law_enforcement/acl/apobop/index.html.

⁷² See ss.3, 8, 9, 11(2A) 11(2B), and 13 (1A) of the *Independent Commission Against Corruption Act 1988*, and ss.5, 5A and 5B of the *Police Integrity Commission Act 1996*.

Having said that, I am sure that someone could figure out a way of narrowing that concept and, therefore, cutting back maybe two-thirds of those 2,000 complaints because they just would not get to first base and there would be someone in ICAC saying, "This is not for us" and that would be the end of it. The resources of ICAC could be concentrated much more effectively on whatever proportion of complaints raised genuine issues of corruption.⁷³

- 1.79 One possible suggestion for narrowing the range of complaints dealt with by the ICAC would be for the ICAC to interpret the requirement in s.12A that it direct its attention, as far as practicable, to 'serious and systemic corrupt conduct' as meaning both serious and systemic corrupt conduct, rather than serious and/or systemic corrupt conduct.⁷⁴
- 1.80 However, the Inspector indicated during the Committee's examination of him in November 2007 that he believed that the appropriate interpretation of s.12A is that the ICAC should investigate corrupt conduct that is either serious or systemic, or which is both serious and systemic.⁷⁵ The Committee in fact recommended that an amendment be brought forward to put beyond doubt that the wider interpretation of s.12A should apply.⁷⁶ The Premier has written to the Chair indicating that the Government will consider bringing forward an amendment as recommended by the Committee on the next occasion that the ICAC Act is amended.⁷⁷ At the public hearing of 9 July 2008 the Commissioner made it clear that he did not support a narrow interpretation of s.12A, noting that corruption could be serious, such as taking a bribe, without being systemic.⁷⁸ The much broader issue of whether the Act should capture matters such as maladministration is a significant issue that the Committee will examine in the forthcoming major review of the Act.

Previous reviews of the definition of corrupt conduct

- 1.81 Since the ICAC Act was enacted there have been three major reviews of the definition of corrupt conduct, which have canvassed a wide range of proposals to narrow or to widen the definition.
- 1.82 Following a major review of the Act in 1992, a previous Committee recommended that s.8 'General nature of corrupt conduct' remain largely intact but that s.9 'Limitation on the nature of corrupt conduct' be repealed.⁷⁹ This recommendation was not adopted but amendments were made to s.9 to enable the ICAC to make a finding of corrupt conduct against members of Parliament and Ministers of the Crown where there was a substantial breach of an applicable code of conduct, thereby putting them in a similar position to public servants.

⁷³ Mr Kelly, *Transcript of evidence*, 3 July 2008, p. 7.

⁷⁴ The Hon. John Ajaka MLC, *Transcript of evidence*, Transcript 9 July, p. 22.

⁷⁵ Parliament of NSW, Legislative Assembly, Committee on the ICAC, *Review of the 2005-2006 Annual Report of the Inspector of the Independent Commission Against Corruption*, Report no. 2/54, December 2007, pp. 25-27. Recommendation 2 of the Committee (on page ix) reads as follows: 'It is recommended that the Premier, as Minister with responsibility for the administration of the Independent Commission Against Corruption Act 1988, consider bringing forward an amendment to the Act to put beyond doubt that the reference to "serious and systemic corrupt conduct" in s.12A is to be interpreted as a reference to either serious and/or systemic corrupt conduct.'

⁷⁶ *Ibid.*, p. 28.

⁷⁷ Letter from the Premier of NSW to the Chair of the Committee on the ICAC, 12 March 2008.

⁷⁸ Mr Cripps, *Transcript of evidence*, 9 July 2008, p. 22.

⁷⁹ Committee on the ICAC, *Review II*, p. 10.

Commentary

1.83 In 2001 a previous Committee reviewed the definition of corrupt conduct. The Committee recommended that ss.8 and 9 be combined into a single definition.⁸⁰ The Committee proposed inserting at s.8(1): 'Corrupt conduct is conduct that if proved, would constitute or involve a criminal offence, a disciplinary offence, grounds for dismissal or a serious breach of the relevant code of conduct.'⁸¹ The Government at the time did not act on these recommendations.

1.84 When McClintock revisited the definition of corrupt conduct in 2005, he did not see the need for any substantial change to the ICAC Act definitions of corrupt conduct. McClintock recommended:

Recommendation R4.1: That, subject to recommendation R4.2 below, no substantial amendments to the definition of corrupt conduct in sections 7-9 of the Act be made, except to redraft the provisions to more clearly distinguish between corruption by public officials and corruption that adversely affects the performance of public official functions, without involving official wrongdoing.

Recommendation R4.2: That consideration be given to amending section 9 so as to clarify the circumstances in which the definition of corrupt conduct applies to Ministers and Members of Parliament and in which findings of corrupt conduct may be made, and, if sub-sections 9(4) and (5) are not repealed, sub-section 9(5) be amended to clarify the meaning of the words 'a law' by limiting it to criminal law and statutory law.⁸²

1.85 The Independent Commission Against Corruption (ICAC) Amendment Bill 2005 did not amend the definition of corrupt conduct but instead inserted s.13(3A):

(3A) The Commission may make a finding that a person has engaged or is engaging in corrupt conduct of a kind described in paragraph (a), (b), (c) or (d) of section 9 (1) only if satisfied that a person has engaged in or is engaging in conduct that constitutes or involves an offence or thing of the kind described in that paragraph.

1.86 During the second reading speech for the ICAC Amendment Bill 2005 the reasons given for the insertion of s.13(3A) were as follows:

Proposed section 13 (3A) addresses Mr McClintock's concern that it is inappropriate to base a finding of corrupt conduct on the mere possibility that the relevant conduct has occurred. It is consistent with the ICAC's approach to making findings of corrupt conduct. Section 13 (3A) does not affect the ICAC's power to make a finding under section 9 (5).⁸³

1.87 The Bill did not, then, implement the changes recommended by McClintock in relation to the sections of the Act dealing with corrupt conduct and members' and Ministers' conduct, that is, ss.9(1)(d), 9(4) and 9(5), but instead sought to clarify their application.

The Committee's conclusions

1.88 The definition of corrupt conduct in the ICAC Act is an issue that has been a source of debate since the Act came into force. It has been subject to criticism since 1992 from the Law Society and the use of the word 'could' in the definition was the subject of particular criticism by Gleeson CJ in *Greiner v Independent Commission Against*

⁸⁰ *Ibid*, p. 65.

⁸¹ *Ibid*.

⁸² McClintock, *Independent Review*, p. 57.

⁸³ Mr Sartor, second reading speech, ICAC Act Amendment Bill 2005.

*Corruption.*⁸⁴ Nevertheless, there have been three major reviews of the definition of corrupt conduct, two by previous Committees and one by an independent reviewer, and on each occasion, after weighing up submissions and evidence from various sources, no recommendations were made for substantial changes to the definition of corrupt conduct, though in 1993 the Committee did recommend a single definition of corrupt conduct rather than the two-part definition found at ss.8-9. This poses the question as to whether there is any need for a further review of the definition of corrupt conduct.

- 1.89 Notwithstanding, the major review of the ICAC and the ICAC Act that the Committee plans to undertake could be an opportunity to look again at the definition of corrupt conduct in the context of its organisational impact upon the ICAC, including the resources that must be devoted to assessing complaints of corrupt conduct. If, as the Inspector has suggested, the ICAC must devote considerable resources to assessing complaints or issues that relate more to maladministration, narrowing the definition of corrupt conduct might produce a more focused, and therefore effective, ICAC. The Committee's review would provide another opportunity to debate the best approach to ensuring that the ICAC is able to devote the bulk of its attention to complaints of serious and/or systemic corrupt conduct.

⁸⁴ McClintock, *Independent Review*, p. 48.

Appendix One - Questions on notice

RESPONSES TO QUESTIONS ON NOTICE FOR THE PUBLIC HEARING ON 3 JULY 2008

Location of the Inspector's Office

- 1. In a letter to the Committee dated 12 March 2008, the Premier noted the Committee's previous recommendation concerning the feasibility of relocating your office and indicated that he anticipated you would contact him in this regard. Have you pursued this matter with the Premier's administration and, if so, what were the outcome of the discussions?*

Yes. I am advised that there is available office space in the southern part of the CBD referred to as the McKell building.

Inspector's functions

- 2. The Inspector's function under s.57B(1)(a) of the ICAC Act is "to audit the operations of the Commission for the purpose of monitoring compliance with the law of the State". To date the Inspector's two audits have concerned the ICAC's exercise of its functions and powers in relation to the assessment of complaints and the exercise of the ICAC's compulsory powers. What other areas of the ICAC's operations are you considering as subjects for audit?*

Given that the extension of the Inspector's term finishes on 30 September 2008 it would not be appropriate for the Inspector to respond to this question and this is a matter for the new Inspector.

- 3. Under s.57B(1)(d) of the ICAC Act the Inspector is "to assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities". At p.24 of your Annual Report for 2006-2007, you indicate that this function has been carried out as part of the Inspector's auditing function and that the audit of ICAC's compliance with s.12A of the ICAC Act did not appear to raise any issues of legality or propriety.*

- (a) Is it your intention to continue to utilise the audit function under s.57B(1)(a) of the Act to give effect to your functions under s.57B(1)(d), particularly as the s.12A audit was conducted in relation to the ICAC's assessment of complaints?*

Yes, where it is logical to do so. However, it will also be appropriate to undertake the conduct of this function as a separate exercise and this issue may well be considered in the next reporting year.

(b) Are there other areas of the ICAC's operations where you envisage assessments of procedures pursuant to s.57B(1)(d) of the Act may be warranted, e.g. investigation procedures, procedures for the conduct of compulsory examinations and public inquiries, procedures surrounding the use of covert powers by the ICAC?

Yes, particularly where there are discrete procedures used by the ICAC which are not relevant to an audit, for example, investigation procedures.

Complaint statistics

4. In terms of the complaint statistics provided at p.12 of your annual report, can you please provide the Committee with a breakdown of the statistics that includes an indication for each year of operation, of the number of complaints:

- (a) received in each year;**
- (b) finalised in each year; and**
- (c) the number that were ongoing from one year to the next?**

	2005-06	2006-07	2007-08
(a) Complaints received	35	37	
(b) Complaints finalised	24	26	
(c) Complaints ongoing from one year to the next	1 (Breen)	1	

5. The complaint statistics given for 2006-2007 in respect of complaints received by mail, e-mail, facsimile, telephone and from a third party total 52, whereas the number of complaints received for that year total 37. What is the reason for this discrepancy?

The "discrepancy" is due to the following complaints being reported for 2006-07:

- 37 complaints (received in the current year)
- 11 complaints (carried over from previous year)
- 4 complaints (not assessed)

These complaints should have been reported as a total of 41 in the "Complaints Received" category for the current year. To avoid confusion in next year's Annual Report, all complaints, whether assessed or not, will be correctly reported as "Complaints Received".

6. In the Answers to Questions on Notice for the public hearing on 1 November 2007¹ a figure of 39 is given for the number of complaints received by the Inspector during 2006-2007. Can you please explain the difference between this statistic and those contained in your Annual Report for 2006-2007?

The number 39 was a typographical error and should have been reported as 37. This correction will be highlighted in the Inspector's 2007-08 Annual Report.

This discrepancy is to be corrected in the 2007-08 Annual Report.

7. The Annual Report for 2006-2007 records a complaint about the off-duty conduct of an ICAC officer, received by the Inspector in May 2006, in the complaint statistics for that year but it does not appear to be included in the complaint statistics for 2005-2006. Is there any particular reason why this is the case? Is the complaint counted within the number of complaints received for 2005-2006 or 2006-2007?

This was reported incorrectly in the 2006-07 Annual Report. This particular complaint was already recorded and reported in the 2005-06 Annual Report (page 17). The table which appears on page 12 of the 2006-07 Annual Report should have showed this complaint as having been received in the column for 2005-06.

The complaint was not counted in the number of complaints received during the 2006-07 reporting period. It was counted in the number of complaints received in the 2005-06 reporting period.

The incorrect reporting of the complaint in the table on page 12 of the 2006-07 Annual Report will be corrected in the 2007-08 Annual Report.

Report of an audit of ICAC's Compliance with section 12A of the ICAC Act 1988

8. Who conducted the Section 12A audit and what are their qualifications and experience?

The audit was conducted by Mr Michael Gleeson, Senior Project Officer, who was on secondment to my office for a three month period from the NSW Ombudsman's Office. Mr Gleeson's secondment was personally recommended by Mr Simon Cohen, Assistant Ombudsman, NSW Ombudsman's Office. Mr Gleeson's qualifications are a Bachelor of Arts in 1990 from the University of Sydney with a Major in History and a Double Major in Public Policy and Administration. Mr Gleeson has over 15 years experience in the public sector. He has been employed in the NSW Ombudsman's Office since 1993 undertaking assessment and investigation

¹ See Answer to Question on Notice no. 7, Review of the 2005-2006 Annual report of the Inspector of the Independent Commission Against Corruption, December 2007, p.34.

duties. From 1993 to the present time he has progressed in seniority within the NSW Ombudsman's Office to hold his current position of Senior Project Officer.

Mr Gleeson's secondment to the office concluded after he wrote a draft report. The draft report was then finalised for the Inspector by Ms Seema Srivastava, Executive Officer, Office of the Inspector of the ICAC. Her qualifications are:

Bachelor of Arts (Honours)
Bachelor of Laws
Master of Communications (Distinction)
Master of Laws (continuing)

Prior to commencing employment in my office Ms Srivastava has worked in the private sector, public sector and the community sector in a variety of legal and policy positions.

Scope

9. The stated objective of the audit was "to assess whether the ICAC is complying with its obligations under section 12A of the ICAC Act in relation to the assessment of complaints received by the ICAC" (emphasis added).² Section 12A of the ICAC Act provides that:

In exercising its functions, the Commission is, as far as practicable, to divert its attention to serious and systemic corrupt conduct and is to take into account the responsibility and role of other public authorities and public officials have in the prevention of corrupt conduct.

Section 12A applies to the ICAC's exercise of all of its functions and is not confined to the work of the assessments section. Are there other areas of the ICAC's operations for which s.12A would have particular significance? For instance, in respect of the investigative priorities set by the ICAC when determining own motion investigations.

Yes, there are other areas of the Commission's operations to which s12A is significant including investigative priorities when determining own motion investigations.

² Office of the Inspector of the ICAC Report of an audit of the ICAC's compliance with s.12A of the ICAC Act, 28 June 2007, p.5

10. The ICAC Act 1988 was amended in 2005 to include section 12A on the basis of a recommendation in the McClintock report. The rationale provided by McClintock for s12A was founded on concerns that some of the matters that ICAC was investigating did not concern serious or systemic corruption and could be adequately dealt with by other means or agencies:

“As ICAC complements, rather than replaces, the role performed by criminal justice institutions, oversight bodies, and agencies, its particular focus should be the matters for which there is no other remedy – where there are serious allegations of corruption that may not be amenable to ordinary policing methods, where there are systemic corruption risks, or where public officials or bodies are unwilling or unable to investigate corruption allegations or implement anti-corruption strategies.”³

(a) What matters did you take into consideration when evaluating the extent to which the ICAC “complied” with this aspect of s.12A of the Act?

The matters taken into account were:

- the definition of both serious and systemic corruption as defined by the ICAC;
- the skills and resources which were assessed by the ICAC as being required to undertake the investigation by itself and by other public sector agencies and officials.

(b) Your report indicates that the audit included “the handling of matters under s.53 of the Act”. What conclusions did you draw about this aspect of the audit, particularly given that the main recommendations in the audit report (p.15) relate to the ICAC’s referral of matters pursuant to s.19, as distinct from referrals pursuant to s.53, which are referrals for investigation or other action?

The sample of complaint files audited did not show any referrals pursuant to s.53 of the ICAC Act. It was therefore difficult to draw any conclusions from the audit on the ICAC’s use of s.53 and s.54.

11. You have noted in your report that the term “serious and systemic corrupt conduct” is open to interpretation: it may be construed as meaning that the ICAC must direct its attention to corrupt conduct that is both “serious and systemic” in nature; or that the ICAC has two priorities “serious corruption” and “systemic corruption”⁴. You

³ Bruce McClintock SC, Independent Review of the Independent Commission Against Corruption Act 1988 – Final Report, January 2005, p.29.

⁴ *ibid*, pp.2-3.

indicate that the ICAC prefers the latter interpretation, which would cover a wider range of matters, and that your audit has been conducted against this construction. As you would be aware, this Committee previously recommended that:

RECOMMENDATION 2

It is recommended that the Premier, as Minister with responsibility for the administration of the Independent Commission Against Corruption Act 1988, consider bringing forward an amendment to the Act to put beyond doubt that the reference to "serious and systemic corrupt conduct" in s.12A is to be interpreted as a reference to either serious and/or systemic corrupt conduct.

Would the construction recommended by the Committee have any implications for the audit methodology used on this occasion and your findings?

No, the audit methodology and the findings made were on the basis of using the ICAC's statutory construction of the phrase. The ICAC advised the Inspector that it interprets the phrase as being a reference to "serious and/or systemic corrupt conduct". The Inspector's use of the ICAC's statutory construction as a methodology for the audit was indicated in the first full paragraph of page 3 of the Audit Report.

Methodology

- 12. Please provide a copy of the draft terms of the audit plan (referred to on p. 4) and details of the audit methodology. What criteria were used to determine compliance with s12A?**

The Inspector does not believe that it is profitable to examine the draft terms of an audit plan; draft terms may be modified for various reasons including feedback from the Commission as to practicality and relevance. Nevertheless, the draft terms of the audit plan are attached at Annexure A. Details of the audit methodology are attached at Annexure B. The draft terms of the audit and the details of the audit methodology can be found on page 5 and 6 of the "Report of an audit of the ICAC's compliance with section 12A of the ICAC Act 1988" produced by the Office of the Inspector of the ICAC.

- 13. The methodology of the audit provided that,**

The Inspector will provide a confidential preliminary report to the Commission at the conclusion of the audit including draft findings and recommendations.

This preliminary report was provided to ICAC in September 2006. Details of the draft audit report were included in the 2005-2006 Annual Report of the Inspector, which was tabled in Parliament in October 2006. ICAC first responded to the preliminary audit report on 23 November 2006.

- (a) Had the ICAC made a preliminary response, either formally or informally, to the draft audit report before the Inspector's Annual Report was tabled in Parliament?***

Yes, the Inspector had discussed the findings of the audit report with the Commissioner in a monthly meeting prior to the tabling of the Inspector's Annual Report.

- (b) What consultation occurred with the ICAC prior to the publication of details of the draft audit report in the Inspector's Annual Report for 2005-06?***

The ICAC was not consulted.

- (c) What factors did the Inspector take into consideration when deciding to publish details of the draft report, including draft key findings and draft recommendations, particularly in view of the methodological requirement to keep the preliminary report confidential?***

The decision to publish details of the draft Audit Report in the Inspector's Annual Report for 2005-06 was based on the fact that the audit showing an overwhelmingly positive result. The Inspector took the view that this finding should be shared publicly as early as possible in order to affirm public confidence in the ICAC's administration of its resources to achieve its statutory objective. This finding could now however, be provided without some context and therefore a summary of the findings overall were published in the Annual Report.

The concerns raised by the Inspector in the draft Audit Report were of a minor nature in comparison to the overall positive findings of the audit.

14. The audit methodology indicated that:

The Inspector will invite and consider comments and submissions from ICAC before completing a final report (p.6).

The Inspector and ICAC corresponded on the content of the Final Report from September 2006 until mid December 2006. The Audit Report was finalised "taking into account the ICAC's responses" (p.6).

- (a) What modifications were made to the report in response to the submissions from the ICAC?***

The modifications made concerned the number of complaints which raised concerns. In the draft report it was indicated to five, in the final report, this number was modified to four as the ICAC provided a satisfactory explanation with respect to one of the complaints.

(b) Were there any recommendations made by the ICAC for changes to the report that were not taken up by the Inspector?

Yes. The Inspector maintained concern over the use of s.19 as a referral power instead of s.53 and 54.
The Inspector also maintained concern in the final report about four out of the five complaints which had been identified as raising issues of concern in the draft audit report.

(c) The Final Report of the audit was not tabled until Thursday 28 June 2007. Were there any particular problems that contributed to the six-month period taken to finalise and publish the report?

Yes. There were staffing problems including turnover of professional staff hired to assist with, amongst other duties, the finalisation of the audit report. Ms Srivastava commenced maternity leave on 1 March 2007 and returned in late April 2007 on a part-time basis to assist with the finalisation of the Audit Report.

Scope

15. The scope of the project included, "Decisions to commence an investigation under the Act" (p.5). However, the Final Report states that the sample considered was "chosen at random from a larger group of complaints that the Commission had assessed as not warranting investigation" (p.6). Was the sample limited to allegations where ICAC refused to investigate, or did it include allegations where ICAC decided to commence an investigation?

The sample was limited to allegations where the ICAC refused to investigate, as it was felt that within the resources available, this approach would best highlight whether or not the objectives of s.12A were being achieved.

16. The scope of the audit included reviewing the "actions taken by the Corruption Prevention, Education and Research Division."

(a) In what way was it necessary to review the actions taken by the Corruption Prevention, Education and Research Division as part of the audit?

It was felt that review of the Corruption Prevention, Education and Research Division (CPER) would be effective in showing what, if any, educative action was being taken by the ICAC to support achievement of

the action of s.12A, particularly with encouraging public sector agencies and officials to:

- create a culture which prevented serious and corrupt conduct from occurring;
- effectively detect, and investigate any instances of serious and systemic corrupt conduct in accordance with s.12A.

(b) If so, what particular aspects of this Division's actions were reviewed and what did the review reveal?

CPER actions were not reviewed outside that of any comments which it made in respect of the sample of 215 complaints audited.

Samples of Complaints Audited

17. How was the sample size of 215 complaints decided and what methodology was used to select the sample?

The sample size of 215 complaints was decided on the basis of:

- a review of the total number of complaints received by the ICAC in the current reporting period which at the time the audit was due to commence was from 1 July 2005 to 30 April 2006;
- taking a strategic approach to the audit process in light of available resources, i.e. a full-time project officer available on secondment for 3 months to undertake the audit. It was decided on an assessment of the total number of complaints received by the ICAC in the most recent year prior to the audit that a sample of approximately 10% of all complaints should provide a sufficient 'snapshot' of the ICAC's compliance with s.12A of the ICAC Act.

The methodology used to select the sample was:

- reviewing the number of complaints dealt with by the ICAC for each classification between 1 July 2005 and 30 April 2006;
- hold discussions with the ICAC about complaints and the assessment process;
- identify where the bulk of the complaints were;
- to defer a formal review of complaints which were referred by the ICAC to another agency pursuant to s.53 and 54;
- to focus on those complaints which the ICAC determined as requiring no further action, or which it referred to another agency and determined as requiring no further follow-up.

18. Was the sample representative of the range of complaints that ICAC receives?

Yes.

19. How did ICAC assist in identifying a list of the files to be audited? What input, if any, did ICAC have in the decision of which files would be audited?

The ICAC assisted by providing numbers of complaints received across the different categories. The ICAC did not have any input into the decision as to which files would be audited.

20. The annual report states that "2% of the sample audited (a total of 5 complaints) involved the following other issues..." However, the Final Report states that "...four complaints audited exposed some issues with respect to achieving the objectives of s12A" (page 8). It appears that an additional complaint raising an issue was included in the draft but not the final report. Is this the case and, if so, what is the reason for this anomaly?

The reason for this difference was that the Inspector accepted the explanation given by the ICAC about the concerns raised in one of the files queried in the draft audit report.

21. The Assessment and Procedures Manual sets out the categories for the classification of complaints, including: s.10 complaints; protected disclosures, s.11 reports; information; outside jurisdiction; inquiry; intelligence reports; dissemination; own initiative (s.20 matters) and s.13 referrals (pp.7-8). The 215 complaints that were audited were classified as: outside jurisdiction (9.3%); information (9.3%); s.10 (34.9%); protected disclosure (23.3%); s.11 (23.3%) (p. 8).

(a) Why were some classifications omitted from the sample?

Firstly, it is noted that the reference to s.13 should be s.73. The classifications that were omitted from the sample were:

- **Enquiry**
A request for advice from the ICAC, by either a member of the public or a NSW public sector employee, about whether a particular situation might indicate corrupt conduct.
- **Intelligence report**
General intelligence information provided by government agencies.
- **Dissemination**
Information from government agencies, usually non-NSW agencies, such as the Australian Federal Police, the Australian

Crime Commission or the Commonwealth Ombudsman, about corrupt conduct that may be occurring.

- **s.20 (Own initiative)**
Matters initiated by the ICAC without an external complaint or referral. They may arise from other matters already being investigated or from media reports.
- **s.73 referrals (Referrals from Parliament)**
Matters referred to the ICAC by resolution of both Houses of the NSW Parliament (under section 73 of the ICAC Act).

The reason for these classifications being omitted was that a review of these classifications indicated that for the period between 1 July 2005 to 30 April 2006 the bulk of complaints assessed by the ICAC were in the following categories:

- Outside jurisdiction – over 8%
- Information – over 13%
- Section 10 – over 30%
- Protected Disclosure – over 10%
- Section 11 – over 20%

The above categories constituted approximately 92% of the total number of complaints assessed by the ICAC. In comparison, the classifications omitted individually constituted between 7% to 8% of complaints assessed by the ICAC and collectively constituted approximately 7% of the total number of complaints assessed by the ICAC. It therefore appeared to be appropriate to focus available resources and attention on complaints within these categories. In some of the classifications omitted, namely, intelligence reports, referrals from Parliament, own initiative (s.20) and dissemination, the ICAC advised it had no complaints in those categories.

(b) Why were some classifications omitted from the sample?

The classifications omitted were ones where there had been little to no complaints for the reporting periods being examined.

(c) Did the sample proportion reflect the proportion of each classification as part of the total number of matters handled by the ICAC?

Yes.

22. For an ICAC assessment report recommendation to be accepted it must be endorsed by at least two panel members (p.4).

(a) In the course of the audit did you check how frequently panel members diverge in their views on assessment recommendations and how often were recommendations accepted on the endorsement of only two panel members?

Yes.

(b) How often were alternative courses of action recommended by panel members?

None in the sample audited.

(c) If an assessment panel cannot reach consensus on a matter it is referred to the Commissioner for resolution. How often did this occur?

None in the sample audited.

23. Paragraph 5 of the Inspector's audit report states that the "215 complaints audited were chosen at random from a larger group of complaints that the Commission had assessed as not warranting investigation."

(a) Why was the audit limited to complaints that were not investigated, when the rationale behind the inclusion of section 12A in the ICAC Act is to ensure that ICAC limits its investigations of corrupt conduct to corrupt conduct that is serious and systemic?

The approach adopted was because auditing complaints the ICAC had decided not to investigate would be felt to be the best way to understand how the ICAC defined conduct considered not to be "serious and/or systemic" conduct and to assess any inconsistency in its approach. To audit complaints which the ICAC investigated would be to duplicate the ICAC's own internal review processes.

(b) Was consideration given to also including in the sample examples of complaints that led to an investigation?

Yes, but it was considered that this might not be the best use of available resources as there would be less probability of the non-compliance with the ICAC Act on this issue.

(c) Was there an assumption made that all of the complaints ICAC chose to investigate actually involved serious and systemic corruption?

No. It was assumed, however, that all complaints investigated by the ICAC potentially involved serious and systemic corrupt conduct, and that the investigation was subject to a high level of scrutiny by the ICAC's Investigation Management Group, which would have regularly checked the "serious and systemic" nature of the corrupt conduct alleged.

Results of the Audit

24. One of the issues of concern raised in the draft audit report, as detailed in the Inspector's Annual Report, was that,

The ICAC regards what would ordinarily be regarded as direct oral evidence as not constituting 'evidence'.

Would you please explain this issue further and why was it not included in the final audit report?

The ICAC's response to this statement was accepted by the Inspector, i.e. that the ICAC did accept direct oral evidence as evidence and that the example cited in the draft report by the Inspector was not part of its ordinary practice.

The final audit report was therefore modified to leave this comment out as it did not reflect on the ICAC's usual practice in respect of accepting oral evidence.

25. The recommendations contained in the draft report are broader and more numerous than those in the final report. Does this reflect a refinement of the audit findings arising from the consultation process with the ICAC? What other factors attributed to the change in findings between the preliminary and final audit reports?

Yes. The final audit report was based on taking into account comments made by the ICAC on the draft audit report.

26. Has ICAC indicated that it will implement the recommendation made on page 15 of the Final Report?

No, the ICAC has not indicated that it will implement the recommendation made on page 15 of the final audit report.

Report of an audit of the ICAC's compliance with sections 21, 22, 23, 35 and 54 of the ICAC Act 198

The Audit Plan and Process

27. The section of this Audit Report outlining the purpose of the audit states:

In the context of this audit, compliance with the laws of the state means compliance with the Act, other relevant laws, and the principles of natural justice and procedural fairness that apply in the circumstance. (p.4)

(a) Can you provide some elucidation for the Committee of the specific laws encompassed by the phrase 'other relevant laws' against which compliance was measured?

Ordinarily, the phrase "other relevant laws" means statutory or common laws. There were no other statutory or common laws against which compliance was measured in this audit as they were not relevant. The phrase was included in the terms of reference to allow an opportunity to measure compliance against any "other relevant laws" if required.

(b) What particular cases and judicial decisions, other guides, or statutory provisions are relied upon by the Inspector in elucidating the 'principles of natural justice and procedural fairness' against which compliance was measured?

There is no statutory requirement for the Inspector to be a lawyer; the Inspector understands that this was a policy decision reflecting a desire that the inspection function should be carried out practically and without a highly legally technical approach.

There is a large body of law and general principles relating to natural justice and procedural fairness that are applicable to administrative bodies, in various circumstances (often depending on quite precise details).

Accordingly it is neither appropriate, nor possible, to provide a specific answer to this question so far as it relates to the general law.

The audit took into account the following relevant documents:

- *The ICAC Operations Manual;*
- *Investigating complaints – A manual for investigators (2nd edition), NSW Ombudsman, June 2004.*

28. The scope of the audit included:

Identify and meet with selected persons or agencies that have been the subject of the ICAC's exercise of compulsory powers in order to identify the extent to which the ICAC has complied with the law in compelling co-operation. (p.5)

(a) How many 'selected persons' and how many agencies were contacted as part of the audit?

It was decided that it would not be useful to meet with any persons or agencies who/which had been subject to the ICAC's exercise of compulsory powers. Such persons or agencies would not be able to make useful observations on any substantive issues relevant to the issue of compliance with the law in the ICAC's exercise of its compulsory powers.

(b) To what extent were individuals and agencies the subject of ICAC's exercise of its compulsory powers in a position to make observations on compliance issues?

See answer to (a) above.

(c) What was the nature of the feedback they gave?

Not applicable. See answer to (a) above.

Sample of Files Attached

29. The Audit Report provides,

The notices and summonses inspected were contained in investigation files provided by the Commission to the Office of the Inspector." (p.6)

(a) Please explain the process by which the files to be audited were nominated

Files were audited on the basis of taking a percentage of files from the total number of compulsory powers exercised by the ICAC over the last three reporting periods. The files audited were selected on a random basis by the officer employed by the OIICAC who conducted the audit.

(b) Please explain why there was a difference between the number of files nominated for inspection, and the actual number inspected.

The ICAC was not able to locate all of its files.

- 30. Six percent of s.22 notices, and five percent of s.35 notices were included in the audit sample. (p.6) Does this sample size pose any limitations when drawing general conclusions from the audit about the ICAC's compliance with the law in relation to these compulsory powers?**

The sample size in the two above mentioned categories were relatively small. However, the documents audited in relation to the two above categories, i.e.

- a s.22 Notice: by which to exercise a power to obtain documents; and
- a s.35 Notice: a power to summons witnesses and take evidence;

were of a procedural nature. It would not have assisted the objective of the audit, i.e. testing compliance with the ICAC Act, to audit a larger sample. Had there been any evidence of non-compliance or the nature of the documents themselves been contentious in any way a larger sample would have been audited.

- 31. Reference is made to "Procedure No. 6B – the 1999 Procedures" and "Procedure No.2 – the 2005 Procedures" (pp.6-7) as sections of the ICAC's Operations Manual that were relevant to the audit. Can you provide the Committee with a copy of these sections of the Manual?**

It would be more appropriate for copies of these sections of the Manual to be obtained from the ICAC.

- 32. The audit report notes that both the 1999 and 2005 Procedures require ICAC officers to consider whether or not a coercive power needs to be exercised and that such powers should be used with restraint. Both Procedures also require that the reason for the exercise of a formal power as well as the actual exercise of that power be soundly based and recorded (p.7). To what extent did the audit involve examining the circumstances surrounding the exercise of ICAC's compulsory powers in each instance, and the reasoning behind the decision to use the power, or was the nature of the audit more of a checklist type of exercise to ascertain that the requisite record keeping had been undertaken by the ICAC?**

The audit involved examining documentation which provided a justification for the exercise of the powers, such as Minutes attached to Notices submitted to senior management for approval. This enabled the Inspector to assess whether or not any consideration had been given by the ICAC to factors such as natural justice and to pursuing alternative options to the exercise of coercive powers.

33. At p.8 the audit report notes,

Minutes and other documentation attached to the notices and summonses audited showed that the ICAC had considered issues of natural justice and procedural fairness and complied with the law as far as these legal considerations were concerned.

- (a) *Is the ICAC's consideration of natural justice and procedural fairness issues at this point the only indicator available of the ICAC's observance of these common law principles in respect to the exercise of its powers?***

Yes.

- (b) *How do ICAC officers evaluate procedural fairness and natural justice questions when deciding to exercise a compulsory power – what does this process usually involve?***

A written assessment of these issues and other relevant considerations is submitted to senior management for review in a Minute attached to a draft Notice.

- (c) *Did the auditor have certain criteria against ICAC's consideration of these issues was measured?***

General legal principles relevant to procedural fairness and natural justice were applied to assess the ICAC's compliance on this issue.

34. *You have indicated that it was not possible to examine the records concerning the ICAC's exercise of compulsory powers due to the distribution of documents across various management systems following a database upgrade in 2004. Is this a factor that may pose difficulties in future audits by the Inspector of the type undertaken in relation to ICAC's use of its compulsory powers?*

This is an administrative issue which would be more appropriately answered by the ICAC.

Appendix Two - Questions without notice

This chapter contains a transcript of evidence taken at a public hearing held by the Committee on Thursday 3 July 2008. Page references cited in the commentary relate to the numbering of the original transcript, as found on the Committee's website.

CHAIR: It is the intention of the Committee on the Independent Commission Against Corruption to examine each annual and other report of both the Committee and the Inspector, and to report to both Houses of Parliament in accordance with section 64 (1) (c) of the Independent Commission Against Corruption Act. Mr Kelly you appear before the Committee today for the purpose of giving evidence on matters relating to the Inspector of the Independent Commission Against Corruption Annual Report for 2006-07, the report of an audit of the Independent Commission Against Corruption in compliance with section 12A of the Independent Commission Against Corruption Act and the report of an audit of the Independent Commission Against Corruption in compliance with section 21 to 23, section 35 and section 54 of the Independent Commission Against Corruption Act.

The Committee has received a submission from you in response to a number of questions on notice relating to the Independent Commission Against Corruption Annual Report for 2006-07, and also for the two audit reports to which I have referred. Mr Kelly, do you wish your submission to be included as part of your evidence before the Committee today and for it to be made public?

Mr KELLY: Yes, if I may. But I have a couple of additional minor comments to add.

CHAIR: I authorise Mr Kelly's submission to be included as part of his evidence, and that it be made public.

GRAHAM JOHN KELLY, Inspector, Office of the Inspector of the Independent Commission Against Corruption, GPO Box 5341, Sydney, affirmed and examined:

CHAIR: Would you like to make an opening statement before we proceed to questions?

Mr KELLY: Yes, a couple of things. I do not have very much to add to the reports or to the answers that we have provided. However, I do seek the indulgence of the Committee to table a report on the application and conformance with the Listening Devices Act by the Independent Commission Against Corruption. This is a report that was only completed in the last few days and one I have not had the opportunity to table in Parliament. I agreed with the scope of the audit of this report with the Commissioner. I am very pleased to say that a thorough audit of the activities under the Listening Devices Act has revealed complete compliance with its terms. Hence we can take a considerable degree of comfort from what the audit has found. I am in the hands of the Committee as to whether the report should be tabled in Parliament when it resumes or whether it would be sufficient for me to outline the conclusions of the report in the annual report for the year ending 30 June 2008?

One of the questions raised by the Committee, and if I may so say so very helpfully, was a question on the premises of the Inspectorate. When I met with the Premier to inform him that I did not wish to take on another full term, I raised the issue of the premises with

him and there is some prospect that a new location can be found in the city. I have not personally pursued that, because I think that is probably a matter for the new inspector to take up and find something satisfactory to the circumstances under which the new inspector will conduct the role. I do not think there was anything else in particular that I wanted to raise.

CHAIR: In regards to your latest audit report, my understanding is that it should be tabled with the Clerk if the Parliament is not in session. Until that is done, the report is only for the information of the Committee; it is confidential and cannot be made public.

Mr KELLY: In that case I will arrange for the report to be tabled with the Clerk.

CHAIR: You have answered the first question I was going to ask about the office of the Inspector of the Independent Commission Against Corruption. Your view is that a relocation of that office in central Sydney will assist with the retention of staff and the general operation of the office?

Mr KELLY: I think it is fair to say that I feel more passionately about it than the staff do. I do not want this to be misunderstood by anyone. None of us have really found any great level of difficulty with working at Redfern generally but, in terms of a location where people can have a lunch break for example and get out and go to a shop, or whatever it is, it is not a hospitable environment and that impacts on getting people to work there and, more importantly, it impacts very seriously on their morale when they are working there. It is just not a suitable environment in my view. If you were a bigger organisation—and there are a couple of big organisations there—it would be perfectly okay because you get a measure of collegiality. But very often the office manager is there on her own and it is utterly depressing.

CHAIR: In any case, for the purposes of contacting officers in other agencies and ICAC itself, logistically and geographically it would make things easier?

Mr KELLY: Yes. And it does not necessarily have to be in the central business district. It could equally be in one of the satellite locations around the city, but it needs to be in a place where there is a measure of community.

CHAIR: In your report, on page 23, you outline a complaint that you dealt with and the complainant was not happy with your response and wanted to know if there was another avenue to put in a complaint about the inspector. Over the three years you have been in the job, has that occurred very often?

Mr KELLY: Very rarely.

CHAIR: Was that the first one or the only one?

Mr KELLY: It depends on how you characterise responses. Lots of people are unhappy with the outcome but, if I recall correctly, that is the only one where anyone has asked about to whom they can complain about the decision of the inspector.

CHAIR: You have said in past reports that when you do audits and checks on the Commission you do them on investigations that have been completed. I know that has been

a conscious decision on your part. You are not suggesting there is no power to do it during an investigation, as I understand it, but you have chosen not to. Can you explain to the Committee why that is?

Mr KELLY: Yes. In my own mind and in an operational sense I draw a distinction between the auditing function and the complaint function. The auditing function basically is a looking backwards type of function to make sure things are being done properly. That is the normal concept of audit. In relation to the complaint function I have always reserved the right to look at something that is currently before the ICAC, but generally speaking I am not prepared to get involved in the middle of one of its investigations or assessments because that strikes me as being particularly capable of disrupting its function. At the end of the day it is the outcome you should be concerned about rather than the particular processes. We have not had very many complaints about, in a sense, current activities though we have had some and generally speaking those that we have had are about the time that has been taken to process a complaint. I think that is the scope of the answer.

CHAIR: You do not think that as an investigation procedure reaches certain junctions and reaches certain stages it would be fruitful or one of the things you could do is to visit the office or make it a point to look at those investigations when they reach those particular points to see whether, for example, a warrant had been issued properly or complied with so far as seizures are concerned, those kinds of issues at the final stages? Would you see it has something the inspector could do to monitor the progression of an investigation?

Mr KELLY: I think one of the really surprising things that has not occurred is that there have been virtually no such complaints. When the office of inspector was created I think the expectation of a number of people - certainly the Government - was that that would be a fairly notable feature of the role, and it has not turned out to be that way. In other words, there have been very few complaints of that kind during the course of the investigation. I did receive - and obviously I would not want to go into the details of this - one recently but it was not pursued and, frankly, on the face of the inquiry it would not have been something I would have taken up anyway.

So, in a sense, the question you are asking is hypothetical but I will give it a hypothetical answer. In appropriate circumstances, yes, the inspector undoubtedly has power and, equally undoubtedly, in some circumstances it would be appropriate to intervene. But I go back to my earlier answer: as a general proposition, forbearance is fairly important, otherwise you run the risk of disrupting the processes. It is not all that different from the judicial system where, generally speaking, it is difficult to get the Court of Appeal to intervene during the currency of proceedings unless there is a clear issue or a clear error.

CHAIR: I understand what you are saying. It is just that your powers under section 57B, paragraphs (a) to (d) involve not just audits. They involve checking on maladministration, compliance with laws, which encompasses warrants, seizures and all the other things I will get to in a moment with your other audits. I thought it would have been an opportunity for someone in a position like you to check on that while the investigation was going. If you did, you might be able to converse with the commissioner on those things while they are going so they could be looked at on the way, instead of reactively at the end of an investigation. Do you have any comment on that?

Mr KELLY: Let me be blunt. I think you run a real risk of a misapplication of resources, both on the part of the inspector's office and very seriously on the part of the ICAC itself. It does not, as far as I can judge, have an excess of resources. If anything, it is probably a bit the other way, and our interventions obviously cause it to have to devote resources to deal with them, a very appropriately. They have to answer me. So, you want to be pretty careful about that.

Mr DAVID HARRIS: A supplementary on that, just to be clear: Would you necessarily be aware of any issues until the investigation was completed?

Mr KELLY: Not necessarily aware. In fact, I would go so far as to say not generally aware. On the other hand, the Commissioner is pretty forthcoming about what they have on their plate. Within reason, yes.

CHAIR: I noticed in your report you set out a number of cases you have looked at, complaints not warranting investigation, et cetera. You just set out the general nature of the allegation. Would it be better to put those together in table form? For example, would it be better to put in a table of total complaints received, total finalised, ongoing complaints, and then another table which might indicate how the complaints were treated, for example, outside jurisdiction or not warranting an investigation, referred back to the ICAC, and another table with the outcomes - complaints sustained or not sustained - a further table, method of receipt of complaints - by email, facsimile, telephone, et cetera? On turnaround times, for example, would you envisage it would be favourable to put in a table with turnaround times for complaints finalised? What I am getting to is that the ICAC report itself sets out tables so we can look and get fairly quickly a general picture of how the Commission is operating - general statistics. You have a series of examples in there that do not really tell us anything, I think, and I know you have your reasons for that, and my view - and other committee members might have a different view of this - is that it would be easier to comprehend if they were in table form.

Mr KELLY: I am totally happy to take that on board, Chairman. I am sure we can do something like that with the report ending 2008.

CHAIR: You would be happy to talk with your successor, if you have a debriefing, in that respect?

Mr KELLY: Absolutely. I envisage - not envisage - I will complete the annual report for the year ending 30 June myself. So I will take that on board.

CHAIR: Thank you. Inspector, I will move on to the section 12A audit that you have done. There are some limitations to the audit insofar as looking at matters that simply did not proceed to investigation. You have made a conscious decision to only look at matters where the Commission did not want to proceed.

Mr KELLY: Yes.

CHAIR: You looked at them and made an assessment on that. Is there any specific reason why you limited it to that? Is it also the case with a section 12A issue that the matters the Commission does not take up are just as important as the ones that it did take up?

Mr KELLY: The genesis of this is very simple. Again it goes back to the difference between the reality of what has turned out and what their expectation was when the Office of Inspector was created. I think I have mentioned to the Committee on a number of occasions the overwhelming preponderance of complaints that I received have been about complaints to the ICAC that the ICAC has not taken up, and not the other way around. Certainly when complaints are taken up by the ICAC often the people the subject of the complaint are not terribly happy, obviously. Usually there is a relatively public resolution of that. Where the difficulty occurs is when people report alleged corrupt conduct to the ICAC and the ICAC does not take it up. That was the reason for concentrating on it. Why is it that only a small fraction of the approximately 2,000 complaints are taken up compared with those that are not. We thought that was really the focus we had to look at to make sure that it was not simply letting things slip through, whether through bad judgements or lack of resources or whatever. We then had to obviously make a selection in a normal auditing kind of way about what proportion we would look at, and then keep it in that compass.

CHAIR: It is well known and expected that if an investigation is not commenced there will be complaints because the people who refer those complaints to the ICAC want the complaints investigated. If they are not, they usually complain about that. That is to be expected. It is probably no surprise that the vast majority, if not all, are matters where there has been no investigation. You would not get a complaint perhaps from someone who has had their matter investigated. What I am getting at is the audit was for the purpose of detecting whether or not the ICAC was complying with section 12A. Section 12A says that the ICAC should take up matters that have both serious and systemic corruption. Do you think it would have been equally as fruitful to look at those matters that were taken up to make sure that the ICAC was using its resources on matters that did involve serious and systemic corruption?

Mr KELLY: I think the simple answer is no because when they take up something, to my knowledge, it is a serious issue. The one level of controversy which I think has been satisfactorily resolved was seen to be an ambiguity in section 12A, whether the concept of "serious and systemic" meant both had to be present or whether it was sufficient for either to be present. We did correspond with the ICAC and there is no doubt that the ICAC takes the view that they are disjunctive - in other words, if it is serious corruption they will look at it, and when I say look at it they will give priority to it in accordance with the terms of the section, and if it is systemic that will give that priority to it. So the resolution at a pragmatic level of that controversy pretty much takes care of the underlying concern. I would have been widely concerned if they had said even if it is serious we do not have to take it up unless it is also systemic or if it is systemic but not serious we do not have to take it up. I think that would have been quite an inappropriate outcome and would have reported back to this Committee accordingly. But that is not the way they interpret the section. Therefore, I think one can be relatively comfortable that they will take up matters that fall within the terms of it.

CHAIR: Looking at the scope that is set out on page five of the report, part of the list of issues you will look is: "Decision to commence an investigation under the Act." I take it from the time you set out to do that you changed your mind and simply focused on matters, not investigated.

Mr KELLY: Decided not to do it, yes.

CHAIR: Did you arrive at that decision some time into your audit?

Mr KELLY: Through the process of identifying cases that we wanted to look at and really where there were issues.

CHAIR: You also had in here "Handling of matters under section 53 of the Act" - a referral power.

Mr KELLY: Yes. We did make some observations about that. The real issue there was not that they had failed to refer cases to other agencies but they tended to have done that informally and more particularly without any requirement for the underlying agency to report back to them. We did make the observation, and I certainly made it orally to the Commissioner, that at least in a good administration sense there should be some, generally speaking, requirement for the agency to report back to the Commission about what it had done with it. Because there was certainly some evidence that in some cases they would write off to the agency and that was the end of the file. I did not think that was a particularly satisfactory way of dealing with it. It needed closer analysis.

CHAIR: When you checked the files where the commissioner had decided not to pursue, what sort of matters did you check?

Mr KELLY: Pretty much the substance of the decision-making process. Our test is not to decide whether we would do it or not but whether the position was unreasonable. Generally speaking, there were good reasons for not doing it.

CHAIR: In answer to question 10 (a) when you were asked, "What matters did you take into consideration when evaluating the extent to which the ICAC complied with this aspect of section 12A of the Act", at the second dot point you say, "The skills and resources which were assessed by the ICAC as being required to undertake the investigation by itself and by other public sector agencies and officials." What did you mean by that?

Mr KELLY: The available resources. These things will always ultimately be a matter of resource allocation. There are many complaints both to the ICAC and to me where you could spend endless days attempting to get to the bottom of it with no immediately apparent prospect of an outcome that would lead to a conclusion there was serious and systemic corruption. So a very reasonable decision for any agency in ICAC's position is to say, "We do not intend to devote our resources to this case; there are more important cases over here."

CHAIR: Apart from a definition of the section of what you thought was serious and/or systemic corruption, you also took into account -

Mr KELLY: Resources.

CHAIR: - resources of the office?

Mr KELLY: Yes.

CHAIR: Would it be informative to the Committee for you to be able to break that up, for example, or for an inspector to break that up, into the percentage of matters where resources were in issue or definition -

Mr KELLY: It depends what you are asking.

CHAIR: You are putting in place a review; you in have become a reviewer of an assessment process of ICAC by looking at that section. You have definition on one side and resources on the other. What percentage of those matters involved resources and definition? Is definition a major reason?

Mr KELLY: Well, our touchstone was whether their decision was unreasonable. That is the touchstone because in a sense that is the ultimate jurisdiction. We could not now go back and re-characterise the cases that we looked at without, in a sense, starting again - and certainly in the remaining three months of my term I would not propose to do that kind of audit again on the assessment process. Whether a new inspector would want to do that, I am not in a position to say obviously. I understand the underlying point that perhaps it would have been better in hindsight to have subdivided the categories a bit more, but our touchstone had been whether the decision was unreasonable or not. We did identify that small number of cases where we thought that perhaps a different approach could have been taken.

The other thing that I should mention to the Committee is that the Commission certainly takes the view - and I do not disagree with it - that the inspector does not have the role of substituting his or her own view for that of the Commission. The fundamental touchstone is whether there has been maladministration, et cetera, and when you really strip that away it is whether the decision was unreasonable or not. Certainly the Commissioner very strongly takes the view that that is the limit of this role, and I agree. I think that the reason that concept is embodied in the legislation is that if you took the contrary view you would effectively be setting up an appeal on the merits to the inspector. That, to my mind, would emasculate ICAC and would require a vastly different office of the inspector, and you would end up with exactly the same kind of supervisory need in relation to the office of the inspector because someone would say, well, he or she is unreviewable too. I think in a sense, although I had no part in the putting together of the legislation in that regard, the fundamental, philosophical approach embodied in it is correct as a matter of public administration.

Interestingly, I had discussions a few weeks ago with the Parliamentary Commissioner in Western Australia where fundamentally, despite different terms in the legislation, precisely the same issue has come up and there has been quite public controversy there about it. But the bottom line is that the Corruption and Crime Commission [CCC], I think it is called, takes the view that the Parliamentary Commissioner cannot review its decisions on the merits, it has to be within this concept of unreasonableness and maladministration.

CHAIR: The ICAC reports show year after year that there are around the same number of complaints put into ICAC and around the same percentages of those are taken up year after year.

Mr KELLY: Yes, that is right.

CHAIR: From your experience with ICAC, how much does the resources issue impact on those decisions to take up matters or not take up matters because the statistics seem to be the same year after year?

Mr KELLY: I think I recall expressing a view some considerable while ago to the Committee when there was a different membership of the Committee that there is a very real issue about the structure of ICAC and about the extent of ICAC's jurisdiction. Let me spell this out a little bit more: Plus or minus a bit, ICAC costs about \$16 million a year. That is not a very large budget by any means and I am not sitting here arguing for that to be greatly increased. That is a matter for people other than me. But it has, it strikes me, two quite different functions. It has the corruption exposure function - the name and shame function, often called - and it has the corruption prevention educative function. I think if you go back to the then Premier's second reading speech when it was first set up, that second reading speech expressed the view that within 10 years the name and shame function effectively would be passé because the corruption prevention function would have been so successful. Of course, that simply has not occurred.

What I am about to say now is conjecture on my part and entirely impressionistic, but I do not see the corruption prevention function actually having much prominence or clearly measurable success. In fact I do not even know how you would go about measuring success in the corruption prevention function. What is more, in my own reflections on this - and these are entirely personal views, I mean at the end of the day the policy view is for the Parliament and the Government, not for me - I think there is something to be said for having your corruption prevention functions embedded in a central government agency as a policy thing, so when new legislation is coming forward, for example, when new regulations are coming forward, there is someone from a pure policy point of view that looks at it and says, "What are we opening up here? What leverage are we giving to potentially corrupt people?"

The reason I say that is if - and I will not give particular examples of foreign countries - you look at some of the countries that have the worst reputation for corruption, effectively everything is prohibited unless you get permission from someone, and it is that permission system that is used to extract corruption. Every time you put together another piece of regulation that has embodied in it some kind of discretion you are opening up the possibility of some measure of corrupt conduct. That seems to me to be a highly policy-driven issue. It is not just an advisory issue over there in an outside agency. So corruption prevention takes a lot of resources in ICAC and whenever it is there the Commissioner obviously has to devote those resources to it. If it was not part of ICAC then some of those resources would be devoted to the name and shame process and you would probably see ICAC taking up more cases and pursuing more cases through in a different kind of way.

I also mentioned in the truncated statement at the beginning that I think in some ways the name and shame jurisdiction is cast too widely. The definition of corrupt conduct is extraordinarily wide. That means that a whole bunch of things are brought forward - things in the nature of administrative complaints - that could equally go to the Ombudsman's office or be dealt with through some other process because the complaint is that the underlying agency has not dealt with the application properly, someone else has received preference, or whatever it is.

I have to be deferential to the current Commissioner who commenced the judicial review of the ICAC. In that judicial review process he sought various submissions on how the concept of corrupt conduct could or should be narrowed. Basically, no-one could come up with a satisfactory suggestion, so I find myself in a position where I say that I think the concept is too wide, but do I have an answer for how it should be narrowed?

Having said that, I am sure that someone could figure out a way of narrowing that concept and, therefore, cutting back maybe two-thirds of those 2,000 complaints because they just would not get to first base and there would be someone in ICAC saying, "This is not for us" and that would be the end of it. The resources of ICAC could be concentrated much more effectively on whatever proportion of complaints raised genuine issues of corruption.

CHAIR: As you may be aware, certain allegations of corruption keep cropping up in certain departments, for example, RailCorp.

Mr KELLY: Yes.

CHAIR: From time to time the same issues keep recurring and the Commission continues to put forward recommendations that are not taken up, but the impact of those recommendations raises its head. Does the continual raising of those same issues with one or two government departments, for example, RailCorp and local government, tie in with what you have been saying about the education side of ICAC? Do you want to make any comments about ICAC's continuing role in educating government departments and using its resources for that side of its operations?

Mr KELLY: I refer to the question that you were first formulating rather than that part of your question that you were formulating at the end. I find it amazing that people in agencies, and more particularly agency heads, continue to be as un-alert and as inattentive to the potential for corruption in their agencies as they seem to when report after report has been made to ICAC exposing corrupt practices in various kinds of agencies. Local government obviously is an issue. I would not want to comment specifically on individual agencies much further than that, but I think you would be able to infer what are my general views on that.

Taking the second way in which you formulated your question, I think there is a serious question mark over the effectiveness of education. I doubt whether a single person in our community does not realise that it is plainly illegal to bribe government officials. You will not get very far by educating them that it is illegal to bribe government officials, as that will not deter them. What will deter them is exposure of it—getting caught. That brings me to a very different component of the response that I want to give to you.

I suppose that I am digressing a bit, but this is probably the last time we will have one of these general sessions in my time as inspector so, if you do not mind, I will express more general views. I think there is a very real issue about whether the original model of ICAC - merely naming and shaming and not having direct enforcement powers - is right. Over the years this Committee has rightly raised issues about the Director of Public Prosecutions [DPP] prosecuting when ICAC has recommended that consideration be given to prosecute.

There have been logistical difficulties, or some such thing, even in relation to fundamental ICAC powers, such as people failing to comply with summonses, or whatever. I think one could make a pretty strong case that in this more focused ICAC that I would see it should have its own enforcement powers. I then go on to another very general theme. I have to express my views generally because it concerns a current ICAC inquiry. In this day and age I find it incomprehensible that the head of any organisation could effectively take the view that he or she was not responsible for the systemic corruption that occurs in an organisation.

I tend to test things by reference to my other life, which is out there in the public company world. If the managing director of a major listed company had allowed widespread corruption in his or her organisation the major investors would knock on the door of the chairman and the conversation would be pretty straightforward: "Either you do something about it, or we will do something about you at the next annual general meeting." It simply would not be tolerated because it would be seen, effectively, as wasting the money of the shareholders.

As a citizen I do not see why we should not all be seeing corruption in government agencies as the wasting of our money, the distorting of our facilities and the delivery of our services. Agency heads should be held responsible for that. If that analysis is right, in every agency head's contract there should be clear performance standards that make him or her accountable for proper conduct inside the agency, whether or not he or she was directly responsible.

CHAIR: I want to ask you some questions about compulsive powers, but I will now give other members an opportunity to ask questions.

Mr DAVID HARRIS: I asked you earlier whether you would be aware of other issues during an investigation. Roughly how many complaints would you get whilst an investigation was in progress? Do you make clear your role to anyone involved in an ICAC investigation?

Mr KELLY: The answer to the first question is that there are very few - indeed, hardly any. The answer to the second question is that I do not know to what extent ICAC itself, in the course of assessing a complaint, makes it clear. However, its website and government publications of various sorts on the web and what have you make clear the existence of that office. In any event, very often lawyers are involved and they pretty much know how to go about it, but I might state parenthetically not necessarily competently.

Mr DAVID HARRIS: Just more generally, in your time as inspector how has your role developed and what interaction does your office have with the Commissioner and the ICAC? Do you believe that you have an effective relationship?

Mr KELLY: There are two levels to the answer to that question. At a personal level, the Commissioner and I have a very good working relationship. We meet regularly; it is an open and frank relationship. We have disagreements, but that does not impact on the quality of the working arrangement. So, at that level it works I think very well. Does that depend on pure personalities? It probably does. At the institutional level, I think you have a situation where ICAC for very many years was completely unaccountable, and an organisation that has had a history of that finds it unusual and often unpleasant to have accountability thrown over it. You have to see that also in the context that they have a full

workload and then suddenly we come over the top in our own time frame and demand something. So, that diverts their resources. In a sense it necessarily creates a friction and I do not think there is any solution to that. I think that is simply the price of that measure of external scrutiny. I do not know what they would say about me; maybe you should ask them. In fairness, I should say whenever it has come to the crunch, it has not been a difficulty.

Mr DAVID HARRIS: Your term is coming to an end and I know you have talked previously to us about the transition: there will be some debriefing et cetera. Does the appointment of the new inspector happen before the end of your term so that there is actually a time when you both are in the role during a hand-over period or does your term end, the new person starts and anything else is far less formal than that? Obviously, you have a lot of experience that can be related to whoever takes on the role, even though they will have their own slant on how things should work.

Mr KELLY: Formally, one ends and one starts. When someone is identified and put forward for appointment, I do not control. All I have done in that regard is that the Premier did ask what sort of characteristics an inspector should exhibit. I expressed the view - Reverend the Hon. Fred Nile will remember that this view has not changed very much from when the Committee first questioned me about the original appointment - that you have to have someone who takes a very pragmatic attitude. If a highly legalistic attitude were taken by the inspector, you would run a very substantial risk that the effectiveness of ICAC would be seriously compromised. It would be very easy to cause them to have to devote an enormous amount of resources to things that are never going to produce any kind of outcome that has any significance. I would say more than anything else you need a person that is pragmatic.

In terms of briefing and what have you, whether my term has expired or not, if the new person wants a view then I am happy to express it. Let me supplement that answer. One of the reasons it is important that I get out of the road is that you bring one set of skills in setting these things up, but it is a good idea after a relatively short period of time to have a fresh mind look at whether there is an entirely different approach. That comes down to some quite practical issues like how part time it should be; how it should be staffed - in other words, how much resources should be devoted to the function; what kinds of things you should do; what kinds of audits; how you even should handle complaints. I think probably for 75 per cent it would not matter; so long as you had a rational person you would handle them more or less the same. But there is about 25 per cent where views and approaches could legitimately be quite different.

Reverend the Hon. FRED NILE: Have you prepared any recommendations for your successor or do you plan to do that to assist that person? You spoke about a debriefing; do you believe it probably would be of value to put some recommendations in writing?

Mr KELLY: To be honest with you, I had not thought about putting it in writing. I had always thought in terms of simply down over a cup of coffee or so and responding to prompts and what have you. I will take that on board.

Reverend the Hon. FRED NILE: Would or should the new appointment be advertised?

Mr KELLY: That is not a matter for me.

Reverend the Hon. FRED NILE: What would you recommend? Should it be open to applicants or simply an appointment by the Premier?

Mr KELLY: Philosophically I do not have a particularly favourable attitude to advertising for these kinds of positions. I had the good fortune, or misfortune or whatever it was, to sit on the selection panel that prepared recommendations for a very high-profile position in the broader law enforcement community - I will not say which one. There were hundreds of applicants, I will put it this way, mostly from people that you would not have appointed in a hundred years. At the end of the day there were only about five that you would seriously consider. I am just sceptical of that process. I think you would get a lot of very underqualified people coming forward and you probably would not get the people that you really want to look at.

Reverend the Hon. FRED NILE: Are you convinced about the value of having this inspector's position now that you have been in it? Do you see the role of inspector as a practical value?

Mr KELLY: The short answer is no. The long answer is that I better explain myself. The starting point is that having lived with those statutory provisions the Chair mentioned, and the rest of the statutory provisions, they are altogether too complicated and too legalistic. It is really very interesting: last week, of course, we were talking about where things stood with the Breen report. Some of the responses we have got, in fact, in a sense take a jurisdictional point around those convoluted provisions. So, I think the statutory framework itself needs significant simplification. Secondly, there is an issue about whether the various scrutiny agencies should be combined into one big agency. I actually do not think that is a very good idea because the kind of person that you want as the Inspector of the Police Integrity Commission is quite different to the kind of person you want as the Inspector of ICAC for a variety of reasons, not the least being status reasons and also because the issues that are thrown up I think are quite different.

Sooner or later I think there will be a crunch about the inspector's role because at the end of the day the only stick that the inspector has is a report to the Parliament. There is no capacity to require ICAC to do anything or to forbear from doing anything or any such thing as that. I have been fortunate in having a Commissioner at ICAC who has always been prepared to take account of any recommendations that I have made, whether formally or simply in our monthly oral meetings. But in a different situation that could be quite different. So I think there really has to be some thought given to what the public wants out of this role.

The office does cost about \$500,000 a year. In the greater range of government budgets that is a pittance - as everyone in this room knows - but it is \$500,000 a year. Do you get value out of it? I do not know, to be honest with you. I think one of the good things probably has been that it has taken complaints about ICAC away from individual parliamentarians. You are in a position to know this much better than I am, but my impression is that it has freed an inappropriate burden from individual politicians who would otherwise have to deal with things that are often really very awkward for them to deal with. I will leave it to you to ask any supplementary questions in view of that response.

Reverend the Hon. FRED NILE: To follow up your earlier remarks, you said that ICAC has a weakness because it has no enforcement powers. What struck me - and probably everyone present - with the RailCorp case was how brazen the corruption was. The way that people, managers and so on, were interacting, it was as if there was no ICAC. Does that indicate that some people regard ICAC as being ineffective? They believe they can get away with it.

Mr KELLY: Chair, could I at the end of the public examination ask for an in-camera session?

CHAIR: We will be having that anyway, Mr Kelly.

Mr KELLY: If you do not mind, Mr Nile.

Reverend the Hon. FRED NILE: I am happy with that.

Ms LYLEA McMAHON: I have a couple of questions. You have made a number of recommendations. How do you follow up the implementation of your recommendations? The ones I have picked up are the implementation of formal processes and follow-up regarding section 53 referrals, improvements in record keeping, and probity vetting procedures regarding appointments.

Mr KELLY: With the Commissioner, but not in a correspondence sense. There is no question that the record keeping has improved, and we see that daily. There is no doubt that that has improved. The Commissioner has taken on board the need to get some feedback from the agencies. Exactly where they are at, I am not entirely sure. But perhaps it is something that I might take up formally with the Commissioner.

Ms LYLEA McMAHON: You also recommended that they improve their probity vetting procedures regarding appointments.

Mr KELLY: Could I use that awful slang and say that is a work in progress?

Ms LYLEA McMAHON: On the same theme but for the ICAC, in relation to the corruption educative function and prevention, whenever they conduct an inquiry there are recommendations within their final report. Rather than the educative function, which is quite general, would those resources be better applied to ensuring that those recommendations are in fact implemented in those organisations, and having some review and audit process performed by the ICAC in ensuring that that be the case?

Mr KELLY: I cannot entirely answer that question without reverting to the general view about whether they have this educative corruption prevention function or not. But I think if you are going to have that corruption prevention function along with the investigation function, then some reporting back is fundamental. Whether there should be a power to compel implementation or not is a different matter. In fact, I would be strongly opposed to that. But I will take up part of that in the in-camera session in relation to the question that Mr Nile asked.

Ms LYLEA McMAHON: My third question relates to the issue that we will probably discuss in camera, which is the recurrence of corruption in agencies in relation to what I see

as a gap in ICAC being able to review and ensure that organisations have implemented recommendations. Is that something you could comment on now or would you prefer to do so in camera?

Mr KELLY: I think probably it is better for all that to be dealt with then.

The Hon. JOHN AJAKA: If I can put this in the most simplified, general terms, do I understand that maybe one of the things we should be looking at to put recommendations in is a greater funded and better resourced ICAC that looks at the far bigger picture - if I may use that terminology - in far more serious and far more systemic corruption, and looks at completing the investigation and then in fact having the provision and the powers to lay charges and having then the provision and the powers to prosecute those charges? So that is kept in house to some finality without having to involve the police and the DPP unless they have been brought in under some secondment method. It would take away the educational aspect but have a body that deals with the very serious and the very systemic aspects of corruption within government departments from beginning to end. There is really no excuse as to why a report takes two to three years, a DPP briefing takes another two to three years and we suddenly find ourselves in a situation of five or six years having elapsed since the original investigation started. Is that something - I am not saying that you are recommending it - that we should have a close look at?

Mr KELLY: That expresses my view almost perfectly, if I may say so. In other words - to speak in complete truncated terms - something much more like the Hong Kong ICAC than the ICAC we have.

The Hon. JOHN AJAKA: That was the example I was going to use. Looking at it from an education point of view, we take it to the next step. You are saying leave ICAC out of that; a different entity entirely should be dealing with that. Whether that ends up being an existing government department, a newly created government department or even a parliamentary committee that is suddenly responsible for putting out the educational aspects, that is something that should be taken away from ICAC because they should be focusing on the job of, if anything, ascertaining corruption and prosecuting corruption.

Mr KELLY: Yes. My reasoning is a bit idiosyncratic: that is that the tool of the corrupt official is a regulatory discretion - every single time. When legislation is created, whether directly conferring discretions or whether created in vague terms that enables an agency to exercise discretion in how it will interpret those terms, you are building the infrastructure of corruption. Someone somewhere in government needs to scrutinise all aspects of our regulatory framework, to look at where the corruption is extracted. That is my view.

The Hon. JOHN AJAKA: If you ended up with an ICAC division that can investigate, et cetera, is there any reason why it cannot form part of, for example, the police department and be a division of the police department, only to have the additional resources available to it where officers are being transferred from one crime division to another crime division? Or do you feel it would still be best, given that the police themselves could one day be investigated from a corruption perspective, to leave the ICAC completely separate?

Mr KELLY: I have not really thought about that. My immediate response is that I think that the corruption of public officials does have a different character to it from the commission of speeding offences. You end up putting someone - we will call him or her the

Commissioner of Police - in the invidious position of having to make resource allocation decisions that should be made at a policy level and not at an administrative level. I think that when you think it through in that kind of theoretical way, you probably come to the conclusion that it should be a separate agency.

Ms LYLEA McMAHON: In relation to the questions just asked and answered, if the ICAC were to have a prosecutorial role, what is your view as to how that sits with the ICAC's coercive powers to compel people to incriminate themselves versus their rights within criminal proceedings?

Mr KELLY: I pause because it is an extremely good question, if I might be so impertinent as to say. It really raises the question: What priority should be given to the right against self-incrimination? In the United States, of course, we would not be having this discussion at all. But I think in our society we have long since recognised that the right against self-incrimination is subject to a number of countervailing considerations. For what it is worth, I do not think that the existing provisions in the Independent Commission Against Corruption Act are at all suitable anymore. As I understand it, if the appropriate procedures are followed the evidence that is given cannot even be used in civil proceedings.

So you can have a situation where an agency has been deprived of money, its official has confessed, and it cannot even sue to get the money back, let alone prosecute the person. To me that seems to be completely contrary to the public interest. I am not a politician, so I cannot really speak for the people, but for the people I bump into at the supermarket or on the train, I think they would find it outrageous that someone could confess to having filched from a government body and the government body cannot get the money back. So those provisions in the Independent Commission Against Corruption Act, I think, certainly should be looked at again.

Whether you go so far as to further detract from the right against self-incrimination to enable the evidence extracted under compulsion to be used in a criminal prosecution is a fairly serious policy issue. To be honest, in this day and age I do not see many good reasons against that. If a person has confessed to criminality, that ought to be used against them, and the only thing that stands between it being used against them or not being used against them is a relatively technical formula. If a policeman arrests someone and gives them a perfunctory warning and they burst into tears and tell all the truth anyway, it is usable. But if they say the right words, it is not usable. Well, that seems to me to be an artifice, to be frank. But that is a very, very big policy issue, and it is for the Parliament.

Mr ROB STOKES: In relation to the matters you raised about the role of the inspector and the need for the inspector, given the ability to do your role, do you need all the resources currently at your disposal or do you need more, with regard to the next inspector who takes over? For example, I think the Local Government Pecuniary Interest Tribunal has effectively run out of barristers' chambers. Do you think there is a need for a standing office premises, including support staff, for you to be able to perform your role effectively? Secondly, do you think there is a need for more or less resources, or do you think they are about right at the moment?

Mr KELLY: Let us start with the physical aspect. I think it is absolutely imperative that there be separate premises. Let me be quite practical in this answer. For example, I have an office at a major law firm. There is no way in the world I would have ICAC files in

my other office; there is no way in the world I would have ICAC files in my home office. In fact, the ICAC would rightly object to either of those things. I think you have to have stand-alone, secure premises. I do not know how, for example, the Western Australian Parliamentary Commissioner does it, but I certainly would feel very uncomfortable and would not be prepared to do it, and I know that the Commissioner feels equally.

For example, recently we had a complaint that went to the security vetting process, and the material was obviously extremely sensitive. So, instead of getting it to our premises, the executive officer went down to the ICAC and examined it - I think, very rightly so. I readily agreed with the Commissioner that that should be done. So, simple, physical resources are absolutely clear.

With regard to the rest, in my time we have been under-resourced, partly because the executive officer, as was her entitlement, took some maternity leave. She was very flexible about that. She then returned from maternity leave on a part-time basis, and she has been extremely flexible and accommodating. Could we have used more of her time? Absolutely. And could the office have used more of my time? I think, absolutely yes. We could have done more audits, for example. I do not think we would have handled the complaints very much differently - probably a little more speedily, but when you look at the overall turnover it would not have been much different. But we would have done more audits. In terms of the actual office administration, one full-time person is fine. I do not know that I can be much more specific than that.

Mr ROBERT COOMBS: When you talk about the Independent Commission Against Corruption becoming better armed with the enforcement powers you may start to incite the wrath of some of the civil rights activists and organisations that already argue that Independent Commission Against Corruption has too many powers. I would be interested in your comments on that.

You also mentioned about agency heads and corrupt behaviour. The Independent Commission Against Corruption has no enforcement powers and when it finds corrupt behaviour or issues of misconduct it has to pass those matters on to the appropriate authorities. Do you think because of the bureaucracy that has to be gone through with the other organisations, and the time taken in acting on such matters, that has an impact on the morale of the Independent Commission Against Corruption staff so they do not pursue smaller things? There is evidence where issues of corruption start small and end up big. I appreciate it is a broad ranging question but I would be interested in any comment you might have.

Mr KELLY: To some extent I think it would be useful to have the views of the Commissioner, particularly in relation to the frustration that the commission suffers. From various discussions over the years with the Commissioner, there is no question that the Independent Commission Against Corruption has found its relationship with prosecutions frustrating, both in terms of its timeliness or otherwise of prosecutions being brought, and in the way in which the material is presented to the Office of the Director for Public Prosecutions - something we have discussed over the years before this Committee. That does frustrate people and I have no doubt that has an impact on them. In terms of what cases you take up or not, I was going to say I do not think I have detected frustration as a motivator, in a sense, or a psychological impact that would lead them not to pursue things. I cannot think of a case where that could have been the explanation.

Mr ROBERT COOMBS: Did you agree with my statement in relation to the civil rights organisations by further empowering the Independent Commission Against Corruption to pursue some of these matters?

Mr KELLY: It is interesting because that has been the criticism of the Independent Commission Against Corruption from the beginning but after three years that has not been borne out by the complaints that have been received. The complaints have overwhelmingly - and this is not universally true - not been about the over zealous use of the Independent Commission Against Corruption powers; they have been about underutilisation of the powers. The question of the right - to use the American terminology - to plead the fifth, is a theoretical question but we have moved on a bit from that in our society compared with the United States, and I think for the most part for pretty good reasons. I would have thought that there are many other greater civil liberty concerns than any that can legitimately relate to the eradication of corruption.

Mr JOHN TURNER: My question might go back to the in-camera area. I serve on the Public Accounts Committee where the Auditor-General, as you know, does performance audits and a series of recommendations are made. The Public Accounts Committee has elected to bring before it officers from each of the departments where the recommendations have been made and question them as to whether those recommendations have been implemented. Do you see a role for this Committee to do that sort of thing when recommendations have been made to an agency to put in place certain anticorruption activities and require the officers to account as to when the recommendations were carried out or, if not, why they were not carried out?

Mr KELLY: The short answer is—

Mr JOHN TURNER: It may be the chairman might be anticipating something like this, because I think he has called for the Independent Commission Against Corruption details.

Mr KELLY: I have never thought of that. My immediate reaction to it is that it sounds like a very good idea, if I might say so.

Mr JONATHAN O'DEA: As to your written responses in relation to the issue of building and security, you made some comments as to the security of files and the possibility of moving to another building. The McKell building is a public building?

Mr KELLY: According to the Premier there is some space there.

Mr JONATHAN O'DEA: I think the McKell building is a publicly owned building but the issue of security is one of which you are conscious. Within your current premises have there been any instances of a threat to security or any other instances where security has been an issue with the Independent Commission Against Corruption, noting that it is not in a public building but a leased private building?

Mr KELLY: I cannot comment at all on the Independent Commission Against Corruption except that I know when any of us go there we have to go through a process to get inside. In relation to us, I am unaware of anything that has even vaguely approached a security breach. There are two or three concerns though. One concern is a little bit

laughable: for some reason or other there are regular fire drills and we have to rush down the stairs from level seven, having locked the office up. That is not very satisfactory because if there were a real fire we have very little in the way of redundancy. A supplementary aspect of that is something that I find very awkward but we are stuck with it: we are a sub-tenant and a condition of the sub tenancy is that their head tenant is able to evict us on virtually no notice for a period. I cannot publicly go into the details of that but in the event that that should unfortunately happen, our redundancy arrangements comprise a very large suitcase on wheels. That does not seem to me to be entirely satisfactory but at present we cannot come up with much better. That issue goes to the suitability of the current premises. I think that has probably covered the point.

Mr JONATHAN O'DEA: In relation to the Independent Commission Against Corruption have you ever looked at the issue of security?

Mr KELLY: No. I have no reason to believe other than it is a perfectly secure building. They tend to have a focus on these things.

Mr JONATHAN O'DEA: I am not going to go through each of your responses but as to your second response on the functions of the inspector and areas for consideration for future audits, you have perhaps ducked that question by handing it on to your successor. Given that your successor is not going to be in the role for three months, and given that understandably there is going to be a lead time for your successor, are there some areas that you might suggest are worthy of audit? One that I would suggest myself, and invite your comment on, is the practice of how the Independent Commission Against Corruption goes through the process of selecting people and how that is or is not consistent with their stated code of conduct? I am aware of two cases in the last year where there has been a controversy in that regard.

Mr KELLY: The way I would ordinarily go about identifying an area of audit is to discuss it initially with the Commissioner. That is not to say I would ever feel bound by the Commissioner's answer. But modern audit practice, other than your nitty-gritty financial audit - the bigger picture, modern corporate audit practice - is usually to identify functions between an external auditor and the organisation, and identify a function to audit from a risk perspective as much as anything. I think some of the area you have mentioned obviously should be thought about as a possibility, and I am happy to recommend that as a possibility. The other area that I think we probably should give some priority to is the process for seeking search warrants. I do not want to jump back to our meeting last week and talk much about the Breen report, but our experience suggests, just as we looked at the process for getting warrants under the Listening Devices Act, there would be a case for looking at the process for seeking search warrants. So, the exercise of the compulsory powers is very appropriate.

Mr JONATHAN O'DEA: I followed, as I have no doubt the whole Committee did, with great interest your comments in relation to the possible scope for ICAC's further activities in relation to education versus enforcement and naming and shaming. It struck me that in one sense if there was a measure of success around corruption prevention it would probably be the lack of successful findings on investigations. In a sense, that is in conflict with the other measures and I find that rather worthwhile of further consideration. On the other hand, you rightly pointed out that in the past there have been a number of recommendations that appear not to have been acted on by various government bodies and agencies. If you

removed the educative or recommendation type role from ICAC and put it in another central government agency, would there not be more of an inherent risk that other government agencies would treat those recommendations with less serious force? Although not compulsive, would it not be better if those recommendations came from ICAC, which in turn is accountable to a Committee like this?

Mr KELLY: I am tempted to give a flippant answer. It would not have happened in Gerry Gleeson's day, if it were in the Premier's Department, say. It is a question of the priority given to it in government and the strength with which that priority is pursued in government.

Mr JONATHAN O'DEA: So, if Parliament considered further that suggestion of a government agency taking responsibility for the educative type function, would you see it still appropriate for there to be some accountability to a parliamentary oversight committee?

Mr KELLY: Absolutely. I think I should make it plain that the responsibility should be in a central government department and therefore should fall within the portfolio of a very senior Minister. But I would have no difficulty whatsoever with the notion that that function should effectively report to a parliamentary committee. I think one of the good things that has happened really since the judicial review of ICAC is that - if I might say so without being gratuitous or anything like that - as I have observed it, this has become a much more bipartisan area than it was not that many years ago. It is important that the eradication of corruption be seen as a bipartisan issue. If it is not, then your chances of succeeding against the forces of evil that are out there anyway are significantly diminished.

Mr JONATHAN O'DEA: I have another question about outstanding recommendations. It comes from my past 10 or so years in a business background. If you are sitting on the board of a company, it would be standard practice as part of an audit process or an audit committee that you track, not just last year but over perhaps some years, outstanding recommendations.

Mr KELLY: Yes.

Mr JONATHAN O'DEA: Just as I believe this Committee should track its recommendations to ICAC, ICAC should track its recommendations over the years in terms of government authorities or government agencies. Although it cannot compel them, it can keep throwing them up if there has not been an adequate answer. In the same way, I perhaps go further than Ms McMahon's question and say that over the course of your whole time as inspector you have kept track of all your recommendations and, if you have not, I challenge you to go back and do a self audit before you leave so at least your successor has a history of what has not been done as well as what has been done. Can you comment on that?

Mr KELLY: Yes. We have informally done so but we have not done so systematically. If I might say so, I think it is a great idea and we will certainly take it on board and I will try to put that in some kind of report to you before my term runs out. This is a logistical thing I can take up with the committee staff and the chairman later, but I would like to try to arrange one of these meetings in my very last week. There are some time constraints in that week but if we could reach a time, it would probably be useful.

Mr JONATHAN O'DEA: Page 8 paragraph (b) of your report, given that it is becoming a public document, refers to the inspector maintaining concern over the use of section 19 as a referral power instead of section 54—

CHAIR: Sorry to interrupt, Mr O'Dea. That should be section 53, should it not? Is that a mistake?

Mr KELLY: That is a mistake.

CHAIR: Referring to your audit on compulsory powers, with those sections that you looked at, you cited two procedures that ICAC has - one is the 1999 procedure and the other is the 2005 procedure - on how it goes about exercising those powers, for example, to ask for information documents and to summons people to give evidence. It says the reasons for the exercise and the actual exercise of those powers must be recorded. You recall that in the procedures? You have noted that in your report. Were these items checked when these audits were done? Are you satisfied that all these were checked when the audit was done? I note in your report you have said that 98 per cent, I think it was, of results are satisfactory. With the exception of the matters you put in the report, are you satisfied that those checks were all done and those procedures were all complied with?

Mr KELLY: My recollection is yes.

CHAIR: It also says in the procedures that the powers must be exercised with restraint.

Mr KELLY: Yes.

CHAIR: And also take into account the circumstances under which they are exercised. Are you satisfied all those matters were checked? As the Inspector are you satisfied all that information was checked to your satisfaction that the ICAC is exercising its powers in relation to calling for documents, summoning witnesses, requesting information, seeking reports and so on in accordance with those procedures?

Mr KELLY: We saw nothing in that audit that would suggest otherwise. There may be some issues that will be identified in a report yet to be finalised that will run a little contrary to that, but I cannot say more than that at the moment.

CHAIR: One of the items in the report was to check with agencies or people who were made the subject of the exercise of those powers. That seems to me on my reading of that report a legitimate method of getting information, given the procedures of the ICAC. I note you did not do that.

Mr KELLY: When we got into the audit we did not see any reason to.

CHAIR: Given the procedures that the ICAC must follow, we are talking about an organisation that has the most coercive powers of any agency, including the Police, and is able to obtain any kind of information. At the end of the day, you are the only accounting mechanism we have. What was the reason why you did not contact those people to see how the ICAC goes about its work?

Mr KELLY: There was nothing on the face of any of the documentation that we saw from the ICAC that would suggest anyone had any great level of difficulty with it. I guess in a sense it was a resource call not to pursue that aspect any further, but it could have been.

CHAIR: When you say resource call, was that a resource of the Office of the Inspector?

Mr KELLY: Yes.

CHAIR: You did not think to contact one or two? You say you have looked at the files and nothing has come out at you in the files to say, "I had better go and see Mr Smith or this agency". But do you think it would have been a good idea to talk to a few people to see how the ICAC treats other people, for example, heads of agencies or individuals, and how they go about their work?

Mr KELLY: I cannot really add to what I have said. There was not anything that would have suggested there was any legitimate complaint that could have been made about it. Generally speaking, if you invite people to throw stones they tend to do so. Just in terms of what resources we had available and whether it was going to be profitable or not, we came to the conclusion there was nothing that would warrant the time being spent on it.

CHAIR: Speaking for myself, not the Committee, I have the view that people are less likely to complain about ICAC's coercive powers. I feel it is the case that people are less likely to raise concerns about ICAC about that issue. Perhaps the Committee or the public would depend on you as the Inspector to make sure that when the ICAC exercises its powers it keeps in mind procedural fairness as well as actual fairness and probity. I would have thought it was something you could have looked at and put in your report. I was intrigued as to why you did not look at that. The other question I want to ask is in relation to the breakup of the matters that you have looked at. You have, "Section 21-36 per cent of matters." I take it that is 36 per cent of the total times that ICAC exercised section 21?

Mr KELLY: Yes.

CHAIR: I pick out two from the breakup - one is section 22 in relation to calls for documents and the other one is section 35 relating to the summons of witnesses. You check 6 per cent for section 22 and 5 percent for section 35. They are low percentages. Are you satisfied with that low percentage and that when ICAC calls for documents or summonses witnesses that it does so properly and takes into account circumstances and procedures?

Mr KELLY: Chair, this is always an issue for auditors about what proportion you check. I am pretty comfortable that that proportion was enough. Sure, you are not going to get 100 per cent perfection unless you check 100 per cent. But in terms of getting an overall view, I was comfortable that those percentages were fine. It a question of, to use the accounting kind of auditors' terms, materiality.

CHAIR: I believe this is very important because it goes to the core of what the ICAC is able to do and your job, as the only accountable mechanism that we have. When you check these files, do you spread the sample files across different kinds of complaints, different agencies and different procedures?

Mr KELLY: Effectively, yes. It was not concentrated in any particular way.

CHAIR: The ICAC and the Director of Public Prosecutions have agreed to the memorandum of understanding. We have seen a copy of that and the Committee generally agrees it is a step forward from the past one. Were you involved in the process?

Mr KELLY: I was kept apprised rather than being involved in it. I think you will recall that last year, the last time I appeared before the committee I said that I would get involved. I discussed that with the Commissioner. They were well down the track to the negotiation of it. The latest feedback that I had from him, which would have been a couple of months ago, was that it seems to be working satisfactorily from their point of view. But it is something that needs a continuous eye on it.

CHAIR: You are happy with the document?

Mr KELLY: With the document, yes. My level of happiness has to be qualified by the general discussion we were having earlier on about whether the prosecutorial function should be in-house to the ICAC. But subject to that, if you are going to have this kind of arrangement, then at the moment that document seems satisfactory and seems to be working to the satisfaction of the ICAC so far as the commissioner has informed me.

CHAIR: The members of the Committee have used this opportunity, probably because it is your last time here with us, to ask you general questions about the ICAC, which I believe is quite proper. They have raised some interesting points. I want to ask you one or two questions. I will introduce my questions this way. As you are aware, when the ICAC was first put in place the problems in the public sector were far different in magnitude than they are today. The ICAC was put together as a statutory investigating body with very coercive powers where the presumption was that everything was to be held in public and the expositive nature of the corruption was the prime concern. It was always an investigatory authority and very much a secondary function was to gather admissible evidence if there existed any. It was not a priority at all. The Office of the Director Of Public Prosecutions under its Act prosecutes, and the ICAC under its Act investigates. As you know, there has been a great change in the way the ICAC operates now.

In the McLintock report when he looked at, for example, public inquiries, as we call them now, and private examinations, I think we call them, there has been a big shift in how that operates and the majority of matters are now heard in private and a small minority in public if there is a prima facie case found in private examination. I think Commissioner Cripps deals with that very well. So there has been a big change. There has also been a big change in the education side of the ICAC. McLintock also looked at the possibility of the ICAC prosecuting offences under its own Act, which is a legitimate issue to raise. You have been asked questions that touch on the future direction of the ICAC. Do I understand you correctly, are you agreeing with the suggestion that the ICAC becomes a fully in-house investigatory and prosecutorial agency or are you simply happy for the ICAC to go down the path of only prosecuting matters under its own statute? Obviously, the first scenario I have put forward encompasses all kinds of issues. I want your comments on that, if you can briefly encapsulate it in comments.

Mr KELLY: I am personally in favour of ICAC becoming a prosecutorial body in relation to its findings of corrupt conduct. In the meantime I am certainly in favour of ICAC having the power to prosecute under its own Act. That is a very narrow proposition and one about which I doubt that there can be a great deal of controversy. In relation to the bigger issue, the first one that you raised, I accept that there is a much greater level of controversy, but for the reasons that I outlined earlier I am in favour of ICAC becoming not only an identifier of corruption but a prosecutor of corruption.

CHAIR: You obviously agree with ICAC prosecuting matters under its own Act in the local court, for example, which is where the jurisdiction is, but what do you say about the proposition that ICAC should move more into making a priority the collection of admissible evidence, which it now does more than it ever did before, to investigate corruption, gather admissible evidence and refer that evidence to an organisation set up for prosecuting all types of offences, whilst at the same time having its own Act offences to prosecute. Would that be a more practical, pragmatic and achievable objective than having a new giant organisation that is going to do everything?

Mr KELLY: I don't know about it being a giant organisation.

CHAIR: With the inherent conflicts that that would engender?

Mr KELLY: The problem that we have seen in the last few years is that ICAC gets absolutely clear evidence of straight corruption - not the extended definition corruption but straight corruption. It has sometimes got it under the exercise of its compulsory power, but it has got it - and nothing happens. Out there in Peoplesville, but even worse in the public sector, people yawn. It would be a matter for the front page of the newspaper every day of the week if a murder were not prosecuted in this state, but the priority that is given or, to perhaps put it more accurately, the priority that is not given to the enforcement of corruption laws I think is one of the things that more than anything else allows us to end up in a culture where corruption - I don't want to be too flamboyant on this, I will not say "flourishes" - can exist.

How do you go about fixing that? It seems to me that you have an organisation that has clear power to do something about it. As soon as you get more than one agency involved, as sure as the sun rises tomorrow morning, you end up with interagency disputes. You end up with the police saying it is not their function to go and get the admissible evidence, you end up with the Director of Public Prosecutions saying that the brief is not in the right form, and both of them are right. Here you have a finding of corrupt conduct and nothing is done about it. So I think your only solution to give an appropriate level of priority to the enforcement of our anti-corruption laws is to have someone clearly focused on it and focused on the ultimate outcome of having people who engage in corrupt conduct properly dealt with by the legal system.

CHAIR: In a situation where the commission was gathering admissible evidence during an investigation about matters of public justice, for example, that the Director of Public Prosecutions usually deals with, where it was able to get that evidence to a prosecutorial body in a timely fashion and that prosecutorial body was in a position to prosecute that matter, given there is a prima facie case, subject to its guidelines, et cetera, in that situation where out in Peoplesville, as you call it, there would be a signal that if you are found to be corrupt under the Act and there is admissible evidence you will be charged

with the relevant charges, is that not a better, more practical way of achieving that than having the commission become in effect an ICAC and a director of public prosecutions? I think what I have just said probably could be achieved, subject to all people agreeing of course, but that would remove ICAC from being simply an investigatory body and an organisation full of inherent conflicts. Do you see that as a more achievable aim?

Mr KELLY: If it works, but query whether the evidence to date is that it has worked. That is my problem.

CHAIR: We will be talking to the Commissioner soon and it may be something that we put to the Commissioner. We were simply interested in getting your views.

Mr KELLY: I readily accept that there are deeply rational views to the contrary, but my own view is that the way forward and the way to send the signal even more strongly is to move down the track of a Hong Kong style ICAC rather than what we have had, so that the delays and the disputes have no excuse.

The Hon. JOHN AJAKA: As I understand it, the Director of Public Prosecutions office does have divisions within it where, for example, you have instructing officers who have the role of solicitors, in effect, who might prepare briefs and put them together, but ultimately they do not prosecute, they hand it to the Crown prosecutor counsel who does the prosecution. Would an answer to ICAC's situation be that if they do take on a prosecutorial role their officers would take on more the role of instructing solicitors preparing the brief and still be able to access the outside by either briefing Crown prosecutors to present it in court as opposed to they presenting it in court, so that eliminates some of the resource problems, or even going to the outside Bar where counsel can be briefed on occasions to take on the role of prosecutor?

Mr KELLY: It is ironical that you raise that issue because many years ago I did a paper for a law conference on why I thought there was a very good case for higher level prosecution functions to be briefed out to the outside Bar under a model very much like the one you are speaking of and certainly I have not changed in that position. I accept that people legitimately might have a different view, but there is certainly something to be said for that if there are resource issues. Certainly I do not mean to suggest that it is not without a price, including a monetary price, but that is a model that could be pursued. You do not have to have the in-house silk, so to speak, at ICAC, but you do nevertheless under the model that I would support have the decision to prosecute and the formal responsibility for the prosecution in house. How it is serviced in a legal service provision way is a different issue.

The Hon. JOHN AJAKA: Are we entitled to ask for a copy of that paper, if it is available?

Mr KELLY: You are entitled to ask for it but whether I still have it is a very doubtful issue. I will try to dig it up, but I suspect that it got archived into a shredder many years ago.

CHAIR: I want to ask you one more question in this session about resources. The Act envisages that you receive and deal with complaints, but section 57B clearly requires you to perform audits. You can check on maladministration issues and be proactive in your role - something about which I am very much in favour because you are the only

accountable mechanism that we have. However, I detect from what you have said that on many occasions in the last few years you would have wished to have had more resources. Am I correct in my assumption? If you had had more resources you could have spent more time on producing more reports and being more proactive in monitoring the ICAC. If another inspector believed it were appropriate you could also have looked at matters during an investigation, et cetera.

Mr KELLY: I hesitate to give a simplistic yes answer. In a sense, the proper answer is a distillation of answers to various questions asked today by various members of the Committee. I did not want to take another substantive appointment because I think it is time for a new inspector to rethink how the role should be performed. Now that the basic infrastructure and the way that the environment works have been identified it is time for a new inspector to rethink how the role should be performed.

Frankly, I think that the Government and, ultimately, the Parliament - not necessarily between now and 30 September but within the next year or so - should rethink the role that it wants the inspectorate to perform. If the inspectorate's primary function is to deal with 90 per cent of the complaints that it gets - I am plucking a figure out of the air, but the high proportion of complaints that it gets - that ultimately have no real merit in the sense that the ICAC made a perfectly sensible decision not to pursue those complaints and, in any event, the complaints were not terribly important, if that is its real role, in my view only minimal resources should be devoted to it.

I am not saying that it should not exist, but only minimal resources should be devoted to it. However, if it is to play a more proactive and constructive role, the powers and responsibilities need to be a bit more honed and the kind of person that you need requires more time and probably a different skills base. I do not know whether that is a responsive answer to your question, but it is probably the best that I can do.

CHAIR: Let me put it another way. Parliament has already enacted this legislation and it has set out the tasks that the inspector has to carry out. I do not think that the Government or the Parliament have to tell you what to do - your functions are already set out in this Act. I think you touched on the point that I want to make in your last answer. If you decided that you should be more proactive you would need more resources.

Mr KELLY: Yes.

CHAIR: You have gone about doing the work in the way that you have because you work within your existing resources. Is that right?

Mr KELLY: Yes.

CHAIR: However, if you were to be more proactive in conducting continual checks and monitoring the commission, you would need more resources. Is that a correct reflection of your tasks?

Mr KELLY: It follows just as night follows day.

CHAIR: That answers my question. In essence, you are saying, "If you want me to do more, give me more resources"?

Mr KELLY: But we have to be cognisant of the flipside of that coin. What we do impacts on how the ICAC applies its resources as well. Even the most benign audit requires the ICAC to apply some resources. Rather than there being a flipside to the coin, there is a reciprocal to that proposition. But that is a legitimate decision and it is a legitimate approach.

CHAIR: In essence, if you were to fulfil these functions properly you would need more resources to carry them out?

Mr KELLY: Yes.

CHAIR: Your concern is not with ICAC and its resources?

Mr KELLY: No.

CHAIR: Rather, your concern is about carrying out these functions?

Mr KELLY: Yes.

CHAIR: That is not my view. Your concern is not with the ICAC and its resources - that is a problem for somebody else - your concern is about carrying out your functions, and I perceive that you have been limited in carrying out your functions? Is that correct?

Mr KELLY: Yes.

CHAIR: If you had more time in the office, or you employed additional personnel - you might not need many; you might need only one or two additional people, or you and they might be required to work longer hours - would you be able to carry out more functions?

Mr KELLY: There is no question that we could have carried out more audits.

CHAIR: Before we receive in-camera evidence I want to point out something for the benefit of members of the Committee. Currently you are investigating a matter that has taken up an enormous amount of resources in your office. In one report that I read I think reference was made to about 900 hours that had been taken up. That matter is yet to be concluded but it is nearing completion. We will ask you about that matter in camera. However, I want to put on the record that all members are aware that the report will refer to matters that should be considered as being in the public interest.

We will discuss those matters in camera, but I think it is fair to say that Committee members will want to raise those matters in public once the report has been handed down. I take it that all members agree that they will address those issues once the report has been handed down. We might ask you some questions about those matters in due course. Do you have any comments to make about that?

Mr KELLY: In a chronological sense, that might be after the expiration of my term. However, that does not present a difficulty from my point of view.

CHAIR: Procedurally it will not. We will now go into an in-camera session.

(Evidence continued in camera)

INDEX TO TRANSCRIPT OF PROCEEDINGS

A		
Appointment of new Inspector.....	71, 72	
B		
Budget and funding of the Inspector's Office	76, 85, 86	
C		
Complaints made to Inspector	62, 70	
D		
Definition of corrupt conduct	68	
F		
Functions and powers of Inspector	63	
I		
ICAC, assessment of evidence by	67	
ICAC, assessment of resources.....	66	
ICAC, cost of investigating complaints.	68	
ICAC, educative function.....	69, 73	
ICAC, exercise of compulsory powers .	78, 80, 81	
ICAC, file management	73	
ICAC, power to prosecute ..	69, 70, 74, 75, 83, 84	
		ICAC, relationship with DPP
		77
		ICAC, structure and jurisdiction
		68, 74
		Implementation of recommendations... ..
		80
		L
		Limitations of audit.....
		63, 64, 65, 66, 78
		Location of Inspector's Office.....
		62, 76
		M
		Memorandum of understanding between ICAC and DPP
		82
		P
		Performance standards for agency heads
		70
		Privilege against self-incrimination.....
		75
		Public awareness of Inspector's functions
		70
		R
		Relationship with ICAC
		71
		Role of the Inspector.....
		72, 85
		S
		Security of Inspector's Office
		78

Appendix Three – Minutes

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 13)

Thursday, 3 July 2008 at 10.02am
Room 814-15, Parliament House

1. Members present

Mr Terenzini (Chair), Mr Ajaka, Mr Coombs, Mr Donnelly, Mr Harris (Deputy Chair), Ms McMahon, Revd Nile, Mr O'Dea, Mr Stokes and Mr Turner.

In attendance: Helen Minnican, Jasen Burgess, Dora Oravec, Chris Papadopoulos and Mille Yeoh.

2. Apologies

Ms McKay.

3. Witnesses present

Mr Graham Kelly, Inspector of the ICAC.

4. Review of the 2006-2007 Annual Report of the Inspector of the Independent Commission Against Corruption – Public hearing

The press and the public were admitted. The Chair opened the public hearing and, after welcoming the Inspector of the ICAC, gave a short, opening address.

Mr Graham Kelly, Inspector of the ICAC, affirmed and examined. The Inspector indicated that he wished to have his submission included as part of his sworn evidence and for it to be made public. The Inspector made a few opening remarks and provided, for the information of Committee members only, a copy of his latest audit report entitled, Report on an audit of the ICAC's compliance with the Listening Devices Act 1984. The report was provided on a confidential basis to the Committee, pending tabling of the report to Parliament.

The Chair questioned the witness, followed by other members of the Committee.

The Inspector requested an opportunity to correct the typographical errors in his answers to the questions on notice prior to the document being published by the Committee.

The public hearing concluded at 12:09pm, and the public and the press withdrew.

The Committee took a short 10 minute adjournment.

Questioning of the Inspector resumed at 12.20pm in camera, including additional questions taken on notice at the Committee's meeting with the Inspector on 26 June 2008.

Evidence concluded, the Chair thanked the Inspector for his attendance and the witness withdrew at 12:53pm.

5. Deliberative meeting

The Committee commenced deliberations at 12:54pm. (Mr Turner and Ms McKay apologies)

Appendix Three – Minutes

i. Minutes

Resolved, on the motion of Revd Nile, seconded Ms McMahon, that the minutes of the meeting held on 26 June 2008 be confirmed.

ii. ***

iii. ***

iv. Publication of transcript

Resolved, on the motion of Mr Stokes, seconded Ms McMahon, that the uncorrected transcript of the day's public hearing with the ICAC Inspector be made available to the ICAC on a confidential basis, for information, prior to the public hearing with the ICAC on 9 July 2008.

Resolved, on the motion of Revd Nile, seconded Mr Donnelly, that the corrected transcript of the day's public hearing with the Inspector in relation to the review of the Inspector of the Independent of the ICAC's 2006-2007 Annual Report and the submission by the Inspector be made public.

6. ***

Deliberations concluded, the meeting closed at 1.22 pm.

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 15)

Monday, 18 August 2008 at 10.07am

Jubilee Room, Parliament House

1. Members present

Mr Terenzini (Chair), Mr Harris (Deputy Chair), Mr Ajaka, Mr Coombs, Mr Donnelly, Ms McKay, Ms McMahon, Revd Nile, Mr O'Dea, Mr Stokes and Mr Turner.

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

2. Deliberative meeting

i. Minutes

Resolved, on the motion of Revd Nile, seconded Mr Harris, that the minutes of the meeting of 9 July 2008 be confirmed.

ii. ***

iii. Report outlines

The Chair spoke to the draft report outlines for the review reports on the ICAC and the Inspector 2006-2007 Annual Reports, previously circulated to the Committee.

Resolved, on the motion of Ms McKay, seconded Mr Coombs, that the Committee endorse the draft report outlines as circulated.

iv. ***

v. ***

vi. ***

vii. ***

3. ***

4. ***

Deliberations concluded, the meeting closed at 1.50 pm.

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 17)

Wednesday, 24 September 2008 at 8:30 am
Waratah Room, Parliament House

1. Attendance:

Members present: Mr Terenzini (Chair), Mr Ajaka, Mr Coombs, Mr Donnelly, Mr Harris, Revd Nile, Mr O'Dea, Mr Stokes, Mr Turner.

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

The Chair opened the meeting at 8.30am.

2. ***

3. ***

4. Deliberative meeting

The Committee commenced deliberations at 9:32am.

i. Minutes

Resolved, on the motion of Mr Donnelly, seconded Mr Stokes, that the minutes of the in camera hearing and deliberative meeting held on 10 September 2008 be confirmed.

ii. ***

iii. Distribution of papers in preparation for deliberations on 29 September 2008

• The following draft reports were distributed:

- (a) Review of the 2006-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption; and
- (b) Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption

Appendix Three – Minutes

- ***
- ***

iv. ***

Deliberations concluded, the meeting adjourned at 9:45am.

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 18)

Monday, 29 September 2008 at 10:03 am
Room 814-5, Parliament House

1. Attendance:

Members Present: Mr Terenzini (Chair), Mr Donnelly, Mr Harris, Mr Khan, Mr Khoshaba, Ms Beamer, Revd Nile, Mr O’Dea, Mr Smith, Mr Stokes.

Apologies
Mr Coombs

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

The Chair opened the meeting at 10.03am ***

2. Minutes

Resolved, on the motion of Revd Nile, seconded Mr Harris, that the minutes of the private hearing and deliberative meeting held on 24 September 2008 be confirmed.

3. Consideration of Chair’s draft reports

The Chair addressed the Committee on proposed amendments to both of the draft reports, schedules of which were distributed at the meeting (copies attached).

i. ***

ii. **Review of the 2006 – 2007 Annual Report and audit reports of the Inspector of the ICAC**

The Chair opened discussion on the draft report entitled, “Review of the 2006 – 2007 Annual Report and audit reports of the Inspector of the ICAC”, previously circulated and taken as read, and addressed the Committee on the background to the report and the recent appointment of a new Inspector, Mr Harvey Cooper, who commences his term on 1 October 2008. ***

Resolved on the motion of Mr Donnelly, seconded Mr Khoshaba, that the draft report, as amended, be the report of the Committee and that it be signed by the Chair and presented to the House.

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

iii. ***

4. ***

5. ***

Deliberations concluded, the meeting adjourned at 1.19pm.

Review of the 2006-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption

Schedule of proposed amendments

Para 1.11 delete second sentence and insert instead 'The Committee proposed to the Inspector the following alternate model for representing statistics to that found on page 12 of the Inspector's Annual Report 2006-2007.': clarifying amendment.

Para 1.57 delete 'protections' from line 1 and insert instead 'privilege': clarifying amendment.

Para 1.58 delete 'protection' from line 5 and insert instead 'privilege': clarifying amendment.

Para 1.78 delete 'corruption' from line 1 and insert instead 'corrupt conduct': clarifying amendment.

Para 1.84 delete 'corruption' from line 1 and insert instead 'corrupt conduct': clarifying amendment.