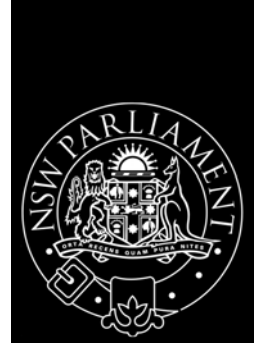


PARLIAMENT OF NEW SOUTH WALES



Committee on the Independent Commission Against Corruption

Review of the 2006-2007 Annual Report of the Independent
Commission Against Corruption

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Terms of reference

Independent Commission Against Corruption Act 1988

64 Functions

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

Chair's foreword

The current review is the second ICAC Annual Report review conducted by the Committee during the 54th Parliament. The Committee has examined a range of issues, including the prosecution of offences arising out of ICAC investigations, and aspects of the Commission's corruption prevention function. The Committee also considered proposals for amendments to the ICAC Act, which were raised by the Commission during the review.

The issue of delays in prosecutions arising from ICAC investigations has been examined by the Committee on several occasions. The Commission raised the issue with the Committee during its previous review, advising the Committee of improvements to processes to overcome delays in the prosecution of matters by the Director of Public Prosecutions (DPP), for example, improved communication between the Office of the DPP and the Commission and, on the Commission's part, a focus on gathering admissible evidence during investigations. The Commission has also kept the Committee informed of changes to the Memorandum of Understanding (MoU) governing its relationship with the DPP. The latest MoU, which was signed by the Commissioner and the Director of Public Prosecutions in December 2007, in particular addresses the processes to be followed by both agencies and provides timelines for the provision of advice by both parties. The Committee notes that, while such timelines had previously not been observed, the MoU now provides for regular liaison meetings between the ICAC Deputy Commissioner and the relevant managing lawyer within the DPP, to discuss progress on matters in which the Commission is awaiting the DPP's advice.

In addition to improvements achieved through the MoU, the Commission is also seeking to prepare briefs of evidence during investigations, in order to reduce delays with the prosecution of matters arising out of investigations. The Committee has noted recent improvements in terms of the timely preparation of briefs by ICAC for the DPP, in addition to progress on finalising several matters where ICAC has been awaiting the DPP's advice. While this recent progress is encouraging, the Committee is mindful of previous, unsuccessful attempts to address the issue through the introduction of timelines and targets. The Committee is nevertheless hopeful that the progress achieved by both the ICAC and the DPP will continue and the Committee will monitor the prosecution of matters arising from ICAC investigations, to determine whether unacceptable delays are occurring.

The efficacy of the Commission's corruption prevention function was considered by the Committee during the review. In particular, the Committee addressed the issue of unsatisfactory agency responses to the Commission's corruption prevention recommendations, which are made at the conclusion of its investigations. While the Commission's functions include the formulation of such recommendations, the implementation of these recommendations by affected agencies is not required under the ICAC Act. The Committee has noted that the Commission has the ability to escalate matters in which it is dissatisfied with an agency's response to its recommendations under part 5 of the ICAC Act, and it encourages the Commission to make greater use of this power. In the Committee's view, agencies should be required to respond to ICAC's corruption prevention recommendations. The Committee has, therefore, recommended that the current practice of agencies providing ICAC with an implementation plan, followed by 12 and 24 month progress reports, should be a statutory requirement under the ICAC Act. In addition, the Committee has recommended that the Commission publish details of agencies that have failed to comply with the recommended statutory requirement in its annual reports.

The Committee considered the notion of allocating the Commission's corruption prevention function to another agency, following evidence from the Inspector of the ICAC in which he

Chair's foreword

expressed the view that the efficacy of this function was hard to measure and that it may be desirable to allocate it to a central agency. However, the Committee has concluded that while the effectiveness of the Commission's corruption prevention work is difficult to measure, this function is in many ways intrinsic to the Commission's investigative work and it should not be undertaken by another agency.

During the review, the Commission sought the Committee's support for proposed amendments to the ICAC Act, mostly in connection with the prosecution of offences resulting from ICAC investigations. The Committee has supported the Commission's proposal to amend s.116(4) of the Act, to allow for proceedings for offences under ss.82 and 95¹ of the Act to be commenced within three years of the alleged offence. Currently, the Act does not specify a time limit for the commencement of prosecutions pursuant to these sections, which means that, as they are summary offences, prosecution must commence within six months of the alleged offence being committed. The Committee heard that the current time limit has resulted in persons not being prosecuted for certain offences, as the offences did not come to light until after the time period had expired. The Committee has, therefore, recommended that s.116(4) be amended, in addition to recommending an amendment to s.112 to clarify that the Commission may make non-publication orders in relation to written submissions. The Committee has noted that, while the Commission's current practice is to make such orders, clarification is required to put beyond doubt that the ICAC has the capacity to restrict the publication of written submissions, if it determines that it would be in the public interest to do so. Such an amendment would also make it clear that the penalty provisions specified under the Act can be imposed in response to a disclosure of this type of material.

The Commission sought the Committee's support for two further amendments to the Act. The ICAC proposed that s.37 be amended to enable evidence obtained (or a document produced) under objection during a Commission public inquiry or compulsory examination to be admissible for use in subsequent civil or disciplinary proceedings. The Commission also argued for an amendment to s.116(2), to ensure proceedings pursuant to s.87² of the ICAC Act are dealt with in the higher courts, as opposed to the Local Court. The Committee has concluded that these proposed amendments require further, more detailed investigation including input from interested stakeholders. The Committee is intending to conduct a review of the ICAC and the ICAC Act in 2009, which will allow for closer examination of the issues raised by these proposed amendments.

I would like to thank the Commissioner and senior members of the ICAC executive for their contribution to proceedings. I am also grateful to the members of the Committee for their participation in this year's ICAC review and for their deliberations on the report. Finally, I thank the staff of the Secretariat, who provided valuable support to the Committee during the Review.

Frank Terenzini MP
Chair

¹ Section 82 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 provides that it is an offence to impersonate an officer of the Commission.

² Section 87(1) provides that it is an indictable offence to knowingly give false or misleading evidence to the Commission at a compulsory examination or public inquiry.

List of recommendations

RECOMMENDATION 1: That 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 and that the Independent Commission Against Corruption Act 1988 be amended accordingly. 15

RECOMMENDATION 2: Further, that the Commission include in its annual report details of those agencies and departments that fail to comply with this statutory requirement. 15

RECOMMENDATION 3: That the Premier, as Minister with responsibility for the administration of the Independent Commission Against Corruption Act 1988, consider bringing forward an amendment to s.112 of the Act to clarify that the Commission may direct that written submissions be the subject of a non-publication order, if the Commission determines that such a direction is necessary or desirable in the public interest. 27

RECOMMENDATION 4: That s.116(4) of the *Independent Commission Against Corruption Act 1988* be amended to enable proceedings commenced pursuant to sections 82 and 95 of the Act to be commenced within three years of the commission of the alleged offence. ... 31

Commentary

INTRODUCTION

- 1.1 One of the functions of the Committee on the Independent Commission Against Corruption (the Committee) is to examine each annual report of the Commission and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report.
- 1.2 As part of the Committee's review of the Commission's 2006-2007 Annual Report, ICAC were provided with questions on notice. Senior members of the ICAC executive, including the Commissioner, appeared before the Committee at a public hearing on 9 July 2008. The full text of ICAC's answers to questions on notice, and the transcript of proceedings from the public hearing are reproduced at Appendices 1 and 2 of this report. Other relevant material, such as the current Memorandum of Understanding between the ICAC and the Office of the Director of Public Prosecutions (DPP) and answers to questions taken on notice during the public hearing, are also reproduced as Appendices to this report.
- 1.3 In brief, the Committee's review has focussed on issues concerning:
- the prosecution of offences that arise out of ICAC investigations;
 - ICAC's corruption prevention function; and
 - the Commission's proposals for amendments to the ICAC Act.

PROSECUTIONS ARISING FROM ICAC INVESTIGATIONS

Background

- 1.4 The provisions of the ICAC Act confer limited responsibility on the ICAC in terms of criminal prosecutions, in order to separate ICAC's function of investigating corruption from the prosecutorial role of the DPP. ICAC's principal functions under s.13 of the Act include investigating corruption, making findings in relation to corrupt conduct and expressing the opinion that the advice of the DPP should be sought in relation to proceedings against particular persons for criminal offences. The assembling of evidence that may be admissible in prosecutions of persons for criminal offences is a secondary function of the ICAC under s.14 of the Act. Such evidence is to be furnished to the DPP by the Commission.
- 1.5 The procedure for prosecutions arising from ICAC investigations is:
- ICAC assembles admissible evidence as part of its investigation.
 - In its investigation report, ICAC makes a s.74(2) statement on whether (or not) it will seek the advice of the DPP on prosecuting any affected persons.³
 - ICAC compiles a brief of evidence for the DPP.
 - The DPP assesses the evidence provided by ICAC and decides whether there is enough admissible evidence to prosecute any affected persons.

³ Section 74(1) of the Act provides that the Commission is not authorised to state that a person is guilty of, has committed, is committing or is about to commit a criminal offence or disciplinary offence, or should be prosecuted for such an offence.

- If ICAC's brief of evidence is deemed to be insufficient, the DPP makes requisitions to ICAC for further evidence, information, or witness statements. The DPP may decline to proceed with prosecuting a matter.
- If the DPP decides there is sufficient admissible evidence to proceed with the prosecution, ICAC institutes proceedings based on the DPP's advice on matters such as the charges to lay.
- The DPP takes over prosecution of the matter in court.⁴

Delays in prosecution of matters

1.6 The Committee has raised the issue of delays in prosecutions arising out of ICAC investigations during several previous reviews of ICAC annual reports. In particular, the Committee's review of ICAC's 2005-2006 Annual Report identified problems in relation to prosecutions, specifically, instances of lengthy delay between the referral of evidence from the ICAC to the DPP and the receipt by ICAC of the DPP's final advice. The Committee noted that measures to reduce delays, such as a focus on assembling admissible evidence and improving liaison between the ICAC and the DPP during the investigation process, had resulted in some improvements. However, the Committee concluded that in spite of these efforts, unacceptable delays were still occurring and there was a need for improved co-operation between the DPP and ICAC.

Memorandum of Understanding with the DPP

1.7 During its previous review, the Committee noted the ICAC's evidence indicating that the Memorandum of Understanding (MoU), which sets out the respective responsibilities of the DPP and the ICAC in terms of the provision and consideration of admissible evidence obtained during ICAC investigations, was to be reviewed.⁵ The ICAC Commissioner, the Hon Jerrold Cripps QC, wrote to the Committee in April 2008 to advise that an updated MoU had been agreed to.⁶ In his letter, the Commissioner outlined the main changes to the MoU:

- Providing a distinction between admissible and non-admissible, background information;
- Detailing the matters to be included in the ICAC case lawyer's summary report;
- Providing a distinction between processes for summary (time-limited) and indictable offences;
- Specifying that the DPP is to assign a senior lawyer to briefs referred by ICAC and advise ICAC of the name of the lawyer within two weeks of receiving the brief;
- Specifying that the DPP lawyer will arrange a conference with relevant ICAC officers within four weeks of receiving the brief;
- Providing that any issues arising in relation to the brief, including whether any requisitions will be issued, are to be discussed at the conference;

⁴ *Independent Commission Against Corruption Act 1988* ss.14(1) and 74(1), *Director of Public Prosecutions Act 1986* s.9; *Transcript of evidence*, 11 September 2007, p 3

⁵ *Transcript of evidence*, 11 September 2007, pp 1-2

⁶ The 2007 Memorandum of Understanding between the ICAC and the DPP is reproduced at Appendix 4.

- Requiring that a timetable for the issuing of and response to requisitions be agreed to, or, if there are no requisitions, that a timetable be agreed to for the furnishing of advice by the DPP; and
 - Providing for a more streamlined process for consideration of charging persons who indicate their intention to plead guilty.⁷
- 1.8 The Committee notes that the changes to the MoU provide more guidance on the processes to be followed by both agencies and timelines for the provision of advice and material by both agencies. In his report as part of the independent review of the ICAC Act, Bruce McClintock SC commented on the issue of unacceptable delays in prosecutions arising from ICAC investigations. In terms of the MoU, McClintock noted that:
- The memorandum outlining the relationship between ICAC and the DPP on the conduct of criminal prosecutions arising from ICAC investigations contains timeframes for the provision of information by ICAC and advice by the DPP. However, these do not seem to be observed.⁸
- 1.9 In his correspondence to the Committee, the Commissioner acknowledged that MoU timeframes had previously not been observed. The Commissioner advised that this issue was being addressed through the use of regular meetings between the agencies:
- The previous MoU already had appropriate time limits in place ... The main problem had been that these time limits had not been enforced by either party to the MoU. The regular liaison meetings between the Deputy Commissioner and the Managing Lawyer of ODPP Group 6 ... are intended to monitor issues like this These officers, as well as liaising about specific matters as they arise, will meet at least once every two months to discuss the progress of prosecutions generally.⁹

Timely provision of briefs to the DPP

Brief preparation plans

- 1.10 Improved co-ordination and planning by the ICAC during recent investigations has aided the timely preparation of briefs of evidence. The Committee heard that Commission lawyers and investigators are working together during investigations to establish the offences being investigated and to identify the evidence required for the prosecution of the offences, in order to expedite ICAC's provision of the brief to the DPP. Roy Waldon, the Solicitor to the Commission, told the Committee of the Commission's new brief preparation plan procedures:
- Mr WALDON:** ... You will notice on the first page of that chart in relation to operation Cordoba the number of days between the report and the brief to the DPP was 96, which was a very low number of days. We looked at why it was in Cordoba that we were able to get the brief to the DPP much quicker than in other matters. One of the reasons we identified was that something similar to a brief preparation plan had been worked on between the lawyer and the investigators working on that matter so that the offences had been identified, the elements of those offences had been identified, and what evidence we needed to put together to prove those elements had been identified. And then in putting together the brief that document had been used to assemble the brief. So what we have done as a result of that is now to change our procedure and introduce

⁷ Correspondence from the Hon Jerrold Cripps QC, 11 April 2008, pp 1-2 (see Appendix 4)

⁸ B McClintock SC, Independent review of the *Independent Commission Against Corruption Act 1988*, Final Report, January 2005, para 3.4.42

⁹ Correspondence from the Hon Jerrold Cripps QC, 11 April 2008, p 2

preparation of brief preparation plans as a mandatory matter for all new matters. Those plans are being prepared and signed off by the lawyers and the investigators by the executive director of ID and myself. They are then being used as a plan to put together the brief. So I think from now on that will assist in also bringing down the number of days between the investigation being conducted and the brief going to the DPP.¹⁰

Preparation of brief during investigation

- 1.11 In evidence to the Committee, the Commission indicated that it was focussing on amassing admissible evidence and preparing briefs of evidence during the course of investigations. Theresa Hamilton, the ICAC's Deputy Commissioner, told the Committee that for the Commission's next public inquiry it would seek to have briefs ready for the DPP soon after the inquiry's conclusion, thereby reducing delays:

CHAIR: ... I noticed towards the end of that table in operations Cadmus, Aztec, Quilla and Pelion a general reduction in the days that it has taken the Commission to submit a brief. We talked earlier in the last meeting, as I remember, about you preparing admissible evidence during investigation. ... Has it generally reduced delays?

Ms HAMILTON: Yes, I would say that it has. Could I say, for example, in Cadmus charges have now already been recommended and laid, and I think that shows that if you can get the briefs over there more quickly they will be looked at more quickly and charges can be laid more quickly. And also in the next public inquiry that we are going to hold that will be the first time where we actually look to have the briefs ready practically by the end of the public inquiry, Mr Symons informs me. So that is what we are working towards, that there will not be a big delay; that the briefs will be getting prepared sort of almost as you go and that will be reducing and reducing.¹¹

- 1.12 The Commission advised the Committee that, in addition to using preparation plans, it has instituted measures such as timelines to expedite the preparation of briefs of evidence during investigations. Ms Hamilton expressed the view that the use of timelines by ICAC would reduce delays in the preparation of briefs for the DPP:

... One issue we are looking at in drafting a new memorandum of understanding is that we notice that it puts a lot of timelines and duties on the DPP at present but it does not say much about what we are doing. We will be incorporating timelines for ourselves. We aim to get a brief to the DPP within X months, at the completion of the public inquiry, and that will hopefully improve it even further.¹²

- 1.13 The effectiveness of initiatives such as timelines, in terms of the successful outcome of prosecutions was highlighted by Ms Hamilton in evidence to the Committee:

... 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.¹³

Recent improvements

- 1.14 The Committee notes that there has been an improvement in the timeliness of the preparation of briefs of evidence for matters arising from recent ICAC investigations,

¹⁰ Mr Roy Waldon, Solicitor to the Commission, ICAC, *Transcript of evidence*, 9 July 2008, p 26

¹¹ *Ibid*

¹² *Ibid*, p 11

¹³ *Ibid*

as indicated in the table below. The Committee commends the Commission on the measures it has taken to improve processes for the preparation of briefs of evidence for the DPP.

Table 1: Preparation of briefs in relation to recent ICAC reports¹⁴

Report	Date of report	Date brief to DPP	Days from report to brief to DPP
Ambrosia	21/12/2005	16/3/2007	450-859*
Cadmus	20/9/2006	18/7/2007	301
Aztec	26/10/2006	10/8/2007	288
Quilla	21/12/2006	21/4/2008	487
Persis	18/6/2007	31/4/2008	290
Pelion	22/8/2007	12/6/2008	294
Sirona	22/9/2007	7/5/2008	230

* Briefs prepared in relation to 33 persons; 18 of 33 were completed in 450 days.

Improved liaison with the DPP

- 1.15 ICAC has sought to improve its communication with the DPP through the institution of regular meetings between the Deputy Commissioner and the managing lawyer of Group 6 at the DPP. The MoU provides that progress on the provision of advice by the DPP and ICAC's responses to DPP requisitions is discussed at these meetings, which are to be held at least every two months.¹⁵ The MoU also specifies that in addition to these meetings a conference is to be held between the relevant DPP lawyer and ICAC officers within four weeks of a brief of evidence being received by the DPP.¹⁶
- 1.16 These regular meetings with the DPP appear to have been effective in terms of promoting progress on matters in which the ICAC has been awaiting advice from the DPP for some time. In answers to questions on notice the Commission advised that 'the regular liaison meetings with the DPP's office have resulted in advice being provided on charges in several old matters recently, including Operation Cadmus, Operation Unicorn and Operation Agnelli.'¹⁷
- 1.17 In addition to finalising older matters, the Deputy Commissioner told the Committee that she expected the improved liaison between the two agencies to be particularly effective in relation to current and future ICAC investigations:

Ms HAMILTON: I have been meeting every two months with the lawyer in the DPP in charge of our matters. I think it has had an effect: they are allocating lawyers to our briefs when they go over; we are having meetings with them. I think its effect will be mainly seen in new matters. I think one effect, as we have said in our response, is that apart from a couple of old and very difficult matters, which are still hanging around, all the briefs presently with the DPP went over only last year, and that is a big improvement on past years where we have had matters that have been there three or four years.¹⁸

¹⁴ Source: ICAC, answers to questions on notice, question 28, pp 18-20 (see Appendix 1)

¹⁵ Memorandum of Understanding between the ICAC and the DPP, section 33, p 8

¹⁶ Ibid, section 6, p 3

¹⁷ ICAC, answers to questions on notice, question 29b, pp 20-21

¹⁸ Ms Hamilton, Deputy Commissioner, ICAC, *Transcript of evidence*, 9 July 2008, p 11

Conclusion

1.18 The Committee hopes that ICAC's use of timelines and preparation plans in its preparation of briefs of evidence for the DPP will ensure that matters progress more quickly following the conclusion of an investigation. However, the Committee notes that the provision of advice and requisitions by the DPP can also result in delays. In other words, in addition to ICAC working to improve their processes, it is important that the DPP observes the timelines and procedures that are outlined in the MoU on their provision of advice to ICAC. While the Committee is encouraged by the recent improvements on ICAC's part, it is mindful that previous MoUs have included targets and timelines with little effect. The Committee trusts that the regular meetings and improved liaison between the ICAC and the DPP will help to promote the speedy provision of advice and material from both agencies, in accordance with the provisions of the MoU. The Committee will continue to closely monitor delays in the prosecution of matters arising from ICAC investigations in future reviews.

CORRUPTION PREVENTION FUNCTION

1.19 In the section below, the Committee outlines the Commission's corruption prevention work during investigations, before examining issues raised during the Committee's review in relation to the implementation of ICAC's corruption prevention recommendations, with particular reference to delays by RailCorp in implementing ICAC's recommendations. The Committee then focuses on the education and advisory part of the Commission's corruption prevention function and examines issues raised during the review in relation to the efficacy of this function.

(i) Corruption prevention in relation to investigations

1.20 Corruption prevention is one of the Commission's principal functions. Section 13 of the ICAC Act provides that the Commission is to:

- Examine laws, practices and procedures of public authorities and public officials to discover corrupt conduct and revise work methods or procedures that the Commission views as being conducive to corrupt conduct;
- Instruct, advise and assist any public authority, public official or other person (on the request of the authority, official or person) on ways to eliminate corrupt conduct;
- Advise public authorities or public officials of changes in practices or procedures, compatible with the effective exercise of their functions that, in the Commission's opinion, are necessary to reduce the likelihood of corrupt conduct occurring;
- Co-operate with public authorities and public officials in reviewing plans, practices and procedures to reduce the likelihood of corrupt conduct occurring.¹⁹

1.21 Corruption prevention is integral to the conduct of the Commission's investigations. In addition to requiring the Commission to conclude whether corrupt conduct has or is likely to occur, the Act requires ICAC to conduct its investigations with a view to determining whether laws governing any public authority or public official should be changed to reduce the likelihood of corrupt conduct occurring, and to assess whether

¹⁹ ICAC Act, subss.13(1)(d)-(g)

any authority's or official's work methods, practices or procedures have allowed or could allow, encourage or cause corrupt conduct to occur.²⁰

Corruption prevention recommendations

1.22 Section 13 of the ICAC Act empowers the Commission to make recommendations in relation to corruption prevention:

- (3) The principal functions of the Commission also include:
 - (a) the power to make findings and form opinions, on the basis of the results of its investigations, in respect of any conduct, circumstances or events with which its investigations are concerned, whether or not the findings or opinions relate to corrupt conduct, and
 - (b) the power to formulate recommendations for the taking of action that the Commission considers should be taken in relation to its findings or opinions or the results of its investigations.

1.23 During 2006-2007, ICAC's Corruption Prevention, Education and Research Division made 113 corruption prevention recommendations as a result of Commission investigations. ICAC received 13 progress reports on the status of its corruption prevention recommendations during 2006-2007, indicating that 80% of recommendations had been implemented by affected agencies.²¹

1.24 The Commission's corruption prevention work during investigations and the procedures for assessing the implementation of corruption prevention recommendations are outlined below:

- During major investigations, a corruption prevention officer works on the investigation team in order to identify corruption risk areas and activities by reviewing the agency's systems, policies, procedures and work practices. The officer prepares the corruption prevention chapter/s of the Commission's investigation report and develops corruption prevention recommendations, targeting systems and practices in order to prevent future corruption.
- The Commission tables its investigation report, which includes any findings and corruption prevention recommendations that it has determined to be necessary as a result of the investigation. The recommendations are made to affected agencies and detail any modifications to practices and procedures that the Commission views as necessary to reduce the likelihood of corrupt conduct reoccurring.
- Within three months of the investigation report being tabled, the Commission requests affected agencies to provide an implementation plan that details the actions, timeframes, and organisation or individual responsible for addressing each of the recommendations. The plan is published on the investigation outcomes section of the ICAC website.
- Agencies are requested to provide a 12 month interim report and a 24 month final report on their progress in implementing the recommendations. The reports are expected to include information on the status of each recommendation, the most recent action or update in relation to the recommendations, any relevant documents regarding particular initiatives undertaken, as well as information on any systems or structural changes that may have occurred within the agency. The

²⁰ Ibid, subss.13(2)(a)-(c)

²¹ ICAC, *Annual Report 2006-2007*, pp 44 & 50

interim and final reports are also published on the investigation outcomes section of the ICAC website.

- The agency is responsible for advising the Commission of any further updates in relation to the implementation of recommendations.
- In its annual reports, the Commission publishes a table outlining information received from affected agencies during the reporting year on the implementation of corruption prevention recommendations. The number and percentage of recommendations that the Commission considers to have been addressed are detailed. The Commission considers that recommendations have been addressed when they have been implemented, action is being taken to implement them, or the agency has considered them and found an alternative way of addressing the issue.²²

RailCorp's implementation of corruption prevention recommendations

1.25 Pursuant to its functions under s.64(d) of the Act, the Committee is interested in examining corruption trends over time. In this regard, ICAC's investigations into allegations of corruption within RailCorp offer a long-term study.

ICAC investigations involving RailCorp

1.26 In total, ICAC has conducted six investigations into RailCorp and its predecessors:

- Report on investigation into the State Rail Authority – Trackfast Division (1992)
- Report on investigation into the State Rail Authority – Northern Region (1993)
- A major investigation into corruption in the former State Rail Authority (1998)
- Corrupt networks: report into the conduct of a technical specialist in the State Rail Authority (2001)
- Report on investigation into defrauding the RTA and RailCorp in relation to provision of traffic management services (Operation Quilla - 2006)
- Report on an investigation into corrupt conduct associated with RailCorp air-conditioning contracts (Operation Persis - 2007).

1.27 RailCorp was the affected agency in two of the six investigations conducted by ICAC during 2006-2007, which resulted in 41 corruption prevention recommendations. The Commission is currently investigating allegations that a number of RailCorp employees and contractors acted fraudulently and/or engaged in bribery in terms of the procurement of goods and services (Operation Monto). The Commission held public hearings as part of Operation Monto in late 2007 and early 2008 and has recently published six reports relating to parts of the investigation. Operation Monto has unearthed several corruption issues reaching across all parts of the investigation, many of which have arisen in previous ICAC investigations into RailCorp. Given these circumstances, the Commission plans to publish a final report, dealing with corruption prevention issues as well as making corruption prevention recommendations relating to RailCorp's structure, practices and procedures.²³

²² See ICAC, *Annual Report 2006-2007*, pp 49-50, 117 and the 'Investigation outcomes' section of ICAC website, <<http://www.icac.nsw.gov.au/go/investigations-and-inquiries/investigation-outcomes>> (accessed 31 July 2008).

²³ ICAC, *Report on an investigation into bribery and fraud at RailCorp – Second report*, August 2008, p 5

1.28 The Commission has noted that similar corruption issues have arisen in several of its previous investigations into RailCorp. The table below, taken from a document produced in evidence during a Commission public inquiry, details types of corrupt conduct that have featured in six RailCorp-related investigations. The table also indicates whether certain types of conduct are present in the current investigation, Operation Monto.

Table 2: Common types of corrupt conduct in ICAC investigations into RailCorp²⁴

Type of Conduct	Year of Report						Present in Monto? 2007/2008
	1992	1993	1998	2001	2006	2007	
Collusion	✓	✓		✓	✓	✓	✓
Favouritism	✓		✓			✓	✓
Fraud		✓	✓	✓	✓		✓
Falsification of information		✓	✓	✓	✓	✓	✓
Bribery		✓	✓				✓
Conflict of interest			✓	✓		✓	✓

Delays in RailCorp's implementation of corruption prevention recommendations

1.29 The Committee heard evidence of delays in RailCorp's progress with the implementation of corruption prevention recommendations. ICAC advised the Committee in answers to questions on notice that the finalised implementation plan for Operation Persis, due in September 2007, had not yet been received:

The 12 month progress report on Operation Persis would normally have been expected in June 2008, and this would have given the Commission information about the progress of implementation of recommendations. However, at this stage the finalised implementation plan which is meant to precede the 12 month progress report has not yet been received. The Commission is therefore unable at this stage to identify which, if any, of its recommendations have been implemented.²⁵

1.30 The Commission wrote to RailCorp in February 2008, seeking information on the outstanding implementation plan and an earlier plan. In answers to questions on notice, the Commission advised the Committee that it had not received the requested information from RailCorp.²⁶

1.31 Subsequent to the Committee's hearing with the ICAC on 9 July, RailCorp provided the Commission with an updated version of its initial recommendation implementation plan for Operation Persis.²⁷

1.32 In answers to questions on notice, the Commission advised that RailCorp's 12 month progress report for Operation Quilla²⁸ was received in May 2008 and indicated that

²⁴ ICAC, tabled document, 'Common themes in six previous ICAC investigations into RailCorp', p 1 (see Appendix 2).

²⁵ ICAC, answers to questions on notice, question 11, p 9

²⁶ Ibid, question 35, p 26

²⁷ The implementation plan is available on the investigation outcomes section of ICAC's website, see <<http://www.icac.nsw.gov.au/index.cfm?objectid=96ABC77A-B1C9-2EEB-A4C6FBAA6C26BD27>> (accessed 18 September 2008)

six of the Commission's 14 recommendations have been implemented.²⁹ A more recent progress report, published on the Commission's website, indicates that implementation of 10 recommendations has been fully completed. Of the remaining recommendations, three relating to staff training have either been partially implemented or are ongoing.³⁰ RailCorp is developing an alternate solution to the remaining recommendation, which proposed changes to invoice processes in relation to procurement of goods and services, as part of its Procurement Transformation Project.

ICAC's view

- 1.33 Commissioner Jerrold Cripps QC told the Committee that he was dissatisfied with the delayed RailCorp response to ICAC's corruption prevention recommendations. The Commissioner advised that the Commission would, in response to such situations, consider using its referral powers under sections 53 and 54 of the ICAC Act (examined in detail below at paragraph 1.37):

CHAIR: I want to get on to the topic of recommendations that the Commission makes and the implementation of those recommendations. ... What we are noticing with Railcorp, we have a situation where the implementation plan is yet to come into the Commission and yet this is ordinarily the time we would expect a 12-month progress report. With Operation Quilla I think there are similar issues with delays in reporting. We know from the document that you have been good enough to make available to us that with regards to Railcorp over seven investigations we still have the same issues recurring for the Commission, and it seems as though we are getting a delay in the implementation and we are getting these recurring themes in these investigations. ... are you satisfied with the way things are going? Do you have any comments and observations to make about this particular agency in view of its history and in view of the work it gives the Commission and its lateness in providing you with information?

Mr CRIPPS: ... My short answer to your question is that I am not satisfied. I am not happy about the time lapse. Perhaps we should have pushed it a bit harder and I think in the future we will. I think the way we should do it is probably through sections 53 and 54, which I am aware would send the matter to the Parliament or the Government to handle.³¹

- 1.34 The Commission stressed the importance of agencies being held responsible for the implementation of ICAC's corruption prevention recommendations. In evidence, Dr Waldersee, who was recently appointed as Executive Director of Corruption Prevention, Education and Research, noted that the Commission's role is developing recommendations and following up on their implementation, rather than actively overseeing their implementation. Dr Waldersee emphasised that the Commission is not, and should not be, held responsible for management reluctance to implement its recommendations, as managers within affected agencies could hold the Commission accountable for any future corruption:

²⁸ ICAC's report in relation to Operation Quilla, *Report on investigation into defrauding the RTA and RailCorp in relation to provision of traffic management services*, was published in December 2006.

²⁹ ICAC, answers to questions on notice, question 11, p 9

³⁰ Recommendation number 14 related to training for all staff with procurement responsibilities. RailCorp's progress report indicates that it is developing training courses to cater for the different requirements of its 3,000 employees with involvement in procurement. So far 680 staff have completed at least 1 procurement training course: see Corruption prevention recommendations RailCorp – 12 month progress report, <<http://www.icac.nsw.gov.au/index.cfm?objectid=A71557B1-917D-0BDD-87193D9D09A9113B>>(accessed 18 September 2008), p 1

³¹ Mr Cripps, Commissioner, ICAC, *Transcript of evidence*, 9 July 2008, p 5

Dr WALDERSEE: ... The corruption prevention recommendations, as the system typically works, are developed within the investigation process. ... We assess the implementation. We do not step in and act as administrator and take charge. To do so is not only not our role, it would not be an effective role were it to be made our role. If the management, after a finding, will not take responsibility and ownership of the recommendations and implement them, then the issue of implementation is way beyond the scope of corruption prevention. We cannot do it as administrator, and as the Commissioner has said, if we did we would then be held liable. It would give the managers the ability to shift responsibility for future corruption across to the ICAC. ... Our final recourse is a part 5 escalation and information to the Minister that this is not being done and it is then the Minister's responsibility. If they want to put in an administrator or they want to sack the senior management, whatever they deem fit, but that is well beyond the role of corruption prevention.³²

- 1.35 The Committee notes that the ICAC Act stresses agencies' responsibility in terms of corruption prevention by providing that, in exercising its function in terms of serious and systemic corrupt conduct, the Commission 'is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct'.³³

Public confidence in ICAC

- 1.36 The Commissioner also noted the effect on public confidence in ICAC's effectiveness of repeated instances of corrupt conduct within particular agencies. A series of investigations into corrupt conduct in agencies such as RailCorp may lead to a public perception that ICAC's exposure of corruption does not act as a deterrent and as a result may diminish public confidence in the Commission's work:

Mr CRIPPS: ... I am aware, and I think almost everybody in the Commission is aware, of the problems associated with Railcorp or State Rail. And there has been a repetition of conduct notwithstanding exposures and recommendations made. ... the Commission is concerned that corruption that has been exposed and made public and within no time, it gets exposed again. We have had illustrations in evidence, as you are probably aware, of people doing these things while they know that there is a public inquiry going on about other people, and they are doing the very things that the other people are doing—so something has to be done to stop this.

... But the short answer to your question is we are concerned about the repetition of this conduct both because it does in a sense affect public perception of the quality of our work. The perception is that we keep exposing it and nothing happens.³⁴

Referrals under part 5 of the ICAC Act

- 1.37 Section 53 of the ICAC Act provides for the Commission to refer matters to relevant authorities for investigation or action if it deems such a 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)

³² Dr Walderssee, Executive Director, Corruption Prevention, Education and Research, ICAC, *Transcript of evidence*, 9 July 2008, pp 5-6

³³ ICAC Act, s.12A

³⁴ Mr Cripps, *Transcript of evidence*, 9 July 2008, p 5

Commentary

- (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.
 - (6) If the Commission communicates information to a person or body under this section on the understanding that the information is confidential, the person or body is subject to the secrecy provisions of section 111 in relation to the information.
- 1.38 ICAC 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.³⁵
- 1.39 Under s.55, 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:
- (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.
- 1.40 Section 77 of the ICAC Act provides that the Commission may furnish to the Presiding Officer of each House of Parliament a report setting out a recommendation referred to in s.55, which the Commission considers should be adopted and the reasons for doing so. The Committee is not aware of how frequently, if at all, the Commission has utilised this provision.
- 1.41 According to its Annual Report, the Commission usually uses its powers under part 5 following consultation with an agency to determine whether it is appropriate for it to investigate an issue, which frequently relates to relatively serious corruption allegations. If the Commission considers an internal investigation to be appropriate, it refers the matter and requests a report on the findings. In 2006-2007 the Commission made 17 referrals under sections 53 and 54 of the Act.³⁶ The Commission, therefore, appears to have used these powers to require agencies to investigate matters, rather than to seek a report on the implementation of outstanding recommendations once an ICAC investigation into a matter has concluded.

³⁵ ICAC Act, s.54

³⁶ ICAC, *Annual Report 2006-2007*, p 27

1.42 In evidence to the Committee, the Commissioner proposed greater use of this referral power in future, with matters possibly being referred to the relevant Minister:

Mr CRIPPS: ... I think the problem we have here—and I take responsibility for this—probably there should have been more recourse much quicker to sections 53 and 54. It should have been referred to the Minister to deal with, and the Minister then, if it could not be dealt with, could refer it to the Parliament. I think perhaps we should be doing more of that, and we will be doing more of that in the future.³⁷

1.43 In terms of RailCorp's delayed implementation of ICAC recommendations, the Commissioner indicated that the Commission may take steps to refer the matter to the Minister for Transport under part 5 of the Act, should RailCorp's response be further delayed:

Mr JONATHAN O'DEA: I noted your comments in relation to sections 53 and 54 and the intention to be again more proactive in potentially escalating matters to the relevant Minister. It was not clear to me whether or not you had actually escalated any matters to date. Given the situation that RailCorp and your response to question 35 (d) about RailCorp's still outstanding implementation plan, do you intend, if you have not already, now escalating it to the Minister for Transport?

Mr CRIPPS: We will give independent consideration to that. We have not done it. You can infer that it is more likely than not that will happen unless we get a response very quickly.³⁸

Functions of the Committee

1.44 During the hearing it was suggested that the Committee could seek further information from agencies in relation to their implementation of ICAC's corruption prevention recommendations. The Commissioner expressed the view that any further information the Committee could obtain through such a process would benefit the Commission.

Ms JODI McKAY: I sit on the Public Accounts Committee as well ... One of the important roles that we play is in terms of closing the loop on the implementation of recommendations. An initiative we introduced this year relates to the holding of public hearings, the bringing in of departments and asking them about the implementation of recommendations. This relates purely to systems and processes and making them accountable. Putting aside the terms of reference of this Committee, because we need to look at that, it seems to me it is about closing the loop in a public sense. I know you have reports at 12 months and 24 months, but what we found in introducing this approach is that suddenly departments get very busy about looking at those recommendations because they are called in here and they appear before us. If they discount a recommendation, we ask them to account for that approach and why they are not following up on that. Is that not something that could be of assistance?

Mr CRIPPS: Yes, I suppose so.

Ms JODI McKAY: Taking aside the terms of reference of this Committee, is that something that could happen?

Mr CRIPPS: Yes, I think it is. I think it is something you could do and it probably would be helpful to us. ...

Ms JODI McKAY: It is a follow-up audit that is saying that we are not just accounting for it in a recent report, but actually saying, "How did you do this internally? What are the

³⁷ Mr Cripps, *Transcript of evidence*, 9 July 2008, p 6

³⁸ *Ibid*, p 14

Commentary

processes that you have now implemented within your organisation that are following up on what you have done?"

Mr CRIPPS: I am sure that would be of value to us. It would be a source of information that we could have regard to ...³⁹

- 1.45 During his appearance before the Committee, the Inspector of the ICAC, Mr Graham Kelly, also expressed his support for the Committee undertaking such a role.⁴⁰
- 1.46 Following the public hearing, the Committee received two items of correspondence relating to the discussion about implementation of the Commission's recommendations. The Commissioner wrote to the Committee on 15 September, seeking advice on whether the Committee supported the suggestion made by a particular member during the hearing, of referring to the Committee agencies that are unwilling to implement ICAC recommendations. The Commissioner advised that he was considering a recommendation to this effect and sought clarification of the Committee's position on the proposal.⁴¹
- 1.47 The Committee also received a letter from the Director General of the Department of Premier and Cabinet, Ms Robyn Kruk, dated 18 September, informing the Committee that the Commissioner of the ICAC was to address the Cabinet at a forthcoming meeting. The address would give the Commissioner an opportunity to inform Cabinet of particular concerns regarding corruption in certain areas of the government's operations, which could be the focus of ministerial and agency attention. The Director General indicated that the Commissioner's address would not be subject to cabinet confidentiality.⁴²

Conclusion

- 1.48 In the Committee's view, the delays referred to during the Committee's review are concerning given repeated ICAC investigations into corrupt conduct within RailCorp. Of particular concern is the fact that certain corruption issues have arisen repeatedly in spite of previous ICAC investigations revealing similar types of corrupt conduct and systemic failures. Agencies are responsible for the implementation of the Commission's recommendations and the implications of repeated failure to do so are significant in that the Commission's effectiveness may be called into question. This is particularly so given that ICAC relies on information and reports from the public in performing its role.⁴³
- 1.49 In the Committee's view, the Commission's referral powers under sections 53 and 54 of the ICAC Act provide an appropriate mechanism for the Commission to pursue implementation issues. This may be warranted in circumstances where the Commission has repeatedly made findings and recommendations in relation to similar types of corrupt conduct in a particular agency, and the agency's implementation of corruption prevention recommendations is considered to be inadequate. The Committee supports the Commissioner's intention to make greater use of these provisions and considers that agencies should be required to give a full

³⁹ Mr Cripps, *Transcript of evidence*, 9 July 2008, p 19

⁴⁰ *Transcript of evidence*, 3 July 2008, p 13

⁴¹ Letter from the Hon Jerrold Cripps QC, Commissioner, to Mr Frank Terenzini, Chair, dated 15 September 2008.

⁴² Letter from Ms Robyn Kruk, Director General Department of Premier and Cabinet, to Mr Frank Terenzini, Chair, dated 18 September 2008

⁴³ In 2006-2007, 38.4% of the Commission's investigations arose from complaints from the public, see ICAC, Annual Report 2006-2007, p 35.

account as to why recommendations have not been implemented or have been implemented only in part.

RECOMMENDATION 1: That 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 and that the *Independent Commission Against Corruption Act 1988* be amended accordingly.

RECOMMENDATION 2: Further, that the Commission include in its annual report details of those agencies and departments that fail to comply with this statutory requirement.

- 1.50 The Committee notes that under Parts 5 and 8 of the Act, the Commission has at its disposal a mechanism for referring matters to agencies and, in turn, the Minister and, ultimately, Parliament. To date, it is not apparent to the Committee that the Commission has fully utilised this avenue. In the event that the Commission does utilise these provisions with little effect, the Committee would examine the operation of these particular sections of the Act.
- 1.51 *The role of the Committee* -The Committee's functions under s.64(1) of the ICAC Act include monitoring and reviewing the exercise by the Commission of its functions. While it may be appropriate, consistent with these functions, for the Committee to as part of its monitoring role review the overall rate of implementation of the Commission's recommendations, it would be inappropriate for the Committee to actively pursue agencies on their responses to specific ICAC recommendations. Nor would it be appropriate for the Committee to advocate on behalf of the Commission in respect of its recommendations.
- 1.52 There is a significant distinction to be drawn between the role of the Public Accounts Committee in following up specific recommendations made by the Auditor-General and the role of a parliamentary oversight committee, such as the ICAC Committee. As an investigative commission, the ICAC possesses extensive coercive and covert powers for the purpose of carrying out its functions. The ICAC Committee's oversight of the Commission involves striking a delicate balance between holding ICAC to account for the exercise of these powers and the performance of its functions, without undermining its independence. It would be inconsistent with this oversight role and the Committee's statutory functions, for it to actively pursue the implementation of specific ICAC recommendations with individual agencies. This is particularly so given the capacity for ICAC under the Act to report non-implementation of its recommendations.
- 1.53 While the Committee has a wide jurisdiction under the Act the statutory limitations on its jurisdiction at s.64(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. Section 64(2) of the Act provides that the Committee is not authorised to:
- investigate matters relating to particular conduct; or

- reconsider decisions to investigate, not investigate or cease investigating a particular complaint; or
 - reconsider findings, recommendations, determinations or other decisions of the Commission relating to particular investigations or complaints.
- 1.54 Legislative amendment would be required to remove any of these limitations.
- 1.55 The Public Accounts Committee's statutory functions under s.57 of the *Public Finance and Audit Act 1983* recognise the relationship that has developed between Parliaments and Auditors-General, which is grounded in the role performed by the Parliament in scrutinising expenditure by the Executive. The Public Accounts Committee's follow-up of the Auditor-General's recommendations is not a role analogous to that performed by the Committee on the ICAC as a parliamentary oversight committee.
- 1.56 Nevertheless, s.64(1)(d) of the ICAC Act does provide the Committee with the function of examining trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and reporting to both Houses of Parliament on any change which it thinks desirable to the functions, structures and procedures of the Commission.⁴⁴ For this purpose the Committee has a direct interest in the extent to which those systemic measures identified by ICAC to prevent corruption are implemented by agencies over time.
- 1.57 Repeated failure to implement recommendations in relation to recurrent types of corruption is, from the Committee's perspective, an area of inquiry that it has a statutory obligation to examine. It would be a legitimate area of inquiry for the Committee to monitor the implementation rates for ICAC's recommendations and related problem areas for the purpose of determining whether the Act needs to be amended to ensure that ICAC is effective. For instance, should it be considered necessary, the Committee may examine further amendments to the Act to strengthen the options available to ICAC in the event that its recommendations are repeatedly ignored, leading to entrenched corruption within the public sector.
- 1.58 One such option would be to consider an amendment to the ICAC Act along the lines of s.27 of the *Ombudsman Act 1974*, which provides for the Ombudsman to make a report to the Presiding Officers of the Parliament if he/she is not satisfied that sufficient steps have been taken, in due time, as a result of an investigation report made under s.26 of the Act.⁴⁵ If a s.27 report is made by the Ombudsman, the responsible Minister must make a statement in response no more than 12 sitting days after the Ombudsman reported to the Presiding Officers.
- 1.59 The Committee would encourage the Commission to utilise its referral powers under Parts 5 and 8 of the Act and will review whether use of these powers effectively aids the Commission in performing its functions.

(ii) Corruption prevention education and advice

- 1.60 In addition to its corruption prevention work during investigations, the Commission's functions also extend to corruption prevention education through:

⁴⁴ ICAC Act, subss.64(1)(d)

⁴⁵ Section 26 of the Act provides for the Ombudsman to make a report as a result of an investigation if any conduct being investigated is found (among other things) to be unlawful, unreasonable, or unjust or discriminatory.

- Educating and advising public authorities and officials, and the community on ways of combating corrupt conduct;
- Educating and communicating information to the public on the negative effects of corrupt conduct and the importance of maintaining integrity in public administration;
- Encouraging and promoting public support in combating corrupt conduct;
- Developing, organising and overseeing educational or advisory programs that may be described in a reference to the Commission by both Houses of Parliament.⁴⁶

1.61 This educative role is undertaken by the Commission's Corruption Prevention, Education and Research Division through the following activities:

- Research projects – the Commission worked on 2 major research projects during 2006-2007;
- Prevention advice projects and publications to guide agencies on their systems, policies and procedures – 6 research or prevention advice publications were produced in 2006-2007;
- Provision of advice in response to corruption prevention queries from agencies and the general public – the Commission responded to 276 advice requests and gave prevention advice in relation to 49 complaints alleging corrupt conduct;
- Delivery of education and training programs to improve awareness and understanding of corruption issues and corruption prevention – 70 training sessions courses/presentations were held by ICAC during 2006-2007.⁴⁷

1.62 Dr Waldersee advised the Committee of the Commission's intention to focus on targeting certain areas identified as high risk in terms of vulnerability to corruption. He told the Committee that as part of this targeted approach, the Division had held a planning session to identify certain high risk areas in order to better direct the Commission's corruption prevention education, research and training capabilities:⁴⁸

Dr WALDERSEE: ... My concern was that we increase our productivity in target areas and focus our effort, because there are only 22 of us. Local government is one of those areas that we are moving on, and we have specifically prioritised our targets. At the local government level it is coastal planning departments. So it is highly specific. That is where the corruption incentive is; that is where complaints are coming. What we are going to do is activist and interventionist. It will be advice on structures, control systems, increasing detection risk. It will involve some research.

For example, we do not know why people do not comply when we give recommendations. Is it that they do not know or they will not? If they do not know, education is a great answer. If they will not, it is a waste of time. So we need to know some of those factors before we can go forward. It will involve education. It will involve detection risk through activities such as informing progress associations, external oversight bodies, the general public on what to look for, what we need in a complaint. Do not just phone us up because you do not like the development. That does not work. We need to know details. It will involve management training. It will involve looking at what they have got on the ground and some tailoring. It will involve increasing detection risks by making the community aware of what is going on. It will involve research so that

⁴⁶ ICAC Act, subss.13(1)(h)-(k)

⁴⁷ ICAC, *Annual Report 2006-2007*, pp 44-45

⁴⁸ *Transcript of evidence*, 9 July 2008, p 21

we know exactly what we are supposed to be targeting in the first place. That is now starting, but it is not in place yet ...⁴⁹

1.63 The Commission advised the Committee that it will report on this targeted corruption prevention approach in its next Annual Report.

Measuring the effectiveness of corruption prevention

1.64 The Commission measures its corruption prevention and education performance by reporting on results for relevant activities, including:

- the number of requests for advice, and advice given, in relation to complaints and reports of corrupt conduct,
- the number of presentations and training sessions delivered,
- the number of corruption prevention recommendations made and implemented,
- the number of website visitors, including external sessions,
- the results of Community Attitudes Surveys,⁵⁰
- the number of advice tip sheets and prevention or research reports published.

1.65 ICAC's results in terms of meeting some of these corruption prevention targets are indicated in the table below.

Table 3: Selected key quantitative results for corruption prevention and education activities⁵¹

Measure	2004-05	2005-06	2006-07	Target
Telephone/email requests for corruption prevention advice	333	246	244	n/a
Speaker presentations delivered	43	33	31	30
Training sessions delivered	45	61	39	40
Percentage of public inquiries which resulted in the making of corruption prevention recommendations	-	-	85%	90%
Number of external visitor sessions to ICAC website		404,013	478,821	n/a
Percentage of respondents to the Community Attitudes Survey who believe the ICAC has succeeded in exposing corruption	-	-	72%	60%
Percentage of respondents to the Community Attitudes Survey willing to report corruption	-	-	80%	60%
Number of prevention or research reports published	-	7	6	3

Note: ICAC does not set targets for measures reflecting incoming work or activity that is beyond its control, in these instances not applicable (n/a) appears in the target column.

Difficulties with measuring the effectiveness of corruption prevention

1.66 The Committee held a public hearing with the Inspector of the Independent Commission Against Corruption, Mr Graham Kelly, on 3 July. During the proceedings, the Inspector commented on the Commission's corruption prevention function. In particular, the Inspector noted the difficulty of measuring the success of

⁴⁹ Dr Waldersee, *Transcript of evidence*, 9 July 2008, pp 13-14

⁵⁰ ICAC conducts periodical surveys of community perceptions of corruption, attitudes to reporting corruption and awareness and perceptions of the ICAC. The most recent survey, of 502 NSW residents, was done in 2006: see ICAC, *Annual Report 2006-2007*, p 55.

⁵¹ Source: ICAC, *Annual Report 2006-2007*, p 10. Not all key result areas reported on in the Annual Report have been included in the table.

the Commission's corruption prevention function, stating that he did not see that the Commission's corruption prevention function had had much success:

Mr KELLY: ... What I am about to say now is conjecture on my part and entirely impressionistic, but I do not see the corruption prevention function actually having much prominence or clearly measurable success. In fact I do not even know how you would go about measuring success in the corruption prevention function.⁵²

1.67 In response, the Commissioner noted that the effectiveness of corruption prevention is hard to gauge, and pointed to the difficulty of establishing not only how much corruption exists, but how much corruption has been stopped through prevention programs.

Mr CRIPPS: ... One of the problems, of course, as you are aware, and this committee is aware, that in the area of corruption it is extremely difficult to know whether any particular steps that are taken will result in less corruption, whether there would be corruption if they had not been taken because we do not know how much corruption there is there or we do not know how much has been stopped.⁵³

1.68 The Committee notes that, as part of his independent review of the ICAC Act, Bruce McClintock SC also noted the difficulty of measuring the effectiveness of the Commission's corruption prevention education and research functions. However, McClintock concluded that he was 'satisfied that ICAC is aware of the importance of addressing corruption risks and that its corruption prevention and education activities are generally appropriate to this task.'⁵⁴

The problem with some measures - stability of complaints

1.69 During the Committee's hearing with the ICAC Inspector, the Chair noted the stability of the number of complaints received by ICAC.⁵⁵ In response, Dr Waldersee elaborated on the difficulty of interpreting the level of complaints received by the Commission. Dr Waldersee commented that the number of complaints is affected not only by corruption prevention but also by the deterrent effect of the exposure of corruption. It is therefore problematic to ascribe stable levels of complaints simply to a failure of corruption prevention.

Dr WALDERSEE: I would like to respond to this ... one of the reasons that there was thought to be very little impact of the corruption prevention function was the stability over time of the number of complaints made to the ICAC and the number of investigations that were undertaken, and this was taken to be evidence corruption prevention is not working as was intended when the Act was initially brought in.

The stability argument I think is too broad because of the difficulty of measurement. The number of complaints could just as easily be taken to be an indication of the effectiveness of deterrence, and the argument that was woven through the testimony was that deterrence, exposure, is the core function. The ICAC does deterrence and it does prevention. The stability argument has to apply to both equally because you cannot say it is corruption prevention.⁵⁶

1.70 The stability of complaints, in Dr Waldersee's view, could be interpreted as a sign of ICAC's success in corruption prevention, given changes that have led to greater

⁵² Mr Graham Kelly, Inspector of the ICAC, *Transcript of evidence*, 3 July 2008, p 6

⁵³ Mr Cripps, *Transcript of evidence*, 9 July 2008, p 5

⁵⁴ McClintock, Independent review of the *Independent Commission Against Corruption Act 1988*, para 3.3.5

⁵⁵ In 2006-2007, the Commission received 2,149 complaints, while in 2005-2006 it received 2,191: see ICAC, *Annual Report 2006-2007*, p 15.

⁵⁶ Dr Waldersee, *Transcript of evidence*, 9 July 2008, p 8

potential for corruption in certain government sectors such as local government. The Commission's corruption prevention work also involves raising awareness on reporting corruption, and stable levels of complaints may be interpreted as an indication of success in encouraging the public to report corruption. In outlining these points, Dr Waldersee emphasised to the Committee that evaluating the number of complaints the Commission receives is difficult due to the many different interpretations that could be placed on the statistics.

Dr WALDERSEE: ... Conversely, the stability argument could be said to be an indicator of great success because there are changes within the environment, such as the demographic shifts to sea changes that puts pressure on councils' development functions and planning functions; there is discretion contracting within government services, all increasing the risk of corrupt behaviour occurring.

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

... We do not know what this stability means. It could mean that corruption prevention is highly effective at raising reporting, which is one of the targets—to educate people on how to report corruption they see, while at the same time reducing the actual number of corrupt occurrences that would also produce stability or, as was presented last week, that there is no impact whatsoever of deterrence or corruption prevention, which is equally possible. So I am saying these numbers cannot be really used to make much of an evaluation of what is really happening.⁵⁷

Possible new ways to measure the effectiveness of corruption prevention

1.71 In evidence, Dr Waldersee elaborated on the methodology he intends to use to measure the effectiveness of the Commission's corruption prevention training activities. He indicated that the Commission will use a quantitative before and after measure to assess the effectiveness of the Division's programs, with the emphasis being on improvements in raising awareness and knowledge of ways to combat corruption, rather than attempting to measure whether corruption has been reduced.

Dr WALDERSEE: ... The methodologies I intend to use will not be a global de-corruption reduction. As the Commissioner has noted, we do not know how much corruption there is in the first place, so how can we know if we have reduced it? What it will do—and this is how I intend to evaluate all programs from now on—it will be a straightforward before-and-after measurement. If the training is designed to give managers a certain amount of knowledge on how to structure or arrange their organisation, we want to know: What did they know before and what do they know after, and is that different? That would be the measure of effect: it would be a quantitative methodology, looking to see whether we achieved some sort of statistically significant improvement in what we were trying to achieve with this training.

What we will never be able to ascertain is whether the training and the skills that had been given to the manager were implemented in a realistic way or a genuine way ... because that would again require us to be highly interventionist. ... That gets back to my earlier comments that that is really not the role. We are there to provide the tools. We will provide assessment—but not where we kick the door in and walk in and say we are going to do it. If they want it done, we can do it, but we are not able to force ourselves.

... But it would be: What were we trying to achieve with the training? So down the line we hope it will be: we train, they implement, and corruption is reduced. We do not believe there is much point in trying to measure that far down the line. We would

⁵⁷ Ibid, p 8

measure back at the beginning: We train; we have changed their knowledge. It is then up to the organisation and the management to take that knowledge and implement it.⁵⁸

Corruption prevention being undertaken by a central agency

1.72 In evidence before the Committee, the Inspector of the ICAC has recently proposed that the Commission's corruption prevention function could be undertaken by a central agency, allowing for corruption prevention to be addressed as a matter of policy. The Inspector told the Committee that, in his view, this would enable the Commission to focus more of its resources on investigating and exposing corruption.

Mr KELLY: ... I think if you go back to the then Premier's second reading speech when it was first set up, that second reading speech expressed the view that within 10 years the name and shame function effectively would be passé because the corruption prevention function would have been so successful. Of course, that simply has not occurred.

... What is more, in my own reflections on this—and these are entirely personal views, ... I think there is something to be said for having your corruption prevention functions embedded in a central government agency as a policy thing, so when new legislation is coming forward, for example, when new regulations are coming forward, there is someone from a pure policy point of view that looks at it and says, "What are we opening up here? What leverage are we giving to potentially corrupt people?"

... Every time you put together another piece of regulation that has embodied in it some kind of discretion you are opening up the possibility of some measure of corrupt conduct. That seems to me to be a highly policy-driven issue. It is not just an advisory issue over there in an outside agency. So corruption prevention takes a lot of resources in ICAC and whenever it is there the Commissioner obviously has to devote those resources to it. If it was not part of ICAC then some of those resources would be devoted to the name and shame process and you would probably see ICAC taking up more cases and pursuing more cases through in a different kind of way.⁵⁹

1.73 In response to the Inspector's suggestion, the Commissioner noted that the Commission's corruption prevention work is 'dependent on what we discover in public inquiries and compulsory examinations where the precise issue of corruption is identified ... and [it] is then dealt with.'⁶⁰ It is the Commissioner's view that there would be no advantage in establishing an agency to undertake the corruption prevention role.

1.74 Dr Waldersee advised the Committee that, in his view, corruption prevention is a risk management issue, rather than a matter of policy. Preventing corruption is a process involving the assessment of relevant structures and systems and working with management to minimise and detect corruption, rather than simply providing policy advice to management. He told the Committee:

Dr WALDERSEE: ... The idea that was floated was the idea that corruption prevention should maybe move off to a central agency. The argument behind that was corruption prevention is essentially a policy function and should be located in a policy type agency, because discretion within policy is what creates corrupt opportunity. That was my following of the argument in the transcript.

What I would say about corruption prevention is that we are most definitely not a policy agency. If there is not discretion within government it is a massive machine; it could not

⁵⁸ Dr Waldersee, *Transcript of evidence*, 9 July 2008, pp 12-13

⁵⁹ Mr Kelly, *Transcript of evidence*, 3 July 2008, p 6

⁶⁰ Mr Cripps, *Transcript of evidence*, 9 July 2008, p 8

function without discretion being there. Corruption prevention therefore is not about policies that allow discretion, it is about management of that risk created by the discretion. So the issue is one of structures, processes, control systems, the way management is run, detection risks—exactly the same sort of management structural process issues that would be found in an insurance company or a bank. But it is most definitely more like management advice than it is policy advice. That is why I do not feel it should be moved on those grounds.

I would like to add, as the Commissioner has pointed out, corruption prevention is not independent of investigation and exposure. Corruption prevention operates within investigations to understand the structural control systems, procedures—the failures that allowed the corruption to occur in the first place. Without that involvement in investigations we could not make recommendations and without our involvement in investigations they would find themselves short of the knowledge necessary to understand the structures, processes and controls needed to run the investigations.⁶¹

Conclusion

- 1.75 In the Committee's view, corruption prevention is inextricably linked to the investigation and exposure of corruption. The expertise and knowledge of corruption that the Commission brings to its investigations is closely connected to its corruption prevention work. The Committee supports the Commission's view that corruption prevention is best approached from an informed risk management perspective combined with investigative expertise. While recognising the difficulty of establishing the success of current prevention activities, the Committee feels that the Commission's corruption prevention work is more effective due to its integration with the Commission's investigatory function. The Committee has concluded that corruption prevention would not be more successfully undertaken by a separate agency.
- 1.76 In addition to monitoring the implementation of ICAC's corruption prevention recommendations, the Committee intends to review the results of the Commission's planned quantitative assessment of its corruption prevention programs.

PROPOSED AMENDMENTS TO THE ICAC ACT

- 1.77 In this section the Committee examines the Commission's proposals for amendments to the ICAC Act, which were raised during the Annual Report review.

Section 37 - admissibility of evidence in disciplinary or civil proceedings

- 1.78 Section 37(3) of the ICAC Act provides that answers given or documents produced by witnesses under objection at ICAC public inquiries or compulsory examinations, are not admissible against them in criminal, civil or disciplinary proceedings. The section does not apply to proceedings for offences under the ICAC Act.

ICAC's view

- 1.79 The Commission sought the Committee's support for an amendment to s.37 to remove the limitation on the admissibility of evidence given under objection for civil and disciplinary proceedings. The Commissioner told the Committee that he saw no justification for the protection granted by s.37 with respect to such proceedings. Disciplinary or civil proceedings taken against a person who has made admissions to

⁶¹ Dr Waldersee, *Ibid*, pp 8-9

the Commission under objection may fail due to a lack of evidence, if there is no other admissible evidence available. The Commissioner advised the Committee that he believes it should be a matter of policy for public officials to face disciplinary proceedings and to face civil action to recover fraudulently obtained public money, even if there is no admissible evidence of their misconduct:

A public official may give evidence to the Commission that the public official has solicited or accepted bribes in connexion with the performance of the public official's official duties or engaged in other forms of misconduct. As the law currently stands, if this evidence is given under objection it cannot be used against the public official in any disciplinary proceedings. Without other evidence it may not be possible to commence disciplinary proceedings, or if such proceedings are commenced they may fail due to lack of evidence. As a matter of public policy, officials who have admitted engaging in corrupt conduct or misconduct should not be able to avoid disciplinary proceedings simply because there is a lack of other evidence of their conduct.

...

Where contractors or others have admitted defrauding public sector agencies their admissions should, as a matter of good public policy, be available to be used in any civil proceedings taken by the public sector agency to recover the monies it lost as a result of the fraud.⁶²

- 1.80 The Commission also pointed to the *Police Integrity Commission Act 1996*, which contains provisions, similar to those in the ICAC Act, empowering the Police Integrity Commission (PIC) to compel people to produce documents and give evidence before it. Section 40(3) of the PIC Act, containing provisions relating to privilege, provides that:

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

- 1.81 Section 173 of the PIC Act provides for action that may be taken in relation to misconduct or unsatisfactory performance by a police officer; s.181D provides that the Commissioner of Police may remove a police officer from the Police Force, if he/she lacks confidence in the officer's competence, integrity, performance or conduct; and s.183 provides that the Commissioner may revoke a promotional appointment.

- 1.82 In answers to questions taken on notice, the Commissioner argued that the use in disciplinary proceedings of evidence obtained under objection is therefore not unprecedented:

The removal of the protection with respect to disciplinary proceedings is not without precedent. Section 40 of the *Police Integrity Act 1996* serves a similar purpose to section 37 of the ICAC Act. However it contains a notable exception in that evidence given under objection is nevertheless admissible against the witness in disciplinary proceedings under the *Police Act 1990* and the *Public Sector Employment and Management Act 2002*. Section 96 of the *Law Enforcement Integrity Commissioner Act*

⁶² ICAC, answers to question taken on notice at 9 July public hearing, p 3 (see Appendix 3)

2006 also allows evidence given under objection to be used in disciplinary proceedings if the person giving the evidence is a staff member of a law enforcement agency.⁶³

Conclusion

- 1.83 The abrogation of the privilege against self-incrimination, balanced by the subsequent restrictions on the use of admissions, is considered necessary in order for investigative commissions such as ICAC to detect and expose corrupt conduct. The nature of corruption is that it may involve offences that are victimless and is often only known about by those involved. Investigation of such particular crimes requires the use of extraordinary powers. According to Hall, combining compulsory powers with the loss of privilege against self-incrimination is 'designed to ensure the full and effective investigation of possible corruption ... in the public interest ... evidence of conduct of that nature often lies peculiarly within the knowledge of persons who cannot be expected to disclose their knowledge.'⁶⁴
- 1.84 The ICAC has extraordinary powers to compel people appearing before it to give evidence and produce documents that may incriminate them. The protection afforded under s.37(3) of the Act, which prevents evidence obtained under compulsion from being used in subsequent civil and disciplinary proceedings, balances the public interest in investigating corruption against the loss of individual civil rights associated with the use of coercive powers. Removing the bar on the use of self-incriminating evidence obtained under objection would involve a significant departure from the legal framework under which ICAC exercises such extraordinary powers. It is the view of the Committee that such a step would require detailed examination and full consultation with relevant stakeholders.
- 1.85 For instance, the provisions contained within the Police Integrity Commission Act 1996, to which the ICAC has referred in support of its proposal should be examined in the context of the policy intent and objectives of the legislation. In particular, the Committee would take evidence from stakeholders including the Police Integrity Commission and Police Association on the operation of s.40(3) of the PIC Act, its efficacy and the context of its operation. The Committee intends to undertake a review of the ICAC and ICAC Act in 2009. The review will provide an opportunity to further explore specific proposals to amend the ICAC Act.

Section 112 - restricting the publication of written submissions

- 1.86 Section 112 of the ICAC Act empowers the Commission, if it is satisfied that it is in the public interest, to restrict the publication of:
- any evidence given before the Commission;
 - any documents' contents, or a description of any thing, that is produced to the Commission or seized under a search warrant issued under the Act;
 - information that may enable the identification or location of a person who has or may give evidence before the Commission; or
 - the fact that a person has given, or may give, evidence at a compulsory examination or public inquiry.

⁶³ Ibid, p 3

⁶⁴ Peter M Hall QC, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, Lawbook Co, 2004, pp 596 & 597

- 1.87 The penalty provisions for persons contravening a non-publication order made under s.112 are 50 penalty units or imprisonment for 12 months, or both.⁶⁵
- 1.88 The Commission often makes non-publication (suppression) orders if it is conducting a compulsory examination. Orders may be lifted or varied, if the Commission is satisfied it is in the public interest to do so. Non-publication orders are made for various reasons, including:
- Avoiding prejudice to current legal proceedings;
 - Protecting the reputation of a person who has been adversely named;
 - Preventing the publication of allegations until a response has been received from the person who is the subject of the allegations;
 - Protecting a person's safety or welfare;
 - Protecting minors;
 - Protecting trade secrets or law enforcement procedures; or
 - National security reasons.⁶⁶
- 1.89 The Committee notes that, at the conclusion of all three public inquiries held this year, the Commission made orders pursuant to s.112 of the Act to restrict the publication of written submissions.

ICAC's view

- 1.90 The Commission advised the Committee in answers to questions taken on notice that it is unclear whether s.112 enables the Commission to make orders restricting the publication of written submissions. When an ICAC public inquiry concludes, counsel assisting the Commission makes submissions, which are usually written, in relation to findings and recommendations that may be made by the Commission, based on the evidence.⁶⁷ These written submissions are usually provided to relevant parties (or their legal representatives) and affected persons are given the opportunity to make submissions in response. Submissions that have been received in response may also be provided to other parties for comment.⁶⁸
- 1.91 The Commission submitted to the Committee that s.112 should be clarified to include written submissions, in order to make it clear that the Commission has the power to make orders restricting their publication. The Commission commented that it is preferable in many cases to restrict the publication of submissions until after the publication of its investigation report, to avoid the publication of recommendations and findings that the Commission may not end up accepting. In support of this view, the Commission noted that the publication of submissions could impact adversely on people's reputations and may create the impression that the contents of the submission are consistent with the views and findings of the Commission, when in fact the role of counsel assisting is to present possible findings, based on the available evidence, to assist the Commission in formulating its findings:

Publication of such submissions may have an adverse impact on reputation and may incite unnecessary public speculation. Publication may result in members of the public

⁶⁵ ICAC Act, subss.112(2)

⁶⁶ ICAC, 'Information for witnesses' brochure, <[http://www.icac.nsw.gov.au/files/pdf/Information_for_Witnesses\[1\].pdf](http://www.icac.nsw.gov.au/files/pdf/Information_for_Witnesses[1].pdf)> (accessed 9 September 2008), pp 3-4

⁶⁷ This is also the case with some compulsory examinations, where the Commission intends to publish a report in relation to the investigation: see ICAC, answers to question taken on notice at 9 July public hearing, p 5.

⁶⁸ Ibid

erroneously believing the submissions represent the findings or view of the Commission.

There have been cases in the past where copies of submissions have been obtained and published by the media which has led to unnecessary speculation as to what findings might ultimately be made by the Commission. This problem could be overcome by amending section 112 of the ICAC Act to make it clear that the Commission has power to make non-publication orders with respect to written submissions.⁶⁹

Restrictions on publication of evidence and closing submissions

1.92 The power to make orders restricting the publication of evidence is generally used by statutory and royal commissions to protect witnesses or the investigation. According to Peter Hall QC:

Non publication or 'suppression orders', whether made temporarily or indefinitely, may provide appropriate or necessary protection for witnesses and/or serve the interests of preserving the integrity of an investigation. The order may relate to names, means of identification and/or to segments of evidence given by a witness.

The grounds for the making of a non-publication order are similar to certain of those that justify a private hearing ...⁷⁰

1.93 The restriction on publication provisions provided for in s.112 of the ICAC Act relate to documents, evidence or information that has been provided to the Commission, rather than documents, such as written submissions, which are produced by or for the Commission. In practice, as noted above, the Commission has made directions pursuant to s.112 to suppress counsel assisting's written submissions at the conclusion of public inquiries.

1.94 Section 31 of the ICAC Act relating to public inquiries provides that the Commission may decide to hear closing submissions, including those made by a legal practitioner assisting the Commission as counsel, in private. According to Hall, counsel assisting's role in terms of closing submissions includes to:

- provide notice to all persons who might be adversely affected (whether or not they have been granted authorisation to appear) of possible adverse findings;
- make final submissions as to:
 - 'the possible findings of fact that could be made by the Commission (including references to the evidence that supports such findings and references to contrary evidence); ...⁷¹

1.95 The Committee notes that closing submissions made by counsel assisting appear to have a similar purpose and content to written submissions, and that the Act provides for the Commission to hear closing submissions in private.

Conclusion

1.96 The Committee supports ICAC's proposal to amend s.112 of the ICAC Act to clarify that non-publication orders may be made if the Commission deems it to be in the public interest to restrict the publication of written submissions at the conclusion of a public inquiry. While the current provisions enable the Commission to restrict the publication of material that is obtained by the Commission or evidence given before

⁶⁹ Ibid

⁷⁰ Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, p 656

⁷¹ Ibid, p 675

it, the Committee notes that the Act empowers the Commission to hear closing submissions for a public inquiry in private, and that it has been the Commission's practice to suppress the contents of written submissions pursuant to s.112.

- 1.97 The Committee shares the Commission's view that possible adverse impact on people's reputations and unnecessary speculation about the Commission's findings, may be an undesirable consequence of written submissions prepared by counsel assisting being publicly available. The Act should therefore be amended to clarify that ICAC may restrict the publication of written submissions, if it determines that to do so would be in the public interest.
- 1.98 An amendment will make it clear that the Commission may institute proceedings in case of a breach of a non-disclosure order that has been made by it in relation to written submissions, and that the relevant penalty provisions would clearly also apply to a disclosure of this type of material.

RECOMMENDATION 3: That the Premier, as Minister with responsibility for the administration of the *Independent Commission Against Corruption Act 1988*, consider bringing forward an amendment to s.112 of the Act to clarify that the Commission may direct that written submissions be the subject of a non-publication order, if the Commission determines that such a direction is necessary or desirable in the public interest.

Section 116(2) - proceedings may be heard in the Local Court

- 1.99 Section 116(2) of the ICAC Act provides that offences under the Act that are indictable offences may be heard and determined in the Local Court, if the Court is satisfied that it is proper and the defendant and prosecutor consent.⁷² If a person is convicted in the Local Court pursuant to this section, the maximum penalty is 50 penalty units or two years imprisonment (or both).⁷³
- 1.100 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).

ICAC's view

- 1.101 The Commission requested the Committee's support for an amendment to s.116(2) to remove its application to offences under s.87 of the Act. The Commission advised that lower courts generally impose relatively light sentences for offences under s.87, with convictions rarely resulting in imprisonment:

Witnesses who give false evidence do not appear to be concerned about the possible criminal consequences. This may be due to the relatively light sentences which are being imposed on persons convicted of offences under section 87 of the ICAC Act. The Commission is concerned that a perception exists that people who tell lies at a compulsory examination or public inquiry will either not be punished or will not receive any serious punishment. It is certainly the case that the prospect of possible punishment is not acting as a deterrent.

⁷² An indictable offence is a more serious offence that is prosecuted on indictment in a higher court, such as the District or Supreme Court, while a summary offence is a minor offence that may be dealt with summarily in the Local Court.

⁷³ ICAC Act, s.116(3)

Commentary

In considering sentencing for an offence under section 87 of the ICAC Act, the Court of Criminal Appeal has previously held that, at least in the absence of extraordinarily compelling subjective circumstances, penalties which do not involve a significant sentence of full-time imprisonment are manifestly inadequate and inadequate to a point verging on irresponsibility (*R v Aristodemou*, NSW CCA, 30 June 1994).⁷⁴

1.102 In support of its proposal, the Commission provided the Committee with data obtained from the Director of Public Prosecutions on sentencing for perjury and false statement offences under the Crimes Act, which are comparable to offences under s.87 of the ICAC Act. The data indicated that local courts are less likely than higher courts to impose custodial sentences for these offences. For example, 29% of all offenders convicted of perjury under s.327(1) of the Crimes Act in the local court from January 2004 to December 2007 received a bond, 43% received a suspended sentence, while 14% were sentenced to home detention and 14% received a prison sentence. Between October 2000 and September 2007, 17% of offenders convicted of the same offence in a higher court received a suspended sentence, while 83% were given a prison sentence.⁷⁵

1.103 Commissioner Jerrold Cripps QC told the Committee that the Commission's effectiveness is affected by witnesses' perception that they will not be punished for lying to the Commission:

I cannot emphasise enough the importance of people telling the truth to the Commission. If they do not tell the truth to the Commission, or fear they will be punished, the efficacy of what the ICAC does is seriously diminished.

...

People who tell the truth to ICAC usually tell the ICAC what they think it already knows, and even then they will put a gloss on what the truth is to make their conduct appear to be less culpable than would otherwise be the case. ... What encourages people to tell the truth is to know that they will be jailed if they do not. This is necessary if ICAC is to function efficiently.⁷⁶

Conclusion

1.104 Giving false or misleading evidence to the Commission is a serious offence. The Committee is concerned that the Commission's effectiveness may be diminished by the perception that courts impose light sentences on people who do not tell the truth during ICAC compulsory examinations or public inquiries. However, the Committee feels that the proposed amendment to s.116(2) of the Act requires more detailed examination, including consultation with the Director of Public Prosecutions and other relevant stakeholders.

1.105 The Committee notes that the statistics presented by the Commission require further clarification. For instance, the figures provided cover different time periods and it is not apparent as to what variables may impact on the sentencing outcomes applicable in each court. Also, the Committee does not have available to it details concerning the operation of the relevant provisions of the Crimes Act and is not able to satisfy itself of whether or not the comparisons made with offences under the ICAC Act are compelling.

⁷⁴ ICAC, answers to question taken on notice at 9 July public hearing, p 2

⁷⁵ *Ibid*, pp 6-7

⁷⁶ Mr Cripps, *Transcript of evidence*, 9 July 2008, p 3

- 1.106 The Committee intends to conduct a review of the ICAC and ICAC Act as part of its inquiry program in 2009. This review will allow for in depth consideration of the implications of the Commission's proposal.

Section 116(4) - time limit on proceedings for summary offences

- 1.107 Under s.116(4) of the ICAC Act, proceedings for the prosecution of alleged offences under sections 80(c) or 81 of the Act may be commenced within three years of the commission of the alleged offence.⁷⁷
- 1.108 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.
- 1.109 Under s.179(1) of the *Criminal Procedure Act 1986*, proceedings for summary offences must be commenced no later than six months from when the offence was alleged to have been committed. This section does not apply to offences for which an Act specifies another period within which proceedings must be commenced.⁷⁸

Previous amendments to section 116

- 1.110 The *Police Legislation Amendment Act 1996* amended s.116 of the ICAC Act by inserting s.116(4). During the second reading speech for the Bill, the then Minister for Police, The Hon. Paul Whelan MP, addressed the reason for the amendment:

The period in which a person may be prosecuted under clause 104(c) for making a false or misleading statement to the PIC will be extended to three years. A similar provision is made for prosecutions under section 80(c) of the ICAC Act amendment under the Police Legislation Amendment Bill. The change addresses a practical problem raised by the ICAC in commencing prosecutions within the current limitation period of six months.⁷⁹

- 1.111 A 2005 amendment to s.116 of the Act added subs.5, which provides that proceedings for alleged offences under s.112 may be commenced within two years of the commission of the alleged offence.⁸⁰

ICAC's view

- 1.112 The Commission requested the Committee's support for an amendment to the Act to include sections 82 and 95 in the category of offences, under s.116(4), for which prosecution may commence within three years of the commission of the offence. Currently prosecution for offences under these sections must commence within six months of the commission of the offence, as they are summary offences with no other time period specified for the commencement of proceedings being specified by the ICAC Act.
- 1.113 In support of the proposal, the Commission noted that it has not always been possible to identify such offences until after the six month period has passed: 'Notices requiring information are issued early in an investigation to obtain

⁷⁷ Sections 80(c) and 81 of the Act make it an offence for a person to obstruct the Commission in the exercise of its functions by wilfully making a false statement or attempting to mislead it or its officers, and to wilfully make a false statement or mislead to the Commission in making a complaint under the Act.

⁷⁸ *Criminal Procedure Act 1986* s.179(2)(a)

⁷⁹ The Hon Paul Whelan MP, *Legislative Assembly Hansard*, 4 June 1996, pp 2465-66

⁸⁰ *Independent Commission Against Corruption Amendment Act 2005*, Sch 1 cl 63

information, and the fact that the information is false may not come to light until further steps, including in some cases a public inquiry, have been taken.⁸¹

1.114 In addition, investigations may be compromised by the commencement of legal proceedings, as persons involved in ICAC investigations would be alerted to the fact that the Commission is conducting an investigation and evidence obtained by the Commission would be revealed during the proceedings. The Commission also noted that the commencement of proceedings would necessarily mean that persons being investigated would be alerted to the fact that the Commission was aware that they had provided it with false information.

1.115 In order to illustrate the difficulties that have arisen as a result of the six month limit, the Commission referred to Operation Atlas, its investigation into corruption allegations involving Wollongong City Council:

During the course of this investigation a number of public officials were required to provide statements of information under section 21 of the ICAC Act. It subsequently became apparent, as additional evidence was obtained, that a number of people provided false or misleading responses. It is an offence under section 82 of the ICAC Act for a person to knowingly furnish information in response to a section 21 notice which is false or misleading in a material particular. The relevant penalty includes imprisonment for up to 6 months. The offence however is a summary offence. As the false or misleading nature of the statements was not apparent until after the 6-month period it was not possible to commence any prosecution action under section 82 of the ICAC Act.

An additional problem arose in Operation Atlas when it was discovered that two persons had impersonated Commission officers. Evidence in relation to this was only obtained more than 6 months after the event. Although it is an offence under section 95 of the ICAC Act to impersonate a Commission officer, no prosecution could be commenced due to the expiration of time.⁸²

1.116 The Commission also noted the previous amendments to s.116, which extended the time available for commencing prosecutions for summary offences under sections 80(c) and 81.⁸³ The Committee has referred to a similar 2005 amendment in relation to offences under s.112 of the Act.

Conclusion

1.117 The Committee supports the amendment proposed by the Commission to s.116(4) of the ICAC Act. Offences provided for under sections 82 and 95 of the Act may not become apparent until further investigation by the Commission, by which time the statutory limit of six months may have lapsed. Where the alleged offence is apparent within the time limit, the Commission may decide not to commence prosecution proceedings in order to avoid prejudicing a continuing investigation. Persons who have allegedly committed offences under these sections may not be prosecuted as a result of these circumstances.

1.118 In the Committee's view, the effectiveness of the Commission may be seen to be diminished by persons avoiding criminal prosecution for allegedly providing the Commission with false or misleading information, or impersonating a Commission officer. The Committee notes that previous amendments to s.116 of the Act have

⁸¹ ICAC, answers to questions on notice, 'Submission re amendment of s.116 of the *Independent Commission Against Corruption Act 1987*

⁸² ICAC, answers to question taken on notice at 9 July public hearing, p 4

⁸³ Ibid

resolved similar problems, which were identified by the Commission, with respect to prosecutions under sections 80(c) and 112. The Committee therefore recommends that consideration be given to an amendment to the ICAC Act to allow for the commencement of prosecution proceedings for offences under sections 82 and 95 within three years of the commission of the alleged offence, consistent with the statutory time limits applicable to prosecutions under sections 80(c) and 81.

RECOMMENDATION 4: That s.116(4) of the *Independent Commission Against Corruption Act 1988* be amended to enable proceedings commenced pursuant to sections 82 and 95 of the Act to be commenced within three years of the commission of the alleged offence.

Appendix One – Questions on notice

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION ICAC Annual Report 2006-2007 - Questions on notice

Assessing matters

1. **The Annual Report indicates that the Assessments section underwent structural changes during 2006-2007, partly to 'address concerns about responsiveness' (p14).**
 - a. **What concerns existed in relation to the section's responsiveness?**
 - b. **Has this aspect of the section's operation improved as a result of the structural changes?**
 - c. **Has the appointment of a Deputy Manager to the Assessments section to allow the Manager to focus on strategic direction (p14) proved effective?**

Answer

- a. The concerns that existed with respect to responsiveness related to the times being taken to:
 - present matters to the Assessment Panel in the first instance;
 - make any follow up assessment enquiries before representing the matter to the Assessment Panel; and
 - send final letters to complainants or agencies and finalise matters generally.
 - b. Yes. For example in the Jan-March 2007 quarter, of 501 matters reported to the Assessment Panel, the average time taken to report matters to the Panel was 85.03 days.

In contrast, in the Jan-March 2008 quarter, of 740 matters reported to the Assessment Panel, the average time taken to do so had dropped in the region of 16% to 71.70 days.

In relation to finalising matters, in the Jan-March 2007 quarter, Assessments finalised 389 matters, at an average of 110.22 days.

In the Jan-March 2008 quarter, Assessments finalised 603 matters, at an average of 78.56 days.
 - c. Yes. The appointment of a Deputy Manager has enabled day-to-day management of the Section to be devolved to that officer. Whilst the Manager still peruses and provides preliminary commentary in relation to all new written complaints and reports, the Manager has more time in which to build up liaison relationships with agencies and to participate in presentations and training, often in conjunction with members of the CPER Division. Moreover, the Manager has been able to devote more time to focusing on identifying what value is or should be provided by the Section and strategies for how to enhance value delivery, including addressing issues of staffing levels, training needs and improving productivity.
-
2. **The Annual Report also indicates that procedural improvements were introduced during 2006-2007 to enhance the Assessments section's complaint handling capacity (p14).**
 - a. **What specific procedural changes were made to aid complaint handling and were there any policy changes also involved?**
 - b. **What staff training needs were identified as part of the improvements?**

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Answer

- a. The specific procedural changes introduced in the 06/07 year were:
- Introduction of complaint assessment checklist
This document was created to assist assessment officers to focus on relevant issues and to ensure a systematic, consistent approach when assessing complaints. A checklist is completed on each new complaint and kept on file.
 - Revision of assessment panel report template
The purpose of refining the previous template was to ensure assessment officers were required to provide reasons for their recommended course of action, as well as an analysis of whether a matter was potentially serious or systemic.
 - Assessment panel charter
The charter sets out the panel's objectives and functions in order to clarify for Assessments staff and for Panel members what their respective roles and responsibilities are.
 - Assessment panel codes
These codes were introduced in September 2006. Use of the codes ensures that the ICAC's database contains a decision and reason code for each complaint, once it has been dealt with by the assessment panel.
- b. The staff training needs identified were:
- Skills in dealing with unreasonable complainant behaviour, particularly during telephone calls
 - Enhancing analytical and writing skills
 - Time management skills
 - Comprehension/retention skills, particularly when needing to digest voluminous material
 - Technical skills in certain areas, eg local government,
 - Improved understanding of the roles played by other Divisions, particularly CPER and Investigation Divisions
3. **Table 32 in the 2006-2007 Annual Report (p108) indicates that the average time taken to deal with complaints was 109 days, up from 45 days the previous financial year.**
- a. **Have the Assessments section's staff vacancies, which are identified as having partly resulted in the longer time taken to resolve matters, been filled (p9)?**
 - b. **Which agencies took a considerable amount of time to respond to ICAC's requests for information?**

Answer

- a. During the 2006/07 year 4 Assessments staff members resigned. The time lag between their departure and hiring their replacements contributed to the build up of a backlog in matters. Three temporary Assessment Officers were recruited on a 12

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month basis to assist in addressing the backlog problem. The other vacancies have all been filled.

- b. There were a number of agencies that took a considerable time to respond to the ICAC's information requests, but most of these involved only one matter per agency. For some agencies, such as Department of Education (DET) and the Department of Corrective Services (DCS), there were several matters involving delay. In one instance, DET took 9 months to provide a copy of a report it had commissioned and a copy of which the ICAC requested¹ and 8 months in another². In one matter involving DCS despite several requests, it took 25 months to obtain requested information³. In one matter involving DET in which the Department undertook several related investigations, delays in responding to information requests from the Commission resulted in the file remaining open for over 1000 days⁴.
4. **“Table 1: Key quantitative results for corruption exposure activities” on page 9 of the Annual Report indicates that the average time taken to deal with matters more than doubled from 45 days in 2005-06 to 97 days in 2006-2007. The two main factors for the increase are noted as the considerable time taken by agencies to respond in some cases and the staff vacancies in the Assessments Section. A new target for 2007-2008 was to be determined following an examination of workflows and activities.**
- a. **Has the review been conducted and a new target been set?**
- b. **Which agencies were involved in the cases mentioned and was the time taken to provide a response in each case reasonable?**

Answer

- a. Yes. A review resulted in the conclusion that responsiveness times were best measured in discrete areas, rather than simply averaging the time taken to finalise a matter. The primary reason for this was that there were times in the life of a complaint which were out of the control of Assessments, eg when waiting for a response from an agency, but against which Assessments was measured. A new overall target has been set at 60 days. However, this excludes times when Assessments is waiting for a report back from an agency (requisitioned under s. 53 of the ICAC Act, or where the agency has set in train an investigation, not at the ICAC's direction, and the ICAC had requested a copy of that agency's final report).

In addition, the following internal targets have been set for the Assessments Section:

Average number of days taken to register complaint on receipt by Commission	target = 10 business days
Average number of days taken to respond to simple inquiries not requiring reporting to Assessment Panel	target = 5 days following receipt by Assessment Officer
Average number of days taken to report urgent matters to Assessment Panel	target = 5 business days following registration

¹ E06/0632

² E05/1464

³ E05/2077

⁴ E04/1455

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Average number of days taken to report straightforward matters (eg Outside Jurisdiction, information) to Assessment Panel

target = 10 business days following registration

Average number of days taken to report to Assessment Panel either complex matters or those requiring some initial action

target = 25 business days following registration

Average number of days taken to close file

target = 10 business days following entry of Panel decision

Average number of days taken to review a report received from an agency incl s. 54 report, and report back to Panel

target = 20 business days following report's receipt

- b. Please see the answer to 3b. In addition, in one matter involving the University of Western Sydney⁵ it took 5.5 months to obtain requested information. However, due to understaffing at the time (mid-late 2006) it took 5 months for that information to be assessed and the matter to be re-reported to the Assessment Panel, with a further delay of 2 months in closing the file. This is indicative of multiple factors contributing to the file remaining open for 14 months.

In one matter involving the Department of Juvenile Justice (DJJ), the file remained open for 24 months⁶. DJJ was requested to conduct an investigation and report back under ss. 53, 54. It took DJJ 7 months to complete that report, following which the ICAC requested further clarifying information, which took DJJ 5 months to provide. The matter was re-reported to the Assessment Panel, which resolved that the information provided by DJJ to date was insufficient. Follow-up inquiries were made with DJJ, which resulted in the file remaining open for a further 6 months to enable it to be re-reported to the Assessment Panel.

Investigating corruption

- 5. During 2006-2007 the Commission revised the categories used to classify investigations down from two to three with the aim of streamlining supervision and improving efficiency in the allocation of resources. How has the reduction in the number of investigation categories altered the supervision of matters and the allocation of resources (p33)?**

Answer

The reduction in the number of investigation categories from three to two has resulted in the following improvements in the supervision of matters and the allocation of resources:

- The allocation of the most serious investigations to appropriately experienced personnel;
- Increased efficiency in investigation planning and tasking;

⁵ E05/2311

⁶ E05/0052

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- More efficient direction and management of the most serious investigations by Senior Management;
- Stream-lined and reduced reporting and a decrease in the number of meetings;
- Prioritisation of limited specialist resources to investigations, including Financial Investigators, Analysts and the Senior Forensic Investigator.
- Two target timeframes for the completion of preliminary investigations and investigations allowing efficient allocation of resources and reducing the time lag in investigations and preliminary investigations.
- Senior Investigators while carrying the same work allocation can prioritise between two areas of reporting and responsibility concentrating on and managing more serious/complex Investigations.

The investigation reclassification in conjunction with the replacement of a two-team investigation model to a single Investigation Division group has allowed greater flexibility in the allocation of resources across Investigations.

- 6. Table 1 of the 2006-2007 Annual Report (p9) includes a target of 80% for the number of investigation reports to be completed within 3 months after the completion of a public inquiry in 2007-2008. 25% of investigation reports were completed in the same timeframe in 2006-2007. What strategies has the Commission adopted to help achieve this target?**

Answer

The Commission attempts to complete reports on its investigations as soon as possible after the completion of the public inquiry.

Report preparation involves reviewing and analysing the available evidence and submissions made on behalf of affected persons to ensure the report is factually correct, findings and recommendations are soundly based and all relevant legal requirements have been addressed. Where corruption prevention recommendations are to be made it is necessary to ensure the Commission has an understanding of the relevant systems examined and the recommendations are appropriate. Once drafted, reports are reviewed within the Commission by a review panel consisting of the Commissioner, Deputy Commissioner and Executive Directors of Legal, Investigations and CPE&R to ensure accuracy and appropriateness of findings and recommendations. The report then goes through an editing and production stage which usually takes 4 weeks.

The ability to meet the 80% target depends on the length and complexity of the matter being reported. It generally takes longer to complete reports on more complex investigations as they require more time spent on analysis of the evidence and writing of the report. Competing work priorities of those preparing, reviewing and editing the draft report may also impact on the time taken to complete the report.

In order to meet the 80% target, report preparation, review and editing is, as far as possible, given priority over other work.

Table 1 below shows the time taken between completion of the public inquiry and tabling of the report for matters reported on since 1 July 2007. To date 60% of reports have been tabled within the 3 month period. The Greenway report took longer due to the Christmas/New Year holiday period but would otherwise have been completed within the 3 month period.

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TABLE 1: Time interval between completion of public inquiry and issuing of public report – 2007/08

Public inquiry	Date public inquiry complete	Date investigation report tabled	Days from end of PI to tabling
Investigation into corrupt conduct associated with the regulation of brothels in Parramatta (Operation Pelion)	28/05/07	22/08/07	86
Investigation into corrupt issuing of driver licences (Operation Sirona)	15/06/07	20/09/07	97
Investigation into manipulation of contract procurement procedures at Bankstown & Strathfield councils (Operation Torrens)	31/08/07 [^]	15/11/07	76
Investigation into allegations that Douglas Norris received payments to expedite applications for public housing (Operation Greenway)	5/10/07	31/01/08	118
Investigation into allegations of bribery affecting Wollongong City Council (Operation Berna)	12/11/07	20/12/07	38

[^] No public inquiry held in this matter. Date is that for receipt of final submissions.

7. During 2006-2007 the Commission developed a risk assessment program for search warrants, controlled operations and surveillance activities (p33). What sort of mitigation strategies are used by the Commission to target high risk areas identified through the program?

Answer

The Risk Assessment Program was designed to provide the Investigation Division (ID) with a formal and uniform process for each investigation undertaken. Risk mitigation allows the ID to take measures in advance of, or after, an operation aimed at decreasing or eliminating the likelihood, consequence and impact of risks.

Recurrent high risks are mitigated with standard treatment strategies to reduce the likelihood of harm. Additionally each recurrent and newly identified high risk is assessed individually and mitigated on the changing circumstances of each operation.

Operational risk mitigation strategies include:-

- Risk avoidance – treatments that limits the likelihood of an event happening;
- Likelihood reduction – treatments that reduce the likelihood of an event happening;
- Consequence reduction – treatments that reduce impact of an event occurring;
- Risk transference – treatments that share the responsibility for reducing the likelihood and consequences of an event happening currently or in the future.

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High Risk Area	- Personnel safety - Possession of Firearms
Mitigation Strategy	Treatment
Risk Avoidance	<ul style="list-style-type: none"> • Background checks and detailed profiles of subjects and associates as to firearm possession/violence.
Likelihood Reduction	<ul style="list-style-type: none"> • Operation briefings where firearms are stored. • ICAC personnel trained in conflict de-escalation. • Occupant asked whether and where firearms are held on the premises. • Premises and firearms secured on entry. • Access to firearms controlled by ICAC.
Consequence Reduction	<ul style="list-style-type: none"> • Personnel trained in First Aid. • Identification of nearest hospitals.
Risk transference	<ul style="list-style-type: none"> • Use of the NSW Police to enter premises.

Strategic risk mitigation strategies include:-

- Capturing lessons learnt to develop policy, procedures, and training;
- Implementation of effective operational procedures through continuous improvement;
- Establishment of a knowledge management framework through the review of operational plans and procedural systems and processes relating to high risk;
- Ensuring clear and transparent decision-making on high risk areas;
- Consistency in the treatment of high risk areas.
- Improvement of operational planning and resource allocation though informed risk management.

8. **During the 2006-2007 reporting period the ICAC commenced two investigations on its own initiative under s.20 of the ICAC Act (p.35).**

a. **What conduct was investigated by the ICAC in these two investigations?**

b. **What led the ICAC to decide to conduct own motion investigations in these instances?**

Answer

a. The conduct investigated under s.20 of the ICAC Act related to:

1. An article in the Sydney Morning Herald said that a University of Wollongong student had been offered a position with a British company as a researcher, but that the position actually involved writing essays for university students at Australian universities. The article noted that several other companies were aiming to recruit Australian students to “cater to the plagiarism market here”.

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2. An article appeared in the Sydney Morning Herald alleging that an MP had profited from private companies that bought and sold millions of dollars' worth of government land.

- b. The question about what specifically led the ICAC to decide to conduct own motion investigations in these instances may come within the terms of section 64(2) of the Act which provides:

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.

In general terms, section 20 of the Act requires the Commission to act on information from any source, including acting on its own initiative. In these circumstances, if the Commission becomes aware of information from any source that may raise a suspicion of corrupt conduct within its investigative jurisdiction, it will assess that information to determine if it should be investigated.

9. **What is the reason for the fall since 2004-2005 in the number of summonses issued to give evidence or produce documents or both at a compulsory examination or public inquiry (Table 9)?**

See answer to Question 10 below.

10. **What are the reasons for the fluctuations in the number of listening device and telecommunications interception warrants issued over the last three years?**

Answer

The exercise of the Commission's statutory powers, including the number of summonses issued and the number of listening device warrants and telecommunications warrants sought, depends on operational requirements and the nature of investigations being conducted.

The fluctuations do not represent any reduction in investigation work or emphasis but rather reflect the fact that particular investigations conducted in the reporting period required less use of these powers.

Corruption Prevention

11. **In 2006-2007 the ICAC made a total of 47 corruption prevention recommendations directed towards Railcorp, 27 of which related to Operation**

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Persis concerning the conduct of Railcorp contractors. Have these recommendations been implemented?

The process for implementation of Commission recommendations is that agencies are requested to provide an implementation plan within three months of the publication of the investigation report. The Commission then requests progress reports regarding the implementation of this plan at approximately 12 and 24 months after the publication of the investigation report. The 24-month progress report is the final report to the Commission.

The 12 month progress report on Operation Persis would normally have been expected in June 2008, and this would have given the Commission information about the progress of implementation of recommendations. However, at this stage the finalised implementation plan which is meant to precede the 12 month progress report has not yet been received. The Commission is therefore unable at this stage to identify which, if any, of its recommendations have been implemented.

In relation to Operation Quilla, which was also reported in 2006-2007, RailCorp advised in May 2008 in its 12 month progress report that 6 of the 14 recommendations have been implemented.

12. The Annual Report indicates the ICAC has been working closely with the health department and area health services since 2003 on a corruption resistance project in the NSW public health sector, focussing on four main corruption risks (p.51).

- a. **What particular risks and issues were used as the basis for the program being implemented in the health area?**
 - b. **How does the ICAC intend to monitor the effectiveness of this project and the associated training program to combat corruption in this sector?**
- a. In 2001 the ICAC conducted research about corruption risks in the NSW public sector. This research identified that health services conduct a large number of functions that are associated with higher corruption risks.⁷

In 2003, based on this information and because of the size of the health sector and its importance to the NSW community, the ICAC initiated a corruption prevention project: Strengthening the Corruption Resistance of the NSW Public Health Sector. The project was undertaken in close collaboration with the Department of Health. In the initial phase of the project the ICAC analysed information from:

- the literature
 - the ICAC's complaints data base
 - interviews with senior health administrators, and
 - the ICAC's 2001 public sector research project
- to identify four main corruption risk areas for the health sector.

These were:

- misuse of resources

⁷ *Profiling the NSW public sector: Functions, risks and corruption resistance strategies*, Independent Commission Against Corruption, 2003.

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- conflict between public duty and private activities and interests
 - inappropriate relationships between clinicians and suppliers, particularly pharmaceutical companies
 - corruption in responding to errors or problems in the delivery of health services.
- b. The output of the project was a train-the-trainer resource for use by in-house trainers. As such, the effectiveness of the training package will be the measure to assess the effectiveness of the project. Senior managers (clinical and non-clinical) are the focus of the training resource.
- The training resource was delivered to the health sector initially through a train-the-trainer session given by ICAC staff to in-house trainers from the public health sector. The evaluation forms completed by the attendees were very positive, both about the delivery of the session and the purpose and content of the toolkit.
- The extensive consultation that was done with the Department of Health at the start and throughout the project established a very successful partnership that ensured there was executive support for the project throughout the health sector.
- The Commission will continue to monitor the take-up and effectiveness of the training kit within the public health sector. After allowing sufficient time for implementation of the kit, the Commission will follow its standard review processes for evaluation. This may include a survey of users to determine use, practicality and effectiveness of the kit. Discussion will also be held with senior health sector executives to determine the need for any review or change to the kit or further corruption prevention initiatives.

Accountability

13. **The 2006-2007 Annual Report refers to a review and enhancement of liaison and reporting procedures with the Inspector of the ICAC (p11). Please provide further details on how liaison with, and reporting to, the Inspector was improved during 2006-2007.**

Answer

During this period, the Deputy Commissioner and the Inspector's executive officer have had regular telephone contact and face-to-face meetings to discuss liaison issues. All requests for information or interviews with ICAC officers are initially directed to the Deputy Commissioner, who ensures that full cooperation with the Inspector's inquiries is provided by the Commission. The Deputy Commissioner also facilitates access by the Inspector's executive officer and other staff for the purpose of audits that they conduct of the ICAC's operations. All requests by the Inspector for reports from the ICAC on specific matters are dealt with by the Deputy Commissioner, to ensure timely, consistent and appropriate responses.

The Commissioner also continues to have regular personal meetings with the Inspector to discuss policy issues of mutual interest and to make sure that all requests for information and access by the Inspector's office have been dealt with appropriately.

Our organisation

14. **Average staff numbers in the Assessments section have dropped in the 2006-2007 reporting period, whereas they seem to have increased in almost every**

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other ICAC division and the Commission reported an overall increase of 6.3 full-time equivalent staff over the period (p69).

- c. How many staff vacancies were there in the Assessments section during 2006-2007?**
- d. Does the Commission find it difficult to recruit staff for this particular section of the organisation? If so, what steps are being taken to address this?**

Answer

- a. While the average staff number in Assessments for 2006-07 was 11.4 full-time equivalent (FTE) staff, the actual staff number at the end of June 2007 was 12.9 (FTE). During 2006-07 there were 4 resignations from the Assessment section and 7 appointments and due to the time taken to recruit staff there were approximately two vacancies for most of the year. There was one position that the Commission was unable to fill in 2006-07. This was the newly created position of Indigenous Liaison and Assessment Officer that received funding support from a grant from the Elisa Dixon Foundation. The Commission was unsuccessful in its recruitment action in 2006-07 and the funding lapsed. However, the Commission applied to the Foundation in 2007-08 for further funding for the position which was approved. The Commission has been successful in its recruitment action on this occasion.
- b. Generally it has not been difficult recruiting staff for the Assessment Section except in relation to the specialist position of Indigenous Liaison and Assessment Officer, where it took two attempts to make an appointment to that position. However, due to the time taken to undertake a full probity assessment for new employees there is a longer lead time for replacement of staff at the Commission compared to other organisations which can impact on average staff numbers for the year.

15. The Commission's Audit Committee reviews of audit projects resulted in improvements to review and sign-off procedures in relation to complaint assessment (p72). Please provide further detail of the improvements.

Answers

In their review of Assessments Section, the Commission's internal auditors noted that for complaints received by telephone which are classified as either information only or outside the jurisdiction of the Commission, there was no physical file created. While these matters are registered in the complaint handling and case management system (ICS), the auditors were concerned that there was no physical evidence of the review and assessment process for these matters.

It was decided that all signed-off case notes/inquiry reports and any signed external correspondence will be scanned and linked to the electronic file in ICS. This will provide an audit trail of signed documentation. Also the "Preliminary Instruction Sheet: Assessments - Incoming Correspondence" was amended to include "Physical file required – Yes/No" for completion by the Manager, Assessments, as part of Assessments' quality assurance review process.

16. The Commission indicates that it will select and implement a new complaint handling and case management system in 2007-2008 (pp9 & 74).

- e. Has the new system been implemented?**

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f. If so, has the Inspector been briefed on the new system's features and requirements?

Answer

- a. The replacement of the Commission's complaint handling and case management is a major system development project for the Commission involving a number of development stages. In the first half of 2007-08 the Commission undertook a detailed review and re-engineering of business processes and prepared comprehensive user requirements and tender specifications based on this review. The evaluation of tenders for a new system has been completed and the Commission is working with the selected contractor on the detailed design of the new system. The next stage will involve configuring the new system to the Commission's requirements and developing system interfaces with the Commission's electronic records management system. This will be followed by system and user acceptance testing, development of system and user documentation and sign-off and training of all staff prior to the system launch.
- b. During the design and system configuration stage it is proposed to brief the Inspector on the new system features. Also training on the new system for the staff of the Inspector will occur at the same time as training is organised for Commission staff.

17. The 2006-2007 Annual Report discusses the Commission's provisions of fee for service shared corporate services support to the Health Care Complaints Commission (p75).

- a. **What is the extent of the corporate services shared by the ICAC and HCCC and how does this arrangement work?**
- b. **How much does the Commission receive in fees from the HCCC for these services?**

Answer

- a. Under the shared corporate services arrangement with the Health Care Complaints Commission (HCCC) for 2006-07, the ICAC provided a range of corporate services functions for the HCCC that included:
 - Overseeing the management and operation of its corporate services unit;
 - Assisting the organisation in corporate planning and risk management;
 - financial planning advice, financial management services and policy development;
 - human resources advice, planning and policy development; and
 - information management, planning and policy development, technology planning and advice.

The arrangement operates under a Memorandum of Understanding between the HCCC and ICAC which specifies the services provided by the ICAC and the input necessary from HCCC staff. The ICAC staff primarily engaged in providing corporate services to the HCCC were the Executive Director, Corporate Services, Manager, Human Resources and Administration and the Manager, Information Management and Technology. Fees are charged by the ICAC for the level of services provided.

From December 2007 the arrangement has been expanded to include accounts payable, accounts receivable and full accounting services and payroll processing and

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personnel services and involves a number of ICAC staff from the Finance and Human Resources areas.

- b. Income received from the HCCC for 2006-07 was \$192,000. It is estimated that service fees income for 2007-08 will be \$385,000 which includes the cost of the additional services commenced from December 2007.

Financial statements

- 18. In the 2006-2007 Annual Report's financial statements an amount of \$289,000 is listed as an operating expense for 'fees for services'. This amount increased from \$140,000 spent on the same category the previous financial year. What does this item cover?**

Answer

This item of expenditure relates to professional services received by the Commission and covers activities such as proof reading of reports and publications, development of corruption prevention materials and promotions, computer forensic services, fees for surveillance operations, market rent review negotiations and system development work. Also 2006-07 included the following initiatives:

- development and production of 10 corruption prevention training scenarios on DVD (\$92,000),
- review and preparation of design specifications for the redevelopment of ICAC's website (\$79,000); and
- assistance with the preparation of the business case proposal for the replacement of the Commission's complaint handling and case management system (\$25,000).

- 19. There was an increase of \$43,000 in the cost of contract security services for the same period. What factors led to the increased expenditure by the ICAC on security services?**

Answer

Security services at the Commission are provided under contract by the Security Management Branch, NSW Police, with the charges based on agreed hourly rates.

During 2006-07 the building owners, Stockland, undertook major renovation works that required access to the Commission's secure leased areas after normal business hours. The Commission required that these works be carried out under security supervision and Stockland agreed to the reimbursement of the Commission for the cost of additional security staff involved amounting to \$34,000. Costs for 2006-07 also included a 4% increase in the chargeable rate for security services.

Prosecutions and disciplinary action arising from ICAC investigations

Operation Agnelli – August 2003 (p110)

- 20. The 2006-2007 Annual Report indicates that the Commission is obtaining additional material in response to the DPP's requisitions, which were received**

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in February 2007 (p110), in relation to the prosecution of Graham Lawrence and John Fitzgerald. Please provide an update in relation to these briefs.

Answer

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.

Operation Unicorn – April 2005 (p113)

- 21. The 2005-2006 Annual Report indicates that the Commission is awaiting the DPP's advice in relation to the prosecution of 6 people (p101). The 2006-2007 Annual Report indicates that the Commission is awaiting DPP advice in relation to Adam Perkins, Bob Scott, Kim Wilson and Dale Holt (p113).**
- a. Has the DPP provided advice on the briefs of evidence in relation to these individuals?**
 - b. How many days passed between the date of the briefs being submitted to the DPP and the response from the DPP?**

Answer

The DPP has provided advice in respect of Mr Bill Smith and Mr Stephen Griffen (as detailed in response to question 22 below), but has not provided advice in relation to Perkins, Scott, Wilson and Holt.

Briefs of evidence were sent to the DPP on 3/11/05. On 29/8/06 the DPP asked the Commission to obtain 15 additional statements. On 3/11/06 the DPP asked the Commission to obtain a further 19 statements. The Commission has obtained and provided 33 of the 34 statements requested by the DPP. One statement remains outstanding.

- 22. Have the requisitions by the Office of the Director of Public Prosecutions (DPP) on the briefs of evidence in relation to Bill Smith and Stephen Griffen been responded to by the Commission? If so, when did the Commission respond to the requisitions?**

Answer

The Commission provided statements in response to the DPP's requisitions on 11/7/07, 7/11/07 and 13/3/08. One statement remains outstanding.

On 13 June 2008 the DPP advised the Commission that there is sufficient evidence to charge Mr Bill Smith, Mr Stephen Griffen and Ms Veronica Bailey with offences in contravention of s. 178BB Crimes Act 1900 of making a false statement with intent to obtain a valuable thing, and also to charge Mr Malcolm Smith and Ms Debbie Barwick with offences in contravention of s. 178BB of concurring in the making of the said false statements. Attached to the advice was a document specifying further requisitions which the Commission is currently attending to.

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Operation Cordoba – June 2005 (pp113-14)

- 23. In relation to the prosecution of Anne Bechara, the DPP did not proceed with the offence of procuring false testimony, under section 89 of the ICAC Act.**
- a. How many requisitions were made by the DPP in relation to the prosecution of Ms Bechara?**
 - b. Is the ICAC able to provide the reasons given by the DPP for the decision not to proceed with the prosecution?**

Answer

- a. No requisitions were made by the DPP concerning Anne Bechara.
- b. Ms Bechara pleaded guilty to 11 offences under s.87 of the *ICAC Act* of giving false or misleading evidence to the Commission. She was sentenced on 19/12/06 to 4 months imprisonment to be served as home detention. The factual basis of the s.87 charges overlapped that of the offence of conspiracy to cause false testimony under s.89 of the *ICAC Act*. The DPP therefore decided not to proceed with the s.89 prosecution.

- 24. In relation to the prosecution of Scott Allman, in July 2006 the DPP advised that there was sufficient evidence to proceed with the prosecution of the offence of use of a listening device under section 5 of the Listening Devices Act. The DPP then withdrew prosecution in November 2006. Is the Commission aware of the DPP's reasons for the withdrawal?**

Answer

The DPP advised the Commission that his decision to withdraw the charges under the *Listening Devices Act* was based on "an assessment of the strength of the Crown case, the available admissible evidence to prove the offences, as well as the likelihood of the accused successfully making out the defence provided under the Act on the balance of probabilities." Section 5(3)(b) of the *Listening Devices Act* permits the recording of conversations if a principal party consents to that use of the device and the recording of the conversation is reasonably necessary to protect the lawful interests of that party. The Commission did not agree with this assessment, and provided further information to the DPP, including a judicial decision which seemed to support a contrary view in respect of the availability of the suggested defence, but the DPP's view remained unchanged.

- 25. In relation to the prosecution of Michael Saklaoui, in July 2006 the DPP advised that there was sufficient evidence to proceed with the prosecution of the offence of use of a listening device under section 5 of the Listening Devices Act, and insufficient evidence to proceed with prosecution for offences of blackmail and corrupt rewards under the Crimes Act. In November 2006, the DPP withdrew prosecution for the offence under the Listening Devices Act.**
- a. How many requisitions were made in relation to the prosecution of Mr Saklaoui?**
 - b. Is the Commission satisfied with this outcome?**

Answer

- a. Four (also relevant to Alfred Tsang).
- b. The prosecution under the *Listening Devices Act* was withdrawn for the reasons stated in the preceding answer concerning Mr Allman, and the Commission was not satisfied with this outcome for the reasons set out in that response.

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The DPP also advised that the admissible evidence against Michael Saklaoui to support a charge of blackmail was insufficient to warrant proceeding against him. It was his view that the most probative piece of evidence had been produced by Mr Saklaoui under objection and could not be used against him.

At the request of the Commission, the DPP reconsidered his decision in relation to the prosecution of Mr Saklaoui for an offence under s249B of the *Crimes Act 1900*. His original decision that no prosecution should be commenced was not changed.

26. Are there any other prosecutions resulting from Operation Cordoba?

Answer

Three other persons have been prosecuted. Table 2 below sets out these matters. The prosecution of John Abi-Saab is yet to be finalised.

TABLE 2 – Cordoba Prosecutions

Name	Offences Charged	Date Of Result	Result
Geoffrey Howe	2 x s.80(c) ICAC Act 2 x s.87 ICAC Act	24 Oct 2005	Good behaviour bond – 2 years S80(c) – On each count – Good behaviour bond – 2 yr S87 – 1st count – 3 months – suspended S87 - 2nd count – 6 months - suspended
Alfred Tsang	2 x s.249B(1) Crimes Act	2 Nov 2007	Four months periodic detention
John Abi-Saab	2 x s.112 ICAC Act 1 x s.100A Crimes Act (blackmail) 5 x s.80(c) ICAC Act 6 x s.87 ICAC Act 1 x s.89 ICAC Act	19 Jan 2006 14 Mar 2008	Fined \$2000 on each s.112 count. Committed for trial; has pleaded guilty to the counts under s80(c) and s87 of the ICAC Act and these will be finalised after trial.

Other Operations (pp114-15)

27. The 2006-2007 Annual Report indicates that the Commission is preparing briefs of evidence in relation to the prosecution of individuals for various criminal offences as a result of the following investigations. Please provide an update on the status of briefs of evidence relating to these investigations:

- Operation Cassowary (December 2005)
- Operation Cadmus (September 2006)
- Operation Aztec (October 2006)
- Operation Quilla (December 2006)
- Operation Persis (June 2007)

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AnswerCassowary

All briefs in Operation Cassowary (involving 19 individuals) were delivered to the DPP on 14 December 2007. The Commission is currently awaiting advice from the DPP on these matters.

Cadmus

Mr Michael Ishac was convicted of 6 offences under s.308H(1) of the *Crimes Act 1900* (unauthorised access to computer data) on 15 January 2007 and placed on a one year good behaviour bond.

On 2 June 2008 the DPP advised that there is sufficient evidence in relation to Mr Michael Ishac, Mr John Tourni, Mr Brian Khouzame, Ms Mariam Tourni and Father Elias Khoury with respect to all the offences identified in the Commission report. Criminal proceedings will be commenced against each of these shortly. The Commission is yet to receive advice in relation to Mr Albert Bullen and Mr Hammurabi Barhy.

Aztec

The Commission is awaiting advice from the DPP.

Quilla

All briefs of evidence were sent to the DPP on 21 April 2008. The DPP has allocated a lawyer to the matter. It is anticipated that, in accordance with the current MOU with the DPP, a conference will be arranged shortly between the Commission and DPP lawyers with responsibility for the matter.

Persis

All briefs of evidence were sent to the DPP on 3 April 2008. DPP officers and Commission lawyers were to meet on this matter in May, but court commitments intervened. A meeting will take place on 20 or 21 July 2008.

- 28. Please provide a table, similar to that provided to the Committee during its previous review⁸, detailing the period of time between ICAC's provision of briefs of evidence to the DPP and the DPP's decision on each matter, for matters current during the 2007-2008 reporting period (to date). Please include the date of all requisitions received from the DPP with respect to each matter.**

Answer

**PROSECUTION TIMESCALES FOR MATTERS CURRENT
FROM 1 JULY 2007 TO 30 APRIL 2008**

REPORT	DATE OF REPORT	DATE BRIEF TO DPP	DAYS FROM REPORT TO BRIEF TO DPP	DATE OF DPP REQUISITIONS	DATE OF ICAC FINAL RESPONSE TO DPP REQUISITIONS	DATE OF FINAL DPP ADVICE	DAYS BETWEEN SUBMISSION OF BRIEF AND FINAL DPP ADVICE
AGNELLI Lawrence Fitzgerald	28/8/03 28/8/03	1/3/04 1/3/04	186 186	25/10/04, 25/8/06 & 27/2/07	Various. One statement to come.	11/2/08	1442

⁸ See ICAC, Answers to questions on notice, 3 September 2007, Attachment C.

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HUNTER Harb	29/7/04	11/4/06	621	12/12/06	N/A	11/12/06	243
UNICORN Smith Perkins Scott Wilson Holt Griffen	1/4/05 1/4/05 1/4/05 1/4/05 1/4/05 1/4/05	3/11/05 3/11/05 3/11/05 3/11/05 3/11/05 3/11/05	216 216 216 216 216 216	29/8/06 & 3/11/06	10/7/07, 7/11/07 & 13/3/08. One statement to come.	2/6/08 Smith & Griffen	942
CORDOBA Abi-Saab (2) Tsang	23/6/05 23/6/05	28/9/05 28/9/05	96 96	Nil 06/06	Nil 19/10/06	21/11/06 28/8/06	418 326
CASSOWARY Whitcher Whaanga Fraser Ratkovic Browning Gomez Mohammad Abboud Leon Noel Ritchie Kalland Burton Bacon Bishop McAndrew Atkins McMaster Moya Senior	14/12/05 14/12/05	14/12/07 14/12/07	730 730				
REPORT	DATE OF REPORT	DATE BRIEF TO DPP	DAYS FROM REPORT TO BRIEF TO DPP	DATE OF DPP REQUISITIONS	DATE OF ICAC FINAL RESPONSE TO DPP REQUISITIONS	DATE OF FINAL DPP ADVICE	DAYS BETWEEN SUBMISSION OF BRIEF AND FINAL DPP ADVICE
ARGUS * El Zahab, A El Zahab, J Daher	26/3/06 26/3/06 26/3/06	26/3/06 26/3/06 26/3/06	0 0 0	6/9/06 6/9/06 6/9/06	Various Various Various	6/9/06 6/9/06 6/9/06	163 163 163
INCA Strange Wade	8/6/06 8/6/06	3/11/06 3/11/06	150 150	Nil Nil	- -	26/4/07 26/4/07	174 174
AMBROSIA Williams More Younis Kayrouz Aboulhosn Sleiman Karam Bazouni Tannous Makdessi Nader	21/12/05 21/12/05 21/12/05 21/12/05 21/12/05 21/12/05 21/12/05 21/12/05 21/12/05 21/12/05 21/12/05 21/12/05	16/3/07 16/3/07 16/3/07 16/3/07 16/3/07 16/3/07 16/3/07 16/3/07 16/3/07 16/3/07 16/3/07 16/3/07	450 450 450 450 450 450 450 450 450 450 450 450				

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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	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				
Nehme, J	21/12/05	24/5/06	154	Nil	N/A	31/1/08	616
Massoud	21/12/05	-	-				
Zaiter	21/12/05	24/5/06	154				
Barrakat	21/12/05	17/3/08	817				
Sabra	21/12/05	-17/3/08	-				
Nguyen	21/12/05	-	817				
Boumelhem	21/12/05	28/4/08	-				
Nehme, N	21/12/05	22/4/08	859				
Nakhoul	21/12/05	22/4/08	853				
Daoud	21/12/05	-	853				
Haidar	21/12/05	17/3/08	-				
Mouwad	21/12/05		817				
CADMUS						2/6/08	320
Tourni	20/9/06	18/7/07	301				
Khoury	20/9/06	18/7/07	301				
Khouzame	20/9/06	18/7/07	301				
Hilal	20/9/06	18/7/07	301				
Bullen	20/9/06	18/7/07	301				
Barhy	20/9/06	18/7/07	301				
AZTEC							
Wade	26/10/06	10/8/07	288				
Williams	26/10/06	10/8/07	288				
Ashe	26/10/06	10/8/07	288				
REPORT	DATE OF REPORT	DATE BRIEF TO DPP	DAYS FROM REPORT TO BRIEF TO DPP	DATE OF DPP REQUISITIONS	DATE OF ICAC FINAL RESPONSE TO DPP REQUISITIONS	DATE OF FINAL DPP ADVICE	DAYS BETWEEN SUBMISSION OF BRIEF AND FINAL DPP ADVICE
QUILLA							
Stepito	21/12/06	21/4/08	487				
Job	21/12/06	21/4/08	487				
PERSIS							
Marcos, S	18/06/07	31/4/08	290				
Marcos, B	18/06/07	31/4/08	290				
Mourched	18/06/07	31/4/08	290				
Mikhail	18/06/07	31/4/08	290				
PELION							
Fryar	22/08/07	12/6/08	294				
Lu	22/08/07	12/6/08	294				
Srijan	22/08/07	12/6/08	294				
Innes	22/08/07	12/6/08	294				
Kuang	22/08/07	12/6/08	294				
Tina	22/08/07	12/6/08	294				
Song	22/08/07	12/6/08	294				
Shan	22/08/07	12/6/08	294				
Xu	22/08/07	12/6/08	294				

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Huang Carle	22/08/07 22/08/07	12/6/08 12/6/08	294 294				
SIRONA McPherson Phomsavanh Jaturawong	20/09/07 20/09/07 20/09/07	7/5/08 7/5/08 7/5/08	230 230 230				
BERNA Tasich	20/12/07						
GREENWAY Norris Hogan Murray Peters Nolan	31/1/08 31/1/08 31/1/08 31/1/08 31/1/08						

* No report. Date taken from date brief sent to DPP.

Memorandum of Understanding

29. During the Committee's review of ICAC's 05-06 Annual Report, certain issues were raised concerning the operation of the Memorandum of Understanding between the DPP and ICAC (MoU).⁹ In recent correspondence you have advised the Committee that the MoU has been reviewed, as a result of which a number of changes were made, and that a revised MoU was signed on 12 December 2007.

- a. Are you satisfied with the terms of the current MoU and its operation?
- b. Do you consider that the changes have led or will lead to improvements in the handling of prosecutions arising from ICAC investigations?

Answer

- a. The Commission had a lead role in drafting the current terms of the MoU, and made several changes that it considered would improve the timeliness and effectiveness of the liaison between the ICAC and the DPP's office. In particular, the MOU now specifies that the ODPP will assign a senior lawyer to a brief referred by the ICAC and advise the ICAC of the name of that lawyer within two weeks of the receipt of the brief. It also provides that:
 - the assigned lawyer will arrange a conference with relevant ICAC officers within four weeks of the receipt of the brief;
 - issues arising from the brief will be discussed at that conference, including whether any requisitions will be issued;
 - a timetable will be agreed for the issuing of and response to the requisitions and, if no requisitions are to be issued, a timetable will be agreed for the furnishing of advice by the ODPP.
- b. Some of the problems with delay in the provisions of advice in criminal matters and the pursuit of those matters through the court system have developed over many years, and improvements in the process will take some time to take effect.

⁹ Transcript of proceedings, 11 September 2007, pp 1-2

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However, the regular liaison meetings with the DPP's office have resulted in advice being provided on charges in several old matters recently, including Operation Cadmus, Operation Unicorn and Operation Agnelli.

Unlike past years, where many of the matters within the DPP's office had been there for many years, all matters on which the ICAC is now awaiting advice from the DPP's office (except for some parts of Unicorn and two matters in Ambrosia, as detailed above) were sent over in 2007 or later.

Implementation of ICAC recommendations

30. Table 38 records that the Department of Corrective Services, as at June 2007, had addressed only 6 of 16 recommendations (38%) made by the ICAC in its report on an investigation into the cover-up of an assault on an inmate at Parramatta Correctional Centre.

a. Has there been any further progress by the Department in implementing the remaining recommendations?

The practice of the Commission is to seek a report on progress in implementing corruption prevention recommendations 12 months after the report is published, and again 24 months after the report is published. In this case the 24 month progress report was due in June 2008. An interim report was received on 20 June 2008. The initiatives implemented by the Department of Corrective Services include new policies on "Using force on inmates" and "Managing Video Evidence". The Department advises that these policies will commence on 31 August 2008, and that a final 24 month progress report will then be provided to the Commission.

b. What were the reasons for the Department not implementing all of the recommendations in the Commission's report?

The Commission was advised that the reason a number of recommendations had not been implemented at the time of the 12 month report was that the Department had established a high level Steering Group to address the handling of use of force incidents and to revise policy in that area. One of the issues under consideration was the replacement of video cassette recordings with DVD-R cameras and direct download to a new TRIM records management system, an initiative which would make some of the original recommendations redundant.

The interim report of 20 June stated that there had been technical difficulties with this preferred solution. An alternative strategy has been devised and is in the process of implementation. Therefore, there are some recommendations that have not yet been adopted but which are intended to be adopted on 31 August 2008. These relate to revised policies, which the Department advises require incorporation into local operating procedures and delivery of training to staff before they take effect. One other recommendation will be delivered on during 2008.

There are three recommendations the DCS advises it does not propose to implement, or proposes to implement only in part, for reasons of practicality or because it believes the issue has been addressed in a different way.

c. What percentage of recommendations have been addressed by the Department to date?

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Forty four per cent of recommendations have now been implemented. From 31 August 2008, if the Department proceeds as it has advised, 75% of recommendations will have been implemented.

Section 14(2) Report

- 31. The Commission's 'Report to the Minister for Local Government under section 14(2) of the Independent Commission Against Corruption Act 1988 in relation to Burwood Local Council' appears to have been tabled by the Minister for Local Government in the Legislative Assembly on 7 May 2006¹⁰. However, the Commission did not release the report until August 2006. What was the reason for the delay in the release of the report by the ICAC?**

Investigation reports are generally furnished to Parliament under the provisions of section 74 of the ICAC Act. These reports generally contain a recommendation that the report be made public immediately. In such cases the report is prepared in advance for publication and so can be posted on the ICAC website as soon as the report is tabled in Parliament.

The Commission may, under section 14 of the ICAC Act, furnish a report on the exercise of the functions of a public authority to the authority or to the Minister for the authority. The decision on whether and when section 14 reports are made public is a matter for the authority and/or Minister to whom the report is addressed (and who must also comply with any directions in the report under section 111 of the ICAC Act in relation to confidential information).

Consequently the ICAC does not prepare section 14 reports for publication on its website until after receiving information that the report has been made public. The delay in this case occurred between the report being tabled and initiating the publication process. Once the report was approved on 27 July 2006 by the Deputy Commissioner for publication on the ICAC website it was prepared in standard investigation report format and posted on the ICAC website on 7 August 2006.

Inspector's Audit Reports

- 32. Do you have any comment to make on the recommendations contained in the Inspector's audit reports and has the ICAC implemented the Inspector's recommendations?**

Answer

There were two reports during the 2006/07 year as follows:

1. Report into compliance with sections 21, 22, 23, 35 and 54 of the *ICAC Act*
2. Report into compliance with section 12A of the *ICAC Act*

Report into compliance with sections 21, 22, 23, 35 and 54 of the *ICAC Act*

¹⁰ Legislative Assembly, *Votes and Proceedings*, 9 May 2006, item 6, p 2019

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The Inspector's report on the audit of the Commission's compliance with ss.21, 22, 23, 35 & 54 of the *ICAC Act* noted that the notices and summonses audited complied with the relevant provisions of the *ICAC Act*.

The audit revealed that in some cases records concerning service of some notices were missing from the relevant file and in some cases notices and summonses and minutes in support of the issuing of some notices and summonses could not be located on file.

All notices and summonses are required to be registered with the Commission's Property Section before being served. Details of service are also filed with the Property Section. New procedures introduced as a consequence of the audit require a copy of the supporting minute, setting out the reason for the exercise of the relevant power, also be filed with the notice or summons.

Report into compliance with section 12A of the *ICAC Act*

On page 10 of the report the Inspector noted that *"the Commission's practice of referring matters pursuant to s. 19 without providing any context or information to the authority or officer to whom the matter is being referred is problematic. It would be more consistent with the objectives of s. 12A if the Commission provided the context of a referral, for example, explaining why a matter itself and what, if any, inquiries it made regarding the veracity of the allegations. Such information would assist the authority or the official to whom a matter has been referred to make an informed decision on whether or not to investigate"*.

On page 15 the Inspector recommended that *"the ICAC develop a policy to ensure that information and context is provided to public agencies and officials where referrals are made under s. 19. For example such information could include*

- *Any inquiries made by the ICAC;*
- *The reasons why the ICAC did not investigate; and*
- *The likelihood of serious and or systemic conduct existing if the allegations were substantiated"*.

Comment: Referrals to public authorities under s. 19 are used where less serious corrupt conduct issues are raised or, alternatively, where a matter does not involve corrupt conduct but the ICAC considers it should be brought to the authority's attention. It is used in preference to ss. 53, 54 in cases where the matter is not serious and systemic in nature. It does not impose an obligation upon an authority to investigate, nor does it impose an obligation upon the ICAC to consult with that authority prior to referral. It does not abrogate authorities' responsibilities to report appropriate matters to the ICAC under section 11. If, in the course of making enquiries, further issues are identified that warrant reporting to the ICAC, a report under s. 11 is still expected.

In contrast there is an expectation within the public sector that the ICAC will refer only serious matters under ss. 53, 54, for example where, if resources allowed, the ICAC may have otherwise investigated the matter itself. Referrals under ss. 53, 54 are also utilised to build capacity within an authority for it to oversee the investigation of appropriate matters and make recommendations about remedial action.

During the 2006/2007 year, but prior to receipt of the Inspector's comments, the Assessments Section revised its template documents with respect to s. 19 referrals. All such matters are referred under a covering letter, which makes it clear that the ICAC does not propose to take any action. It is noted that the matter may be of interest to the authority to whom it is referred. It is noted that if, in the course of the authority conducting inquiries,

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further issues are raised which warrant reporting to the ICAC under s. 11, then these issues should be reported by the authority.

Accompanying the referral letter is a summary document, the contents of which may vary slightly depending upon whether the complainant is anonymous, the complainant's identity is disclosed, or the complainant's identity is not disclosed to the authority to whom the matter is referred. The referral document requires the author to set out the context to the complaint. The document reiterates that the referral is for the information of the authority only.

The Manager, Assessments regularly raises the issue of referrals under s. 19 with public sector authorities during liaison meetings and discussions, to gauge whether authorities have appropriate systems in place to manage such referrals, and to answer queries about the basis upon which such referrals have been or may be made.

Furthermore, in June 2007 the ICAC published its *Guidelines for Principal Officers*, which was distributed to all principal officers of state authorities. This document outlines, amongst other things, the points of difference between referrals under s. 19 as opposed to ss. 53, 54 and the expectations of the ICAC in relation to both.

A local government version of these Guidelines will be finalised once the Department of Local Government has issued its new Model Code of Conduct.

ICAC COMMITTEE PUBLIC HEARING – 28 MAY 2008

Additional Questions on Notice

s.31 of the ICAC Act – Public inquiries

33. What guidelines does the ICAC have in place with respect to the interpretation of those factors specified at s.31(2) of the ICAC Act as the type of matters to be considered when determining the public interest in conducting a public inquiry?

The Commission does not have any specific guidelines in place relating to the interpretation of the factors specified in s.31(2) of the *ICAC Act*. It is not considered necessary to establish such guidelines. Each matter is considered on its own merits with any decision on whether to proceed to a public inquiry made by the Commissioner after taking into account the specific statutory criteria listed in section 31 and the advice of the Commission's Strategic Investigations Group (SIG).

34. What considerations, in addition to those specified at s.31(2), does the ICAC take into account when making a determination that it is in the public interest to conduct a public inquiry?

Answer

Procedure 5 of the Commission's Operations Manual deals with the conduct of public inquiries. It provides that in addition to the matters set out in s.31(2) of the *ICAC Act* the criteria for determining to hold a public inquiry may include:

- the allegations involve serious or systemic corrupt conduct;
- it is desirable to widely expose any corrupt conduct or systems failures;
- the allegations are already in the public domain and a Public Inquiry would provide a transparent mechanism for public officials and others to be publicly accountable for their actions;

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- public exposure of issues are likely to provide those subject to false accusations or innuendo an opportunity to clear their names;
- public exposure will educate the public about serious corruption or systemic issues;
- public exposure will be an important deterrent to similar corrupt conduct by others. If people know their conduct may be subject to public exposure they may be less likely to engage in corrupt activity;
- public exposure is likely to encourage others to come forward with information relevant to the investigation;
- public exposure of failed or inadequate systems is necessary to encourage public agencies to actively engage in reform and/or to establish public understanding of why change is necessary; and
- the desirability of enhancing public confidence in the operations of the Commission by demonstrating openness and public accountability in the Commission's conduct of investigations.

RailCorp investigation – June 2007

35. The ICAC's report on its investigation into corrupt conduct associated with RailCorp air-conditioning contracts, explains that the evidence and other material obtained through compulsory examinations, search warrants, and s.22 notices "indicated a clear likelihood that Mr Marcos had misused his position as a RailCorp employee to obtain financial gain through dealings with Mr Mourched and Mr Mikhail". The report further notes that:

Given the serious nature of the allegations and the need to take further evidence from a number of witnesses, including Mr Marcos, Mr Mourched and Mr Mikhail, to establish the facts and evaluate conduct and to identify any systems weaknesses, the Commission determined it was in the public interest to conduct a public inquiry. (p.10).

- a. Was the evidence available to the ICAC, at the point when the decision was taken to conduct a public inquiry, sufficient to establish a *prima facie* case in respect of the corruption allegations under investigation?
- b. How did the ICAC assess the benefits of using a public inquiry to obtain further evidence at this point of the investigation, rather than further compulsory examinations or other investigative techniques?
- c. What was the advantage of the public inquiry process in identifying systems weaknesses within RailCorp?
- d. What is the current situation in respect of RailCorp's implementation of the recommendations made by the ICAC in this investigation report?

Answer

- a. As this question relates to a decision taken by the Commission in respect of a particular investigation, the Commission considers that it may come within the terms of section 64(2) of the Act which provides:

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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.

In general terms, the Commission does not consider that it is useful to introduce concepts such as the requirement for a “prima facie” case into its statutory functions. The Act sets out in some detail the circumstances in which the ICAC may conduct a public inquiry and the criteria which must be taken into account in deciding whether to hold a public inquiry. These are the matters the ICAC considers in such cases.

- b. As pointed out above, in response to a., this question relates to a specific decision taken by the ICAC in relation to an investigation, and therefore appears to come within the terms of s.64(2) of the Act. The Commission has outlined in its responses to questions 33 and 34 the statutory and other factors that it takes into account in deciding to hold a public hearing.
- c. In the course of an investigation, information about systems weaknesses are obtained through a variety of means including statements and interviews, informal requests for policies, formal powers such as s21 and s22 notices, compulsory examinations and public inquiries.

Public inquiries are particularly useful for clarifying any ambiguous and inadequate information about systems and system weaknesses that has been acquired during the investigation. Generally, clarification will be sought from senior managers and system administrators.
- d. The process for implementation of Commission recommendations is that agencies are requested to provide an implementation plan within three months of the publication of the investigation report. The Commission then requests progress reports regarding the implementation of this plan at approximately 12 and 24 months after the publication of the investigation report.

The Operation Persis implementation plan was due in September 2007. In February 2008 the ICAC wrote to Railcorp requesting clarifying and additional information, and a finalised response, in relation to an implementation plan received earlier from Railcorp. To date this information and the finalised implementation plan is outstanding.

SUBMISSION RE AMENDMENT OF S.116 OF THE *INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988*

The Commission would like to seek the Committee's support for an amendment to s.116 of the *Independent Commission Against Corruption Act 1988*.

Section 116 provides that offences against the ICAC Act are generally to be dealt with summarily in the Local Court, unless otherwise specified.

Prosecution action for such summary offences must be commenced within 6 months of the offence being committed.

This has caused problems for the Commission, most recently in the Operation Atlas investigation, in relation to offences under s.82(b) of the Act. Section 82(b) makes it an offence for a person to knowingly provide false or misleading information in response to a Notice issued by the Commission.

The requirement that a prosecution for such an offence must be commenced within 6 months causes a problem for the Commission on two bases:

1. The Commission often does not become aware of the falsity of information provided until further investigation has been undertaken. Notices requiring information are issued early in an investigation to obtain information, and the fact that the information is false may not come to light until further steps, including in some cases a public inquiry, have been taken.
2. Even if the Commission does become aware within 6 months that false information has been provided, it may prejudice the ongoing investigation to commence a prosecution at that time, as it would alert persons subject to investigation that the Commission was aware through other means of the falsity of the information supplied.

Section 116(4) of the Act presently specifies that prosecutions for offences under s.80(c) (willfully making a false statement to the Commission) and s.81 (making a false complaint to the Commission) may be commenced within 3 years, presumably recognizing that such offences may not come to light for some time after their commission.

In the Commission's view, section 82(b) of the Act should be included in section 116(4) as an offence in respect of which prosecution action may be commenced up to 3 years after the commission of the offence.

Appendix Two – Questions without notice

This chapter contains a transcript of evidence taken at a public hearing held by the Committee on Wednesday 9 July 2008. Page references cited in the commentary relate to the numbering of the original transcript, as found on the Committee's website.

CHAIR: I call the meeting to order. It is a function of the Committee on the Independent Commission Against Corruption to examine each annual and other report of the Commission, to report to both Houses of Parliament in accordance with section 64 (1)(c) of the Independent Commission Against Corruption Act. The ICAC Committee welcomes the Commissioner of the Independent Commission Against Corruption and other officers and executives of the Commission. I also welcome and thank Committee members for appearing. The Committee has received a submission from the Independent Commission Against Corruption in response to a number of questions on notice relating to the annual report for 2006-07. Commissioner, do you wish to make this submission part of your evidence today and to be made public?

Mr CRIPPS: Yes.

CHAIR: I will need the concurrence of members of the Committee to make that authorisation, perhaps by a show of hands. I authorise the submission to become part of the Commission's evidence and also to be made public. The Independent Commission Against Corruption has also supplied the Committee with a table detailing various investigations into State Rail and RailCorp. The table was produced in evidence by the Independent Commission Against Corruption during a public inquiry at which the former chief executive of RailCorp, Mr Vince Graham, gave evidence. Commissioner, do you have any objection to this document being made public?

Mr CRIPPS: No.

CHAIR: Thank you, Commissioner. I authorise that document to be made public. I ask witnesses to now take the oath or affirmation.

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,

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

ROY ALFRED WALDON, Executive Director, Legal Division, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, sworn and examined:

ROBERTA LYNN ATKINSON, Deputy Director, Corruption Prevention, Education and Research, 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

LANCE COREY FAVELLE, Executive Director, Corporate Services, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, affirmed and examined:

CHAIR: Commissioner, would you like to make an opening statement to the Committee?

Mr CRIPPS: Thank you very much. Members of the Committee, when I last spoke to this Committee I mentioned that the Commission was concerned with how it should discharge its secondary function referred to in section 14 (1) (a) of the legislation. That section, as I am sure most people here are aware, gives the Commission the function to assemble evidence that may be admissible in a prosecution of a person for a criminal offence against the law of the State in connection with corrupt conduct and to furnish that evidence to the Director of Public Prosecutions. Since then the ICAC has entered into a new memorandum of understanding, which in fact expired last May, which attempts to address a number of issues arising by reason of the fact that the two separate agencies are obliged to discharge law enforcement functions in circumstances where neither can be said to be responsible for the final outcome in any particular case.

The secondary obligation imposed by section 14(1) has been interpreted over the years as requiring the ICAC to act in the same way as the police act when matters are referred to the Office of the Director of Public Prosecutions [ODPP] by the police. For reasons which I have already outlined to this Committee, the legal justification for the ICAC undertaking this activity is, I think, questionable. The High Court has reminded us that the ICAC is not a law enforcement agency, therefore the question must be asked to what extent it is entitled or permitted to act as one. Nevertheless, as I have mentioned, a pragmatic view was taken by my predecessors that law enforcement should be carried out by the Commission because if it did not do so nobody would. Neither the police nor the ODPP is prohibited as a matter of law from undertaking these functions. Rather, as I understand it, the decision in each case is a policy decision. As I have said, the Commission seeks to cooperate with the ODPP and I accept the ODPP is anxious to cooperate with the Commission. Deputy Commissioner Hamilton can answer any questions relating to the cooperation of the organisation with this new MOU that is coming into existence. At the end of the day, neither agency is responsible for the outcome in any particular case and it would seem to me the time has come for Parliament to clearly outline how the Commission should function in the area of law enforcement, if that is a function it should have.

Earlier, when discussing this matter with the Committee, I have referred to the fact that in my opinion it is not open to the Commission to exercise coercive powers, post-investigation or pre-investigation, for the purpose only of obtaining evidence that may be admissible and/or of interest to the ODPP and any other person who claims to be interested. It is generally accepted, I think, that almost all ICAC's coercive powers are predicated on the proposition that the Independent Commission Against Corruption, as presently established, should not be concerned with criminal convictions as such. Nonetheless, many members of the public and indeed a significant number of parliamentarians seem to think that the Commission should be undertaking functions beyond those mandated by its charter, that of investigation and exposure on one hand and corruption prevention on the other. Hence its efficacy tends to be measured not only by the number of criminal convictions secured by the

ODPP but also by the length of sentences imposed by the judiciary on people found guilty of corrupt conduct.

As things presently stand, at the conclusion of investigation the Commission expresses an opinion, as it is obliged by law to do, as to whether consideration should be given to obtaining the advice of the ODPP with respect to the prosecution of a person for a specified criminal offence. If advised by the ODPP that the prosecution should be commenced, it is left to the Commission to file the court attendance notice [CAN]. That of course gives to the public the appearance that the Commission has commenced criminal proceedings (which it has) and is responsible for the outcome (which it is not). I am not by these remarks intending to be critical of the ODPP because I do not know enough about its operations to criticise its priorities and decisions as to why, for example, it will not issue CANs in its own name even though the prosecution is taken over by the ICAC as soon as ICAC lodges the CAN. Moreover, I accept that cases coming from ICAC are much more complicated and sophisticated than generally appears in criminal law prosecutions.

Although the legislation makes it clear that the ICAC has two principal functions—of investigation and exposure and corruption prevention—people believe, as I have said, that it includes being responsible for criminal convictions and the length of sentences. The Commission's almost total lack of control over what happens once criminal proceedings have commenced does not appear to loom large in the judgements that people make about the Commission. As we all know, there are all sorts of reasons why a lay-down misère criminal prosecution might result in a verdict of not guilty or, if guilty, result in a pathetically light sentence. For example, witnesses may not come up to scratch, presentation may not have been wholly competent, the matter could be before an aberrant judge, a mad jury or, as has been the case, before a magistrate who believes that Parliament should never have taken away the privilege against self-incrimination, hence people who tell lies should not be punished. In all events, whether that is so or not, ICAC has no control over these matters.

The purpose of the above observation is really a plea to the Parliament to define with more precision what it wants the ICAC to do in respect of the administration of the criminal law and how it is intended to do that. I am also aware that unless the problems are addressed, ICAC will be unfairly criticised for matters over which it has no control and hence public confidence in it as an institution tends to be damaged or diminished.

A matter of particular concern to me is the unfortunate tendency of lower courts to impose very light sentences, mostly without any imprisonment, for people who have been found guilty of telling lies under oath to this Commission. In the early days of the Commission the Court of Criminal Appeal expressed the opinion that it would be a rare case indeed where a person who told lies did not finish up in jail, and by that I mean behind bars; I do not mean weekend detention. The case before the Court of Criminal Appeal was about someone who had been jailed and that person—he told lies—argued that it was unfair that he should be jailed because, first, the lies he told were not to protect himself—he said he was telling lies so he was not seen as dobbing in his mates—and, secondly, there had been six or eight magisterial decisions in which the magistrate had given bonds. The Court of Criminal Appeal said, no, it should be a jail sentence, the legislation does not distinguish between whether you are telling lies to protect your friends or whether you are telling lies to protect yourself. It went on to say it did not investigate the question of what six or eight magistrates might have done but said that if they had done what they were said to have done, clearly they did not understand their function. What they had done of course was to give bonds.

The question I have to address is that telling lies in evidence given under oath carries a penalty. The penalty for that under section 87 is jail for five years. However, another section in the legislation provides that that section need not be used by the ODPP because with the consent of the person who is charged it can be heard before a magistrate in a Local Court. In order to emphasise the importance that should be attached to people telling the truth to this Commission, it is my suggestion that that second section should be repealed and there should be no option if someone tells a lie to this Commission but that they go to a higher court and get treated accordingly. I cannot emphasise enough the importance of people telling the truth to the Commission. If they do not tell the truth to the Commission, or fear they will be punished, the efficacy of what the ICAC does is seriously diminished.

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

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

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

There is one last matter I would like to mention, and it is something more in the nature of a request than anything else. In recent months the ICAC has been subjected, as

everybody knows, to criticism from some members of Parliament and epithets used which, if applied to a court of law, would have amounted to scandalising contempt. I do not suggest that members of the public and certainly not members of Parliament should be denied their right of free speech. Indeed, it was as a result of my suggestion that there was removed from the ICAC legislation provision which would have made those comments contempt of the commission and punishable as such. I took the view that scandalising contempt, if it continued to be a doctrine of law, should be restricted in its application to the judiciary and not extended to administrative bodies.

If public statements are accepted—which I accept and I think most people here and political parties accept—and if the State and the Parliament are committed to stamping out corruption and claims to support the ICAC as an institution, most people here would agree that for the ICAC to discharge its function properly it must have the confidence of the public. The legislation established this Committee with the powers to supervise the workings of ICAC. It also established an Inspectorate. That also, I might add, was on my suggestion before I became commissioner. It would seem to be therefore—and this is the request—if Parliament is to have concerns about the activities of the ICAC, the best place to deal with those concerns, and which at the same time will preserve public confidence in the body as an institution, would be through the recognised channels, namely, the parliamentary joint committee to the extent that it can be done, but if not the inspector, who has enormously wide powers.

As is apparent, I suppose, to most people here, I generally decline to enter into public controversy in my position as commissioner. I take the view that I want to advance the commission, but I do not want to advance my own personality. The request I make therefore is this: If members of Parliament have any concerns with the way this commission is functioning, that concern should be dealt with by reference to either the Committee or to the Inspectorate where the matter can be handled rationally and sensibly and where reasonably minded people can discuss the matter objectively. That is my final remark. One other matter I thought I would raise before you is this. When I read through the meeting you had with Inspector Kelly I noticed there were quite a number of questions directed to corruption prevention and education, where it should be, how it should operate and the like. It occurs to me that it may be appropriate for the new director, Dr Waldersee, to give a short outline of that at this stage if you wish him to or wait until he is asked questions. I leave it to you.

CHAIR: I anticipate there will be quite a few questions on the impact of recommendations and corruption prevention. I intend to ask a few questions on the issue and then I will allow Committee members to ask you questions on that. Thank you for that statement. On viewing your report, my first question is about the assessment section in your commission. We have noticed that there have been four resignations in that section of the commission over a relatively short period of time. Generally, is there a higher turnover in that section compared to other sections in your office? If so, what is the reason for that? Also, is there anything that contributes to that in that section?

Mr CRIPPS: I will ask Ms Hamilton to answer that because she is the head of that assessment section. Before she does, though, let me say this. We have a number of divisions in the ICAC, as you know. The one that is probably the most stressful and the one from which it is least likely that a person can advance further in the organisation or indeed in any other organisation is assessments. So it is an area that we have to be particularly careful about. Generally speaking, it is my experience that staff are very good at this.

Ms HAMILTON: As the Commissioner said, there is a relatively high turnover in assessments. In relation to the comparison with other divisions, it depends on the division. For example, legal is very stable and has been for many years. It tends to have a very low turnover. The investigations division has a slightly higher turnover. In respect of the high turnover in assessments, as the commissioner has pointed out, it is a front-line area dealing with difficult complainants. I think though that probably a more telling factor is that there is relatively little chance to progress to other divisions, and we have tried to address that recently by allowing some suitable assessment officers to be seconded to the investigation division to work as assistant investigators. I think that has worked out quite well because it allows them to get a broader look at what the commission is doing, not just see the initial complaint. It is more satisfying and it may eventually result in their being able to go more permanently to another division. I hope that addresses your inquiry.

CHAIR: I have no doubt that you have measures in place to deal with that but I can understand how it is the front line of your operations. I have noticed in your report that you have made some changes to your assessment process with checklists and different measures to address the issues. Was that a result of the 12A audit or was that just the commission?

Ms HAMILTON: We did make some changes as a result of the 12A audit to firm up the procedures and to make sure that there was a more uniform approach to the assessment of matters by creating a checklist, and the inspector did identify some matters where in his view there had been inconsistent criteria.

CHAIR: One thing I want to ask you about is questions three and four and your answers to those questions. It appears obvious in your answers to those questions that on one hand the average time taken to deal with complaints has gone up from an average of 45 days to 109 days, and one of the reasons you have put down is the delay in receiving information from agencies. We have the Department of Education and Training around nine months; the Department of Corrective Services, 25 months. You have another statistic in there with the Department of Education and Training that resulted in about 1,000 days waiting for information. I notice that in answer to question four you reviewed this issue and you have set yourself a 60-day target. As I understand it, you will exclude that time now from your reporting statistics and I think you call this reporting on discrete areas and you will exclude that time. That will make your statistics look better. Will there be information in your reports about the time delay waiting for agencies? Are you concerned about this delay? What are your observations and comments about that? It is stifling your operations, I would anticipate.

Ms HAMILTON: At this stage, as I understand it, those discrete targets have been set as internal targets. We are still reporting on total time, including the time with agencies. Despite that, the average finalisation has been reduced now—in the January-March 2008 quarter to 78.5 days. That is due to a number of factors such as the manager has taken efforts to increase morale, team building, the transfers we were talking about and just generally keeping an eye on it. At this stage we are still counting the time and we still manage to reduce the time, and I think that is because we are keeping more of an eye on agencies and being less generous with extensions of time for them to respond to us. In the past I think if they asked for another month or two months, they were automatically given it. So we are keeping an eye on that to try to keep those times down and hopefully over time that will have an effect but it will not happen overnight.

CHAIR: I want to get on to the topic of recommendations that the commission makes and the implementation of those recommendations. The Committee is keen to ask you some questions about this to ascertain how it is working. In 2006-07 there were 47 recommendations made to Railcorp with regards to certain investigations. We have 27 of those in Operation Persis and Operation Quilla has some outstanding issues. What we are noticing with Railcorp, we have a situation where the implementation plan is yet to come into the commission and yet this is ordinarily the time we would expect a 12-month progress report. With Operation Quilla I think there are similar issues with delays in reporting. We know from the document that you have been good enough to make available to us that with regards to Railcorp over seven investigations we still have the same issues recurring for the commission, and it seems as though we are getting a delay in the implementation and we are getting these recurring themes in these investigations. I know you have the system in place where you follow up on recommendations by posting them on the web, et cetera. Just staying with Railcorp for the moment, are you satisfied with the way things are going? Do you have any comments and observations to make about this particular agency in view of its history and in view of the work it gives the commission and its lateness in providing you with information?

Mr CRIPPS: Yes, I am prepared to comment on that but I would ask you, before I do comment on it, to bear this in mind. The reports for what we call Monto—that is the State Rail list of the recent rash of six or eight inquiries—have not been made. I will be talking about matters where there can be no doubt about what has happened because there has been a public inquiry and admissions have been made so there is no question of the Parliament not being aware of what is going on. My short answer to your question is that I am not satisfied. I am not happy about the time lapse. Perhaps we should have pushed it a bit harder and I think in the future we will. I think the way we should do it is probably through sections 53 and 54, which I am aware would send the matter to the Parliament or the Government to handle. I will ask that people who are probably better able to discuss this than I am how careful we have to be about how far we get into ensuring that people undertake these processes we think they should.

We cannot give people tick-offs for the detail because we run the risk that if a complaint is made to the commission about something happening we are compromised by the fact that we are thought to be part of the problem. However, could I say this? I am aware, and I think almost everybody in the commission is aware, of the problems associated with Railcorp or State Rail. And there has been a repetition of conduct notwithstanding exposures and recommendations made. We are at the present time giving serious consideration as to how we will deal with this in a way that we have not dealt with other matters before, but I would rather not talk about that now except to tell this committee that the commission is concerned that corruption that has been exposed and made public and within no time, it gets exposed again. We have had illustrations in evidence, as you are probably aware, of people doing these things while they know that there is a public inquiry going on about other people, and they are doing the very things that the other people are doing—so something has to be done to stop this.

In the future we think that it has to be something more but eventually probably you will find that we will be throwing it back to the Government or the Parliament to respond to it. But the short answer to your question is we are concerned about the repetition of this conduct both because it does in a sense affect public perception of the quality of our work. The perception is that we keep exposing it and nothing happens. But there is also the

problem about what can happen, and whether we have the power or, for that matter, the skill or expertise to do anything about it. I do not know whether anyone else wants to speak about these matters.

Dr WALDERSEE: I will just speak briefly on the issue of RailCorp. First, noting that RailCorp is exceptional by its intransigence, not typical of what happens following a finding. It is a very special case. The corruption prevention recommendations, as the system typically works, are developed within the investigation process. They are made, the agency shifts across, we follow up, as you understand that is the process. We assess the implementation. We do not step in and act as administrator and take charge. To do so is not only not our role, it would not be an effective role were it to be made our role. If the management, after a finding, will not take responsibility and ownership of the recommendations and implement them, then the issue of implementation is way beyond the scope of corruption prevention. We cannot do it as administrator, and as the commissioner has said, if we did we would then be held liable. It would give the managers the ability to shift responsibility for future corruption across to the ICAC. So generally it is not something we can do so we stop where we are. Our final recourse is a part 5 escalation and information to the Minister that this is not being done and it is then the Minister's responsibility. If they want to put in an administrator or they want to sack the senior management, whatever they deem fit, but that is well beyond the role of corruption prevention.

CHAIR: On a wider scale, we also have the situation with the Department of Corrective Services with 16 recommendations fulfilled. It has given you a reason why it would not implement one recommendation because it has addressed it in a different way, et cetera. Firstly, were you satisfied with that response from the Department of Corrective Services? In a broader sense, you have 80 per cent of your recommendations being implemented across the board, are you satisfied that the recommendations being implemented are having any effect on corruption in these agencies?

Mr CRIPPS: To the extent that these recommendations have not been picked up and carried, to the question I would have to say I am not satisfied that they have been done properly. The extent to which, if they were done properly, there would be no repetition of the conduct, I cannot answer that question. One of the problems, of course, as you are aware, and this committee is aware, that in the area of corruption it is extremely difficult to know whether any particular steps that are taken will result in less corruption, whether there would be corruption if they had not been taken because we do not know how much corruption there is there or we do not know how much has been stopped. We like to think that the exposure, particularly of senior public officials engaged in corruption, will have the effect of deterring other people from behaving badly, and I think it generally does.

People have only got to look back 20 or 30 years and see what we all took as almost par for the course conduct now does not happen in lots of areas, whether it was secondary employment, conflict of interests and the like. But the answer is I am not happy about them not implementing these recommendations or, at least, not giving us a satisfactory explanation. I think the problem we have here—and I take responsibility for this—probably there should have been more recourse much quicker to sections 53 and 54. It should have been referred to the Minister to deal with, and the Minister then, if it could not be dealt with, could refer it to the Parliament. I think perhaps we should be doing more of that, and we will be doing more of that in the future.

CHAIR: In relation to corruption prevention, I have noticed that in your response to the questions you are implementing—

Mr CRIPPS: Which question?

CHAIR: Question 12, commissioner. In regards to your working closely with the Department of Health for the corruption prevention project you have put in place there, the results from the study in 2001 and the instigation of this project in 2003 where you have carried out a research on the public sector which has highlighted some corruption risk in the Department of Health. I think I read in your report where something was presented in August 2007. Would you provide the committee with an update on how that project is going?

Mr CRIPPS: Could I pass that question onto Ms Atkinson?

CHAIR: Certainly.

Ms ATKINSON: Yes, the output of that particular project was a train the trainer tool kit on preventing risks in the health sector. That was developed and released in August 2007. It was very well received. We had a train the trainer session where our staff actually drew in the relevant people from the health sector to demonstrate how the tool kit would be used, and that was, in effect, our launching of the project. We will be following up how well that tool kit is used in the public health sector, how useful it is and whether, in fact, it needs to be changed. So in due course there will be a review of that particular tool kit.

CHAIR: I have noticed in your statistics that the section 10 complaints make up 6 per cent for the Department of Health, and the section 11 complaints make up 14 per cent but your protected disclosures make up 18 per cent. Are those figures reflective of the difficulty there is in getting complaints out of the Department of Health? Is that one of the reasons why you think this tool kit will have an effect? I am saying that your figures are fairly low percentage wise, compared with local government or State Rail and you have instigated this tool kit, which is very good. Do those figures reflect any particular problem with the Department of Health about complaints coming forward?

Ms ATKINSON: As you know the Department of Health is a big sector so there will always be complaints concerning the Health sector to the ICAC. So this is a long running project—I think its genesis was in about 2003, and there are particular issues with the Health sector that have been very difficult for Health administrators to deal with. I think they have been listed in our response to your question on notice. So there are issues of misuse of resources, conflict between public duty and the private interests of some of the medical staff and so on. So they were seen as areas whereby we could intervene and help administrators deal with those particular issues. It also seemed to us that the best way to do this was to encourage the Health sector to take on the responsibility of training people in the related policies and practices rather than us attempt to take that on our own shoulders, hence the train the trainer tool kit.

CHAIR: Is there any contemplation of that kind of initiative being used in RailCorp where there is an obvious problem?

Mr CRIPPS: I do not know, but I have to say what is being referred to by corruption prevention obviously is predicated on the basis that there is total cooperation from the

agency concerned. Now I do not know what will happen with RailCorp. It is a very big problem. It is bigger than Health. For example, the amount of complaints and reports from Health are really quite small, I think, compared with the size of it as a government bureaucracy. I just do not know.

CHAIR: At first glance, I am suggesting, that your recommendations are not having an effect on RailCorp?

Mr CRIPPS: I think that is a fair enough comment.

CHAIR: You have got this initiative with Health where you are going in and creating a kit and allocating resources. Would you see that something like that would be of benefit with RailCorp?

Mr CRIPPS: It is possible. As I said to you earlier in response to your first question, how we deal with RailCorp at the end of the day when this one report—we are going to come out with one report devoted to corruption prevention. Normally we would put it at the end of reports but with this one there will be one report. These will be matters that people will be looking at as possible solutions and trying to give some advice on the matters. At the present time we have not done that so I do not know whether it would work if we did.

Ms ATKINSON: Could I add something to that?

Mr CRIPPS: Yes.

Ms ATKINSON: The general principle, as Commissioner Cripps has stated, is that these tool kits are developed in cooperation with the agencies that are going to use it. The precursor to this was a tool kit that we developed with the university sector, and that was again done as a cooperative enterprise just as the Health one was. So I think for us to work with an agency to develop a tool kit we need to have that agency supportive of the need for that kind of training. In fact, the project that lay behind this, the research that lay behind it, was very much a consultative, cooperative project so that the Health sector itself were of a mind with the ICAC about the particular issues where training was needed.

Mr CRIPPS: And also could I just finally add to this that we are conscious at ICAC I think that at the end of the day things like codes of conduct and train the trainers programs can be just pieces of paper if the organisations which get them do not take them in the right spirit and apply them as they have to be applied, namely to put an end to bad practices. So we have to be, as Ms Atkinson has said, confident that we are getting the proper cooperation.

CHAIR: I want to put this to you: as you know we had a meeting with the inspector last week and we have given you the transcript.

Mr CRIPPS: Yes, you did.

CHAIR: As I recall it the inspector expressed certain views about various part of your operation, one of which was corruption prevention. As I remember his view was that the corruption prevention function does not have much prominence, and it is difficult to measure the success of that function. He was thinking about proposing that the function should be

undertaken by a central government agency focussed on this issue which would give you the time to do investigation and exposing corruption. He suggested basically to allocate it to another agency and you can get on with investigating and exposing corruption because of what he perceived to be the ineffectual nature of it. Do you have any comments on that?

Mr CRIPPS: I do. The first comment I would make is this that corruption prevention never stands alone anyway in our organisation, most of the work is dependent on what we discover in public inquiries and compulsory examinations where the precise issue of corruption is identified, and that precise issue is then dealt with. I do not really see the advantage of setting up yet another organisation to do this. By way of illustration, one of the things that—I think the Parliament has finally done this—I did not want, the ICAC, to have was the corruption prevention function of the police, when we did not have the function of investigating the police. Now the Parliament has taken that and given it to the PIC, which is where it should be. I do not know that there should be any other organisation set up to do this, but I invite Mr Waldersee to comment.

Dr WALDERSEE: I would like to respond to this, having also read the transcript of Mr Kelly's testimony. In the bigger context, just before the excerpt you quoted, one of the reasons that there was thought to be very little impact of the corruption prevention function was the stability over time of the number of complaints made to the ICAC and the number of investigations that were undertaken, and this was taken to be evidence corruption prevention is not working as was intended when the Act was initially brought in.

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

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

CHAIR: Are you saying—

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

What can be done, given the environment shifts—we are not clear what the numbers mean—we can measure the effectiveness of what we think are the mechanisms for reduction of corruption. So if we educate people within organisations on how to go about

making protected disclosures, we can measure if there has been a shift in the knowledge and propensity to report corruption if it is encountered. That we can measure. We do it a bit; I plan on doing it more as the new executive director.

It looks like investigation produces a measurable outcome because you have a number of findings. The number of findings is not a measure of deterrence and the number of recommendations we make are not a measure of prevention effectiveness. So it has got to be very carefully thought out what that means. The idea that was floated was the idea that corruption prevention should maybe move off to a central agency. The argument behind that was corruption prevention is essentially a policy function and should be located in a policy type agency, because discretion within policy is what creates corrupt opportunity. That was my following of the argument in the transcript.

What I would say about corruption prevention is that we are most definitely not a policy agency. If there is not discretion within government it is a massive machine; it could not function without discretion being there. Corruption prevention therefore is not about policies that allow discretion, it is about management of that risk created by the discretion. So the issue is one of structures, processes, control systems, the way management is run, detection risks—exactly the same sort of management structural process issues that would be found in an insurance company or a bank. But it is most definitely more like management advice than it is policy advice. That is why I do not feel it should be moved on those grounds.

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

Mr CRIPPS: Could I just add one matter? I think these sorts of implied criticisms sometimes tend to overlook why ICAC was originally set up. It was set up against the backdrop that the ordinary criminal law could not attend to the problem of corruption. We all know that if there have been 20 muggings in Hyde Park and the police did something about it and the next year there are none, you can infer that police action has resulted in that happening. But when you do not know how many muggings there are in Hyde Park and you never will know until it is known, it makes the question of what is deterrence and what works complicated.

CHAIR: I can quite understand the argument about incorporating corruption prevention in with investigation because the two work hand in hand. What I was asking is that given the Inspector's comments and given the recurring problems we have in certain agencies, is there another way to implement, on health issues, for example, other initiatives or think outside the square and implement other initiatives to address this recurring problem in what appears to be an agency which the signs are continues to feature in investigation reports?

Mr CRIPPS: Without going through it again could I just say this: What you are saying has been really taken on board by us in the decision that was made. We will look at all these separate allegations of corruption in State Rail and at the end of the day, and unlike any

other one, we will sit down and try and work out how we can bring in a system that will reduce that. We keep talking about corruption prevention; what we are really talking about is corruption reduction: I do not think anyone is going to stop it.

CHAIR: I agree with that. I think realistically that is right.

Mr DAVID HARRIS: Just following on from that and building on the comments of Mr Waldersee, I think what we found with child protection is that when we strengthened the reporting laws people played it safe, so everybody reports everything. The fact that ICAC is there means that you are obviously getting more reports because people play it safe. If there is a perception there might be corruption they will refer it to you just in case—and in a lot of cases it is to protect their own behind in a lot of ways. So, as you mentioned earlier, that means that your assessment procedures at that first point are very important. I have read how you have brought in the new procedures.

At this stage, and I am not sure how long ago you introduced them, have you been able to do an initial evaluation on how that new system is working and do you have in place any internal audit procedures where you do random checks on ones that have been rejected and ones that have been accepted just as a checking mechanism to make sure that the procedures are working well?

Ms HAMILTON: As I understand, the manager of the assessment section has done some auditing of the checklist; it is part of her management role. Could I say: I think she has been a very successful manager. With complaints increasing in certain quarters she has managed to actually get the numbers down. The commission as a body has not done a formal audit of that process at this time, but that may well be a good idea. I think the fact that we seem to be getting more efficiencies in the assessment process probably is some indication that it is working, at least because I think people are able to deal with it more quickly because they know what they are looking for when they look through a complaint, and they are assessing it more quickly. But certainly an audit of how consistently the criteria are being applied would be something we would look at in the future.

Mr DAVID HARRIS: In a kind of follow-up from the Commissioner's opening comments: There is a general view now that ICAC is the panacea of all solutions to everything. As soon as something happens anywhere it is flicked to ICAC to get them to investigate it. Do you feel it is probably necessary in a way to re-brief politicians at this point on the actual operations scope of ICAC—I am a new person in Parliament and have not had a briefing for example—just to make sure that people really understand that role? Because I know it is good for the media sometimes to say, "Get ICAC to investigate it", but, as you say, that then impacts on the public perception that if it is not then ICAC is not working.

Mr CRIPPS: I touched on this in my opening speech about what perceptions there were, including perceptions of parliamentarians. I would be very happy to address the Parliament or parliamentary representatives as to just why it works. The only aspect of it I would not disclose is what the legislation will not let me disclose, namely, the details of any particular investigation. I would be more than happy to do that, because, as you point out, there does seem to be a perception these days increasingly that as soon as anything goes wrong everyone seems to think that ICAC can jump in and do something.

We have powers and very important powers, and a very significant power is to call people up, put them in the box, take away their right of silence and privilege against self-incrimination. We cannot do that at the whim of somebody who wants to get that information; we have to do that because we are satisfied we should be investigating and we should be using those powers. The short answer to your question is yes, I would be quite happy to speak to the Parliament or representatives of it on this issue and explain as much as they wish to know about it.

Reverend the Hon. FRED NILE: One of the issues that concerns me is the matter you raised earlier, Commissioner, when you said that criticism by members of Parliament was not helpful to the commission and the whole issue of the credibility of ICAC at the moment, and your response to some of the allegations that have been in the media concerning, apparently, an employee within ICAC about which there are question marks, and individuals who are under investigation claiming that they were acting as ICAC officers, which obviously was false; and, thirdly, the claims by some of those individuals that they are getting information from within ICAC about some of these cases. What is your response to some of those criticisms, which obviously in the public's mind are damaging to ICAC's credibility, and probably that is the intention?

Mr CRIPPS: I think I know the issues and the people and personalities behind the question that you are asking. I am more than happy to answer those questions. I am conscious that there is a provision in the legislation to the extent that any of them are being investigated I cannot make that information available to you. I think I know what you are referring to and I think I know the issues. I do not think that this raises that issue of you being precluded from hearing that. What I would like to do, if it is satisfactory to this Committee, is respond to those questions in camera. I would be happy to do that.

Reverend the Hon. FRED NILE: In your answers to questions under the memorandum of understanding, I refer to your answer to question 29. This has been one of my concerns: to get speedy cooperation with ICAC by the DPP, who, in my opinion, were not giving that absolute cooperation. I can understand that they have their own priorities and role, and you come in as ICAC with your matters, and it is almost like saying, "That is interfering with what we want to do", and that is put to one side; it is not given top priority. The memorandum of understanding was to try to change that situation and in your answer you have indicated that certain things have been agreed to, such as an assigned lawyer would arrange a conference with relevant ICAC officers, et cetera. My general question is: In your opinion, are those changes working within the cooperation area between ICAC and the DPP? Is it successful or does more need to be done?

Mr CRIPPS: It is moving towards a good result, I hope—as good as you can get against the backdrop that at the end of the day nobody is responsible. Would you mind if the deputy commissioner answers this, because she is the person who liaises with the DPP? Could I mention this, though. I have referred to the administration of the general criminal law. There is another aspect of that which is probably more germane to the problems I have than the administration of the general criminal law. It is the administration of the Independent Commission Against Corruption Act itself and the administration of those where there are offences against that Act. That concerns me much more than the administration of the general criminal law, because unless that is attended to we will not function properly.

Ms HAMILTON: I have been meeting every two months with the lawyer in the DPP in charge of our matters. I think it has had an effect: they are allocating lawyers to our briefs when they go over; we are having meetings with them. I think its effect will be mainly seen in new matters. I think one effect, as we have said in our response, is that apart from a couple of old and very difficult matters, which are still hanging around, all the briefs presently with the DPP went over only last year, and that is a big improvement on past years where we have had matters that have been there three or four years.

I think if we keep working in the direction we are, the time limits will be substantially reduced in the future. One issue we are looking at in drafting a new memorandum of understanding is that we notice that it puts a lot of timelines and duties on the DPP at present but it does not say much about what we are doing. We will be incorporating timelines for ourselves. We aim to get a brief to the DPP within X months, at the completion of the public inquiry, and that will hopefully improve it even further.

Reverend the Hon. FRED NILE: I appreciate the emphasis on timelines and so on. The bottom line, however, is: Do we get a successful outcome? Does the DPP actually prosecute someone and is someone found guilty, after all the work you have done?

Ms HAMILTON: 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.

Reverend the Hon. FRED NILE: So there can be a deliberate attempt to delay the whole process, from a lot of directions?

Ms HAMILTON: I am sure that often a prospective defendant would prefer that the matter was delayed as long as possible—as you would.

Ms LYLEA McMAHON: In relation to a number of recommendations of the inspector, there were three main areas of recommendations. I would like to know how they have proceeded or are being implemented. There were recommendations about improving the formal process and follow-up in relation to section 53 referrals. There were also recommendations about improved record keeping, and there were also recommendations concerning improvements to probity vetting procedures regarding appointments.

Mr CRIPPS: Other people may wish to speak about this, those who have more detailed knowledge of what is going on. Section 53, I think we have largely dealt with. I accept that we should perhaps be a little more proactive in using sections 53 and 54 than we have been to date, and we will do that. Regarding the records, I will have to leave that to other people. As you may know, it was my original part report that stopped before I got appointed. I had the view that we really did need an inspector. The institution needed an inspector for two reasons: first, to make sure that the covert powers we had—which exceed the powers that almost any other body in Australia has—were being exercised properly, so as to ensure that we behaved ourselves, and that we knew, and if we did not, we might be

caught; and secondly, I think it increases public confidence in the efficacy of the institution. As to the records, I am not sure which ones—⁸⁴

Ms HAMILTON: The records kept for the notices—

Mr WALDON: I might be able to answer that. As you know, the inspector conducted an audit on our exercise of powers under various sections of the Independent Commission Against Corruption Act. During the course of that audit he was looking for compliance with our procedures, which require that before any power is exercised, that is under sections 21, 22, 23 and 35 of the Act, there should be a supporting minute to the commissioner or deputy commissioner who is assigning that notice. I am confident that in all cases there were supporting minutes, but there was some difficulty, particularly in older matters, in locating the physical copy, or even in some cases the electronic copy, of those supporting minutes.

During the course of the audit as that became apparent, I implemented a new system in the commission which now requires that those supporting minutes be kept with the copy of the notice, and those supporting minutes and the notices are filed with our property section. These days, if you were to conduct an audit on notices or summonses that have been issued since that audit was conducted by the inspector, you go to the property section and for each notice or summons that has been issued there will be a supporting minute attached to it and filed with it.

Ms LYLEA McMAHON: Have you yourself conducted an audit to ensure that that is occurring?

Mr WALDON: I have done a spot audit on a number of matters to see that that has been occurring, and the result has been positive.

Mr CRIPPS: As to the third matter you raised—which I think was probity, was it not?

Ms LYLEA McMAHON: Yes, probity vetting procedures regarding appointments.

Mr CRIPPS: I am not sure what this is directed to. I am not aware that there has been a complaint about this. Perhaps there has; I do not know. What I thought I would do at the next meeting with the inspector is find out what he is referring to. If you can tell me what he is referring to—

Ms LYLEA McMAHON: There was a recommendation in relation to improving your probity vetting procedures in relation to appointments regarding a complaint the inspector had received.

Mr CRIPPS: I am not suggesting that something has not caused him to make that remark, but I do not know the details. I will take it up with the inspector and find out, and if we have probity issues I will certainly try to address them.

⁸⁴ In his corrections to the transcript the Commissioner, Mr Cripps, clarified his evidence to the Committee in the following manner: 'I had the view that the ICAC needed an Inspector, the institution needed an inspector for three reasons. First to make sure the cover and coercive powers it had (which exceed the powers of the police) were being exercised properly. Secondly, if it did not defaulting people would be caught. Thirdly, to increase public confidence in the efficacy of the institution. As to the records, I am not sure which ones-'

Ms LYLEA McMAHON: In July 2006 the inspector wrote to the commissioner recommending that the ICAC review its probity vetting procedures as part of good record keeping and accountability, and also that recommendations be considered in any review of the ICAC's vetting procedures. That appears on pages 14 and 15 of the inspector's annual report.

Mr CRIPPS: Could I take that on notice? If it is acceptable to the Committee, I shall send the response to this question in writing.

Ms LYLEA McMAHON: With regard to prevention activity in relation to the health department, you are intending to do a review of how effective that prevention activity has been. What methodology are you considering, and what activities are you considering?

Dr WALDERSEE: I will go first, in terms of considering the future, and Lynn can go second and say what is already in place. The methodologies I intend to use will not be a global de-corruption reduction. As the commissioner has noted, we do not know how much corruption is there in the first place, so how can we know if we have reduced it? What it will do—and this is how I intend to evaluate all programs from now on—it will be a straightforward before-and-after measurement. If the training is designed to give managers a certain amount of knowledge on how to structure or arrange their organisation, we want to know: What did they know before and what do they know after, and is that different? That would be the measure of effect: it would be a quantitative methodology, looking to see whether we achieved some sort of statistically significant improvement in what we were trying to achieve with this training.

What we will never be able to ascertain is whether the training and the skills that had been given to the manager were implemented in a realistic way or a genuine way, as opposed to, "Thanks for the day off for the training", because that would again require us to be highly interventionist. We would have to go into the organisation, and we would then have to, as a consulting firm would, nose around and try to determine the genuineness of what has been undertaken. That gets back to my earlier comments that that is really not the role. We are there to provide the tools. We will provide assessment—but not where we kick the door in and walk in and say we are going to do it. If they want it done, we can do it, but we are not able to force ourselves.

Ms LYLEA McMAHON: It would not be things such as interviews or surveys?

Dr WALDERSEE: Yes. But it would be: What were we trying to achieve with the training? So down the line we hope it will be: we train, they implement, and corruption is reduced. We do not believe there is much point in trying to measure that far down the line. We would measure back at the beginning: We train; we have changed their knowledge. It is then up to the organisation and the management to take that knowledge and implement it. Sorry, it looks like I am losing you.

Ms LYLEA McMAHON: No. I suppose I struggle with this idea that if there is a prevention role, that is really around changing people's behaviour.

Dr WALDERSEE: Yes.

Ms LYLEA McMAHON: Not just if they have the knowledge, but whether their behaviour is changing?

Dr WALDERSEE: Yes.

Ms LYLEA McMAHON: I understand the argument you are putting: that responsibility for that lies with the management. But if there is not some measure that that is occurring or not occurring, how is the management of that organisation held accountable for that?

Dr WALDERSEE: In this sort of situation where we are providing advice, we are not holding management accountable. The accountability of management gets much more into an investigation of—ultimately what you are saying is: Are they being negligent in the way they behave, in a way that will allow corruption to occur? That is way beyond what a training program assessment could ever do; that is investigatory powers.

Ms LYLEA McMAHON: But one of the KRAs is accountability. So I would have thought there was some role for the ICAC in that level of accountability, particularly, as we have just been talking about, with regard to RailCorp, where there have been numerous investigations and numerous recommendations. I would have thought there is a role in that prevention aspect of holding organisations accountable, and that in fact you have the power to do that in terms of a part 5 escalation to the Minister.

Dr WALDERSEE: That is generally done, though, within the context of the aftermath of an investigation, where there have been findings. It is not generally done where there is a cooperative arrangement to deliver training.

Ms LYLEA McMAHON: I suppose that then comes back to the systematic approach to ensuring that recommendations are implemented and have, in effect, exacted some change in behaviour—which is where the two come together.

Dr WALDERSEE: The recommendations that flow from an investigation we do follow up; we do assess. At the moment it is done by reporting by the agency. In hard cases, such as RailCorp, in the future, I believe it should be an on-the-ground assessment. But that is in the context of findings following an investigation, where it is a joint effort by management and ourselves, and that can then be escalated to a part 5. Whereas, where it is essentially a joint or collaborative approach to try to improve the situation within an organisation, it would be a bit off-putting if we then escalated that to the Minister after they, in good faith, had asked for us to work with them to help improve things, and we did that and then said, "No, it is not good enough; the Minister is going to hear about this." That would be quite detrimental to anybody ever coming to us and asking for that sort of assistance. That is my view.

Ms LYLEA McMAHON: What about those areas where you identify risk? Last year we spent some time discussing prevention in local government. That is an area where the ICAC has identified a risk. It is a little different to where an organisation asks you for assistance?

Dr WALDERSEE: Yes. The middle ground—and this is what I am currently developing, I have only been on the job for two months or something like that—we seem to have a highly reactive approach. If someone asks us for help we help them. If somebody is

being investigated we become involved in the investigation. My concern was that we increase our productivity in target areas and focus our effort, because there are only 22 of us. Local government is one of those areas that we are moving on, and we have specifically prioritised our targets. At the local government level it is coastal planning departments. So it is highly specific. That is where the corruption incentive is; that is where complaints are coming. What we are going to do is activist and interventionist. It will be advice on structures, control systems, increasing detection risk. It will involve some research.

For example, we do not know why people do not comply when we give recommendations. Is it that they do not know or they will not? If they do not know, education is a great answer. If they will not, it is a waste of time. So we need to know some of those factors before we can go forward. It will involve education. It will involve detection risk through activities such as informing progress associations, external oversight bodies, the general public on what to look for, what we need in a complaint. Do not just phone us up because you do not like the development. That does not work. We need to know details. It will involve management training. It will involve looking at what they have got on the ground and some tailoring. It will involve increasing detection risks by making the community aware of what is going on. It will involve research so that we know exactly what we are supposed to be targeting in the first place. That is now starting, but it is not in place yet, not in two months.

Ms LYLEA McMAHON: You will be able to report on that?

Dr WALDERSEE: Yes, indeed.

Ms LYLEA McMAHON: Will you be reporting on it separately or as part of the annual report?

Dr WALDERSEE: It will not be in this annual report because the year has finished. So it will probably be reported separately. We are similarly looking at targeting human services. That is our second priority area and that includes housing, aged care, health, et cetera, which as the research discussed earlier in the Committee showed is a high-risk area too. So it will be that same sort of comprehensive targeted and proactive approach.

Mr JONATHAN O'DEA: The productivity you just talked about did not cover increasing focus on following a legislative program. That is really what, I think, the Inspector was talking about—that when there are either legislative changes or changes driven by Parliament there is a need to be a little more proactive in anticipating where gaps might be created. I took on board your answer about where the education or prevention function best sits and the good reasons you put forward why it might stay with the Independent Commission Against Corruption. Behind a lot of the comments was the perceived need for there to be more proactive focus in terms of following legislative change. I suggest you might take that on board in terms of your productive focus. Do you have any comment on that?

Mr CRIPPS: Yes, we certainly will take that on board. I suppose to some extent we have done this sometimes. We periodically get requests from a government as to proposed legislation and what it will do. Because it has been announced publicly we have had requests from the Minister for Planning about whether certain things should be changed. We respond to those as we can, but we respond to them in the same way really that Dr

Waldersee refers to generally, that is, we do not get involved in the detail of it but we will draw to the attention and have drawn to the attention of the relevant Minister the corruption risks associated with what they are preparing. Then it is their decision. After all, as we all know and as Dr Waldersee has said, the whole of government functions on discretion. The wider the discretion and the more important that discretion is to the people who receive it, the greater the risk of corruption. That is what we have to advise people.

Mr JONATHAN O'DEA: I noted your comments in relation to sections 53 and 54 and the intention to be again more proactive in potentially escalating matters to the relevant Minister. It was not clear to me whether or not you had actually escalated any matters to date. Given the situation that RailCorp and your response to question 35 (d) about RailCorp's still outstanding implementation plan, do you intend, if you have not already, now escalating it to the Minister for Transport?

Mr CRIPPS: We will give independent consideration to that. We have not done it. You can infer that it is more likely than not that will happen unless we get a response very quickly.

Mr JONATHAN O'DEA: Following on from question 19 and a question raised with the Inspector about the security of your building and, indeed, his own security, I note that you are housed in a Stockland building which is not a publicly owned building. I have heard a school of thought from some reasonably persuasive authorities that the Independent Commission Against Corruption should be housed in a secure government-owned building.

Mr CRIPPS: I can understand that. Our relationship with Stockland over the last couple of years has not been altogether favourable, I have to say. They are redoing their building and they have caused us all sorts of problems.

Mr JONATHAN O'DEA: Have there ever been any security issues, physical security or security of information?

Mr CRIPPS: No. It is just that they have shut it down and done all sorts of inconvenient things, but there have been no security issues, not that I am aware of.

Mr FAVELLE: No. The question you are obviously referring to was the additional costs associated with security for that year.

Mr JONATHAN O'DEA: The question was not related to that. It was more related to the fact that you are operating in a building that is privately owned rather than government owned and hand in hand with that goes a lack of control over the sorts of issues that were addressed in question 19. Also, there are other security issues, such as listening device capabilities in windows that you do not have ultimate control over, and a whole range of issues. There is a school of thought—and, as I said, it is on good authority that I have heard these concerns—that the Independent Commission Against Corruption should be housed if not in its own building then certainly in a tightly controlled government building.

Mr CRIPPS: There is a strong argument about that. Indeed, I know it is different from ours, but the Hong Kong ICAC has recently got its own building. They attached huge importance to that. Are you going to give us the money to have our own building?

Mr JONATHAN O'DEA: The starting point might be that you state a clear view of your requirement.

CHAIR: If the Inspector is requesting to move, maybe we can organise something.

Mr CRIPPS: I see a force in what has been said in terms of security, although I do not know of any security problems. I would be grateful if more detail of those could be given so that I can address them and make sure they do not happen.

Mr JONATHAN O'DEA: Reverend the Hon. Fred Nile raised one, but you do not have to wait for it necessarily to happen.

Mr CRIPPS: No, of course not.

Mr JONATHAN O'DEA: I am encouraged by your willingness to address Parliament. I think that would be a good thing and I hope or expect that Mr Harris's suggestion would be welcomed by all in the spirit in which it was offered. I would be interested in hearing your views, and it may be appropriate to mention it in an address if it occurs, as to this issue. When a matter is sent to you for initial assessment or examination and does not proceed to a formal investigation, the tendency of parliamentarians and others is to then claim that the person concerned has been cleared or exonerated by the Independent Commission Against Corruption. I think that is distorting public perception as well as the integrity of proper process. Would you comment on that and whether it is an issue worthy to address?

Mr CRIPPS: I will address Parliament on that. You have to understand that sometimes there is a perception amongst members of the public that when a complaint comes to the ICAC it has nothing else to do except deal with that complaint. Of course, you have lots of complaints coming in, we have lots of inquiries going on, we have lots of work to do and we have to deal with each complaint in the context of the legislation, which itself recognises our discretion in this area. There are areas where we think there could be something in this, we will send it away to somebody else, we will not deal with it, and the like. It is an issue we have to bear in mind and I would like the Parliament to bear that in mind. I am very happy to speak to the Parliament about this.

Mr JONATHAN O'DEA: You talked about referring matters elsewhere. When a matter comes in at the initial stage and it has not gone to an investigation, how often would the ICAC refer a matter back to Government?

Mr CRIPPS: Do you mean the agency from which the problem arose?

Mr JONATHAN O'DEA: Correct.

Ms HAMILTON: Quite a lot.

Mr JONATHAN O'DEA: Is that process transparent?

Mr CRIPPS: It is transparent.

Ms HAMILTON: Basically any matter that we do not want to do ourselves, we cannot do ourselves and it is not going to be an actual 53 or 54 referral, if we think that somebody needs to look at it or at least be aware of it we will refer it back to the government department against whom the allegation is made. I cannot off the top of my head give you a figure, but that would happen in a lot of cases. Perhaps even, it would be fair to say, in the majority of cases we do nothing more than refer it back to the government agency to which it relates, so that they can be aware of it. We are not necessarily saying that you need to investigate this. We are not saying it is corrupt conduct. We are saying that you should be aware of this, this has been said, we have not looked at it, we do not know if it is true or not, but we are giving it to you for your information. That happens in a lot of cases.

Mr JONATHAN O'DEA: There is no further tracking?

Mr CRIPPS: No.

Mr JONATHAN O'DEA: Do you have no concerns that it might be buried by someone who has a vested interest?

Ms HAMILTON: We remind principal officers in our literature and in any talks we give that just because we have sent it back in that way, if they looked at it and they uncovered corrupt conduct, they are still under an obligation to refer that corrupt conduct back to us. So to a certain extent we do rely on people to whom this information is referred complying with their duty to refer allegations of corrupt conduct to us if they uncover it.

Mr JONATHAN O'DEA: What is your view in terms of protected disclosures, employee whistleblowers and the current process that the Parliament has suggested in terms of review, that is, this Committee? What is your view in terms of how suitable you think that process is and whether you have any comments?

Mr CRIPPS: Do you mean how suitable a review is of itself?

Mr JONATHAN O'DEA: How suitable the review is, including by this Committee? Also, do you have any input or suggestions as to what we should be looking at?

Mr CRIPPS: Everyone recognises there are a huge amount of problems associated with protected disclosures. Everybody knows that the question is: What is the best way to deal with it? We would certainly cooperate, but maybe the Deputy Commissioner has some view about that.

Ms HAMILTON: I have had a lot to do with whistleblowing both in Queensland formerly and here. It is an enormously difficult area. I think one of the biggest problems with it is that all of the Acts that create whistleblowing legislation, perhaps by necessity, make it very complex. You have to give the right sort of information, you have to be the right sort of person, and it has to be about a very specific kind of conduct. That, or course, means that for a lot of people who consider themselves whistleblowers, the legislation does not consider them whistleblowers. So that is the first problem that a review might need to look at. The second problem that is again hard to address is the protections to whistleblowers. You can charge people criminally who take reprisals or you can take certain civil actions, but it is very hard to protect whistleblowers from the reality of people not talking to them in the office or not inviting them to drinks. That sort of reprisal is something that legislation probably cannot

deal with. That is the real problem of protected disclosures. I do think a review of it is a good idea because the legislation is always something that can be improved in respect of protected disclosures.

Mr JONATHAN O'DEA: You are comfortable with this Committee undertaking that review, of which Parliament has given an intention?

Ms HAMILTON: Yes.

Mr CRIPPS: We would not dare criticise Parliament.

Ms HAMILTON: It is a matter for Parliament obviously. As the Commissioner says, I do not think we should second-guess that decision.

CHAIR: No doubt, we will talk about that in the future.

The Hon. GREG DONNELLY: Commissioner, in relation to RailCorp, you mentioned there was a program of completing investigations with the production of a final report into RailCorp.

Mr CRIPPS: Yes.

The Hon. GREG DONNELLY: Are you able to provide a timetable about your intentions in this regard in some detail, or is it something that will be done in due course?

Mr CRIPPS: Could I take that on board?

The Hon. GREG DONNELLY: Sure.

Mr CRIPPS: I am conscious that we have timetables for these things. I would just like to get a clearance that I can make that available under section 64 because we are still investigating.

The Hon. GREG DONNELLY: Sure. That would be good

Mr CRIPPS: If we can, you will get it.

The Hon. GREG DONNELLY: That would be fine. My next question relates to the issue of overseas jurisdictions. Obviously corruption investigating bodies are creatures of their own legislative framework. I think we all appreciate that. Looking around the table, I am not speaking for other members but for myself. I am pretty unfamiliar with similar sorts of bodies around the world. From time to time we hear about the Singapore model being quite a good model and been quite strong in different areas. There are obviously weaknesses and strengths for each institution. I am just wondering whether you think it would be of value for this Committee, on an ongoing basis, to keep itself apprised of best practice inside some of the comparable bodies overseas. I note there was a conference last year—I was unable to get to it and I do not know whether other Committee members went to it—where there were bodies coming together in respect of this from Singapore and elsewhere. But in terms of a Committee like this being better informed about best practice, internationally speaking, for

corruption bodies, do you have a view about whether we should be trying to inform ourselves about that?

Mr CRIPPS: Yes, I think you should, but what I would encourage you to do is probably not just go around and look at what everyone else has done, but see what they are intending to do and how efficient they are. For example, there is a view abroad that we are very similar to the Hong Kong ICAC. In fact, our similarities begin and end with the name. The Hong Kong ICAC is a law enforcement agency. People have the right of silence, they have privilege against self-incrimination, they have legal professional privilege, they call people and hold them incommunicado for 40 days or something—they have huge powers. They employ 1,400 people for a population of 7 million, which is about the population of New South Wales, and they have legislation which says, for example—this is the biggest thing in the public area—that if you, as a public servant, cannot account for your wealth by reference to your salary, and you fail to give a proper explanation to a judge, you can go to jail for 10 years. You tend to think: Who wants to remove privilege against self-incrimination if you have those powers?

They say, and I do not criticise them for this, the problem was very great, as was the problem they had with getting the legislation through; they had to pass legislation that effectively bypasses it all. But that is what you have to look at. If you do not mind my saying so, it raises the issue that I have raised before in my opening, namely, what it is that Parliament wants us to do? At the present time, on the face of legislation, it is to expose corruption and probably, as I say, prevent or reduce corruption. That is really what the Parliament wants to do. If it wants us to go further than that, by all means look at other institutions and see how they work, with probably one caveat: well before your time everyone used to say that if something happened in Sweden or Canada, everyone should follow it in Australia. I got to the point that whenever anyone mentioned Sweden or Canada, I held both sides of the chair.

The Hon. GREG DONNELLY: I well appreciate the point you are making. My next question goes to the question of technical capability. If I recall, last year we asked Mr Symons a question about whether or not ICAC has, to coin a phrase, the very best or very good equipment and technology to deal with the villains and crooks, given that they are very sophisticated and clever. I do not have the transcript from last year. If I recall correctly, I think the general answer was that there was a belief that you are pretty much up there in terms of the capability and in terms of what you need to carry on your investigating responsibilities and powers.

Mr CRIPPS: Yes.

The Hon. GREG DONNELLY: I am just wondering whether that is still the view—that in fact you have the very best in terms of what is needed to conduct the investigations?

Mr CRIPPS: Yes.

The Hon. GREG DONNELLY: If not, what would need to be done to address that issue?

Mr SYMONS: Do we have the very best? No. What would we do to adjust it? Triple our budget. To be sensible about it, yes, we are continuing monitoring what is available in

the marketplace and what is suitable for our application. We have bought equipment this year. We have worked within our budget application for that type of equipment. I do not have any major problems of equipment in the sense that we have been withheld funds; in other words, we do have the right equipment. Yes, we are monitoring all the time. We are involved with other agencies—continually involved with other agencies in joint committees and things—to see what is in the marketplace. But, look, we could get a satellite put up in the sky that can pinpoint your badge on your shirt, but we are not going to go to that length. But, no, we do have sufficient equipment. I am content that we do monitor the outcome.

The Hon. GREG DONNELLY: Sure. My final question goes back to a point Reverend Nile made in his line of questioning about the memorandum of understanding with the DPP. On page 20 of the answers to the questions on notice, if you do not mind my saying so—and I am not being cheeky here—your answer to question 29A does not quite clearly answer the question in terms of are you satisfied. I think in answering the Reverend's question you said, and I do not wish to paraphrase you, words to the effect that you were as satisfied as you reasonably could be in the circumstances. This was not in your answer but in response to his questioning this morning.

Mr CRIPPS: Oh, I see.

Reverend the Hon. FRED NILE: It is question 29.

The Hon. GREG DONNELLY: It is on page 20 and it is question 29A. You lay out the assignment of the lawyer with the DPP.

Mr CRIPPS: It does not seem to be on mine. Would you mind just referring to it again?

The Hon. GREG DONNELLY: This is page 20, question 29. The question asks, "Are you satisfied with the current MOU and its operations?" You lay out in your answer what is there, but it seems to me that in terms of our reflections last year—we went through this in a bit of detail and I think it was raised last year in particular when questioning the Inspector—a tension operated in different manifestations, if I may put it that way. Obviously the MOU has gone some of the way, and I think that can be implied both from what you say here and from your comments this morning, but do you think there is more that we as a Committee could do to press forward and improve this even further, or are you content to allow it just to settle, see how it goes for a period and then review where we are after a reasonable period?

Mr CRIPPS: I suppose my short answer is that you make up your own minds about what you would prefer to do. So far as we are concerned, you can ask Ms Hamilton again how good this is and whether it wants improving. I think she has already said that we are hoping for improvements. I am sorry if that answer was ambiguous. But it also raises this question in relation to which I would like, if we could, to request a response: Could it clearly be identified what our role is intended to be? Once we get that clear, a lot of other things will follow. But as far as what the parliamentary Committee wants to do, I can see no reason why the parliamentary Committee cannot take what steps it wants to take, unless they apply to particular investigations. By the time we are dealing with these matters that are in the MOU, the investigation is usually finished. You cannot talk about what happened in the investigation, but you can talk about what might happen to people who are going to be punished or not punished.

Ms JODI McKAY: My question relates to the implementation of the ICAC recommendations. I know we have touched on RailCorp and the Department of Corrective Services. I am taking into consideration that I am a new member, so feel free to say that I am totally off track with this, Commissioner.

Mr CRIPPS: Yes.

Ms JODI McKAY: I sit on the Public Accounts Committee as well, so we work with the Auditor-General. One of the important roles that we play is in terms of closing the loop on the implementation of recommendations. An initiative we introduced this year relates to the holding of public hearings, the bringing in of departments and asking them about the implementation of recommendations. This relates purely to systems and processes and making them accountable. Putting aside the terms of reference of this Committee, because we need to look at that, it seems to me it is about closing the loop in a public sense. I know you have reports at 12 months and 24 months, but what we found in introducing this approach is that suddenly departments get very busy about looking at those recommendations because they are called in here and they appear before us. If they discount a recommendation, we ask them to account for that approach and why they are not following up on that. Is that not something that could be of assistance?

Mr CRIPPS: Yes, I suppose so.

Ms JODI McKAY: Taking aside the terms of reference of this Committee, is that something that could happen?

Mr CRIPPS: Yes, I think it is. I think it is something you could do and it probably would be helpful to us. I imagine your Committee deals with waste and mismanagement as well as corruption?

Ms JODI McKAY: Yes, it does. It is primarily related to systems and processes. The Auditor-General has found it very helpful because it is closing the loop and it does something that he cannot do.

Mr CRIPPS: Yes.

Ms JODI McKAY: Other than the annual reports, such as the 12-month report and the 24-month report, we can as a Committee bring them in and ask them to account for the implementation of those recommendations.

Mr CRIPPS: Yes.

Ms JODI McKAY: It is a follow-up audit that is saying that we are not just accounting for it in a recent report, but actually saying, "How did you do this internally? What are the processes that you have now implemented within your organisation that are following up on what you have done?"

Mr CRIPPS: I am sure that would be of value to us. It would be a source of information that we could have regard to, so long as it did not put us in that position that Dr

Waldersee said we should not be in; as long as it would not put us in that position.

Ms JODI McKAY: No.

Mr CRIPPS: You would just be furnishing us with information. I think, speaking for the commission, we would be grateful to have that information.

Ms JODI McKAY: All right. We might take that on board, Chair. The other question I have relates to the work you have been doing with the Health Care Complaints Commission. I notice there is some substantial income forecast. Is that the motivation for the efficiency of shared services, or is the motivation about income generation? How did that eventuate? What is the motivation for it?

Mr FAVELLE: I think it is both. Personally I think it is both. It has been a Government reform program for corporate services for a number of years to have a shared service environment. One of the limitations that ICAC would have is that, because of the nature of what we do, we need to maintain control over our own corporate service activities. We have covert operations, et cetera, that we need to keep secret, but there was always the opportunity for us to provide services to another party. Because of associations we had with some of the people of the Health Care Complaints Commission, this was the opportunity where we could do that. It allows that shared service environment.

It certainly gives us the ability to maintain the capacity to offer a range of corporate services, with the Government obviously needing to maintain strict control over funding, and we are subject to normal Government funding, efficiency gains, and things like that. We knew that if we continually have to meet these efficiency gains without some ability to defray some of our costs, such as corporate services, that would cause us a problem in the future. It is both income generation but also obviously efficiency in terms of a scale.

The other factor that I have always promulgated, I suppose, as part of doing it is that we are like agencies, and we have an understanding of the role that they perform. That helps in relation to the delivery of corporate service for them. If you are a bureau-type of involvement at the corporate service level, you may have no real understanding of the underlying operational areas that are being delivered by that other agency for which you are providing corporate services. It gives us synergy that allows the organisations to benefit jointly, both in terms of the services and in terms of the nature of what they do. Corporate services, certainly in things like human resources policies, are more focused and they might be developed in consultation with the Health Care Complaints Commission at their particular operational requirements, rather than if you are a separate agency that would not understand it. It has a range of benefits.

Ms JODI McKAY: Is it something that you are looking at expanding further? Obviously the synergy has to be there.

Mr FAVELLE: The synergy has to be there. We have looked at other possibilities, but the problem is that if we go beyond the size we are now, we have to probably bring in a lot more resources and then it becomes not so economical. At this stage we have been able to use some level of excess capacity.

You might have 15 per cent of an accounts payable officer. You cannot suddenly get rid of 15 per cent of an accounts payable officer but you could get some other work that utilises their time. Once you get to a point where you are pretty well utilising most of people's ability to provide services you have to add extra resources and it may then be counterproductive. We could do limited things but at this stage I think they would be limited into the future.

The Hon. JOHN AJAKA: Commissioner, we have talked about ICAC having dual roles of investigation and education. One of the difficulties I have with the dual role of education is that when an educator goes into a department to try to educate and meet with and talk to various personnel, they know that person is from ICAC and I see a difficulty with the free flow of information that they might not have if you were not ICAC, if it was another department. I am wondering whether having the tag of ICAC, who you are and the powers you have inhibit some of those you are trying to educate against corruption, or is it the opposite and it helps. What are your views on that?

Mr CRIPPS: I will let Dr Waldersee answer that, except to say this: I suppose it depends on what education you are providing. If it is being provided by somebody else on the basis that it is going to go to ICAC anyway, I do not know.

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

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

The Hon. JOHN AJAKA: That leads to my next question. Looking at the aspect of resources, if there was a genie in a bottle and you were able to order more resources—not to the extent of looking at the badge on my lapel—at a realistic level does ICAC require further resources to be able to increase its educational component? In other words, if you are using 97 per cent of your resources on investigation and only three per cent—

Mr CRIPPS: I do not think he said that.

The Hon. JOHN AJAKA: I am not saying he is saying that, but if you were, and clearly you do not want to reduce your investigation resources—you need those—is there a need or a request for additional resources for education by way of personnel, money etcetera? Is that something this Committee should look at?

Dr WALDERSEE: First of all, I do not want to have misled this Committee.

The Hon. JOHN AJAKA: I did not mean it that way; it was just an example.

Dr WALDERSEE: Education is one part of the corruption prevention division, it is not all of the division. The corruption prevention division provides ongoing advice to agencies that ask us "What do we do next?" There are assessments referred to us for advice, so it is a corruption prevention issue not an investigation issue. We are involved in investigations. I am not trying to say our entire division is only three per cent. It is the education function within that which is integrated into the rest.

The Hon. JOHN AJAKA: I understood that.

Dr WALDERSEE: Okay, I thought there might have been a misunderstanding. I then promptly forgot the question.

The Hon. JOHN AJAKA: Is there a need for further resources to be able to increase the educational aspect so that it would have some realistic effect on prevention?

Dr WALDERSEE: My approach since I have taken this position has been that we probably have not achieved the maximum impact out of the resources we already have. There are a grand total of 22 to 24 of us and there are tens of thousands of public sector employees and hundreds of agencies. To spread ourselves across all that is pointless. We could not do anything and nor would I dare ask for the amount of resources we would need to do that. As I mentioned earlier, we are moving to a much more focused approach, targeting the particularly high-risk areas. We have just completed a planning day where we believe we have identified those high-risk targets. It is now a matter of redeploying within the division to make sure that we are able to bring to bear our corruption prevention education, research and training capabilities and go out there and actively target these areas. Until that is done it would be unreasonable to ask for more money because the short answer is that it is not yet clear we have achieved the maximum bang for the buck, to use that term.

The Hon. JOHN AJAKA: Commissioner, when you ask us to have a good look at what should be the role of ICAC, do you see that maybe there should be a concentrated effort on the more serious and more systemic corruption and not simply have ICAC looking at each and every matter referred to it? Maybe even the referral to ICAC should be vetted so that it allows you to concentrate your resources on what the public would perceive were the major matters of corruption.

Mr CRIPPS: Yes indeed. Let me say this, though: The legislation itself, which was amended about four or five years ago, in terms said ICAC had to direct its attention to serious and systemic corruption. There was some doubt about what those words meant—

was the word "and" meant to be construed disjunctively or conjunctively. I took the view that it was to be construed disjunctively, so it was "or". We have got that. To that you have to add the definition of corruption. From a lawyer's point of view the definition of corruption is capable almost of sweeping up anything that amounts to being dishonest if there is a disciplinary procedure in the agency. I cannot have people telling me someone is corrupt because they lied about being at their grandmother's funeral and that can result in disciplinary action. I took the view, when I was looking at this issue in more detail than I have since looked at it, that there was indeed justification for people to say that in theory at least the definition of corrupt conduct travelled far beyond what people in the street would think was corrupt conduct.

However, when I was doing that inquiry I wrote to the Bar Council, the Council for Civil Liberties and the Law Society and said, "I have had this raised with me. Would you please give me illustrations of when conduct has been declared to be corrupt that people in the street would not think is corrupt?" None of them could give me an illustration of it, so I finally took the view that if you start mucking around with the definition you are going to have more litigation, and it has not happened. We do this all the time, incidentally. We see something that could be corrupt and we send it back to an agency or we think it is so minute we might not do anything about it. We are doing it the whole time. We are concentrating our resources. People have to have regard to the fact—people may not like us saying this—that sometimes you get to the position where you are so flooded with work—indeed, State Rail has flooded us with work—that you have to start making priorities as to whether you can keep on doing it. We have had occasion in the past, with the cooperation of the Parliament or the Government, where we have said we really are flooded and we have a really bad one coming in, can you help us out, and we have been helped out.

The Hon. JOHN AJAKA: Is there an argument that the definition should be "serious and systemic", not "or"? Is there an argument that that would—

Mr CRIPPS: No, I do not think so myself, because you could have something that is hugely serious but may not be systemic. We have done one—the mayor of a municipality taking a bribe, money across the counter. That would be serious. The more tricky one is what should we do if it is systemic but not serious. I think my answer to that would be I would like to see what it is they are talking about before deciding how we deal with it.

The Hon. JOHN AJAKA: Thank you, Commissioner. Looking at the role of ICAC, is there an argument for ICAC to be a little more like the Hong Kong model, where they actually have the final power of prosecution, to eliminate this problem? One of the difficulties I have is hearing that you receive an initial complaint and seven years later someone is looking at whether charges are going to be laid. I just find that preposterous. Given the fact that you have already got into the investigation and you have special counsel who is well aware of it, should he suddenly take on the role of Crown Prosecutor and continue with it so that you see it to finality? Is there a good argument for this Committee to look at that?

Mr CRIPPS: I thoroughly agree with you that the administration of criminal justice requires a statement that it is an outrage for someone to be prosecuted 10 years after they have done something unless there is some really good reason for it, like someone has been murdered and nobody knew about it. But it is really a matter for the Parliament to tell us what we should be doing.

The Hon. JOHN AJAKA: Which is what I am after.

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

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

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

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

Mr ROBERT COOMBS: The Hon. John Ajaka has stolen my thunder somewhat. What I am trying to grapple with is utter frustration—both yourself and indeed Mr Kelly

articulated this last week—in that you have investigated, you have obviously got a position where in all likelihood there is corrupt activity but nevertheless a prosecution is not undertaken or it just fades and ends up in an inappropriate situation, to say the least. Mr Kelly even described the situation where one particular person from a government agency was not prosecuted and ended up with promotion. When we asked him what is to be done, he mentioned the Hong Kong model. I have not had a look at the Hong Kong model but from your short synopsis this morning I am not sure that the Hong Kong model is appropriate for the circumstances in New South Wales. I said at the outset that I am grappling with this because I would like us to be doing something concrete about it.

I am wondering whether you have any comment on what is best to be done. Should we be writing to you with some recommendations, or can you make recommendations to this Committee? It might go so far as using the current system better. It might go to a situation where we do make some recommendations back to our Parliament in relation to implementing some law enforcement principles and all that goes along with it. Of course, all that stuff, I do not have to tell you, and I think you just touched on it—there are tremendous political implications with it but as far as I am concerned there are probably just as many political implications if we do not lift the bar and recognise that, despite all the good work over the past 15 or 20 years, there is still a corrupt element out there and we have to tackle it. I suppose it is a long-winded question but nevertheless I think it is time somebody dipped their toe in the water, so to speak, and said, "Come on, this has got to be done if we are to go to the next level."

Mr CRIPPS: I think I have unambiguously dipped my toe in the water about what should happen to disciplinary proceedings and civil proceedings: Protection should not be there. Some might say that I am up to my knees in water. Also, you have to remember—this is why I would like Parliament to think about what it wants of us because eventually that is what we are; we are a servant of the Parliament. Eventually it must work out what it is because, leaving aside section 37, under our legislation, as you know, we do not have to be satisfied beyond reasonable doubt before making a finding of corrupt conduct, although the seriousness of the finding is certainly taken into account in whether you come to a conclusion. So we have that problem, and maybe they say, "Well, if you go any further you have to have it beyond reasonable doubt". But these are issues that people have to talk about, but I actually agree with you that if you have an institution like the one we have and you want to make it function and you want to have the public confident that it is functioning, I think we have to go a little further about how you treat people who have been caught stealing from the public.

Mr ROB STOKES: I have two questions. I have been listening to what has been going on today and also the interview we had with the inspector, going to the role of ICAC. I noted the inspector's comments that he felt that there might be some sense in having the policy function transferred to a central unit of government.

Mr CRIPPS: That is for prevention.

Mr ROB STOKES: For prevention. In light of that, in light of Dr Waldерsee's response to those comments, and also to the fundamental position that corruption risk arises where there is an institutional discretion, in light of those things, are you satisfied that there is an appropriate level of consultation between the commission and a Minister or department in the preparation of legislation that institutionalises discretions? What I am thinking of specifically if there has been a lot of activism by the Parliament in relation specifically to

planning law and that has shifted a lot of the discretions from a local level to a central level. With that as an example, have you been satisfied that there has been an appropriate level of consultation between the Parliament and the Parliamentary Counsel in preparing legislation of that type, or do you think there is a need for a formal protocol or those sorts of things?

Mr CRIPPS: I do not think there is a need for a formal protocol about this. I think we have been informed by the Government what it proposes to put to the Parliament. I suppose we would also accept any view that was put by the Opposition as to whether it has a role, but at the end of the day it is a parliamentary decision. Frankly, I cannot understand how governments in the Western World could operate if the bureaucrats did not have discretions. You would end up like Russia was, I think. Of course, planning generates more discretion than perhaps most others because whether you get a planning approval or not may mean you are a millionaire or you are broke. These are very big problems, and the bigger the discretions, the bigger the risk, particularly if the big discretion is sounded out in big money.

I suppose if there were a protocol as to how everyone got together before legislation finally went into the Parliament, I could certainly look at it. Let me just say that at the present time we do sometimes get views from the Government and sometimes we do not answer them because you can see the question is asked so they can get up in the Parliament and say, "ICAC has ticked this off". So we just do not answer it, but we have a look at it and see whether we will answer it or not. The same as we would look at anyone else from the Parliament to make a submission, but we have it in our own mind that we had to respond to this in a way that keeps us above party politics and at the same time can make a useful contribution to the debate.

Mr ROB STOKES: My second question is also related to planning matters. I noted Dr Waldersee's comment about an investigation focusing on planning matters for coastal councils. That made me reflect that as a result of the major project SEPP most significant coastal developments now fall within the ambit of the Department of Planning. Is your investigation designed to look also into the department, given that that is where most of the discretion now lies?

Dr WALDERSEE: I do not want to go off the track again but it is not an investigation; it is intervention, meaning it is an activist corruption prevention activity. We are not going to demand councils let us in to investigate them. It is a proactive corruption prevention and intervention, not an investigation. But I agree with your point that everything within a kilometre of the beach is a State level should they choose to do so. Are we going to look at that or intervene there? It is not on our list at this point. When I say it is not on the list, it is on the list; it was about number three after, I think, health and human services, infrastructure and then planning. They were seen in about that order as probably the riskiest so picking them off one at a time it was not currently top of the list but I take your point. What happened in Wollongong could easily have been simply shifted to the central level and the same thing occur there. But it is on our list. We just thought there were higher risk items.

Mr CRIPPS: Can I add to this because planning is an area about which I had some knowledge before I took on this job? What is self evident about planning and the fact that you have a discretionary planning system is that there are huge corruption risks. However, it is for the Parliament to decide how to deal with those. They are so obvious that it is a wonder anyone has to say, "What are the planning risks? What are the corruption risks?" They are obvious: bribes, all sorts of things. The question is how you deal with it and at the same time keep the system fluid and discretionary, as it has to be. That is what I think. I

know I am avoiding answering the question but I do not think ICAC has a special expertise in that area at all. I think everyone in the community has a view about how you stop this, the people's representatives in Parliament best of all.

Ms LYLEA McMAHON: In relation to councils' general inspections, I know that many other agencies have the power of identifying an area of potential risk, particularly to conduct general inspections. Is that something within the consideration or auspice—

Mr CRIPPS: General inspections?

Ms LYLEA McMAHON: Yes, general inspections. If there is an area that you identify at risk. Underpayment of wages in the hospitality industry, for example, was identified as an area of risk from the Office of Industrial Relations, so it has the power to conduct general inspections in restaurants.

Mr CRIPPS: We have not done that, to my knowledge.

Ms LYLEA McMAHON: Is that something that is either within the consideration or the auspice of the powers of their ICAC?

Mr CRIPPS: Well it does relate, I suppose — people here may have different views about this, but it does relate to the function that we have of being what they call proactive rather than reactive. The question is what we should do and how much more money we need to do it.

Dr WALDERSEE: I do not know whether the ability to inspect without cooperation of the agency is permissible under the Act as it has not been done. It would be an activity in high-risk areas that it would be quite nice to have if you felt that a coastal council, for example—to stick with that example—was potentially at significant risk, that it was not doing things appropriately, for corruption prevention to be able to say, "We would like to have an inspection of what is going on just to make recommendations." I think the problem, as I understand it, is if we do turn up corruption, then there is little choice but to report it and proceed to an investigation. So it all becomes quite coercive, which reduces people's willingness to cooperate. So in short it would probably be nice but it would be exceptional or where you would ever use it.

Mr SYMONS: We have the right under section 20 of an own-initiative investigation but that would have to be based on reasonable grounds.

Ms HAMILTON: Presently, the commissioner can authorise us to enter any public authority and inspect their records and copy them if it is suspected corrupt conduct has been occurring. I think you are talking more about a prevention style of general inspection.

Mr CRIPPS: It is almost like an audit.

Ms HAMILTON: Like an audit, which we do not have at the moment, and I think, from what Dr Waldersee said, he thinks it might be counterproductive in that you would not get the cooperation in any case.

Dr WALDERSEE: It would be very rarely you would want to use it, I believe.

Ms ATKINSON: In the past we have undertaken what we used to call corruption risk reviews but again that was with the cooperation of the agency. We discontinued those, and they will have a rebirth in the form of a self-directed corruption risk review on the Internet in due course. That project is in train at the moment.

Reverend the Hon. FRED NILE: You put some proposals to the committee about some changes to legislation. It would help the committee if you would put that in writing and send it to the committee or to the Minister?

Mr CRIPPS: Yes, we will send it to this committee and then you can decide what you want to do with it.

Reverend the Hon. FRED NILE: You could send it to the Minister with a copy to the committee?

Mr CRIPPS: Yes, or we can do both: give it to you and a copy to the Minister or to the Minister and a copy to you.

Reverend the Hon. FRED NILE: Just so there is no confusion over exactly what you want. I would like to be precise in order to deal with your issue.

Mr CRIPPS: Yes.

CHAIR: Reverend, is that in connection with section 116?

Mr CRIPPS: Yes, are you talking now about section 116?

Reverend the Hon. FRED NILE: The one about the civic and disciplinary proceedings.

Mr CRIPPS: Yes, okay there is that one.

Reverend the Hon. FRED NILE: You did say earlier you would like more precision on the role of ICAC?

Mr CRIPPS: Yes. There is one mentioned in our submission about whether we extend the limitation period beyond six months because we often do not find out people have been deceitful to us inside six months. We can put them all down in writing.

Ms HAMILTON: There was also the perjury?

Mr CRIPPS: Yes, lying under oath should be treated as seriously as perjury.

Ms HAMILTON: They are the core issues.

Mr CRIPPS: We will do that, certainly, yes.

CHAIR: I note the table included in your answers in your submission to question 28. I thank you for providing that, it is very useful, as a proposal that details time limits or time

taken for you to refer a matter to the DPP and ultimately get advice from the DPP. It clearly shows at a glance the enormous delays that you have had in the past. I noticed towards the end of that table in operations Cadmus, Aztec, Quilla and Pelion a general reduction in the days that it has taken the commission to submit a brief. We talked earlier in the last meeting, as I remember, about you preparing admissible evidence during investigation. Is there a connection with that new practice? Has it generally reduced delays?

Ms HAMILTON: Yes, I would say that it has. Could I say, for example, in Cadmus charges have now already been recommended and laid, and I think that shows that if you can get the briefs over there more quickly they will be looked at more quickly and charges can be laid more quickly. And also in the next public inquiry that we are going to hold that will be the first time where we actually look to have the briefs ready practically by the end of the public inquiry, Mr Symons informs me. So that is what we are working towards, that there will not be a big delay; that the briefs will be getting prepared sort of almost as you go and that will be reducing and reducing.

Mr WALDON: Could I just add to that just briefly? You will notice on the first page of that chart in relation to operation Cordoba the number of days between the report and the brief to the DPP was 96, which was a very low number of days. We looked at why it was in Cordoba that we were able to get the brief to the DPP much quicker than in other matters. One of the reasons we identified was that something similar to a brief preparation plan had been worked on between the lawyer and the investigators working on that matter so that the offences had been identified, the elements of those offences had been identified, and what evidence we needed to put together to prove those elements had been identified. And then in putting together the brief that document had been used to assemble the brief. So what we have done as a result of that is now to change our procedure and introduce preparation of brief preparation plans as a mandatory matter for all new matters. Those plans are being prepared and signed off by the lawyers and the investigators by the executive director of ID and myself. They are then being used as a plan to put together the brief. So I think from now on that will assist in also bringing down the number of days between the investigation being conducted and the brief going to the DPP.

CHAIR: I detect from that table and from your remarks in answer to question 29(b) in regards to the memorandum of understanding, you quite rightly point out that the process of improvement is going to take some time to take into effect. You also mention at the beginning of page 21, I detect, that already some improvement has occurred in the Office of the DPP getting material back to you which is very encouraging to see. I will be very interested to see how things develop from there, in particular, with new provisions in the memorandum of understanding about the allocation of lawyer. I would like to think that we could expect less time with the commission doing investigations as a result of replying to requisitions by the DPP. In one case I saw you had to procure 35 statements, which seemed to me to be astounding, considering you have already conducted an investigation. That leads me to the next question. You mentioned that you are not authorised to continue and seek statements in response to requisitions by the DPP if there is no investigation. Do you need any legislative amendment for that?

Mr CRIPPS: I think it gets back to what we talked about earlier what the Parliament wants us to do. First of all, I have a very firm view that we cannot get statements from people unless we are investigating, exercising our coercive powers. I do not think, for example, when we are finished investigating and prepared a report—I know theoretically we never really finish—I do not think we can say because we have started investigations we

can haul people in left, right and centre to get information from them about criminal prosecutions. As you know, although the answers people give on these compulsory powers, cannot be used against them, the answers cannot, the information can and often is. So the law enforcement authority can just go around and, in fact, get admissible evidence for something that they know is the fact but cannot be proved they would like it to be proved.

Now we exercise this function at the present time. I have the greatest misgivings about us ever using this otherwise than while we are investigating a matter, and consequently I have a misgiving, but not as strong, as to whether we should be even going out and interviewing people about these things. They obviously think they are being interviewed by the police. But I am not saying it should not happen, all I am saying is you, I mean the Parliament, ought to regulate and tell us what you want me to do.

CHAIR: You have highlighted in your opening statement and throughout the course of this hearing that there needs to be a clear setting out of your role. The inquiry that you started that ended up being called the McClintock report, taken over by Mr McClintock, SC, touched on a few of these issues.

Mr CRIPPS: Yes.

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

Mr CRIPPS: Yes.

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

Mr CRIPPS: Yes.

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

Mr CRIPPS: At least lying to the commission.

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

Mr CRIPPS: Yes.

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

Mr CRIPPS: I must say I have not really pursued this until I get an indication, I suppose, in a sense of what Parliament wants us to do. I suppose an issue could arise where I say a matter should be prosecuted but the DPP says "No". When that happens I know that I can lodge the CAN but the DPP can just simply withdraw it because he can take over the proceedings. I am not saying these sorts of things happen. I think we ought to have

a greater say in who gets prosecuted and who does not. We have had a few examples, which I will go into in private if you want, but not publicly.

CHAIR: You mentioned those in your report.

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

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

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

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

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

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

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

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

CHAIR: How far?

Mr CRIPPS: It would have to be worked out I suppose in conjunction with what the Government or the Parliament wants with respect to the role of the DPP and the role of us. For example, as an illustration, what happens when I think a recommendation someone should be prosecuted for telling lies. The DPP then looks at it and says "I do not think the evidence would lead a jury beyond reasonable doubt to conclude that" whereas I think it would or that "We have not got the wherewithal to do this. We have got other priorities on our plate" and that could well be right. The question is should there be an alternative?

Maybe there should. Maybe one can get the Solicitor-General to do the prosecuting on behalf of the ICAC.

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

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

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

Mr CRIPPS: Yes.

CHAIR: And perhaps have an agency prosecute until finality?

Mr CRIPPS: If there is a real dispute.

CHAIR: If there is a dispute with the DPP?

Mr CRIPPS: Yes.

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

Mr CRIPPS: Yes, it does.

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

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

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

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

CHAIR: Which creates the issues that you have highlighted. I just wanted to be clear on what it is you thought was appropriate. Just one other matter, again within the McClintock

report about public inquiries and private examinations of public inquiries. As you are aware, when ICAC first started off it was very much an out-in-the-open exposure of corruption because the scene was very different back then, and over the years it has changed to more of gathering admissible evidence but more so a restriction on public inquiries. Before the McClintock report I think section 31 referred to the fact that hearings can either be held in public or in private and will be determined by the Commission according to public interest.

Mr CRIPPS: With a preference to go public in the earlier legislation.

CHAIR: That is right. Very early it was the presumption was public but you could set up a private examination if it was for certain reasons. Then I think in 1991 it changed: it could be either according to the public interest, and of course as you know, with the McClintock report the legislation changed again. Mr McClintock obviously recognised the importance of a public hearing in your commission, and I have no qualms with that: I think he called it the culmination of investigation and an investigatory tool. I personally do not cavil with that. Other members might have a view but I do not cavil with that. How has the new change in legislation affected the processes?

Mr CRIPPS: I am not sure about that. Maybe Mr Waldon can answer that because he has been with the commission virtually since it started. The McClintock view, which was essentially the view I had, although I had not reduced it to writing, I adhered to from the moment I became Commissioner. I took the view that there were all sorts of considerations that had to be gone into before you went public; you should not just presume because you are going to do an inquiry it should be done in public; you had to have regard to people's reputations and the like.

But there were cases where, for example, the only way the public could be confident that you could resolve a highly disputed issue of fact would be to do it in public. In that event a person's reputation would probably have to stand behind the public interest in ICAC proceeding properly. But perhaps Mr Waldon can answer this question.

Mr WALDON: I can answer it very simply I think. I do not think there has been much difference in what has gone public and what has not gone public both immediately before and immediately after the McClintock report. I think there was always, prior to the McClintock report, careful consideration given to why we should go public if we were looking at going public. I was looking for it but I have not been able to find it but I think in answer to one of the questions on notice we set out an extract from our operations manual.

CHAIR: Question 34 on page 24.

Mr WALDON: The issue about serious and systemic corrupt conduct is obviously an additional matter which came in as a result of changes to the Act. But most of those dot points were in previous operations procedures dealing with the issues that you would take into account in deciding whether to have a public inquiry or not. So I think the short answer is I do not think there has been much difference in what matters have gone public and what matters have not gone public as a result of those changes to the legislation.

CHAIR: It was mentioned in the McClintock report that there were some excerpts from the parliamentary joint committee back in 2002 where they came up with a recommendation saying that wherever possible, as I remember it, investigations we cannot

do in private and there would be an expository type public hearing on already investigated material when there is sufficient to make an adverse finding. I think things have moved a long way in the way the commission operates, and I think it is operating very well, but how far away do you operate from that?

Mr CRIPPS: I do not think we do operate that far from that. Obviously, we do not have a public inquiry unless we really see that there is a case for having it, and there is a double-barrelled reason for having it public: one is to just expose, which we are meant to do if we can; it is also to give the person who is on the receiving end of the allegation the opportunity to counter that allegation in public, if that is what that person wants to do. But generally speaking it is done in the context that we have had an investigation and we have a fairly powerful case. I do not mean by that that people should think because we go public therefore we have got a committed view on anything, because that is not so. One of the big things we take into account in a public inquiry is the person who is on the receiving end of the allegation must have the chance to put all information before us that may counter the view that the commission might prime facie hold.

But then we could have a case, which I have not had really at the present time, where ordinarily you would not go public, but in order to satisfy the public that the matter is being treated properly and openly, with transparency, you might have to go public. But, having said that, I have to say I am not going to be railroaded by politicians either. I have to make my own independent judgement about that, but it could happen.

CHAIR: I noticed, I think it was, the Bankstown-Strathfield inquiry, did not go public. Incidentally, could I say this: you are not obliged to give reasons but you do, and we all appreciate that. But I think in those reasons you said that the evidence had already been gathered. So it seems to vary from case to case, from inquiry to inquiry. I just wanted to ask how far away you operate from that original recommendation from the parliamentary joint committee, and it does not seem like it is very far away from it at all.

Mr CRIPPS: I do not think so.

Mr WALDON: I do not think it is that far away. I take on board what the Commissioner says as well: I do not think we want to get to the stage where we do everything in private and then, having established the facts, do a show hearing in public. I do not think we want to do that. But what we want to do in private, I think, is to get enough evidence to establish whether or not there is an issue of corruption to show whether it is a serious or systemic issue, and then we can make a decision whether we should continue it in private or go public. And the public inquiry stage is not just a revealing of what has happened in private or the compulsory examinations, it is also there to adduce evidence and obtain additional evidence to enable us to establish whether there has been corrupt conduct.

But certainly a lot of work is done in private in order to get to that first stage of determining whether there might be something there that is worthwhile investigating in a permanent public arena.

CHAIR: Do you get many instances when you conduct a public inquiry where people approach you for the first time?

Ms HAMILTON: As a result of the public inquiry?

CHAIR: Yes.

Mr CRIPPS: Yes, we have had that—very few. But mostly they are people who know what the issue is and say, "It is much worse than you think it is".

CHAIR: Is it theoretically possible clinically to have a private examination and gather enough evidence to make adverse findings and simply have a straight expository public hearing?

Mr CRIPPS: Yes, it could happen. But one would have to be very careful when one did that that first of all we never denied anybody's right to answer the allegation the way they wanted to answer it if it was a reasonable way to answer it. If people said, "I know you say that, but I want to say this and I want this public", it would not bind me but I would take that into account.

CHAIR: In your requested amendment to the Act, section 116, if you have any further comment to make I do not have any difficulty with that at all.

CHAIR: No, I have no further comment.

CHAIR: Admittedly I had not noticed it and I cannot see why section 82 (v) is not included in that section.

Mr CRIPPS: I think there are four matters.

Ms HAMILTON: There are four but the one that the Chair is referring to is extending the time limit to three years, which it has been for similar offences, and there just seems to be no reason why it should not be extended also for that, and we would appreciate the Committee's support to do that.

CHAIR: Unless other members want to make any comment about it, I do not have any problem with that. If no-one else has any other questions what we propose to do is perhaps have a short break and then move into an in-camera session.

(Short adjournment)

(Evidence continued in camera)

(The Committee adjourned at 1.26 p.m.)

DOCUMENT TABLED BY ICAC AT PUBLIC HEARING ON WEDNESDAY 9 JULY 2008

Common themes in six previous ICAC investigations into RailCorp

This is a summary of the types of corrupt conduct and modus operandi found in six previous ICAC investigations into RailCorp and its forebears. The six investigations are:

1. Report on Investigation into the State Rail Authority – Trackfast Division (1992)
2. Report on Investigation into the State Rail Authority – Northern Region (1993)
3. A Major Investigation into Corruption in the Former State Rail Authority (1998)
4. Corrupt Networks: Report into the conduct of a technical specialist in the SRA (2001)
5. Report on investigation into defrauding the RTA and RailCorp in relation to provision of traffic management services (2006)
6. Report on an investigation into corrupt conduct associated with RailCorp air-conditioning contracts (2007).

The most common types of corrupt conduct identified over the past six investigations are collusion, fraud and falsification of information (see Table 1).

Table 1: Common types of corrupt conduct

Type of Conduct	Year of Report						Present in Monto? 2007 / 2008
	1992	1993	1998	2001	2006	2007	
Collusion	✓	✓		✓	✓	✓	✓
Favouritism	✓		✓			✓	✓
Fraud		✓	✓	✓	✓		✓
Falsification of information		✓	✓	✓	✓	✓	✓
Bribery		✓	✓				✓
Conflict of interest			✓	✓		✓	✓

Utilisation/exploitation of professional relationships and friendships was identified as a key modus operandi in most investigations. The increasing emphasis in recommendations from recent reports on the need for improved monitoring/auditing of procurement records, suggests that falsification of information in procurement processes also remains a continuing problem. Table 2 summarises the modus operandi employed by corrupt individuals in the past six investigations.

Table 2: Common modus operandi

Modus Operandi	Year of Report						Present in Monto? 2007 / 2008
	1992	1993	1998	2001	2006	2007	
Drafting/falsifying tenders etc	✓			✓			✓
Recommending contractors/allocating work to favourites	✓	✓	✓	✓		✓	✓
False/inadequate certifying of claims	✓	✓	✓				✓
Help contractors prepare claims etc	✓	✓					✓
Use/exploit professional relationships		✓		✓	✓	✓	✓
Overcharging/false claims			✓		✓		✓
Disguised fraud					✓	✓	✓
Rail employees use own companies						✓	✓

While there is consistency in the practise of managers/supervisors improperly recommending and allocating work to favoured contractors, there is change over time in other practises. For example, in 1992, 1993, and 1998 the false or inadequate certification of contractors' claims of work performed (so as to enable them to receive payment) was common, but this was not a feature in the last three reports – although it appears common in some segments of Operation Monto.

In recent investigations, corrupt employees appear to rely more on indirect methods to pursue corrupt objectives, specifically utilising RailCorp's policy of contracting out services as a cover for corrupt schemes that involve procurement from contractors.

13 November 2007

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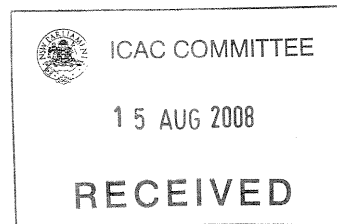
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Appendix Three – Questions taken on notice at public hearing including proposed amendments to the ICAC Act



INDEPENDENT COMMISSION AGAINST CORRUPTION

ICC 227
C08/719



Mr Frank Terenzini MLA
Chair
ICAC Parliamentary Joint Committee
Parliament of NSW
Macquarie Street
Sydney NSW 2000

Dear Mr Terenzini

RE: QUESTIONS ON NOTICE

The purpose of this letter is to answer two questions taken on notice at the hearing on 9 July 2008.

Ms McMahon asked a question concerning action taken in response to a recommendation made by the ICAC Inspector to improve probity vetting procedures.

I understand the Inspector's recommendation related to a staff appointment in 2002. The person concerned was initially appointed on secondment at which time the usual probity vetting was conducted. The probity vetting was conducted prior to the completion of a NSW Police misconduct investigation relating to that person. The person was subsequently appointed to a permanent position. There was no documentation on file to show whether or not any further probity vetting had occurred before the permanent appointment was made.

On the assumption that no further checks had been undertaken the Inspector recommended that the Commission review its probity vetting procedures to ensure that any previous checks are updated prior to permanent appointment of staff previously seconded to the Commission. He also recommended that all probity vetting records be kept on the same file.

It is current Commission practice to actively monitor issues identified in any probity vetting procedure. In the matter considered by the Inspector that would involve continued liaison with the NSW Police to ascertain the outcome of any investigation, making a record of that outcome, and assessing what if any further action should be taken by the Commission. The Commission also ensures that probity vetting files contain all information relating to probity vetting, including any updates and action taken in response to those updates.

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Appendix Three – Questions taken on notice at public hearing including proposed amendments to the ICAC Act

Mr Donnelly requested information on the publication schedule for the public report on the Commission's RailCorp investigation.

The Commission has decided to publish eight reports on this investigation. The first seven reports will deal with separate corruption exposure segments of the investigation. The final report will deal with corruption prevention issues.

The first two reports, dealing respectively with the conduct of Michael Blackstock and Renea Hughes, were made public on Wednesday 13 August. It is anticipated that the remaining reports will be published in September and October 2008.

Yours sincerely



Theresa Hamilton
Deputy Commissioner
14th August 2008

D10135880



INDEPENDENT COMMISSION AGAINST CORRUPTION

ICC 227
C08/720



ICAC COMMITTEE

15 AUG 2008

RECEIVED

Mr Frank Terenzini MLA
Chair
ICAC Parliamentary Joint Committee
Parliament of NSW
Macquarie Street
Sydney NSW 2000

Our Ref: Z08/0094

Dear Mr Terenzini

RE: Proposed amendments to the *Independent Commission Against Corruption Act 1988*

The purpose of this letter is to identify and seek the Committee's support for a number of amendments to the *Independent Commission Against Corruption Act 1988* (the *ICAC Act*).

Some of these amendments were foreshadowed by the Commissioner during our recent appearance before the Committee on Wednesday 9 July 2008.

Section 116(2)

Section 116(2) provides that if an offence against the *ICAC Act* is an indictable offence, a Local Court may nevertheless hear and determine the proceedings in respect of such an offence if the court is satisfied that it is proper to do so and the defendant and prosecutor consent. Section 116(3) provides that if a Local Court convicts a person of such an offence then the maximum penalty that the court may impose is, in the case of an individual, the smaller of a fine of 50 penalty units or imprisonment for two years, or both, or the maximum penalty otherwise applicable to the offence.

The concern in relation to these provisions arises in the context of convictions for offences under section 87 of the *ICAC Act* of giving false or misleading evidence to the Commission. Section 87 of the *ICAC Act* creates an indictable offence with a maximum penalty of 200 penalty units or imprisonment for five years, or both.

The giving of false or misleading evidence to the Commission at a compulsory examination or public inquiry fundamentally affects the Commission's ability to effectively perform its principal functions under the *ICAC Act*. It has been the Commission's experience that most witnesses who are involved in corrupt conduct knowingly give false evidence. It is only when

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they are faced with overwhelming evidence of their involvement in corrupt conduct that some change their evidence and make admissions. Even these admissions are often limited to what they think the Commission already knows.

Witnesses who give false evidence do not appear to be concerned about the possible criminal consequences. This may be due to the relatively light sentences which are being imposed on persons convicted of offences under section 87 of the *ICAC Act*. The Commission is concerned that a perception exists that people who tell lies at a compulsory examination or public inquiry will either not be punished or will not receive any serious punishment. It is certainly the case that the prospect of possible punishment is not acting as a deterrent.

In considering sentencing for an offence under section 87 of the *ICAC Act*, the Court of Criminal Appeal has previously held that, at least in the absence of extraordinarily compelling subjective circumstances, penalties which do not involve a significant sentence of full-time imprisonment are manifestly inadequate and inadequate to a point verging on irresponsibility (*R v Aristodemou*, NSW CCA, 30 June 1994).

Unfortunately, there has been a tendency of lower courts to impose comparatively light sentences for offences under section 87 of the *ICAC Act*. Where terms of imprisonment are imposed these have generally been suspended. In the last few years convictions in the Local Court for section 87 offences have all, with one exception, resulted in the imposition of suspended sentences. The one exception involved the imposition of a 4 month period of imprisonment to be served as home detention.

The Commission has recently been provided by the Office of the Director of Public Prosecutions with some statistics comparing penalties imposed by local and higher courts with respect to offences of perjury under section 327(1) of the *Crimes Act 1900* (which is analogous to an offence under section 87 of the *ICAC Act*) and making a false statement on oath under section 330 of the *Crimes Act 1900*. A copy is attached.

The statistics clearly indicate a substantial difference in penalties imposed by the Local Court and those imposed by higher courts. The number of sentences involving an actual period of imprisonment is significantly higher in the higher courts. The fact higher courts more often impose periods of imprisonment is recognition of the seriousness of such offences.

The Commission requests that section 116 of the *ICAC Act* be amended so that it does not apply to offences under section 87 of the *ICAC Act*. This would ensure that such offences are dealt with in the higher courts where the maximum penalty may be imposed.

Section 37

The current effect of section 37 of the *ICAC Act* is that, if a witness at a compulsory examination or public inquiry objects to answering a question or producing a document or

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other thing, then the answer, the document or other thing is not admissible in evidence against the witness in any criminal, civil or disciplinary proceedings. The legislation provides an exception in relation to prosecutions for offences under the *ICAC Act*.

The protection should not extend to protect witnesses who may be facing disciplinary proceedings who are or become involved in civil proceedings. I do not consider there is any real justification for a person who has given evidence compulsorily to be protected from those answers in subsequent disciplinary or civil proceedings.

A public official may give evidence to the Commission that the public official has solicited or accepted bribes in connexion with the performance of the public official's official duties or engaged in other forms of misconduct. As the law currently stands, if this evidence is given under objection it cannot be used against the public official in any disciplinary proceedings. Without other evidence it may not be possible to commence disciplinary proceedings, or if such proceedings are commenced they may fail due to lack of evidence. As a matter of public policy, officials who have admitted engaging in corrupt conduct or misconduct should not be able to avoid disciplinary proceedings simply because there is a lack of other evidence of their conduct.

The removal of the protection with respect to disciplinary proceedings is not without precedent. Section 40 of the *Police Integrity Act 1996* serves a similar purpose to section 37 of the *ICAC Act*. However it contains a notable exception in that evidence given under objection is nevertheless admissible against the witness in disciplinary proceedings under the *Police Act 1990* and the *Public Sector Employment and Management Act 2002*. Section 96 of the *Law Enforcement Integrity Commissioner Act 2006* also allows evidence given under objection to be used in disciplinary proceedings if the person giving the evidence is a staff member of a law enforcement agency.

It is not unusual for the Commission to hear admissions from witnesses of frauds perpetrated on public authorities. In the Commission's recent investigation into allegations of serious and systemic corruption affecting RailCorp (Operation Monto), evidence was given by a number of witnesses in which they admitted defrauding RailCorp of substantial sums of money. This evidence was given under objection which means that it cannot be used by RailCorp in any civil action it might consider taking to recover the amounts.

Where contractors or others have admitted defrauding public sector agencies their admissions should, as a matter of good public policy, be available to be used in any civil proceedings taken by the public sector agency to recover the monies it lost as a result of the fraud.

Summary offences

A number of offences in the *ICAC Act* are summary offences which means that a prosecution must be commenced within 6 months of the date from when the offence was alleged to have

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been committed, unless another limitation period is specified with respect to the particular offence (section 179 *Criminal Procedure Act 1986*). Given the nature of the Commission's investigations it is not always possible to identify that an offence has occurred until after the expiration of the 6-month period. In other cases it may be that the offence has been identified but it may not be possible to commence criminal proceedings within the 6-month period without compromising the Commission's investigation by alerting persons to the fact that the Commission is conducting an investigation or divulging evidence obtained in the course of the investigation.

Recent examples of these problems have emerged in the Commission's investigation into corruption allegations affecting Wollongong City Council (Operation Atlas).

During the course of this investigation a number of public officials were required to provide statements of information under section 21 of the *ICAC Act*. It subsequently became apparent, as additional evidence was obtained, that a number of people provided false or misleading responses. It is an offence under section 82 of the *ICAC Act* for a person to knowingly furnish information in response to a section 21 notice which is false or misleading in a material particular. The relevant penalty includes imprisonment for up to 6 months. The offence however is a summary offence. As the false or misleading nature of the statements was not apparent until after the 6-month period it was not possible to commence any prosecution action under section 82 of the *ICAC Act*.

An additional problem arose in Operation Atlas when it was discovered that two persons had impersonated Commission officers. Evidence in relation to this was only obtained more than 6 months after the event. Although it is an offence under section 95 of the *ICAC Act* to impersonate a Commission officer, no prosecution could be commenced due to the expiration of time.

Section 116 of the *ICAC Act* has previously been amended to provide that proceedings for summary offences under sections 80(c) and 81 of the *ICAC Act* may be commenced within 3 years of the commission of the alleged offence. That section also provides that proceedings for an offence under section 112 of the *ICAC Act* may be commenced within 2 years after the commission of the alleged offence.

The Commission recommends that section 116 be amended to provide that proceedings for offences under sections 82 and 95 of the *ICAC Act* may be commenced within 3 years after the commission of the alleged offence.

Section 112

Section 112 allows the Commission to make non-publication orders. There is considerable doubt as to whether this section allows the Commission to make non-publication orders with

D10135371

respect to written submissions made about available findings and recommendations arising from evidence given at compulsory examinations or public inquiries.

At the conclusion of its public inquiries (and some compulsory examinations if it is proposed to produce a public report) Counsel Assisting the Commission makes submissions as to what findings and recommendations may be available to the Commission on the evidence. These submissions are usually written.

It is the usual practice for the submissions of Counsel Assisting to be provided to all relevant parties. In certain circumstances submissions received in response may also be circulated to other interested parties for comment.

In many cases it is preferable that submissions not be publicly available, at least until such time as the Commission has published its findings and recommendations in its section 74 report. This is because the submissions may canvass findings and recommendations that may not ultimately be accepted by the Commission. Publication of such submissions may have an adverse impact on reputation and may incite unnecessary public speculation. Publication may result in members of the public erroneously believing the submissions represent the findings or view of the Commission.

There have been cases in the past where copies of submissions have been obtained and published by the media which has led to unnecessary speculation as to what findings might ultimately be made by the Commission. This problem could be overcome by amending section 112 of the *ICAC Act* to make it clear that the Commission has power to make non-publication orders with respect to written submissions.

Please advise if you require any additional information in relation to any of the above matters.

A copy of this letter will be provided to the Premier for his information.

Yours sincerely



Theresa Hamilton
Deputy Commissioner
14th August 2008

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Appendix Three – Questions taken on notice at public hearing including proposed amendments to the ICAC Act

CRIMES ACT 1900

s.327(1) perjury

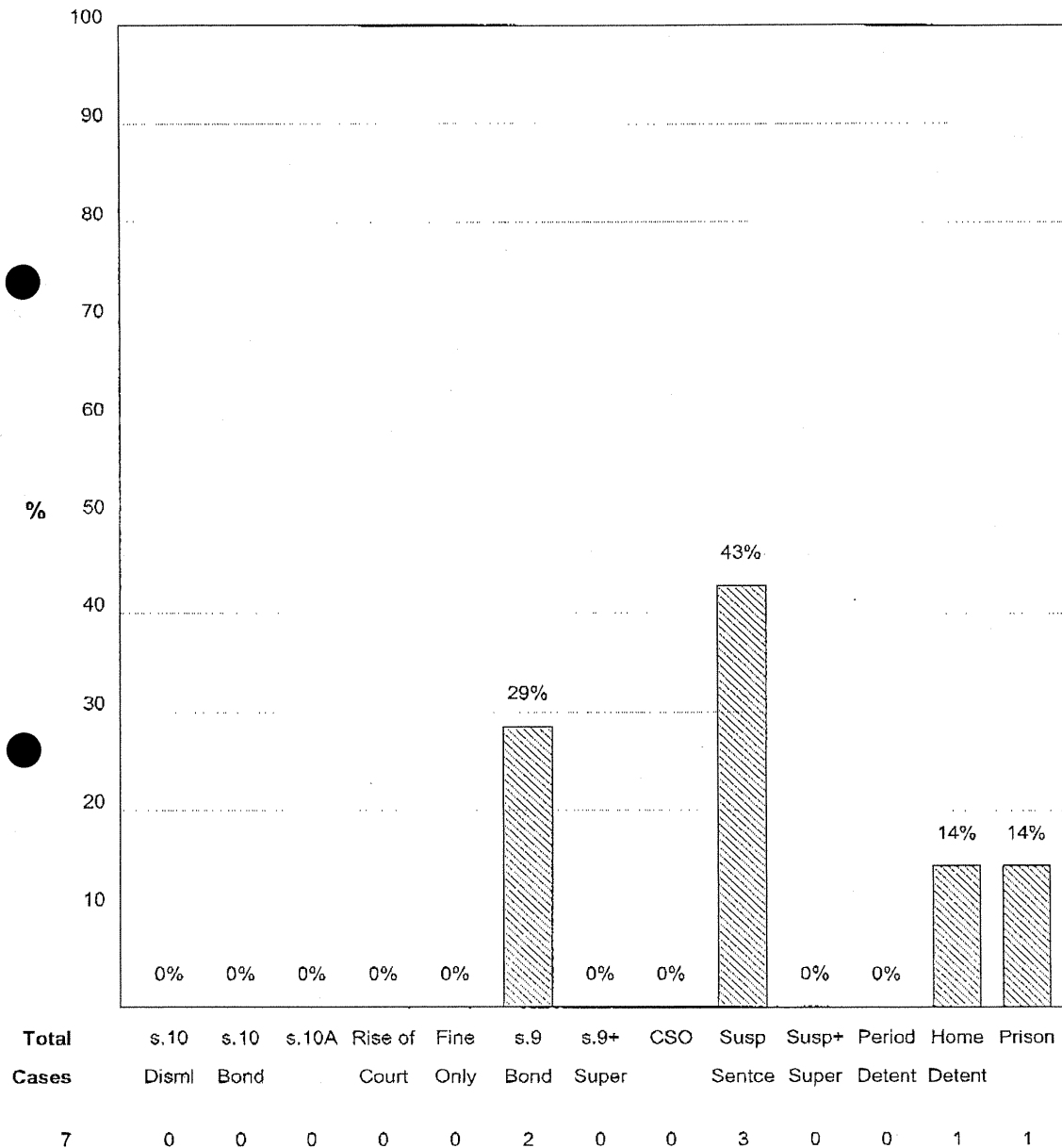
Local Courts - as at Jun

Sentences from Jan 2004

to Dec 07

Penalty Type

All Offenders



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CRIMES ACT 1900

s.327(1) perjury

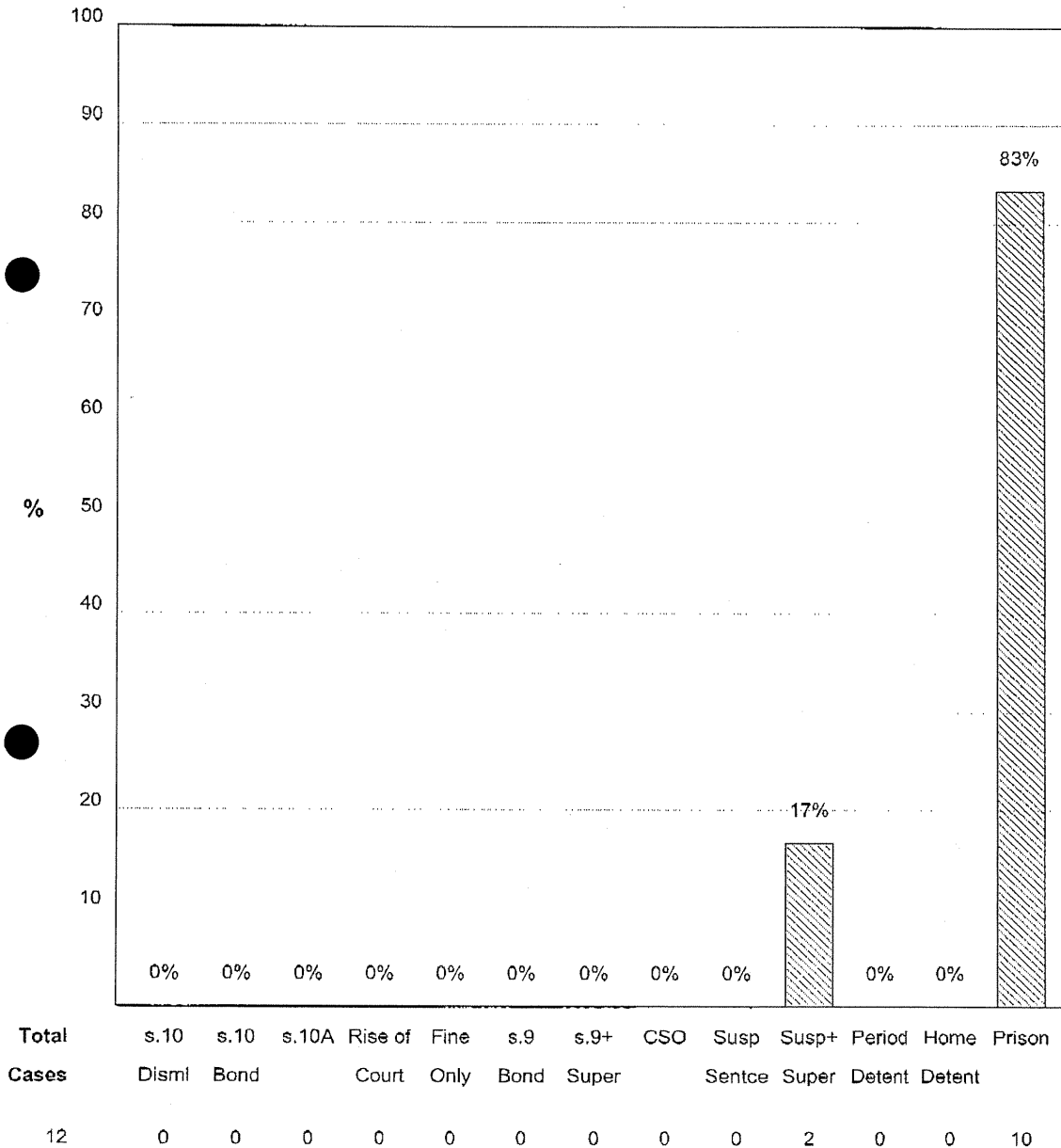
Higher Courts - as at 21

Sentences from Oct 2000

to Sept 07

Penalty Type

All Offenders



Appendix Three – Questions taken on notice at public hearing including proposed amendments to the ICAC Act

CRIMES ACT 1900

s.330 false statement on oath

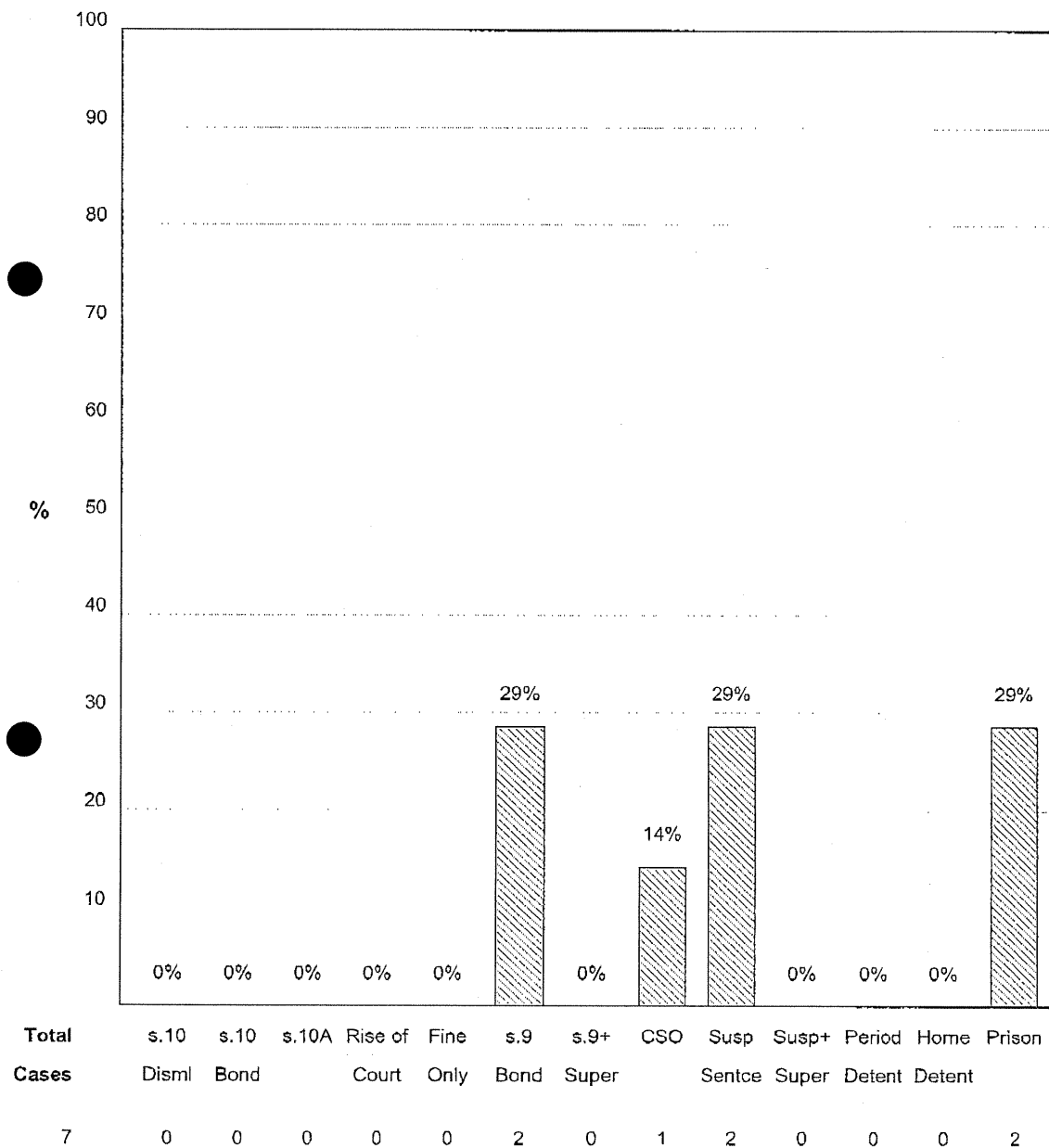
Local Courts - as at Jun

Sentences from Jan 2004

to Dec 07

Penalty Type

All Offenders



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CRIMES ACT 1900

s.330 false statement on oath not amounting to perjury

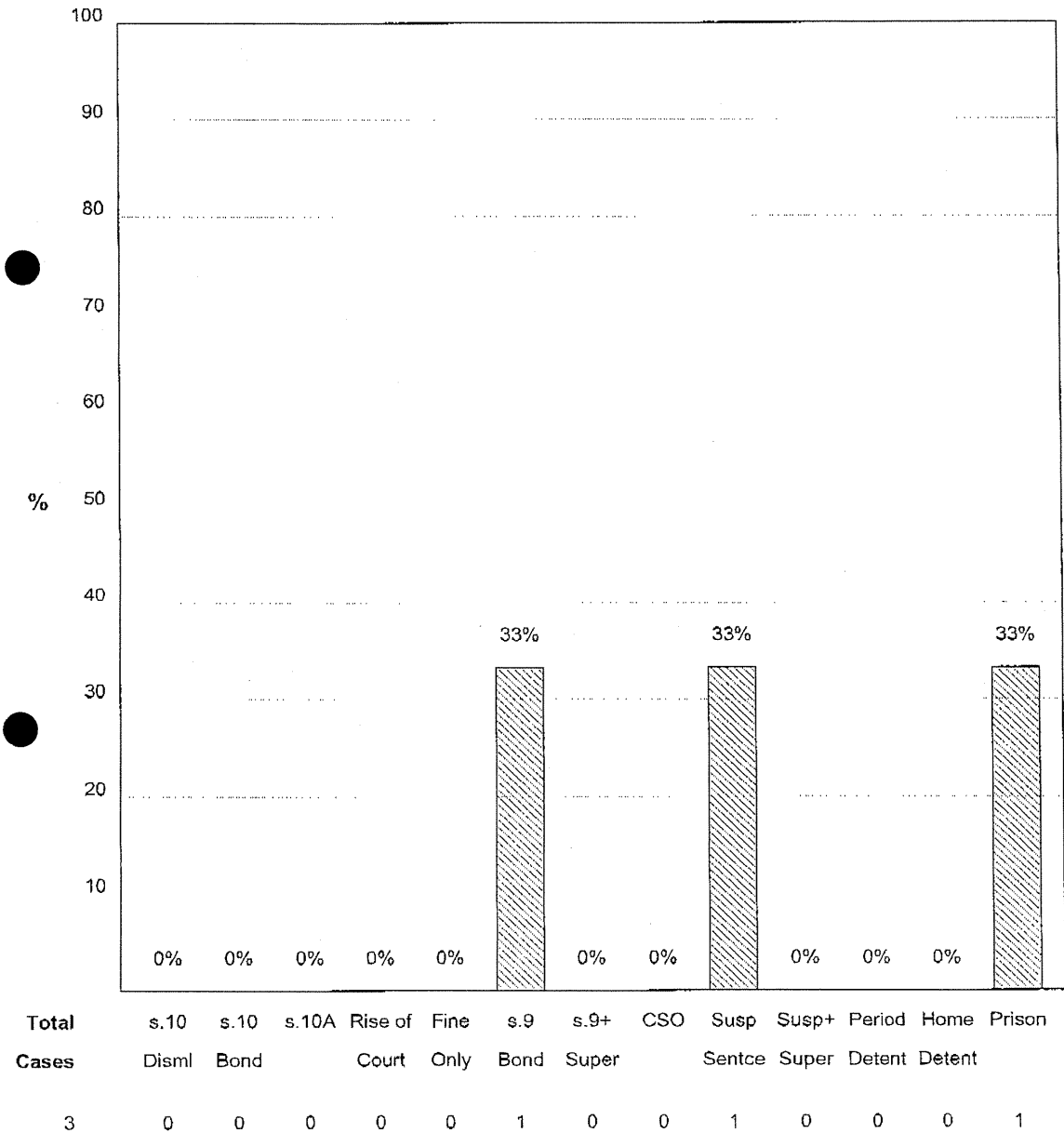
Higher Courts - as at 21

Sentences from Oct 2000

6 Sept 07

Penalty Type

All Offenders



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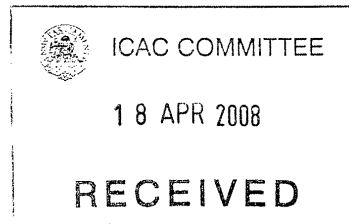
Appendix Four – Memorandum of understanding between ICAC and DPP



ICC 212
C08/218

INDEPENDENT COMMISSION AGAINST CORRUPTION

Mr Frank Terenzini MP
Parliament House
Macquarie St
Sydney NSW 2000



Dear Mr Terenzini

RE: MEMORANDUM OF UNDERSTANDING BETWEEN THE ICAC AND THE DPP

I enclose for the information of the Committee a Memorandum of Understanding between the ICAC and the DPP which was signed on 12 December 2007.

The previous MOU was reviewed during 2007, in consultation with the DPP's office, to address issues such as delays in the provision of advice about proposed prosecutions and a perceived lack of effective communication between our offices.

The main changes to the MOU are:

- (1) Sections 2(b)(i) and (ii) have been re-drafted to emphasize that the ICAC will provide quality briefs in a timely manner, and that the ODPP agrees to assign a senior lawyer to review those briefs in a timely and efficient manner.
- (2) The new sections 3-10:
 - provide a clear distinction between admissible and background (non-admissible) information, and require admissible evidence to be provided to the DPP in a separate volume;
 - provide a clear distinction between the processes to be followed for summary (time-limited) and indictable offences;
 - detail the matters that the ICAC case lawyer's summary report should contain;
 - specify that the ODPP will assign a senior lawyer to a brief referred by the ICAC and advise the ICAC of the name of that lawyer within two weeks of the receipt of the brief.
 - specify that the assigned lawyer will arrange a conference with relevant ICAC officers within four weeks of the receipt of the brief;
 - provide that issues arising from the brief will be discussed at that conference, including whether any requisitions will be issued;
 - require a timetable to be agreed for the issuing of and response to the requisitions and, if no requisitions are to be issued, require a timetable to be agreed for the furnishing of advice by the ODPP.

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-2-

- (3) A new section has been drafted (section 11) to provide a more streamlined process for consideration of charging where a person has indicated that they intend to plead guilty.
- (4) The main change to the sections on requisitions (section 13 to 16) is that they now specify that requisitions will be issued only after a conference has taken place between ICAC officers and the relevant officer of the ODPP in accordance with the revised MOU.
- (5) The previous MOU already had appropriate time limits in place, e.g. that advice would be provided by the ODPP within 6 weeks of the receipt of responses to requisitions by the ICAC. The main problem had been that these time limits had not been enforced by either party to the MOU. The regular liaison meetings between the Deputy Commissioner and the Managing Lawyer of ODPP Group 6 (referred to below) are intended to monitor issues like this
- (6) The official points of contact will now be the Deputy Commissioner of the ICAC and the Managing Lawyer for ODPP Group 6. These officers, as well as liaising about specific matters as they arise, will meet at least once every two months to discuss the progress of prosecutions generally.

I have informed the DPP that this MOU will be reviewed after 6 months to assess how effective it has been in dealing with the issues of delay and inadequate communication and liaison between our offices.

Yours sincerely



Hon. Jerrold Cripps QC
Commissioner

11 April 2008

IN-CONFIDENCE

MEMORANDUM OF UNDERSTANDING

1. This Memorandum of Understanding ("MOU") is made on the *12th* day of *December* 2007 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.

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.

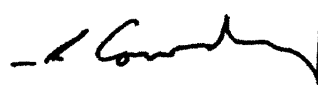
MOU TO BE BROUGHT TO ATTENTION OF RELEVANT STAFF

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

31/1/07



N R Cowdery AM QC
Director of Public Prosecutions

12.12.07

Appendix Five - Minutes

Minutes of Proceedings of the Committee on the Independent Commission Against Corruption (no. 14)

Thursday, 9 July 2008 at 10.00am
Room 814-15, Parliament House

1. Members present

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

In attendance: Les Gonye, Helen Minnican, Dora Oravec, Jacqueline Isles and Mille Yeoh.

2. Apologies

Mr Turner.

3. Witnesses present

Hon Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption; Theresa Hamilton, Deputy Commissioner; Mick Symons, Executive Director, Investigation Division; Lynn Atkinson, Deputy Director, Corruption Prevention, Education and Research; Dr Robert Waldersee, Executive Director, Corruption Prevention, Education and Research; Lance Favelle, Executive Director, Corporate Services; Roy Waldon, Executive Director, Legal / Solicitor to the Commission.

4. Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption

Public hearing

The press and the public were admitted. The Chair opened the public hearing and welcomed the witnesses.

Commissioner Cripps indicated that he wished to have the ICAC's answers to the questions on notice, including the submission on s.116 of the ICAC Act, included as part of the sworn evidence and for the document to be made public. The Chair asked the Commissioner if he had any objection to the Committee making public a table of recommendations compiled by the ICAC in relation to its State Rail and Railcorp investigations. The Commissioner indicated that he had no objections. The Committee agreed on a show of hands to authorise the answers to the questions on notice and the recommendations table to be made public.

The Hon Jerrold Sydney Cripps QC, Commissioner of the ICAC, 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, were sworn.

Roberta Lynn Atkinson, Deputy Director of Corruption Prevention, Education and Research, Robert William Waldersee, Executive Director of Corruption Prevention, Education and Research, and Lance Corey Favelle, Executive Director of Corporate Services, were affirmed.

The Commissioner made an opening statement.

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

The Committee finished examining the witnesses and the public hearing concluded at 12:40pm, at which point the Committee took a short adjournment.

The public and the press withdrew and the questioning of the witnesses resumed in camera at 1.00pm.

Evidence concluded, the Chair thanked the witnesses for their attendance and the witnesses withdrew.

The hearing concluded at 1.26pm.

5. Deliberative meeting

The Committee commenced deliberations at 1.27pm. (Mr Donnelly not present - apologies)

i. Minutes

Resolved, on the motion of Revd Nile, seconded Mr Ajaka, that the minutes of the public and in camera hearings, and the deliberative meeting held on 3 July 2008 be confirmed.

ii. ***

iii. ***

Deliberations concluded, the meeting closed at 1.56 pm.

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

Monday, 18 August 2008 at 10.07am

Jubilee Room, Parliament House

1. Members present

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

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

2. Deliberative meeting

i. Minutes

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

ii. ***

iii. Report outlines

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

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

iv. ***

v. ***

vi. ***

vii. ***

3. ***

4. Further deliberations

The Committee deliberated.

Resolved, on the motion of Mr O'Dea, seconded by Ms McKay:

"That the corrected transcript of proceedings of the hearings conducted on 9 July 2008 and this day be published".

Resolved, on the motion of Mr Ajaka, seconded by Ms McKay:

"That the letter from the ICAC Commissioner in relation to the Memorandum of Understanding [MOU] between the ICAC and the Director of Public Prosecutions, and the MOU itself, be published".

The Committee adjourned at 1:50 pm.

Deliberations concluded, the meeting closed at 1.50 pm.

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

Wednesday, 24 September 2008 at 8:30 am

Waratah Room, Parliament House

1. Attendance:

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

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

The Chair opened the meeting at 8.30am.

2. ***

Appendix Five - Minutes

3. ***

4. **Deliberative meeting**

The Committee commenced deliberations at 9:32am.

i. **Minutes**

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

ii. ***

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

- The following draft reports were distributed:
 - (a) Review of the 2006-2007 Annual Report and audit reports of the Inspector of the Independent Commission Against Corruption; and
 - (b) Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption
- ***
- Late correspondence – The Committee noted the following late correspondence:
 - (a) ***
 - (b) ***
 - (c) Letter from the Commissioner of the ICAC, the Hon. J. Cripps QC, to the Chair, dated 15 September 2008, concerning the implementation of recommendations by the ICAC – letter scheduled for discussion on 29 September 2008;

iv. ***

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

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

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

1. **Attendance:**

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

Apologies
Mr Coombs

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

The Chair opened the meeting at 10.03am ***

2. Minutes

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

3. Consideration of Chair's draft reports

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

i. Review of the 2006 – 2007 Annual Report of the Independent Commission Against Corruption

The Chair opened discussion on the draft report entitled, "Review of the 2006 – 2007 Annual Report of the Independent Commission Against Corruption", previously circulated and taken as read, and addressed the Committee on the general direction taken in the report. Discussion ensued.

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

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

ii. ***

iii. Authorisation for publication of documents

Resolved on the motion of Mr O'Dea, seconded Mr Stokes, that ICAC's answers to questions taken on notice at 9 July public hearing, from Theresa Hamilton, Deputy Commissioner, dated 14 August 2008, be authorised for publication.

Resolved on the motion of Mr Khoshaba, seconded Mr Stokes, that ICAC's proposed amendments to the Independent Commission Against Corruption Act 1988, from Theresa Hamilton, Deputy Commissioner, dated 14 August 2008, be authorised for publication.

4. ***

5. ***

Deliberations concluded, the meeting adjourned at 1.19pm.

Review of the 2006-2007 Annual Report of the Independent Commission Against Corruption

Schedule of proposed amendments

Recommendation 4 – in list of recommendations and body of report at p.31

Change “proceedings under sections” to “proceedings commenced pursuant to sections”

Para 1.27 delete ‘four’ from line 7 and insert instead ‘six’: ICAC published 2 further investigation reports as part of Operation Monto on 25 September.

Para 1.28 delete ‘hearing’ from line 3 and insert instead ‘public inquiry’: clarifying amendment.

Para 1.40 delete ‘made’ from line 3 and insert instead ‘referred to’: clarifying amendment.

Para 1.51 move para 1.51 to immediately follow para 1.58: clarifying amendment.

Para 1.52 delete ‘ensure as part of its monitoring role to’ from line 4 and insert instead ‘as part of its monitoring role’: clarifying amendment.

Para 1.85 delete final sentence and insert instead ‘The Committee intends to undertake a review of the ICAC and ICAC Act in 2009. The review will provide an opportunity to further explore specific proposals to amend the ICAC Act’: this makes the draft report consistent with the Chair’s draft report for the Committee’s review of the Inspector’s annual and audit reports, in terms of stating the Committee’s intention to conduct an inquiry into the ICAC and ICAC Act in 2009.

Para 1.93 line 4, insert ‘or for’ after ‘produced by’: clarifying amendment.

Para 1.106 delete and insert instead ‘The Committee intends to conduct a review of the ICAC and ICAC Act as part of its inquiry program in 2009. This review will allow for in depth consideration of the implications of the Commission’s proposal’: as noted above, this makes the draft report consistent with the Chair’s draft report for the Committee’s review of the Inspector’s annual and audit reports.

Para 1.112 delete ‘period for proceedings’ from the final line and insert instead ‘period specified for the commencement of proceedings’: clarifying amendment.