REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

INQUIRY INTO THE PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

REVIEW OF THE 2007-2008 ANNUAL REPORT OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION

INQUIRY INTO PROPOSED AMENDMENTS TO THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT

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At Sydney on Tuesday 11 August 2009

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The Committee met at 10.30 a.m.
(the following extract of proceedings commenced after the luncheon adjournment)

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PRESENT

Mr F. Terenzini (Chair)

Legislative Council	**Legislative Assembly**
The Hon. G. J. Donnelly	Ms D. Beamer
The Hon. T. J. Khan	Mr D. R. Harris
Reverend the Hon. F. J. Nile	Mr N. Khoshaba
	Mr J. R. O'Dea
	Mr G. F. Martin
	Mr G. E. Smith
	Mr R. G. Stokes

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

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

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

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

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

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

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

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

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

Mr CRIPPS: Yes, please.

CHAIR: As the witnesses are here to cover three separate areas, I propose that the Committee members ask questions firstly on the inquiry into the protection of public sector whistleblower employees, and then move on to the amendments to the Independent Commission Against Corruption Act, and then to the review of the 2007-2008 annual report. Therefore the evidence, when read and transcribed, will be together but in separate lots for the purpose of convenience. Commissioner, before questions commence, would you like to make an opening statement?

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

Subject to what the Committee might say, I see very little point in travelling over the grounds that I have already, on a number of occasions, travelled when I have dealt with questions on, for example, what should happen to section 37. As the Committee knows, it is my view that section 37 should be amended so as to remove the immunity from use in disciplinary and also civil proceedings, although other people have different views

about that. A number of organisations have made submissions about this matter, some of which, particularly the one from the Bar, appeared to think that I was advocating the removal of the privilege against self-incrimination in criminal trials. However, I was not.

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

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

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

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

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

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

The commission received a direction from Cabinet that I could not employ anyone without Cabinet's approval, because it is to do with a freeze on all government departments. I immediately contacted Mr Lee and told him that was inimical to what I understood to be the independence of the commission. He wrote a letter to me saying that that direction does not apply to the commission. Shortly after that I received another direction from Cabinet that said that a senior counsel could not be employed by the commission without the approval of a

Minister—I think the Attorney General but I cannot remember. I have not received a reply from the Government on that, but I have written to Mr Lee and told him that it is even worse than the first one; that we should have to get permission from a Minister of the Crown to see whether we have to brief someone and therefore make available to that person a whole lot of information that should never be made available in any event. I had assumed in my letter that that direction does not apply to us. I have asked Mr Lee to ensure that in future, if he would not mind, that some attention was paid to these directions.

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

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

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

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

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

CHAIR: That is suitable.

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

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

Mr CRIPPS: Yes.

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

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

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

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

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

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

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

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

CHAIR: Section 16 talks about vexatious or frivolous complaints and defining those terms. In the discussion paper we put forward a proposal to define those terms so that matters that come forward that are

considered frivolous or vexatious can be dispensed with instead of investigating them. The Deputy Ombudsman says that they all should be investigated or presumed to be confidential and proper disclosures unless along the way matters come up that make them not so.

Ms HAMILTON: No. I disagree with that because I think it is helpful to have a provision that allows you to categorise disclosures as vexatious or frivolous in some cases. Also, as we previously submitted, I think further trying to define those terms, which are used quite often in many Acts and I think have a well-known meaning as being vexatious or frivolous, might only make the issue worse. I do not know that there has ever been any particular problem in categorising certain disclosures as vexatious or frivolous or that that has been successfully challenged later. So, we would support maintaining that provision and do not see the necessity to define vexatious or frivolous any further.

CHAIR: We should apply the normal dictionary meaning?

Ms HAMILTON: Yes, exactly.

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

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

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

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

CHAIR: It is a private commercial enterprise.

Ms HAMILTON: So they have privatised the declaration?

Mr GREG SMITH: As well as government departments.

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

Mr GREG SMITH: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms HAMILTON: I do not really see why that limitation would be necessary. Just because the contractor is no longer in a relationship does not mean they might not have information from the previous term when they were working with the government. Sometimes people take a long time to make up their mind to come forward for various reasons. I would see no reason to limit it to current contractors as long as a previous contractor had information about corrupt conduct or maladministration.

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

Ms HAMILTON: Such complaints could already, I believe, be categorised as frivolous or vexatious—certainly vexatious, I would say, if they are being made for an ulterior motive. But if it is considered that they

were not covered by that general provision, I would certainly have no objection to a provision being inserted that precluded complaints that were made on those sorts of specious grounds.

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

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

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

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

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

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

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

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

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

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

Mr CRIPPS: Of the assessment?

Mr GREG SMITH: Yes.

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

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

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

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

Mr CRIPPS: Yes, the panel.

Mr GREG SMITH: The panel does?

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

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

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

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

Mr CRIPPS: No.

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

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

Mr SYMONS: Not outside of the ICAC.

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

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

Mr CRIPPS: Oh, yes.

Mr GREG SMITH: For surveillance?

Mr CRIPPS: For surveillance, no.

Ms HAMILTON: We have our own surveillance.

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

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

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

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

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

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

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

Mr CRIPPS: I do not know.

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

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

Ms HAMILTON: No. I know.

Mr CRIPPS: I do not know.

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

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

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

Mr GREG SMITH: Very much.

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

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

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

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

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

Ms HAMILTON: Yes.

Mr CRIPPS: I have just had a look at section 16 because Theresa was one up on me that she had not heard about it for a while and I had not heard about it till she heard about it. But when I read the section it really requires them to have a look at the claim before they come to the conclusion that it is vexatious. Also there does seem to me—if you do not mind me saying so—a real problem in getting sections like that to look for the most remote possibility that it will never happen and say that the section cannot work. I would like to know just what it is when it has not happened.

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

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

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

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

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

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

Mr JONATHAN O'DEA: Of course we can.

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

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

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

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

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

Ms HAMILTON: Well, yes. The trouble is people might come to us and say, "I was moved because I made this complaint" or " I was demoted because I made this complaint" but when we get the evidence and the files and the human resources reports there is nothing there at all about that; it is all about long-term problems or this person has been a troublemaker. I am not saying therefore that that whistleblower is lying. Their perception that the reprisal was taken may well be true, but it is another thing to prove it beyond reasonable doubt in a court of law for a criminal offence. I would ascribe the lack of prosecutions to no more than that: it is a very difficult offence to prove. But I still think it is a deterrent to know that it is there and hopefully it would deter some employers from taking reprisal action if they know it is a criminal offence.

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

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

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

Mr CRIPPS: Yes, I will.

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

Mr CRIPPS: Yes.

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

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

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

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

CHAIR: There have been a number of cases where without that evidence there has been a failure of disciplinary proceedings or the disciplinary proceedings have not been able to be instigated. I know if the

evidence of admission were used it would do it but without that are you saying that the incidents of success in disciplinary proceedings are very low with the information you already send them?

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

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

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

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

Mr CRIPPS: I do not remember that.

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

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

CHAIR: Would you have any objection to that amendment?

Mr CRIPPS: Yes.

CHAIR: No objection.

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

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

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

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

Mr CRIPPS: No.

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

Mr CRIPPS: No, I do not think so.

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

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

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

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

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

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

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

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

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

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

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

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

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

The Hon. TREVOR KHAN: I agree.

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

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

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

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

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

Mr CRIPPS: What got me to the stage of making these recommendations was it did not take me long to realise that the assumption behind section 37 was that if people knew the evidence could not be used against them they were going to tell the truth. I have presided over almost all the compulsory examinations and all the public inquiries and that has never been my experience at all. The people tell me what they think the commission knows. They do not go any further unless they think the commission knows. You see it repeatedly when they start off by denying it and the telephone intercepts are played. If the theory were right, you would not have to play the telephone intercepts and these people would be disclosing it. They do not at all. That also brings me, if I can nag on the final point, to why people who tell lies to the commission should be punished. The choice here is that you admit to corruption or you get jailed for telling lies. You do not have the choice that if you do not admit to corruption you will be given a good behaviour bond by a magistrate.

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

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

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

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

Mr GREG SMITH: Yes.

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

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

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

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

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

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

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

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

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

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

Mr CRIPPS: Yes.

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

Mr CRIPPS: No, I do not.

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

Mr CRIPPS: Yes.

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

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

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

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

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

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

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

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

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

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

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

Mr CRIPPS: No, not an appeal.

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

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

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

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

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

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

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

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

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

are people in RailCorp who are trying to do that. Perhaps you should ask Dr Waldersee. He might have a view about this because he has been dealing with the RailCorp people.

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

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

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

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

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

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

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

Mr CRIPPS: About TI.

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

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

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

Mr WALDON: Yes.

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

Mr CRIPPS: There should be in order to make it clear. I take the view that the really important function of the Inspector is not to wonder whether we have been as diligent as we should have been in attending to complaints, although it is not irrelevant. The important function of the Inspector is to ensure that people in the organisation do not abuse the power they have to tap phones and to put surveillance devices on people so that members of the public have confidence we are not doing it. People in the commission are warned that if they do

it they might be caught. So far as I am concerned, any possible inhibition in this legislation to the Inspector would get my support if it were removed.

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

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

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

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

CHAIR: It is available to you.

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

CHAIR: Has it worked?

Mr CRIPPS: Yes.

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

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

There has also been more interaction between DPP lawyers and lawyers at the ICAC to try to resolve issues about briefs without letting them drag on unnecessarily. Generally, the MOU has been a lot more successful with newer matters rather than with older matters. However, I think that is to be expected because the older matters started before it was being enforced. You will see from the prosecution timescale chart that with newer matters generally, if you average out the times, the times are down to a year or less, which compares favourably with the four or five years that things were taking in the past. I think the MOU is having an effect. We never expected it to work overnight, but it certainly has had a beneficial effect on newer matters that are going to the DPP's office.

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

Mr CRIPPS: Do you mean public inquiries?

CHAIR: Referrals or complaints of corruption.

Reverend the Hon. FRED NILE: Workload.

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

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

Mr CRIPPS: Yes.

CHAIR: Is there a problem?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr CRIPPS: Yes.

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

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

Mr KOUREAS: In early July.

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

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

Mr CRIPPS: No, Premier's and Cabinet.

The Hon. TREVOR KHAN: Were the letters at least signed by the same individual?

Mr CRIPPS: I cannot remember that now. I took the view that what had happened was that there was some Cabinet direction as to how all government agencies would behave and it was just sent out to ICAC as being one of the government agencies. I thought it was important to direct Cabinet's mind to the fact that ICAC should not be viewed as another government agency. I suppose I could have run up Mr Lees and he would have said, "Oh no, it does not apply to you". I could have rung up about the Senior Counsel and someone would have said, "It did not apply to you", but I thought it was probably appropriate to make a stand to ask the Government to continually think about ICAC's independence.

The Hon. TREVOR KHAN: Obviously there has not been the opportunity to read the document that you have tabled, but are you looking for, in a sense, a one-off injection of funds to overcome the backlog that has been created or is it an issue of increased recurrent funding?

Mr CRIPPS: It is recurrent, I think. That is what we are asking for. When you read it you will see that we have slipped down the scale of employees, and I have to say one of the reasons why it took a while to become noticeable is because I think the way the division was being run was very effective and very efficient, but even with all that we have got back to where we were two or three years ago. But it became a real issue because of the huge amount of work we had last year, and we have had almost as much work this year. I do not see that New South Wales is going to be freed from the burden of corruption just because I leave on 13 November.

Mr GREG SMITH: Has the commission put forward a case for some sort of review as to the staffing levels that are needed and the resources that are needed because of increasing work?

Mr CRIPPS: Yes. I think this document tries to do this. The document that I have been permitted to table is really a forerunner of an approach we are making to Treasury. It was to give this parliamentary committee an indication of what we were doing—because we are answerable to this parliamentary committee and not the Government—and in the hope that this parliamentary committee will see that what we are saying has merit and support it. But it has just been dropped on you today. If any of you have any queries about it please let me know and I will do my best to respond to them.

Mr GREG SMITH: I must say it is not novel that you are having to fork out 1 per cent efficiency savings, that the Government only gives 2.5 per cent for the extra salaries and then negotiates 4 or 4.5 per cent. If that continues year after year it means that your staff falls each year; you cannot replace people when they leave. I suggest that that same thing is happening in the DPP and other agencies. Are you aware of that?

Mr CRIPPS: I have not gone into that. It is enough dealing with my own agency.

Mr GREG SMITH: You probably do not have the amount of work you did at one stage because you do not do police corruption.

Mr CRIPPS: Except that that is 10 years ago.

Mr GREG SMITH: At the time when the Police Integrity Commission was established was there a loss of staff and budgetary amounts from the ICAC?

Mr CRIPPS: You would have to ask Mr Waldon this because he was the only person here who was there.

Mr GREG SMITH: It is good to have the corporate memory. When I was seconded there Mr Waldon would have been there then.

Mr WALDON: I was not in a senior position then so I was not party to the negotiations or discussions.

Mr GREG SMITH: But showing great potential.

Mr WALDON: But I am aware that there were discussions and as a result of that it was identified that an amount of the commission's recurrent budget would be subtracted from future years because of the setting up of the PIC.

Mr GREG SMITH: But nevertheless, the workload has progressively increased, particularly in areas like local government, RailCorp, those sorts of things—major investigations—and you have a need for more staff, as it were, to combat the workload?

Mr WALDON: Yes. If I could just add to that? I think it became very significant both late last year and this year that I think for the first time that I have been at the commission we actually had to take a number of preliminary investigations—not full investigations but preliminary investigations—and place them on hold because we just did not have the people to resource them. So that effectively meant that some matters just were

not being looked at for quite a period of time until we were able to draw back the resources from some of the major investigations.

Mr GREG SMITH: And that would be an impediment to successful investigation sometimes, would it not, because the trail gets cold?

Mr WALDON: Absolutely.

Mr GREG SMITH: How many actual investigators do you have working for the ICAC? You have got 39 in the division but how many are actually investigators?

Mr SYMONS: We have a surveillance pool attached to that. We have maybe 25 investigators, but bear in mind you have got annual leave and maternity leave and things like that. So even though the strength is 39 you take out your surveillance team and that takes one team to one side and drops it down. So we work on an average of about 20 to 25 investigators on the floor without impediments.

Mr GREG SMITH: That is about 30 per cent of the total staff?

Mr SYMONS: Of ICAC?

Mr GREG SMITH: Yes.

Mr SYMONS: Yes, it would be.

Mr GREG SMITH: To conduct the inquiries that you get do you think that it is sufficient to have that proportion of investigators with 60 or 70 other staff?

Mr SYMONS: I guess, for want of a term, the investigation division—without being hit by Roy—is actually the engine room and that generates the flow-on to corruption prevention and it occupies the flow-on through the legal, et cetera, as well as other matters that come through. But the investigation is the engine room, which happens. But you need corruption prevention. The concept with RailCorp—

Mr GREG SMITH: I am not denying that, I am just asking you whether it affects your ability—

Mr SYMONS: I think the balance is good.

Mr GREG SMITH: The balance is good but the numbers are not enough?

Mr SYMONS: Correct.

Mr GREG SMITH: And to be a more effective agency you could do with an input of a lot more staff—qualified staff and qualified investigators?

Mr SYMONS: Yes.

Mr JONATHAN O'DEA: Commissioner, you may be aware that on a number of times in Parliament I have raised the finances of the Independent Commission Against Corruption. I was pleased with one of the Premier's responses in that it indicated a willingness to seriously consider an increase in budget, which was promising. Obviously, we do not want to make these things political unless they have to become political. One would like to think that there is bipartisan support for increased resources when a responsible entity like the ICAC asks for them.

Having said that, I was a little surprised at your comment differentiating the ICAC from the rest of the public service regarding staff directives, but not normal budget constraints; that is, the 1 per cent efficiency saving. Last year, despite the fact that there was a demonstrably increased call on your resources, there was in fact a real budget cut in the budget process, which was of concern to me. I do not understand why you differentiate between the staff directives, which should be seen as independent, and the normal budget process, where perhaps you could be seen as part of the public service. Would you comment on that?

Mr CRIPPS: We are not happy, but it is necessary. We do not get money from any source other than the Government. So, to that extent, we cannot be said to be wholly independent of government. But, so far as staff is concerned, I can make this point: It is true that last year we got into trouble that has flowed over to this year, but we thought we had solved it by increasing efficiencies, doing a whole lot of things to try to accommodate the extra work that we were getting. But we have now come to the conclusion that we cannot keep on doing that. We cannot keep on being more efficient.

Mr JONATHAN O'DEA: So?

Mr CRIPPS: So, there is no inconsistency really, I do not think there is. Also, on the problem associated with staffing and the independence, we just cannot have the Government telling us whom we employ. I would always, and I do not know whether my successor would, pay attention to reasonable requests of the Government that we do A, B and C. But that is what they have to be viewed as, requests not directions. And it is understood that we can say no if we want to.

CHAIR: Commissioner, this may well be the last time you give evidence. I congratulate you, and indirectly your executive staff and all the staff at the Independent Commission Against Corruption, on the excellent professional job that you have done in the service of the people of New South Wales in your role as commissioner. I am bold enough to speak on behalf of the Committee members to say that the ICAC operates in a very professional and excellent manner. A previous inspector commented a few times that the commission operates extremely well under very difficult circumstances, and that encapsulates how it works with the number of inquires and complaints that you receive, and in assessing them. It is an enormously difficult task. Since I have been a member of this Committee, and as its Chair, I have enjoyed my relationship with you and your helpful and professional staff. I take this opportunity to wish you the very best for your future after your appointment ceases. Whatever you choose to do in the future, I wish you the very best. I thank you, once again, for doing an excellent job.

Mr CRIPPS: Thank you for those generous words. I am sure that my successor will probably carry this organisation through in the way it should be carried through. Once again, I thank this Committee for the constructive work and suggestions it has made, and also for the civilised and courteous way that we are able to deal with issues such as we dealt with today and have dealt with in the past.

CHAIR: Is the submission you provided for the information of members only?

Mr CRIPPS: No, I table it with your permission. Obviously you will use it as you want to use it. My purpose in giving it to you was in the hope that you would see that a reasonable argument was put forward that lends Treasury support.

(The witnesses withdrew)

(The Committee adjourned at 3.17 p.m.)