PARLIAMENT OF NEW SOUTH WALES

Committee on the Independent Commission Against Corruption

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

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

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Membership and staff

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Staff	Helen Minnican, Committee Manager
	Carly Sheen, Senior Committee Officer
	Dora Oravecz, Research Officer
	Emma Wood, Committee Officer
	Amy Bauder, Committee Officer
Contact Details	Committee on the Independent Commission Against Corruption Parliament of New South Wales Macquarie Street Sydney NSW 2000
Telephone	02 9230 2161
Facsimile	02 9230 3309
E-mail	icac@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au/icac

Functions of the Committee

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 third ICAC Annual Report review conducted by the Committee during the current Parliament. As part of the review, the Committee considered a proposal by the former Commissioner to amend the terms of office for Assistant Commissioners, and a request for additional recurrent funding for the Commission, in addition to matters arising during previous reviews, including prosecutions arising out of ICAC investigations and the implementation by agencies of the Commission's corruption prevention recommendations.

During the review, the former Commissioner, the Hon Jerrold Cripps QC, told the Committee that he supported an amendment to the ICAC Act to provide for a longer maximum period of appointment for the office of Assistant Commissioner. The Act currently provides for terms not exceeding five years. The Committee considers that a longer maximum seven-year period of appointment for Assistant Commissioners would allow for the retention of corporate knowledge within the Commission. The report therefore recommends an amendment to the ICAC Act to enable persons to hold the office of Assistant Commissioner for terms totalling no more than seven years and that they be eligible for re-appointment.

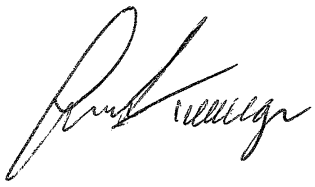
The Committee again considered the issue of agency responses to ICAC reports, in particular, corruption prevention recommendations that the Commission may make at the conclusion of an investigation. Although the Commission's statutory functions include the formulation of recommendations for action in relation to the results of its investigations, the Act does not state that agencies are required to respond to the recommendations. The Committee is of the view that such a requirement should be in place and has sought a response from the Premier to its previous recommendation that the practice of agencies providing the ICAC with implementation plans and progress reports be a statutory requirement under the ICAC Act. The Committee has also recommended that the Commission respond to the Committee's previous recommendation that once the proposed amendment takes effect, it publish in its annual reports details of agencies that have failed to comply with the recommended statutory requirement.

The matter of delays in prosecutions arising from ICAC investigations has been examined by the current Committee and previous Committees. The Committee has heard evidence indicating improvements to processes to overcome delays in the prosecution of matters by the Office of the Director of Public Prosecutions (DPP). Improved communication between the Office of the DPP and the Commission and a focus by the ICAC on gathering admissible evidence and compiling briefs of evidence during investigations have contributed to a reduction in delays for recent matters. The Committee hopes to see a continuation of the progress achieved by both the ICAC and the DPP and will continue to monitor this issue.

During the review, the Commission sought the Committee's support for a request for additional recurrent funding, citing an increased investigative workload and staff shortages during the reporting year. The Committee supports the request and will seek an update from the Commissioner on the matter of funding for additional staff during 2010.

I would like to thank the former Commissioner, the Hon Jerrold Cripps QC and senior members of the ICAC executive for their contribution to the review. The review marked the end of the Hon Jerrold Cripps's term as Commissioner and I particularly wish to thank him for his work during what has been a busy five years for the Commission.

I am grateful to the members of the Committee for their participation in this year's review and their deliberations on the report. I also thank the staff of the Secretariat for their work during the review.



Frank Terenzini MP
Chair

List of recommendations

Commentary

Introduction

1.1 The Committee on the ICAC's functions include examining each annual report and other report of the Commission and reporting to both Houses of Parliament on any matter appearing in, or arising out of, such reports.

1.2 During the Committee's review of the ICAC's 2007-2008 Annual Report, the Hon Jerrold Cripps QC's statutory five year term as Commissioner concluded. The Hon David Ipp QC commenced his term as Commissioner in November 2009.

1.3 The Committee held a public hearing on 11 August 2009, at which the then Commissioner and senior members of the ICAC executive gave evidence. As part of the Committee's review, the Commission was provided with questions on notice on matters arising out of the Annual Report and the ICAC Inspector's Breen report.[1] The full text of ICAC's answers to questions on notice and an extract from the transcript of proceedings from the public hearing are reproduced at Appendices 1 and 2 of this report. Other relevant material, such as the updated Memorandum of Understanding between the ICAC and the Office of the Director of Public Prosecutions (DPP) and ICAC's request for additional recurrent funding, are also reproduced as Appendices to this report.

1.4 In brief, the Committee's review has focussed on issues concerning:

- Proposals for change made by the Commission, including a request for a recurrent funding increase and changes to the length of term in office for the Commissioner and Deputy Commissioner.
- The execution of search warrants on members' offices.
- Matters raised during the previous review, including agency responses to ICAC's corruption prevention recommendations and the timeliness of prosecutions arising out of ICAC investigations.

ICAC's proposals for change

1.5 During the review, the Commission raised certain matters with the Committee. In particular, the Commissioner requested the Committee's support for additional recurrent funding for the Commission, in addition to amendments to the *Independent Commission Against Corruption Act 1988* relating to the appointment of the Commissioner and Deputy Commissioner. The Committee examines these issues below.

Additional recurrent funding for the Commission

Introduction

1.6 During the 11 August 2009 public hearing, the Commissioner of the ICAC provided the Committee with a document that outlined the Commission's request for additional recurrent funding. The Commissioner told the Committee that the ICAC would be

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

seeking funding from Treasury, based on the points raised in the document provided. In support of the request, the Commissioner stated that an increase in the number of investigations conducted by the Commission had resulted in the need for recurrent additional funding:

> … It is recurrent, I think. That is what we are asking for. When you read it you will see that we have slipped down the scale of employees, and I have to say one of the reasons why it took a while to become noticeable is because I think the way the division was being run was very effective and very efficient, but even with all that we have got back to where we were two or three years ago. But it became a real issue because of the huge amount of work we had last year, and we have had almost as much work this year. …[2]

1.7 The Solicitor to the Commission, Mr Roy Waldon, advised the Committee that the resulting lack of resources had led to the suspension of some preliminary investigations. Mr Waldon agreed that delays in completing preliminary investigations could impact on the successful outcome of the investigations:

> **Mr WALDON:** … I think it became very significant both late last year and this year that I think for the first time that I have been at the commission we actually had to take a number of preliminary investigations—not full investigations but preliminary investigations—and place them on hold because we just did not have the people to resource them. So that effectively meant that some matters just were not being looked at for quite a period of time until we were able to draw back the resources from some of the major investigations.
>
> **Mr GREG SMITH:** And that would be an impediment to successful investigation sometimes, would it not, because the trail gets cold?
>
> **Mr WALDON:** Absolutely.[3]

Factors outlined in the ICAC's request

1.8 The Commission's 'Request for additional recurrent funding', tabled at the public hearing, stated that 'it is essential to ensure ICAC receives adequate funding in order to service the requirements of the Commission and to meet community expectations to ensure a public sector free from the taint of corruption.'[4] According to the Commission's request, the Investigation Division requires an increase of at least eight full-time equivalent positions to enable it to function adequately and effectively. The Commission estimated that additional recurrent funding of $850,000 is required to enable additional investigators and other staff to be recruited.[5]

1.9 The Commission made the following points in support of a funding increase:

<u>Funding and staff numbers</u>

- The Commission's budget allocation for 2009-2010 financial year is $18,751,000 - an increase of 3% on the previous year's actual expenditure.
- Although NSW Treasury reduced the allocation by 1% (for efficiency savings), it provided funding for a staff award increase of 2.5% towards an actual award increase of 4%. This resulted in a net increase of 1.5% in employee related expenditure for the Commission. Although the Commission has developed

[2] The Hon Jerrold Cripps QC, ICAC Commissioner, *Transcript of evidence*, 11 August 2009, p. 21.
[3] Mr Roy Waldon, Solicitor to the Commission, *Transcript of evidence*, 11 August 2009, pp. 21-2.
[4] Tabled document, *ICAC request for additional recurrent funding*, p. 1, reproduced as Appendix 3.
[5] Tabled document, *ICAC request for additional recurrent funding*, pp. 7-8, reproduced as Appendix 3.

savings strategies to finance the 1.5% gap, it states that it will find it 'increasingly difficult in the long term to sustain such commitment'.

- The 2009-2010 budget provides funding for 109.3 full-time equivalent staff, compared with 116 for the previous year. The funding will support 39 Investigation Division staff, down from 43 the previous year.[6]

Impact on investigations

- The Investigation Division's key performance indicators provide for preliminary investigations to be completed in 120 days, with investigations (or operations) to be completed within 12 months (recently reduced from 18 months). In 2007-2008, the Division completed 70 preliminary investigations within 122 days on average. Each of the 20 full investigations were completed within 18 months. The heavy work load of the Division during 2008-2009 meant that 20 matters were put on hold for an average of 40 calendar days, prior to being allocated to an investigator: 'this impacts directly on the ability of the Commission to investigate complaints of corruption in a timely manner.'[7]
- In addition to conducting investigations, Division staff prepare briefs of evidence for the DPP in relation to proceedings for offences arising out of ICAC investigations, as well as responding to requisitions made by staff of the DPP, and appearing in court as required. The large number of operations conducted during 2007-2008 meant that in the following year there was an increase in the time spent by Division staff on preparing briefs of evidence. This in turn resulted in a drop in the time allocated to investigations in 2008-2009. Brief preparation therefore impacted on the ability of the Commission to investigate new allegations:

  > … the more matters investigated by ICAC, the more matters referred to the DPP. It is an ever increasing demand on the time of the Investigation Division. There is a strong possibility the demands for brief preparation will seriously erode time available for investigations leading to an increase in time spend on investigations with a stronger possibility of evidence being lost due to these extended time frames.[8]

- The reduction in funded staff will impact adversely on the Commission's effectiveness and efficiency. The time taken to conduct investigations will increase, which may affect the ability of the Commission to meet court imposed time frames. Furthermore 'a delay in instigating an investigation will ensure an erosion of the evidence - it is either not available through the routine destruction of business records, including bank records, or the time taken allows offenders to destroy any incriminating material'.[9]
- In addition, the time available for staff training has reduced due to the need to allocate staff to investigation and brief preparation work. Confiscation of assets gained through corrupt conduct, in co-operation with the NSW Crime Commission, is another aspect of the ICAC's work that may be affected, as it is resource intensive and can affect the time available for investigations. In addition, a reduction in staff will result in more matters being referred back to agencies for investigation - an unsatisfactory process for serious matters, which may result in public criticism.[10]

[6] Tabled document, *ICAC request for additional recurrent funding*, pp. 1-2 (see Appendix 3).
[7] Tabled document, *ICAC request for additional recurrent funding*, p. 4 (see Appendix 3).
[8] Tabled document, *ICAC request for additional recurrent funding*, p. 7 (see Appendix 3).
[9] Tabled document, *ICAC request for additional recurrent funding*, p. 9 (see Appendix 3).
[10] Tabled document, *ICAC request for additional recurrent funding*, pp. 7-9 (see Appendix 3).

Committee comment

1.10 The Committee considered the Commission's resources situation at its meeting on 3 September 2009 and determined to write to the Premier expressing support for the Commission's funding request. On 9 October 2009, the then Premier, the Hon Nathan Rees MP, wrote to the Committee advising that he had forwarded the Commission's request for funding to the Treasurer 'for consideration and approval', in addition to providing the Committee's letter to the Treasurer.

1.11 In the Committee's view, the Commission's funding request raises matters that are fundamental to the Commission's ability to undertake its functions. The Commission has argued that inadequate staffing in its Investigation Division has the potential to impact on its operations and effectiveness, in addition to affecting the public's confidence in the Commission. It is the Committee's view that the Investigation Division should be resourced to conduct timely investigations of matters that are assessed to be serious enough to warrant investigation. The Committee notes that investigations are resource intensive, particularly where they involve the use of coercive powers and monitoring of surveillance. The ICAC has noted that investigations consisting of overt and covert phases may require the allocation of additional staff, which can detract from other investigations and activities.

1.12 The Committee is concerned by the possibility that the Commission may put preliminary investigations on hold due to a lack of staff. The Committee has previously examined the issue of delays in relation to the prosecution of matters arising out of ICAC investigations. If preliminary investigations are suspended due to a lack of staff, the outcome of any subsequent investigation may be affected by the delay. Furthermore, the timely preparation of briefs of evidence may be affected by a reduction in Division staff. The Committee would be disappointed to see a return to lengthy delays in the prosecution of ICAC matters, due to delays in the preparation of briefs of evidence. In the Committee's view, the Investigation Division should have sufficient staff to ensure that briefs are prepared while an investigation is being conducted.

1.13 Although the Commission works to ensure that agencies take responsibility for corruption prevention, referring serious allegations to an agency for investigation, where the Commission does not have the necessary resources to conduct the investigation itself, may not always prove to be a satisfactory or effective way of dealing with such allegations. As the Commission has noted, it may result in delays and could affect the adequacy of the investigation due to the agency's lack of expertise and coercive powers to conduct the investigation.

1.14 It is clear to the Committee that the Commission's ability to detect and expose corruption may be diminished if the reduction in staff numbers impacts in the way the Commission has outlined. The Committee notes the advice of the Premier that the Commission's request for additional funding, and the Committee's letter expressing support for the request, have been referred to Treasury for consideration. This issue is a matter of ongoing concern, which the Committee will monitor during the next 12 months. The Committee will seek an update on the status of funding for additional ICAC staff from the new Commissioner, the Hon David Ipp QC, during its first public hearing with the Commissioner in 2010.

Terms of office for Commissioner and Assistant Commissioner

Background

1.15 During his final appearance before the Committee, the Hon Jerrold Cripps QC observed that he supported a change to the provisions of the ICAC Act relating to the terms of office for Commissioners and Assistant Commissioners. Commissioner Cripps expressed the view that the Commissioner's appointment should be for a non-renewable maximum seven-year term, while the Assistant Commissioner should be appointed for a renewable period of up to seven years. The Commissioner reflected that valuable corporate memory and experience may be lost if the expiration of the terms of the Commissioner and Assistant Commissioner were to coincide or closely follow each other:

> … I have advocated consideration of the position that I now hold, and which I will vacate on 13 November, should be for a non-renewable period like the Auditor-General position; that is, a seven-year period, non-renewable. I have spoken to other commissioners about this. It takes a while to get into the swing of being a commissioner, particularly when commissioners are almost always taken from well outside the public sector and the like. It seems to me that that proposal ought to be given serious consideration.
>
> I have a stronger view about the role, or the term of office, of the assistant commissioner, who is the deputy commissioner, and her appointment lasts for only five years. Currently we run the risk of two people retiring in very close proximity to each other and the corporate memory of the institution will be lost. I ask the Committee to consider, or whether you do or not, to think about the role of the commissioner and probably more importantly for the commission's functioning, about the role of the deputy commissioner to be a renewable role.[11]

1.16 Schedule 1 of the ICAC Act contains the provisions relating to the Commissioner's and Assistant Commissioner's terms of office:

> 4 Terms of office
>
> (1) Subject to this Schedule, the Commissioner or an Assistant Commissioner shall hold office for such term not exceeding 5 years as may be specified in the instrument of appointment, but is eligible (if otherwise qualified) for re-appointment.
>
> (2) A person may not hold the office of Commissioner for terms totalling more than 5 years.
>
> (3) A person may not hold the office of Assistant Commissioner for terms totalling more than 5 years.

Terms for other comparable offices

1.17 The terms for office holders occupying comparable offices within Australian jurisdictions are detailed in the following table:

[11] The Hon Jerrold Cripps QC, Commissioner, ICAC, *Transcript of evidence*, 11 August 2009, p. 2.

Table 1: Terms of office for relevant office holders in Australian jurisdictions

Office and jurisdiction	Length of term	Eligibility for reappointment	Maximum period in office
NSW Ombudsman: *Ombudsman Act 1974* s.6(2)	As is specified in the instrument of his or her appointment	Yes	7 years
NSW Deputy Ombudsman	Terms not specified		
NSW Police Integrity Commissioner: *Police Integrity Commission Act 1996* Sch 1 cl 4	As may be specified in the instrument of appointment	Yes	5 years
NSW Assistant PIC Commissioner	Terms not specified		
NSW Crime Commissioner *New South Wales Crime Commission Act 1985* Sch 1 cl 4	As may be specified in the instrument of appointment	Yes	Not specified
NSW Assistant Crime Commissioner	As may be specified in the instrument of appointment	Yes	Not specified
Qld Chairperson of Crime and Misconduct Commission *Crime and Misconduct Act 2001* ss.223, 231(1)	Stated in the instrument of appointment (full-time)	Not specified	5 years
Qld Corruption and Crime Commissioner *Corruption and Crime Commission Act 2003* ss.223, 231(2)	Stated in the instrument of appointment (part-time)	Not specified	5 years
Qld Assistant Commissioner, CMC *Crime and Misconduct Act 2001* s.247	Not longer than 5 years, stated in the contract of employment	Yes subject to conditions at ss.247(2)	Not more than 15 years, subject to conditions at ss.247(3) and (3A)
WA Corruption and Crime Commissioner *Corruption and Crime Commission Act 2003* Sch 2 cl 1	5 years	Yes, eligible for reappointment once	10 years
WA Acting Commissioner, CCC *Corruption and Crime Commission Act 2003* s.14(3)	… the terms and conditions of appointment, including remuneration and other entitlements, of a person acting under this section are to be as determined from time to time by the Governor		

Committee comment

1.18 In his final appearance before the Committee, the Hon Jerrold Cripps QC reflected that the terms of office for the Deputy Commissioner (or Assistant Commissioner pursuant to the ICAC Act) should allow for a longer maximum period of appointment. The Committee notes that, in terms of comparable jurisdictions, the Queensland Crime and Misconduct Act recognises the benefits of accumulated corporate

knowledge in providing for assistant commissioners and senior officers to be re-appointed to the Crime and Misconduct Commission (CMC) for a period of up to 15 years. The Queensland Act provides for an assistant commissioner or senior officer to hold office for a period of five years. However, such officers may subsequently be re-appointed for further terms of up to 10 years, if:

- The Commission considers that the person's performance as an assistant commissioner or senior officer has been of the highest standard and the person is likely to continue to contribute at a high standard to the Commission's performance (initial five year re-appointment).
- The re-appointment is necessary for the efficient operation of the Commission and does not result in the person holding office in the Commission for more than 15 years in total (further five year re-appointment).[12]

1.19 The maximum period of office for assistant commissioners was increased from eight years in 2006. Although the CMC has broader functions and a different organisational structure to the ICAC, it is still relevant to consider the issues raised during the second reading debate on the Crime and Misconduct and Other Legislation Amendment Bill, which extended the terms of office for assistant commissioners. The following relevant factors were raised in relation to the amendment:

- Allowing for the retention of corporate knowledge, to take advantage of the skills required for investigative staff.
- Maintaining the objectivity of the CMC and the independence of senior officers by allowing for the regular turnover of staff.
- The Parliamentary Crime and Misconduct Committee's (PCMC) view that there is a need to extend the tenure of senior staff to combat the CMC's difficulties with filling senior positions. It was noted that the PCMC is able to monitor the operation of the amended provision, including whether it is used extensively.
- Relevant strategies developed by the CMC, including:
  - A workforce management plan – setting out strategies for succession planning, attracting and retaining experienced staff and enhancing management competency.
  - A succession management process – identifying key positions and their feeder positions, predicting potential shortages, identifying capabilities required for effectiveness and high performance in key roles, determining what gaps exist and how to fill the gaps.[13]

1.20 The Committee acknowledges that situations could arise where vacancies in the offices of Commissioner and Assistant Commissioner of the ICAC coincide. Such a situation could create operational difficulties and a lack of continuity within the Commission. In the Committee's view, an amendment to the ICAC Act to provide for a longer maximum term of office for Assistant Commissioners could assist the Commission by ensuring continuity of corporate memory and knowledge. The Committee notes that, as a person appointed to the office of Assistant Commissioner may be re-appointed, successful applicants would not necessarily be appointed for a full seven year term. However, the possibility of re-appointment for up to seven years would allow for continuity and retention of highly skilled and experienced senior staff.

[12] *Crime and Misconduct Act 2001* (Qld) ss.247(1)(2)(3) and (3A)
[13] Queensland Legislative Assembly Hansard, 10 August 2006, pp. 2852, 2854-5.

On balance, the Committee is satisfied that a relatively short extension of the maximum period in office for Assistant Commissioners may serve to assist the Commission to continue performing its functions in an effective way by ensuring ongoing employment of high calibre senior staff.

1.21 While emphasising his views on the terms of office for Assistant Commissioners, the former Commissioner also noted that the maximum period for the Commissioner's terms of office could also be extended. The Committee notes that, during the second reading speech for the ICAC Bill, the then Minister for Police, the Hon Edward Pickering MLC, stated that 'the term of office of a person appointed as the commissioner or as an assistant commissioner shall not exceed, in aggregate, five years. This will ensure that there is no entrenchment of any one person at the pinnacle of the commission's hierarchy.'[14] Notwithstanding the intentions expressed during the second reading debate, the Committee is of the view that there may be merit in considering a longer term for the position of Commissioner. The Committee has determined to defer making a recommendation on this proposal, pending an opportunity during its next public hearing with the ICAC senior executive, to seek the views of the current Commissioner, the Hon David Ipp QC, on the adequacy of the terms of office for the office of Commissioner.

1.22 In the interim, the ICAC Committee recommends that the Premier consider introducing legislation to amend the ICAC Act to provide that an Assistant Commissioner may hold office for a term not exceeding seven years, but is eligible for re-appointment. A person may not hold the position of Assistant Commissioner for a period of more than seven years.

RECOMMENDATION 1: 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 provide that:

a. An Assistant Commissioner may hold office for a term not exceeding seven years, but is eligible for re-appointment; and

b. A person may not hold the position of Assistant Commissioner for a period of more than seven years.

Duty to notify ICAC of possible corrupt conduct

Background

1.23 The Commissioner drew the Committee's attention to a recent reduction in the number of public sector 'principal officers', who are required to notify the Commission of suspected corrupt conduct, pursuant to s.11 of the Act. Section 11(5) of the Act provides that the principal officer of a public authority may be prescribed in a regulation made under the Act, 'but in the absence of regulations applying in relation to a particular public authority, the principal officer is the person who is the head of the authority, its most senior officer or the person normally entitled to preside at its meetings.'

[14] Legislative Council Hansard, Wednesday 1 June 1988, p. 981.

1.24 The Hon Jerrold Cripps QC told the Committee that the reduction in the number of principal officers was a consequence of the recent merging of agencies in order to create fewer, larger public sector departments:

> … the Government recently established 13 new super departments to replace a number of existing departments. … the concern that the commission has is this: under the system as it was before the amalgamation of departments, there were at least 110 people who were under a statutory obligation to report incidents of suspected corruption to this commission. Unless the legislation is changed, there will now be only 13 people and the prospect of that is twofold: first, a lot of what should have come to the commission may never even get to the top members. … Secondly, even if it does, it will take a long time to get through the system to get to this commission. I would like some consideration to be given to ensuring that we are, in effect, in the same position as we were before that legislation was passed.[15]

Recent developments

1.25 Following the Committee's public hearing with the ICAC senior executive, the ICAC Act was amended. The *Independent Commission Against Corruption and Ombudsman Legislation Amendment Act 2009* included amendments to s.11 of the Act, with the insertion of s.11(6) which provides that:

> The regulations may prescribe the principal officer of a separate office within a public authority as the principal officer of the public authority in relation to matters concerning the separate office.

1.26 In the second reading speech on the Bill the Attorney-General, the Hon John Hatzistergos MLC, stated that the amendment to s.11 was prompted by a request from the ICAC, following recent departmental amalgamations:

> This amendment has also been requested by the Commissioner of the ICAC. Section 11 of the ICAC Act provides that the principal officer of a public authority is under a duty to report to the commission any matter that the person suspects, on reasonable grounds, concerns or may concern corrupt conduct. The wide-ranging reforms of the New South Wales public sector instituted by the Government this year mean that chief executive officers of the new amalgamated departments are under this obligation to report corruption to the ICAC.[16]

1.27 The Attorney-General went on to say that the intention of the amendment was to maintain effective reporting of corrupt conduct by allowing for further principal officers within newly combined public authorities to be prescribed by regulation. This would ensure that those senior officers, who had previously been under a reporting obligation, would continue to be required to report such matters. The prescribing of principal officers would occur following consultation with the Commission:

> The bill ensures that the management and reporting of corruption allegations in key areas of the public sector continue to operate in the most effective way under the new public sector arrangements. The bill amends section 11 of the ICAC Act to allow additional reporting officers to be prescribed by regulation in respect of separate offices within a public authority. The amendment ensures that the former department heads who continue to hold leadership positions in operationally discrete areas—for example, the Commissioner of Corrective Services within the new Department of Justice and Attorney General—continue to be subject to reporting obligations.
>
> The Government wants to ensure that the officers who are in the best position to form a view as to whether a matter is reportable under section 11 remain under a duty to report

[15] The Hon Jerrold Cripps QC, *Transcript of evidence*, 11 August 2009, p. 2.
[16] Legislative Council Hansard, Thursday 12 November 2009, p. 19510.

corruption. The particular officers to be prescribed under this new provision will also be determined following further consultation with the Independent Commission Against Corruption.[17]

Committee comment

1.28 The statutory requirement for principal officers to report suspected corruption is important in terms of emphasising the responsibility of agencies, in particular senior staff, to be aware of workplace culture, including any potentially corrupt conduct that may be occurring within their agency. The importance of agency responsibility has been made clear through the recent ICAC investigations into systemic, recurrent corrupt conduct within RailCorp. It is vital, therefore, that departmental amalgamations do not have the effect of reducing the number of officers who are under an obligation to report matters to the ICAC. Reports of suspected corruption are also critical in alerting the Commission to matters that may require investigation. The former Commissioner expressed concern that reports of suspected corruption may be reduced due to the reduction in principal officers.

1.29 The Committee is, therefore, pleased to note that this issue has been addressed through recent amendments to the ICAC Act. The Committee intends to monitor the operation of s.11(6), by seeking the views of the current Commissioner during its next public hearing with the ICAC. The Committee will seek the Commissioner's view on the implementation of the amendments to s.11(6) and whether they have addressed the concerns raised by the former Commissioner. In particular, the Committee will seek advice from Commissioner Ipp as to whether the number of notifications by such officers to the ICAC of suspected corruption has been affected.

The execution of search warrants on members' offices

Background

1.30 The Committee considered the execution of search warrants on members' offices as part of its *Review of special reports tabled in 2008 by the Inspector of the Independent Commission Against Corruption*.[18] The Committee examined matters arising out of the Inspector's special report on issues relating to the ICAC's investigation of allegations against the Hon Peter Breen MLC. In particular, the Committee focussed on parliamentary privilege and the ICAC's processes for the handling of potentially privileged material in its search of Mr Breen's parliamentary office; the Commission's application for the search warrant on Mr Breen's parliamentary and private premises, including errors made in the warrant application; the definition of maladministration at s.57B of the ICAC Act; and the Inspector's comments on the management structure of the Commission.

1.31 The parliamentary privilege implications of the ICAC's execution of a search warrant during the Breen investigation have been considered by the Legislative Council Privileges Committee in several reports, which ultimately recommended the development of a protocol for the execution of search warrants on members' offices by the Commission. Recent developments in relation to the recommended protocol are outlined below, followed by a discussion of the definition of maladministration at s.57B of the ICAC Act.

[17] Legislative Council Hansard, Thursday 12 November 2009, p. 19510.
[18] Committee on the ICAC, *Review of special reports tabled in 2008 by the Inspector of the Independent Commission Against Corruption*, report 7/54, March 2009.

Recent developments

Legislative Council and Legislative Assembly Privileges Committees' recommendations

1.32 In September 2009 the Chairs of the Legislative Council Privileges Committee and the Legislative Assembly Committee on Parliamentary Privilege and Ethics moved motions in both Houses, resolving that the Committees inquire into and report on the development of a memorandum of understanding between the Presiding Officers and the Commissioner of the ICAC in relation to the execution of search warrants by the ICAC on members' parliamentary offices, with particular reference to:

- The draft protocol recommended by the Privileges Committee in its February 2006 report, Protocol for execution of search warrants on members' offices.
- The ICAC's 'Procedures for Obtaining and Executing Search Warrants', in particular section 10 of the procedures.
- Recent answers to questions on notice provided by the ICAC to the Committee on the ICAC, concerning the execution of search warrants at Parliament House, as part of the Committee's review of the 2007-2008 Annual Report of the ICAC.[19]

1.33 As part of its inquiry, the Legislative Council Privileges Committee compared the draft protocol it recommended in its 2006 report[20] with the protocol subsequently adopted by the Commission in 2008 and revised in July 2009. The Privileges Committee then prepared a draft memorandum on the execution of search warrants on members' offices, which incorporated the ICAC's protocol, as a basis for consultation with the Commission. Following consultation, the Committee and the ICAC agreed on the content of the memorandum.[21]

1.34 In comparing the Commission's protocol and the Committee's 2006 draft protocol, the Privileges Committee identified the following points of difference:

Public interest immunity

- The Committee considered parliamentary privilege to be a 'more pressing question' than public interest immunity, noting that public interest immunity is more likely to arise in relation to documents held by Ministers than documents held by members. The Committee was satisfied that, although the 2009 ICAC protocol did not refer to members making a claim of public interest immunity regarding the execution of a warrant, the protocol enabled them to seek legal advice prior to the execution of a warrant, thereby, providing them with access to advice on questions of public interest immunity arising in relation to a search: 'if a claim is identified through that process, it is open to the member to seek to enforce the claim in the courts.'[22]

[19] Legislative Council Minutes No 115, Thursday 10 September 2009, p. 1362, item 3 and Legislative Assembly Votes and Proceedings, No 147, Tuesday 22 September 2009, pp. 1593-4, item 19. The Legislative Assembly resolution also provided that the Committee have leave to meet with the Legislative Council Privileges Committee to discuss the development of a general protocol for the execution of search warrants on members' offices.

[20] Legislative Council Privileges Committee, *Protocol for the execution of search warrants on members' offices*, report 33, February 2006, pp. 31-6.

[21] Legislative Council Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, report 47, November 2009, pp. 3-4.

[22] Legislative Council Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, report 47, November 2009, p. 17.

Determining claims of parliamentary privilege

- The Commission's protocol did not refer to the criteria for determining claims of privilege, whereas the Committee's protocol had included a definition of 'proceedings in Parliament' consistent with s.16(2) of the *Parliamentary Privileges Act 1987* (Cth)[23], along with a test for determining whether documents are protected by privilege. The test, which was intended to act as a guide for members and the Clerk in identifying documents that may be defined as 'proceedings in Parliament', provided that a document was privileged if it 'was created, used or retained for purposes of or incidental to the transacting of business in a House or committee.'
- During consultation on the memorandum, the ICAC advised that, although it accepted the Privileges Committee's use of s.16(2) to define proceedings in Parliament, it did not accept the test. In particular, the ICAC did not agree that retention of a document for the purposes cited by the Committee, is within the scope of 'proceedings in Parliament' and, therefore, may render a document immune from seizure. The Commission stated that this aspect of the test proposed by the Committee may operate so as to prevent the seizure of any document, as a member could claim they intended to use a document at some future time, for or incidental to, the transacting of relevant business in the House. In conclusion, the Committee noted that ICAC acknowledged retention of a document may in some cases be covered by privilege, and reflected that such matters were more relevant to procedures adopted in the practical implementation of the protocol, rather than the actual terms of the protocol.[24]
- The ICAC protocol did not refer to procedures for disputed claims of privilege, however it acknowledged that, if the ICAC disputes a claim, the issue is to be determined by the relevant House. The Privileges Committee noted the ICAC's advice that it would 'reserve its right in appropriate cases to seek judicial determination' of disputed claims determined by a House. The Privileges Committee did not concur that privilege determinations should be open to judicial review, referring to 'the broader, well-established principle that it is for the courts to determine the existence of a privilege but it is solely for the House to determine the manner of the exercise of a privilege … the Committee would expect that the House would vigorously assert this principle.' Nonetheless, the Committee concluded that this question did not prevent the reaching of agreement on the development of procedures to be followed in the execution of a warrant on members' offices.[25]

[23] Section 16 Parliamentary privilege in court proceedings

…(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, *proceedings in Parliament* means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published. …

[24] Legislative Council Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, report 47, November 2009, pp. 18-9.

[25] Legislative Council Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, report 47, November 2009, pp. 20-1.

1.35 The Legislative Council Privileges Committee concluded that the procedures set out in the Commission's protocol 'incorporate the key measures for the protection of privileged material recommended by this Committee.'[26] Consequently, the Committee made the finding that section 10, procedure 9 of the ICAC *Operations Manual* provided a suitable basis for the Commission's execution of search warrants on members' offices. The Committee further recommended:

> That the House resolve that the President enter into the Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices set out in Appendix 7 of this report.
>
> That the House send a message to the Legislative Assembly requesting the Assembly to authorise the Speaker to join with the President in entering into the Memorandum of Understanding with the ICAC Commissioner concerning the execution of search warrants on members' offices.[27]

1.36 The Legislative Assembly Committee on Parliamentary Privilege and Ethics reported in November 2009 that there was a need for a formal protocol or statutory provision that would confirm parliamentary privilege in circumstances where a search warrant was executed on a member's office. It recommended that the House enter into an agreement with the ICAC, consistent with the memorandum provided for in the Legislative Council Privileges Committee report. The Committee also recommended that the government introduce legislation to confirm the protection of Article 9 of the Bill of Rights, similar to s.16 of the *Parliamentary Privileges Act 1987* (Cth).[28]

Adoption of a memorandum of understanding between the ICAC and the Presiding Officers

1.37 Both Houses subsequently passed a motion authorising the Presiding Officers to enter into a memorandum of understanding with the Commissioner of the ICAC concerning the execution of search warrants on members' offices, as set out in the Legislative Council Privileges Committee report.[29] The memorandum is reproduced at Appendix 5 of this report.

1.38 During the debate on the motion in the Legislative Assembly, the Hon John Aquilina MP stated that:

> … the Legislative Council and the Commission have largely settled the areas of difference arising from the protocol originally adopted by the Privileges Committee to the point that the protocol is now acceptable to both the Parliament and the Commission. The memorandum and associated processes are designed to ensure that search warrants are executed without improperly interfering with the functioning of the Parliament and so that its members and their staff are given a proper opportunity to claim parliamentary privilege in relation to documents in their possession.[30]

[26] Legislative Council Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, report 47, November 2009, p. 22.
[27] Legislative Council Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, report 47, November 2009, p. ix.
[28] Legislative Assembly Committee on Parliamentary Privilege and Ethics, *Memorandum of Understanding - Execution of Search Warrants by the Independent Commission Against Corruption on Members' Offices*, November 2009, p. 5.
[29] Legislative Council Minutes No 129, Wednesday 25 November 2009, p. 1553, item 4 and Legislative Assembly Votes and Proceedings, No 168, Wednesday 2 December 2009, pp. 1807-8, item 34.
[30] Legislative Assembly Hansard, Wednesday 2 December 2009, p. 20507.

Committee comment

1.39 The Committee is pleased that the memorandum of understanding between the ICAC and the Presiding Officers has been adopted, in spite of the differences of opinion referred to in the Legislative Council Privileges Committee's report. The memorandum was clearly a necessary development, given the issues raised by the Commission's handling of the execution of a warrant as part of the Breen investigation. The legislative amendments proposed by the Legislative Assembly Privileges Committee may also assist in clarifying any matters related to parliamentary privilege that are still the subject of contention, in particular the classification of documents that are the subject of claims of privilege.

1.40 The ICAC Committee's functions include monitoring the Commission's exercise of its functions. The Committee has therefore examined the issues raised by the Breen report by focussing on internal decision making processes within the Commission in the lead up to the execution of warrants, such as those which led to errors in the Breen case. The Committee notes that the Inspectorate's Breen report stated that search warrant application processes within the Commission have since been revised on several occasions.[31] The memorandum of understanding has also assisted in refining the procedures to be observed by Commission officers who are seeking approval for, and executing, a search warrant. The Committee notes the Commission's advice that Procedure 9 of the Operations Manual now requires ICAC case officers preparing reports for authorised justices as part of an application for a search warrant to consult with the relevant team lawyer - a requirement that was not in place at the time of the Breen investigation. The Commission advised that it has emphasised this requirement through training presentations to staff.[32] Finally, it is relevant to note that, as outlined in the section below, the ICAC Inspector's recent search warrant audit revealed no irregularities with respect to the Commission's applications for, and execution of, search warrants.

1.41 The Committee considers that the significant procedural and privilege matters raised as a result of the Breen investigation have been thoroughly examined and substantially resolved, through changes to Commission processes and the adoption of the memorandum of understanding. The Committee will continue to monitor the Inspector's audit reports, particularly with respect to any issues relating to procedures for the execution of warrants, and matters relevant to the Commission's coercive powers. In the Committee's view, the Breen case demonstrates the value and importance of the Inspector's audit role in monitoring the legality of the ICAC's operations and assessing its procedures.

ICAC Inspector's 2009 audit report on ICAC search warrants

1.42 As noted above, the Committee intends to monitor the Inspector's audit reports on the execution of search warrants by the ICAC. It is relevant to note that in March 2009, the Inspector of the ICAC tabled his most recent report to Parliament on his audit into applications for and execution of search warrants by the ICAC, more generally. The audit was conducted pursuant to s.57B of the ICAC Act, which states that the principal functions of the Inspector include:

[31] Office of the Inspector of the ICAC, *Special Report of the Inspector of the Independent Commission Against Corruption to the Parliament of New South Wales Pursuant to Section 77A of the Independent Commission Against Corruption Act 1988 on Issues Relating to the Investigation by the Independent Commission Against Corruption of Certain Allegations Against the Honourable Peter Breen, MLC*, September 2008, pp.158-60.
[32] ICAC, Answers to questions on notice, question 47, p. 32.

- Auditing the Commission's operations to monitor compliance with the law.
- Dealing with (by reports and recommendations) conduct amounting to maladministration by the Commission or its officers, including delay in conducting investigations and unreasonable invasions of privacy.
- Assessing the effectiveness and appropriateness of the Commission's procedures relating to the legality or propriety of its activities.[33]

1.43 The Inspector's audit reviewed documents relevant to 54 search warrants, which were issued between July 2007 and June 2008. The warrants related to 12 investigations, including the Commission's high-profile RailCorp and Wollongong City Council investigations. In conducting the audit, the Inspector considered:

- Whether there were grounds for reporting evidence of the abuse of power, impropriety, or other forms of misconduct on the ICAC's behalf (s.57B(1)(b) of the Act).
- Whether there were grounds for reporting evidence of maladministration (s.57B(1)(c) of the Act).
- The effectiveness and appropriateness of the Commission's procedures in relation to the legality of its activities (s.57B(1)(d) of the Act.[34]

1.44 According to the report, the warrants were examined 'to determine the reasons for taking the steps necessary for their issue, as well as the manner in which those warrants were executed and the use to which the material discovered as a result of those warrants was used.'[35]

1.45 The Inspector concluded that the audit revealed no evidence of abuse of power, impropriety, misconduct or maladministration on the Commission's behalf. All examined warrants had been appropriately applied for and executed, and the issuing and execution of the warrants was 'effective in locating material which contributed to the findings and recommendations made by the Commission in its published reports.'[36] The Inspector also noted that, in those cases where consideration of prosecution for certain offences was recommended by the Commission in its investigation report, the documents seized were likely to form part of the brief of evidence submitted to the Office of the Director of Public Prosecutions.[37]

Definition of maladministration

1.46 As noted above, section 57B(1)(b) provides that one of the Inspector's functions is to deal with conduct amounting to maladministration, including delay in the conduct of investigations and unreasonable invasions of privacy by the Commission or its officers. Section 57B provides that:

> (4) For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:

[33] ICAC Act, s.57B(a), (c) and (d)
[34] Office of the Inspector of the ICAC, *Report of an audit of applications for and execution of search warrants by the Independent Commission Against Corruption*, March 2009, p. 75.
[35] Office of the Inspector of the ICAC, *Report of an audit of applications for and execution of search warrants by the Independent Commission Against Corruption*, March 2009, p. 24.
[36] Office of the Inspector of the ICAC, *Report of an audit of applications for and execution of search warrants by the Independent Commission Against Corruption*, March 2009, p. 76.
[37] Office of the Inspector of the ICAC, *Report of an audit of applications for and execution of search warrants by the Independent Commission Against Corruption*, March 2009, p. 27.

(a) contrary to law, or

(b) unreasonable, unjust, oppressive or improperly discriminatory, or

(c) based wholly or partly on improper motives.

1.47 During the Committee's review of the former Inspector's report on the Breen matter, Mr Graham Kelly, told the Committee that the definition of maladministration was difficult to interpret objectively, and not suited to enabling effective oversight of the ICAC. According to Mr Kelly:

> A finding of maladministration is a serious finding and is based on pretty technical legal principles. It would be very easy for an inspector to make a mistake unknowingly and end up before the court over such a finding. I also have to say that at the end of the day what amounts to maladministration and what does not quite amount to maladministration involves a very fine line and one that I think turns, despite what the courts might say, highly upon one's impression and one's predilection and one's view of precision or lack of precision. In this case even it was a very close call. I do not think that that is a productive way for effective supervision of an otherwise independent and extremely powerful organisation like ICAC to be executed.[38]

1.48 As part of its review of the ICAC's annual report for 2007-2008, the Committee sought the view of the Commission on the adequacy of the definition, in particular whether it is difficult to interpret or apply in practice. In answers to questions on notice the Commission stated that, although 'unlawful' and 'improper' conduct are not difficult concepts to understand, 'unreasonable' and 'unjust' conduct could present problems in terms of the interpretation and application of s.57B of the Act. The Commission suggested that the Committee seek the views of the Inspector on the adequacy of s.57B:

> The concepts of unlawful conduct and intentionally improper conduct are not difficult to comprehend. The definition however includes unreasonable and unjust conduct. Whether conduct comes within the definition will depend on the particular facts of each matter and the way in which the words of the section are interpreted. For example, it is the Commission's view that the word "unreasonable" bears its administrative law meaning, namely, conduct so unreasonable that no reasonable person could have so exercised the power. In the context of s.57B(4) it must also be "serious". The meaning of "unjust" is less clear, although presumably it involves at least an element of unfairness. However conduct, honestly engaged in, may lead to what may be perceived to be an unfair result without any impropriety being involved and which should not otherwise attract condemnation or an adverse finding of maladministration.
>
> These uncertainties may lead to difficulties in interpreting and applying parts of s.57B(4). It would be appropriate to canvass the view of the current Inspector on this issue.[39]

Committee comment

1.49 The former ICAC Inspector told the Committee that he found the definition of maladministration at s.57B(4) of the Act to be difficult to interpret. The Commission has also identified potential issues with some of the terms used in the definition. The Committee is concerned to establish whether this provision of the Act may impede the Inspector in performing his functions. The Committee intends to raise this matter with the current ICAC Inspector and the Commissioner of the ICAC, as part of its

[38] Committee on the ICAC, *Review of special reports tabled in 2008 by the Inspector of the Independent Commission Against Corruption*, report 7/54, March 2009, p. 4.
[39] ICAC, Answers to questions on notice, question 56, p. 38.

inquiry program in 2010. The adequacy of s.57B is a matter that the Committee may also consider during its review of the ICAC Act.

Matters raised during previous annual report review

Proposed amendments to the ICAC Act

1.50 During the examination of the ICAC's previous annual report, several proposals to amend the ICAC Act were raised by the Commission. They are briefly outlined below, along with the Committee's response to each proposal:

- *s.37 - to remove the limitation on the admissibility of evidence given under objection for civil and disciplinary proceedings.* The Commissioner stated that he saw no justification for the protection granted by s.37 of the Act with respect to such proceedings. The Commissioner emphasised that disciplinary or civil proceedings taken against a person who has made admissions to the Commission under objection may fail due to a lack of evidence, if there is no other admissible evidence available. The Committee determined that further, detailed examination of this proposal was required, including consultation with relevant stakeholders.
- *s.112 - to make it clear that the Commission has the power to make orders restricting the publication of written submissions pursuant to s.112*. The Commission stated that it is often preferable to restrict the publication of submissions until after it has published an investigation report, to avoid the publication of recommendations and findings that it may decline to accept. The Committee supported this proposed amendment.
- *s.116(2) - to remove its application to offences under s.87 of the Act (giving false or misleading evidence to the Commission).* Section 116(2) provides that indictable offences under the Act may be heard and determined in the Local Court, if the Court is satisfied that it is proper and the defendant and prosecutor consent.[40] The Commission stated that lower courts generally impose relatively light sentences for offences under s.87, with convictions rarely resulting in imprisonment.[41] The Commission argued that people appearing before it would be more inclined to tell the truth if they were aware that they may be imprisoned for lying, and that the Commission's effectiveness was diminished by witnesses giving false evidence. The Committee considered the issue and concluded that the implications and certain aspects of the proposal required clarification and a more detailed examination.
- *s.116(4) - to include ss.82 and 95[42] in the category of offences for which prosecution may be commenced within three years of the commission of the offence, pursuant to s.116(4).* Prosecution for offences under sections 82 and 95 were required to be commenced within six months of the commission of the

[40] Section 116(2) of the Act provides that, if a person is convicted in the Local Court, the maximum penalty is 50 penalty units or two years imprisonment (or both). Under s.87(1) of the Act, a person knowingly giving false or misleading evidence to the Commission at a compulsory examination or public inquiry is guilty of an indictable offence, with a maximum penalty of 200 penalty units or five years imprisonment (or both).
[41] The Act provides that the maximum penalty for an offence under s.87 is 200 penalty units or five years imprisonment (or both).
[42] Section 82 of the ICAC Act provides for the offences of failing to comply with a notice requiring an authority or official to produce a statement of information, and providing false or misleading information in relation to such a notice. Section 95 of the Act makes it an offence for a person to impersonate an officer of the Commission.

offence, as they are summary offences, with no other time period for the commencement of proceedings being specified within the ICAC Act. The Commission noted that it has not always been possible to identify some offences until after the six month period has passed, after which it was not possible to commence prosecution action. The Commission also noted that investigations may be compromised by the commencement of legal proceedings, as persons involved in investigations would be alerted to the fact of the investigation and evidence obtained by the Commission would be revealed during proceedings. The Committee supported the proposed amendment.[43]

Recent developments

1.51 The Committee is currently conducting an inquiry into certain proposed amendments to s.37 of the Act, following a referral from the former Premier, the Hon Nathan Rees MP, of those matters identified by the Committee as in need of closer scrutiny. The *Independent Commission Against Corruption Amendment Act 2008*, assented to on 16 December 2008, amended s.112 and s.116(4) of the ICAC Act,[44] which were amendments supported by the Committee. As a result, the ICAC is able to make orders under s.112 to restrict the publication of written submissions, including submissions made by Counsel assisting the Commission. In addition, the amendment to s.116(4) allows for the commencement of proceedings for offences under ss.82 and 95 within three years of the commission of the alleged offence. As noted above, prior to the amendment such proceedings had to be commenced within six months.

1.52 In terms of the proposal to amend s.116(2) to remove its application to the offence of giving false or misleading evidence to the Commission, the Committee intends to seek the views of the current Commissioner on the adequacy of sentences for false of misleading evidence offences under s.87 of the Act. The Committee will conduct a review of the ICAC and ICAC Act as part of its future inquiry program, which will allow for in depth consideration of the implications of the Commission's proposal. The Committee will consider the issue in light of any data and information provided by relevant stakeholders, including the Attorney-General, Office of the Director of Public Prosecutions and the ICAC.

Implementation of corruption prevention recommendations

1.53 At the conclusion of its investigations, the Commission makes findings and corruption prevention recommendations that it determines to be necessary, based on the results of the investigation. The recommendations, which are made to affected agencies, detail modifications to practices and procedures that, in the Commission's view, are necessary to reduce the likelihood of corrupt conduct recurring.

1.54 Within three months of the investigation report being tabled, the Commission requests affected agencies to provide an implementation plan, detailing the actions, timeframes, and organisation or individual responsible for addressing each recommendation. Agencies are also requested to provide a 12 month interim report and a 24 month final report on their progress in implementing the recommendations. Agency implementation plans are published on the ICAC website, along with interim and final progress reports.

[43] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, pp. 22-31.
[44] *Independent Commission Against Corruption Amendment Act 2008*, Sch 1, cl 7 and cl 8.

RailCorp

1.55 During its previous annual report review, the Committee examined the implementation of ICAC's corruption prevention recommendations by agencies, with particular reference to RailCorp. Delays in RailCorp's implementation of corruption prevention recommendations became apparent during the review, with the Commissioner expressing dissatisfaction with RailCorp's response to the recommendations made as a result of Operation Quilla.[45] The delays were concerning, given the number of investigations the ICAC has conducted into corruption within RailCorp in recent years.

1.56 In answers to questions on notice as part of the current annual report review, the Commission advised that RailCorp had provided the outstanding corruption prevention progress report in relation to Operation Quilla. Of the 14 recommendations, nine had been fully implemented, three partially implemented, one was not agreed to and one had not yet been implemented.[46]

1.57 Dr Robert Waldersee, head of the Commission's Corruption Prevention, Education and Research section, commented that RailCorp appeared to be implementing changes and was responding to the Commission's recommendations more co-operatively than had previously been the case. Dr Waldersee also observed that it can take several years to overcome long-term, systemic corruption occurring within a large agency such as RailCorp:

> Without going into the details of the procurement transformation project and various other responses, I think it would be fair to say that, barring something we do not know about, we are getting a far more cooperative response than we have had in the past and a reported willingness to undertake some serious change. … Secondly, as the commissioner noted, it is a huge job to turn this around. It is a year since our recommendations. Nobody would expect you to change in a year an organisation of 15,000 people with this long-term history of problems. That is not a realistic time frame. If large amounts were devoted to the change you would still be looking at a 5-year to 10-year turnaround. It is a big issue. On the face of it, the short answer to your question is that they appear to be far more cooperative than they have been in the past.[47]

1.58 The Committee is encouraged by the Commission's evidence indicating that RailCorp's response to corruption prevention recommendations has improved in the current reporting period. The Committee acknowledges that changing the culture of an organisation to overcome entrenched corruption is a difficult and time-consuming process, as Dr Waldersee observed. The Committee intends to monitor RailCorp's response to recommendations arising out of the most recent ICAC investigation reports.

Recommendations to require agencies to respond

1.59 In considering the issue of agency implementation of corruption prevention recommendations, the Committee has recommended previously:

[45] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, p. 10.
[46] ICAC, Answers to questions on notice, question 17, pp.13-4. RailCorp did not agree to one of the recommendations, as it considered that it would have required the creation of another level of management. The recommendation that had not been implemented was due to have been implemented by July 2009.
[47] Dr Robert Waldersee, Executive Director, Corruption Prevention, Education and Research, ICAC, *Transcript of evidence*, 11 August 2009, p. 17.

- The practice of agencies and departments in giving implementation plans and progress reports to the Commission in response to recommendations from its investigations be made a statutory requirement under the ICAC Act.
- The Commission include in its annual report details of agencies and departments that fail to comply with this statutory requirement.[48]

1.60 To date, the Committee's recommendations have not been adopted. The Committee will monitor the implementation of corruption prevention recommendations by agencies and seek the view of the current Commissioner as to whether there are any ongoing problems in this regard. If so, the Committee may consider the issue as part of its review of the ICAC and the ICAC Act, due to commence shortly. It is relevant to note that final implementation reports received from agencies in 2008-2009 by the ICAC showed that 84% of recommendations were fully implemented by agencies.[49]

Part 5 referrals from the ICAC

1.61 During the previous annual report review, the Commission's referral powers under Part 5 of the ICAC Act were examined by the Committee as a possible process through which the ICAC could attempt to resolve situations where agency responses to corruption prevention recommendations were inadequate or delayed.

Relevant legislation

1.62 Section 53 of the Act provides for the Commission to refer a matter to a relevant authority for investigation or action, if it deems the referral to be warranted:

> (1) The Commission may, before or after investigating a matter (whether or not the investigation is completed, and whether or not the Commission has made any findings), refer the matter for investigation or other action to any person or body considered by the Commission to be appropriate in the circumstances.
>
> (2) The person or body to whom a matter is referred is called in this Part a **relevant authority**. (original emphasis)
>
> (3) The Commission may, when referring a matter, recommend what action should be taken by the relevant authority and the time within which it should be taken.
>
> (4) The Commission may communicate to the relevant authority any information which the Commission has obtained during the investigation of conduct connected with the matter.
>
> (5) The Commission shall not refer a matter to a person or body except after appropriate consultation with the person or body and after taking into consideration the views of the person or body. …

1.63 The Commission may require the relevant authority to submit a report on the referred matter, including action taken by the authority, within a period of time determined by the Commission.[50] In answers to questions on notice, the Commission outlined the factors it takes into consideration when assessing such reports:

- the nature and quality of the investigation and resultant report
- whether the report has addressed all relevant aspects, and

[48] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, p. 15.
[49] ICAC, *Annual Report 2008-2009*, Appendix 4, p. 146.
[50] ICAC Act, s.54

- the adequacy of any recommendations made to prevent recurrences, where either corrupt conduct or corruption risks had been identified.[51]

1.64 The Commission advised that the matter is then reconsidered by the Assessment Panel, which recommends what steps should be taken, and the agency is advised of the Panel's decision. If the Commission is not satisfied with the action taken by an agency in response to a referral, it can take further steps pursuant to s.55 of the Act.

1.65 Under s.55 of the Act, the Commission may take further action, including submitting a report to the relevant Minister, if it is not satisfied with the action taken by the authority following a referral pursuant to s.53:

> (1) If the Commission is not satisfied that a relevant authority has duly and properly taken action in connection with a matter referred under this Part, the Commission shall inform the relevant authority of the grounds of the Commission's dissatisfaction and shall give the relevant authority an opportunity to comment within a specified time.
>
> (2) If, after considering any comments received from the relevant authority within the specified time, the Commission is still not satisfied, the Commission may submit a report to the Minister for the relevant authority setting out the recommendation concerned and the grounds of dissatisfaction, together with any comments from the relevant authority and the Commission.
>
> (3) If, after considering any comments received from the Minister for the authority within 21 days after the report was submitted to that Minister under subsection (2), the Commission is still of the opinion that the recommendation should be adopted, the Commission may make a report as referred to in section 77.

1.66 The Commission noted that no further action was required in relation to any matters during 2007-2008.[52]

1.67 Section 77 provides that the Commission may furnish to the Presiding Officer of each House of Parliament a report setting out a recommendation pursuant to s.55, which the Commission considers should be adopted and the reasons for doing so.

Committee's previous report

1.68 In its previous review report, the Committee noted that the ICAC appeared to use its powers under Part 5 primarily to require agencies to investigate relatively serious corruption allegations, rather than to seek reports on the implementation of outstanding recommendations once the ICAC has concluded investigating a matter. In evidence to the Committee, the then Commissioner proposed that the ICAC should make greater use of the referral power under Part 5 of the Act to matters to the relevant Minister, who could in turn refer the matter to Parliament.[53]

1.69 In light of certain questions put to him at the hearing, the Commissioner sought the Committee's view on whether it supported the suggestion that agencies, which are unwilling to implement ICAC recommendations, should be referred to the Committee. The Committee addressed this question in its report, emphasising that while it would be appropriate, in keeping with its jurisdiction, for the Committee to examine ICAC's effectiveness and monitor implementation rates for ICAC recommendations, including

[51] ICAC, Answers to questions on notice, question 7(b), p. 3.
[52] ICAC, Answers to questions on notice, question 7(b), p. 3.
[53] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, p. 13; see transcript of evidence 9 July 2008, p.6..

related problem areas, the Committee clearly did not consider that its oversight role encompassed review of recommendations in specific cases. The Committee noted:

> While the Committee has a wide jurisdiction under the Act the statutory limitations on its jurisdiction at s64(2) are very clear. These provisions reflect the legislative intent that it would be inappropriate for the Committee to: endorse or express opinions on the merits, or otherwise, of specific ICAC decisions and recommendations; review or reinvestigate matters that ICAC has investigated and determined; or serve as an appeal mechanism or arbiter in respect of specific decisions and recommendations made by the ICAC.[54]

1.70 The Committee noted that legislative change would be needed to remove the limitations found at s.64(2) of the Act.

1.71 Consequently, the Committee supported the Commissioner's intention to make greater use of the referral provisions under Part 5 of the Act and recommended that the ICAC Act be amended to *require* agencies to provide implementation plans and progress reports to the ICAC in response to recommendations arising from its investigations. The Committee also recommended that the ICAC include details in its annual reports of agencies and departments that fail to comply with this statutory requirement.[55]

1.72 The Committee also indicated that it would examine avenues for the ICAC to take in cases of repeated failure to implement recommendations in relation to recurrent types of corruption, for example, by proposing an amendment modelled on s.27 of the *Ombudsman Act 1974*, in which the responsible Minister must make a statement to Parliament in response to a report to Parliament by the Ombudsman that sufficient steps have not been taken following an investigation. The Committee encouraged the ICAC to use its referral powers under Part 5 of the ICAC Act and undertook to review whether this process was effective in assisting the Commission to perform its functions.[56] This approach is consistent with the ICAC's status as an independent statutory body and the parliamentary oversight role performed by the Committee.

Current review

1.73 During the current review, the Commissioner told the Committee that the possibility of escalating Part 5 referrals to the Minister and the Parliament, pursuant to the ICAC Act, had worked to prompt agencies to respond to the Commission's referrals:

> **CHAIR:** … It appears as though you have formulated an escalation protocol when government departments do not follow or implement your recommendations. Are you suggesting that this Committee should have a role in that process as final measure? … If you are recommending changes and they are not being implemented you already have referral powers in your Act to take it to the Minister, et cetera. What role can this Committee play in that process?
>
> **Mr CRIPPS:** I suppose that this Committee would represent the Parliament in the last analysis. In the scheme of things the first complaint or submission is made to the head of the department, then to the Minister, and then to the Parliament if we do not get the proper response. …

[54] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, p. 15;
[55] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, p. 15.
[56] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, p. 16.

CHAIR: It is available to you.

Mr CRIPPS: It is available. We have threatened it.

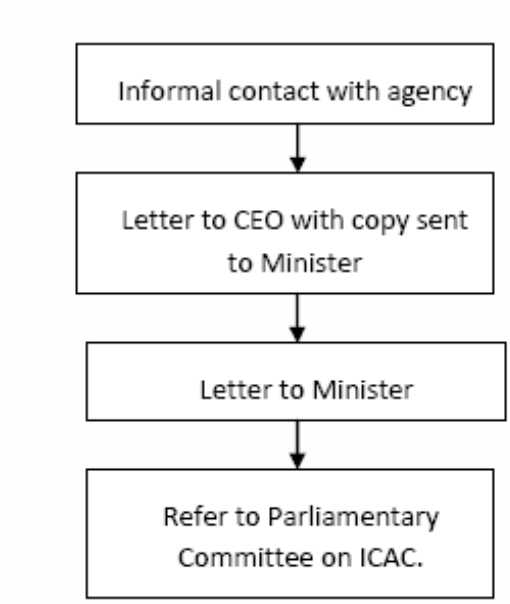
CHAIR: Has it worked?

Mr CRIPPS: Yes.[57]

1.74 As noted above, the Commission has developed an escalation protocol to deal with significant delays in agency reports in response to a referral under Part 5 of the Act. In answers to questions on notice, the Commission stated that the protocol 'shows the steps … that might be available to the Commission. It assumes the possibility of the Parliamentary Committee on the ICAC undertaking hearings on this subject and that appropriate options for publicising the failure of agencies to comply can be found.'[58]

1.75 The protocol is reproduced below:

ICAC's escalation protocol for Part 5 referrals[59]



Conclusion

1.76 The Committee has previously noted the Commissioner's evidence that the referral powers provided to the ICAC under Part 5 of the Act may be utilised to encourage agencies to respond to recommendations arising from ICAC investigations. The Commission has developed a protocol to outline the processes that it may follow after a matter has been referred to an agency. While the Commission has not found it necessary to escalate any matters to date, the adoption of an escalation protocol provides an indication of the Commission's intention to use the provisions of the Act to escalate matters, where it is deemed necessary to do so. Such an escalation would seek to ensure that agencies failing to respond to referrals from the Commission take responsibility for important matters to which ICAC has directed their attention. The Committee notes the Commissioner's evidence that the escalation

[57] The Hon Jerrold Cripps QC, Commissioner, ICAC, *Transcript of evidence*, 11 August 2009, p. 18.
[58] ICAC, Answers to questions on notice, question 18(a), p. 14.
[59] ICAC, Answers to questions on notice, question 18(b), p. 15.

provisions appear to have been effective in encouraging certain agencies to respond to the Commission's referrals and providing a way for the Commission to ensure its recommendations are adopted.

1.77 However, there are a number of matters concerning the Commission's protocol, which the Committee considers require further clarification, particularly, in respect of the final stage of the protocol, which involves referral to the Committee, and the way in which the protocol relates to existing statutory provisions and the role of the Committee.

1.78 In looking at the Parliament's intention regarding Part 5 referrals, the Committee notes that this part of the Act was aimed at establishing a mechanism for referral by ICAC of matters to other appropriate authorities to avoid duplication of investigative action with bodies such as the Ombudsman, State Crime Commission and National Crime Authority. During the second reading speech on the ICAC Bill in the Legislative Council, the then Minister for Police stated that:

> It is for this reason that the commission has been given wide powers to refer matters to other authorities for investigation. The commission may require an authority to report back to it on the results of its investigation. It is critical in the war against corruption for all law enforcement authorities to cooperate. It is expected that the commission will work with and not against other law enforcement agencies and indeed the commission is empowered to pass on information that may be of assistance to other law enforcement agencies.[60]

1.79 Consequently, it appears to the Committee that referrals under Part 5 of the ICAC Act were intended to be made in relation to the investigation of allegations, as distinct from following up recommendations arising from ICAC investigations. Nevertheless, the Committee supports as wide an interpretation of these provisions as is reasonable and considers that ICAC's referral of matters to relevant departments and authorities for investigation and/or action accords with the spirit of the legislation. However, it may be that Part 5 of the Act may not be the most appropriate mechanism for the ICAC to rely upon when seeking to ensure appropriate steps are taken in response to its investigations. Nevertheless, the Committee is supportive of an appropriate process being put in place so that the ICAC can operate effectively and has the means to pursue the adoption of its recommendations in the public interest.

1.80 It would be open to the Commission generally to raise with the Committee any matter relating to the exercise of its functions. However, the protocol as understood by the Committee, arose from evidence relating to the referral provisions found in Part 5 of the ICAC Act. The referral provisions involve a formal process and it is not clear to the Committee how the ICAC's escalation protocol relates to that process.

1.81 In the view of the Committee, the Act already provides a mechanism for the Commission to take further action where, within 21 days after submitting a report to the Minister and considering the Minister's comments, it remains of the opinion that a recommendation for action should be adopted (s.55(3)). That mechanism, pursuant to s.77 of the Act, enables the Commission to furnish the Presiding Officers of each House of Parliament with a report setting out the recommendation referred under s.55, which ICAC considers should be adopted and the reasons for its opinion. The Committee is concerned that the protocol adopted by the ICAC should not be

[60] NSW Legislative Council Hansard, 1 June 1988, p. 966.

confused with the formal process already available to the Commission under the Act, or that it might be regarded as a substitute for that process.

1.82 Any matter raised with the Committee by the ICAC would need to be considered on a case-by-case basis, in light of the legislation governing the Committee's operations. The Committee's functions under the ICAC Act include reporting to both Houses of Parliament with comments on any matter pertaining to the Commission, or to the exercise of its functions, to which the Committee considers that the attention of Parliament should be directed.[61] Circumstances may eventuate where the Committee considers that the repeated failure of an agency to respond to a referral from the ICAC and a subsequent referral of the matter to the relevant Minister, raise matters within the Committee's jurisdiction and may warrant the matter being drawn to the attention of Parliament. For instance, while the Committee is prevented from investigating a matter relating to particular conduct, or reconsidering a finding, recommendation, determination or decision regarding a particular investigation or complaint, an agency's failure to respond to a referral may be indicative of a significant systemic failure on which the Committee may wish to comment in the public interest. It may also indicate problems with the effectiveness of the Part 5 referral provisions or be relevant to the Committee's function to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, pursuant to s.64(1)(d) of the Act.

1.83 The Committee considers that the protocol needs to be properly explained and its operation clarified, otherwise, there is the potential for the protocol to be interpreted in such a way that may undermine the Committee's authority and its ability to respond appropriately, as needed, according to the circumstances of a matter. A lack of clarity around the protocol also may create the impression that the relevant Minister reports to the Committee rather than to the Parliament.

1.84 Given the importance of this issue to the effectiveness of the Commission and its relationship with the Committee, the Committee will revisit it during the forthcoming twenty year review of the Commission. In the interim, the Committee will also seek a response from the Commission and the Premier on the two recommendations made in its previous annual report review and will continue to monitor the Commission's use of Part 5 referrals, and the implementation of the recommendations arising from its investigations.

RECOMMENDATION 2: That the Premier respond to the Committee on its previous recommendation to amend the *Independent Commission Against Corruption Act 1988* to require agencies and departments to provide implementation plans and progress reports to the Commission in response to recommendations arising from its investigations.[62]

RECOMMENDATION 3: That the Independent Commission Against Corruption respond to the Committee on the previous recommendation that it include in its annual reports details

[61] ICAC Act, s.64(1(b)

[62] For previous report see Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, Recommendation 1, p. ix.

of those agencies and departments that fail to comply with the proposed statutory requirement.[63]

Prosecutions arising out of ICAC investigations

1.85 The Committee has previously examined delays in the prosecution of matters arising out of ICAC investigations and has identified measures such as a focus on assembling admissible evidence and improving liaison between the ICAC and the DPP during the investigation process, as measures to help improve turnaround times. Changes to the Memorandum of Understanding between the ICAC and the DPP have sought to expedite the prosecution of such matters, by outlining processes and timelines for the provision of advice and material by both agencies and providing for improved liaison between the agencies through regular meetings.[64]

1.86 During the previous annual report review, the ICAC indicated that improved co-ordination and planning during investigations had aided the timely preparation of briefs of evidence by the ICAC for provision to the DPP, while lawyers and investigators were also working together to establish the offences being investigated and to identify the evidence required for the prosecution of the offences in order to expedite provision of the brief to the DPP.[65]

1.87 During the current review, the Commission advised the Committee that a new memorandum had been agreed to, with the only amendment being to specify the period of time within which the ICAC will provide briefs of evidence to the DPP following final submissions being received during an investigation. The Deputy Commissioner told the Committee that both parties were satisfied with the MoU and that improved liaison had been particularly useful in reducing the amount of time taken to progress the prosecution of newer matters:

> Recently we signed a new memorandum of understanding. As we said in response to your questions on notice, the only real change to it is that it now specifies we will try to get briefs to the DPP within three months at the end of submissions on a public inquiry, which is our internal target. We have now formally put that into the MOU. Otherwise both parties considered that it had been working well and did not require amendment. In particular, I say from my point of view that the regular liaison meetings I have with the DPP officer have been very useful. Apart from anything else, both of us now realise the other competing priorities we have with our work, but we are trying our best to work around them.
>
> There has also been more interaction between DPP lawyers and lawyers at the ICAC to try to resolve issues about briefs without letting them drag on unnecessarily. Generally, the MOU has been a lot more successful with newer matters rather than with older matters. However, I think that is to be expected because the older matters started before it was being enforced. … with newer matters generally, if you average out the times, the times are down to a year or less, which compares favourably with the four or five years that things were taking in the past. I think the MOU is having an effect. We

[63] For previous report see Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, Recommendation 2, p. ix.
[64] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, pp. 2-6.
[65] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, p. 3.

> never expected it to work overnight, but it certainly has had a beneficial effect on newer matters that are going to the DPP's office.[66]

1.88 The Commission has previously acknowledged that timeframes specified in the MoU were not being observed. However, during the current review, the Commission indicated in answers to questions on notice that timeframes are usually observed:

> The timeframes for contact to be made between ICAC officers and ODPP officers after receipt of a brief are generally being complied with, at least as far as telephone contact being made within 2 weeks of receipt of the brief. It has not always been possible to arrange meetings within that timeframe but meetings are held as soon as reasonably possible.[67]

1.89 The Committee notes that the Commission's request for additional recurrent funding highlighted the impact of inadequate staff numbers in the Investigation Division on resource intensive, time consuming tasks such as brief preparation:

> ... there is an impact on investigations as investigators are required to prepare criminal briefs, conduct inquiries on behalf of the DPP and appear, when required, in court in relation to these matters. This is to the detriment of time available for active investigations. It is also important to understand a "brief" may vary from 5 statements to 250 statements and other documents depending on the complexity of the matter. These statements have to be prepared in the accepted format thus requiring investigators to spend time with the various witnesses to get them to adopt the statement. This takes considerable time to achieve.[68]

Office of the Director of Public Prosecution's view

1.90 As part of its inquiry into proposed amendments to s.37 of the ICAC Act, the Committee heard from the Managing Lawyer of Group 6 at the DPP, Ms Marianne Carey. Group 6 is responsible for matters arising from ICAC investigations, and provides advice to the ICAC on whether the evidence provided in briefs of evidence is sufficient to commence a criminal prosecution. In evidence to the Committee, Ms Carey made the following points in relation to ICAC matters:

- Recent MoU amendments and improved co-operation between the DPP and ICAC have led to improvements in the provision of briefs by the Commission and the timeliness of the DPP's responses. However, some problems continue to arise in relation to the ICAC's briefs.[69]
- While the quality of the briefs provided by the Commission has improved, they do not resemble briefs compiled by the police. A relevant factor is the size of many ICAC briefs: 'To be fair … their briefs can be as big as 20 volumes. Between 10 and 20 is not unusual. … They are not compiled in the same way, although it is improving …'[70] The Commission has employed a former police officer, who is involved in assisting with briefs of evidence: '… I believe his role is to assemble the briefs and assist investigators and lawyers in the assembling of the briefs so that they are in a better state, they are better organised and they better comply.'[71]

[66] Theresa Hamilton, Deputy Commissioner, ICAC, *Transcript of evidence*, 11 August 2009, p. 18.
[67] ICAC, Answers to questions on notice, question 36(a), p. 20.
[68] Tabled document, *ICAC request for additional recurrent funding*, p. 5, reproduced as Appendix 3.
[69] Ms Marianne Carey, Managing Lawyer, Group 6, ODPP, *Transcript of evidence*, 4 May 2009, p. 31.
[70] Ms Marianne Carey, Managing Lawyer, Group 6, ODPP, *Transcript of evidence*, 4 May 2009, p. 37.
[71] Ms Marianne Carey, Managing Lawyer, Group 6, ODPP, *Transcript of evidence*, 4 May 2009, p. 38.

- Admissibility of evidence provided by the ICAC is a significant factor in causing delays and necessitating requisitions from the DPP: 'the majority of the requisitions we still issue are requests for evidence in admissible form.'[72]
- The Commission should focus more on assembling admissible evidence during investigations, to prevent delays in the provision of the brief and to overcome difficulties that may arise with the Commission using its coercive powers to gather evidence once an investigation has concluded: 'if the ICAC's mind is turned to gathering admissible evidence … there may be no need, once the reference is concluded, for the DPP, for example, to requisition material in the search.'[73]
- Lack of resources within Group 6, and within the Office of the DPP generally, impact on the DPP's ability to provide advice to the ICAC. Group 6 is also responsible for prosecutions for the PIC, NSW Police Force and the Coroner's Court: 'we have lifted our performance in the provision of advice time wise. The only way we have been able to do that is for my group to work extremely hard. They work unpaid overtime, they work on weekends and they work out of hours.'[74]
- Lack of resources within the Commission itself can also contribute to delays, as the DPP's requests in relation to fraud matters may require expert analysis of business records or forensic accounting.[75]

Conclusion

1.91 The Committee is supportive of the continued efforts of the Commission and the DPP to improve the management of matters arising out of ICAC investigations. Efforts have been made by the Commission to focus on the assembling of admissible evidence during investigations to speed up the provision of briefs to the DPP, while both agencies have sought to institute regular meetings to discuss the progress of matters.

1.92 It is clear to the Committee that both the DPP and ICAC are aware of the effect that delays may have in hindering the successful prosecution of affected persons against whom the Commission has made corrupt conduct findings. The Deputy ICAC Commissioner has acknowledged the consequences of lengthy delays, both in terms of the result of a prosecution and the sentence handed down at its conclusion:

> … I think the timelines have a big effect on whether you do get a successful result, both in terms of witnesses being available, the evidence being fresh, and in particular on sentence. I think one reason that corruption matters are getting relatively light sentences at the moment is that people are being sentenced many years after the offence has occurred and courts are traditionally reluctant to sentence people to imprisonment for things that happened many years ago. The timelines do not just exist in isolation; they actually affect the result of the prosecution.[76]

1.93 During its recent annual report reviews, the Committee has heard evidence that many factors can contribute to delays in prosecutions. While some factors, such as staffing and resources, may not be able to be resolved through better planning, both parties are clearly seeking to resolve issues, and better communication has gone a

[72] Ms Marianne Carey, Managing Lawyer, Group 6, ODPP, *Transcript of evidence*, 4 May 2009, pp. 33-4.
[73] Ms Marianne Carey, Managing Lawyer, Group 6, ODPP, *Transcript of evidence*, 4 May 2009, pp. 31, 34, 36.
[74] Ms Marianne Carey, Managing Lawyer, Group 6, ODPP, *Transcript of evidence*, 4 May 2009, pp. 39-40.
[75] Ms Marianne Carey, Managing Lawyer, Group 6, ODPP, *Transcript of evidence*, 4 May 2009, pp. 31-2.
[76] Committee on the ICAC, *Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption*, report 3/54, October 2008, p. 4.

great way to resolving those matters that can be dealt with through improvements to internal processes and liaison. The issue of adequate resources for both the ICAC and DPP is clearly having an impact on the timely provision of briefs by the Commission, and advice in response by the DPP.

1.94 The Committee notes that evidence being gathered in an admissible form throughout an ICAC investigation is an important factor in preventing delays, both in terms of the provision of the brief and minimising subsequent requisitions from the DPP. The DPP's Managing Lawyer of Group 6 indicated that the Commission's employment of a former police officer may have contributed to an improvement in the quality of briefs. The Committee notes that, if funding for extra staff were provided, the Commission may be in a position to dedicate additional staff members to liaising with the DPP in relation to the quality and form of briefs.

1.95 While the resourcing of the DPP is outside the Committee's jurisdiction, the Committee hopes that its support for the Commission's funding request will assist in ensuring that resources are provided to the ICAC's Investigation Division, to enable it to allocate adequate staff to assemble evidence in admissible form during investigations, and to compile briefs of evidence for the DPP shortly following the conclusion of a public inquiry. It is clear that these preliminary stages of the prosecution process are important in ensuring a timely and successful conclusion to prosecutions arising from ICAC investigations. The Committee also encourages the DPP and ICAC to continue their regular meetings, as the improved liaison between the agencies has demonstrably assisted with resolving issues in relation to outstanding matters and has improved understanding of competing priorities.

End of the Hon Jerrold Cripps QC's term as Commissioner

1.96 As the Committee has noted, the term of office for the Hon Jerrold Cripps QC concluded in November 2009. The former Commissioner presided over several significant, high-profile inquiries during his term. The 2008-2009 ICAC Annual Report notes that, during the past five years, the Commission conducted 50 investigations, holding 30 public inquiries and 211 compulsory examinations, which resulted in 354 corruption prevention recommendations. In terms of corruption prevention, corruption prevention advice was provided on at least 1,400 occasions during the five year period.[77]

1.97 The Committee wishes to thank the Hon Jerrold Cripps QC for his work during his term as Commissioner. During the Committee's final hearing with the former Commissioner, the Chair of the Committee commended him on his professionalism and dedication in performing what can be a difficult and demanding role:

> … I congratulate you, and indirectly your executive staff and all the staff at the Independent Commission Against Corruption, on the excellent professional job that you have done in the service of the people of New South Wales in your role as commissioner. I am bold enough to speak on behalf of the Committee members to say that the ICAC operates in a very professional and excellent manner. A previous inspector commented a few times that the commission operates extremely well under very difficult circumstances, and that encapsulates how it works with the number of inquires and complaints that you receive, and in assessing them. It is an enormously difficult task. Since I have been a member of this Committee, and as its Chair, I have enjoyed my relationship with you and your helpful and professional staff. I take this

[77] ICAC, *Annual Report 2008-2009*, p. 5.

> opportunity to wish you the very best for your future after your appointment ceases. … I thank you, once again, for doing an excellent job.[78]

1.98 The Committee also welcomes the Hon David Ipp QC into the office of Commissioner and looks forward to meeting with him in 2010.

[78] Mr Frank Terenzini MP, Chair, *Transcript of evidence*, 11 August 2009, p. 21.

Appendix 1 – Questions on notice

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

QUESTIONS ON NOTICE

ICAC ANNUAL REPORT 2007-2008

ICAC ANNUAL REPORT 2007-2008

ASSESSING MATTERS

1. The 2007-2008 Annual Report indicates (p.19) that 41% of the complaints the Commission received from the public related to local government, up from 38% in 2006-2007 and 35% in 2005-2006. Of these complaints 574 related to building and development applications and rezoning, compared with approximately 180 in 2006-2007. Does the Commission consider this increase to be significant and are there any implications for the Commission's operations?

There has been a slight trend upwards in the last few years in relation to the number of matters concerning local government. However the Commission does not consider that this is of significance. As noted in the annual report (pp. 19-20), it has been the Commission's experience that the over-representation of local government in s.10 complaints received is due, primarily, to the nature of interaction people have with local government and the personal interest many take in decisions at that level. The publicity surrounding Wollongong Council in the wake of Operation Atlas also generated a number of complaints about that agency. In addition, several other local councils such as Shellharbour and Port Macquarie-Hastings attracted publicity at a local level in response to Department of Local Government investigations, which had a tendency to see an increase in complaints about those agencies.

2. The Annual Report states that the Commission has set up a working group to review the way it categorises the complaints and information it receives (pp. 20 & 33), as the broad categories in use may not be useful in understanding what the complaints involve. Please update the Committee on the progress of the review.

The review has been completed. A cross-divisional working group was formed to revise the categories currently used in the ICS database, with the intention that the revised categories would be incorporated into the new MOCCA database, due to go live in August 2009. Problems had been identified with the categories being used, in that they were in some instances vague or unclear (for example, general terms like "collusion"). Furthermore Corruption Prevention Education and Research staff found them difficult to use to perform background research (e.g. for projects or training).

- The working group took the following steps:
- initial development of categories
- revision following cross-divisional consultation
- revision following more detailed consultation with Assessment officers

- revision following a trial of categories in which four Assessment officers used them to assess 20 recent Commission matters.

This approach resulted in a two-tiered system where both function areas and corrupt conduct are classified into general "areas" and each area or type of conduct is then divided into a set of more specific "types". The new general and specific categories are attached in Annexure A.

3. In 2007-2008 the Commission received 282 protected disclosures, an increase of 45% from 2006-2007 when it received 194 protected disclosures (p.22 and p.19 *ICAC Annual report 2006-2007*). However, in terms of their proportion of complaints overall, protected disclosures only rose slightly from 9% to 10.4%, owing to an overall increase in complaints. The number of protected disclosures has in fact remained static at 9-10.7% for the past three years (p.18). Does the Commission have an explanation as to why the number of protected disclosures remained reasonably static for the past three years?

There has been a steady rise in the overall number of complaints and reports for the last three years, including in the number of protected disclosures. While the proportion of protected disclosures, relative to all other matters, has remained reasonably static, the Commission does not consider this to be statistically significant.

4. The number of protected disclosures relating to local government increased from 27% to 32% of disclosures received, while for transport, ports and waterways the figure more than doubled, from 8% to 14% of disclosures received (p.23 and p.19 of *ICAC Annual report 2006-2007*). Were these respective increases related to Operation Atlas (the investigation of allegations into corrupt conduct in Wollongong Council) and Operation Monto (the investigation into allegations of fraud and bribery in RailCorp)?

It is likely that this is the case. A high-profile public inquiry such as those arising out of Operations Atlas and Monto, does, generally, result in a spike in complaints and reports, particularly when it is perceived by complainants that their allegations mirror those under consideration at a public inquiry.

5. Of the 282 protected disclosures received in 2007-2008, the Commission took no further action in relation to 118 (42%), and referred a further 84 (29%) to the agency for information (p.32). Is the Commission aware of the percentage of these referrals to agencies that resulted in agencies taking action, such as disciplinary action, against the person or persons adversely named? In the Commission's view, what conclusions can be drawn from the fact that such a high proportion of disclosures warrant no further action?

Currently the Commission does not require an agency to advise of outcomes when a matter is referred under s.19 of the Act for that agency's information. As commented upon in question 6 below, many matters relate to workplace grievances, which are generally matters that do not involve serious or systemic corrupt conduct. They also often concern matters which the agency involved is better placed than the Commission to address.

6. The overwhelming majority of protected disclosures concern workplace issues such as employment practices (211 matters) and staff management (71 matters). Most frequently the alleged misconduct relates to favouritism/nepotism (99 matters), breach of policy or procedure (83 matters) and harassment/victimisation/discrimination (51). (p. 23) What, in the Commission's view, is the significance of these figures? Do they indicate that protected disclosures are often primarily concerned with workplace grievances?

Yes, as noted in the response to question 5, many protected disclosures relate to workplace grievances.

7. In 2007-2008 the Commission referred 26 matters to agencies, pursuant to ss. 53 and 54 of the ICAC Act, which was double the number referred in 2006-2007 (p 30). The Commission notes that this is in line with s 12A of the Act, which provides that ICAC should take into account the responsibility and role that agencies have in preventing corruption.

a. The Act provides that the Commission may require an agency to submit a report detailing the action it has taken in relation to a matter referred under Part 5 of the Act. Is it the Commission's practice to require agencies to report back following a s 53 referral?

Yes. The Commission is required, by virtue of s.53(5) of the Act to first consult with the relevant person or body prior to any referral. Consultation prior to referral always takes place. In the 2007-08 year all agencies with which the Commission consulted agreed to accept such a referral and to report back to the Commission under s.54.

b. How does the Commission monitor agency responses to s53 referrals?

Assessment staff are responsible for assessing and reporting on s.54 reports which arise out of s.53 referrals. Assessments reports on a monthly basis to the Commission's Strategic Investigation Group on the progress of s.53 referrals. Once a due date by which the agency will provide its s.54 report has been agreed to, any request for an extension of time is to be made by the agency to the Deputy Commissioner in writing for her consideration. Once a report has been received under s.54 of the Act, the report is assessed, having regard to:

- the nature and quality of the investigation and resultant report
- whether the report has addressed all relevant aspects, and
- the adequacy of any recommendations made to prevent recurrences, where either corrupt conduct or corruption risks had been identified.
- The matter is then reconsidered by the Assessment Panel with recommendations made as to the next steps. The agency is then advised of the Panel's decision.
- If the Commission is not satisfied with the action taken by the agency to which a matter is referred it can take further steps pursuant to s.55. No such action was required in the 2007-08 year.

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - ICAC ANNUAL REPORT 2007-2008

INVESTIGATING CORRUPTION

8. The Commission held public inquiries over 51 days and 70 compulsory examinations in 2007-2008, compared with 24 and 49 inquiries and examinations respectively the previous reporting year (p.36). This increase constitutes a significant increase in the Commission's use of its statutory powers. The Annual Report notes that, in the year ahead, the Commission will seek to ensure that investigative activities are flexible enough to meet challenges arising out of an increase in the use of statutory powers (p.51).

a. What is the extent of the further increase expected by the ICAC in relation to the use of its statutory powers over the coming year?

The use of statutory powers is dependent on the number and nature of investigations conducted by the Commission. It is difficult to anticipate with any precision what future investigations the Commission may need to conduct and therefore difficult to anticipate whether there is likely to be an increase in the use of statutory powers over the course of any following year.

In the period 1 July 2008 to 30 June 2009 the Commission conducted 28 days of public inquiries and 33 compulsory examinations. This level of activity is similar to that in 2005-06 and 2006-07. The relatively high number of public inquiry days and compulsory examinations in 2007-08 is a result of a spike in investigative activity in that period predominantly as a result of investigations involving RailCorp and Wollongong City Council. The Commission's experience in 2007-08 was that the Commission's investigative procedures and management were sufficiently flexible to accommodate the increased level of investigative activity, although for some periods functions such as brief preparation or preliminary investigations had to be delayed to meet the demand.

b. What do the strategies used by the Commission to manage such increases involve?

The Commission actively monitors investigation activity through the Strategic Investigations Group (SIG). The SIG comprises the Commissioner, Deputy Commissioner, and Executive Directors of Investigations, Legal, and Corruption Prevention Education & Research. The SIG meets regularly to consider reports on all current investigations, preparation of investigation reports for publication and preparation of prosecution briefs of evidence. Part of its role is to ensure that investigations are prioritised according to the Commission's goals and that resources are efficiently deployed. If necessary, resources are re-allocated between investigations. This sometimes involves deciding to temporarily suspend or reduce work on some investigations and prosecution brief preparation in order to ensure that other investigations are appropriately resourced.

9. The Annual Report states that, in the year ahead, the Commission will ensure that investigative activities comply with legislative and internal requirements (p 51).

a. What internal requirements does the Commission have in place for its investigative activities?

Commission officers are required to comply with the procedures set out in the Commission's Operations Manual in relation to the exercise of the Commission's coercive powers. The Operations Manual addresses relevant legislative and internal procedural requirements.

A Commission lawyer is assigned to each investigation team. Part of that lawyer's role is to ensure investigative activity complies with relevant legislative and procedural requirements. Any application for the exercise of coercive powers is considered by the team lawyer and reviewed by the Executive Director, Legal or his delegate.

In addition, all investigations are oversighted by and regularly reported to the Commission's Strategic Investigations Group which comprises the Commissioner, Deputy Commissioner, and Executive Directors of Investigations, Legal and Corruption Prevention, Education & Research.

Training on and communication of relevant legislative requirements and changes is also an element in ensuring Commission officers are kept abreast of legislative changes and continue to exercise their official functions in accordance with relevant legislative and internal requirements.

Further details on the Commission's internal compliance and accountability framework are set out in chapter 5 of the 2007-08 annual report.

b. What strategies has the Commission used to meet legislative and internal requirements when there are substantial increases in investigative activity?

The Commission's existing internal compliance and accountability framework (as set out in chapter 5 of the 2007-08 annual report) has proven sufficiently robust to meet the increases in investigative activity experienced in 2007-08.

PREVENTING CORRUPTION

10. The Annual Report states that, in the year ahead, the Commission plans to trial a proactive corruption prevention approach, focusing on high-risk functions in certain areas (p.69). Please update the Committee on the progress of the trial.

Taskforces were established to trial a proactive corruption prevention approach. A multidisciplinary group of staff drawn from across the Corruption Prevention, Education and Research Division utilised their combined skills and capabilities to focus effort in an area of the public sector that was recognised as being of high risk or of particular vulnerability to corruption. For the 2008-09 year the Prevention

Management Group (PMG) approved the Division's choice of two focus areas: Procurement, Outsourcing and Contracting and Local Government (Council) Planning.

Procurement, Outsourcing and Contracting taskforce

The Procurement, Outsourcing and Contracting taskforce is currently examining the corruption risks associated with public sector procurement in NSW. The goal of the taskforce is to determine current and emerging risks of corruption that are likely to affect public sector agencies and the support that those agencies may need to make their procurement practices more resistant to corruption.

The work of this taskforce has been divided into three segments: understanding and mapping the regulatory environment; gathering information about identified corruption risks; and identifying preventative action. The taskforce is approximately half way through this program of work having mapped the regulatory framework, conducted focus groups with public officials responsible for procurement and distributed a survey on procurement practices to 300 agencies. Outputs will include publishing a discussion paper on the risks of corruption in public procurement.

Local government development taskforce

The ICAC also selected local government development as a high-risk function appropriate for its new proactive strategy.

The ICAC's strategy focussed on the corruption prevention lessons arising from a number of recent local government investigations, including its October 2008 *Report on an investigation into corruption allegations affecting Wollongong City Council*. This has chiefly involved the delivery of a variety of local development themed speeches, papers, training sessions and seminars for local government practitioners. To date, this has involved delivering 30 customised sessions for local government practitioners in front of 950 attendees (including Mayors, Councillors, General Managers and other local government planning and management staff). In addition to covering the high risk area of planning, these sessions have also covered recruitment, conflicts of interest and managerial discretion.

The ICAC is also in the process of developing an internal audit tool to enable local councils to self-assess their vulnerability to corruption risks in their planning function.

In addition, the ICAC is developing new website content to provide information including election donation disclosures, registers recording how councillors vote on developments and SEPP 1 registers that are required to be published on council websites.

The taskforce model will be evaluated as a method of operating. To date it has proved to be well-suited to this kind of exploratory work as it allows for a problem to be approached from different perspectives using a range of skills. The team approach also provides for the flexible application of resources, the capacity to maintain momentum – if one member is busy others can take over – and professional development of members. The focus on a particular area of risk is also a useful way to raise awareness of an issue throughout the public sector.

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11. The Corruption Prevention, Education and Research Division gave 57 training sessions and 37 speaking presentations in 2007-2008 (p.60), an increase of 46% and 19% respectively on the previous year, in spite of a slight decrease in staff.[1] Is the increase in training sessions and speaking presentations a response to demand from agencies?

Training sessions

The increase in training sessions was due to a combination of factors:

The introduction of a new service offering training sessions twice each calendar year. These training sessions are offered to individuals rather than agencies and are provided at a venue arranged by the ICAC. These sessions are proactively marketed by the ICAC across the public sector. This is in contrast to the agency requested training which is provided to the agency at their request, within their venue, to staff of that agency. The new calendar training program aims to meet the needs of agencies that are too small in either staff numbers or budget to have training provided in-house.
A number of additional agency requests were generated as agencies decided to run the training in-house after initially expressing interest in the calendar based program.
A number of training workshops were also delivered in October 2007 as part of the inaugural Australian Public Sector Anti-Corruption Conference.

Speaking sessions

The increase in speaking sessions was due to the number of presentations by ICAC staff delivered at the APSAC conference in October 2007.

12. The Annual Report notes that resources for education and training were not increased in 2007-2008 and that the main challenge for the Division is to maximise the impact of its corruption prevention work, using limited resources (pp. 60 & 69). During the Committee's review of the Commission's 2006-2007 Annual Report, Dr Waldersee told the Committee that, in his view, 'we probably have not achieved the maximum impact out of the resources we already have' and that the Commission would be using a more focussed approach to corruption prevention to maximise its resources.[2] What strategies has the Commission used to maximise the impact of its corruption prevention work, given its limited resources?

Resources

In 2008-09 we reviewed our core activities and streamlined our approach to a number of work functions, including training systems. Efficiencies have been achieved by eliminating the practice of having a

[1] The Annual Report states that in 2006-2007 the average number of staff in the CPER Division was 24.3, while in 2007-2008 it was 23.2: ICAC, *Annual Report 2007-2008*, p.88.

[2] Committee on the ICAC, Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption, Report 3/54, October 2008, p.89.

corruption prevention officer co-present with learning and development officers. This has enhanced divisional frontline corruption prevention capacity and enabled an increase in face to face training.

Focus

The Commission has adopted a proactive corruption prevention approach focusing on those areas of highest risk and with the potential for greatest impact. The Commission has targeted senior level public servants and focused on matters of policy and legislation.

The Commission has taken an active interest in ensuring that all parties involved with the implementation of the federal government stimulus package are aware of and take action to deal with the heightened corruption risks. This has involved the adoption of a high visibility deterrence approach.

As stated above, taskforces in the areas of planning and procurement were established to focus effort in areas of the public sector that were recognised as being of high risk and vulnerable to corruption.

IMPLEMENTATION OF ICAC'S CORRUPTION PREVENTION RECOMMENDATIONS

13. According to the Annual Report, the Commission considers a corruption prevention recommendation to have been addressed if it has been implemented, action is being taken to implement it, or the agency has considered the recommendation and found an alternative way of addressing the issue. However a note that appears below tables 44 and 45 states that 'addressed includes fully implemented, partially implemented or not agreed' (pp. 147-148).

a. What is the significance of the distinction between these two ways of defining whether recommendations are considered to have been 'addressed'?

These descriptions refer to the same three circumstances. The footnote text is an abbreviated way of referring to the same situations, that is:

Footnote text:	Paragraph text:
Fully implemented	Has been implemented
Partially implemented	Action is being taken to implement
Not agreed	Agency has considered the recommendation and found an alternative way of addressing the issue.

Depending on the circumstances 'not agreed' may also include situations in which the agency has considered a recommendation and found it to be incapable of implementation or unnecessary.

Any of these situations could occur as the result of changes in the agency's structure, functions, staffing, resources or operating environment in the time since the corrupt conduct occurred. In some cases agencies take action to deal with the structural arrangements that produced the

corruption risk after an investigation exposes the corrupt conduct and before they receive the recommendations. In others completely unrelated management decisions or events may have an effect on the agency's operating environment.

b. Is it a requirement for an agency that disagrees with a recommendation to identify an alternative way of addressing the issue?

It is rare for agencies to disagree with recommendations and it has not been necessary to formulate a 'requirement' of this kind. If an agency's response to recommendations appears not to address a particular recommendation the Commission's practice has been to seek clarification about the way the agency intends to implement it. This approach allows the Commission to assess the agency's reasons for not agreeing with a recommendation and respond in a way that facilitates implementation.

c. Please provide the Committee with a table indicating 12 and 24 month progress reports received to date for the investigations listed in tables 44 and 45 (Appendix 4), with recommendations broken down into the number that have been implemented, partially implemented and not implemented.

All of the agencies in those tables have now provided 24 month (final) reports. See attached table.

Agency	Report	Received	Recommendations			
			Total	Implemented	Partially implemented	Not implemented
Investigation into safety certification and the operations of the WorkCover NSW licensing unit						
WorkCover NSW	Final	Dec 2007	19	19	-	-
Investigation into schemes to fraudulently obtain building licenses						
TAFE	Final	Feb 2008	8	8	-	-
VETAB	Final	Feb 2008	7	7	-	-
Office of Fair Trading	Final	Feb 2008	8	4	-	4*
Minister for Education	Final	Feb 2008	1	1	-	-
Investigation into the conduct of an officer of the Local Court Registry in Penrith						
Attorney-General's Department	Final	Feb 2008	12	4	6	2**
Report on an investigation and systems review of corruption risks associated with HSC take-home assessment tasks						

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Board of Studies	Final	May 2008	14	14	-	-
Department of Education	Final	May 2008	5	5	-	-
Minister of Education	Final	May 2008	1	1	-	-
Investigation into defrauding the RTA and RailCorp in relation to provision of traffic management services						
RTA	Final	Feb 2009	16	16	-	-
RailCorp	Final	April 2009	14	9	3	2***
Investigation into the sale of surplus public housing properties						
Department of Housing	Final	Nov 2008	4	3	-	1****

* *These recommendations were rendered obsolete as a result of the agency removing the practice that created the greatest corruption risk.*

** *Implementation of these recommendations is not feasible in the agency's current operating environment.*

*** *One of these recommendations was not agreed to by the agency and the other is not yet implemented - Recommendation 30 (classified as "not agreed") recommended that RailCorp consider placing the Alternative Transport Unit (ATU) and other such small units that report directly to a general manager, under the supervision of a branch manager (answerable to a division general manager). RailCorp considered the recommendation and reported that as the ATU reports to the General Manager, Standards and Passenger Information implementing the recommendation would create another level of management. RailCorp does not intend to create another level of management. However a separate contract administration position has been tasked with checking contracts and ensuring processes are in place to monitor performance.*

**** *This recommendation is not capable of implementation until 2010 when the agency will have completed a major ICT rollout.*

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AGENCY PROGRESS REPORTS

14. The Annual Report states that in 2007-2008 two agencies did not provide the Commission with progress reports on the implementation of recommendations, in spite of repeated requests (p 58). Which agencies failed to provide the Commission with progress reports and have they been provided since the publication of the Annual Report?

The two agencies that had not provided the Commission with progress reports in 2007-2008 were:

- the Attorney General's Department (final report) regarding the Report on investigation into the conduct of an officer of the Local Court registry at Penrith
- RailCorp NSW (12 month progress report) regarding the Report on investigation into defrauding the RTA and RailCorp in relation to provision of traffic management services.

The outstanding reports from RailCorp and the Attorney General's Department were subsequently provided.

15. In answers to questions on notice for the Committee's review of the Commission's 2006-2007 Annual Report, the Commission indicated that the Department of Corrective Services had implemented 54% of the corruption prevention recommendations made in relation to Operation Inca, with 75% due to have been implemented by 31 August 2008.[3] What percentage of the recommendations have been implemented to date? Did the Department disagree with any recommendations?

The final report from the Department of Corrective Services indicated that of the 16 recommendations made by the ICAC, 82% had been implemented. This included 69% that had been fully implemented, and 13% partially implemented.

Three recommendations had not been implemented, because they had been addressed differently or were made redundant because of other changes to procedures resulting from the implementation of other recommendations.

16. The Commission's 2007-2008 Annual Report stated that the Attorney General's Department had addressed 83% of the Commission's corruption prevention recommendations arising out of Operation Hunter, with the final 24 month progress report on implementation of the recommendations having been due in February 2008 (p 147).

a. Has the Commission received the Department's final progress report?

Yes

[3] ICAC, Answers to questions on notice, 30 June 2008, question 30(c), pp. 21-22.

b. If so, what percentage of the recommendations have now been addressed by the Department?

Ten of the 12 recommendations were implemented or in progress at the time of the final report (83% of the recommendations).

c. Did the Department disagree with any recommendations?

Two recommendations (3 and 4) were not implemented.

The Department did not 'disagree' with the recommendations but reported that their implementation would not be feasible. They both relate to a new information management system, JusticeLink, that the Department was developing at the time of the investigation but was not finalised by the time the recommendations were made.

They were as follows:

Recommendation 3:

That the Attorney General's Department considers modifying the local court information databases to record the following information about accesses as an additional accountability measure:

- whether information was printed out
- whether information was copied/pasted.

Response: As JusticeLink is an Internet Explorer browser-based system, the browser can be used to print information or copy and paste information. It is not possible to track what operations are performed at the browser level. It is not possible to implement the recommendation in relation to the legacy systems.

Recommendation 4: That the Attorney-General's Department modifies the local court information databases to record a 'reason for access' when information is viewed on the system.

Response: This recommendation has been considered in relation to the JusticeLink product. The modification of JusticeLink to record a 'reason for access' when information is viewed on the system was considered, however, the implementation of this recommendation is not planned:

If the 'reason for access' was implemented, most staff would enter 'enquiry' which would be valid. It would be difficult to determine if it was a valid enquiry or not. It would not be possible to identify unauthorised access.

Operational efficiency – it is anticipated that the 'reason for access' would need to be filled out at least 40,000 times per day. The operational delay that this would cause is unacceptable.

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17. The Annual Report also indicated that RailCorp had not addressed any of the Commission's corruption prevention recommendations arising out of Operation Quilla, with the 12 month progress report having been due in February 2008, while the RTA had addressed all of the Commission's recommendations in relation to the same investigation (p 148).

a. Has the Commission received RailCorp's 12 month progress report?

Yes.

b. If so:

i. Did RailCorp provide the Commission with an explanation for the delay in providing the progress report?

No.

ii. What percentage of the recommendations have been addressed by RailCorp?

100% have been addressed – the breakdown is as follows:

- 64% fully implemented (9 out of 14 recommendations)
- 21% partially implemented (3 recommendations)
- 7% not agreed (1 recommendation)
- 7% not yet implemented (1 recommendation)

Recommendation 30 (classified as "not agreed") recommended that RailCorp consider placing the Alternative Transport Unit (ATU) and other such small units that report directly to a general manager, under the supervision of a branch manager (answerable to a division general manager). RailCorp considered the recommendation and reported that as the ATU reports to the General Manager, Standards and Passenger Information implementing the recommendation would create another level of management. RailCorp does not intend to create another level of management. However a separate contract administration position has been tasked with checking contracts and ensuring processes are in place to monitor performance.

Recommendation 18 (classified as "not yet implemented") was that RailCorp introduces a system whereby invoices are provided to the unit involved in procuring goods and services as an additional check on the accuracy of the invoice. At the date of the annual report it was described as due for implementation in July 2009.

Recommendation 14 (classified as "partially implemented") was for training to all staff with responsibilities for procurement. At the date of the annual report training had commenced and was planned to continue over several months.

Recommendation 29 (classified as "partially implemented") recommended that RailCorp ensures its performance management system is properly implemented among all staff, with

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ATU staff being a priority. At the date of the annual report implementation had begun and was to continue progressively through the organisation.

c. If not:

i. Why has RailCorp not supplied the progress report?

N/A

ii. Does the Commission have any comments regarding RailCorp's response to its recommendations?

N/A

PART 5 REFERRALS

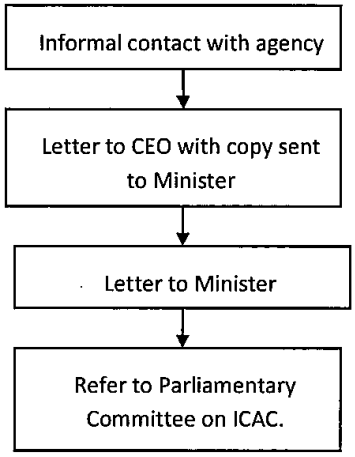
18. As part of its review of the Commission's 2006-2007 Annual Report, the Committee encouraged the Commission, in pursuing problems with the implementation of corruption prevention recommendations, to make greater use of its powers under Part 5 and s 77 of the ICAC Act, which provide for it to refer matters to agencies, and report to the Minister and ultimately the Parliament.[4] In its Annual Report, the Commission states that it is considering reporting certain uncooperative agencies to the responsible Minister, or to the Committee (p.58).

a. Has the Commission referred or reported any matters, pursuant to Part 5 and s 77 of the Act?

An escalation protocol (see flowchart below) was approved by the Executive. To date it has not been necessary to make use of the protocol as there have not been significant delays in receiving agency reports.

Flowchart 1: Escalation protocol shows the steps of escalation that might be available to the Commission. It assumes the possibility of the Parliamentary Committee on the ICAC undertaking hearings on this subject and that appropriate options for publicising the failure of agencies to comply can be found.

[4] Committee on the ICAC, Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption, Report 3/54, October 2008, pp. 14-16.



b. If so, what was the outcome of the referral/s and was the Commission satisfied with the outcome?

N/A

COMPLIANCE AND ACCOUNTABILITY

19. The Annual Report states that the Commission developed new procedures for the exercise of powers and keeping of records in preparation for the commencement of the *Surveillance Devices Act 2007* (p.77). Please outline to the Committee the changes the Commission has made to its procedures and the operational implications of the new legislation.

In addition to regulating the use of listening devices the *Surveillance Devices Act 2007* also regulates the use of optical surveillance devices, data surveillance devices and tracking devices. The Commission introduced a new procedure to its Operations Manual to address these changes. As was previously the case with applications for listening device warrants under the *Listening Devices Act 1984*, the procedure requires all applications for surveillance device warrants to be approved by the Executive Director, Investigation Division, reviewed by the team lawyer and finally reviewed and approved by the Executive Director, Legal.

The *Surveillance Devices Act 2007* also imposes strict limitations on the use of certain information (defined as "protected information") and imposes a number of new record keeping requirements. A new Operations Manual procedure was introduced to meet these requirements.

The *Surveillance Devices Act 2007* has assisted the Commission's operations by making provision for warrants to be obtained for the use of optical surveillance devices and data surveillance devices and thereby allowing their use in circumstances where previously they could not be used.

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OUR ORGANISATION

20. According to the Annual Report, the Commission's new complaints handling and case management system (MOCCA) is expected to be implemented by June 2009, subject to successful completion of stage 1 of the implementation program (p.95). The Report notes that MOCCA will improve performance and provide better support for the Commission's operational areas.

a. Please provide a progress update on MOCCA's implementation.

On completion of Stage I, the ICAC executive accepted the 'Proof of Concept' and the 'Technical Design' of the MOCCA System in September 2008. ICAC then entered into a contract with Dialog Information Technology to develop and implement the system based on this technical design. Stage II of the project commenced in October 2008. A project team comprising representatives from various business units and Information Technology was formed to work with Dialog IT. The development work was completed in May 2009. User acceptance testing has taken longer than initially predicted and it is anticipated that it will be completed by mid August 2009. Initial training for all Commission staff on the new system has been completed. It is envisaged that the new system will go live by the end of August 2009.

b. In what way is MOCCA expected to improve the performance of the Commission's operational areas?

MOCCA will have many features and functionalities which will directly and indirectly improve the performance of the Commission operations. In the long term there will be improvement in processing time for cases to be assessed, escalated and closed. This benefit would be in line with reporting targets required by s.76(2)(ba) of the ICAC Act. The system will provide automated task-handling and the ability to track tasks, eradication of redundant data, and validation of entered data (thereby ensuring data integrity). Some of the key features of MOCCA which will improve the performance of operational areas include:

- Seamless interface with Microsoft Outlook which will allow operational staff to maintain one single diary and to-do list.
- Extensive search and reporting capability.
- Improved corruption prevention, project management and handling of seized property capabilities.
- Brief preparation functionality of the system will assist in the preparation of briefs of evidence for the DPP.
- Increased intelligence and investigative analytics capabilities e.g., linking common or related data/information, which will improve investigation and reporting of more complex cases.
- As MOCCA is based on Microsoft Dynamics CRM, it will provide a standard Microsoft look, feel and navigation which will make it easy to learn and use.

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- Increased capability to implement user-driven, legislative-driven or process-driven changes which will provide a flexible platform to meet the Commission's changing needs.
- Extensive audit trails for both system accesses and data modification which will provide secure management of protected and highly protected matters.
- Robust security based on Active Directory users, security roles and teams.

21. In answers to questions on notice during the Committee's 2006-2007 Annual Report review, the Commission indicated that the ICAC Inspector would be briefed on MOCCA's features during the design and system configuration phase of the project, and that Inspectorate staff would also be given training on the new system at this time.[5] Have the staff of the Inspectorate been briefed and given training on MOCCA's features?

All Inspectorate staff will be provided with training on the new system before the new system goes live or immediately after that depending upon availability of Inspectorate staff for the training. Any additional training requirements identified during the briefing and training will be accommodated by ICAC.

22. The Commission states that in the year ahead it plans to finalise a redesign of its internet and intranet websites (p 98).

a. When is the redesign expected to be completed?

The new Internet website is in the final stages of development which is expected to be completed by mid-August 2009. The user acceptance testing (UAT) will commence thereafter which is expected to be completed by end of August. Content upload and editing is underway. It is envisaged that the new site will go live by the end of September 2009.

Work on redesign and development of the Intranet website will commence following the completion of Internet website.

b. What specific enhancements to processes for users will the new website feature?

It will be similar to the NSW Government Website Style Directive. The website will incorporate a new design and simplified information architecture that takes into account user feedback and improvements identified by usability testing. One key enhancement will be that all information for any particular investigation will be accessed from a single page, enabling users to track the development a matter that has been made public. Other enhancements include:

- Principal Officer log-on to provide information to Principal Officers and allow secure electronic submission of reports
- On line subscription to publications and content uploads

[5] ICAC, Answers to questions on notice, 30 June 2008, question 16b, p. 12.

- Electronic registration for training and events.

The corruption prevention section of the site will provide information to users to apply in organisational corruption risk assessments and to use to develop their corruption prevention policies and plans.

An issue has been raised with the Commission regarding people being concerned that their names were remaining on the website in investigation reports, and hence appearing in internet searches several years after an investigation. The Commission considered it to be appropriate to make a policy that investigation reports older than ten years would be taken down from the site when the new site goes live but abstracts would remain and reports made available on request.

PROSECUTIONS AND OTHER ACTION ARISING FROM ICAC INVESTIGATIONS

Questions 23-31

In order to ensure that information provided about prosecution action is up to date, answers to questions 23-31, including a detailed prosecutions timescale table, will be provided separately on 3 August 2009.

REFERRALS TO NSW CRIME COMMISSION

32. The Annual Report states (p 4) that the Commission intends to focus on identifying matters for referral to the NSW Crime Commission, for consideration of action to seize illegally obtained assets.

a. What criteria has the Commission used to identify matters for referral to the NSW Crime Commission?

The NSW Crime Commission will only take action when:

- it believes there is sufficient evidence to prove a serious crime related activity against a person based on the civil standard
- it is clear that the person has derived proceeds of crime and
- there are sufficient assets to indicate it is worthwhile to commence action.

ICAC applies these criteria and will advise the NSW Crime Commission of the potential for asset seizure when, in the course of an investigation, it becomes apparent tainted property exists.

b. At what stage of an investigation does the Commission identify the matter for referral to the NSW Crime Commission?

This depends on the nature of the assets, the potential for disposal and other relevant issues.

33.

a. How many matters has the Commission referred to the NSW Crime Commission in the past five years?

The ICAC has formally advised the NSW Crime Commission in relation to six operations. This resulted in the referral of 24 persons where advice was sought as to whether it would be appropriate to commence proceedings.

b. How many forfeiture and proceeds assessment orders have been made in the past five years as a result of the Commission's referral of matters to the NSW Crime Commission and how much money did the orders involve?

Information from the NSW Crime Commission indicates it has commenced action in relation to four persons and finalised action against two persons in the previous five years. The two finalised matters resulted in the collection of $1,130,000.

In the four pending matters, assets have been restrained or forfeiture orders made to a total value of $2,634,000, although it is not known at this stage how much of this amount will actually be collected when the matters are finalised.

c. How many matters have been referred to the NSW Crime Commission to date in 2008-2009 and what is the current status of the matter/s?

Only one matter was referred in the previous financial year – no action was taken as there were issues regarding the potential offence, the calculation of the proceeds of crime derived from the offence and the linking of the property to the person referred.

34. According to the Annual Report (pp 36 & 49), eight people have been referred to the NSW Crime Commission for consideration of assets forfeiture as a result of the recent RailCorp investigations, with forfeiture orders having been made against one person for $584,000. Have any other orders been made as a result of these referrals?

Orders are being sought for two other persons in relation to the RailCorp investigation. The value of the restrained property in respect of those two persons is approximately $1.8 million.

35. The Annual Report states (p 41) that the Commission has Memoranda of Understanding with various agencies including the DPP, the ATO, the PIC and the NSW Police Force.

a. Has the Commission entered into a Memorandum of Understanding with the NSW Crime Commission?

There is no Memorandum of Understanding with the Crime Commission relating to the referral of matters to them for asset confiscation. The dissemination is made under s.16(3) of the ICAC Act.

b. If so, please provide the Committee with a copy of the Memorandum of Understanding.

Not applicable – see above

MEMORANDUM OF UNDERSTANDING WITH THE DIRECTOR OF PUBLIC PROSECUTIONS

36. The Memorandum of Understanding (MoU) signed by the DPP and the Commission in 2007 provides for agreed timetables in relation to the issuing of, and response to, further requisitions. During the Committee's previous Annual Report review, the Commissioner noted that time limits had been specified in the previous MoU, but the limits had not been enforced by either party.[6]

a. Have the timeframes specified in the current MoU been observed by the DPP and ICAC during 2007-2008?

The timeframes have generally been observed, although the pressure of other work, including court commitments, investigations and public inquiries, has meant that there have still been occasional delays in providing and responding to requisitions.

The timeframes for contact to be made between ICAC officers and ODPP officers after receipt of a brief are generally being complied with, at least as far as telephone contact being made within 2 weeks of receipt of the brief. It has not always been possible to arrange meetings within that timeframe but meetings are held as soon as reasonably possible.

b. Is the Commission satisfied with the operation of this aspect of the 2007 MoU?

The Commission is satisfied that the timeframes within the MOU are generally being complied with and that this has resulted in a reduction in turnaround times for current briefs, especially when compared with turnaround times in past years.

37. The 2007 MoU also provides for more frequent meetings between DPP lawyers and relevant ICAC officers to discuss briefs of evidence that have been submitted to the DPP by the Commission, in addition to regular meetings between the Deputy Commissioner and the managing lawyer of Group 6 at the DPP.

a. Have Commission officers and DPP lawyers met regularly to discuss briefs of evidence during 2007-2008?

[6] Quoted in Committee on the ICAC, Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption, no 3/54, October 2008, p. 3.

Commission officers and DPP lawyers have met regularly to discuss briefs during 2007-2008, and the Deputy Commissioner and the managing lawyer of Group 6 at the DPP meet every two months to discuss the progress of all outstanding matters.

b. Is the Commission satisfied with the operation of this aspect of the 2007 MoU?

The Commission is satisfied that regular liaison meetings have assisted in reducing the turnaround times for current briefs. They have also resulted in a better understanding between the ICAC and the ODPP about the problems encountered in prioritising preparation and consideration of ICAC briefs because of competing work commitments in both offices.

38. In the Commission's view, have the terms of the 2007 MoU led to ongoing improvements in the handling of prosecutions arising from ICAC investigations during 2007-2008?

As detailed above, the Commission is satisfied that the terms of the current MOU have led to improvements in the handling of prosecutions arising from ICAC investigations during 2007-2008.

A new MOU is currently being settled, and the only change that is considered necessary is that the ICAC will incorporate into the MOU its current internal target of providing briefs of evidence to the ODPP within three months of the final submissions being received at the public inquiry.

DEFINITION OF CORRUPT CONDUCT

39. In his final Annual Report as Inspector of the ICAC, Mr Graham Kelly stated that he believed the definition of corrupt conduct in s.8 of the Act should be revisited, as it generates too many trivial complaints.[7] A previous Committee also considered the definition and recommended a simplification of ss.8 and 9 of the Act, to combine the current two-part definition of corrupt conduct into a single, more streamlined section.[8]

a. In the Commission's view, does the current definition of corrupt conduct generate too many trivial complaints?

The Commission does not consider any amendment to the definition of corrupt conduct is necessary. The Commission is not of the view that the current definition generates more trivial complaints than would otherwise be the case. The definition of corrupt conduct needs to be sufficiently broad to cover all aspects of corrupt conduct.

[7] Office of the Inspector of the ICAC, *Annual Report 2007-2008*, p.2.

[8] Committee on the ICAC, *Review of the ICAC Stage II – Jurisdictional Issues*, November 2001, pp. 64-65.

b. Would changes to the definition of corrupt conduct assist the Commission to perform its functions more effectively? If so, what amendments to the definition would the Commission propose?

N/A. See response above.

REPORTING PROVISIONS

40. The Committee notes that the general provisions relating to reports in Division 3 of the Act are relevant to the Commission's reports.[9] Has the Commission experienced any delays or problems with furnishing reports to Parliament?

The Commission has not experienced any delays or problems with furnishing reports to Parliament.

[9] The Committee discusses the former ICAC Inspector's views on the reporting provisions in ICAC Committee, *Review of the 2007-2008 Annual Report of the Inspector of the Independent Commission Against Corruption*, report 6/54, March 2009, p. 10.

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ANNEXURE A

TABLE OF REVISED CATEGORIES FOR THE CLASSIFICATION OF CONDUCT AND FUNCTION

General Function	Specific Function
Human resources and staff administration	1. Allocation of work or hours 2. Recording of hours, work performed or leave 3. Recruitment, promotion and acting up 4. Use of benefits 5. Secondary employment 6. Post-separation employment 7. Activities performed at work that are not role-related 8. Other human resource and staff administration functions
Development applications and land rezoning	1. Assessment of development applications 2. Land zoning or rezoning 3. Other development application or land rezoning functions
Procurement, disposal and partnerships	1. Tender/quotation process prior to evaluation 2. Evaluation of tenders or quotations 3. Contract management 4. Direct negotiations 5. Disposal 6. Joint venture and partnerships 7. Other procurement, disposal and partnership functions
Reporting, investigation, sentencing and enforcement	1. Inspections 2. Internal reporting 3. Investigation of allegations or complaints 4. Legal or tribunal proceedings 5. Issue or review of fines, custodial sentences or other sanctions

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	6. Enforcement of fines, custodial sentences or other sanctions 7. Other reporting, investigation or enforcement functions
Allocation of funds, materials and services	1. Allocation of funds to clients 2. Allocation of materials 3. Allocation of services 4. Grants and sponsorship 5. Other functions related to resource or service delivery
Issue of licences or qualifications	1. Assessment of applicants for licences or qualifications 2. Actual generation of licences or qualifications 3. Other functions related to the issuing of licences or qualifications
Policy development and information processing	1. Policy formulation or decisions 2. Strategic planning and other analysis of agency information 3. Other policy development and information processing functions
Electoral and political activities	1. Fund-raising and declaration of donors 2. Lobbying and caucusing 3. Voting and vote counting 4. Other electoral or political functions
Processing of electronic and cash payments	1. Contractor or client payments 2. Receipt of payments 3. Other payment processing functions
Other	1. Functions not listed elsewhere

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General Conduct	Specific Conduct
Partiality	1. Discrimination 2. Favouritism 3. Other partiality
Personal interests	1. Improper management of a pecuniary conflict of interest 2. Improper management of a non-pecuniary conflict of interest 3. Unauthorised secondary employment 4. Other conduct related to personal interests
Intimidating or violent conduct	1. Bullying, harassment, victimisation 2. Extortion or blackmail 3. Assault (physical) 4. Other intimidating or violent conduct
Improper use or acquisition of funds or resources	1. Misappropriation of funds 2. Misappropriation of goods 3. Misuse of resources other than IT 4. Misuse of IT 5. Other improper use of funds or resources
Improper use of records or information	1. Forgery or fabrication of records 2. Destruction of records 3. Use of confidential information for private purposes 4. Unauthorised release of confidential information 5. Failure to provide information 6. Providing misleading information 7. Plagiarism

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	8. Other improper use of records or information
Corrupt conduct related to investigations or proceedings	1. Breach of Protected Disclosure Act or internal reporting requirements 2. Failure to submit a s11 report or offences under the ICAC Act 3. Failure to investigate or investigate properly 4. Perjury or other false evidence 5. Destroying or tampering with evidence, or other means of perverting the course of justice or an investigation 6. Other conduct related to investigations or proceedings
Bribery, secret commissions and gifts	1. Offering/ soliciting a bribe or secret commission 2. Accepting a bribe or secret commission 3. Corrupt conduct relating to gifts 4. Other conduct involving gifts, bribes or secret commissions
Failure to perform required actions not already listed	1. Breach of legislative requirements 2. Breach of policy requirements 3. Failure to advertise appropriately 4. Other failure to perform required actions
Other corrupt conduct	1. Miscellaneous corrupt conduct
No corrupt conduct alleged in matter	1. Maladministration 2. Serious and substantial waste 3. Other non-corrupt conduct

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COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

QUESTIONS ON NOTICE

INSPECTORATE'S BREEN REPORT

ICAC INSPECTOR'S REPORT ON BREEN COMPLAINT10 (BREEN REPORT)

PARLIAMENTARY PRIVILEGE

41. The Committee is concerned as to the level of awareness and understanding of parliamentary privilege within the ICAC prior to the execution of the search warrant on Mr Breen's office.[11] According to the report, the then Solicitor to the Commission, one of the principal sources of advice to the Commissioner in relation to whether the ICAC could execute the search warrant on Parliament House, indicated that he regarded *Crane v Gething* as supporting the position that executing the search warrant did not breach parliamentary privilege (p.39). However, in *Crane v Gething* Senator Crane's challenge to the validity of the AFP warrants was abandoned and the Court declined to decide whether or not certain documents were privileged, ordering the return of the documents to the Senate.

a. Is the assessment of relevant case law cited above indicative of an inadequate grasp of the concept of parliamentary privilege on the part of senior officers in the ICAC at the time of the Breen investigation?

The Commission is concerned that the Inspector's investigation did not thoroughly explore the issue of awareness and understanding of parliamentary privilege within the Commission at the time of the Breen search warrant. Although some officers were questioned on this issue others were either not questioned at all or not questioned in any depth. For example, although interviewed on two occasions, the then Principal Lawyer responsible for reviewing the search warrant application, was not asked any questions about his understanding of parliamentary privilege or what consideration he gave to that issue in reviewing the search warrant application.

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[10] 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 s.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 (henceforth the Breen report).

[11] Section 122 of the ICAC Act section provides that:

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

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - INSPECTORATE'S BREEN REPORT

The issue of how parliamentary privilege affected the Commission's investigation was given consideration by senior Commission officers, including, among others, the Commissioner, Deputy Commissioner and Solicitor to the Commission. They arrived at the correct conclusion that, provided the warrant did not purport to authorise the seizure of material covered by parliamentary privilege, s.122 of the ICAC Act would not be infringed.

The Inspector's report includes two short excerpts from interviews with Mr Pritchard, the then Solicitor to the Commission, in which reference is made to the case of Crane v Gething (pp.38-40). These limited excerpts should not be taken as representing the full extent of Mr Pritchard's understanding of parliamentary privilege, or the extent of understanding of that issue by other Commission officers. The comments cited in the excerpts are limited to the issue of whether search warrants can be executed on parliamentary offices, rather than the issue of dealing with claims of privilege over specific documents which arise during the execution of a warrant.

Presumably, Crane v Gething was cited by Mr Pritchard as the only judicial case directly relating to the execution of a search warrant on parliamentary and electorate premises. Senator Crane initially challenged the validity of the warrants but subsequently withdrew that challenge. As stated in the Inspector's report, although the decision does not contain a judicial conclusion that search warrants can be executed on parliamentary offices, it gives some support to the argument that they can be so executed (p.40). Presumably, if French J was of the view that the execution of a search warrant on a parliamentary premises was a breach of parliamentary privilege he would have said so during the course of his judgment.

b. Has the level of understanding of parliamentary privilege on the part of Senior ICAC officers improved since the Breen investigation?

The Commission does not believe that the level of awareness of parliamentary privilege by Commission officers was fully explored by the ICAC Inspector and does not accept that the level of awareness was deficient at the time of the execution of the Breen search warrant. In any event it is impossible to answer this question given that the senior management of the Commission has completely changed since 2003, when this matter arose.

c. What sort of advice or training do senior ICAC officers and team lawyers receive in relation to parliamentary privilege?

All senior officers who are involved with investigations and team lawyers are cognisant of Procedure 9 of the Operations Manual which deals with the execution of search warrants and contains a specific section dealing with the execution of a search warrant on premises used or occupied by a Member of Parliament.

The Commissioner, Deputy Commissioner and Solicitor to the Commission are also available to provide advice to Commission officers if required.

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - INSPECTORATE'S BREEN REPORT

42. The Breen report concludes that there is nothing to suggest that the ICAC considered the question of what do to in relation to claims of parliamentary privilege at the time that it made the decision to seek a warrant to search Mr Breen's parliamentary office (p. 88). The report concludes the investigating officers had not given consideration to the steps that needed to be taken to preserve parliamentary privilege and to deal with any such claims.

a. What steps has the ICAC taken to improve investigators' knowledge of parliamentary privilege issues?

See response below.

b. What sort of training or professional development do investigators currently undertake in the area of parliamentary privilege?

The Commission believes that the evidence does not support the Inspector's statement at p88 of his report that the question of what to do about claims of parliamentary privilege was not considered by Commission officers.

It is the Commission's view that the issue of how parliamentary privilege affected the Commission's investigation was given proper consideration by Commission officers. It is noted in this regard that not all Commission officers who were interviewed by the Inspector's office were asked about what consideration was given to this issue.

Those Commission officers who executed the warrant were careful to ensure that parliamentary privilege was protected. This is supported by Ms Lynn Lovelock, the then Deputy Clerk of the Legislative Council, who stated in her interview of 22 August 2006 that the Commission officers executing the warrant had no intention of seizing material that was privileged and sought her advice on a number of occasions as to whether privilege was claimed over certain items.

The Commission also notes the following reference at paragraph 3.65 of the December 2003 report by the Legislative Standing Committee on Parliamentary Privilege and Ethics:

"In relation to the seizure of documents from Mr Breen's office, it does not appear that the ICAC acted with improper intent, or with reckless disregard as to the effect of its actions on the rights and immunities of the House and its members. Both immediately prior to and during the execution of the warrant, the ICAC was concerned to comply with its obligations to preserve parliamentary privilege, and expressed its intention not to take any documents which might fall within the scope of proceedings in Parliament."

All investigators are required to be cognisant of Procedure 9 of the Operations Manual which deals with the execution of search warrants and contains a specific section dealing with the execution of a search warrant on premises used or occupied by a Member of Parliament.

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - INSPECTORATE'S BREEN REPORT

Investigators are not provided with specific training or professional development in relation to the issue of parliamentary privilege. In the event a search warrant was to be executed on premises used or occupied by a Member of Parliament then, apart from the requirements in Procedure 9, Commission officers executing the warrant would have available internal legal advice and guidance. The Commission considers this to be sufficient given the rarity of events likely to involve execution of a search warrant on premises used or occupied by a Member of Parliament.

43. The ICAC now has a search warrant procedure in place for the execution of a search warrant on a parliamentary office, namely section 10 of Procedure no. 9 -Procedures for Obtaining and Executing Search Warrants.

a. To what extent is the procedure based on the Protocol recommended by the Legislative Council in 2005?

The Legislative Council published a recommended protocol in February 2006 (Report 33). Section 10 of Procedure 9 of the Commission's Operations Manual essentially replicates the sections of the recommended protocol in relation to the execution of a search warrant on premises used or occupied by a Member of Parliament.

The Legislative Council recommended protocol also set out a procedure for resolving disputes as to whether documents are protected by parliamentary privilege which included a basis for classifying whether or not particular documents are subject to privilege. This provides that documents will be classified as privileged where the Clerk and member claim the documents were brought into existence, subsequently used or retained for the purposes of or incidental to the transacting of business in a House or Committee. The Commission has not adopted this classification as it does not accept that a claim that documents that were not brought into existence or actually used for the purposes of or incidental to the transacting of business, but merely retained for that purpose, unless supported by other material evidence, necessarily makes those documents privileged. This could potentially allow a member to claim any document was privileged by merely claiming he or she intended to use it at some future time for the purposes of or incidental to the transacting of business in a House or Committee.

In the event the issue of parliamentary privilege arises in any future operation the Commission would need to determine, on a case by case basis, whether it accepted such a determination and if not whether it should seek judicial review of any such decision.

b. Does the term 'parliamentary office' in the abovementioned procedure include electorate offices?

Procedure 9 applies to any premises used or occupied by a member.

c. What changes were made on 7 August 2008 to the ICAC's procedures for executing search warrants on parliamentary offices? (see Breen report p.47).

The change made to Procedure 9 in August 2008 removed the requirement to complete the "progressive checklist" and made it a guide. A new "authorisation checklist" was included. This

requires approval of any search warrant application by the Executive Directors of Investigations and Legal. No other changes were made affecting the execution of search warrants on parliamentary offices. Further details in relation to the "progressive checklist" are given in answer to question 47.

44. How are the terms of the *Parliamentary Precincts Act 1997* accommodated within ICAC's procedures? What requirements are in place for prior notification of the Presiding Officers prior to the execution of a search warrant in the parliamentary precincts?

The *Parliamentary Precincts Act 1997* (the Act) defines the parliamentary precincts and provides for the control, management and security of those precincts. The Commission does not consider the Act has direct relevance to the exercise of powers under a search warrant. In this regard the Commission notes that, at the time of the execution of the Breen search warrant, the then Deputy Clerk to the Legislative Council obtained legal advice from the Crown Solicitor that there was no power under the Act to prevent Commission officers entering Parliament House for the purpose of executing a search warrant (see p.113 of the ICAC Inspector's report).

The Deputy Clerk of the Legislative Council was given prior notification of the execution of the Breen search warrant (see pp. 112-5 of the ICAC Inspector's report).

The Commission notes the Act is not referred to in the Legislative Council recommended protocol from which the procedures in Operations Manual Procedure 9, relating to the execution of a search warrant on premises used or occupied by a Member of Parliament, are based. In accordance with the recommended protocol, Procedure 9 provides that if the premises to be searched are in Parliament House the Executive Director, Legal will contact the relevant Presiding Officer prior to execution and notify that officer of the proposed search.

APPLICATION FOR AND EXECUTION OF THE SEARCH WARRANT

45. The report found that incorrect information was included in the application for a search warrant in relation to Mr Breen's ownership of 3 Lucia Crescent, Lismore. What procedures does the ICAC currently have in place to check the veracity of information provided in witnesses' statements?

The incorrect information provided in the application for a search warrant was the result of a misunderstanding by a Commission officer and was not based on incorrect information contained in any witness statement (see pp. 93-94 of the ICAC Inspector's report).

46. The report states that after the search warrant was granted the ICAC became aware of the error in the application but did not inform the authorising justice, which the Inspector concludes would have been "a prudent and transparent thing to do", although not a legal requirement (p.169). Are there now procedures in place which would ensure that, if such a situation arose once more, the ICAC would inform the authorising justice?

Procedure 9 does not address this issue. There is no legislative requirement to inform the authorising justice of errors discovered in the application after the execution of the warrant. Normally the Commission would inform the authorising justice of any error.

47. The report indicates that the ICAC did in fact have a progressive checklist for search warrant applications as part of its written procedures in October 2003 but on this occasion did not use it, and also failed to observe the requirement that the report to the authorised justice be completed by the investigator in consultation with the team lawyer (p.170). What action has been taken since the Breen investigation to ensure that policies and procedures are adhered to?

The purpose of the "progressive checklist" was to assist those involved in making search warrant applications by setting out each of the steps required by Procedure 9 and requiring sign-off at each step. Experience showed that completion of the "progressive checklist" was unnecessarily onerous and did not significantly assist Commission officers. What is important is that each of the tasks set out in the checklist is completed. Each nominated task was completed in the Breen search warrant application process. It is noted that the ICAC Inspector did not identify any task that was not completed.

Procedure 9 no longer requires completion of the progressive checklist, although it is still included in the Procedure as a guide. Procedure 9 now contains an "authorisation checklist" which requires the Executive Directors of Investigations and Legal to approve all applications. The Executive Director Legal does not give final approval to search warrant applications until the "authorisation checklist" is completed.

At the time of the Breen search warrant, Procedure 9 did not require the case officer to consult with the team lawyer when preparing the report to the authorised justice, although this was a step (as opposed to a "requirement") identified in the "progressive checklist". Procedure 9 was amended in May 2005 to require the case officer to consult with the team lawyer in preparing the report to the authorised officer. Training presentations have reminded staff of this requirement and earlier this year the Executive Director, Legal circulated an email reminder to relevant staff.

48. The report indicates on p.170 that the ICAC has introduced a mandatory procedure for recording who makes the decision to obtain a search warrant and who approves the application, warrant and occupier's notice; however, there is no mandatory procedure for recording who takes *responsibility* for ensuring the accuracy of factual assertions contained in such an application. Has the ICAC introduced, or does it plan to introduce, a mandatory procedure for recording who takes responsibility for the accuracy of factual information in an application for a search warrant?

The person swearing or affirming in the application that there are reasonable grounds for believing the matters that justify the application for the issue of a search warrant is the person responsible for ensuring that any factual statements he or she makes in the application are correct. Operations Manual Procedure 9 requires the person making the application to have a thorough knowledge of the

facts to support the information provided in the application and requires them to ensure the application is factually correct.

49. Page 174 of the report notes that the search warrant checklist has now been downgraded to a guideline. What approach does the ICAC take to mitigate the risk that the mistakes made in relation to the application for the search warrant do not recur?

The purpose of the "progressive checklist" was to assist those involved in making search warrant applications by setting out each of the steps required by Procedure 9 and requiring sign-off at each step. Its use would not have alerted anyone to the fact that the application contained incorrect information. Investigators are required to ensure that their affidavits are factually correct. Operations Manual Procedure 9 requires the person making the application to have a thorough knowledge of the facts to support the information provided in the application.

50. It would appear from the report that during the Breen investigation senior officers of the ICAC, including the Commissioner, relied on the use of oral briefings to be kept informed as to the preparation of the application for the search warrant (see for example pages, 57, 81, 84, 87, 88 of the report). In the Committee's view, reliance on oral briefings can be problematic because it does not establish a clear line of responsibility for the preparation of search warrant applications. When preparing applications for search warrants, does the ICAC now use formal, written briefings as an accountability measure?

The question appears to confuse the issue of oral briefings with that of the decision to apply for a search warrant and the preparation of the warrant documentation in the Breen matter. In the Breen matter there was no doubt that the decision to approve the application was made by executive management. The application for the warrant, which set out the basis for the issue of the warrant, was prepared by a Commission investigator, reviewed by a Principal Lawyer and the Executive Director, Legal. In reviewing the written application the latter two in particular satisfied themselves that there was a proper factual and legal basis for the application to be made.

The Commission does not accept the premise that oral briefings are "problematic". Urgent matters may often require oral as opposed to written briefings. The Commission does not regard it as appropriate to require all briefings on the need for a search warrant or progress of a search warrant application to be in writing.

In investigations where the need for the execution of search warrants at some time in the future can be reasonably anticipated it is the usual practice to include reference to this in the investigation report considered by the Commission's Strategic Investigations Group at one of its regular meetings. The Commission also notes that the Procedure 9 "Authorisation Checklist" requires the Executive Directors, Investigations and Legal to sign their approval to all search warrant applications.

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - INSPECTORATE'S BREEN REPORT

51. The report concludes that "it was at least arguably imprudent" of the ICAC to serve the notice on the person who had been assisting its investigation and was the primary source of the information on which the warrant was obtained. Does the ICAC now have such considerations included as part of its guidelines in this area?

As indicated in the ICAC Inspector's report (pp. 116 - 118), Mr Breen was contacted about the search but did not attend. s.15(3) of the *Search Warrants Act 1985* required an "occupiers notice" to be served on "a person who appears to be an occupier of the premises and to be of or above the age of 18 years". Ms Sammartano was a member of Mr Breen's parliamentary staff with access to and use of the relevant office. It was reasonable in the circumstances for the Commission officer executing the warrant to view her as an occupier. Her involvement in the Commission's investigation was not relevant to this decision.

The Commission does not regard it as inappropriate, or unlawful to have served the occupier's notice on Ms Sammartano in the circumstances and notes that the Inspector did not conclude that the notice was not properly served.

52. The since repealed *Search Warrants Act 1985* (NSW) provided for application for a search warrant to be made to an "authorised justice", defined in s.3 as:

a. Magistrate, or

b. a registrar of a Local Court or the registrar of the Drug Court, or

c. a person who is employed in the Attorney General's Department and who is declared (whether by name or by reference to the holder of a particular office, by the Minister administering this Act by instrument in writing or by order published in the Gazette, to be an authorised justice for the purposes of this Act.

The Inspector's report (p.107) indicates that the search warrant application was authorised by Mr Paul Morgan JP at the Downing Centre court complex, Sydney; presumably, an employee working in the local courts administration, functioning as an "authorised justice" under the *Search Warrants Act 1985.*

a. Should those search warrant applications that have the potential to infringe the privileges of parliament, be made a separate class of application under statute, requiring a higher level of authorisation than is presently required?

b. For example, should an application for a warrant to search a member's parliamentary office be considered by a judge of the District Court or the Supreme Court?

This is a matter for the Parliament to determine. The Commission however does not see any demonstrable need for applications for search warrants to search parliamentary offices to be required to be made to a judge of the District Court or Supreme Court.

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - INSPECTORATE'S BREEN REPORT

53. What external legal advice does the ICAC consider necessary when obtaining a warrant to conduct a search that may raise issues of parliamentary privilege? Would the ICAC obtain advice from the DPP or the Solicitor General, as is the case in other jurisdictions where law enforcement bodies seek to obtain search warrants relating to members of Parliament?

The Commission would generally rely on its own internal legal advice in determining whether or not to apply to a search warrant on a parliamentary office. The Commission would seek external advice if it considered it appropriate to do so.

54. Documents and records that may be subject to parliamentary privilege and perhaps relevant to an ICAC investigation are not confined to material stored in a member's parliamentary office. Do the ICAC's current search warrant procedures make provision for situations where warrants may be sought to conduct searches and seize material located outside the parliamentary precincts, which may be subject to parliamentary privilege?

Procedure 9 applies to any premises used or occupied by a member.

THE ICAC'S ORGANISATIONAL STRUCTURE

55. The report indicates that the application for, and execution of, the search warrant by the ICAC in the Breen investigation raises issues in relation to the Commission's structure and the impact this has upon its investigations and operational decision-making. The Breen report comments that the matrix management (including multi-disciplinary team management) of the ICAC is "no substitute for clear accountability in an agency with as extensive compulsory powers as the Commission has" (p.168).

a. How does the ICAC maintain clear lines of authority and accountability, including senior managerial oversight of ICAC investigations, within the context of a matrix management structure and multi-disciplinary team management?

The Commission is satisfied that it maintains clear lines of authority and accountability, including senior management oversight, for all investigations.

The Commission's Assessment Panel, which consists of the Deputy Commissioner, Executive Director, Investigation Division, Executive Director, Legal, and the Executive Director, Corruption Prevention, Education and Research, determines which matters will be investigated by the Commission.

Once the Assessment Panel has determined a matter should be investigated the Executive Director, Investigation Division assigns the matter to an investigation team and case officer. This is done in consultation with the relevant Chief Investigator and takes into account the level of expertise required to undertake the necessary investigative enquiries. The case officer is

accountable to the team leader and through that position to the team Chief Investigator and Executive Director, Investigation Division, for the general conduct of the investigation.

The Commission's Operations Manual contains a number of procedures for the exercise of statutory powers. These procedures clearly define levels of responsibilities between case officers, team lawyers and others. For example, Procedure 9, which deals with obtaining and executing search warrants, provides that all applications for search warrants must first be approved by the Executive Director, Investigations, drafted by the Case officer, reviewed by the case Lawyer and finally approved by the Executive Director, Legal. Other responsibilities are also clearly delineated.

The Commission has an internal committee to oversee all investigations. The Strategic Investigations Group (SIG) comprises:

- The Commissioner.
- The Deputy Commissioner.
- The Executive Director, Legal and Solicitor to the Commission.
- The Executive Director, Investigation Division.
- The Executive Director, Corruption Prevention Education and Research.
- The SIG usually meets fortnightly and considers reports on progress and developments for each investigation and generally sets strategic directions for investigations.

b. How does the ICAC overcome any risks associated with such a structure, as highlighted by the Inspector's report in relation to the Breen investigation?

The way in which the Commission addresses possible structural risk is outlined in answer 55a above.

c. What changes have been made to the ICAC's matrix management structure in light of the Breen investigation and report to ensure:

i. that senior personnel conversant with parliamentary privilege and procedures for dealing with claims of parliamentary privilege have a key role in ensuring that the issue of privilege is fully and carefully considered before any search warrant is sought or executed?

No changes have been made to the Commission's management structure in light of the Breen matter.

The issue of how parliamentary privilege affected the Commission's investigation in the Breen matter was given proper consideration by Commission officers, including, among others, the Commissioner, Deputy Commissioner and Solicitor to the Commission. As

indicated in answer 41a above, the evidence also demonstrates that those Commission officers who executed the warrant were careful to ensure that parliamentary privilege was protected.

The Commission notes that Procedure 9 of the Operations Manual, which relates to search warrants, has a specific section dealing with execution on a Member's office. Procedure 9 also requires all applications for a search warrant to be considered by the Team Lawyer and finally approved by the Executive Director, Legal.

ii. the accuracy of factual information used in the application for a search warrant?

No specific changes have been made to the Commission's management structure to ensure accuracy of information used in applications for search warrants. The incorrect information provided in the application for the Breen search warrant was the result of a misunderstanding by a Commission officer and was not related to the Commission's management structure.

Operations Manual Procedure 9 requires investigators to have a thorough knowledge of the facts to support the information provided in their applications and requires them to ensure that the applications are factually correct.

iii. that the leaders of ICAC's investigative teams assume responsibility for critical phases of an investigation, particularly where there are legal questions surrounding authorisation for the exercise of coercive and covert powers?

Investigation team leaders are responsible for the day to day management of their teams and supervision of the investigative matters assigned to their teams. They are oversighted by Chief Investigators and the Executive Director, Investigations. The conduct of all investigations is oversighted by the Commission's Strategic Investigations Group.

Any legal questions concerning the exercise of coercive and covert powers in a particular investigation are, at first instance, referred to the case lawyer for advice. Complex legal questions and those involving contentious or policy issues are referred to the Executive Director, Legal. Depending on the nature of the matter, the advice of the Deputy Commissioner and Commissioner may also be sought.

In addition, Operations Manual procedures require all applications for the exercise of coercive powers are considered by the case lawyer and reviewed by the Executive Director, Legal. This ensures that relevant legal issues are identified and addressed.

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - INSPECTORATE'S BREEN REPORT

MALADMINISTRATION

56. Evidence given by the former Inspector of the ICAC, Mr Graham Kelly, when examined on the Breen report and the Inspectorate's 2007-2008 Annual Report, suggests that the definition of maladministration at s.57B of the ICAC Act is difficult to apply in practice due to its technical nature.[12] Does the ICAC have a view on the whether the definition is difficult to interpret or apply in practice and, consequently, in need of amendment?

The current definition in s.57B(4) of the ICAC Act provides that "conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:

- contrary to law, or
- unreasonable, unjust, oppressive or improperly discriminatory, or
- based wholly or partly on improper motives."

The concepts of unlawful conduct and intentionally improper conduct are not difficult to comprehend. The definition however includes unreasonable and unjust conduct. Whether conduct comes within the definition will depend on the particular facts of each matter and the way in which the words of the section are interpreted. For example, it is the Commission's view that the word "unreasonable" bears its administrative law meaning, namely, conduct so unreasonable that no reasonable person could have so exercised the power. In the context of s.57B(4) it must also be "serious". The meaning of "unjust" is less clear, although presumably it involves at least an element of unfairness. However conduct, honestly engaged in, may lead to what may be perceived to be an unfair result without any impropriety being involved and which should not otherwise attract condemnation or an adverse finding of maladministration.

These uncertainties may lead to difficulties in interpreting and applying parts of s.57B(4). It would be appropriate to canvass the view of the current Inspector on this issue.

[12] Mr Graham Kelly, former Inspector of the ICAC, *Transcript of evidence*, 1 December 2008, pp. 1-2.

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - INSPECTORATE'S BREEN REPORT

ICAC'S RESPONSE TO MR BREEN'S COMPLAINT

57. Prior the Inspector's inquiry, Mr Breen made a complaint to the ICAC in relation to the conduct of its investigation into matters relating to him. The Commissioner acknowledged that a mistake had been made in relation to the search warrant but proposed to take no further action and instead suggested that Mr Breen to write to the NSW Police Force if he was of the view that criminal offences were associated with the application for the search warrant. The Police Commissioner, in turn, suggested Mr Breen refer the matter to the ICAC Committee, which then referred Mr Breen's complaint onto the Inspector (see Breen report, pp. 161-164).

If faced with a similar complaint, would the ICAC now, as a matter of course, advise the complainant to take the issue up with the Inspector?

The ICAC's Memorandum of Understanding with the Inspector provides in paragraph 5.1 that the Commission "will notify the Inspector of matters which come to its attention which involve conduct of an officer of the Commission that comes within the principal functions of the Inspector". A complaint similar to Mr Breen's which was received today would be referred to the Inspector in accordance with this MOU.

ICAC RESPONSE TO THE INSPECTOR'S INVESTIGATION

58. Have there been any recommendations made by the Inspector's Office in relation to the Breen investigation which the ICAC has not acted upon? If so, why has the ICAC chosen not to implement these recommendations?

The Inspector's principal recommendations are set out at pp. 173-174 of the report.

The first recommendation is that "at least key personnel at the ICAC are fully conversant with this issue (parliamentary privilege) and with those procedures (Operations Manual Procedure 9). It also follows, in the Inspector's view, that the ICAC should ensure that these issues are fully and carefully considered before any search warrant is sought or executed on Parliamentary premises." The Commission is satisfied that it complies with this recommendation.

The second recommendation is that "a part of the decision-making record should include a suitably senior person who takes responsibility for ensuring that factual information is accurate."

As advised in answer to question 48, the person swearing or affirming in the application that there are reasonable grounds for believing the matters that justify the application for the issue of a search warrant, is the person responsible for ensuring that all statements he or she makes in the application are correct. The person making the application is the person best placed to ensure the factual information is correct.

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - INSPECTORATE'S BREEN REPORT

Applications are made by trained and experienced investigators and senior investigators. They are keenly aware of the need to ensure that information contained in their applications is accurate and that they are responsible for ensuring the information is accurate.

While those in a more senior position may have a general understanding of the factual background they are unlikely to have the comprehensive understanding needed to ensure the degree of accuracy required. It would be operationally difficult and onerous to require more senior officers to have the requisite detailed knowledge required to ensure the factual information is accurate.

A recommendation was also made at p.127 (paragraph 7.7.1) that the Commission give consideration to reviewing its practice in relation to the service of occupiers notices. For the reason given in answer 51, the Commission is not of the opinion there was anything unreasonable in the service of the occupiers notice in the Breen matter and therefore does not consider its practices need to be reviewed.

59. The Breen report indicates that a draft of the report was provided to the ICAC and certain individuals for their review and to enable them to make submissions in response (p.12). Written submissions were received from the ICAC and a number of individuals and the report took into account, to the extent considered appropriate, matters that were raised in these submissions. When giving evidence on 1 December 2008, Mr Kelly indicated that the tabling of the report was held up due to 'threats of litigation' and 'continuous pressures' for the Inspector's office to confine its findings 'strictly according to the provisions of the Act'.[13] Did the ICAC, or to the best of the Commission's knowledge, any current employees of the ICAC, raise questions with the Inspector in relation to whether the draft report was within jurisdiction? If so, what form did such questioning take, for example was it via formal submissions and/or legal advices questioning the jurisdictional basis of parts of the draft report?

The Commission cannot comment on the Inspector's claim the Tabling of his report was held up by threats of litigation or other "continuous pressures". Neither the Commission nor any current Commission employee raised the issue of whether the draft report was within the Inspector's jurisdiction.

[13] Mr Graham Kelly, former Inspector of the ICAC, *Transcript of evidence*, 1 December 2008, p.+2.

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

QUESTIONS ON NOTICE

ANNUAL REPORT 2007-2008

PROSECUTIONS AND OTHER ACTION ARISING FROM ICAC INVESTIGATIONS

23. Please provide a table, similar to that provided to the Committee during its previous review[1], detailing the period of time that has elapsed between ICAC's provision of briefs of evidence to the DPP and the DPP's decision on each matter, for matters current during the 2008-2009 reporting period (to date). Please include the date of all requisitions received from the DPP with respect to each matter.

A table for the period 1 July 2008 to 31 July 2009 is attached.

The Commission has been advised that reports from the DPP lawyers reviewing the briefs in Monto 2 (Hughes) and the remaining brief in Cadmus (Barhy) are likely to go to the Director for his consideration in the week commencing 3 August 2009.

24. The Annual Report indicates (p 145) that the Commission is preparing briefs of evidence in relation to the prosecution of individuals for various criminal offences as a result of two investigations. Please provide an update on the status of briefs of evidence for:

- Operation Berna (December 2007)

- Operation Greenway (January 2008)

The brief of evidence in Operation Berna was provided to the DPP on 30 October 2008. On 31 July 2009 the DPP advised that there is sufficient admissible evidence to prosecute Mr Tasich with one offence under section 249B(2) of the *Crimes Act 1900* and three offences under section 87 of the *ICAC Act 1988*. However, the DPP directed that the issuing of Court Attendance Notices should only occur after the Commission obtained statements from three people. The Commission is in the process of obtaining the required statements.

The briefs of evidence in Operation Greenway were provided to the DPP on 30 September 2008. The Commission received DPP requisitions on 6 February 2009. These have been attended to and the Commission is currently awaiting advice from the DPP. The Commission has been advised that a report from the DPP lawyer reviewing the briefs is likely to go to the Director for his consideration in the week commencing 3 August 2009.

OPERATION AGNELLI – AUGUST 2003

25. In answers to questions on notice for the Committee's review of ICAC's 2006-2007 Annual Report, the Commission indicated that:

[1] ICAC, Answers to questions on notice, 30 June 2008, question 28, p. 17.

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - ICAC ANNUAL REPORT 2007-2008

The DPP provided advice to the Commission relating to the possible prosecution of Mr Graham Lawrence and Mr John Fitzgerald on 11 February 2008 for offences under s.176 of the Crimes Act 1900 (director or officer publishing fraudulent statements) or, in the alternative, s.176A of the Crimes Act 1900 (director cheating or defrauding). The Commission sought clarification of this advice from the DPP and was advised on 14 February 2008 that the DPP would proceed with the prosecution of Messrs Lawrence and Fitzgerald. The Commission is awaiting advice from the DPP on the number of counts for each person and the wording of the Court Attendance Notices so that proceedings can be commenced.[2]

However, the 2007-2008 Annual Report states (p 140) that the Commission is obtaining additional material in response to DPP requisitions received on 11 February 2008 in relation to the prosecution of Graham Lawrence and John Fitzgerald.

a. Has the DPP provided final advice in relation to the prosecution of Lawrence and Fitzgerald? If so, what was the advice?

b. What is the current status of these matters - have proceedings against Lawrence and Fitzgerald commenced?

Based on advice received from the DPP Court Attendance Notices were served on Mr Lawrence and Mr Fitzgerald on 21 October 2008 for offences under section 176 of the *Crimes Act 1900* (director or officer publishing fraudulent statements) or, in the alternative, section 176A of the *Crimes Act 1900* (directors cheating or defrauding). Both matters have been adjourned to 29 July 2009.

The DPP sought four additional witness statements. The Commission was able to obtain and provide three of these statements. The DPP was advised that the Commission was unable to locate the fourth witness. The DPP subsequently advised that it will require some additional statements from witnesses who gave evidence at the public hearing. The Commission is awaiting advice from the DPP identifying which witnesses are needed to provide statements.

OPERATION UNICORN – APRIL 2005

26. In answers to questions on notice for the Committee's review of ICAC's 2006-2007 Annual Report, the Commission indicated that final advice had been received from the DPP in relation to the prosecution of Bill Smith and Stephen Griffen on 2 June 2008.[3] However, the 2007-2008 Annual Report (p 141) states that the Commission is obtaining additional information in response to DPP requisitions received on 13 June 2008. What is the current status of the prosecution of Smith and Griffen?

Court Attendance Notices were served on Mr Bill Smith, Mr Stephen Griffen, Mr Malcolm Smith and Ms Debbie Barwick in October 2008 for offences under section 178BB of the *Crimes Act 1900*

[2] ICAC, Answers to questions on notice, 30 June 2008, question 20, pp. 13-14.

[3] ICAC, Answers to questions on notice, 30 June 2008, question 28, p. 18.

(making a false statement with intent to obtain a valuable thing). These offences relate to the transfer of Koompahtoo Local Aboriginal Land Council (KLALC) land to two KLALC members in 2001. A hearing in relation to these matters took place at Newcastle Local Court from 24 to 26 June 2009. The Magistrate ruled no case to answer for Mr Malcolm Smith and Ms Debbie Barwick. The matters involving Mr Bill Smith and Mr Stephen Griffen have been adjourned for further hearing to 21 August 2009.

Ms Veronika Bailey could not be located to be served with a Court Attendance Notice.

27. The 2007-2008 Annual Report indicated that the Commission is obtaining additional information for the DPP, in response to further requisitions relating to Adam Perkins, Bob Scott, Kim Wilson and Dale Holt. What is the current status of the briefs of evidence in relation to these prosecutions?

This matter relates to the receiving of a corrupt reward by Mr Bill Smith in return for improperly issuing a KLALC letter of consent for the laying of pipes through KLALC land for the benefit of Villa World Pty Ltd. All requisitions have been responded to and the Commission is currently awaiting advice from the DPP. The Commission has been advised that a report from the DPP lawyer reviewing the briefs is likely to go to the Director for his consideration in the week commencing 3 August 2009.

OPERATION CASSOWARY – DECEMBER 2005

28. The Annual Report indicates (p 142) that recommendations were made in relation to the prosecution of 18 persons as a result of this investigation, with the briefs of evidence having been provided to the DPP in December 2007. What is the status of the 18 briefs of evidence?

The Commission is awaiting advice from the DPP. The Commission has been advised that a report from the DPP lawyer reviewing the briefs is likely to go to the Director for his consideration in the week commencing 3 August 2009.

OPERATION AMBROSIA – DECEMBER 2005

29. The Annual Report indicates (p 142) that recommendations were made in relation to the prosecution of 36 persons as a result of this investigation. The Report states that three of the matters have been finalised, briefs of evidence in relation to two persons are in the process of being finalised and briefs in relation to 30 persons are with the DPP awaiting advice.

a. Please provide an update in relation to the briefs of evidence that are being prepared in relation to the two persons.

The two briefs (Sabra and Boumelhem) were sent to the DPP on 5 September 2008. On 5 June 2009 the DPP advised the Commission there was sufficient evidence to prosecute each of Messrs Sabra and Boumelhem for an offence of obtaining a financial advantage (a licence) by deception contrary to section 178BA of the *Crimes Act 1900* and an offence of using a false instrument contrary to section 300(2) of the *Crimes Act 1900*. The Commission has been awaiting provision of particulars of the charges from the DPP before issuing court attendance notices, and these particulars were received on 3 August 2009.

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - ICAC ANNUAL REPORT 2007-2008

b. What is the status of the 30 matters in which the Commission is awaiting the DPP's advice?

The Commission received advice on 5 June 2009 that there is sufficient evidence to prosecute eight of the 30 matters. The Commission has been awaiting provision of particulars of the charges from the DPP before issuing court attendance notices, and these particulars were received on 3 August 2009.

The Commission is awaiting the advice of the DPP with respect to the remaining 22 matters. The Commission has been advised that a report from the DPP lawyer reviewing the briefs is likely to go to the Director for his consideration in the week commencing 3 August 2009.

c. What is the status of the matter relating to the remaining person?

The remaining matter is that of Mr Yousseff Nehme (see p 142 of the 2007-08 Annual Report). Mr Nehme pleaded guilty and was sentenced to three years periodic detention.

OPERATION INCA – JUNE 2006

30. The 2006-2007 (p 115) and 2007-2008 (p 143) Annual Reports stated that proceedings are current in the prosecution of Jeffrey Strange for offences under the ICAC Act. What is the current status of these proceedings?

This matter was finalised on 27 October 2008. The two offences under section 80(c) of the ICAC Act (make false statement to an ICAC officer) were found proven but no conviction was recorded. He was placed on a 2 year good behaviour bond and ordered to pay court costs of $73. The two offences under section 87 of the ICAC Act (give false evidence) were dismissed.

Operation Aztec – October 2006

31. The Annual Report indicates (pp 145) that recommendations were made in relation to the prosecution of three persons as a result of this investigation, with the briefs of evidence having been provided to the DPP in August 2007. What is the status of the three briefs of evidence?

Advice on all three matters was received from the DPP on 5 November 2008. On 27 November 2008, as a result of that advice, Court Attendance Notices were served on Mr Wade for seven offences under section 249B of the *Crimes Act 1900* (corrupt commissions or rewards), Mr Ashe for four offences under section 178BB of the *Crimes Act 1900* (obtaining money by false statement) and Mr Williams for two offences under section 249B of the *Crimes Act 1900*. They pleaded guilty to all offences. The matters have been stood over to 7 August 2009.

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

APPENDIX

PROSECUTION TIMESCALES FOR MATTERS

CURRENT FROM 1 JULY 2008 TO 31 JULY 2009

REPORT	DATE OF REPORT	DATE BRIEF TO DPP	DAYS FROM REPORT TO BRIEF TO DPP	DATE OF DPP REQUISI-TIONS	DATE OF ICAC FINAL RESPONSE TO DPP REQUISI-TIONS	DATE OF FINAL DPP ADVICE	DAYS BETWEEN SUBMISSION OF BRIEF AND FINAL DPP ADVICE
AGNELLI							
Lawrence	28/8/03	1/3/04	**186**	25/10/04,	Various.	11/2/08	**1442**
Fitzgerald	28/8/03	1/3/04	**186**	25/8/06, 27/2/07, & 6/7/08		11/2/08	**1442**
UNICORN							
Smith (1)	1/4/05	3/11/05	**216**	29/8/06,	10/7/07,	13/6/08	**953**
Smith (2)	1/4/05	3/11/05	**216**	3/11/06,	7/11/07,		
Perkins	1/4/05	3/11/05	**216**	13/6/08,	13/3/08,		
Scott	1/4/05	3/11/05	**216**	18/7/08,	21/10/08,		
Wilson	1/4/05	3/11/05	**216**	12/3/08,	10/2/08,		
Holt	1/4/05	3/11/05	**216**	31/3/09,	19/3/09, &		
Griffen	1/4/05	3/11/05	**216**	& 27/5/09	10/7/09	13/6/08	**953**
Bailey	1/4/05	No brief	**N/A**			13/6/08	**953**
M. Smith	1/4/05	No brief	**N/A**			13/6/08	**953**
Barwick	1/4/05	No brief	**N/A**			13/6/08	**953**
CASSOWARY							
Whitcher	14/12/05	14/12/07	**730**				
Whaanga	14/12/05	14/12/07	**730**				
Fraser	14/12/05	14/12/07	**730**				
Ratkovic	14/12/05	14/12/07	**730**				
Browning	14/12/05	14/12/07	**730**				
Gomez	14/12/05	14/12/07	**730**				
Mohammad	14/12/05	14/12/07	**730**				
Abboud	14/12/05	14/12/07	**730**				
Leon	14/12/05	14/12/07	**730**				
Noel	14/12/05	14/12/07	**730**				
Ritchie	14/12/05	14/12/07	**730**				
Kalland	14/12/05	14/12/07	**730**				
Burton	14/12/05	14/12/07	**730**				
Bacon	14/12/05	14/12/07	**730**				
Bishop	14/12/05	14/12/07	**730**				
McAndrew	14/12/05	14/12/07	**730**				
Atkins	14/12/05	14/12/07	**730**				
McMaster	14/12/05	14/12/07	**730**				
Moya	14/12/05	14/12/07	**730**				
Senior	14/12/05	14/12/07	**730**				

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - PROSECUTION TIMESCALES

REPORT	DATE OF REPORT	DATE BRIEF TO DPP	DAYS FROM REPORT TO BRIEF TO DPP	DATE OF DPP REQUISI-TIONS	DATE OF ICAC FINAL RESPONSE TO DPP REQUISI-TIONS	DATE OF FINAL DPP ADVICE	DAYS BETWEEN SUBMISSION OF BRIEF AND FINAL DPP ADVICE
AMBROSIA							
Williams	21/12/05	16/3/07	**450**				
More	21/12/05	16/3/07	**450**				
Younis	21/12/05	16/3/07	**450**				
Kayrouz	21/12/05	16/3/07	**450**				
Aboulhosn	21/12/05	16/3/07	**450**				
Sleiman	21/12/05	16/3/07	**450**				
Karam	21/12/05	16/3/07	**450**				
Bazouni	21/12/05	16/3/07	**450**				
Tannous	21/12/05	16/3/07	**450**				
Makdessi	21/12/05	16/3/07	**450**				
Nader	21/12/05	16/3/07	**450**				
Ben	21/12/05	16/3/07	**450**				
Dib	21/12/05	16/3/07	**450**				
Punz	21/12/05	16/3/07	**450**				
Borovina	21/12/05	16/3/07	**450**				
Akiki	21/12/05	16/3/07	**450**				
Ayoub	21/12/05	16/3/07	**450**				
Harb, B	21/12/05	16/3/07	**450**				
Allem	21/12/05	18/9/07	**636**				
Megas	21/12/05	22/4/08	**853**				
Constantin	21/12/05	18/9/07	**636**				
Massoud	21/12/05	22/5/08	**883**	Nil	N/A	5/6/09	**379**
Zaiter	21/12/05	24/5/06	**154**	Nil	N/A	5/6/09	**1108**
Barrakat	21/12/05	17/3/08	**817**				
Sabra	21/12/05	5/9/08	**989**	Nil	N/A	5/6/09	**273**
Nguyen							
Boumelhem	21/12/05	17/3/08	**817**	Nil	N/A	5/6/09	**445**
Nehme, N	21/12/05	5/9/08	**989**	Nil	N/A	5/6/09	**272**
Nakhoul	21/12/05	28/4/08	**859**	Nil	N/A	5/6/09	**403**
Daoud	21/12/05	22/4/08	**853**	Nil	N/A	5/6/09	**409**
Haidar	21/12/05	22/4/08	**853**	Nil	N/A	5/6/09	**409**
Mouwad	21/12/05	14/4/08	**845**	Nil	N/A	5/6/09	**417**
	21/12/05	17/3/08	**817**	Nil	N/A	5/6/09	**445**
CADMUS							
Bullen	20/9/06	18/7/07	**301**	Nil	N/A	8/7/09	**721**
Barhy	20/9/06	18/7/07	**301**				
AZTEC							
Wade	26/10/06	10/8/07	**288**	Nil	N/A	5/11/08	**453**
Williams	26/10/06	10/8/07	**288**	Nil	N/A	5/11/08	**453**
Ashe	26/10/06	10/8/07	**288**	Nil	N/A	5/11/08	**453**
QUILLA							
Stepto	21/12/06	21/4/08	**487**	Nil	N/A	19/6/09	**424**
Job	21/12/06	21/4/08	**487**	Nil	N/A	19/6/09	**424**
PERSIS							
S. Marcos	18/06/07	31/4/08	**290**	Nil	N/A	5/3/09	**309**
B. Marcos	18/06/07	31/4/08	**290**	Nil	N/A	5/3/09	**309**
Mourched	18/06/07	31/4/08	**290**	Nil	N/A	5/3/09	**309**
Mikhail	18/06/07	31/4/08	**290**	Nil	N/A	5/3/09	**309**

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - PROSECUTION TIMESCALES

REPORT	DATE OF REPORT	DATE BRIEF TO DPP	DAYS FROM REPORT TO BRIEF TO DPP	DATE OF DPP REQUISI-TIONS	DATE OF ICAC FINAL RESPONSE TO DPP REQUISI-TIONS	DATE OF FINAL DPP ADVICE	DAYS BETWEEN SUBMISSION OF BRIEF AND FINAL DPP ADVICE
PELION							
Fryar	22/08/07	13/6/08	**295**	Nil	N/A	18/11/08	**158**
Lu	22/08/07	13/6/08	**295**	Nil	N/A	19/5/09	**340**
Srijan	22/08/07	13/6/08	**295**	Nil	N/A	19/5/09	**340**
Innes	22/08/07	13/6/08	**295**	Nil	N/A	19/5/09	**340**
Kuang	22/08/07	13/6/08	**295**	Nil	N/A	19/5/09	**340**
Tina	22/08/07	13/6/08	**295**	Nil	N/A	19/5/09	**340**
Song	22/08/07	13/6/08	**295**	Nil	N/A	19/5/09	**340**
Shan	22/08/07	13/6/08	**295**	Nil	N/A	19/5/09	**340**
Xu	22/08/07	13/6/08	**295**	Nil	N/A	19/5/09	**340**
Huang	22/08/07	13/6/08	**295**	Nil	N/A	18/11/08	**158**
Carle	22/08/07	13/6/08	**295**	Nil	N/A	19/5/09	**340**
SIRONA							
McPherson	20/09/07	7/5/08	**230**	Nil	N/A	16/3/09	**313**
Phomsavanh	20/09/07	7/5/08	**230**	Nil	N/A	16/3/09	**313**
Jaturawong	20/09/07	7/5/08	**230**	Nil	N/A	16/3/09	**313**
BERNA							
Tasich	20/12/07	30/10/08	**315**	31/07/09	Underway	31/07/09	**274**
GREENWAY							
Norris	31/1/08	30/9/08	**243**				
Hogan	31/1/08	30/9/08	**243**				
Murray	31/1/08	30/9/08	**243**	6/2/09	29/6/09		
Peters	31/1/08	30/9/08	**243**	6/2/09	29/6/09		
Nolan	31/1/08	30/9/08	**243**				
MONTO 1							
Blackstock	13/8/08	14/10/08	**62**	12/3/09			
Madrajat	13/8/08	14/10/08	**62**	12/3/09			
Ward	13/8/08	14/10/08	**62**	12/3/09			
Chambers	13/8/08	14/10/08	**62**				
Clarke	13/8/08	14/10/08	**62**				
MONTO 2							
Hughes	13/8/08	31/10/08	**79**	28/5/09	15/6/09		
W Kuipers	13/8/08	31/10/08	**79**	28/5/09	15/6/09		
K Kuipers	13/8/08	31/10/08	**79**	28/5/09	15/6/09		
MONTO 3							
Stanic	8/9/08	7/7/09	**302**				
Szoboszlay	8/9/08	7/7/09	**302**				
Kouraos	8/9/08	7/7/09	**302**				
Palombo	8/9/08	7/7/09	**302**				
MONTO 4							
Walker	8/9/08	22/4/09	**226**				
Azzopardi	8/9/08	22/4/09	**226**				
W Kuipers	8/9/08	22/4/09	**226**				
Michael	8/9/08	22/4/09	**226**				
Napier	8/9/08	22/4/09	**226**				
Matt Napier							

COMMITTEE ON THE ICAC: QUESTIONS ON NOTICE - PROSECUTION TIMESCALES

REPORT	DATE OF REPORT	DATE BRIEF TO DPP	DAYS FROM REPORT TO BRIEF TO DPP	DATE OF DPP REQUISI-TIONS	DATE OF ICAC FINAL RESPONSE TO DPP REQUISI-TIONS	DATE OF FINAL DPP ADVICE	DAYS BETWEEN SUBMISSION OF BRIEF AND FINAL DPP ADVICE
MONTO 5							
G Hetman	25/9/08						
D Murdocca	25/9/08						
S Murdocca	25/9/08						
P Murdocca	25/9/08						
MONTO 6							
Akkawi	25/9/08	23/4/09	**210**				
ATLAS							
Morgan	8/10/08	17/7/09	**292**				
Vellar	8/10/08	6/7/09	**281**				
Zanotto	8/10/08	6/7/09	**281**				
Gigliotti(1)	8/10/08	13/7/09	**288**				
Younan	8/10/08	13/7/09	**288**				
Carroll	8/10/08	13/7/09	**288**				
Tasich	8/10/08	13/7/09	**288**				
Tabak	8/10/08	29/04/09	**203**				
Scimone	8/10/08	7/04/09	**181**				
Gigliotti(2)	8/10/08	31/3/09	**174**				
Jonovski	8/10/08	31/3/09	**174**				
Esen	8/10/08	31/3/09	**174**				
MONTO 7							
Laidlaw	19/11/08						
Kotevski	19/11/08						
Hansen	19/11/08						
Araldi	19/11/08						
Hili	19/11/08						
Schliebs	19/11/08						
Severino	19/11/08						
Petrovski	19/11/08						
Affleck	19/11/08						
Penny	19/11/08						
Skinner	19/11/08	8/7/09	**233**				
Dulhunty	19/11/08						
MIRNA							
Sanhueza	18/12/08	8/1/09	**21**				
C Taylor	18/12/08	8/1/09	**21**				
A Taylor	18/12/08	8/1/09	**21**				
Gurguis	18/12/08	8/1/09	**21**				
Xuereb	18/12/08	8/1/09	**21**				
BELLIN							
Pei	12/2/09	16/02/09	**4**	Nil	N/A	22/5/09	**95**
Lu	12/2/09	16/02/09	**4**	Nil	N/A	22/5/09	**95**
CAPELLA							
Huang	26/2/09	10/03/09	**12**	8/5/09	8/7/09		
BAUER							
Chen	30/6/09	14/7/09	**14**				
Sun	30/6/09	14/7/09	**14**				

Appendix 2 – Questions without notice

This appendix contains an extract from the transcript of evidence taken at the public hearing held by the Committee on 11 August 2009. At the hearing, the Committee took evidence from the Commission in relation to a number of inquiries, including the review of the 2007-2008 ICAC Annual Report. Page references cited in the commentary relate to the numbering of the original transcript, as found on the Committee's website.

JERROLD SYDNEY CRIPPS, Commissioner, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney,

THERESA JUNE HAMILTON, Deputy Commissioner, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney,

ROY ALFRED WALDON, Solicitor to the Commission, Executive Director, Legal Division, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney,

MICHAEL DOUGLAS SYMONS, Executive Director, Investigation Division, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney,

ROBERT WILLIAM WALDERSEE, Executive Director, Corruption Prevention, Education and Research, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, and

ANDREW KYRIACOU KOUREAS, Executive Director, Corporate Services, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, sworn and examined:

CHAIR: It is a function of the Committee on the Independent Commission Against Corruption to examine each annual and other report of the commission and report to both houses of Parliament in accordance with section 64 (1) (c) of the Independent Commission Against Corruption Act. The Committee welcomes the commissioner of the Independent Commission Against Corruption and other members of the ICAC executive for the purpose of giving evidence on matters relating to the ICAC's annual report for 2007-2008.

In addition to examining the ICAC on its annual report, the Committee will continue to take evidence in relation to the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament. The Committee will also take this opportunity to ask further questions of the ICAC as part of its inquiry into proposed amendments to the Independent Commission Against Corruption Act. The proposed amendments to the Act will amend section 37 to remove the current restrictions on the use in disciplinary proceedings and in civil proceedings, either generally or solely in relation to the recovery of assets, of evidence that was obtained compulsorily by the commission. A further proposal is to amend the Independent Commission Against Corruption Act that will make the assembling of admissible evidence a principal function of the commission.

I thank the witnesses for appearing today. Commissioner, the Committee has received a submission from the Independent Commission Against Corruption in response to a number of questions on notice relating to its annual report for 2007-2008 and also a submission in response to the discussion paper on whistleblower protection. Do you wish those to form part of the evidence today?

Mr CRIPPS: Yes, please.

CHAIR: As the witnesses are here to cover three separate areas, I propose that the Committee members ask questions firstly on the inquiry into the protection of public sector whistleblower employees, and then move on to the amendments to the Independent Commission

Against Corruption Act, and then to the review of the 2007-2008 annual report. Therefore the evidence, when read and transcribed, will be together but in separate lots for the purpose of convenience. Commissioner, before questions commence, would you like to make an opening statement?

Mr CRIPPS: Yes, I would. If it is acceptable to the Committee my opening statements will touch upon all three of the items. Today is the last time, as you all probably know, that I will have the honour of addressing this Committee, because my term of office expires on 13 November 2009. I do not imagine that there will be another joint parliamentary committee meeting before that date. I will bring a couple of matters to the attention of the Committee before I deal with the questions on notice and indeed the protected disclosures and amendments to the legislation.

Subject to what the Committee might say, I see very little point in travelling over the grounds that I have already, on a number of occasions, travelled when I have dealt with questions on, for example, what should happen to section 37. As the Committee knows, it is my view that section 37 should be amended so as to remove the immunity from use in disciplinary and also civil proceedings, although other people have different views about that. A number of organisations have made submissions about this matter, some of which, particularly the one from the Bar, appeared to think that I was advocating the removal of the privilege against self-incrimination in criminal trials. However, I was not.

So far as I am aware the Committee has received a large range of submissions on other matters and unquestionably will decide the matters in accordance with its view of those submissions. Nothing I can say would add to or detract from anything the Committee would otherwise want to do. Previously I have addressed this Committee about the problem that faces the commission when people have been found to have told lies to the commission, which in theory, or in legislative mandate, carries a penalty of five years jail. But almost never is anybody seriously punished for telling lies to the commission. That has an effect on the work of the commission, because it is a central part of the work of the commission that we rely on people being truthful in order to discover corruption. If people are not truthful, at least they should face the prospect that they will be punished for not being truthful. However, I have dealt with that before.

I have also made submissions concerning what should happen if people are found to have behaved with corrupt conduct and what punishment should follow from that. It has been my increasing concern since I have been a member of this commission that on the one hand there is an arm of government that is very concerned with maintaining integrity and ethical conduct in the public sector and another aspect of government that seems to spend its time letting off people who have done the very things that it thinks are very serious. But that is a matter for the Parliament, presumably, to come to grips with in due course.

In previous discussions I have advocated consideration of the position that I now hold, and which I will vacate on 13 November, should be for a non-renewable period like the Auditor-General position; that is, a seven-year period, non-renewable. I have spoken to other commissioners about this. It takes a while to get into the swing of being a commissioner, particularly when commissioners are almost always taken from well outside the public sector and the like. It seems to me that that proposal ought to be given serious consideration.

I have a stronger view about the role, or the term of office, of the assistant commissioner, who is the deputy commissioner, and her appointment lasts for only five years. Currently we run the risk of two people retiring in very close proximity to each other and the corporate memory of the institution will be lost. I ask the Committee to consider, or whether you do or not, to think about the role of the commissioner and probably more importantly for the commission's functioning, about the role of the deputy commissioner to be a renewable role. I have already raised a couple of matters with Mr Lee in Cabinet, which I would like to place before the Committee, having told Mr Lee that I would do so.

First, the Government recently established 13 new super departments to replace a number of existing departments. That is a matter for the Government to make up its mind about, but the concern that the commission has is this: under the system as it was before the amalgamation of departments, there were at least 110 people who were under a statutory obligation to report incidents of suspected corruption to this commission. Unless the legislation is changed, there will now be only 13 people and the prospect of that is twofold: first, a lot of what should have come to the commission may never even get to the top members. I am not criticising them; in the nature of things they will not hear a lot of what goes on in their departments. Secondly, even if it does, it will take a long time to get through the system to get to this commission. I would like some consideration to be given to ensuring that we are, in effect, in the same position as we were before that legislation was passed.

The second matter that I wish to raise relates to the independence of the commission. I have always found that the independence of this commission has been respected by government and certainly by this Committee. However, there is a bureaucratic tendency amongst people in government, not in Parliament, to think that we are just another agency of government and, therefore, directions from Cabinet should apply to us in the same way as they apply to everyone else. I am, of course, aware that on matters such as the budget our independence is not absolute. We can function only if we are given the budgetary allowance to do so. My position in the past has not been a position of complaints against the Government in this regard, although later on, with the Committee's permission, I will table a short report as to why in the future we will have to make provision for a little extra.

The commission received a direction from Cabinet that I could not employ anyone without Cabinet's approval, because it is to do with a freeze on all government departments. I immediately contacted Mr Lee and told him that was inimical to what I understood to be the independence of the commission. He wrote a letter to me saying that that direction does not apply to the commission. Shortly after that I received another direction from Cabinet that said that a senior counsel could not be employed by the commission without the approval of a Minister—I think the Attorney General but I cannot remember. I have not received a reply from the Government on that, but I have written to Mr Lee and told him that it is even worse than the first one; that we should have to get permission from a Minister of the Crown to see whether we have to brief someone and therefore make available to that person a whole lot of information that should never be made available in any event. I had assumed in my letter that that direction does not apply to us. I have asked Mr Lee to ensure that in future, if he would not mind, that some attention was paid to these directions.

The last matter I want to raise with the Committee is about some of the questions in the questions on notice. You may recall that a number of matters in the questions on notice relate to the Breen inquiry. As you now know because you have got the answers, I have decided that it is appropriate for me to answer all those questions. A question did arise originally, which caused some concern, and it was this: That section 64 of the legislation forbids this Committee from in fact investigating any matter, I think are the terms, relating to an investigation. Obviously, these questions about Mr Breen certainly related to this investigation. But I adopted a different view about it for this reason.

Before the inspector had been appointed I think it would be clear that a lot of these questions could not have been asked. The question I had to apply my mind to was whether that section should be read down more charitably to this Committee now that there has been an inspector appointed to do the very thing that this inspector did do, and to report these things publicly to the Committee. I took the view—I hope I am right—that that being so, one had to take a more, from your point of view, generous view of the prohibition in section 64 because I do not see how the system can work otherwise if I do not. I have assumed that this Committee has thought it can properly ask the questions, or it would not have done so.

The other matter I would like to address your attention to is the question of parliamentary privilege arising out of these matters. It has been said by some that it is in contempt of Parliament for a decision of the House to be impeached anywhere. Now actually, as you will probably know, section 9 of the Bill of Rights, which applies to New South Wales, provides that the freedom of speech in debates and proceedings in Parliament should not be impeached or questioned in any court or place out of Parliament. However, these questions that were put to the commission invite a comment about those matters.

It does seem to me, unless people have a view to the contrary that I would like to hear, that being in this room at the present time we are not in a place out of Parliament. This is a place in Parliament before a Committee selected by the Parliament to undertake the Parliament's business. So, in that regard I have also answered the questions. It also seemed to me that this principle has not been applied very often because, after all, when Mr Greiner, the ex-premier, was found to have engaged in corrupt conduct, the decision and the report was presented to the Parliament. The decision was set aside by the Supreme Court and, as far as I know, nobody took the view that that was outside the jurisdiction of the Supreme Court by operation of article 9 of the Bill of Rights.

Anyway, I just thought I would mention these two matters because in fact I have answered all of the questions or at least had my staff answer those questions that should have been answered. Essentially, that is what I want to say. A further matter I want to address is this. I have mentioned to you that in the past I have had no trouble—everyone has trouble meeting their budget and making their budget stretch—in submissions I have put as the Parliament or the Government has always been charitable. However, because we had a very busy year last year—you may recall that that arose out of the Wollongong inquiry and the RailCorp inquiry—it has had the effect of pushing back a lot of work that we otherwise think is important and should have been done like a lot of briefs to prepare to go to the DPP and also a number of preliminary investigations. I am asking your permission to put before you for your consideration, and I hope your support, a submission that I propose later to make to Treasury for the purpose of this submission. I do not claim the right to be here to be tabling documents, but I do claim that entitlement to ask you whether I can and if I can, I will table that document. I do not expect people to talk about it at the present time, but I just ask you to think about it and then if you agree with it, we would like your support.

CHAIR: That is suitable.

Mr CRIPPS: Finally, could I say this? As I say, this is my last time before you people here. I would like to express my appreciation of the way you have assisted the commission to discharge its statutory functions and the courtesy with which, to date at least, you have treated my submissions.

CHAIR: I ask you to keep in mind that some time down the track I anticipate that this Committee may consider inquiring into a 20-year review of the commission and look at many different issues. During the course of this afternoon or at the conclusion of your evidence feel free to list some issues that you think the Committee may examine. We would be pleased if we could have your input again at that time, or anyone else from the ICAC, into any area you think we should look at or not look at or whether things are working well or not working well, and to look at how the commission should operate in this day and age. That may happen after your appointment is finished.

Mr CRIPPS: Yes.

CHAIR: We always welcome your input. We will commence with questions about the whistleblower inquiry. One piece of evidence given by Ms Hamilton before the Committee on the last occasion related to the Protected Disclosures Unit proposed in the discussion paper to oversee the Act and its administration. The Deputy Ombudsman today has given evidence that he feels quite comfortable with performing that role in toto without any perceived conflict that Ms Hamilton raised on the last occasion. He has given evidence to that effect. Do you have any further comments about

your evidence on the last occasion on the issue of a conflict? Do you still have reservations about the Ombudsman performing that role?

Ms HAMILTON: I do have reservations. A lot would depend on the detail of the role. The reservation I raised was about possible conflicts if the Ombudsman's office was to become too intricately involved in decisions that were being made within departments that might later be the subject of a complaint to the Ombudsman. For example, if the Ombudsman was telling a department, "You should deal with this this way" or, "You should take this protected disclosure" or "You should not" a high level policy review-type unit might not be an issue. I simply say that I would need to know more detail about what was proposed. I just thought to assist by raising what might become an issue if the Ombudsman was given too intricate and too direct a role in relation to how departments deal with protected disclosures.

CHAIR: We have heard evidence today about the media's role in protected disclosures. You know from the Act that you make a disclosure to the relevant authority and if nothing happens there, you can move on and then you can disclose it to a member of Parliament or the media. A submission has been made that you should be able to go straight to the media or a member of Parliament about that protected disclosure. What are your thoughts on that?

Mr CRIPPS: I do not share that view. I think that arrangements are there. They do make arrangements for the appropriate alternative conduct if the proper response is not made, but generally speaking I do not think the first response should be to the media. That assumes that everything that comes out of the media is crystal clear and always right, and that is not always the case.

CHAIR: Just to clarify, I think you made some comments about keeping the disclosure updated at certain intervals along the process. I take it from your evidence that you do not think it is a good idea to have that timetable set in place where you go back to the person who has made the protected disclosure to update them?

Ms HAMILTON: Yes. The concern was that in some cases it may not be a problem at all to have to go back to the discloser. But there might be some cases where the investigation is at a delicate covert operational level and it is not appropriate to disclose what is happening even to the person who originally made the complaint. The concern raised was that to have an invariable direction that you must always go back at a set period to the complainant might prejudice investigations in some cases.

CHAIR: Some comment has been made today about section 16 of the Protected Disclosures Act. The Deputy Ombudsman recommends that we delete that section on the basis that the system he would want in place is that when you make a disclosure it is presumed confidential and it is presumed to be a protected disclosure unless along the way something appears not to make it a disclosure. The discussion paper puts forward a definition for those terms "vexatious" and "frivolous." From your evidence I take it that you do not agree with that or you see problems in defining them. Would you elaborate on that?

Ms HAMILTON: Sorry, you will have to remind me which one is section 16?

CHAIR: Section 16 talks about vexatious or frivolous complaints and defining those terms. In the discussion paper we put forward a proposal to define those terms so that matters that come forward that are considered frivolous or vexatious can be dispensed with instead of investigating them. The Deputy Ombudsman says that they all should be investigated or presumed to be confidential and proper disclosures unless along the way matters come up that make them not so.

Ms HAMILTON: No. I disagree with that because I think it is helpful to have a provision that allows you to categorise disclosures as vexatious or frivolous in some cases. Also, as we previously

submitted, I think further trying to define those terms, which are used quite often in many Acts and I think have a well-known meaning as being vexatious or frivolous, might only make the issue worse. I do not know that there has ever been any particular problem in categorising certain disclosures as vexatious or frivolous or that that has been successfully challenged later. So, we would support maintaining that provision and do not see the necessity to define vexatious or frivolous any further.

CHAIR: We should apply the normal dictionary meaning?

Ms HAMILTON: Yes, exactly.

Mr DAVID HARRIS: This morning we heard evidence that Victoria has a system where disclosures can be made to a third party. In the particular case it was a private company that had been contacted by other private companies or by the public sector to carry out that function. Do you see any role in New South Wales for that sort of system and do you see any obvious problems with it?

Mr CRIPPS: I am not sure but I believe at all events that the status of protected disclosures should extend to people who are reporting corruption or maladministration of public officials. I have never understood the reason why that status can only be given to someone who is a public servant. It seems to me to be more particularly appropriate in this day and age when so much of government business is outsourced and dealt with by people who are not part of the public system. Perhaps Theresa has other comments.

Ms HAMILTON: I think, as the commissioner said, we certainly favour the protection extending to private contractors who are doing business with the Government and want to make a disclosure. I am not sure that was exactly the issue you raised?

Mr DAVID HARRIS: No. We have this company called STOPLine. Some public sector companies will have available to their employees a phone number they can ring to make a disclosure. That company then would be involved in letting the public sector companies know and also use their investigation.

CHAIR: It is a private commercial enterprise.

Ms HAMILTON: So they have privatised the declaration?

Mr GREG SMITH: As well as government departments.

Mr SYMONS: There are a number of companies and one is run by a former Commissioner of Police. Is that the one you are talking about?

Mr GREG SMITH: Yes.

Mr SYMONS: There are other companies. Deloittes do it as well and other companies do it. In my view it is an excellent avenue. It takes away the fear factor within the agency, especially the smaller the agency, "I am going up to tell about a person who works with me." It provides some degree of anonymity and it is an excellent vehicle. I am not advocating that we go to that company, but as a concept, it is an excellent concept in the sense that it takes it outside the system but it is still within the system.

Having said that, Victoria and South Australia have a system—in particular South Australia and I believe Queensland—whereby anyone can be, to use that dreaded term, "a whistleblower". It is covered by the legislation. Yes, it is a company. As I said, it is also done by Deloittes and done by some of the other major companies, and it is a growth industry. He has been pushing for some time and has a number of people on his books across various States, as I understand it.

Reverend the Hon. FRED NILE: Commissioner, do you have any views on the protected disclosure steering committee during this reform process? Does it perform a good and important role? How can you improve its role?

Mr CRIPPS: I think it does, but I will leave that to Theresa because she is the one who is immediately concerned with this matter.

Ms HAMILTON: That is probably why he asked you. Yes, I do think so. I must say that it has not met frequently. In fact, I think I have only been to one meeting since I have been at the ICAC, but it was a detailed meeting about some of the same legislative amendments that we have been discussing here today when they were first mooted. That was how I was able to identify, for example, that there were differences of opinion among the agencies about which agency you could go to with protected disclosures, and whether you were protected if you went to the wrong agency. I think it has been useful from the point of view of highlighting, even among the agencies that administer the legislation and are involved in it, that there are differences of opinion that have led to some of the submissions that we have made here today.

Reverend the Hon. FRED NILE: The fact that it does not meet, or meets very infrequently, seems to put a question mark over its effectiveness or its value. When bodies do not meet, that seems to send a message.

Ms HAMILTON: I can only agree with that. I think I saw it mainly as an avenue to discuss how the legislation is working. It does not need to meet frequently to do that, but there probably would be more room to discuss other administrative arrangements and how the whole Act is being administered by the various agencies as well as consistency. Yes, I can only agree; it probably would have been more useful if it met more frequently.

Reverend the Hon. FRED NILE: Should there be some more direct role for convening it? Who convenes it now?

Ms HAMILTON: The Ombudsman's office convenes it, I think.

Reverend the Hon. FRED NILE: Should that continue, or should it be convened by the ICAC's office?

Ms HAMILTON: The Ombudsman's office has always taken a great interest in this legislation and has played a lead role. I certainly would have no objection to its continuing to be their responsibility.

Reverend the Hon. FRED NILE: There have also been questions raised about the involvement of contractors in the whole process of protected disclosures. Do you have any views on that, or have they changed?

Ms HAMILTON: No. I think we are still strongly of the view that private contractors who are in some sort of relationship with government work should be allowed to make protected disclosures as long as it comes within the purview of the Act as being about the conduct of a public officer or a public department. Yes, the commission continues to support that amendment.

Reverend the Hon. FRED NILE: However, New South Wales Health has made submissions to us that there should be some limitation and that it should apply only to contractors who are in a current contractual relationship with some public authorities. What is your view on that issue?

Ms HAMILTON: I do not really see why that limitation would be necessary. Just because the contractor is no longer in a relationship does not mean they might not have information from the

previous term when they were working with the government. Sometimes people take a long time to make up their mind to come forward for various reasons. I would see no reason to limit it to current contractors as long as a previous contractor had information about corrupt conduct or maladministration.

Reverend the Hon. FRED NILE: The Ministry of Transport also had some concerns that complaints made by contractors to avoid legitimate action, pursuant to the relevant contract, should be excluded from protection under the Protected Disclosures Act. Do you have any views on that?

Ms HAMILTON: Such complaints could already, I believe, be categorised as frivolous or vexatious—certainly vexatious, I would say, if they are being made for an ulterior motive. But if it is considered that they were not covered by that general provision, I would certainly have no objection to a provision being inserted that precluded complaints that were made on those sorts of specious grounds.

The Hon. TREVOR KHAN: I am interested in that last limitation, in a sense, and also in your discussion with regard to section 16. To my uneducated mind, what section 16 seems to suggest is that an investigating officer, at the commencement of an investigation, can decline to undertake the investigation because it is frivolous and vexatious. The point I raise is this: How reasonably does an investigating officer come to a view that the complaint is frivolous and vexatious, if indeed they have not commenced investigation?

Ms HAMILTON: I must say that it is sometimes quite apparent on the face of complaints. It is not a decision that would be made lightly, I would suggest, and it is not every complaint that you think does not have substance or perhaps does not have force that you would categorise as frivolous or vexatious. It normally is a complaint that on the face of it is nonsensical or perhaps could not possibly be true on any level. It sometimes involves aliens or conspiracy theories about these types of things. I am just saying that it is sometimes quite apparent that complaints are frivolous or vexatious, just on the face of it. I think it is helpful to be able to categorise them as such up front and not have to spend a lot of time disclosing why they are being investigated.

The Hon. TREVOR KHAN: While I accept—obviously, in cases such as aliens—that there is a bit of a problem, could I suggest that section 16 potentially provides an opportunity for investigating officers to decline to investigate complaints which in fact may turn out, whilst on their face appearing to be frivolous or vexatious, to in fact have some substance.

Ms HAMILTON: I can only say in respect of the commission that decisions not to investigate are not made by individual officers. We have a very high-level assessment panel. I am on it and the executive directors of investigation and legal are on it. The decisions are made at a high-enough level that I am quite confident that matters are not being unfairly categorised as frivolous or vexatious when they are not. Obviously there are other departments which may not have such a high-level assessment panel. But, as I said to the Chairman previously, I have been in this area for a long time and I think under the concept of a frivolous and vexatious complaint, it is quite well known what it has to be to reach that level, and it really has to be something that anybody reading it would think, "This is frivolous or vexatious."

The Hon. TREVOR KHAN: Would you differentiate vexatious from malicious in terms of a definition of a complaint?

Ms HAMILTON: Yes, because malicious complaints can often be quite valid in that they are being made for bad motives by disgruntled former employees or ex-wives, but they are often excellent sources of information. It is a malicious complaint, but it may be true and worth investigating. Vexatious is really that it is just being made for some personal animus against the person complained about, or to cause trouble, or to cause an investigation of this person. Often it is quite apparent that that is the reason it is being made.

The Hon. TREVOR KHAN: I will not take up much more time of the Committee, but could you accept that in the mind of some investigating officers—and I am not taking into account your organisation—that the distinction between a malicious complaint and a vexatious complaint is not as clear, and that the danger exists that malicious complaints will, in a sense, be interpreted as vexatious?

Ms HAMILTON: I could not say what happens in other organisations. It is obviously a training issue. I think any organisation that accepts protected disclosures should train the officers who will be assessing them to make sure they understand what is a frivolous or vexatious complaint.

Mr CRIPPS: We have complaints and in the commission we deal with it in the same way. I found this problem when I first started—how they were divvied up—because on one view of the matter, as soon as you open the envelope you start investigating. But in point of fact, if you view it as an assessment before you then move to another more formalised step; that is what we do in the commission. We have a committee that decides this. If they do not decide unanimously, to either accept or reject it, it has to come to me. That is the way we deal with it, anyway.

Mr GREG SMITH: What is the level of the officers on the committee?

Mr CRIPPS: Of the assessment?

Mr GREG SMITH: Yes.

Mr CRIPPS: They are the deputy, the legal executive, the investigation executive and the corruption prevention and control officer.

Mr GREG SMITH: Is there a lower level of scrutiny of these documents before it goes to the committee?

Mr CRIPPS: Yes. There is an assessment committee. There is a woman who heads that who first of all sends it to the committee.

Mr GREG SMITH: Does anyone scrutinise the matters that they recommend rejection of?

Mr CRIPPS: Yes, the panel.

Mr GREG SMITH: The panel does?

Mr CRIPPS: The panel I have referred to. If the panel cannot agree on it—and I do not treat this as meaning three to two—unless the panel is unanimous, I have directed that they be referred to me and I will have to have a look at it.

Mr GREG SMITH: Do you have, say, a practice of not getting too involved in an investigation using compulsive powers if the police are already investigating aspects of the allegation?

Mr CRIPPS: We certainly do not want to inhibit the success of police investigations, so we certainly take that into account if we know the police are investigating. Perhaps you could ask Mick Symons. He might know more about that than me. I have never come across this problem. They contact us, too.

Mr GREG SMITH: Are there cases in which they ask for your support to use your compulsive powers to assist their investigation?

Mr CRIPPS: No.

Mr SYMONS: Our powers are restricted strictly to the ICAC Act. We do not engage in fact-finding for any other agencies.

Mr GREG SMITH: But do you not form task forces?

Mr SYMONS: Not outside of the ICAC.

Mr CRIPPS: And you have to remember too that this is an organisation that is given extraordinarily wide powers, particularly to investigate. It does seem to lead to the view by some members of the media that someone has just got to throw up a bit of scuttlebutt and we can drag people off the street and put them into the witness box and make them answer questions. That is certainly not the way that I would run this commission. I think you have to have a reasonable ground for investigation before you start using those powers.

Mr GREG SMITH: But on occasions you would need assistance from the police, would you not?

Mr CRIPPS: Oh, yes.

Mr GREG SMITH: For surveillance?

Mr CRIPPS: For surveillance, no.

Ms HAMILTON: We have our own surveillance.

Mr GREG SMITH: What if you do not have enough?

Mr CRIPPS: Has it happened? I do not know.

Mr SYMONS: The only time that we have actually assisted the police on a serious matter, which I will not go into, was some years ago. There has been no incidents in my experience and on my readings when we have gone outside that. However, having said that, if it was a position where we would look at assistance, we obviously have another commission that we could look at, the Police Integrity Commission. But we have always managed to cover within our resources. It would have to be a massive job for us to go outside for that.

Mr GREG SMITH: Just getting onto public whistleblowers who are not public servants, do you see that there is a case for incorporating protection of them in the Protected Disclosures Act?

Mr CRIPPS: I do, but I do not know whether Theresa does.

Ms HAMILTON: Our primary submission to this Committee was that anybody should be able to make a protected disclosure, not just public officers. That remains our position. As we said, in particular we feel that private contractors who are working in government work should be able to make protected disclosures.

Mr GREG SMITH: Recently we have seen the use of defamation actions against parents at schools who were complaining about what they thought were corrupt practices, among other things, in the schools. Do you think that there is a case for giving those parents protection?

Mr CRIPPS: I do not know.

Ms HAMILTON: They would have been protected if they had complained to us. They may have complained to the wrong body.

Mr GREG SMITH: That is not often what they think of first.

Ms HAMILTON: No. I know.

Mr CRIPPS: I do not know.

Mr SYMONS: The legislation in South Australia does provide that protection on the understanding and stipulation that the complaint is made in good faith. There is one case I know of in which a person was successfully sued for defamation, but that particular person ran a double-barrel; they slipped in one complaint in a legitimate way and then put one in through the back door, and they got caught through the back door. But in South Australia there is a defence to defamation on the understanding that the complaint is made legitimately. It may be something to look at in that we do have that here in this State. I do know the case that you are talking about in which people were sued, but I am also a bit concerned about the content of what was said in that particular case as well.

Mr CRIPPS: Also the defamation laws would cover parents making most complaints to schools, unless they were made not only maliciously but quite untrue and unfounded. Under the defamation laws I would imagine there would be a defence of qualified privilege and the like to cover that sort of thing.

Mr SYMONS: Are you aware of the contents of that case?

Mr GREG SMITH: Very much.

Mr SYMONS: You know with the actual format it would have been very difficult to drag it under any umbrella of protected disclosure or method of disclosure.

Mr GREG SMITH: The method of disclosure exposed the complainants, very much so.

Mr ROB STOKES: I direct my question mainly to the deputy commissioner, and it relates to section 16. I want to get my head around this because the Ombudsman had very clear views on the unsuitability of this section. Once you have determined through your assessment process that a complaint is frivolous or vexatious, you then have discretion as to whether or not to continue with the investigation. The reason for my semantics is that you can decide that it is frivolous but it might be the tip of an iceberg so you still proceed to look at it. Does that happen from time to time or is that it once you have decided the matter is frivolous or vexatious?

Ms HAMILTON: I must say in my experience I cannot think of any occasion where we did actually decide that a matter was frivolous or vexatious, because it has to be fairly clear-cut. That is why I think it is important to have it there for those clear-cut cases so you can say we are not even going to look at this. But, on the other hand, we try to assess carefully whether something, even if it is expressed badly or does not seem to have much evidence, has something behind it. It is an art more than a science is all I can say. You try to assess as best you can whether it is worth looking at further, bearing in mind you have to concentrate on serious and systemic matters.

Mr ROB STOKES: You mentioned then that it is something that is very rarely used?

Ms HAMILTON: Yes.

Mr CRIPPS: I have just had a look at section 16 because Theresa was one up on me that she had not heard about it for a while and I had not heard about it till she heard about it. But when I read the section it really requires them to have a look at the claim before they come to the conclusion that it is vexatious. Also there does seem to me—if you do not mind me saying so—a real

problem in getting sections like that to look for the most remote possibility that it will never happen and say that the section cannot work. I would like to know just what it is when it has not happened.

When I was doing an inquiry into this organisation, before I was appointed, it was always said to me that the definition of "corruption" was bad because it could lead in theory to corrupt conduct that ordinary people would not think was corrupt. Now people crossed their heart and spat their death and said they were concerned for the public safety and the like, so I said to the Bar Council, "You give me an illustration of it." I said to the Council of Civil Liberties, "You tell me when it has happened?" I said to the Law Society, "Tell when it has happened?" I said this to about five of them and not a reply. So I decided why change the definition?

Mr JONATHAN O'DEA: Commissioner, obviously we recognise that there are some frivolous or vexatious whistleblowers and my following question does not relate to that class of whistleblower. My question relates to legitimate whistleblowers, some of who suffer detrimental action or treatment. I think everyone would say that there are people that would fall into that category. Why do you think it is, from my understanding, there has not been one single successful prosecution for detrimental action in New South Wales?

Mr CRIPPS: I do not know. Do you want to say anything about that?

Ms HAMILTON: Apart from the obvious that it is a very hard thing to prove. Employers can always come up with other reasons. These days most employers are too sophisticated to write something saying they decided to move a person because they complained about them—they ascribe other reasons. It is a very difficult thing to prove.

Mr JONATHAN O'DEA: It may be that the experience of the employee is filtered somewhat or a different reason is put by the employer. In light of that, do you think it is inappropriate for this Committee to hear directly from legitimate whistleblowers that have been the subject of detrimental action, given that employers can provide a filtered version? Would you say it is inappropriate for us to hear directly from people in that category?

Mr CRIPPS: You are the Parliament of New South Wales. You can do what you want to do as far as I am concerned.

Mr JONATHAN O'DEA: Of course we can.

The Hon. TREVOR KHAN: Unless we do not have the numbers.

Mr JONATHAN O'DEA: When we have the numbers.

Mr CRIPPS: Personally I do not see a problem if the Parliament—the only problem I would see is a Parliamentary problem and that is whether you have so many things to do that you cannot add that to it. But that is your issue.

Mr JONATHAN O'DEA: What I glean from your responses is that there is, perhaps, a unique perspective of whistleblower employees that is not necessarily gleaned from the perspective of an employer?

Mr CRIPPS: That may be so. I do not know.

Ms HAMILTON: Well, yes. The trouble is people might come to us and say, "I was moved because I made this complaint" or " I was demoted because I made this complaint" but when we get the evidence and the files and the human resources reports there is nothing there at all about that; it is all about long-term problems or this person has been a troublemaker. I am not saying therefore that that whistleblower is lying. Their perception that the reprisal was taken may well be true, but it is

another thing to prove it beyond reasonable doubt in a court of law for a criminal offence. I would ascribe the lack of prosecutions to no more than that: it is a very difficult offence to prove. But I still think it is a deterrent to know that it is there and hopefully it would deter some employers from taking reprisal action if they know it is a criminal offence.

Mr GERARD MARTIN: Surely the reason that we have organisations such as yours is that it is very difficult for a partisan organisation such as a parliamentary committee to call people, to take evidence and to try to make some sort of a judgement on whether someone has been harshly treated. That is why we have the Independent Commission Against Corruption and the Ombudsman. Would that be right?

Ms HAMILTON: Yes. I am not saying that the Independent Commission Against Corruption necessarily just goes on the papers and does not necessarily want to investigate any matter that is hard. In appropriate cases we would be happy to call in people and to take evidence and to test what an employer was saying about the reason, but it would need to be an appropriate case.

Mr NINOS KHOSHABA: Commissioner, we heard earlier from Mr Chris Wheeler, who expressed concern with the current Act and believes that the Protected Disclosure Act should be simplified. I do not expect an answer from you now but I am hoping at a later time you will read his evidence and draw to the Committee's attention anything you would like to comment on?

Mr CRIPPS: Yes, I will.

CHAIR: I now wish to move on to the inquiry into the proposed amendments to the Independent Commission Against Corruption Act. That evidence has now concluded. I take it you have had an opportunity to read the submissions?

Mr CRIPPS: Yes.

CHAIR: I think you touched on it before but I am not quite clear on it. You commented that without the evidence obtained through compulsion the employer has a difficult time in bringing forward earlier than normal disciplinary proceedings. That is because the employer is unable to use that evidence of admission. When you have a situation where you are recommending to an employer a disciplinary hearing, and you have conducted your inquiry, what material—leaving aside that you cannot send the admission material—do you send to the employer? What other material would an employer receive from you that would allow that employer to continue to instigate disciplinary proceedings if the employer was not able to use the evidence of admission?

Mr CRIPPS: We would send the material over to them, including what was said at these hearings but it cannot be used. What you have to remember it is that the work that the commission does cannot be held up by us continually getting evidence either from the Director of Public Prosecutions or from the employer when we have other primary functions to fulfil. Once we know a public servant has behaved disgracefully, and we hear that at a public inquiry after he or she has taken an objection, we know it and we can move on to something else. We really do not have the resources to start saying: Right, now we will behave as though we were the employer of that person and knowing what that person has done let us look around for admissible evidence to prove that which we cannot use but we know as fact. That is the problem.

CHAIR: Is it your evidence and experience that without the employer being able to use the evidence of admission that the disciplinary proceedings either would not take place or they would be prolonged? How much would the evidence of admission assist an employer?

Mr CRIPPS: Mostly in disciplinary proceedings that evidence would do it.

CHAIR: There have been a number of cases where without that evidence there has been a failure of disciplinary proceedings or the disciplinary proceedings have not been able to be instigated. I know if the evidence of admission were used it would do it but without that are you saying that the incidents of success in disciplinary proceedings are very low with the information you already send them?

Mr CRIPPS: As I say if you had that admission, and it could be used, you would not have to look for anything else. It is there—the person has made an admission. I suppose it is possible that that person might go to the disciplinary hearing and say, "I did not really mean it" or something. That is about it, but let me make this point. My essential argument for getting rid of it is as a matter of doctrinaire legal principle I see no reason why the privilege of self-incrimination should extend to public servants who admit they have cheated the public.

CHAIR: I understand what you are saying but if someone asks the question: What about the other evidence that the Independent Commission Against Corruption could give the employer? There must be other evidence that we could use. If someone stands on their dig on principle and says they do not like the idea of a person being compelled to give evidence knowing that that evidence is going to be used against them. It would grate with us that are lawyers and it would grate with other people. Is it your evidence that without that we have a very low rate of disciplinary proceedings? The proceedings may take too long and people can resign and get their entitlements, for example? If the Committee were to make a recommendation would that be your evidence?

Mr CRIPPS: Yes, it is. Also, which I touched upon in my opening, the Government or the Parliament has to make up its mind as to where integrity lies in the public system and how it is enforced. My own personal view, for what it is worth, is that people who are in the public sector have the highest expectation of integrity and ethical behaviour, because that is the nature of the people who take on the position of serving the public.

CHAIR: I did not interrupt the evidence the Committee received from the Bar Association as a very strong objection to this proposition—it did not come across that way to me. Mr Odgers even suggested that we include in the Act parts of section 128 of Evidence Act. I do not know if you have read that piece of his evidence?

Mr CRIPPS: I do not remember that.

CHAIR: He said we should include in the Act as an amendment section 128 of the Evidence Act, which is that a certificate be given that the evidence cannot be used against that person. His fear was that if that evidence can be used in the disciplinary proceeding then the evidence in the disciplinary proceeding could be used in another court, such as a criminal court. He was concerned with that derivative use. He suggested that section 128—I cannot remember the wording of it—could not be used in that way. He did not want to see a situation where an accused in a criminal court was being cross-examined on evidence he gave in a disciplinary proceeding, for example. I do not know if you have had a chance to look at that?

Mr CRIPPS: No, but I have thought about that. You just simply assume that that evidence cannot be used in criminal proceedings.

CHAIR: Would you have any objection to that amendment?

Mr CRIPPS: Yes.

CHAIR: No objection.

Mr CRIPPS: There did seem to be a view, if I might say so with respect to the Bar Association—of which I was once a happy member—that they seem to think that I was opposed to the privilege of self-incrimination and I have never suggested that.

CHAIR: That was a misunderstanding—there is no doubt about that.

Mr CRIPPS: It seems to me that it is reasonable to be used in a disciplinary proceeding, because they do not get that protection, but you could just build into the legislation that it can be used in disciplinary proceedings only or whatever. If you add the word "only" it would be good enough.

Reverend the Hon. FRED NILE: To make it clear, you had no intention of it being used in criminal proceedings at all?

Mr CRIPPS: No.

Reverend the Hon. FRED NILE: A question has been raised whether all the information you collect can be or has been supplied to the various departments to conduct an inquiry or investigation? Is there any restriction on what you can supply?

Mr CRIPPS: No, I do not think so.

Reverend the Hon. FRED NILE: Can you supply tapes of telephone intercepts?

Mr WALDON: There might be in relation to telephone interception if we have not had a public inquiry. But we are talking about cases where we have had a public inquiry. The view is if a telephone intercept has been played in a public inquiry then we can provide it. It is a public document and we can provide it anywhere.

Reverend the Hon. FRED NILE: Should there be an amendment to provide for that information to be used where there has not been a public inquiry?

Mr CRIPPS: I would like to think about that. In criminal proceedings it can be used.

Ms HAMILTON: That would require an amendment to the Commonwealth Act, which I do not think would be forthcoming, in any case.

Reverend the Hon. FRED NILE: It can be used in disciplinary hearings?

Ms HAMILTON: It can be used in some kinds. The Federal Act provides all of the prescribed proceedings where you can use TI [telephone intercept] product. It does include some disciplinary proceedings, but not all. In cases where there is TI product, they are probably not the sorts of cases we are talking about where the problems arise. The problems arise more in cases where there are a lot of financial records but without the admissions those records are probably not enough to show the wrongdoing. You need the admissions, otherwise it is an enormously difficult task to build a case against somebody. So that is the real beauty of hearing admissions. They pull all that evidence together. We are, of course, quite happy to provide whatever evidence we have to departments. But that evidence, without the admissions, may not be sufficient.

Reverend the Hon. FRED NILE: The admission should be sufficient, should it not?

Ms HAMILTON: The admission is the best evidence you can get, if it is a reliable admission. Obviously it simplifies the process considerably if the person has admitted, "Yes, they are my bank records. Yes, I received that money. Yes, it was a corrupt arrangement." We often have those admissions as clearly as that, but they cannot be used in disciplinary proceedings.

Reverend the Hon. FRED NILE: It seems that in some cases, such as RailCorp, they do not make much progress in successful process or convictions.

Mr CRIPPS: If you run an organisation that has over a period of 20 years been exposed about 20 times for corruption, it is probably a reasonable assumption to think that lessons are not very adequately learnt. But we really do not know. The problem with RailCorp was a repetition of almost identical corrupt conduct going on and on and on because, to use that tedious expression, there appeared to be a culture within the organisation of tolerating it. That did not mean everyone was corrupt, but it meant there was a toleration of corruptness.

The Hon. TREVOR KHAN: I am interested in the use of the material. We have talked about disciplinary proceedings. Before another witness I raised a circumstance where there is an admission of corrupt conduct that involves a subcontractor. A public service organisation may have some use for that material in, for example, proceedings in relation to termination of contract, particularly where a corrupt official is called to give evidence by the subcontractor or contactor who is seeking to defend the termination of contract. In those circumstances, simply limiting the use of the information to disciplinary proceedings may catch only one of the fish involved in the corrupt enterprise.

Mr CRIPPS: I do not know that it would, but one is better than none.

The Hon. TREVOR KHAN: I agree.

Ms HAMILTON: Certainly that is a good example of a civil proceeding where you would hope that you could use the evidence because it does seem to be against public policy and the public interest for someone who has been in a corrupt arrangement to be able to sue for termination of contract when the admissions made cannot be used, even if that person himself made the admissions.

Mr WALDON: I think it is precisely for that reason that we were submitting that evidence given under compulsion of ICAC should be available in civil proceedings as well, so public sector organisations can, if they need to, take action to avoid contracts or claims for damages.

The Hon. TREVOR KHAN: I am mindful of the time. One of the suggestions that has been made to us, and I am sure your answer will be reasonably quick, is if evidence that has been given under compulsion were allowed to be used that it would limit the commission's capacity to elicit the admission in the first place.

Mr CRIPPS: I have heard that argument put, but I do not subscribe to it. What we aim to do in the public inquiries is to get the best evidence we have of corruption. The best evidence we have of corruption is someone who has committed a criminal offence. So we are not going to steer away from exposing conduct that could amount to a criminal offence just because we have to. Our function is to expose corruption. The secondary function is to ensure, if possible, that people get convicted when they should and be disciplined when they should. So, in my view, it would not have any effect on the way we would conduct public inquiries.

The Hon. TREVOR KHAN: Perhaps I have phrased it poorly. I am looking at it from the perception of that poor egg or not so poor egg who is in the witness box and the implication that it may impact upon their employment and discourage them from making admissions they otherwise might make.

Mr CRIPPS: What got me to the stage of making these recommendations was it did not take me long to realise that the assumption behind section 37 was that if people knew the evidence could not be used against them they were going to tell the truth. I have presided over almost all the

compulsory examinations and all the public inquiries and that has never been my experience at all. The people tell me what they think the commission knows. They do not go any further unless they think the commission knows. You see it repeatedly when they start off by denying it and the telephone intercepts are played. If the theory were right, you would not have to play the telephone intercepts and these people would be disclosing it. They do not at all. That also brings me, if I can nag on the final point, to why people who tell lies to the commission should be punished. The choice here is that you admit to corruption or you get jailed for telling lies. You do not have the choice that if you do not admit to corruption you will be given a good behaviour bond by a magistrate.

The Hon. TREVOR KHAN: If it is before a magistrate, this may be difficult for you to answer. Would a way of dealing with the good behaviour bond issue be to set a standard non-parole period?

Mr CRIPPS: I think so. What they have to remember is in the middle 1990s a case went to the Court of Criminal Appeal in which it was said that for someone to tell a lie to the commission would always involve a jail term. Since then we have moved into areas of home detention and other aspects of punishment. But all I ask is that these magistrates observe the direction of the Court of Criminal Appeal. Unless people fear that they will go to jail if they tell lies, they are not in a position where it is very conducive to them telling the truth. Most of them have in fact engaged in corrupt conduct. They do not find it easy to admit that. But the choice should be you either admit it or you go to jail for telling lies.

Mr GREG SMITH: Commissioner, do you propose in cases where people who are already charged with false swearing but beat the charge and are acquitted that the evidence given before the commission can be used in a disciplinary proceeding?

Mr CRIPPS: Do you mean if it was given before a public hearing?

Mr GREG SMITH: Yes.

Mr CRIPPS: Yes, I think it should be used. The fact that it has not resulted in a criminal conviction, it would not be used in a criminal court.

Mr GREG SMITH: If somebody is before, say, the GREAT tribunal and gives false evidence that they were coerced or tricked into admitting matters before the ICAC, should they be subject to criminal sanction if it could be proved they were lying when they said that?

Mr CRIPPS: Do you mean if they defended in criminal proceedings—

Mr GREG SMITH: In GREAT proceedings they said they had been coerced at ICAC.

Mr CRIPPS: I am not sure what happens in GREAT, but I would like to think that if someone takes an oath in GREAT and tells a lie they get punished.

Mr GREG SMITH: That is what the Bar Association might be getting at in its push that people are exposed to further prosecution by using evidence that has been given originally at the commission. If they put up a defence as to why they gave that evidence, they might be then exposed to further criminal offences.

Mr CRIPPS: I suppose that is theoretically possible. It is also an illustration of what I said earlier about vexatious illustrations. I would like to see that having happened.

Mr GREG SMITH: Have you experienced people coming before you taking the rap for others and later considering it to be a false admission?

Mr CRIPPS: No. I have had people who have told lies—wives to protect their husbands but not necessarily to inculpate themselves.

Mr GREG SMITH: Would you recommend prosecution of those people?

Mr CRIPPS: Yes.

Mr GREG SMITH: There has been experience in the criminal courts. I particularly think of one gentleman, now deceased, who was a major witness against various people, including Al Grassby, who pleaded guilty to perjury because in a trial he took the box and said the drugs were his. Ultimately that was the basis upon which a police officer was released, following conviction, because the indemnity for perjury had not been disclosed to the defence. You do not have that experience at the commission?

Mr CRIPPS: No, I do not.

Mr ROB STOKES: In relation to disciplinary proceedings and civil proceedings, is the commission still of the view that civil proceedings should be excluded from privilege?

Mr CRIPPS: Yes.

Mr ROB STOKES: Is the commission of the view that it is more important in disciplinary proceedings than in civil proceedings or do they go together?

Mr CRIPPS: I suppose it depends upon the issue. If you get a person—and we have had this—who will freely admit to having robbed the people of New South Wales of $1 million, that is probably more important than a lesser disciplinary offence for something else. I think it probably depends on the circumstances of each case.

Mr ROB STOKES: My next question relates to disciplinary proceedings. Does the commission have a view as to whether the term "disciplinary proceedings" should be separately defined in the Act, say in the same terms as in the Public Sector Employment and Management Act.

Mr CRIPPS: I had not applied my mind to that. What do you mean?

Mr ROB STOKES: As I understand, disciplinary proceedings are not separately defined in the Act.

Mr CRIPPS: No. It just depends upon what proceedings you talk about whether they fall into the definition of disciplinary proceedings, which I think would be almost any disciplinary proceedings. In other words, you do not have to go before GREAT for it to be disciplinary proceedings.

Mr ROB STOKES: My final question relates to earlier questions about the appropriate penalty for lying to the commission. How does that fit in with, for example, the sentencing procedure Act in terms of a hierarchy of sentencing options? Perhaps, arguably, magistrates might be following what they see as the intent of the sentencing procedure Act?

Mr CRIPPS: I would ask the magistrates who thought that to have a look at what the Parliament has said is the maximum penalty for this offence. It is five years. I do not think they have to be deflected by anything else.

Mr GREG SMITH: Do you feel that the finding of corrupt conduct should be sufficient as a ground to sack someone in any department?

Mr CRIPPS: No. There is no doubt the finding that someone has engaged in corrupt conduct does not have any legal consequences, but it certainly has reputational effects. I do not see why anybody should be bound by what the commission has found if they want to dispute it in a proper tribunal later on.

Mr GREG SMITH: I am not suggesting that they do not have an appeal.

Mr CRIPPS: No, not an appeal.

Mr GREG SMITH: Would that not solve your worry that they make these admissions, yet they could walk back into their department because there is nothing that can be used against them in the current regime? If a finding of corrupt conduct was given the status of a conviction, would that not solve the problem?

Mr CRIPPS: I had not thought of that but I would be reluctant to agree to it. I do not think a declaration by the commission that someone has engaged in corrupt conduct should be an irrebuttable presumption in disciplinary proceedings against a person who wants to say that the commission got it wrong.

Mr GREG SMITH: Prima facie should it be enough to discipline the person?

Mr CRIPPS: I do not know. You would not have to. All you would have to do is tender the evidence. You would then make up your own mind whether or not it is good enough.

Mr GREG SMITH: If they do not understand that they are gone?

Mr CRIPPS: I had not applied my mind to this. I do not think you would need to do that. You would just need to tender the evidence and leave it at that. It will be responded to or it will not.

Mr JONATHAN O'DEA: Commissioner, earlier in response to a question you raised the issue of RailCorp. As this might be your last appearance before this Committee I wanted to observe that there have been further admissions of corrupt conduct since we last focused on that organisation—an issue that largely has been reported in the media. In the case of those individuals the question of disciplinary proceedings is somewhat hampered by the current regime. In light of those and other examples I am sympathetic to the changes that you have proposed. Clearly, I do not think it is in the public interest to have to go through those same proceedings again.

As a matter of public record, I asked the new Minister, who is now directly responsible for RailCorp, following certain changes that have passed through Parliament, why more is not being done within that organisation. The response was that things were happening and that a quarterly report was now going to ICAC. This is an important area at which this Committee has looked before, so I do not want to go into details of in-camera discussions. Are you now satisfied in relation to RailCorp that proper treatment and attention are being given to systemic and cultural problems in that organisation?

Mr CRIPPS: I do not know and that is all I can say. I suppose that this really relates to the recommendations we made, whether those recommendations will be carried out and, if they are carried out, whether that will alter what I have loosely called the culture of the organisation. I am sure that there are people in RailCorp who are trying to do that. I have never said that everyone engaged in RailCorp potentially will be corrupt. But I have said that you have a culture of corruption that is hard for people to avoid. At present there are people in RailCorp who are trying to do that. Perhaps you should ask Dr Waldersee. He might have a view about this because he has been dealing with the RailCorp people.

You also have to remember that when we deal with an agency and make recommendations as to how that agency should respond, essentially we make no secret of the fact that we are passing over to that agency the solution to that problem. We cannot get involved in the management of that problem for two reasons. Firstly, we do not have the staff and, secondly, if something goes wrong we are part of the problem.

Mr JONATHAN O'DEA: Are you satisfied with the response as best you can be, not being part of the organisation?

Dr WALDERSEE: Without going into the details of the procurement transformation project and various other responses, I think it would be fair to say that, barring something we do not know about, we are getting a far more cooperative response than we have had in the past and a reported willingness to undertake some serious change. As the commissioner said, we do not know what is going on inside, as we do not go in and look. This is based simply on our interaction. Secondly, as the commissioner noted, it is a huge job to turn this around. It is a year since our recommendations. Nobody would expect you to change in a year an organisation of 15,000 people with this long-term history of problems. That is not a realistic time frame. If large amounts were devoted to the change you would still be looking at a 5-year to 10-year turnaround. It is a big issue. On the face of it, the short answer to your question is that they appear to be far more cooperative than they have been in the past.

CHAIR: We will now move on to your annual report. Inspector Harvey Cooper referred to his audit function and to his ability to check on telecommunications interception [TI] records. He suggested an amendment to the Commonwealth Telecommunications Act.

Mr CRIPPS: Could you tell me which question this is?

CHAIR: In his audit function Inspector Harvey Cooper referred to his ability to audit telecommunications records and he suggested an amendment. As I understand it, you made an order to allow him to do that in the public interest. Have there been any developments in that area?

Mr WALDON: Are you talking about TI or about surveillance devices?

Mr CRIPPS: About TI.

CHAIR: Does it relate to both those issues or to just one?

Mr WALDON: There are issues relating to both. In the most recent issue, the Inspector indicated that he wanted to audit our surveillance devices records under the new Surveillance Devices Act. We took the view that, in order for him to do that, the commission had to certify that it was in the public interest to provide him with that material which, of course, the commissioner did. Because of the way in which the Surveillance Devices Act is structured, there are only limited bases on which you can provide surveillance device material to anyone. I think there were a couple of bases on which that information could be provided to the Inspector. However, for the purposes of the audit we took the view that in order to ensure it complied with the requirements of the Act our commissioner had to certify that it was in the public interest for it to be provided. That was done.

CHAIR: That is the way in which it is proceeding at the moment?

Mr WALDON: Yes.

CHAIR: Is there a case for amendments to both Acts?

Mr CRIPPS: There should be in order to make it clear. I take the view that the really important function of the Inspector is not to wonder whether we have been as diligent as we should

have been in attending to complaints, although it is not irrelevant. The important function of the Inspector is to ensure that people in the organisation do not abuse the power they have to tap phones and to put surveillance devices on people so that members of the public have confidence we are not doing it. People in the commission are warned that if they do it they might be caught. So far as I am concerned, any possible inhibition in this legislation to the Inspector would get my support if it were removed.

Mr WALDON: I add that there are other restrictions under the Telecommunications (Interception and Access) (New South Wales) Act that also create a problem for us in giving the Inspector access to our TI material. In that jurisdiction it is not a case of our commissioner certifying that it is in the public interest to provide; we have to comply with the Commonwealth legislation. That would be an issue for amendment to the Commonwealth legislation.

Mr CRIPPS: I think they would need amendments to the Commonwealth legislation. It is a bit leery about letting anybody—

CHAIR: We would always welcome submissions from you about that if it assists your role. We could deal with that in our own way and then pass it on. It appears as though you have formulated an escalation protocol when government departments do not follow or implement your recommendations. Are you suggesting that this Committee should have a role in that process as final measure? What role do you see this Committee playing in that process? If you are recommending changes and they are not being implemented you already have referral powers in your Act to take it to the Minister, et cetera. What role can this Committee play in that process?

Mr CRIPPS: I suppose that this Committee would represent the Parliament in the last analysis. In the scheme of things the first complaint or submission is made to the head of the department, then to the Minister, and then to the Parliament if we do not get the proper response. I have never turned my mind to whether it should come to this Committee as opposed to the Parliament. We have never sent one to the Parliament anyway.

CHAIR: It is available to you.

Mr CRIPPS: It is available. We have threatened it.

CHAIR: Has it worked?

Mr CRIPPS: Yes.

CHAIR: It is a bit like the injunction threat. If you threaten injunction things start to happen. Can you give me an update as to what stage you have reached with the memorandum of understanding [MOU] with the Director of Public Prosecutions [DPP]?

Ms HAMILTON: Yes. Recently we signed a new memorandum of understanding. As we said in response to your questions on notice, the only real change to it is that it now specifies we will try to get briefs to the DPP within three months at the end of submissions on a public inquiry, which is our internal target. We have now formally put that into the MOU. Otherwise both parties considered that it had been working well and did not require amendment. In particular, I say from my point of view that the regular liaison meetings I have with the DPP officer have been very useful. Apart from anything else, both of us now realise the other competing priorities we have with our work, but we are trying our best to work around them.

There has also been more interaction between DPP lawyers and lawyers at the ICAC to try to resolve issues about briefs without letting them drag on unnecessarily. Generally, the MOU has been a lot more successful with newer matters rather than with older matters. However, I think that is to be expected because the older matters started before it was being enforced. You will see from the

prosecution timescale chart that with newer matters generally, if you average out the times, the times are down to a year or less, which compares favourably with the four or five years that things were taking in the past. I think the MOU is having an effect. We never expected it to work overnight, but it certainly has had a beneficial effect on newer matters that are going to the DPP's office.

CHAIR: I have seen the tables that show numbers for later matters have come down markedly. I interpret that as being successful. Lastly, I note that there has been an increase in the work you have had in the past financial year. Has the reporting from local councils increased as a share of your total reporting?

Mr CRIPPS: Do you mean public inquiries?

CHAIR: Referrals or complaints of corruption.

Reverend the Hon. FRED NILE: Workload.

Mr CRIPPS: The workload from local councils has increased. I do not know whether overall they have gone beyond the complaints.

CHAIR: Your pie graph shows local councils contributing 38 per cent of your workload, or whatever it is. I think that figure has gone up.

Mr CRIPPS: Yes.

CHAIR: Is there a problem?

Mr CRIPPS: There might be; we do not know. We know that if you have something—and I use the word advisedly—as sexy as Wollongong you would find there would be a huge number of complaints coming from councils because they get a lot of publicity. Everyone thinks that if Wollongong is doing it everyone must be doing it. Most of the statisticians who do these reports and surveys will point to the fact that the prominence of ICAC's work in a given area tends to generate complaints in that area.

Mr DAVID HARRIS: My question, which I direct to Dr Waldersee, refers to question on notice No. 10 relating to proactive corruption prevention approaches. Can you update us on the progress of the internal audit for local councils? If that has been completed have local councils been taking up that tool and providing any feedback?

Dr WALDERSEE: No, it has not been completed; it is underway. Initially it was a self-diagnostic tool for councils. We found that planners and planning managers did not have the time, the knowledge or the inclination to do it. But there is a recommendation that they have internal audit account functions and we thought this was the place. We have talked to internal audit and essentially it does not know enough about planning to be able to audit what goes on and to work out whether or not this or that should have happened. Those guidelines for internal auditors are well underway but they are not finished. There is a keenness amongst internal auditors to get it and we think it will be taken up.

Reverend the Hon. FRED NILE: Have you supplied the Committee with a copy of the new memorandum of understanding?

Ms HAMILTON: No, but I am happy to do so. We got it only last week but I will provide a copy to the research director.

Reverend the Hon. FRED NILE: The other matter you raised, Commissioner, about the reduction down to 13 officers, there has been no legislation passed, as far as I am aware, establishing 13 separate departments. Are you in a position to lobby the Government—

Mr CRIPPS: Yes, I have actually spoken to the Cabinet office about it and Mr Lees said they would give consideration to any submission we made. What I am anxious to do is to have the same outcome as we have got at the present time, namely, a sufficiently large number of people who are motivated to report instances of reasonably suspected corruption, and I am fearful that if you leave it to 13 people it is not going to work as well.

Reverend the Hon. FRED NILE: So the Government could designate those officers—

Mr CRIPPS: Yes. I did not get the impression that the Government thought this was an insoluble problem. Nobody said, " I am going to do it for you", but I can say it had a favourable audience with Mr Lees.

Reverend the Hon. FRED NILE: ICAC has set up the new complaints handling and case management system. Is that working to your satisfaction? I think you were going to go live by the end of August 2009.

Mr CRIPPS: This is MOCCA. This is something that my grandson would have understood, and he is aged three but I do not because I am aged 76. So I will have to ask Andrew, who understands MOCCA, to explain this. This is an electronic imposition that has been imposed on us.

Mr KOUREAS: We have not got it loaded yet because of unforeseen technical issues but we are anticipating going live by the end of the month. We are doing some more testing tomorrow afternoon and then a final test next week if all goes well. So we are anticipating going live by the end of the month and we expect the system to be a considerable improvement on the previous system.

Reverend the Hon. FRED NILE: So it is more technical problems with computers?

Mr KOUREAS: Yes, it is integrated to all Microsoft-suitable applications. It offers more functionality; it sends various tasks to people automatically in the system. I anticipate some improvement in the way the process is being handled.

The Hon. TREVOR KHAN: Commissioner, if I could go back to the questions Reverend the Hon. Fred Nile asked you with regards to the 110 down to 13? I take it from the answer that you gave that you have been invited to make some sort of submission. Putting yourself in the position that you are talking to Mr Lees at the present time, what would be the nature of the submission that you will be making to him to give him some guidance as to how you would define the group?

Mr CRIPPS: He now knows who it is in the public sector that has an obligation to report suspected corruption. He knows where they sit in the public sector and he knows the areas that they come from. What I would like is someone to apply their minds to that to make sure there are people in those comparable positions—and they will be still there even though you have stopped having 100 people and you have reduced it to 13—to make sure that those people have the obligation and understand the obligation. It is really important to do this because one of the problems that ICAC has even under the present system is there is a tendency for some agencies to start investigating before ICAC does and their investigations can muck up ICAC's investigations. So we like to get these complaints very quickly so we can deal with them, and there will be a tendency, I think, to slow it up. How the Government or the Parliament does this I do not know.

The Hon. TREVOR KHAN: Could I move on to another matter, again involving the Director General of Premier and Cabinet? It relates to directions that you have received with regard to the employment of people within your organisation. Were those directions made in writing?

Mr CRIPPS: Yes.

The Hon. TREVOR KHAN: Approximately when were those directions made?

Mr CRIPPS: The first ones were about two or three months ago.

Mr KOUREAS: In early July.

Mr CRIPPS: That is the one about the staff freeze—early July.

The Hon. TREVOR KHAN: Were the directions both from Premier's and Cabinet or were they from another department?

Mr CRIPPS: No, Premier's and Cabinet.

The Hon. TREVOR KHAN: Were the letters at least signed by the same individual?

Mr CRIPPS: I cannot remember that now. I took the view that what had happened was that there was some Cabinet direction as to how all government agencies would behave and it was just sent out to ICAC as being one of the government agencies. I thought it was important to direct Cabinet's mind to the fact that ICAC should not be viewed as another government agency. I suppose I could have run up Mr Lees and he would have said, "Oh no, it does not apply to you". I could have rung up about the Senior Counsel and someone would have said, "It did not apply to you", but I thought it was probably appropriate to make a stand to ask the Government to continually think about ICAC's independence.

The Hon. TREVOR KHAN: Obviously there has not been the opportunity to read the document that you have tabled, but are you looking for, in a sense, a one-off injection of funds to overcome the backlog that has been created or is it an issue of increased recurrent funding?

Mr CRIPPS: It is recurrent, I think. That is what we are asking for. When you read it you will see that we have slipped down the scale of employees, and I have to say one of the reasons why it took a while to become noticeable is because I think the way the division was being run was very effective and very efficient, but even with all that we have got back to where we were two or three years ago. But it became a real issue because of the huge amount of work we had last year, and we have had almost as much work this year. I do not see that New South Wales is going to be freed from the burden of corruption just because I leave on 13 November.

Mr GREG SMITH: Has the commission put forward a case for some sort of review as to the staffing levels that are needed and the resources that are needed because of increasing work?

Mr CRIPPS: Yes. I think this document tries to do this. The document that I have been permitted to table is really a forerunner of an approach we are making to Treasury. It was to give this parliamentary committee an indication of what we were doing—because we are answerable to this parliamentary committee and not the Government—and in the hope that this parliamentary committee will see that what we are saying has merit and support it. But it has just been dropped on you today. If any of you have any queries about it please let me know and I will do my best to respond to them.

Mr GREG SMITH: I must say it is not novel that you are having to fork out 1 per cent efficiency savings, that the Government only gives 2.5 per cent for the extra salaries and then negotiates 4 or 4.5 per cent. If that continues year after year it means that your staff falls each year; you cannot replace people when they leave. I suggest that that same thing is happening in the DPP and other agencies. Are you aware of that?

Mr CRIPPS: I have not gone into that. It is enough dealing with my own agency.

Mr GREG SMITH: You probably do not have the amount of work you did at one stage because you do not do police corruption.

Mr CRIPPS: Except that that is 10 years ago.

Mr GREG SMITH: At the time when the Police Integrity Commission was established was there a loss of staff and budgetary amounts from the ICAC?

Mr CRIPPS: You would have to ask Mr Waldon this because he was the only person here who was there.

Mr GREG SMITH: It is good to have the corporate memory. When I was seconded there Mr Waldon would have been there then.

Mr WALDON: I was not in a senior position then so I was not party to the negotiations or discussions.

Mr GREG SMITH: But showing great potential.

Mr WALDON: But I am aware that there were discussions and as a result of that it was identified that an amount of the commission's recurrent budget would be subtracted from future years because of the setting up of the PIC.

Mr GREG SMITH: But nevertheless, the workload has progressively increased, particularly in areas like local government, RailCorp, those sorts of things—major investigations—and you have a need for more staff, as it were, to combat the workload?

Mr WALDON: Yes. If I could just add to that? I think it became very significant both late last year and this year that I think for the first time that I have been at the commission we actually had to take a number of preliminary investigations—not full investigations but preliminary investigations—and place them on hold because we just did not have the people to resource them. So that effectively meant that some matters just were not being looked at for quite a period of time until we were able to draw back the resources from some of the major investigations.

Mr GREG SMITH: And that would be an impediment to successful investigation sometimes, would it not, because the trail gets cold?

Mr WALDON: Absolutely.

Mr GREG SMITH: How many actual investigators do you have working for the ICAC? You have got 39 in the division but how many are actually investigators?

Mr SYMONS: We have a surveillance pool attached to that. We have maybe 25 investigators, but bear in mind you have got annual leave and maternity leave and things like that. So even though the strength is 39 you take out your surveillance team and that takes one team to one side and drops it down. So we work on an average of about 20 to 25 investigators on the floor without impediments.

Mr GREG SMITH: That is about 30 per cent of the total staff?

Mr SYMONS: Of ICAC?

Mr GREG SMITH: Yes.

Mr SYMONS: Yes, it would be.

Mr GREG SMITH: To conduct the inquiries that you get do you think that it is sufficient to have that proportion of investigators with 60 or 70 other staff?

Mr SYMONS: I guess, for want of a term, the investigation division—without being hit by Roy—is actually the engine room and that generates the flow-on to corruption prevention and it occupies the flow-on through the legal, et cetera, as well as other matters that come through. But the investigation is the engine room, which happens. But you need corruption prevention. The concept with RailCorp—

Mr GREG SMITH: I am not denying that, I am just asking you whether it affects your ability—

Mr SYMONS: I think the balance is good.

Mr GREG SMITH: The balance is good but the numbers are not enough?

Mr SYMONS: Correct.

Mr GREG SMITH: And to be a more effective agency you could do with an input of a lot more staff—qualified staff and qualified investigators?

Mr SYMONS: Yes.

Mr JONATHAN O'DEA: Commissioner, you may be aware that on a number of times in Parliament I have raised the finances of the Independent Commission Against Corruption. I was pleased with one of the Premier's responses in that it indicated a willingness to seriously consider an increase in budget, which was promising. Obviously, we do not want to make these things political unless they have to become political. One would like to think that there is bipartisan support for increased resources when a responsible entity like the ICAC asks for them.

Having said that, I was a little surprised at your comment differentiating the ICAC from the rest of the public service regarding staff directives, but not normal budget constraints; that is, the 1 per cent efficiency saving. Last year, despite the fact that there was a demonstrably increased call on your resources, there was in fact a real budget cut in the budget process, which was of concern to me. I do not understand why you differentiate between the staff directives, which should be seen as independent, and the normal budget process, where perhaps you could be seen as part of the public service. Would you comment on that?

Mr CRIPPS: We are not happy, but it is necessary. We do not get money from any source other than the Government. So, to that extent, we cannot be said to be wholly independent of government. But, so far as staff is concerned, I can make this point: It is true that last year we got into trouble that has flowed over to this year, but we thought we had solved it by increasing efficiencies, doing a whole lot of things to try to accommodate the extra work that we were getting. But we have now come to the conclusion that we cannot keep on doing that. We cannot keep on being more efficient.

Mr JONATHAN O'DEA: So?

Mr CRIPPS: So, there is no inconsistency really, I do not think there is. Also, on the problem associated with staffing and the independence, we just cannot have the Government telling us whom we employ. I would always, and I do not know whether my successor would, pay attention to

reasonable requests of the Government that we do A, B and C. But that is what they have to be viewed as, requests not directions. And it is understood that we can say no if we want to.

CHAIR: Commissioner, this may well be the last time you give evidence. I congratulate you, and indirectly your executive staff and all the staff at the Independent Commission Against Corruption, on the excellent professional job that you have done in the service of the people of New South Wales in your role as commissioner. I am bold enough to speak on behalf of the Committee members to say that the ICAC operates in a very professional and excellent manner. A previous inspector commented a few times that the commission operates extremely well under very difficult circumstances, and that encapsulates how it works with the number of inquires and complaints that you receive, and in assessing them. It is an enormously difficult task. Since I have been a member of this Committee, and as its Chair, I have enjoyed my relationship with you and your helpful and professional staff. I take this opportunity to wish you the very best for your future after your appointment ceases. Whatever you choose to do in the future, I wish you the very best. I thank you, once again, for doing an excellent job.

Mr CRIPPS: Thank you for those generous words. I am sure that my successor will probably carry this organisation through in the way it should be carried through. Once again, I thank this Committee for the constructive work and suggestions it has made, and also for the civilised and courteous way that we are able to deal with issues such as we dealt with today and have dealt with in the past.

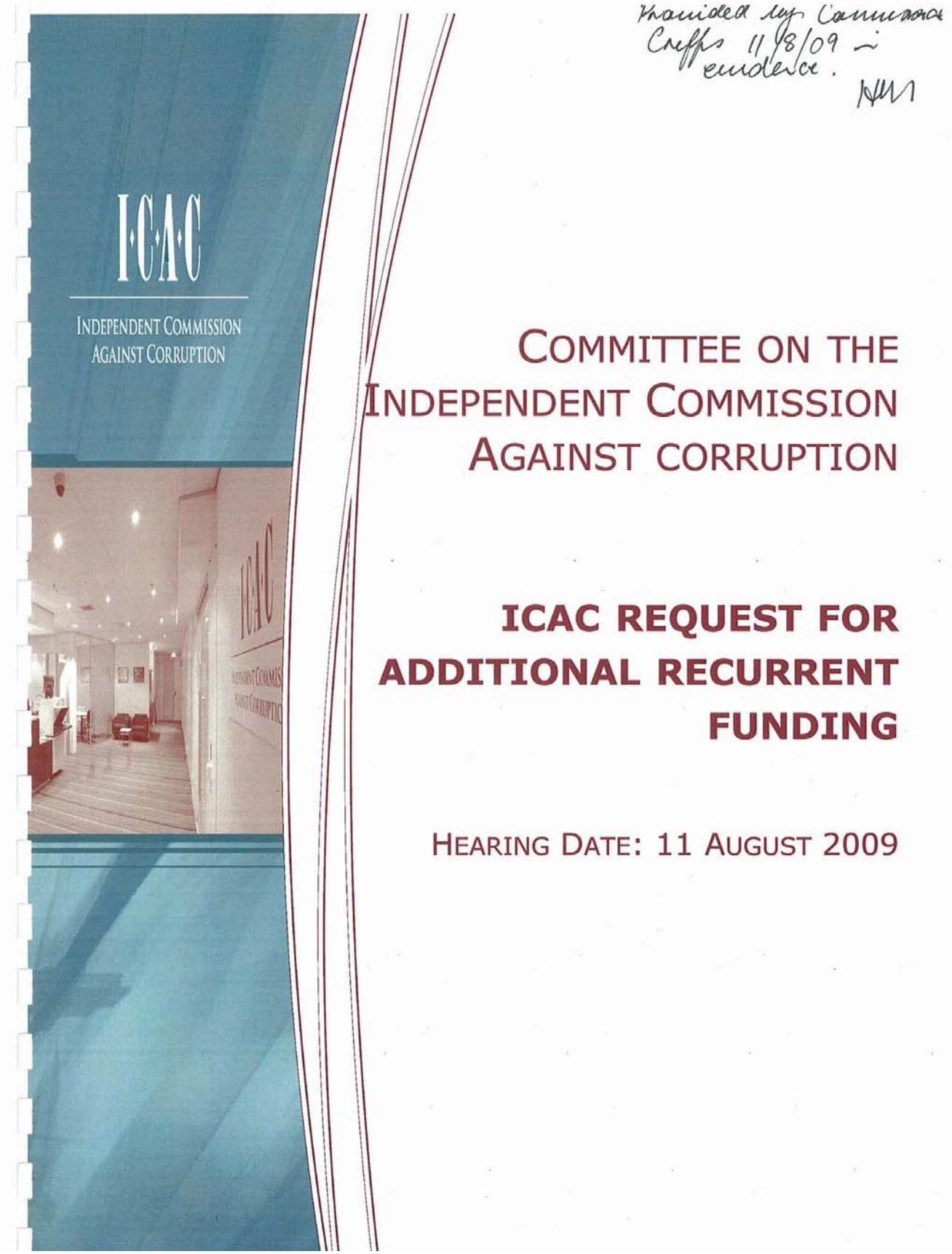
CHAIR: Is the submission you provided for the information of members only?

Mr CRIPPS: No, I table it with your permission. Obviously you will use it as you want to use it. My purpose in giving it to you was in the hope that you would see that a reasonable argument was put forward that lends Treasury support.

(The witnesses withdrew)

(The Committee adjourned at 3.17 p.m.)

Appendix 3 – ICAC's request for additional recurrent funding



ICAC Request for Additional Recurrent Funding

Introduction

The Independent Commission Against Corruption (ICAC) was established in March 1989. Its funding allocation has significantly fluctuated over the ensuing periods. ICAC is seeking recurrent supplementation funding to enable it to effectively conduct its operations across all its Service Groups, including its primary one of Corruption Investigation. As outlined below, in recent years there has been a reduction in real terms of allocated funding for the ICAC.

Background

Section 13 of the *Independent Commission Against Corruption Act 1988* (ICAC Act) outlines the principal functions of ICAC. In short, ICAC is required to investigate allegations linked to corrupt conduct as defined within the ICAC Act and to undertake a corruption prevention role. Section 14 of the ICAC Act refers to the function of compiling evidence in relation to criminal offences, and the referral of such evidence to the Director of Public Prosecutions or other appropriate agencies as required.

In the two year period 2007-2008 to 2008-2009, the Investigation Division of ICAC conducted 119 preliminary investigations and 34 full investigations (Operations). A preliminary investigation is one where the investigation is designed to determine if the material under investigation should be subject to a more complete investigation (that is – is there any substance to the allegations?) This is in line with Section 20A of the ICAC Act. These investigations may require the allocation of considerable resources depending on the complexity of the issues raised.

A full investigation (operation) will normally require considerable resources as the full powers of the ICAC as well as other statutory powers are generally used in these matters. These investigations may involve both covert and overt phases as well as the use of electronic surveillance. Many of these operations incorporate the interception of telecommunications. This requires intensive personnel allocation for monitoring purposes. This can be to the detriment of other investigations with personnel being reallocated to these duties.

It is essential to ensure ICAC receives adequate funding in order to service the requirements of the Commission and to meet community expectations to ensure a public sector free from the taint of corruption.

The ICAC's 2009-10 expenditure allocation is $18,751,000 which represents an increase of 3.8% on the previous year actual expenditure ($18,053,000). NSW Treasury, as part of the budget allocation process, reduced the budget allocation by 1% representing efficiency savings as well as providing funding for a staff award increase of 2.5% (net increase of 1.5% for employee related expenditure) against an actual 4% increase. The Commission has implemented savings strategies with a view to self financing the funding gap (1.5%) between the award increase funding provided by NSW Treasury and the actual increase. While the Commission has committed to funding the 1.5% wages gap, it is

finding it increasingly difficult in the longer term to sustain such commitment. This requires an ongoing review of expenditure savings strategies with the potential to impact on the extent of investigations undertaken by the Commission.

Figure 1 indicates the actual Full Time Equivalent staff positions since 2004-2005. This reflects the impact of budget allocations on staffing within the Commission over these periods. The average FTE over this period is 111.1 – the allocation for 2009-2010 is 109.3.

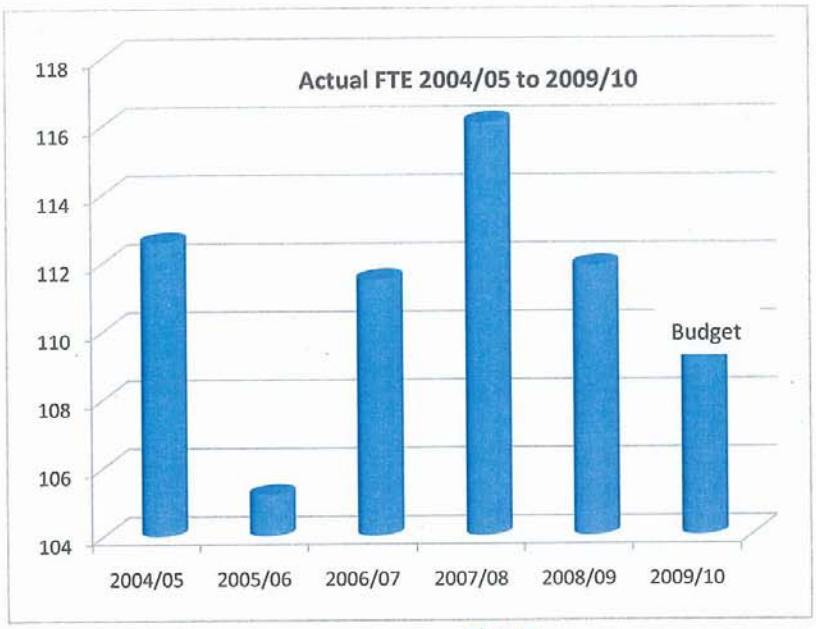


Figure 1

Request for Supplementation

The Commission submits there are two basic factors giving rise to the request for supplementation, namely:

1. An effective reduction to funded Full Time Equivalent (FTE) positions flowing from NSW Treasury budget allocation
2. The resultant flow-on effects of inadequate staffing levels on ICAC's core activities and likely adverse public perceptions thereof (extended timeframes for finalising investigations etc.)

The Commission's 2009-10 budget supports funding for 109.3 Full Time Equivalent (FTE) positions compared to last year's of 116FTEs. As a consequence, funding for the Investigation Division supports 39 FTE – a drop from 43 FTE in the previous year. The current strength of the Investigation Division is 42. This is forecast to result in an increase to the Net Cost of Services and consequent Deficit in the 2009-10 year as the reduction in FTE strength can only be achieved through attrition. The other issue is the impact on the ability of the Investigation Division to be able to provide

adequate service to the community of New South Wales as it will be unable to investigate matters promptly. This has the potential to allow corruption to expand in the years to come.

Table 1 highlights the Net Cost of Service Comparative Table 2004/05 to 2008/09 and Figure 2 highlights the Net Cost of Services over this same period.

Actual	2004/05 $000	2005/06 $000	2006/07 $000	2007/08 $000	2008/09 $000	2009/10 (budget)
Total Expenses	17,997	15,860	16,729	18,622	18,053	18,751
Total Retained Revenue	527	415	487	882	772	640
Gain/(loss) on sale of non current assets	0	(22)	1	0	10	
Net Cost Of Services	17,470	15,467	16,241	17,740	17,271	18,111

Table 1: Net Cost of Service Comparative Table 2004/05 to 2009/10

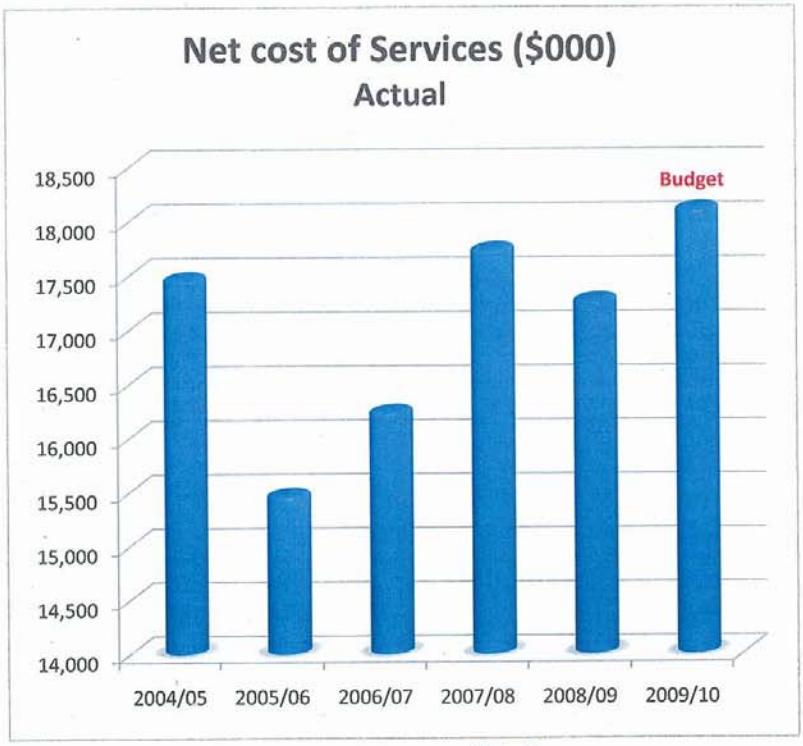


Figure 2

3

Appendix 3 – ICAC's request for additional recurrent funding

Investigating Corruption

There was a considerable increase in the time spent on full investigations (Operations) in the 2007-08 financial year. This has impacted on the time frames of investigations in 2008-09 due to the need for personnel to prepare criminal briefs for the ODPP.

Investigation Data from 2007-08

In 2007-08, the Investigation Division completed 70 preliminary investigations including matters carried over from the previous period. The average time for these investigations was 122 calendar days.

In addition, the Investigation Division also conducted 20 full investigations (Operations) including nine matters which were carried over from the previous period. Nineteen of these matters were completed during this period at an average of 285 calendar days.

Investigation Data from 2008-09

In 2008-09, the Investigation Division completed 49 preliminary investigations including matters carried over from the previous period. The average time for these investigations was 126 calendar days.

There were 14 full investigations (Operations) including 7 which were carried over from the previous period. Ten of these investigations were completed with an average of 154.5 calendar days. The reason for the drop in average time over this period was 4 targeted operations with a relatively short time frame (15-69 calendar days). Four operations have been carried over to the next period. The average time these matters were outstanding as of 30 June 2008 was 340 calendar days.

Analysis of data

The Investigation Division operates under a number of key performance indicators. Two indicators relate to the time spent on preliminary investigations and operations. The time set for a preliminary investigation is 120 calendar days with 18 months as the time set for completing an operation. The time frame for completing an operation has been recently changed to 12 months.

As previously stated in 2007-2008, the Investigation Division finalised 70 preliminary investigations. This included matters carried over from 2006-2007. The average time to complete these investigations was 122 days. Forty eight (69%) of these matters exceeded 120 days. All operations were concluded within the required 18 months. In 2008-2009, the Investigation Division finalised 49 preliminary investigations at an average time of 126 calendar days. Twenty four (49%) of these were greater than 120 days. All operations were within the stipulated 18 month time frame.

The data so far presented relates to investigation time. However, there are other factors which need to be considered when assessing the work load of the Investigation Division. The data clearly indicates an intense work load. Declared operations generally require intensive resources to the detriment of other investigations. In 2008-2009, 20 matters were placed on hold pending allocation to an investigator because of the work load within the Division. The average time on hold was 40 calendar days. This impacts directly on the ability of the Commission to investigate complaints of corruption in a timely matter.

4

Operations normally result in a public inquiry with findings made by the Commission. Section 13 (5) (b) (i) of the *Independent Commission Against Corruption Act 1988* relates to the function of the Commission in seeking advice of the Director of Public Prosecutions (DPP) as to the commencement of proceedings against particular persons for criminal offences against the laws of the State.

In a three year period (2006-2007, 2007-2008 and 2008-2009) the Commission sought advice from the DPP as to whether charges should be preferred against 187 persons. As a result of this, the DPP agreed to 585 charges to date. The DPP is still considering a number of other matters. The referral of a matter to the DPP requires staff from the Investigation Division and Legal Division to prepare criminal briefs and to assist with requisitions made by staff from the Office of the Director of Public Prosecution (ODPP).

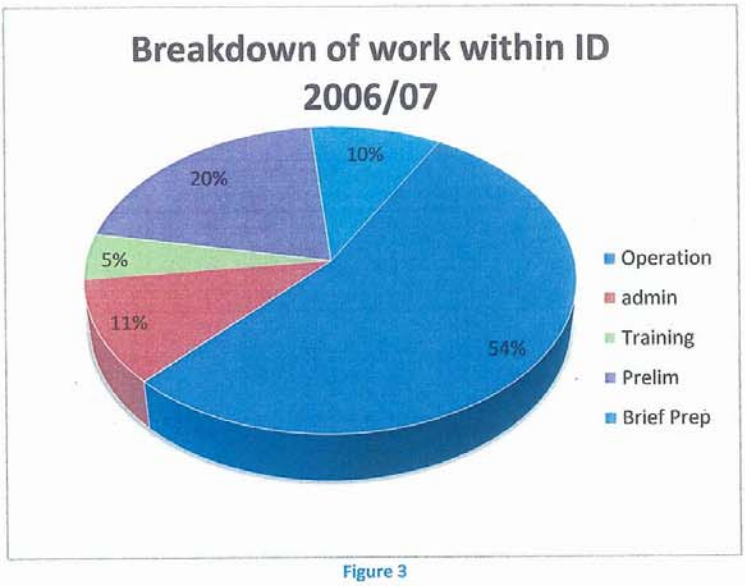


Figure 3

As previously stated, there is an impact on investigations as investigators are required to prepare criminal briefs, conduct inquiries on behalf of the DPP and appear, when required, in court in relation to these matters. This is to the detriment of time available for active investigations. It is also important to understand a "brief" may vary from 5 statements to 250 statements and other documents depending on the complexity of the matter. These statements have to be prepared in the accepted format thus requiring investigators to spend time with the various witnesses to get them to adopt the statement. This takes considerable time to achieve.

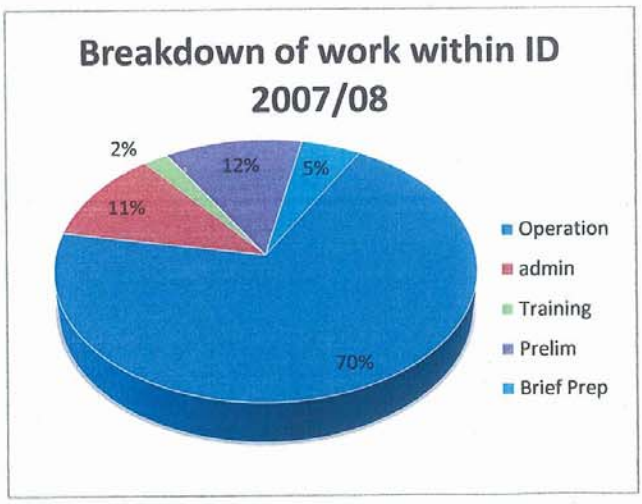


Figure 4

Investigators also spend time on administration tasks and training. The latter is required to ensure investigators maintain an understanding of current techniques and legislation.

Figure 3 is a break down of work allocation for 2006-2007. This graph indicates there was only 10% of time spent on Brief Preparation, 54% on operations

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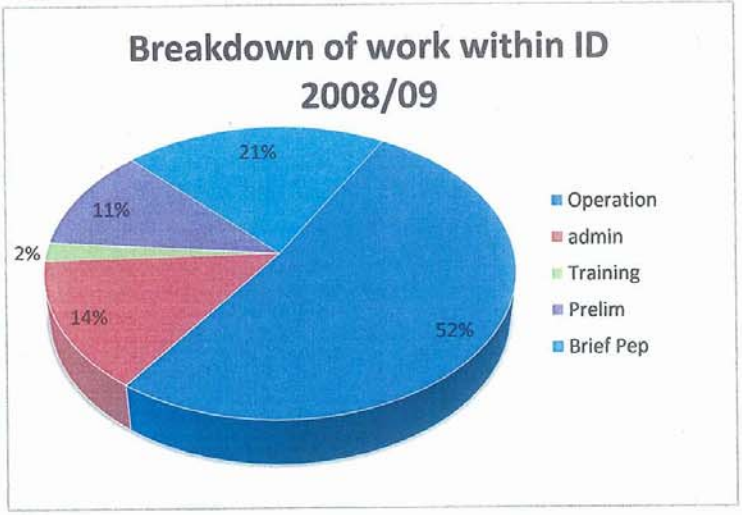

Figure 5

and 20% on preliminary investigations.

Figure 4 represents the period of 2007-2008. This indicates there was a substantial increase in the time spent on operations in this period – up to 70%. This was a result of a number of investigations into RailCorp and the Wollongong Council Investigation.

This increase in time spent on investigations was to the detriment of time available for preliminary investigations and training. In this particular period only 5% of the time was spent on Brief Preparation and 12% on preliminary investigations. Training dropped from 5% to 2% of the total time.

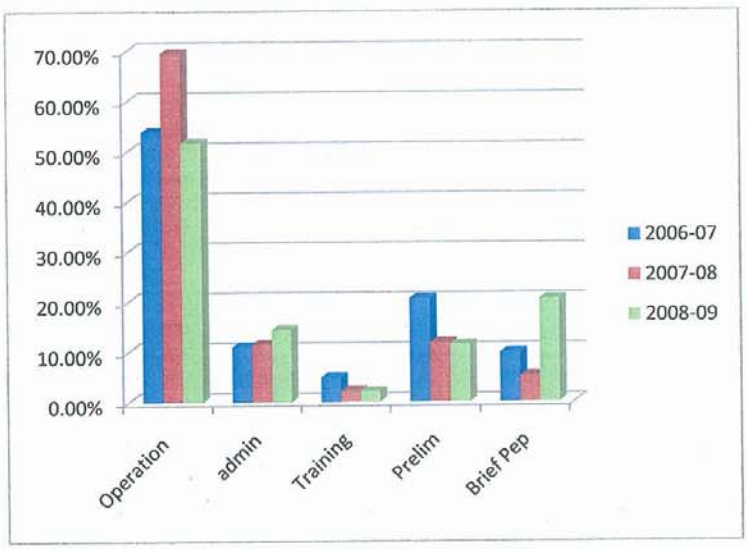

Figure 6

The time spent on operations in 2007-2008 resulted in an increase in time spent on Brief Preparation in 2008-09 where it occupied 21% (up from 5% in previous period). There was a drop from 70% to 52% in the time spent on investigating operations coupled with a 1% drop in the time spent on preliminary investigations (12% to 11%). Training maintained 2% of the allocated time. (See Figure 5)

6

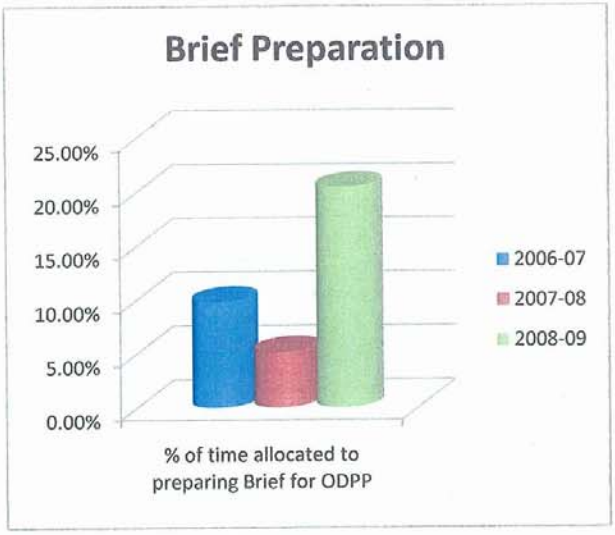

Figure 7

Figure 6 indicates the time allocated for five primary work groups within the Investigation Division for the three financial years 2006-2007, 2007-2008 and 2008-2009. This graph further highlights the impact of brief preparation on the availability of personnel to investigate new allegations raised with the Commission.

Figure 7 reinforces the impact of brief preparation on available time within the Investigation Division. It is important to appreciate this function is not going to decline – the more matters investigated by ICAC, the more matters referred to the DPP. It is an ever increasing demand on the time of the Investigation Division. There is a strong possibility the demands for brief preparation will seriously erode time available for investigations leading to an increase in time spend on investigations with a stronger possibility of evidence being lost due to these extended time frames.

This distinct possibility has the potential to compromise investigations conducted by ICAC and to affect public confidence in the Commission.

Direct impact of reduction in funding

As previously stated, the allocated funding for 2008-2009 has resulted in a reduction of funding for the Investigation Division. This resulted in a reduction in allocated Full Time Equivalent positions from 43 in 2008-2009 to 39. In order for this figure to be achieved (that is - for the Investigation Division to maintain budget) either Commission employees will have to be retrenched or there will be a reliance on natural attrition. Either approach will have an adverse impact on the statutory functions of the Commission.

Suffice to say, the reduction, if imposed, will further impact on the effectiveness and efficiency of the Investigation Division. Time frames for investigations will extend. The ability to be able to respond to mandatory court imposed time frames will be challenged – the need to meet these requirements is also to the detriment of time available for investigations.

There is a need to maintain a training regime to ensure staff knowledge is maintained. This has not been occurring in the past two reporting periods because of the need to allocate personnel to investigation and brief preparation. This is potentially to the detriment of the ability of the Commission to maintain and expand the effectiveness and efficiency of employees.

7

Confiscation of assets

The Investigation Division has a protocol to advise the NSW Crime Commission if, in the course of an investigation, property is identified which may be subject to confiscation. In the previous 5 years the Commission has referred 24 persons to the Commission as a result of investigations. The NSW Crime Commission has commenced action in relation to four persons and finalised action against two persons. The two finalised matters resulted in the forfeiture of $1,130,000. In the four pending matters, assets have been restrained or forfeiture orders have been made to a total value of $2,634,000, although the actual forfeitures may be less than this amount in due course.

The NSW Crime Commission will assess all other matters referred to determine if they come within their ambit and will take action if appropriate.

Confiscation of assets is a strong deterrent to corrupt activities. It also provides an avenue of return to the State to compensate for the money or other assets obtained in the course of corrupt activities. However, the compilation of the appropriate documentation is resource intensive and also impacts on the available time for investigations.

Confiscation of assets is an important factor in corruption investigation even though ICAC does not directly gain any revenue from the confiscation of assets as a result of ICAC investigations.

Conclusion

The current funding allocation to the ICAC is not sufficient to maintain the Investigation Division at the appropriate level to provide the expected service to the public of New South Wales. There is a need to increase the strength of the Investigation Division in order to provide an effective service. At present, matters are not progressing at the appropriate pace to meet community expectations. It is estimated there is a need for an increase of at least 8 FTEs is required to address investigation corruption issues whilst additional staff may also be required to manage the flow on increase to the corruption prevention workload.

The future reduction in personnel imposed through the current budget allocation will further impact on these time frames resulting in further community frustration.

The lack of resources within the Investigation Division will see an increase in matters sent back to agencies to investigate. This is not a satisfactory process for serious matters and a similar method adopted by the Queensland Crime and Misconduct Commission has been the subject of community criticism. There is the potential for investigation activities to reduce as brief preparation time further impacts on these duties. This will mean a reduction in the amount of investigations taken on by ICAC – this will potentially be to the detriment of the integrity of the NSW Public Sector.

ICAC investigations have resulted in actual forfeiture of more than $1.1m with a potential for a further $2.6m. There is a potential for a reduction in confiscation returns as investigations may no longer be able to take the extra steps necessary for a successful confiscation process due to the need to finalise matters strictly in compliance with the ICAC Act requirements, including preparing briefs for the DPP

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There is a strong likelihood of a reduction in investigations conducted by ICAC because of the inability to resource investigations under the current budget allocation. In addition to the potential for reduction in the number of investigations undertaken by ICAC in any given period there is also a virtual guarantee matters will take longer to complete because of resource and funding issues. It is important to appreciate a delay in instigating an investigation will ensure an erosion of the evidence – it is either not available through the routine destruction of business records, including bank records, or the time taken allows offenders to destroy any incriminating material. The latter prospect is of serious concern when it becomes known the matter has been referred to ICAC but ICAC is unable to commence an investigation because of inadequate resources. It is not appropriate to refer matters back to agencies for initial investigation in such cases because they lack both expertise and coercive powers.

Recommendation

ICAC estimates that to address the abovementioned issues, additional recurrent funding of $850,000 is required to supplement its current budgetary allocation. This will allow the recruitment of additional investigators and other staff associated with Corruption Prevention as well as providing adequate resources for any other additional staff required.

Appendix 4 – 2009 Memorandum of Understanding between the ICAC and the DPP

MEMORANDUM OF UNDERSTANDING

1. This Memorandum of Understanding ("MOU") is made on the day of 2009 between the Independent Commission Against Corruption ("the ICAC") and the Office of the Director of Public Prosecutions ("ODPP").

PURPOSE

2. The purpose of this MOU is to set out in general terms the responsibilities of the ICAC and ODPP in relation to:

(a) the furnishing by the ICAC to the ODPP of admissible evidence obtained as the result of ICAC investigations, pursuant to its function under section 14(1)(a) of the *Independent Commission Against Corruption Act 1988* (the ICAC Act); and

(b) liaison arrangements between the ICAC and ODPP to ensure that:

(i) any evidence furnished by the ICAC to ODPP is provided in a timely manner and presented in an orderly, comprehensive and accurate form;

(ii) the ODPP assigns an appropriately senior officer to consider such evidence in a timely and efficient manner.

FURNISHING OF EVIDENCE

3. The ICAC will provide copies of statements, exhibits and any other relevant admissible material to the ODPP, together with a covering letter outlining what charges have been identified by the ICAC as being open on the evidence and a case lawyer's summary report which outlines the evidence obtained during the ICAC investigation and any relevant legal and evidentiary issues. The ICAC will aim to provide a brief of evidence to the ODPP within 3 months of the final submissions being received from all legal representatives at a public inquiry. In cases where no

public inquiry has been held, briefs of evidence will be provided within 3 months of the conclusion of the investigation.

In a separate volume or volumes, the ICAC will provide copies of information that is not admissible but contains relevant background information and indications of what evidence a witness who has declined to provide a statement might provide if called to give evidence. This material will include:

- transcripts of any compulsory examinations or public inquiries conducted by the ICAC in relation to a matter which are not admissible against the person being questioned because that person has been directed to answer after a claim of privilege against self-incrimination;

- exhibits a person has been directed to produce after a claim of privilege against self-incrimination; and

- the ICAC's public investigation report.

In determining what background information should be provided, regard should be had to the DPP's duty of disclosure to the defence.

The case lawyer's summary report should:

- identify any known or expected difficulties of proof;

- identify which witnesses have indicated that they are willing to give evidence, and particulars of the manner in which this willingness was conveyed to the ICAC;

- identify which witnesses have indicated that they are not willing to give evidence and particulars of the manner in which this unwillingness was conveyed to the ICAC;

- identify and explain the significance of the documents included in the brief (preferably in the form of a table attached to the case lawyer's report);

- advise if there is any particular urgency, and, in the case of matters in which summary charges are considered appropriate, advise of the last date on which proceedings can be instituted.

SUMMARY OFFENCES

4. In matters in which the ICAC indicates in its covering letter that the available charges are time-limited summary offences, within six weeks of the ODPP receiving the material referred to in paragraph 3, the ODPP will advise the ICAC if criminal charges are available or will provide a progress report. Where charges are available, the ODPP will identify them and provide the appropriate wording for the CANs and a statement of facts.

5. Where potential offences are summary offences, the ICAC will ensure that the documentation referred to in paragraph 3 is provided to the ODPP as soon as practicable and the ODPP will ensure that the advice as to whether any criminal charges are available is rendered in a timely manner, allowing the ICAC sufficient time for an ICAC officer to take out a CAN in accordance with the advice.

INDICTABLE OFFENCES

6. Upon receipt of the documentation referred to in paragraph 3, the ODPP will assign the matter to an appropriately senior ODPP lawyer. The ODPP will advise the ICAC of the name of the lawyer to whom the matter has been referred, his/her telephone number and other contact details within two weeks of the receipt of the documentation, and the assigned lawyer will arrange a conference with relevant ICAC officers within four weeks of receipt of the documentation.

7. At the conference, the ODPP lawyer and relevant ICAC officers will discuss any issues arising from the brief, including whether any requisitions will be issued. If requisitions are to be issued, a timetable for the issuing of requisitions, the answering of requisitions and the furnishing of advice by the ODPP as to whether criminal charges are available will be agreed. If no requisitions are to be issued, a timetable for the furnishing of advice by the ODPP will be agreed.

8. The timetable agreed will be confirmed in writing by the ODPP to the ICAC case lawyer.

9. Any variation to this timetable, including any requests for further requisitions, should be raised by the DPP lawyer by way of initial discussion and then confirmed in writing.

10. Where the ODPP advises that criminal charges are available, the ODPP will identify them and provide the appropriate wording for the CANs and the statement of facts.

INDICATION OF EARLY GUILTY PLEA

11. In cases where ICAC officers have been advised that a person who has been the subject of an investigation by the ICAC wants to plead guilty, a brief of evidence may be provided that does not include all of the information referred to in paragraph 3. In such cases, the ICAC will provide a more streamlined brief consisting of whatever material is then available, as long as such material sufficiently identifies the offence/s which the ODPP will be asked to consider.

12. In cases where there are co-offenders, and a plea of guilty is being offered on the basis that evidence will be given against other offenders and recognition sought for such cooperation on sentence, ICAC officers will also provide the evidence then available in respect of the co-offenders, a detailed summary of that evidence, and an indication of how the cooperation offered would assist in the prosecution of such co-offenders, but will not be required to provide full briefs of evidence in respect of all such possible co-offenders at the time of the consideration by the ODPP of the proposed guilty plea.

REQUISITIONS

13. Upon receipt of the material referred to in paragraph 3, and after the conference referred to in paragraph 7, the ODPP may raise requisitions, in writing, identifying any additional evidence or other material required to be obtained by the ICAC.

14. The ICAC will obtain additional evidence as requested by the ODPP. If any questions of law arise, clarification and advice will be sought from the ODPP, preferably through another conference.

15. Where a prospective witness has refused to sign a statement in admissible form, the ICAC will provide:

- a copy of the transcript of that witness' evidence before the ICAC;
- a statement from the ICAC officer who attempted to obtain the statement.

16. Where the ODPP after receiving a response to requisitions, has raised additional requisitions necessary to complete the brief of evidence, the ODPP advice as to the charges to be laid, as a general rule, will be provided within six weeks of receiving the additional material, or the ODPP will provide a progress report prior to the expiration of the six weeks, indicating the date by which it is expected the advice will be provided.

INSTITUTING A PROSECUTION

17. If, after consideration of the advice of the ODPP, the ICAC is of the view that other charges (based on the same evidence) are preferable to those advised by the ODPP, the ICAC will consult with the ODPP regarding the laying of those CANs.

18. Upon receipt of appropriate wording for the CANS and statement of facts and a decision by the ICAC to proceed, an ICAC case officer will prepare CANs and then proceed to issue the CANs, obtain a date and serve the CANs upon the Defendant. Prior to obtaining a date for the CANs, the

ICAC case officer will consult with the ODPP about a suitable return date. If for any reason CANs are not served within four weeks of receipt of the ODPP's advice to prosecute (or such shorter period as is appropriate where statutory time limits apply), the ICAC will advise the ODPP in writing of its intended action.

19. The ICAC will file the affidavit of service and court copy of the CANs with the registry of the relevant court and advise the ODPP when this has been done.

20. The ICAC case officer will provide a copy of the CANs and the affidavit of service to the ODPP lawyer within three working days of service.

21. The ODPP will appear on the return date of the CANs.

22. The ODPP will specify in writing to the ICAC the documents required to be included in the brief of evidence to be served upon the defendant.

23. The ICAC case officer will prepare the s75(a) notice and serve it and a copy of the brief of evidence in accordance with the orders made by the Court. A copy of the s75 notice as served on the defendant will be provided by the ICAC officer to the ODPP lawyer with carriage of the matter within three working days of service upon the defendant.

24. The s75 notice will specify the documents and other contents of the brief of evidence through a detailed description.

COSTS

25. The ICAC is responsible for meeting the expenses of security arrangements for ICAC witnesses who are the subject of witness security arrangements.

26. The ODPP is responsible for meeting the cost of witness expenses for those witnesses who are not the subject of witness security arrangements. These expenses include travel costs in all prosecutions conducted by the ODPP and any order for costs to be paid to the defendant if the prosecution fails.

27. The ICAC will bear the costs relating to the investigation of the charge and the obtaining of evidence.

28. The ODPP and the ICAC may make arrangements for the sharing of costs associated with the preparation of evidence for trial.

29. The ICAC will be responsible for arranging for the attendance of witnesses at the hearings. The ODPP will provide the ICAC with information, updated as necessary explaining payment of costs and related matters. The ICAC will forward relevant aspects of this information to witnesses.

SUMMARY HEARINGS, COMMITTAL AND TRIAL

30. The ODPP will provide subpoenas to the ICAC within an adequate time to permit the ICAC to attend to service.

31. The ODPP lawyer with the carriage of a prosecution will meet with relevant ICAC officers at least two weeks before the trial of the matter is due to commence to discuss witness attendance and the exhibits that will be required at trial.

32. The ICAC is generally responsible for the storing and transporting of ICAC exhibits and original documentation. Where such exhibits or documentation are provided to the ODPP prior to trial, the relevant ODPP lawyer will issue a receipt to the ICAC and will be responsible for the safe custody of the exhibits and documentation prior to their tender into evidence or return to the ICAC. The ODPP lawyer will place the receipt on the ODPP file together with a note indicating the location of the items and documentation.

POINTS OF CONTACT

33. The official points of contact, and the points of contact for all matters of a serious or sensitive nature, will be the Deputy Commissioner of the ICAC and the Managing Lawyer for ODPP Group 6.

34. As well as liaising in respect of specific issues that might arise, these officers will meet at least once every two months to discuss the progress of preparation of advice by ODPP lawyers and the progress of responses to requisitions by ICAC officers.

35. The usual points of contact for each prosecution will be between the relevant ODPP lawyer and the ICAC case lawyer.

36. When the ICAC works jointly on investigations with another investigative body or bodies, an officer from the ICAC will be nominated to be the contact officer in relation to the answering of requisitions and the collation of the brief of evidence.

37. The address for all correspondence between the ICAC and the ODPP is:

To the ICAC:
The Solicitor to the Commission
Independent Commission Against Corruption
DX 557 SYDNEY
ATTENTION:(name of ICAC case lawyer)

To the ODPP:
Solicitor for Public Prosecutions
Office of the Director of Public Prosecutions
DX 11525 SYDNEY DOWNTOWN

ATTENTION: The Managing Lawyer, Group 6

GENERAL MATTERS

38. In circumstances where the ICAC considers it appropriate to place before a sentencing judge information relating to the significance and usefulness of an offender's assistance to the ICAC (i.e. *Crimes (Sentencing Procedure) Act 1999* s.23), the ICAC will make the information known to the ODPP and the defence as soon as practicable prior to the day of the hearing. Access to the information prior to or on the day of the hearing will only be given in the presence of an ICAC officer and, subject to contrary arrangements in particular cases, will be given on ODPP premises.

39. The ODPP will notify the ICAC of all proceedings brought under the *Confiscation of Proceeds of Crime Act 1989* where such proceedings relate to a prosecution instituted as the result of an investigation conducted by the ICAC in the exercise of its functions.

MOU TO BE BROUGHT TO ATTENTION OF RELEVANT STAFF

40. The ICAC and ODPP agree that all staff who are involved in the preparation or consideration of briefs of evidence covered by this MOU should be made aware of the terms of the MOU. All new officers commencing at either office who will be involved in the preparation or consideration of such briefs will be made aware of the terms of the MOU.

The Hon Jerrold Cripps QC
Commissioner, ICAC
27/7/09

N R Cowdery AM QC
Director of Public Prosecutions
30.7.09

Appendix 5 –Memorandum of Understanding between the Presiding Officers and the ICAC[79]

MEMORANDUM OF UNDERSTANDING
ON THE EXECUTION OF SEARCH WARRANTS
IN THE PARLIAMENT HOUSE OFFICE OF
MEMBERS OF THE NEW SOUTH WALES PARLIAMENT
BETWEEN
THE COMMISSIONER OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION
THE PRESIDENT OF THE LEGISLATIVE COUNCIL
AND
THE SPEAKER OF THE LEGISLATIVE ASSEMBLY

[79] Legislative Council Privileges Committee, *A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices*, report 47, November 2009, Appendix 5, p. 50.

1. Preamble

This Memorandum of Understanding records the understanding of the Commissioner of the Independent Commissioner Against Corruption (ICAC), the President of the Legislative Council and the Speaker of the Legislative Assembly on the process to be followed where the ICAC proposes to execute a search warrant on the Parliament House office of a member of the New South Wales Parliament.

The memorandum and associated processes are designed to ensure that search warrants are executed without improperly interfering with the functioning of Parliament and so its members and their staff are given a proper opportunity to claim parliamentary privilege in relation to documents in their possession.

2. Execution of Search Warrants

The agreed process for the execution of a search warrant by the ICAC over the premises occupied or used by a member is spelt out in the attached Procedure 9 of the ICAC's Operations Manual entitled 'Procedures for obtaining and executing search warrants' .

The document covers the following issues:

- Procedures prior to obtaining a search warrant
- Procedures prior to executing a search warrant
- Procedures to be followed during the conduct of a search warrant
- Obligations at the conclusion of a search.

3. Promulgation of the Memorandum of Understanding

This Memorandum of Understanding will be promulgated within the Independent Commission Against Corruption.

This Memorandum of Understanding will be tabled in the Legislative Council by the President and in the Legislative Assembly by the Speaker.

4. Variation of this Memorandum of Understanding

This Memorandum of Understanding can be amended at any time by the agreement of all the parties to the Memorandum.

This Memorandum of Understanding will continue until any further Memorandum of Understanding on the execution of search warrants in the Parliament House office of members is concluded between the Commissioner of the ICAC, the President of the Legislative Council and the Speaker of the Legislative Assembly.

The Commissioner of the ICAC will consult with the President of the Legislative Council and the Speaker of the Legislative Assembly in relation to any revising of Section 10 of the attached Procedure

9 of the ICAC's Operations Manual, or any other provision of Procedure 9 which specifically relates to the execution of search warrants at Parliament.

Revocation of agreement to this Memorandum of Understanding

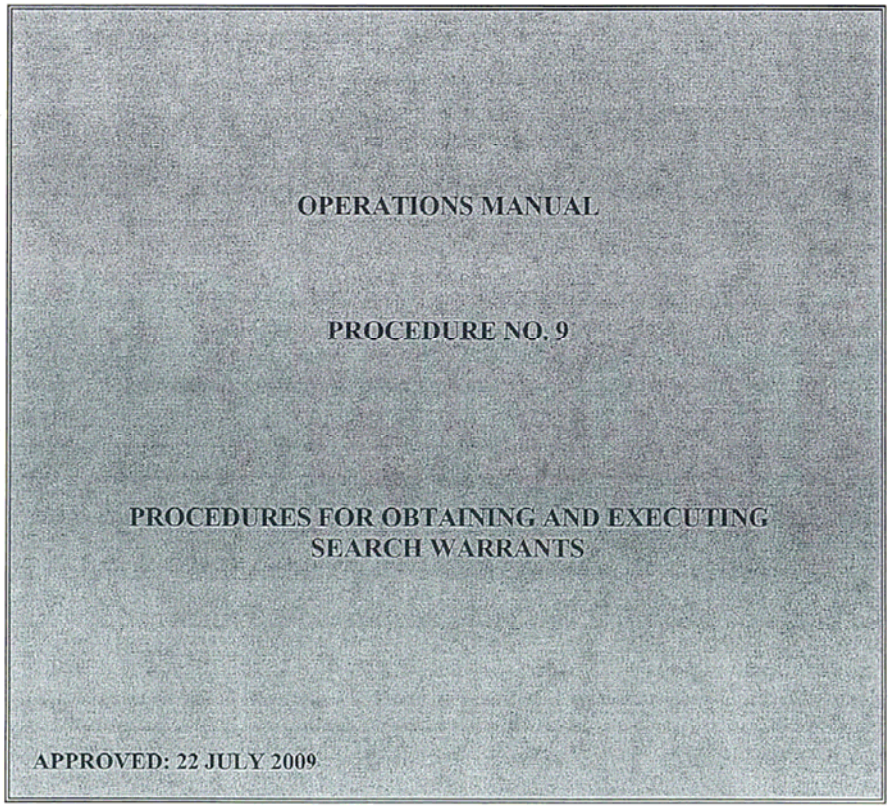
Any party to this Memorandum of Understanding may revoke their agreement to this Memorandum. The other parties to this Memorandum of Understanding should be notified in writing of the decision to revoke.

Signatures

The Hon David Ipp AO QC
Commissioner

The Hon Peter Primrose MLC
President

The Hon Richard Torbay
Speaker



OPERATIONS MANUAL

PROCEDURE NO. 9

PROCEDURES FOR OBTAINING AND EXECUTING SEARCH WARRANTS

APPROVED: 22 JULY 2009

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1

PROCEDURES FOR OBTAINING AND EXECUTING SEARCH WARRANTS

01 GENERAL

1.1 Search warrants issued in New South Wales

Division 4, Part 5 of the *ICAC Act* and Division 4, Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (Except ss.69-73) apply to Commission search warrants.

Section 40 (4) of the *ICAC Act* provides for an officer of the Commission to make application to an authorised officer (as defined in the *Law Enforcement (Powers and Responsibilities) Act 2002)* or the Commissioner for a search warrant.

It is Commission policy that warrants be sought from authorised officers, and not the Commissioner.

1.2 Extra-territorial search warrants

The ICAC is enabled to make an application for extra-territorial search warrants under several interstate statutes:

VIC *Crimes Act 1958*
ACT *Crimes Act 1900*
WA *Criminal Investigation (Extra-territorial Offences) Act 1987*
SA *Criminal Investigation (Extra-territorial Offences) Act 1984*
TAS *Criminal Investigation (Extra-territorial Offences) Act 1987*
NT *Criminal Investigation (Extra-territorial Offences) Act 1985*
QLD *Police Powers and Responsibilities Act 2000*

Assistance may be sought in obtaining interstate warrants from the Fraud Squad State Crime Command of the NSW Police. The Fraud Squad has template documents for use in making these applications and these can be readily adapted to suit an ICAC application. In addition, NSW Police has liaison officers in each of the above jurisdictions.

1.3 General warrants are invalid

It is a fundamental proposition that a general warrant is bad at law. A warrant that purports to permit an unqualified search is likely to be struck down by a court as a general warrant. Evidence obtained under the purported authority of such warrants is obtained unlawfully. Courts insist on a high degree of specificity in a warrant not only in respect of the things for which the search is to be conducted, but also specificity in relation to the place from which the things are to be seized and the times within which the search and seizure may take place.

An example is a case in which search warrants obtained by the Royal Commission into the NSW Police Force failed on their face to indicate any connection with a matter under investigation by the Commission and so failed to delimit the scope of the search. As a consequence the warrants were held to be invalid, as general warrants: see *MacGibbon & Anor v Warner & Ors; MacGibbon & Anor v Ventura & Ors; MacGibbon & Anor v O'Connor & Ors* (1997) 98 A Crim R 450.

02 APPLYING FOR A WARRANT

The applicant for a search warrant must have reasonable grounds for believing that:

i) a thing is on the premises or will be within 72 hours; and

ii) the thing is connected with a matter that is being investigated under the *ICAC Act*.

Reasonable belief is more than an idle wondering whether it exists or not. Reasonable belief requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.

2.1 Drafting and Approval

The Case Officer may use the Case Officer's Checklist at Appendix B as an aid to ensure all steps required by this Procedure are taken. Use of this checklist is not mandatory.

1. The Case Officer will discuss with the Case Lawyer whether there is a sufficient legal basis to make an application for a search warrant.

2. All applications must be approved by the Executive Director, Investigation Division. If approved the Case Officer will arrange for the Executive Director, Investigation Division to sign the Authorisation Checklist (Appendix A).

3. The senior investigator in charge will give consideration to whether any police officers or officers of other agencies should also be authorised under the warrant and if so advise the Executive Director, Investigation Division. In the case of a search warrant to be executed on a parliamentary office approval must be obtained from the Commissioner or Deputy Commissioner.

4. The Case Officer will be responsible for drafting the search warrant application using the legal macro[1]. A separate application must be prepared for each warrant sought. The application must address:

[1] It is important to put all relevant information before the authorised officer, who must make a decision based upon reasonable grounds. The person making the application should have a thorough knowledge of the facts to support the information provided.

It is an offence to give false or misleading information to an authorised officer.

- the authority of the applicant to make an application for a warrant;
- the grounds on which the warrant is sought;
- the address and description of the premises;[2]
- a description of the thing being searched for and if known its location;[3] and
- if a previous application was made and refused, the details of that application and its refusal and additional information that justifies the issue of a warrant.

The issuing officer is also required to consider:

- the reliability of the information;
- the nature and source of the information (see informers); and
- whether there is sufficient connection between the thing(s) sought and the matter under investigation.

5. The Case Officer is responsible for ensuring that all information contained in the application is true and correct and all relevant matters are disclosed.

6. The Case Officer will also draft the warrant[4], Occupier's Notice and if needed, the cl.11 Certificate, using the legal macros.

7. The Case Officer will provide these documents, together with the "Authorisation Checklist" at Appendix A, through the Team Chief

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Some common law cases have stated that there is a strict duty of disclosure of material facts by the applicant seeking the warrant. The facts may be ones that may (or may not) have affected the exercise of the authorised officer's discretion to issue the warrant. To avoid a warrant being struck down, it is sensible to include all material facts (in favour or against the issue of a warrant).

[2] **'Premises':** *includes any structure, building, aircraft, vehicle, vessel and place (whether built on or not) and any part thereof.*

More than the address should be given. It should include a description of the premises, street number, unit number office location, any outbuilding, for example, garage, shed, granny flat and the common property, if applicable. It is advisable to conduct a visual sighting of the premises before conducting the search to ensure that there are no complicating factors.

If vehicles at the premises are to be searched, the warrant should say so and include details of vehicle make, colour, registration number, and owner, if known.

[3] The warrant must identify:
(i) the relevant documents or things believed to be on the premises; and
(ii) state that these documents or things are connected with the matter under investigation.

The matter that is being investigated needs to be specified in the warrant. The reason is to let the occupier of the premises know the scope and purpose of the search, and also to set the bounds to the area of the search which the execution of the warrant will involve as part of the investigation.

[4] In order to retain the greatest flexibility in operations a number of Commission officers should be named as authorised to execute each particular warrant.

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Investigator, to the Case Lawyer for review and settling.[5] The Case Lawyer is to ensure the documents comply with the relevant provisions of the *ICAC Act* and *Law Enforcement (Powers and Responsibilities) Act 2002* and Regulation and is to identify any policy or other issues which the Case Lawyer believes should be brought to the attention of the Executive Director, Legal, that may affect approval. In the case of a search warrant to be executed on a parliamentary office the Case Lawyer should ensure as far as possible that the documents described in the warrant are not likely to be subject to parliamentary privilege.

8. The draft documentation and Authorisation Checklist will be referred to the Executive Director, Legal, for approval, both as to the documentation and the making of the application.

9. If the Executive Director, Legal, does not approve the documentation it is to be returned to the Case Lawyer for appropriate amendment. If the Executive Director, Legal, does not approve the making of the application he/she will discuss with the Executive Director, ID, and the Commissioner or Assistant Commissioner responsible for the investigation to resolve the issue.

10. If approved, the documentation is to be returned to the Case Lawyer who will provide it and the Authorisation Checklist to the Case Officer for submission to the Senior Property Officer for numbering. The Senior Property Officer will return the original warrant to the Case Officer and retain a copy. The Authorisation Checklist will be retained with the other records by the Senior Property Officer.

11. The Case Officer will then arrange for swearing and issue. A copy of the original signed application including the authorised officer's record of the application is to be obtained for Commission records.

12. Where the search warrant affects premises occupied by a public authority as defined in the *ICAC Act*, consideration shall be given as to whether any prior liaison should take place with a public official. Prior liaison shall not occur without the express approval of the Executive Director, ID.

03 SEARCH WARRANT APPLICATION BY TELEPHONE

Section 61 of the *Law Enforcement (Powers and Responsibilities) Act 2002* provides for an application to be made by telephone, radio, telex or other communication device where the warrant is required urgently and where it is not practicable for the application to be made in person.

Section 61(3) provides that an application must be made by facsimile if the facilities to do so are readily available.

[5] It is important all documents contain identical descriptions of the premises and of the documents and other things to be searched for. This can most readily be achieved by copying that material from the application into each of the other documents.

The approval of a Chief Investigator is a pre-requisite to an application for the issue of a search warrant by telephone (or facsimile).

Where a Search Warrant is issued upon application made by telephone, the issuing officer will advise the terms of the warrant and the date and time it was approved. The Case Officer must then ensure that a written warrant is completed in those terms.

Although s.46 of the *ICAC Act* does not distinguish between telephone warrants and others it is unlikely that an issuing officer would allow more than 24 hours for the execution of a warrant obtained by telephone application.

04 DISCLOSING IDENTITY OF INFORMANT

The identity of a registered informant on whose information the application for a warrant is based, should if possible be omitted from the application. If such information is relied upon it should be indicated in the application that the information is from a registered informant. Consideration should also be given to whether there are any operational reasons why the identity of any other person who has supplied information should not be disclosed.

In each case before attending the authorised officer the Case Officer will discuss these issues with the Team Chief Investigator and a decision made whether or not to disclose the identity if pressed to do so by the issuing officer.

Where a decision is taken not to disclose identity and the issuing officer insists on knowing the application is to be withdrawn. The matter is to be reported to the Executive Director, ID and the Executive Director, Legal, so that consideration can be given to taking further action.

05 PREVENTING INSPECTION OF DOCUMENTS

The court is required to keep copies of the application for the warrant and the Occupier's Notice, together with the report to the authorised officer on execution of the warrant. The original search warrant is attached to that report. Generally, these documents are available for inspection by the occupier or by any other person on his behalf (Clause 10, *Law Enforcement (Powers and Responsibilities) Regulation 2005*).

Clause 10 permits an issuing officer to issue a certificate to the effect that the issuing officer is satisfied that:

(a) such a document or part of such a document contains matter:

  (i) that could disclose a person's identity, and

  (ii) that, if disclosed, is likely to jeopardise that or any other person's safety, or

(b) a document or part of a document contains matter that, if disclosed, may seriously compromise the investigation of any matter.

If the issuing officer is so satisfied, then the document or part of the document to which the certificate relates is not to be made available for inspection.

06 COVERT SEARCH WARRANT

Section 47 of the *Law Enforcement (Powers & Responsibilities) Act 2002* makes specific provision for the granting of a covert search warrant. However, s.46C of that Act limits the class of persons who can apply for a covert search warrant to certain authorised police officers, certain officers of the Police Integrity Commission and certain officers of the NSW Crime Commission.

Commission officers are not authorised under the Act to apply for a covert search warrant and therefore the Commission cannot make use of the covert search warrant provisions.

07 BRIEFING

The Case Officer allocated the responsibility for the execution of a Search Warrant/s (Search Team Leader) shall be accountable to the Commission for the entire operation. The Search Team Leader shall:

(a) assess personnel required and allocate tasks, e.g. group leaders, document and property recorder, photographer, video and audio recording operator, etc;

(b) ensure Team members are skilled in the operation of equipment to be used and that such equipment is in working order and ready for immediate use;

(c) assess the need for equipment which will be required to accompany the search team, e.g. camera, video recorder, notebooks, property seizure sheets, containers and seals to secure seized property and documents, and equipment to gain access to the premises if force is likely to be required;

(d) establish the search team/s under his/her personal direction; prepare operational orders, brief the search team/s and Case Lawyer on the proposed execution of the warrant, ensure that each search team member reads and understands the authority of the warrant and is aware of his/her role and any potential risks. The Executive Director, ID shall be advised beforehand of the briefing session and attend if he/she considers it appropriate or necessary;

(e) arrange for the search team/s to physically study the address and precise premises to be searched and be aware of the address and detail, i.e. whether brick or fibro house, office building, etc, and of special landmarks or peculiarities which readily identify them. In short, the search team/s must be fully aware of the exact location and description of the premises to be searched, including entrances and other accesses to ensure that only the premises mentioned in the Warrant are entered.

The Team Property Officer is responsible for:

(a) making themselves aware of the property control procedure as it applies to Team Property Officers as set out in Procedure No. 27 (Registration, Control and Disposal of Property);

(b) the composition, care and control of the search kits - including ensuring that the search kit contains adequate consumables for the search;

(c) maintaining the seizure records in the field including:

(i) Property Seizure Sheets (Appendix 'D');

(ii) General Receipts (Appendix 'C');

(d) control of seized or volunteered property until such time as it is registered with Property.

The Case Lawyer is responsible for providing advice on any legal issues relating to the proposed execution of the warrant.

08 EXECUTION OF WARRANT

Under s.46 of the *ICAC Act* a search warrant ceases to have effect:

(i) one month after issue (or such earlier time as specified); or

(ii) if it is withdrawn by the person who issued it ; or

(iii) when it is executed

whichever first occurs.

The Search Warrant authorises any person named in the Warrant to:

(a) enter the premises, and

(b) search the premises for documents or other things connected with any matter that is being investigated under the *ICAC Act*, and

(c) seize any such documents or other things found in or on the premises and deliver them to the Commission.

A member of the Police Force, or a designated "senior Commission investigator", named in and executing a search warrant may search a person found in or on the premises whom the member of the Police Force or "senior Commission investigator" reasonably suspects of having a document or other thing mentioned in the warrant. This power does not extend to Special Constables.

8.1 Person(s) named in the warrant must execute the warrant

At least one of the persons named in the warrant must be in attendance at the premises to be searched at the time the warrant is executed. In *Hartnett & Ors v State of New South Wales* (SC unrep 31.3.99) warrants were held not lawfully executed because the only person named in the warrants did not attend any of the premises to be searched at the time the warrants were executed. The officer was, instead, co-ordinating the operation from a command post and was not physically involved in any of the searches.

8.2 Times between which warrant can be executed

Search warrants issued under the *ICAC Act* can only be executed between 6:00 am and 9:00 pm and cannot be executed outside of those hours unless the warrant expressly authorises that the warrant may be executed outside of those hours.

When proposing the execution of a search warrant, officers should be conscious of the presence of young children on the premises. The potential for young children to become distressed should be considered. In appropriate cases the Search Team Leader should suggest to the parents that they explain what is happening. If the presence of young children is considered a particular risk to the execution of the warrant the Executive Director, ID should be consulted.

A search conducted under a warrant which does not authorise an out-of-hours search is unauthorised by the warrant and evidence obtained out-of-hours is obtained unlawfully. In *Myers Stores Limited v Soo* (1991 2 VR 597) police officers who executed a warrant between 6:00 am and 9:00 pm, but continued to search after 9:00 pm without any express authority on the warrant, were held to have conducted an unlawful search **as regards that part of the search conducted after 9:00 pm**. This decision was applied by the NSW District Court in *Winter v Fuchs* (June 99) in similar circumstances.

8.3 Entry Announcement

Searches must not be conducted of unoccupied premises unless exceptional circumstances exist. If it is known that the premises will be unoccupied this fact must be made known to the authorised Justice at the time of application.

Pursuant to s68 of the *Law Enforcement (Powers and Responsibilities) Act 2002* one of the persons executing a warrant must announce that they are authorised to search the premises and provide the occupier with an opportunity to allow entry onto the premises.

This requirement need not be complied with if the person believes on reasonable grounds that immediate entry is required to ensure the safety of any person or to ensure that the effective execution of the warranted is not frustrated. In such circumstances, reasonable force may be used to gain entry.

Upon access being gained to the premises mentioned in the Warrant, the Search Team Leader (usually the senior ICAC officer present) shall:

(i) identify the search team as members of the Independent Commission Against Corruption;

(ii) read and explain the Search Warrant to the occupier and produce it for inspection if requested **(NOTE: The Search Team Leader must retain possession of the Search Warrant)**;

(iii) serve the Occupier's Notice. If the occupier is not present, the notice shall be served as soon as practicable after executing the warrant;

(iv) invite the co-operation of the occupier;

(v) execute the warrant,

(vi) advise the Search co-ordinator of time of entry and exit.

8.4 Service of the Occupier's Notice

A person executing a warrant is required, on entry onto the premises or as soon as practicable after entry onto the premises, to serve the Occupier's Notice on the person who appears to be the occupier and who is over 18 years of age (s.67 LEPRA).

If no such person is present the Occupier's Notice must be served on the occupier within 48 hours after executing the warrant (s.67(4) LEPRA).

If an Occupier's Notice cannot be practicably served within these time limits the eligible issuing officer who issued the warrant may, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the Occupier's Notice to the attention of the occupier. Such an order may direct that the Occupier's Notice be taken to have been served on the occupier on the happening of a specified event or on the expiry of a specified time.

In *Black v Breen* (unreported, SCNSW, 27 October 2000) His Honour Ireland AJ held that the failure of the police officers to hand to the plaintiff a complete Occupier's Notice meant that the execution of the warrant was contrary to law. In that case the first page of the notice had been given to the occupier but not the second page.

8.5 Execution

In executing the warrant ICAC officers must:

(i) use the minimum amount of force, where force is required;

(ii) cause the least amount of damage necessary in the course of the search and entry;

(iii) not unduly restrict the movement of occupants of searched premises, unless they are hindering the search;

(iv) wear the approved ICAC identification jacket unless exempted by the Search Team Leader (such exemption only to be given in exceptional circumstances);

(v) if not wearing an ICAC identification jacket, display prominently the ICAC official identification badge during the execution;

(vi) only break open receptacles in the premises if reasonably necessary for the purpose of the search;

(vii) use such assistants as considered necessary.

It is the responsibility of the Search Team Leader to ensure strict compliance with the property seizure procedure. If property is volunteered then it is to be receipted using the form of receipt at Appendix 'C'. If property is seized then it is to be receipted using the form of the Property Seizure Sheet at Appendix 'D'.

In most cases it will be useful for a rough sketch of the floor plan to be drawn on the reverse side of the property seizure sheet and notations made as to where the relevant property was found. The interior of the premises should be photographed or video taped, particularly the areas where the documents or other things were found. Photography or video recording should be done with the occupier's consent whenever possible.

The use of video recording of the search should be done whenever possible. This protects the occupier and Commission officers against spurious allegations. If the occupier refuses consent that refusal should be recorded if possible prior to the audio of the device being switched off. Consent is not required for video taping.

If in the execution of the warrant the warrant holder considers it appropriate to audio tape any conversations with the occupier the warrant holder must gain permission of the occupier to audio tape these conversations.

In the event there is a conversation, consideration should be given to whether, in the circumstances, a caution should be given.

Questions put to the occupier or any other person on the premises concerning documents or things seized and any replies should be appropriately recorded. All such persons must first be told the conversation will be recorded.

Once the execution of the warrant has commenced at least one of the persons named in the warrant should remain on the premises until the search is completed.

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8.6 Operation of Electronic Equipment

Section 75A of the *Law Enforcement (Powers & Responsibilities) Act 2002* allows a person executing or assisting in the execution of a warrant to bring onto premises and operate any electronic and other equipment reasonably necessary to examine a thing found at the premises in order to determine whether it is or contains a thing that may be seized under the warrant. The operation of equipment already at the premises to examine a thing is not authorised unless the person operating the equipment has reasonable grounds to believe that the examination can be carried out without damaging the equipment or the thing.

The Search Team Leader will determine what equipment should be used.

8.7 Removal for Inspection

Section 75A of the *Law Enforcement (Powers & Responsibilities) Act 2002* allows a person executing or assisting in the execution of a warrant to remove a thing found on the premises to another place for up to seven working days for examination to determine whether it is or contains a thing that may be seized under the warrant;

- if the occupier of the premises consents, OR
- it is significantly more practicable to do so having regard to the timeliness and cost of examining the thing at another place and the availability of expert assistance, AND
- there are reasonable grounds to suspect it is or contains a thing that may be seized under the warrant.

If a thing is moved to another place for examination the officer who issued the search warrant may extend the period of removal for additional periods not exceeding seven working days at any one time.

Where an item is removed the person executing the warrant must advise the occupier that the occupier may make submissions to the issuing officer and must give the occupier a reasonable opportunity to do so.

The Search Team Leader will determine whether any items are to be removed from the premises for the purpose of examination.

8.8 Access to and Downloading of Data

Section 75B of the *Law Enforcement (Powers & Responsibilities) Act 2002* allows a person executing or assisting in the execution of a warrant to operate equipment at the premises being searched to access data (including data held at other premises) if that person believes on reasonable grounds that the data might

be data that could be seized under the warrant. The equipment can be used to put any data that could be seized in documentary form so that it may be seized in that form.

The person executing or assisting in the execution of the warrant may;

- copy any accessed data to a disk, tape or other data storage device brought to the premises (or, with the consent of the occupier, copy the data onto such a storage device already at the premises) and
- take the storage device from the premises to examine the accessed data to determine whether it (or any part of it) is data that could be seized under the warrant.

The operation of equipment already at the premises to access data is not authorised unless the person operating the equipment has reasonable grounds to believe that the examination can be carried out without damaging the equipment or data.

Any data obtained under section 75B that is not data that could be seized under the warrant must be removed from the Commission's data holdings and any other reproduction destroyed.

8.9 When is a Warrant Executed?

A warrant is executed when the search is completed and those authorised under the warrant have left the premises. It is not possible to execute a warrant with multiple entries, searches and seizures during the period that the warrant remains in force. A person cannot be denied access to any part of their property, so rooms etc cannot be locked up.

Where the Search Team Leader has executed a Search Warrant and is satisfied that the documents and things described in the warrant:

(a) have been located and seized, or

(b) are not on the premises

he/she shall terminate the search.

If at any stage the search team leave the premises, there is no right of re-entry.

8.10 Rights of Occupier

The occupier of premises has the following rights:

- to see a copy of the warrant;

- to be present during the search and observe, provided they do not impede it. **(NOTE: There is no power for the investigators to require a person to remain on the premises, unless they have been arrested);**

- to be given a receipt for things seized;

- to request a copy of any document seized or any other thing that can be readily copied;

- to receive the occupiers notice.

09 EXECUTION ON LAWYER'S OFFICE

In executing a warrant on a lawyer's office care must be taken regarding any claim for legal professional privilege. Documents covered by legal professional privilege cannot be made the subject of a search warrant (*Baker v Campbell* (1983) 153 CLR 52).

Legal professional privilege attaches to communications only if the communication is for the dominant purpose of a lawyer providing legal advice or services for the purpose of existing or contemplated legal proceedings or obtaining legal advice. It does not protect:

(a) documents prepared for other purposes, even if they are held for the purposes of legal proceedings or obtaining advice; eg title deeds, trust account records, business records, or photocopies of any unprivileged document,

(b) communications made for a criminal purpose,

(c) documents concerning the identity of a client or the fact of their attendance at their solicitor's office.

Guidelines for the execution of search warrants on legal offices have been agreed between the NSW Police Force and the NSW Law Society. These guidelines (with some minor modifications) are set out below and must be followed by Commission officers executing a search warrant on a lawyer's office.

1. Upon attendance at the premises of the lawyer or Law Society, the Search Team Leader should explain the purposes of the search and invite the lawyer or Law Society to co-operate in the conduct of the search. If the lawyer, a partner or employee, or the Law Society or an employee, is suspected of involvement in the commission of an offence the Search Team Leader should say so.

   Identification of all members of the search team should be provided.

2. If no lawyer, or representative of the Law Society, is in attendance at the premises then, if practicable, the premises or relevant part of the premises should be sealed and execution of the warrant deferred for a period which the Search Team Leader in his discretion considers reasonable in all the circumstances to enable any lawyer

or responsible person connected with the premises to attend or, if that is not practicable, to enable arrangements for another person to attend the premises.

3. The lawyer or Law Society should be provided with a copy of the search warrant in addition to being shown the original warrant, if production thereof is demanded by them.

4. A reasonable time should be allowed to the lawyer to enable him or her to consult with his or her client(s) or to the Law Society to enable it to consult with the legal representatives of the persons to whose affairs the documents relate, and/or for the lawyer or Law Society to obtain legal advice. For this reason, it is desirable that warrants be executed only during normal working hours. However, when warrants are executed outside normal working hours, allowances should be made for delays should the lawyer wish to contact his or her client or the Law Society to contact legal representatives, or for either the lawyer or Law Society to take legal advice.

5. Having informed his or her client(s) of the position or the Law Society having informed the legal representatives of the persons to whose affairs the documents relate of the position, and/or either having obtained legal advice, the lawyer or Law Society should, consistent with his or her client's/clients' instructions or the instructions of the legal representatives of the persons to whose affairs the documents relate, co-operate in locating all documents which may be within the warrant.

6. Where the lawyer or Law Society agrees to assist the search team the procedures set out below should be followed:

   (a) in respect of all documents identified by the lawyer or Law Society and/or further identified by the Search Team Leader as potentially within the warrant, the Search Team Leader should, before proceeding to further execute the warrant (by inspection or otherwise) and to seize the documents, give the lawyer or Law Society the opportunity to claim legal professional privilege in respect of any of those documents. If the lawyer or Law Society asserts a claim of legal professional privilege in relation to any of those documents then the lawyer or Law Society should be prepared to indicate to the Search Team Leader grounds upon which the claim is made and in whose name the claim is made.

   b) in respect of those documents which the lawyer or Law Society claim are subject to legal professional privilege, the search team shall proceed in accordance with the guidelines set out below. In respect of the remaining documents, the search team may then proceed to complete the execution of warrant.

7. All documents which the lawyer or Law Society claims are subject to legal professional privilege shall under the supervision of the Search Team Leader be placed by the lawyer and/or his or her staff, or the Law Society and/or its representatives, in a container which shall then be sealed. In the event that the lawyer or Law Society desires to take photocopies of any of those documents the lawyer or Law Society shall be permitted to do so under the supervision of the

Search Team Leader and at the expense of the lawyer or Law Society before they are placed in the container.

8. A list of the documents shall be prepared by the search team, in co-operation with the lawyer or Law Society, on which is shown general information as to the nature of the documents.

9. That list and the container in which the documents have been placed shall then be endorsed to the effect that pursuant to an agreement reached between the lawyer or Law Society and the Search Team Leader, and having regard to the claims of legal professional privilege made by the lawyer on behalf of his or her client(s) or the Law Society on behalf of the persons to whose affairs the documents relate, the warrant has not been executed in respect of the documents set out in the list but that those documents have been sealed in the container, which documents are to be given forthwith into the custody of the clerk of the magistrate who issued the warrant or other independent party agreed upon by the lawyer or Law Society and the Search Team Leader (referred to below as the "third party") pending resolution of the disputed claims.

10. The list and the container in which the documents have been sealed shall then be signed by the Search Team Leader and the lawyer or a representative of the Law Society.

11. The Search Team Leader and the lawyer or representative of the Law Society shall together deliver the container forthwith, along with a copy of the list of the documents, into the possession of the third party, who shall hold the same pending resolution of the disputed claims.

12. If within 3 clear working days (or such longer period as is reasonable which may be agreed by the parties) of the delivery of the documents into the possession of the third party, the lawyer or Law Society has informed the Search Team Leader or his agent or the third party or his or her agent that instructions to institute proceedings forthwith to establish the privilege claimed have been received from the client or clients on whose behalf the lawyer asserted the privilege, or from the person or persons on whose behalf the claim has been made by the Law Society, then no further steps shall be taken in relation to the execution of the warrant until either:

    (i) a further period of 1 clear working day (or such further period as may reasonably be agreed) elapses without such proceedings having been instituted; or

    (ii) proceedings to establish the privilege have failed; or

    (iii) an agreement is reached between the parties as to the disclosure of some or all of the documents subject to the claim of legal professional privilege.

13. Where proceedings to establish the privilege claimed have been instituted, arrangements shall forthwith be made to deliver the documents held by the third

party into the possession of the registrar of the court in which the said proceedings have been commenced. The documents shall be held by the registrar pending the order of the court.

14. Where proceedings to establish the privilege claimed are not instituted within 3 clear working days (or such further period as may have been agreed) of the delivery of the documents into the possession of the third party, or where an agreement is reached between the parties as to the disclosure of some or all of the documents, then the parties shall attend upon the third party and shall advise him or her as to the happening of those matters and shall request him or her, by consent, to release into the possession of the Search Team Leader all the documents being held by the third party or, where the parties have agreed that only some of the documents held by him or her should be released, those documents.

15. In those cases where the lawyer or Law Society refuses to give co-operation, the Search Team Leader should politely but firmly advise that the search will proceed in any event and that, because the search team is not familiar with the office systems of the lawyer or Law Society, this may entail a search of all files and documents in the lawyer's or Law Society's office in order to give full effect to the authority conferred by the warrant. The lawyer or Law Society should also be advised that a document will not be seized if, on inspection, the Search Team Leader considers that the document is either not within the warrant or privileged from seizure. The search team should then proceed forthwith to execute the warrant.

10 EXECUTION ON PARLIAMENTARY OFFICE

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

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

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

1. A search warrant should not be executed on premises in Parliament House on a parliamentary sitting day or on a day on which a parliamentary committee involving the member is meeting unless the Commissioner is satisfied that compliance with this restriction would affect the integrity of the investigation.

2. If the premises to be searched are in Parliament House the Executive Director, Legal will contact the relevant Presiding Officer prior to execution and notify that officer of the proposed search. If the Presiding Officer is not available the Executive Director, Legal will notify the Clerk or Deputy Clerk or, where a Committee's documents may be involved, the Chair of that Committee. The

Clerk will arrange for the premises the subject of the warrant to be sealed and secured pending execution of the warrant.

3. To minimise the potential interference with the performance of the Member's duties the Executive Director, Legal should also consider, unless it would affect the integrity of the investigation, whether it is feasible to contact the Member, or a senior member of his/her staff, prior to executing the warrant with a view to agreeing on a time for execution of the warrant. As far as possible a search warrant should be executed at a time when the member or a senior member of his or her staff will be present.

4. The Commission will allow the Member and the Clerk a reasonable time to seek legal advice in relation to the search warrant prior to its execution and for the Member to arrange for a legal adviser to be present during the execution of the warrant.

5. The Executive Director, Legal will assign a lawyer to attend the search for the purpose of providing legal advice to the Search Team on the issue of parliamentary privilege.

6. On arrival at Parliament House the Search Team Leader and assigned lawyer should meet with the Clerk of the House and Member or the Member's representative for the purpose of outlining any obligations under the warrant, the general nature of the allegations being investigated, the nature of the material it is believed is located in the Member's office and the relevance of that material to the investigation.

7. The Search Team Leader is to allow the Member a reasonable opportunity to claim parliamentary privilege in respect of any documents or other things located on the premises.

8. The Search Team Leader should not seek to access, read or seize any document over which a claim of parliamentary privilege is made.

9. Documents over which parliamentary privilege is claimed should be placed in a Property bag. A list of the documents will be prepared by the executing officer with assistance from the member or staff member. The member, or member's staff, should be given an opportunity to take copies before the documents are secured.

10. The Search Team Leader should request the Clerk to secure and take custody of any documents over which a claim for parliamentary privilege has been made.

11. At the conclusion of the search the Search Team Leader should provide a receipt recording things seized. If the Member does not hold copies of the things that have been seized the receipt should contain sufficient particulars of the things to enable the Member to recall details of the things seized and obtain further advice.

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12. The Search Team Leader should inform the Member that the Commission will, to the extent possible, provide or facilitate access to the seized material where such access is necessary for the performance of the Member's duties.

13. Any claim of parliamentary privilege will be reported by the Search Team Leader to the Executive Director, Legal who will consider the matter in conjunction with the Executive Director, ID, the Deputy Commissioner and the Commissioner for the purpose of determining whether the Commission will object to such a claim.

14. Where a ruling is sought as to whether documents are protected by parliamentary privilege the Member, the Clerk and a representative of the Commission will jointly be present at the examination of the material. The Member and the Clerk will identify material which they claim falls within the scope of parliamentary proceedings.

15. A list of material considered to be within the scope of proceedings in Parliament will then be prepared by the Clerk and provided to the Member and the Commission's representative.

16. Any material not listed as falling within the cope of proceedings in Parliament will immediately be made available to the Commission.

17. In the event the Commission disputes the claim for privilege over these documents listed by the Clerk the Commissioner may, within a reasonable time, write to the President of the Legislative Council or Speaker of the Legislative Assembly to dispute any material considered to be privileged material and may provide written reasons for the dispute. The issue will then be determined by the relevant House.

11 SEARCH OF PERSONS

11.1 Personal Search Power

Section 41(2) of the *ICAC Act* provides that a member of the Police Force, or a "senior Commission investigator", named in and executing a search warrant, may search a person found in or on the premises who is reasonably suspected of having a document or other thing mentioned in the warrant.

Commission investigators who have received training in searching persons will be designated as "senior Commission investigators" pursuant to s.41(3) of the Act. That fact will be endorsed on the back of their identification certificates.

11.2 Guidelines for Personal Searches

Any person should be asked if they have any items on their person before a search is commenced. Only **Frisk** and **Ordinary** searches should be performed.

'Frisk search': *means a search of a person or of articles in the possession of a person that may include:*

(a) a search of a person conducted by quickly running the hands over the person's outer garments; and

(b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

'Ordinary search': *means a search of a person or of articles in the possession of a person that may include:*

(a) requiring the person to remove their overcoat, coat or jacket and any gloves, shoes and hat; and

(b) an examination of those items.

If a Senior Commission investigator believes that a **Strip** search is necessary approval should be obtained from the Executive Director, ID.

'Strip search': *means a search of a person or of articles in the possession of a person that may include:*

(a) requiring the person to remove all of his or her garments for examination; and

(b) an examination of the person's body (but not of the person's body cavities).

The search is to be conducted by a person of the same sex as the person to be searched. The search should be conducted in private with another person of the same sex as a witness to the search. If a witness of the same sex is not available within the search team then an independent witness should be arranged. Arrangements should be made through the Search Co-ordinator.

Persons under the age of 18 should not be searched without the approval of the Executive Director, ID. Wherever possible parents should be present during any such search.

The following details must be entered in the 'Search of Persons Register' held by the Executive Director, ID:

(a) Full name of person searched

(b) Date of birth of person searched

(c) Sex of person searched

(d) Date of search

(e) Time of search (Start/Finish)

(f) Place where search was conducted

(g) Category/ies of search conducted

(h) Name of investigator conducting search

(i) Name of witness (contact details if an independent witness)

(j) Reason for search (including reason for change of search category, if required)

(k) Warrant Number

(l) Description of any property located

12 SEIZURE – SPECIAL PROVISIONS

If, during the execution of the warrant a document or other thing is found that would be admissible in a prosecution for an indictable offence against the law of the Commonwealth, a State or Territory, the officer executing the warrant may seize the document or other thing if he/she believes on reasonable grounds that seizure is necessary to prevent its concealment, loss, mutilation or destruction or its use in committing such an offence (s.47, ICAC Act). The document or other thing does not have to be seized via the warrant.

13 DAMAGE TO PROPERTY

Where damage is caused to any property on the premises during the execution of a Search Warrant, the Search Team Leader shall cause:

- a note to be made of the location and extent of the damage;
- if necessary prepare a plan of and/or photograph the damage;
- make an official record of the circumstances as soon as practicable;
- arrange for the attendance of a senior Commission officer not connected with the execution of the Warrant to note and record details of the damage; and
- arrange for the premises to be secured if the occupants are not present.

The Executive Director, Legal is to be notified of any damage and provided with a copy of the report.

14 RECEIPT OF PROPERTY AT COMMISSION

The Team Property Officer shall be responsible for the conveyance to the Commission of any documents or other property seized as a result of the execution of the Search Warrant until such time that it is registered with Property. The property and the property seizure sheets (and/or property receipt) shall be deposited with Property for recording. In the event that a Property Officer is unavailable because of short notice, lateness of the hour, i.e. night time, weekends etc, the property shall be securely stored and transferred to Property as soon as practicable.

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15 RETURN OF SEIZED DOCUMENTS

Seized documents should be photocopied and either the original or a copy returned to the owner in accordance with the Commission's property procedures. An occupier requiring the prompt return of particular documents which are said to be vital to the conduct of the business/company shall be accommodated subject to the return not hindering the investigation. At the first opportunity following the execution of a search warrant, the Case Officer shall consult with the Case Lawyer and relevant members of the investigation team to cull the documents. Where there is any doubt as to the correctness of returning a document or providing a copy, the Case Officer shall confer with the Executive Director, ID.

16 REPORT TO ISSUING OFFICER

Irrespective of whether or not the warrant is executed the Case Officer will, in consultation with the Case Lawyer and using the Legal macro, prepare and forward to the issuing officer a written report stating whether or not the warrant was executed and, if it was, setting out the matters required by s.74 of the *Law Enforcement (Powers and Responsibilities) Act 2002* within ten days after the execution of the Warrant or the expiry date of the Warrant whichever first occurs. Copies of the Property Seizure sheets must accompany the Report to the issuing officer.

17 DEBRIEF

As soon as practicable following the execution of a Search Warrant, the Case Officer shall convene a debriefing session attended by the search team, the Team Chief Investigator, Case Lawyer, and any other personnel the Team Chief Investigator considers appropriate.

18 FILING WITH PROPERTY

The Case Officer is to ensure that copies of the original signed application (including the completed issuing officer's record of the application), the Occupiers Notice, Search Warrant, non-inspection certificate (if sought), application to postpone service of the occupiers notice (if any), authorisation checklist, property seizure sheets, Report to Issuing Officer and any independent observer form are filed in Property.

The Case Officer will be responsible for providing the Senior Property Officer with the details required to be recorded on the Formal Powers data base.

APPENDIX 'A'

AUTHORISATION CHECKLIST

THIS FORM MUST ACCOMPANY EACH STAGE OF THE APPLICATION

Item	Name & Date	Signature
Executive Director, Investigation Division has approved that an application for a search warrant is appropriate.		
Application, Warrant, Occupier's Notice and (if appropriate) cl.11 Certificate provided to and approved by Executive Director, Legal.		

ONCE COMPLETED THIS CHECKLIST MUST BE FILED WITH PROPERTY AND RETAINED WITH THE RELEVANT SEARCH WARRANT DOCUMENTATION

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APPENDIX 'B'

CASE OFFICER'S CHECKLIST

WARRANT HOLDER

NAME	POSITION

PREMISES SEARCHED

ADDRESS	SUBURB

DESCRIPTION OF PREMISES:

INDEPENDENT OFFICER

NAME	POSITION	LOCATION	CONTACT NUMBER

EXECUTION

TIME OF ENTRY	DATE
TIME OF DEPARTURE	DATE

OCCUPIERS NOTICE: Served Yes/No

NAME	DOB	POSITION

OTHER PERSONS ON THE PREMISES AT TIME OF EXECUTION

NAME	POSITION	ORGANISATION

VEHICLES PRESENT AT LOCATION:

REG NO.	STATE	DESCRIPTION	SEARCHED
			YES/NO
			YES/NO
			YES/NO

MEMBERS OF SEARCH TEAM/PERSONS ASSISTING COMMISSION OFFICERS

NAME		POSITION

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Item
Case Officer consults with Case Lawyer whether sufficient legal basis for search warrant
Executive Director, Investigation Division has approved that an application for a search warrant is appropriate
Case Officer has identified all resources (people/equipment, non ICAC personnel, police, and computer forensic officers) necessary to conduct the search and has obtained approval to use those resources. All equipment needs to be checked to ensure it is in a serviceable condition
Case Officer prepares the draft Application, Warrant, Occupier's Notice and, if required, cl.11 Certificate and submits to Chief Investigator for review
Operations Adviser to liaise with NSW Police re any police assistance required
Application, Warrant, Occupier's Notice and (if appropriate) cl.11 Certificate provided to Case Lawyer who reviews and settles documentation
Case Lawyer provides all documents to Director of Legal for review and approval
Originals of all documents and Authorisation Checklist submitted to Property Manager for registration.
Case Officer makes an appointment with authorised officer, then attends court and swears the warrant. A copy of the application should be requested from the Justice once their notations have been included and it has been sworn. This copy is to be provided to the Property Manager
Case Officer to prepare Operational Orders and brief search teams on the proposed execution and their roles
Report to issuing officer completed by Case Officer in consultation with Case Lawyer. Copy given to Senior Property Officer
Case Officer ensures copies of the original signed application (including the completed issuing officer's record of the application), the Occupiers Notice, Search Warrant, non-inspection certificate (if sought), application to postpone service of the occupiers notice (if any), authorisation checklist, property seizure sheets, Report to Issuing Officer and any independent observer forms are filed in Property.

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APPENDIX 'C'

INDEPENDENT COMMISSION AGAINST CORRUPTION

RECEIPT

PROPERTY RECEIVED BY: _____

AN OFFICER OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION

ON _____

ON THIS DATE, PROPERTY AS LISTED HEREUNDER/

DESCRIBED IN ATTACHMENT

WAS RECEIVED FROM _____ OF

_____

SIGNED: _____

TITLE: _____

DATE: _____

APPENDIX 'D'

PROPERTY SEIZURE SHEET

OPERATION: _____

ADDRESS: _____

_____

Item No.: _____ Seizure Officer: _____

Description: _____

_____

Location: _____

Item No.: _____ Seizure Officer: _____

Description: _____

_____

Location: _____

Item No.: _____ Seizure Officer: _____

Description: _____

_____

Location: _____

Item No.: _____ Seizure Officer: _____

Description: _____

_____

Location: _____

Name/Signature - Occupier

Name/Signature - Property Officer

Date: _____

Appendix 6 – Minutes

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 24)
Monday, 4 May 2009 at 10.00 am
Waratah Room, Parliament House

1. Attendance:

Members present
Mr Terenzini (Chair), Ms Beamer, Mr Khoshaba, Mr O'Dea, Mr Donnelly, Revd Nile, Mr Smith

Apologies
Mr Amery
Mr Harris
Mr Khan
Mr Stokes

In attendance Helen Minnican, Amy Bauder, Jasen Burgess, Dora Oravecz, and Emma Wood.

2. ***
3. Deliberative meeting
***

3.1 Minutes
Resolved, on the motion of Ms Beamer, seconded Mr Khoshaba, that the minutes of the meeting of 12 March 2009 be confirmed.

3.2 Amendment to the minutes of 1 December 2008
Resolved, on the motion of Mr Donnelly, seconded Revd Nile, that:
i. the minutes of the meeting of 1 December 2008 be amended by inserting the words "Question resolved in the negative" on p.3 of the minutes in relation to the vote on Mr Khan's motion of dissent; and
ii. the minutes of 1 December 2008, as amended, be adopted.

3.3 Correspondence group
Resolved, on the motion of Mr Smith, seconded Revd Nile, that the correspondence group include Mr Smith and Ms Beamer, in addition to the present members of the group, that is, the Chair and Mr Stokes.

3.4 ***
3.5 Review of 2007-2008 Annual Report of the ICAC
Resolved, on the motion of Ms Beamer, seconded Mr Khoshaba, that:
i. the questions on notice be adopted by the Committee and forwarded to the Commissioner in preparation for the examination of the ICAC's annual report for 2007-2008; and
ii. the answers from the Commission be provided to the Committee one week before the public hearing, the date of which is to be confirmed subject to the availability of members and the Commissioner.

3.6 ***
3.7 ***
3.8 ***
3.9 General business
There were no items of general business.

Deliberations having concluded, the deliberative meeting adjourned at 11.24am and the Committee resumed the public hearing.

4. ***

The public hearing concluded at 4.00pm and the Committee adjourned until Thursday, 7 May 2009 at 9.30 am in Room 1102.

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 28)
Tuesday, 11 August 2009 at 10.30am
Jubilee Room, Parliament House

1. Attendance

Members present
Mr Terenzini (Chair), Mr Harris (Deputy Chair), Ms Beamer, Mr Donnelly, Mr Khan, Mr Khoshaba, Mr Martin, Revd Nile, Mr O'Dea, Mr Smith, Mr Stokes.

In attendance Helen Minnican, Jasen Burgess, Emma Wood and Amy Bauder

2. ***

***

PUBLIC HEARING

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

The public hearing resumed at 1.35pm.

The Chair welcomed the witnesses.

The Hon Jerrold Sydney Cripps QC, Commissioner of the ICAC, Ms Theresa June Hamilton, Deputy Commissioner of the ICAC, Mr Michael Douglas Symons, Executive Director of the Investigation Division, and Mr Roy Alfred Waldon, Executive Director of Legal Division, Mr Robert William Waldersee, Executive Director of Corruption Prevention, Education and Research, and Mr Andrew Kyriacou Koureas, Executive Director of Corporate Services, all sworn and examined. The Commission's answers to question on notice in relation to the ICAC Annual Report for 2007-2008 and the submission in response to the Committee's Discussion Paper were included as part of the witnesses' evidence.

The Commissioner provided the Committee with a document entitled, "ICAC request for additional recurrent funding", and invited the Committee to consider and lend support to the funding proposal.

The Commissioner made an opening statement.

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

Evidence concluded, the Chair thanked the witnesses for their attendance. The Deputy Commissioner provided the Committee with a copy of the current Memorandum of Understanding with the Office of the Director of Public Prosecutions. The witnesses withdrew.

The Chair made a short statement in closing the hearing.

The public hearing concluded at 3:17pm, at which point the Committee took a short adjournment.

3. DELIBERATIVE MEETING

The deliberative meeting commenced at 3.40pm.

i. Minutes

Resolved, on the motion of Ms Beamer, seconded Revd Nile, that the minutes of the deliberative meeting of 14 May 2009 be confirmed.

ii. Membership change

The Chair announced that Mr Gerard Martin had been appointed to serve on the Committee on the Independent Commission Against Corruption in place of Mr Richard Amery, discharged (Votes and Proceedings of the New South Wales Legislative Assembly, 24 June 2009

iii. ***

iv. ***

v. Review of the 2007-2008 Annual Report of the ICAC

Resolved on the motion of Mr Harris, seconded Mr Donnelly, that the following documents relating to the Committee's examination of the Annual Report of the ICAC for 2007-2008, previously circulated, be published and posted on the Committee's website:

a. answers to questions on notice received from the ICAC, dated 24 July 2009;
b. supplementary answers to questions 23 to 31.

vi. General correspondence

vii. General business

***

There being no items of general business, deliberations concluded and the meeting closed at 4.37pm sine die.

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 29)

Thursday, 3 September 2009 at 9.30am
Parkes Room, Parliament House

1. Attendance

Members present

Mr Terenzini (Chair), Mr Harris (Deputy Chair), Ms Beamer, Mr Donnelly, Mr Khan, Mr Khoshaba, Mr Martin, Revd Nile, Mr O'Dea, Mr Smith, Mr Stokes.

In attendance Helen Minnican, Dora Oravecz and Amy Bauder

2. ***

3. DELIBERATIVE MEETING

The deliberative meeting commenced at 10.01am.

i. ***

ii. Minutes

Resolved, on the motion of Mr Donnelly, seconded Mr Harris, that the minutes of the deliberative meeting and public hearing held on 11 August 2009 be confirmed.

iii. ***

iv. ***

v. Funding issues raised by the Commissioner on 11 August 2009

The Committee considered the Commissioner's proposal entitled, "ICAC request for additional recurrent funding", previously provided to the Committee during the Commissioner's evidence on 11 August 2009. The Chair addressed the Committee on the item. Discussion ensued.

Resolved on the motion of Revd Nile, seconded Mr O'Dea, that the Committee write to the Premier in support of the ICAC's submission for additional funding and, in its report on the annual report examination, identify the issue as one of ongoing concern to be monitored during the next 12 months.

vi. General business

There being no items of general business, deliberations concluded and the meeting closed at 10.11am sine die.

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 34)
Thursday, 22 April at 9.38 am
Room 1136, Parliament House

1. Attendance

Members present
Mr Terenzini (Chair), Ms Beamer, Mr Donnelly, Mr Khoshaba, Mr Martin, Revd Nile, Mr O'Dea, Mr Pearce, Mr Smith, Mr Stokes.

Apologies Mr Khan

In attendance Helen Minnican, Carly Sheen, Dora Oravecz, Emma Wood and Amy Bauder.

2. Minutes

Resolved, on the motion of Mr Khoshaba, seconded Revd Nile, that the minutes of the deliberative meeting of 13 November 2009 be confirmed.

3. ***

4. Consideration of the Chair's draft report into the Review of the 2007-2008 Annual Report of the Independent Commission Against Corruption, previously distributed.

The Chair spoke to the draft report and the amendments as circulated in the Chair's schedule of amendments. Discussion ensued.

The following amendments were agreed to:
Recommendation 1

- insert a full **colon** after the word that in line 3 and insert dot point (a);
- insert the word 'an' before the word 'Assistant';
- insert the letter 's' in 'Commissioner';
- delete the words 'and be' and insert instead the words 'but is'; and
- insert a new dot point (b) 'a person may not hold the position of Assistant Commissioner for a period of more than seven years'.

Paragraph 1.22

- Insert the word 'an' after the word 'that' in line 2;
- Add the letter 's' to the word 'Commissioner' in line 2;
- Delete the words 'and be' and insert instead the words 'but is' in line 3;

- Insert after the word re-appointment, the following sentence, 'A person may not hold the position of Assistant Commissioner for a period of more than seven years.

Resolved on the motion of Mr Pearce, 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.
- That the Chair, the Committee Manager and the Senior Committee Officer be permitted to correct minor stylistic, typographical and grammatical errors.

5. ***

6. ***

There being no further items of general business, the deliberations concluded at 10.12 am and the Committee adjourned sine die.