REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

INQUIRY INTO PROPOSED AMENDMENTS TO THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

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At Sydney on Monday 11 May 2009

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The Committee met at 10.00 a.m.

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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. E. Smith

JEFFREY ALLEN LOY, Acting Assistant Commissioner, Professional Standards Command, New South Wales Police Force, Level 3, 45 Clarence Street, Sydney,

KAREN JANE McCARTHY, Superintendent of Police, Professional Standards Command, New South Wales Police Force, Level 3, 45 Clarence Street, Sydney,

PETER NORMAN COTTER, Detective Chief Superintendent, Director–Whole of Operations, Professional Standards Command, New South Wales Police Force, Level 3, 45 Clarence Street, Sydney, and

CHRISTOPHER HILTON LEEDS, Director–Strategic Support, New South Wales Police Force, Level 3, 45 Clarence Street, Sydney, sworn and examined:

CHAIR: I formally open the proceedings. The Committee on the Independent Commission Against Corruption is holding this hearing as part of its inquiry into the 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 permissible evidence a principal function of the Commission. I thank witnesses for appearing.

Mr LOY: The evidence I will give today is in relation to New South Wales Police Force Professional Standards viewpoint on the changes to the Independent Commission Against Corruption Act to come in line with the Police Integrity Commission Act.

Mr LEEDS: I appear also as one of the Commissioner's delegates who deals with administrative officer discipline in the New South Wales Police Force.

CHAIR: Does anyone wish to make an opening statement?

Mr LOY: Yes, sir. Just in relation to the understanding of the members here today, we understand that there is a whole-of-government response plus arguments for and against the proposed amendments to mirror the PIC provisions in the ICAC Act. I would describe the matter as really a balance between competing public policy priorities; that is, the rights of the individual in setting effective deterrents against corrupt conduct of public sector employees. The evidence given by the members here today will broadly cover the issues of the provisions according to us that work well with the New South Wales Police Force because the organisation has a strong commitment to dealing with misconduct, coupled with very strong external oversight over its complaints handling by the Ombudsman and the PIC.

Section 40 of the PIC Act works effectively for the New South Wales Police Force as the unique law enforcement role of police officers means that it is important to be able to commence internal discipline proceedings as soon as possible if admissions about misconduct are detected. That could include suspending an officer from duty as a risk assessment exercise while the matter is investigated. The PIC Commissioner in his response also notes the special position of public trust requiring the highest level of integrity of its members, not least because of the powers able to be exercised by its members. The New South Wales Police Force does not disagree with this position. Thank you, sir.

CHAIR: We have heard evidence from the Police Integrity Commissioner about the use of section 40(3) of that Act to enable that evidence to be used in disciplinary proceedings as far as officers are concerned. We also heard evidence that that evidence could also be used under part 2 of the Public Sector Management Act for administrative officers. Could you give us an idea of the statutory framework under which you operate, and how that is used in disciplinary proceedings in the Police Force?

Mr LOY: There are a couple of frameworks. One is in particular, once we get that information from PIC, from its hearings, that is exchanged in a couple of ways. It will either be directly from PIC or by our counsel who represents in relation to public hearings in particular. Then we make a decision whether or not that information or evidence as such may be able to be used by the Commissioner under section 181D to lose confidence in the officer directly or we have a reinvestigation under part 8A of the Police Act to reinvestigate the matter to consider whether or not there are sustained findings for disciplinary action. That is really the use of it, if you like.

CHAIR: So what you have available to you is a whole range of options going from demotion—

Mr LOY: That is right.

CHAIR: —through to the Commissioner losing confidence in the officer and dismissal.

Mr LOY: Reviewable and non-reviewable actions under section 173. Non-reviewable is warning notices, mentoring, coaching, advice and guidance, and then you have reviewable actions such as the loss of rank, deferral of increments, loss of seniority and even giving out fines to officers.

CHAIR: We have heard from the Commissioner of ICAC that in his view or the Commission's view the length of time and resources allocated by government departments to pursue disciplinary proceedings is lengthy and takes up a lot of resources. In his view, if evidence from an ICAC inquiry, including a compelled admission, was able to be used in disciplinary proceedings it would alleviate all those resources being allocated and you would not have a situation, for example, where a person who had been found to take bribes, millions of dollars, would be able to resign and take all their entitlements, et cetera, and we would be able to bring these things to a head. That is the general thrust of the Commissioner's thinking. In your sphere of operation what importance does the compelled evidence make up in your disciplinary proceedings? Do you agree with the Commissioner generally on what he is saying?

Mr LOY: Generally we would say we would agree. However, with the hearings and the evidence that is given by the involved officers, we also take into account corroborative evidence of other witnesses in the matter. The evidence of the officer under the coercive powers, that alone is why we would then reinvestigate the matter to ensure that the evidence is adduced of guilt or sustained finding. I think it is problematic just to accept the evidence on face value. I think it is a matter you need to look at. We still have, under section 174, any evidence or sustained findings are put forward to the officer and any penalty, they have the right to go to the Industrial Relations Commission. Again, that is another checking mechanism of our disciplinary procedures.

I think also the resourcing issue as far as New South Wales Police Force, we have a Professional Standards Command, very much organised with the direct reports here today, that is set up for that purpose. I feel that other government agencies or public sector agencies may not have that same ability and resources available, because it is not just what the Professional Standards Command has to do the investigations but again in the field one of our core businesses is investigations so we are very fortunate to have several thousand people who could conduct these matters. That is one of the deficiencies, I think, if you look at other government agencies to have the checking mechanisms and investigations in pursuit of fairness in particular.

CHAIR: So you run your own disciplinary hearings?

Mr LOY: Investigations, yes.

CHAIR: You are saying that it is not just that evidence of admissions that you are using. You are looking much further into the investigations. You are not taking that at face value.

Mr LOY: That is correct, yes.

CHAIR: So that piece of evidence, which we are looking to release in ICAC's sphere, released to be able to be used in disciplinary proceedings—we are looking to remove that restriction; we are investigating it—how much does that assist in reducing or avoiding officers from being able to get out of disciplinary punishment, if you like?

Ms McCARTHY: It is important and we do use it. I guess it depends also on the individual cases and the way the evidence comes out. If the Police Integrity Commission holds a public hearing the Commissioner of Police can be represented at that hearing, and that enables us on a day-to-day basis as that evidence is given to actually obtain that and immediately start preparing a submission for the Commissioner to consider whether he will retain confidence in that police officer. So from that perspective those matters are very clear for the New South Wales Police Force. During the hearings telephone intercept material may be played and other witnesses are called to give evidence and we are able to obtain that live, essentially, at the end of the day.

Where hearings are held in private, which the Police Integrity Commission does do, the New South Wales Police Force is not aware of those matters and those matters are then disseminated to the Professional Standards Command. With those matters sometimes we have to go in and actually do some further investigative work because under the legislative framework the Commissioner of Police is carefully required to give an officer notice under the Act, and under that the notice must contain the grounds under which the Commissioner is considering losing confidence and the evidence must also be available. Because those matters are reviewed in the Industrial Relations Commission, it is sometimes helpful if those matters are put to police officers prior to the notice being established so that their version of events can then be provided to the Commissioner.

Often in those hearings, because of the direct nature of the questioning and the role of the Police Integrity Commission, officers often do not give all their version. They do not have an opportunity to do so. Under the industrial relations framework, we are required to give officers that opportunity.

CHAIR: We have an ongoing situation with ICAC and the Director of Public Prosecutions [DPP] about providing briefs of evidence. There is a Memorandum of Understanding between the two agencies about liaising with one another to provide briefs for the DPP to take up. Can you briefly explain to the Committee, when obviously you are the investigating body and you prepare briefs for the DPP or your police prosecutors, what sort of liaising is there between the police and the DPP when you are preparing these briefs?

Mr LOY: With the police and the DPP, the PIC actually supplies briefs to the DPP now as well. So that is one avenue. They might send a brief to the DPP. If we reinvestigate the matter and we believe that there has been criminal conduct we also send it to the DPP on advising as a prosecuting body but again we might look internally as well for legal advice as to the evidence at hand. Generally speaking, if we get a PIC inquiry and we are going to go down the track of criminal charges, we liaise with the DPP in relation to supply of the brief and any requisitions that they may have and go to that higher level for consideration of laying criminal charges.

Mr DAVID HARRIS: It has been suggested in some other submissions that if compelled evidence could be used in other spheres, then witnesses might become a little less than truthful. What is your experience, given the provisions in your Act?

Mr LOY: I suppose it is case by case. It is a situation whereby a lot of police have been criminally charged in relation to lying to PIC for that reason. They then are presented with overwhelming evidence, in particular with telephone intercepts and listening device information, whereby they then change their position. I suppose there are police who have gone to the Police Integrity Commission and told the truth, the whole truth, as they are expected to, regardless of the consequences against their own person. There have been examples of people actually being recalcitrant and lying on oath. So you get the whole sphere. I do see the problem is obvious in relation to a person who has a common law right not to implicate themselves and that sort of thing. So it is problematic for the Committee to make that judgement.

Mr DAVID HARRIS: So in terms of your experience would that situation make investigations more difficult where, if they were not able to use the evidence in other places, people might be more forthcoming, right up front, and stop a lot of the other investigation that might have to happen?

Mr LOY: Yes, it is problematic, I suppose, but when we reinvestigate the matter under part 8A, when it comes back to us, we have the power to direct interviews as well, and they must answer truthfully. So I suppose a person, if they then change their feet, if you like, through our investigation, untruthfulness is at the core of integrity and the Commissioner has a strong viewpoint on that: untruthfulness is generally a higher test, if you like, as far as dismissal.

If you are untruthful to a senior officer or an inquiry it just goes to the core of your integrity. I suppose the legislative framework for that is under section 2(7)A that a New South Wales police officer must hold integrity above all. I suppose we are in a different position, perhaps, to some other members of the public or other public sector employees in that regard. But there is a higher expectation of police to act with integrity.

Reverend the Hon. FRED NILE: If a witness gives evidence and then changes the evidence after he or she is confronted with intercept phone calls, et cetera, would that make the lying more serious than perhaps the other offence?

Mr LOY: It depends. It is not so much more serious but what it is though, under the coercive powers you can take objection to the evidence, but one of the things is you must be truthful. If you then lie to the PIC

and it has been proven that you have lied to the PIC—there are examples currently whereby the officers have now been charged by the DPP with that particular offence of untruthfulness to PIC. From memory, I will probably be corrected, but I think it is section 48 of the Police Integrity Commission Act.

Reverend the Hon. FRED NILE: Is it perjury?

Mr LOY: It is not perjury but it is a specific offence under the Police Integrity Commission Act. It is just deemed more serious by the Commissioner of Police as far as it goes to the core of your integrity. It is an untenable situation to have a police officer sit there, talk about corrupt and criminal behaviour, and then not able to be taken to another field and investigated: that is the core issue. I suppose that is the Committee's dilemma in relation to the ICAC.

Reverend the Hon. FRED NILE: It was mentioned that you have an advantage of following the evidence in open hearings, but you indicated there is some problem when it is a private hearing. When do you get access to that information?

Ms McCARTHY: Under the Police Integrity Commission legislation at a certain point when the Commission has completed its inquiries it will release that information to the Commissioner of Police. Once it is released then we can act on it in the same way. It is not as timely. There is always a lag between the hearings occurring and the information being disseminated—and that is just a time delay factor. We like to minimise that at all times because when we go to the Industrial Relations Commission, the Commission is very critical about lengthy investigative delays in these types of matters. They can have the effect of compromising your disciplinary outcome if the delays are significant. Of course, there is an opportunity for there to be delay at every point. So when they have the public hearings, we are dealing with it as it comes out; when they are having the private hearings, which they have, obviously some of those hearings are of an exploratory nature and they want to see where particular matters are going. Those hearings are investigative tools. And then when they are at a point when they are ready to release the information to the Commissioner then we go through a process of looking at the information and taking it forward.

Reverend the Hon. FRED NILE: With what information do they supply you?

Ms McCARTHY: They supply us with transcripts and any of the electronic evidence that they may have collected as part of that. Often the Police Integrity Commission will be conducting a criminal investigation in parallel to our disciplinary proceedings. So when a matter is finalised from its perspective it still may be sending a brief of evidence for criminal matters to the DPP. At the same time the Police Commissioner is considering the disciplinary outcomes. It is not necessary for the Commissioner to have an officer dealt with by the criminal jurisdiction in order for him to consider the loss of confidence, because it is a different question that he is asking himself.

Mr LOY: Could I just add to that? There is the issue of the information exchange, but with us liaising with the PIC on a regular basis, it is also about the welfare of the officers and other involved persons. We actually get informed now, and the commanders get informed, when a person is going to a public or private hearing and basically we get the opportunity to manage the welfare of those officers. We are very mindful of the pressures that are put on officers and their families in relation to these issues. I think that is a key point. The PIC will supply—and you have seen the paragraph from PIC on how it supplies us—information, which is for further investigation or disciplinary hearings, but it is also about managing the welfare of the particular officers. I think that is a key point to consider.

Reverend the Hon. FRED NILE: Is the officer's health affected through stress?

Mr LOY: In some respects we think it is the shame of their behaviours at different times and how they manage that, the stress of actually being summonsed and the publicity of things. There is also the risk that although they are public hearings a person's integrity is put on the table as such, and quite often even though there is no sustained findings of the officer, a lot of officers feel that they are tainted because they have been summonsed to that public forum. So there are a lot of welfare issues in and around that.

Ms DIANE BEAMER: You have stated that after you have listened to the evidence you get a chance to go away and further investigate and look at ways in which you can put a brief together—this is evidence that has been compelled by police officers. This committee understands why police officers have that higher level of oversight as such. However, if we are talking about other public bodies other than the way in which the

Independent Commission Against Corruption operates, one of things you have an advantage in is that you are investigators of crime?

Mr LOY: Definitely.

Ms DIANE BEAMER: If I am talking about State Rail or Sydney Ferries, or any other government institution, they are not investigators of crime. Can you see there could possibly be a problem for government agencies, other than the DPP, receiving reports about corruption and pursuing them?

Mr LOY: Definitely. I think it is a commonsense question and it has a basic commonsense answer. We are an investigative body. Our core business is policing and one of the points is that how do you then resource the investigations? But there are external agencies. Mr Leeds may want to lead into that in relation to the IAB and other means of investigation. Again it is a resourcing issue. There are about 30 to 40 public and private hearings in PIC per annum, only three of which are public. There are about 300 or 400 witnesses per annum from the PIC reports that are getting investigated. I suppose you have to look at: What is the volume? What is the issue at hand? I suppose the ICAC is looking at the higher level corruption issues, so I suppose it is about the volume as well.

Mr LEEDS: I might comment on that because the area that I look after, whilst it is small by police standards, is really quite representative of the state public sector, which is section 184 of the Police Act. It imports 2.7 of the Public Sector Employment and Management Act into the Police Act, which virtually emulates the discipline provisions of the Public Sector Management Act. We hire mainly employees but there are also contractors and temporary staff working for the police and we also run the discipline for special constables such as the officers who guard public buildings such as this one. One of the things that we have seen out of some of the evidence that has been given to your Committee is that not everybody engaged by a public sector agency is an employee that may even be subject to the jurisdiction of the Public Sector Management Act. We are in a unique position because we have part 8A of the Police Act, which provides an entirely separate discipline stream for us.

One of the issues that might be of relevance to the Committee is whether the amendment actually gives the ICAC the solution it is looking for. I think it can be quite difficult if you do not employ that person. There is a statutory range of remedies under the Public Sector Employment and Management Act but largely those are ranging from reprimand through to dismissal, that sort of thing. That is again separate from criminal-type activity that I think some of the people making submissions to your committee have actually raised. I think that could be an issue perhaps for the ICAC, and what objective it is trying to obtain.

Mr COTTER: To answer your question absolutely directly, you are quite correct when you say that our core charter is investigative work. That is what we are trained to do over many years, as investigators. In other government agencies that sort of investigative acumen will be foreign to them. We are charged with putting a brief together in admissible form, and not only admissible form but in the right order, the chronology, and that takes years of practice. Then we deliver it to the Director of Public Prosecutions and on we go into the prosecution system, but it will be very foreign. The New South Wales Police Force is an extremely large organisation, of which a couple of hundred are charged, as at Professional Standards, with doing core investigations of the upper echelon of criminality or malpractice.

Of course, we have finite resources. We cannot do everything. Therefore, a lot of work is sheeted out to the field to the officers and investigators to do work out there. For example, command A will be investigating a matter on command B, their neighbouring command, and those matters are dealt with out there and sorted and then returned to us, perhaps, for review. Ultimately, we have so many resources to be able to investigate our internal complaints, whereas other government agencies do not have those resources available; it is not their core business.

Mr GREG SMITH: In the past there was a feeling around that the internal affairs organisation that used to operate in the police service did only a superficial investigation into a lot of people. They would put the allegation to the officer, who would deny it. They would say, "offence not proved". That was the impression that some of us had who worked in the Stewart Royal Commission, for example. At the Independent Commission Against Corruption, in Operation Maloo, which dealt with alleged police corruption, specifically the green light to Neddy Smith to do payroll robberies with impunity, there was the impression that there were plenty of ways of avoiding proper investigation. Does the new system that you operate have problems? Have you had problems

that have arisen because of giving out work to local area commands to investigate the next commands? Have there been instances of bias or lack of proper investigation that you have found?

Mr LOY: There is a review process by the New South Wales Ombudsman and it also oversights every investigation. If they consider that there are deficiencies, if there are deficiencies in investigations, we also have an internal review panel whereby there might be sustained matters, then they come to the table for us to recommend—the three Assistant Commissioners, the Office of General Counsel, human resources and Henry Davis York as solicitors. We also review those matters on recommending any penalty on those issues to go to the Commissioner for consideration. If we identify deficiencies in the investigations we also send that back and say that it is deficient. The Ombudsman gives deficiency notices for investigations.

In relation to whether there is bias or systemic corruption issues, basically we put investigations into the hands of independents in most of the more serious matters. In a local area, as previous local area commander, I was running complaints management teams in the process. In most of the serious matters we would ask the Professional Standards Command for assistance, because it is a higher level. It may even need a higher level of methodology, such as covert and overt resources that the Professional Standards Command has. To answer your question of whether there has been any identified bias, I am not saying that there is no bias out there in the New South Wales Police Force. I am saying that we have a system, a complaints management team that has independence across it.

The Professional Standards Command is the oversight body for New South Wales police investigations. We also have the New South Wales Ombudsman and the Police Integrity Commission, which can review any matter that goes on c@ts.i. In fact, they can take over any investigations that the New South Wales Police has under its command. They can caveat it. They can take command of the operation and caveat the c@ts.i so that no-one else can go in there and read that particular investigation. There are a number of checking mechanisms.

Mr GREG SMITH: Do you think it is working a lot better?

Mr LOY: I believe so. I think with the Ombudsman and the amount of deficiency notices that we get. The relationship now with the New South Wales Police Force, the Ombudsman, and the Police Integrity Commission is such that just recently in a Liverpool job we were asked by the Police Integrity Commission to assist in the arrest phase and search warrant phase. There is a more robust working relationship between the Police Integrity Commission and senior police operators. In fact, in the chair I am in at the minute as the acting commander, and the director of operations, we meet with the Commissioner and Assistant Commissioner of the Police Integrity Commission on a weekly basis.

We discuss current, contemporary investigations that are under the Professional Standards Command. We also discuss any other issues of concern such as investigations in the field. They say, "Jeff, there is a concern about this particular investigation. Can you have a look at that?" And then we have quarterly meetings with the New South Wales Ombudsman as well. Personally, I think there are a lot more robust systems in place. The evidence is towards not systemic corruption, but we still have individuals, unfortunately, who are conducting criminal behaviour in particular. A lot of bad behaviour is linked to alcohol, domestic violence and improper associations—they seem to be the key things that are still troubling the New South Wales Police Force.

Ms McCARTHY: I will just give you a feel for those investigative deficiencies. The three performance measures that are used are, first, general investigative deficiency—that is, a line of inquiry that obviously has not been followed, appropriate questions were not put to police officers during interview. Second, there is timeliness—whether the matter was done in a timely way, whether we grabbed hold of it and got on with the job and investigated it appropriately. Third, there is the other deficiency measure of whether the management action that the New South Wales Police Force has taken was appropriate for the conduct that has been sustained.

In respect of that, there are about 2,000 investigations per year on average that the Ombudsman oversights. Of those three lots of deficiencies, the rate has been about 9 per cent for the last few years. We are talking about a reasonably small amount of investigations. Some of those investigations may have been deficient on timeliness only. So regarding the actual investigative deficiencies, I feel that since the Royal Commission there has been a steady improvement in the way that those matters are approached.

Mr GREG SMITH: Is it much easier to be a whistleblower in the New South Wales Police Force now than it was 20 years ago?

Ms McCARTHY: Certainly. The support is there for people. Our own data actually proves that as well, because people are coming forward.

Mr GREG SMITH: I will come back to that.

Ms McCARTHY: I can give you some data on that as well.

CHAIR: Mr Smith, do you have any relevant questions?

Mr GREG SMITH: Assistant Commissioner Loy, you talked about directed interviews. Is that directed interviews after someone has been dealt with by the Police Integrity Commission and perhaps found to have behaved badly, or might be facing either criminal charges or dismissal? Is that when you do directed interviews?

Mr LOY: We do directed interviews only in relation to departmental investigations. We still must provide a caution if we are to do a criminal investigation.

Mr GREG SMITH: Are there cases in which you have used the product of interviews you do in subsequent Industrial Relations Commission proceedings, if they take place?

Mr LOY: Yes, the documents under direction are utilised in the Industrial Relations Commission.

Mr GREG SMITH: Are there cases where persons who admit wrongdoing before the Police Integrity Commission have resiled from that admission?

Mr LOY: Resiled?

Mr GREG SMITH: Have changed their evidence?

Mr LOY: What, actually admitted at the Police Integrity Commission to doing the wrong thing, and turning around?

Mr GREG SMITH: Yes, said to you that they were under duress or something?

Mr LOY: In general terms, the theme is that once an officer has made admissions of guilt that tends to flow through the rest of the process. That does not mean they do not then argue the case or appeal the decision on penalty, whether it be harsh, unjust or unreasonable. Once the guilt is admitted it tends to flow through.

Mr GREG SMITH: Have there been any cases where the Industrial Relations Commission has exonerated such people when they are brought before it?

Mr LOY: The word "exoneration" is probably not totally correct, but decisions have been overturned by the Industrial Relations Commission. So, the Commissioner has lost confidence in an officer and has gone through a conciliation process and it has gone to a hearing in the Industrial Relations Commission and the Industrial Relations Commissioner has then overturned the decision of the Commissioner and asked for those employees to be returned to the workplace. That has occurred, yes.

Mr GREG SMITH: Is there provision for the Commissioner to appeal against such decisions?

Ms McCARTHY: Yes, there is.

Mr GREG SMITH: Does he?

Ms McCARTHY: He does.

Mr GREG SMITH: Successfully?

Ms McCARTHY: A lot of them are still on foot, but we have had some successes.

Reverend the Hon. FRED NILE: Overturning the Commissioner's decision has been a new development, has it not? At one stage it seemed to be flowing fairly straightforwardly.

Ms McCARTHY: Yes.

Reverend the Hon. FRED NILE: I sense that there have been more challenges to the Commissioner—

CHAIR: This is all very interesting, but we have to stay on track.

Mr GREG SMITH: But with respect, Mr Chairman, it does go to the question of whether it is practical to give ICAC the power to hand it over. Is that really going to be the answer to disciplinary matters if they can be ultimately knocked over by the Industrial Relations Commission?

CHAIR: The police have answered that very broadly in the previous question you asked. How can that be forecast?

Mr GREG SMITH: All right.

Reverend the Hon. FRED NILE: Following up what Mr Smith was saying, there seems to have been some change in the culture of challenging the Commissioner's decisions.

Ms McCARTHY: In 2008 the Commissioner removed 24 police officers by use of Commissioner's confidence provisions. Twenty-two of those officers appealed that decision to the Industrial Relations Commission, so there is a high rate of review of the Commissioner's decisions. As a result of that some matters were conciliated, four officers withdrew their applications after a period of time, and there are about 12 matters still pending. Once they go over for hearing there is quite a length of time in getting a date at the Commission for a matter to be heard.

Ms DIANE BEAMER: But most would resign on the admission—

Ms McCARTHY: That is not the practice.

Ms DIANE BEAMER: It is not the practice to resign?

The Hon. TREVOR KHAN: If they had resigned you would not have 22 appeals.

Ms DIANE BEAMER: That is right but I am wondering how many got to the point where the Commissioner actually had to invoke these powers, because some may have resigned prior to that. Once they have rolled over they have said also, "I'm out of here, Jack."

Ms McCARTHY: There are a small number of police officers that offer their resignation and the Commissioner considers that on its merits, but normally they will go through the whole process. That is our experience.

Reverend the Hon. FRED NILE: In previous years they were not applying to the Industrial Relations Commission, they were just accepting the Commissioner's decision as if that was final. A change of culture has occurred because the officers have seen a new opportunity that did not seem to be there before.

Ms McCARTHY: The legislation has been in place for 10 years and with each year there has been a higher rate of review in the Industrial Relations Commission of the officers who have been removed, leading to the current situation where last year 24 were removed and 22 were reviewed. Our expectation is that the police officers will have their matters reviewed in the Industrial Relations Commission, so obviously as we get more and more experience in that jurisdiction it will assist us to make sure our case is as robust as possible.

The Hon. TREVOR KHAN: Superintendent McCarthy, you raised the issue of delays and the Commission has considered those to be significant on occasion. Are you able to indicate what type of delay or length of time of delay the Commission has considered to be significant in disciplinary proceedings?

Ms McCARTHY: Delays in the investigative phase between the date that the incident occurred and there has not been a finalisation in the officer receiving a notice to show cause after about 18 months. It is usually a period of time that is starting to exceed the 12-month mark. I think there is an acceptance that some of these investigations are quite complex and where they involve other agencies and the Commission is dependent on their timetable there will be some delays. Delays that move beyond the 12-month period start to be quite problematic.

The Hon. TREVOR KHAN: Is that investigation you referred to the investigation by PIC or is it when you are notified and undertake your internal investigation?

Ms McCARTHY: The Commission just views it as collateral. They say that the incident occurred here and there was an investigation here and then there may have been a part 8A investigation by the Commissioner, so they tend to look at it as a whole. But they are obviously very interested in the investigation that the Commissioner of Police is responsible for.

The Hon. TREVOR KHAN: But there could be some incidents, could there not, where the so-called incident has occurred before PIC obtains the information that leads to their investigation. I assume the PIC investigation itself could take many months, if not over 12 months, so you could be looking at something fairly historical before it ever results in your being supplied with the information.

Ms McCARTHY: Yes, that is right.

The Hon. TREVOR KHAN: Would the Commission take that delay into account?

Ms McCARTHY: The test for the Commissioner is the integrity. Under the Act the Commissioner is responsible for the integrity of the Police Force. Does the Commissioner have the confidence going forward that this person should remain a police officer? The Commission is looking at a broader test, which is in all the circumstances has the decision to remove the police officer been harsh, unreasonable or unjust. That brings into play different factors: if you are asking a person to recall things when a matter is historical in nature is that reasonable and fair? There are a whole range of other factors that come into play.

The Hon. TREVOR KHAN: Sure. We can deal with that at another time. Is there a good relationship between the Professional Standards Command and PIC officers?

Ms McCARTHY: Yes.

Mr LOY: In some respects. I think the professional relationship should be noted. They have a different charter to the New South Wales Police Force. We look behind their investigations for our disciplinary procedures. There have been some matters where our viewpoint conflicts in relation to the findings in particular from PIC. Overall, if you look at a general viewpoint, between the New South Wales Police Force and the Police Integrity Commission I would say there is a very robust professional relationship. We have some commonalities in our core business, which is to reduce and eliminate the numbers of corrupt officers and serious misconduct in the Police Force.

The Hon. TREVOR KHAN: Assistant Commissioner, that was not a trick question; it was a lead-in. What I was getting to was that I think the evidence to this point has been that when PIC has completed an investigation it hands over its material to allow you to undertake your investigations. Have there been circumstances where it has not provided all of its material on which it has relied so that you only got, in a sense, a part picture of the evidence?

Mr LOY: They can do and they have the right to do that. We have written to PIC on several occasions and asked for additional information and it has been forthcoming or, if it has not been forthcoming, an explanation as to the reason. In the majority of cases the hearings are public hearings in some respects so we get the transcripts and things like that. It may be that their private investigations or their telephone intercept information leads to a further investigation that they do not wish to disclose.

The Hon. TREVOR KHAN: That is precisely what I envisaged.

Mr LOY: That is quite appropriate, as long as we are getting enough information from PIC to be able to deal with the matter at hand for disciplinary proceedings and take our matters forward so the Commissioner can make an assessment as to whether those officers should continue in the Police Force.

The Hon. TREVOR KHAN: I suppose what I am musing about is this, and I invite your comment: If we are dealing with ICAC providing information to a government department that does not have an investigative arm, such as your own, do you envisage problems with ICAC being prepared to "genuinely hand over" the brief to allow either disciplinary proceedings or criminal proceedings to be taken against an employee of that department?

Mr LOY: In fairness, that is probably a matter between that particular organisation and the ICAC to do what we have done and put in place a process of communication and robustness in relation to what information we have and whether there is information we do not have.

Sometimes you might not have the information. However, if you know that you do not have that information at least you can move forward. If you are blindsided that would make it difficult. At some stage down the track the Industrial Relations Commission will identify those gaps if you are taking disciplinary action or you are going to dismiss a person from your organisation.

The Hon. TREVOR KHAN: Let me envisage this scenario. The ICAC has undertaken a number of inquiries. Let us take State Rail as an example. It is pretty plain that the ICAC's investigation is revealing constant problems, yet it seems to be commonly accepted that the organisation has failed to respond to previous investigations. If this Committee is inquiring essentially into providing greater powers to prosecute someone, do you envisage a problem with a part of a public service that does not respond to former disclosures of corrupt conduct, that is, information being passed on to those sorts of departments?

Mr LOY: I suppose it gets back to the key word, that is, accountability. The executives of those organisations have a responsibility under the different Acts—for example, the Public Finance and Audit Act, and issues such as that—to ensure that their systems and processes are robust to be able to reduce the frauds, the inappropriate misappropriations of funds, and those sorts of things. Amongst their own employees there are contractors, et cetera. I suppose that there are other ways to conduct a business, that is, to make the executives of those organisations accountable for that corrupt conduct.

If there is evidence, as you say, that it has happened previously and no action has been taken, I believe that there have to be some systemic issues relating to their business planning and their planning on how they conduct their statement values. Under the State Plan every government organisation has an obligation to ensure the integrity and ethics of its own organisation and its code of conduct. We have an ethical health strategy linked to the code of conduct. Again, under the legislative framework of the Police Act there is that key point of integrity above all.

You might have to look at the other organisations to see whether they need that legislative framework to ensure that they have integrity above all. Every public service employee has to take that issue into account. The New South Wales Police Force has a mandatory situation where it must do that because of the extra powers and things that it has. However, if you are a public figure you should have the same level of integrity.

The Hon. TREVOR KHAN: I suppose that it follows on. Do you believe that a contract supervisor who works for State Rail should have the same level or expectation of probity as an officer under your command?

Mr LOY: No, I am not suggesting that. I am saying that we understand the reasons why the police need to have that additional responsibility. If you are using public funds and public money and you are willing to provide goods and services for a public authority you should conduct that business in an appropriate and ethical manner or expect the consequences. If those consequences are criminal charges or you are required to go before the ICAC, I would be surprised if contractors and people who were found in some other inquiries to be utilising public funds inappropriately were still on the contract list.

The Hon. TREVOR KHAN: Do you envisage a different answer with regard to the use of evidence obtained under compulsion with respect to disciplinary proceedings as opposed to criminal proceedings?

Mr LOY: There is a difference in relation to criminal proceedings in that we say that there must be corroborative evidence. If an officer sits in the Police Integrity Commission and under coercive powers admits to criminal conduct, in our opinion it is a higher test of the corroborative evidence. You are then dependent on the evidence of other witnesses, which is allowed in criminal procedures. I think that is the key point. The test of the briefs is that, prima facie, there must be a reasonable chance of a conviction.

The Hon. TREVOR KHAN: One would hope so.

Mr LOY: And it must be in the public interest. The three tests still remain in every brief of evidence, regardless of how the evidence is adduced.

Mr JONATHAN O'DEA: I make the observation that prior to the Police Integrity Commission Act and the New South Wales Police Royal Commission, the two systems of the ICAC and the PIC were the same. There has been a divergence. Obviously, currently we are looking at the possibility of bringing those two systems a little closer in the way in which they are treated. I am not suggesting that the two should be the same, but I am interested in your observations as to whether, from your perspective, you see any conflict between the operating systems of the ICAC and the PIC, and whether there is any duplication from your perspective. You talked about corroboration and whether you had looked to an ICAC hearing for corroboration in any situation—not necessarily the evidence but pulling witnesses out of that hearing—because the PIC hearing will not look at situations where both police and other officers are involved. I probably have asked enough questions for the moment.

Mr LOY: The difference at the moment obviously is that the ICAC has no jurisdiction over the New South Wales Police Force. In answer to your question about whether the two are the same or should be the same, it is probably not for me to comment on that. With the PIC and the cooperation between the PIC and the New South Wales Police Force, it is still an oversight body of the New South Wales Police Force. Something that we need to keep in view is that it is looking at a different charter. If you are looking at a question phrased around whether the relationship with police and the ICAC should be the same as the PIC, obviously there needs to be some legislative change for that to occur.

Mr JONATHAN O'DEA: Do you have parallel ICAC inquiries at the same time as PIC inquiries over a related matter? Does that happen?

Mr LOY: I cannot recall.

Mr JONATHAN O'DEA: There might be multiple allegations of corruption of both police and public officers outside the gambit of the PIC.

Mr GREG SMITH: Perhaps you might mention Roger Rogerson. I think he was the subject of parallel inquiries by both agencies. Do you know about that?

Mr JONATHAN O'DEA: Roger Rogerson is a good example.

Mr GREG SMITH: In recent years.

Mr JONATHAN O'DEA: In the potentially different treatment of evidence between the PIC and ICAC does a conflict arise out of that? It is a fairly general question.

Mr LOY: I cannot offer any evidence to the Committee relating to any knowledge of where that has occurred, where we have been in conflict, or the PIC and the ICAC have been in conflict, and we have had to deal with the issue at the Professional Standards Command. I have Mr Leeds on my left and Karen McCarthy on my right who have been at the Professional Standards Command for many years. I do not know whether they can assist.

Mr JONATHAN O'DEA: Prior to the Police Integrity Commission Act were you involved in police disciplinary action?

Ms McCARTHY: No, I was not.

Mr LOY: We cannot help you.

Mr NINOS KHOSHABA: Mr Loy, you referred earlier to the investigation of an officer. Given that members of the New South Wales Police Force are seen to be public figures, at what stage does an investigation become public? You mentioned earlier that, at the end of the day, it could ruin someone's reputation, even if it were proved that that person was not involved in any illegal act.

Mr LOY: Whether a Police Integrity Commission inquiry is public or private is purely a matter for the Police Integrity Commissioner. We have no negotiation in relation to that.

Mr NINOS KHOSHABA: I assume that there might be some cases where there is an investigation and it is obvious that a member may have acted either corruptly or illegally. However, the evidence that was provided could not be used for whatever reason and therefore the case was stopped. What happens then? Do the police continue to have that person under surveillance?

Mr LOY: If we gain information from the PIC at a PIC hearing and we conduct a departmental investigation, we fall back on that interview process. That might occur if an officer goes off on long-term sick leave and that officer is unable, as a result of medical advice, to be interviewed.

There is a process we have to go through with that. That is probably one example where we may not be able to move forward, but again we can still take that evidence and information from PIC and use that evidence in a departmental investigation and, I think, allow the Commissioner to make an assessment on whether or not he loses confidence. Or sometimes if the medical evidence is such, the officer is medically discharged from the Police Force in any event.

The Hon. Trevor Khan: On an HOD I take it?

Mr LOY: It depends on the nature, but sometimes HOD or sometimes just through medical condition.

CHAIR: Mr Khan raised the issue about PIC providing you with evidence and its right to provide you with the evidence it wants. I believe the word "blindsided" was used by Mr Khan about bad evidence. We are examining the evidence of admissions and using that compulsorily obtained evidence in disciplinary proceedings. Do you have any issue with PIC providing that to you?

Mr LOY: No. If a police officer or public servant sits in the Police Integrity Commission under coercive powers and makes admissions of corrupt behaviour or criminal behaviour, I believe the New South Wales Police Force should utilise that information.

CHAIR: That is right. So you have no trouble with that. I believe Ms McCarthy said that it plays an important part in the disciplinary proceedings?

Mr LOY: Yes.

CHAIR: I take it then that if you did not have that, you would have much more difficulty in proceeding?

Mr LOY: Yes, we would. However, if we had that departmentally, we can go back to our own coercive powers, if you wish, on directive interviews and ask for the truth. If the truth is not forthcoming, we investigate the matter to prove that the officer has been untruthful. Again, it goes to the core of their integrity and the officer can be dismissed. It is a crucial point.

CHAIR: We thank you for appearing before the inquiry. We appreciate your time.

(The witnesses withdrew)

ROBERT MARTIN NEEDHAM, Chairperson, Crime and Misconduct Commission, 515 St Pauls Terrace, Brisbane, sworn and examined:

CHAIR: I welcome the Chairperson of the Crime and Misconduct Commission of Queensland. Thank you very much for taking the trip down here to assist us with this inquiry. That is very much appreciated. We have received a submission from you related to this inquiry, and we thank you for it. Do you wish that to be part of your evidence today?

Mr NEEDHAM: Yes, thank you.

CHAIR: Do you wish to make an opening statement to the Committee?

Mr NEEDHAM: If I could just add a couple of things, perhaps: Since I made that submission to your Committee, which I must say looking back on it is a fairly brief submission, I have been sent the transcript of the previous day's hearing, which I have scanned. I cannot say I have read it word for word, but I have scanned it. It makes clear to me some of the issues that you are concerned with, in particular with respect to term of reference No. 3, although there are a couple of other things that I could perhaps say.

Just looking at them generally, I do not desire to add anything at this stage with respect to your first term of reference. But with the second term of reference, about the use of material from hearings in civil proceedings generally or in specific classes of civil proceedings, one of the things that must be considered is the purpose for which you would be looking at such an amendment. If it is basically the purpose of recovery of moneys that have been, say, defrauded from the Crown, then I would have thought that the use of the proceeds of crime legislation would be an adequate way of recovering that, and the use privilege could be taken away for the purpose of the use of that material in such proceedings.

I noted when the ICAC representatives appeared before you, and I think subsequently, there has been some questioning about whether that would mean that ICAC would have to make the applications for proceeds orders. I personally would see no reason why that would be necessary. One of our functions at the CMC is that we do administer all the civil proceeds legislation and we take all the actions. We make applications for restraining orders and for forfeitures in our own matters, our organised crime matters and in our misconduct matters, but we also do it on behalf of the Queensland Police Service, or on behalf of Commonwealth authorities, if there are reasons why they want to use our legislation rather than the Commonwealth legislation, and indeed we would use it on behalf of the New South Wales authorities if it is appropriate.

What I am shortly saying is that the application does not have to be made by the organisation that was involved with the investigation. It could be made by the New South Wales Crime Commission on behalf or arising out of the investigation carried out by ICAC. If the purpose for which the amendment is sought is for its use more broadly in civil proceedings—say, to recover not just proceeds but in certain circumstances in which entitlements can be taken away from a member of Parliament, say, who has been found guilty of corrupt actions or a senior member of the public service—and if it was wanted to be used for those purposes, then of course you would need a broader removal. I can see no reason why it should not be available to be used in those proceedings, quite frankly.

The issue of defamation was raised, I noted yesterday when I was reading quickly through the evidence. I have not gone looking at the ICAC Act but I imagine there is a provision there similar to what we have in the Crime and Misconduct Act: that a witness before one of our hearings has the same protections as a witness before the Supreme Court. In other words, they cannot be sued for defamation, so it could not be used in defamation actions. In relation to term of reference No. 3, I must say I did not really appreciate what that was all about at the time when my Assistant Commissioner–Misconduct drafted our submission; I okayed it and signed it. The issue there seems to be that what Mr Cripps is looking for is a very clear statement of their power to be able to conduct further inquiries where it is needed, after they have forwarded the matter to the DPP.

If I might say, with respect, it seems to have got away from that in term of reference No. 3 to the more broad issue of the state of the brief that should be delivered by ICAC to the DPP. I would have thought that is a matter for ICAC and the DPP. We in Queensland perhaps spoil our DPP. We deliver a fairly good brief. I might say that we do not always deliver statements. We will do that in some cases if the witness is cooperative, but if you have gone through a hearings process with an uncooperative witness and the witness in the witness box under oath has got to a stage, after perhaps a day of cross-examination, of admitting various things, the last thing

that I ever encourage is that they be gone back to outside the hearing and be given an opportunity to recant and withdraw, even if only to a partial extent, the evidence that they gave under oath in the witness box. You cannot get a better basis of evidence that you will be presenting in another court than the evidence they gave on oath.

I dissuade the DPP from insisting on statements in certain cases. If the witness is cooperative, there are no problems; but with certain witnesses, in my view it is a very foolish thing to go back and get a statement. I do not know what the state of your disclosure requirements are in New South Wales, but it is not necessary for the DPP to have a statement in Queensland. You could do up a statement, without getting it signed, of "This is what we take the witness's evidence will be from the conclusion of the evidence given at the hearing", with perhaps references to particular pages in the transcript for each particular paragraph of it. That is sufficient for the defence. The defence will get a full copy of the transcript of evidence, and they will have the whole lot.

I do not understand, quite frankly, the reason for making it a primary function when it is compared to one of the other functions of ICAC. I do not understand what difference that will make. If you do that, I would not have thought it would clarify the issue, as far as the concern that Mr Cripps has.

If you make it a primary function to collate evidence, that does not then, I would not have thought, make it totally clear that after they have finished collating and sent the DPP the brief, they could then later start gathering further evidence if requested by the DPP. May I suggest that the way I would like to see it is the way we have it in Queensland. Section 49 of our Act is the one that enables us to send a matter to the DPP. Section 49(4) states:

> If the Director of Public Prosecutions requires the Commission to make further investigation or supply further information relevant to a prosecution, whether started or not, the Commission must take all reasonable steps to further investigate the matter or provide the further information.

That makes it totally clear that we have the power, even though we have sent the brief off to the DPP; if the DPP wants further information, we can go out and do it. We go even further than that; section 333(1), which I do not know that you need quite as broadly as this, makes it very clear that we can, in effect, just do anything we want to insofar as investigation, even in fact if the criminal proceedings have started. It is very broad. It was brought into effect, my understanding is, after the High Court, in *Hammond*, ruled that it was inappropriate for a body—I am not sure—

Mr GREG SMITH: It was a Meat Royal Commission, substitution of meat.

The Hon. TREVOR KHAN: Was it a Victorian one?

Mr GREG SMITH: Yes.

Mr NEEDHAM: The court ruled it was inappropriate for the inquiry body in that case to be continuing investigations after, in effect, the prosecutions had begun. So section 333(1) means that we can really do any of our investigative processes, even if the trial is about to proceed or in fact the proceedings have been put on foot. I must say that normally I will use our coercive powers. If the DPP asks, say, for further financial information from banks or something like that I will issue a notice to the bank requiring them to provide that information to us. It is totally clear that I can do that and in some cases it is appropriate. It is much more convenient than going through a search warrant process or a subpoena to do it that way.

With respect to hearings, we do it in crime. Our process is that once proceedings are started we would never call the accused person before the hearing, but we will call other people. In crime, we have an organised crime function. If a prosecution is started and then it is determined that a further witness, who has now been able to be found, say, who was unable to be found at an earlier stage, if the DPP wants that witness examined and it is, say, a bikie, they just refuse to talk to you. So we will bring that person to a closed hearing and we will ask the question. We have used it in other cases like doctors being reluctant to talk to us. If you serve them with a notice to attend at a hearing they will suddenly become prepared to talk to you. In all those sorts of things, we use it, but you use it with discretion. Once proceedings have started you think about it and make sure it is an appropriate case in which to use it.

CHAIR: Just picking up on the general nature of what you have been saying, my interpretation—and others might have a different interpretation—of the rationale for term of reference No. 3 was that if those changes were to be made then it might have ICAC simply pursuing evidence for disciplinary or civil proceedings. That was the rationale, whatever one may think of the merit of it, but I think that is generally how

it was. You are not the only witness at this inquiry who has raised that point. Just on that area, I take it from what you are saying that you conduct your investigation and forward good briefs to the DPP and you might get requisitions out of the DPP.

Mr NEEDHAM: Yes.

CHAIR: From what you are saying, in response to those requisitions, you can continue to get further evidence. The ICAC was established as a body to expose corruption—that was the original intent—and to have the hearings in public and to expose and deter like-minded people. The way the Commissioner interprets his Act is that once the investigation is complete he is unable to use his coercive powers because the beginning of each section simply states "for the purposes of investigation". So it is taken that when the report is submitted or released that is the end of the investigation. So while ICAC then pursues procuring statements as a result of requisitions from the DPP, they are done without the use of those coercive powers. From what you are telling me, the Crime and Misconduct Commission is able to continue using those coercive powers. Do you think—this has been raised in this inquiry before—that if the primary function of the Independent Commission Against Corruption now includes obtaining admissible evidence, that would change the nature of the original intent of ICAC, and particularly if it used its continuing coercive powers as a law enforcement agency, it would be very different now to what it was? Do you see the difference? That is what I am getting to. Do you have any comments to make on that?

Mr NEEDHAM: It is that latter part, as to whether they could continue to use the coercive powers. I think there would be no doubt they would be able to perhaps continue to assemble the evidence, but I can totally understand Mr Cripps when he says he would like a clear statement from Parliament that the Commission is entitled to continue to use its coercive powers after in effect it had assembled its brief and sent it to the DPP. I am sure he is the same as I am, that you are very cautious about using your coercive powers, that you only use it in circumstances where you know you have that power and when it is appropriate to use it. If there was any doubt at all as to whether you have the power, then you tend not to use it.

If you are wanting to give the power to the ICAC to do that, to use its coercive powers on request of further information from the DPP, I might, with respect, suggest that it should be spelt out quite clearly so that there can be no argument. If you were to leave it as just saying, "One of the primary functions of the ICAC is to assemble evidence" it would still be arguable. You would still get an argument able to be mounted by a defence, say, in a criminal matter that ICAC had no such power to use the coercive powers at that stage and therefore the evidence obtained should not, in the exercise of the discretion of the court, be utilised against the accused person.

CHAIR: So you are saying that one cannot happen without the other. If you are making it a primary function, if the Government were to do that—it is a policy issue because in my view it would change the very nature of the Commission—are you saying you would also have to make it clear that they can continue to use their coercive powers after investigations are over?

Mr NEEDHAM: That would be my preference.

CHAIR: Returning to the disciplinary proceedings, as I understand it, section 197 of your Act states that you cannot use that evidence for criminal, civil or administrative procedures but in your system, when a witness, after having given evidence compulsorily and being cross-examined, admits matters or incriminates themselves, and then steps out of that forum into another forum with a police officer, as I understand it, the evidence he has just given forms the basis of a directed interview. Is that how that system basically works? As I understand it, you are in favour of removing the prohibition on that evidence in disciplinary proceedings, but the system you have now would still be different. Can you explain how your system works?

Mr NEEDHAM: We do both the work that the PIC does and the work that the ICAC does, and indeed, part of the work that the Ombudsman does. If it is a police officer who is under investigation who has been called to a coercive hearing—and most of ours I might say we do closed—the cross examination takes place. If the police officer admits wrongdoing in that coercive hearing that evidence cannot be used in disciplinary proceedings against that police officer, or in criminal. However, there is the power under Police Service Administration Act for a directed interview for disciplinary purposes. What we do in those circumstances is we have seconded police officers at the CMC. As soon as possible after the witness stands down from giving evidence at the coercive hearing one of our inspectors say—we always use a superior officer, so if it is an inspector being questioned we will use a superintendent or a chief superintendent. There will be an interview at

our premises that day or very soon thereafter the evidence where the police officer will be given direction to answer the questions and the interview will take place.

We like to do it as soon as possible to keep the keep the heat up of the investigation. After you have had a cross examination and you have got the admissions you do not want to again give them the opportunity of watering down their admissions or recanting in any way. We can do that with the police. We also, of course, do hearings with regards to public officials and we do not do that same thing with public officials. It is my understanding that it has always been believed that there was the power with public officers to have a directed interview. I do not know that it is used very frequently, quite honestly, but I have understood that it has always been accepted that it was there. Just in the past six months or so that is starting to be called into question as to whether, in fact, that power does exist because it is not in the legislation. It was almost always, in effect, taken from the common law power of master and servant.

What that means then, is if we do a hearing in respect to a public servant or a public official that then cannot be used in disciplinary proceedings. We will perhaps interview the person outside or we will send the matter back to the department and the department will have to do its interview. We will disseminate the material to the department.

The Hon. TREVOR KHAN: Or not, as the case may be.

CHAIR: That is right.

Mr NEEDHAM: Or not. I heard the questioning of police representatives this morning. I do not think you should assume that departments have no investigative ability, especially big departments who have their ethical standards units, called different names in different departments. If you have got a department with 60,000 or 80,000 people in it, it will have a fair investigative capacity. In the more serious matters there are plenty of agencies around who have people with that capacity and they will be engaged by the departments to do it for them and the departments will get advice from Crown law or from private solicitors as to the appropriate way to do these matters. It should not be assumed that departments do not have the ability to do this. If smaller departments do not have the ability we will provide assistance to them. If need be we will have one of our officers go and work with their officers to complete the investigation. I would be surprised if the ICAC does not do the same: I do not know.

Mr DAVID HARRIS: With that in view, what is your opinion of the quality of evidence that is obtained under objection? Would it be the same if it could be used in disciplinary action, in terms of the witness not necessarily lying but is giving a version, if you like, of the best lie? You may not obtain the quality of information that you would now?

Mr NEEDHAM: I read what Mr Cripps said on that and I basically agree with him except to one extent. I agree with what he says, in that those witnesses really only tell you what they think you know. Now that does not mean to say that you only get admissions of things that you can otherwise prove, because the ideal, of course, when you are cross examining any witness who you think is lying is always to get that witness to the stage that he or she does not know how much you know. You might only know this much, but you suspect they are involved in that much. But if you get them to a stage where they do not know how much it is you know, they know they can be up for perjury if they lie, and you can get admissions over and above matters that you can otherwise prove. You might then be able to go off, and using that admission, find proof independently of it, but you will often get admissions of matters that you could not otherwise prove. But again it gets back to the matter that you will only get those admissions if they believe you have the material on them. I do not think the fact that it will put them in for a disciplinary charge would make one iota of difference.

Reverend the Hon. FRED NILE: The Queensland Crime and Misconduct Act restricts the use of evidence obtained under objection in any civil, criminal or administrative proceeding. Now the ICAC wants that changed and looked at. Have you initiated any change yourself in Queensland? Is there a public call for that?

Mr NEEDHAM: No, I have not. We would find it a bit of a nuisance to have to go through this directed interview process with police but we do it. It has not really been a great problem to us, I might say.

Reverend the Hon. FRED NILE: Do you use a directed interview to get information which can be used in those ways?

Mr NEEDHAM: Yes. I would like to have it but it has not been at the top of my priority list. Each year there are generally a few changes I want and you pick out the ones that are the highest in the order of priority. Though I can say, I think, fairly openly that I have spoken to the Attorney about a total revision of our Act. What happened with our Act was that when the Queensland Crime Commission and the Queensland Justice Commission were amalgamated the two Acts were put together literally like that. They were not restructured to make them meld together properly and it needs to be redone. I think that will happen in the next couple of years. At that stage we will look at everything in the Act, and that would be a good opportunity to look at this as well as everything else.

Reverend the Hon. FRED NILE: In regard to police officers, is the directed interview straight forward because they are used to that procedure?

Mr NEEDHAM: Yes.

Reverend the Hon. FRED NILE: But you cannot use that procedure for public servants, for instance, staff from RailCorp?

Mr NEEDHAM: As I said, in the past it has been understood that you could. It is now in a little bit of a state of flux as to whether it can be done that way in Queensland. An ex-Supreme Court judge sitting on a bit of a review for the Government at the moment has expressed his own opinion that it cannot be done.

Reverend the Hon. FRED NILE: If we had the directed interview procedure, would that be another way to help the ICAC meet its need, to include it in its powers as a second level?

Mr NEEDHAM: It would be an alternative way of achieving the same result but it would be a less efficient way. It would require a greater use of resources. Instead of just being able to use the answers that were given in the morning at the hearing, you would have to sit down and do a further interview in the afternoon to get exactly the same answers. It would seem to be an inefficient way to do it. A much more efficient way is to let us have one hearing, one answer, and use those answers.

Reverend the Hon. FRED NILE: They could be used in that way?

Mr NEEDHAM: Yes.

Reverend the Hon. FRED NILE: Do you see a problem with that procedure if the Act were amended?

Mr NEEDHAM: No, I see no problem at all.

Mr GREG SMITH: You mentioned that in Queensland, when a brief is given to the DPP, lots of statements are not given but evidence is given. Is that right?

Mr NEEDHAM: It will depend. Normally we would look to give statements but sometimes when, as I said, if you have a witness who is uncooperative and, to use the term, in the camp of the accused person, you can cross-examine them, get the answers under cross-examination and then to go into an interview situation, which can be on oath—there is a power, I can give them a notice to give us an interview on oath—but you would have to be starting all over again and doing the same cross-examination.

Generally what can happen, of course, when they take a little bit of time to think about it, especially if you are taking a statement weeks later, is that they come back and try to recant and go back and make it less contrary to their friend, say, who is going to be the accused.

Mr GREG SMITH: I want you to assume that in New South Wales under the Criminal Procedure Act all statements in committal hearings have to be in a prescribed form with a jurat. You cannot just hand up proofs of evidence; it has to be in its prescribed form. Can you put that into your reasoning and see the difficulty that might occur?

Mr NEEDHAM: Certainly.

Mr GREG SMITH: The Committee has had evidence that sometimes the briefs from the Independent Commission Against Corruption [ICAC] are 20 volumes thick and much of it is transcript. Generally the ICAC needs it staff to go on to the next matter as soon as it finishes one. That means that the preparation of the brief is often not given as much attention as it would if it were in, say, the Australian Crime Commission, whose function is mainly to put briefs together and to prosecute, whereas the exposure of corruption is the main purpose of the ICAC. In that context would you see that there would be advantages in upgrading the importance of assembling the brief so that resources could be put into that from an early stage?

Mr NEEDHAM: Two points there. First, is the requirement to have a statement. I think you should amend your legislation. In Queensland we have that form of statement with the jurat at the end, which means it can be what is called a hand-up statement. It can be utilised for evidence-in-chief, and then the defence can elect whether it wants to cross-examine on it. If the defence does not want to cross-examine, the statement can be produced without the witness even having to attend. However, in Queensland there is the provision for the prosecution, if it desires, to not use one of those statements, but to call the witness. If they do, the witness will have to give evidence in full; it cannot be a hand-up statement.

Mr GREG SMITH: Assume that that has happened here, but that period has passed. Now it is only in exceptional circumstances that that happens.

Mr NEEDHAM: I suggest that you should amend the legislation, because there are circumstances in which that will not be able to happen. But, assuming that that is in place, I work well with the ICAC and I am the last one wanting to be here saying things that will cause problems for them, but I take the view at the Crime and Misconduct Commission [CMC] that if we investigate a matter, then it has to be put into a state that it can be prosecuted. I cannot expect to send a matter off to the Director of Public Prosecutions [DPP] and for the DPP to be running around, finding witnesses and taking statements. That is not the function of the DPP; it has no investigative capacity.

It could not use the prosecutor because of the obvious problems that could arise if there are allegations of, say, improper treatment of the witness during the obtaining of the statement, et cetera. They would have to set up a new section, an investigative section, within the DPP to be able to do it. Equally, it would not be appropriate. I am sure Mr Cripps would not really want it going back to the police for the police to be doing it, because—and I do not know about New South Wales police—the Queensland police would have no interest in finalising an investigation done by the Crime and Misconduct Commission.

The Hon. TREVOR KHAN: That would be fair.

Mr NEEDHAM: Therefore, it leaves only one body that can do it, in my view.

Mr GREG SMITH: What is the staff size of the Crime and Misconduct Commission?

Mr NEEDHAM: Just over 300.

Mr GREG SMITH: Do you know that the ICAC has about 100?

Mr NEEDHAM: Yes, but, not meaning to denigrate New South Wales in any way, we do not seem to find the same levels of misconduct in our public sector as found down here. Later this year I anticipate getting telephone intercept powers and other like bodies to ours around Australia are saying to me that they do not know how we do our job without it. Any ICAC report I look at relies heavily upon telephone material, so we might find more when we get that. But, I still do not think, to be fair, that the levels of misconduct in Queensland are at the levels that you find in New South Wales.

Mr GREG SMITH: Apart from the Australian Crime Commission you are the only Commission that investigates crime and misconduct in Queensland, is that right?

Mr NEEDHAM: Yes, there is no separate crime Commission. We do the organised crime, the criminal paedophilia, all that side of it.

Mr GREG SMITH: On directed interviews, do you have cases in which the witness refuses to cooperate with the directed interview?

Mr NEEDHAM: Under the Police Service Administration Act they have no alternative. If they fail, that in itself is a disciplinary offence.

Mr GREG SMITH: Are you aware that the history of directed interviews comes from discipline forces such as the police and the military? Generally, it has not had a history in other public service organisations in Australia.

Mr NEEDHAM: That situation is very much coming to the fore in Queensland at the moment.

The Hon. TREVOR KHAN: Reverend the Hon. Fred Nile asked you a question regarding directed interviews. There really needs to be directed interviews required of public servants. It is not really an amendment to the Independent Commission Against Corruption Act but an amendment to what would be the public services Act, or similar legislation, to require employees under the public services Act, or similar Act, to respond to a directed interview.

Mr NEEDHAM: That is a broader matter, is it not? If you were to bring in this amendment, that would have a narrower effect than the amendment you were just talking about, because if you brought in an amendment such as that, they could do directed interviews in disciplinary matters, in matters that had not even been at the ICAC.

The Hon. TREVOR KHAN: Absolutely.

Mr NEEDHAM: So, if you do this, you are doing it in a more narrow confine than if you make that broad amendment.

The Hon. TREVOR KHAN: Investigations will be undertaken by any body, such as your own, in which questions will be asked of a person before the inquiry, which may cover a particular aspect of conduct. However, for example, if a police officer or a public servant were involved, the directed interview provides the employer of that person with an opportunity, perhaps as a consequence of the questions that are asked, to investigate a broader range of activities that may not be of interest to your inquiry?

Mr NEEDHAM: Yes.

The Hon. TREVOR KHAN: In a sense, the use of the inquiry coupled with a directed interview can give a broader picture of conduct or misconduct than your own inquiry may have been interested in?

Mr NEEDHAM: Yes.

The Hon. TREVOR KHAN: To that extent, the two powers—that is your power to make an inquiry and the directed interview—are complementary powers that may achieve a larger result than even your inquiry anticipated?

Mr NEEDHAM: Yes, that is so. It is a matter of how far you would want to take it as to how far down in the disciplinary scheme of things you would want a department to be able to enforce a directed interview. That is, for instance, low-level staff harassment or bullying; do you want it to get to that stage or do you want to limit it at the more serious misconduct? Those are all policy matters. But I take your point. Before we would get involved in a hearing, it would have to be a reasonably serious matter. Normally we would only conduct them for things like, say, a transport officer issuing driver's licences to friends or to outlaw motorcycle gang members for payments—those sorts of things we would get involved in. We are like the Independent Commission Against Corruption: most of the matters we send back to the departments to deal with themselves.

The Hon. TREVOR KHAN: If we talk about matters being referred back to the department, you made a sobering remark earlier with regards to departments having an investigative arm or function. Plainly some departments such as an education department have quite refined methods of investigation that they use, do they not?

Mr NEEDHAM: Yes.

The Hon. TREVOR KHAN: Obviously police departments have such tools. Are you aware of the problems that occurred in New South Wales with our rail system and what seems to be endemic corruption there?

Mr NEEDHAM: Yes, I have followed it with some interest.

The Hon. TREVOR KHAN: Is it not the case that simply referring an investigation back to a department that seems to be somewhat dysfunctional may not by itself lead to an appropriate outcome with regard to the evidence that has been acquired?

Mr NEEDHAM: Yes, that is so.

The Hon. TREVOR KHAN: Indeed, it seems to be the case that the ICAC investigations into the management of our rail system have exposed that investigation after investigation goes on and nothing seems to change.

Mr NEEDHAM: Going back before this latest series when they put out four or five reports, I do not know what came out of the earlier reports where there were recommendations for criminal proceedings or disciplinary proceedings. Generally in a thing like that it is not just a matter of dealing with the individual officer involved. There are often systemic problems, which ICAC addresses by way of systemic recommendations. It is a matter of whether the organisation has reacted to those systemic recommendations, bringing in, as the Assistant Commissioner said earlier, within their operational plans a fraud and corruption control plan—bringing in systems to ensure that the conduct does not recur. It would appear that that was not done with RailCorp. It is not just a matter of acting against the individual officer; it is a matter of looking at the bigger picture and bringing in changes so as to lessen the opportunity for individual officers to act in the same way again. I noted the fairly strong comments that were made in the final series of reports put out by the ICAC.

The Hon. TREVOR KHAN: Can I go back to the earlier observation you made with regard to proceeds of crime legislation? Your organisation takes responsibility for those proceedings. Because of our more dispersed system of standing royal commissions, if I can put it that way, where do you see that power to initiate proceeds of crime legislation existing in New South Wales?

Mr NEEDHAM: My understanding is that it is with your Crime Commission.

The Hon. TREVOR KHAN: Would you see it occurring with regard to these ICAC-style matters?

Mr NEEDHAM: Yes. They administer your legislation but with any offence upon which it is appropriate to make an application for a restraining order or a forfeiture order—it does not matter whether it is a drug offence, a fraud offence or a corruption-type offence—they should be able to bring an application and deal with it. As I said, we do it in matters that emanate from our own office, but we also do it for the Queensland police for all sorts of offences, mainly drug ones, that come to us, and we do it for the Australian Crime Commission. It does not have to come out of the New South Wales Crime Commission, I would have thought, before they can commence the appropriate action.

Mr JONATHAN O'DEA: You have obviously supported a number of the suggestions for reform in New South Wales, including lifting the restriction on the use of evidence obtained under objection in disciplinary proceedings, and while you have indicated that perhaps that might be picked up in your jurisdiction as part of a total revision of the Act, that would not necessarily be of sufficient priority for you to fight for it at the moment as one of your top causes. It leads me to think that we spend a lot of resources in reviewing and refining approaches and no doubt the Queensland legislature does as well. I am sure you have some cooperative discussions with your equivalent in the ICAC. Do you think there is greater scope for better cooperation between the jurisdictions in terms of the legislation and the general approach to the functions of the ICAC and the Crime and Misconduct Commission on issues such as those we have been talking about today and any others?

Mr NEEDHAM: We work very cooperatively together. You would know that Theresa Hamilton was our general counsel before she was poached by Jerrold Cripps. I know Jerrold well. We can pick up the phone to each other or I can pick up the phone to Theresa at any time and they will always speak to me, and vice versa. Their Act is quite different to ours. We also have the role that the Chairman was referring to of exposing corruption, but it is not put upon us in quite the same way. Under our Act, for example, we have no power to

make findings of fact with respect to people. We do not find anyone to be guilty of corrupt conduct as defined under the ICAC Act. We do not have that power. That can be a little bit awkward at times.

At the end of last year we issued a report of an investigation we did into an ex-director general of training in Queensland who when he left immediately became the chief executive officer of a registered training organisation, which I think is the same in New South Wales where they do training in effective competition with your TAFEs. In the year before he left he was involved covertly in setting up that organisation and using internal knowledge, getting people within the department to provide information to him that he was passing on and talking about how they could poach work off State TAFEs. In the end we did not send the matter off for prosecution although we made recommendations for amendments to our criminal law to bring in a new offence. We made a lot of recommendations about changes to procedures for senior public servants. We could not make a finding of even, say, a disciplinary offence against him because he was no longer working there. We could not send it off for disciplinary work because he had left the public service.

What happens is that as you go through the evidence you set out the evidence and it basically speaks for itself. I did make the comment that his actions were improper, so I went to that extent. But it is really quite dicey as to how far we can go. I would not seek to have the power that ICAC has of making specific findings of corrupt conduct. I would not mind having a very clear power to be able to make statements as to whether the person's actions were appropriate for the position that the person held, to make clear what I in effect do in pushing the envelope now.

It means that our approach is different, and it has to be, so in many ways I can understand why Jerrold Cripps would not feel the necessity to ring me and say, "Are you after this same sort of amendment?" The fact that we might be after it probably would not carry too much weight with your Cabinet in determining whether it is going to bring it in anyway. However, we do work together. May I invite you all to the Australian Public Sector Anti-Corruption [APSAC] conference in Brisbane this year that we are hosting jointly with the ICAC and the Western Australian Corruption and Crime Commission? As I say, we work together, our officers meet on a reasonably regular basis—not only with the ICAC but with the New South Wales Ombudsman—and our prevention officers meet and discuss how they do things and try to learn from one another.

Mr JONATHAN O'DEA: So within the constraints of the legislation and the broader framework there is a good level of cooperation?

Mr NEEDHAM: Yes. In fact, our Act specifically requires us, in effect, to cooperate with like organisations around Australia.

CHAIR: Mr Needham, you are in favour of the disciplinary proceedings part of this inquiry?

Mr NEEDHAM: Yes.

CHAIR: You have been asked about matters relating to RailCorp and about government departments investigating these matters on a disciplinary basis. Obviously, you see the benefit to RailCorp, just like any other government department, of having the ability to use that evidence, do you not?

Mr NEEDHAM: Yes.

CHAIR: As we heard earlier from the police—I do not know whether you heard their evidence—it forms a big part of their proceedings. I take it that, for the same general reason, you see this forming a big part of the disciplinary proceedings in the public service?

Mr NEEDHAM: Yes. To me it is quite incongruous that a public servant could admit before the Commission totally improper action and that evidence cannot be used against him or her in disciplinary proceedings. I do not know whether it is taken down here that departments can do directed interviews. From what Mr Smith indicated to me that is probably not the case.

CHAIR: No. It is a different system. That is one of the problems that we have.

Mr NEEDHAM: In those circumstances to me it is totally incongruous that a public official has admitted on sworn testimony to improper behaviour as a public official, but nothing can be done about it unless you can produce independent evidence to prove that improper behaviour.

CHAIR: A different system is in place in New South Wales, and we go through an intricate process. Again, Mr Needham, on behalf of the Committee I thank you for taking the time to travel to New South Wales to give evidence. Your evidence has been most useful.

Mr NEEDHAM: Thank you.

(**The witness withdrew**)

GREGORY THOMAS CHILVERS, Director, Research and Resource Centre, Police Association of New South Wales, 154 Elizabeth Street, Sydney, and

PHILLIP JAMES TUNCHON, Assistant Secretary, Police Association of New South Wales, 154 Elizabeth Street, Sydney, sworn and examined:

CHAIR: Mr Chilvers, in what capacity are you appearing before the Committee?

Mr CHILVERS: I am appearing in my capacity as Director, New South Wales Research and Resource Centre, Police Association of New South Wales.

CHAIR: Mr Tunchon, in what capacity are you appearing before the Committee?

Mr TUNCHON: I am appearing in my capacity as Assistant Secretary, Legal Services, Police Association of New South Wales.

CHAIR: We have received a submission from you. Do you wish that submission to form part of your evidence today?

Mr CHILVERS: Yes, we do.

CHAIR: Would you like to make an opening statement to the Committee?

Mr CHILVERS: No.

CHAIR: On page 2 of your submission you encapsulate in paragraph (2) your objection to these changes, in particular the changes relating to disciplinary proceedings. Would you elaborate on that for the benefit of the Committee? Flesh it out a bit if you can. How did you formulate your objection? Are you concerned about turning the Independent Commission Against Corruption into a de facto industrial forum? Refer also to the burden of proof and to why you object to this evidence being used.

Mr CHILVERS: Perhaps I should put it into some sort of context, that is, in the context of police. It appears that in this process the ICAC is saying, "The Police Integrity Commissioner already has this power. Why can we not have it?" I suggest that, in a number of instances, there is a different context in policing to the rest of the public sector. First, I do not think you can place the general public sector at the same level as the office of constable for a police officer and the accountabilities that are attached to that. The general public sector does not have the power to take away a person's freedom and/or in certain circumstances his or her life and have that justified at law.

Normally that does not occur in the public sector. The office of constable is a specific office. It has specific powers and enormous accountabilities attached to it. To that extent, police have a high burden of responsibility and accountability in the community. They are given extraordinary powers. We expect a lot from them and we expect more accountability. The use of coerced evidence in the industrial area under section 181D of the Police Act provides for the use of evidence that is coerced in the Police Integrity Commission in that area. That relates to the loss of confidence provisions of the Commissioner of Police.

However, that is then tested in the industrial relations arena where the burden of proof is on the officer who has been dismissed to prove that the dismissal or removal was harsh, unjust or unfair. At the same time, in the public interest, even though a person is successful in the long run at the Industrial Relations Commission, the removal is not a dismissal for the purposes of his or her entitlements. It is also a significant issue. Under the Police Act, if the person is removed for the loss of the Commissioner's confidence and that is successfully prosecuted in the Industrial Relations Commission, the removal is deemed to be a resignation.

The person does not lose his or her entitlements, long service leave, sick leave, annual leave or entitlements under various superannuation Acts. I would suggest that there are good public policy reasons for that. First, it is a quick and efficient way of getting rid of people who should not be in the job and, secondly, it protects other members of the public. For example, why should the wife and children of someone who has been engaged in corrupt behaviour suffer because of the corrupt behaviour of that public officer? It is a different area.

The Police Integrity Commission also has the role of exposing corruption and serious criminality, but that is handed on to the investigative body to investigate and then on to the Director of Public Prosecutions to prosecute. I think that separation is appropriate. I think that the concept of a one-stop shop is dangerous. Let me state at the outset that the Police Association supports the Police Integrity Commission. It has done a lot of good work over the years. However, it has extremely significant coercive powers and it has to be careful in the way in which it exercises those powers.

Hopefully, you would be aware of some recent reports from the Inspector of the Police Integrity Commission that have been tabled in Parliament relating to practices in the Police Integrity Commission that have denied natural justice to people who are the subject of investigation by the Commission. I would suggest that these are significant reports. If you are saying that that sort of untested evidence should be used directly in disciplinary proceedings, I would suggest that it would lead to all sorts of problems.

CHAIR: You might have heard Mr Needham's evidence. He said that it was incongruous for someone who was a public servant. You said that the police are different because they have access to a different level of power, which is obvious. We all agree that they occupy a different position. We have been told—and I put it to you—that it is incongruous if someone has admitted to corrupt conduct, albeit under compulsion, and that evidence is not used by a government department in disciplinary proceedings.

That might result in a couple of things. First, it would impact on the time and resources allocated to the government department to obtain other evidence and, secondly, it would result in officers being able to resign and to take all their entitlements. There is incongruity in a department being able to obtain that evidence, not being able to use that evidence, and employees then being able to benefit from it.

It is arguable, do you agree, that the New South Wales community expectation is that all public servants are entrusted by the public to administer their jobs properly? RailCorp is a classic example of continuing problems for the Independent Commission Against Corruption [ICAC]. People within that organisation fall foul of the ICAC for repeated incidents of corrupt conduct. Do you see merit in applying the argument to a department like RailCorp that it should have that information available at least in disciplinary proceedings—I am not talking about civil proceedings—to assist in helping public servants uphold the expectations of the community?

Mr CHILVERS: Yes, I know where you are coming from. But I think you need to be very careful about the way you legislate for this because the reality is that in the hearings of the Police Integrity Commission and the Independent Commission Against Corruption [ICAC], any appearance—indeed, any legal representation and certainly any opportunity to cross-examine—is at the leave of the Commissioner anyway. This is really, really untested evidence. Admissions and all sorts of things can be made in circumstances that I would suggest would not stand up even without that sort of scrutiny in any jurisdiction, let me say. That is the first thing. It is really a standing royal commission. There are all sorts of problems with the sorts of evidence and admissions made in those sorts of circumstances. That has already been seen to a certain degree where our own Police Integrity Commission is making findings that are untested, that deny the person the subject of the findings natural justice. We have got to be very, very careful about that. There is a temptation to speed things up, if you like, to take the fast track, and by throwing away a person's right to natural justice I think there are very, very significant public interest issues there—number one. I was going to say something else, but it has gone straight out of my head.

CHAIR: What do you mean when you say "natural justice"? Government departments have processes in place to pursue matters of a disciplinary nature. It would not mean that simply by having that evidence things will flow automatically. They have use of that evidence. Do you see what I mean?

Mr CHILVERS: Yes. The other point I was going to make is the issue about State Rail. It has intrigued me that the focus is, "Look, if we have powers to just quickly get rid of people that are identified as being corrupt, you might end up with no-one left in the organisation except the managers." What on earth are the managers doing in this position? Where is the accountability for systems, structures and procedures within the organisation that should be identifying this rather than the integrity Commission or the ICAC coming out and identifying particular individuals down the food chain, let me say, engaged in this sort of behaviour?

The Hon. TREVOR KHAN: That it is somebody else's responsibility cannot be the answer to criminality.

Mr CHILVERS: Criminality is a very different issue.

The Hon. TREVOR KHAN: In the State Rail exercise we are talking about people who are engaged in long-term fraud. You cannot say that the answer to that is that somebody else should manage it better. Some people are engaged in criminal activity.

Mr CHILVERS: And what has happened? You are right, but what you should be doing—the ICAC should be doing now—is identifying areas where this is happening and then sending it off to the body to investigate appropriately and present a brief of evidence and put it before the courts where it can be tested appropriately.

CHAIR: No-one is disagreeing with that, but what I am putting to you is the community expectation. Police officers have enormous powers and they occupy their own position. I would not argue with that, of course, but public servants, and managers and executives of public servants all have their own degree of responsibility to the public. They all have been entrusted by the New South Wales community to do their job, no matter where they sit in the food chain. So, the proposition is that for evidence of admissions of taking bribes of $1 million or whatever it may be, government departments then should be afforded the use of that evidence in the overall process of disciplinary proceedings. Government departments have their own proceedings in place where things are assessed and they have impartial adjudicators and arbitrators to deal with that. What I am simply asking is whether you see merit in someone saying, "Well, look, I think we've reached the stage now where we should also be able to use that evidence as well in that wider process."

Mr CHILVERS: My point is that you have to be very, very careful about doing that with evidence that is untested. I refer back again to what has occurred with our own Police Integrity Commission, where its findings have been made about someone's behaviour and subsequently that person has not been given the opportunity to respond even to those sorts of findings or allegations, and that has been an attempt to use those findings somewhere else. Our own Inspector of the Police Integrity Commission has come back and said, "Well, you can't do that because you're denying natural justice to people" by making these sorts of findings. What I am suggesting is that part of the problem is having an organisation or a statutory body like the Police Integrity Commission that can make fairly damaging findings against all sorts of people, both police officers and public servants, and have consequences flow from that upon someone's employment without having it appropriately tested, can really lengthen the process rather than shorten it. It can lengthen it by having to go back to industrial relations tribunals and all these sorts of things whereas you may in fact be able to give them an opportunity to test that evidence, which we do not have. I am not suggesting we need it, I am suggesting that that sort of untested evidence is fraught with problems.

The Hon. TREVOR KHAN: Mr Chilvers, with the greatest of respect, are you not confusing the use of the findings with the use of the evidence? The use of the evidence, which is currently inadmissible in any other proceedings, forms the basis for somebody to make a conclusion. I do not think anyone is talking about taking somebody else's finding and using that in substitution for their own thought process in determining whether it should be done. So, if you can answer the Chair's question: What do you say about the use of the evidence, not the use of the finding?

Mr CHILVERS: Yes, I hear your point. The point that I made before was that in these jurisdictions where any admissions or whatever are made to the evidence, any opportunity to introduce other witnesses is not there, and any opportunity to cross-examine to go anywhere is just not there. It is all at the discretion, the leave of the Commission. What I am suggesting is that that is the area that we would have problems with.

Mr DAVID HARRIS: Can I clarify that? Are you saying that if Fred Bloggs says, "Yes, I took a bribe for a million dollars," that would not be acceptable to use or are you saying that if Joe Bloggs said, "Yes I did and persons X, Y and Z were involved" and then action was taken against persons X, Y and Z based on that evidence, that would not be acceptable? Is that what you mean?

Mr CHILVERS: We are talking about serious criminal behaviour in these circumstances. I do not think there is any suggestion that that would not proceed to investigation and criminal charges being laid. In that context, a person is in a situation where they are going to be convicted of a serious criminal offence. You do not seriously suggest that they would stay in the public service, surely?

Mr DAVID HARRIS: No, but I think there are actually examples of that happening.

Mr JONATHAN O'DEA: Because the evidence cannot be looked at.

Mr DAVID HARRIS: Yes, because the evidence could not be looked at.

Mr CHILVERS: There are problems there in terms of the way it has been investigated, clearly, and where the Commission has referred it on, I guess. I mean, we are talking specifically about evidence given in a Commission hearing, are we not?

Mr DAVID HARRIS: Yes.

Reverend the Hon. FRED NILE: Thank you for attending. You seem to imply a question mark over the evidence for the whole procedure of ICAC with its gathering of all the surveillance information, phone taps, et cetera, and then asking the witness questions. The witness denies all these things, not knowing that the Commission has the material. Then the Commission discloses it, and then the witness admits it. Is that not sufficient to prove the case?

Mr CHILVERS: It may be. Our experience in recent years has clearly been in the Police Integrity Commission. I guess my understanding of the Commission is that you do not ask a question unless you know the answer already. Trust me: The Commission knows the answers before it asks the question. It would be a silly person who would go down there and not give the correct answers because you will know as soon as you hear, "Well, Constable Chilvers, please listen to this", that you are gone. The Commission by and large does not rely on hearings to prosecute or to prepare briefs or to recommend criminal charges against officers because in fact by the time it gets to the Commission hearings, by and large they have been prepared anyway.

Reverend the Hon. FRED NILE: That is what I am getting at. They have hard evidence of the corruption.

Mr CHILVERS: Yes. I guess I would be concerned if anybody went into a hearing without hard evidence and used a hearing of that sort as a fishing expedition. It strikes me that that is very problematic as well.

Reverend the Hon. FRED NILE: Do you imply that some individuals—I guess there are two situations, PIC and ICAC, and you are a specialist in the PIC area—make admissions under some sort of pressure that may not in fact be correct or justified?

Mr CHILVERS: I think it is possible. I do not know how often that happens. I am not even sure that it happens, but I think it is a possibility.

Reverend the Hon. FRED NILE: The other problem that seems to be developing in the PIC area is the Commissioner of Police's loss of confidence role. We heard from previous witnesses that of the 24 loss of confidence cases, 22 are now before the Industrial Relations Commission. Is that making the Industrial Relations Commission become a second brother to ICAC?

Mr GREG SMITH: PIC.

Reverend the Hon. FRED NILE: PIC in this case, but it would apply to ICAC if that sort of thing started to happen. Is the Industrial Relations Commission the right place for these matters to be then reheard? Does that then make it a duplicate of ICAC that is trying to play the role of ICAC, but with judges who are not qualified or trained?

Mr CHILVERS: I think you need to look at the statistics a little bit further. Of those 24 that have been exercised specifically through 181D, 12 of them have been challenged. I think many of them are still before the Commission. There are two issues: one of them is how many are successful in the long run, and the second one is that the vast majority of removals, I would suggest, under 181D do not go through a formal process. In fact, people are given the opportunity to resign prior to a formal process. I think you will find that of those 24 there are many more that are actually resignations, and do not ever hit the formal process. Do we have figures on that?

Mr TUNCHON: Not currently. We could provide some figures though, and we would be happy to do that.

Mr CHILVERS: So a police officer who comes under notice and is likely to be issued with a 181D notice is effectively given an opportunity to mediate a resignation. The point is that you want to achieve an outcome, and the outcome is that you do not want this person in the job any more.

Mr TUNCHON: There would be a number of those that are still awaiting determination by the Industrial Relations Commission who have also been charged criminally and who are waiting for that forum and process to be finalised before the other is heard and determined.

Mr CHILVERS: Very clearly, if they do not succeed at the criminal trial, then they will not proceed with the 181D.

Mr GREG SMITH: Does that necessarily follow? If they are charged with both disciplinary and criminal offences, is the practice not that the criminal process occurs first? If they beat that, the Commissioner can then pursue the disciplinary action. Are you saying he does not, in cases where there is an acquittal?

Mr CHILVERS: No, indeed not. No, I said in cases where there is a conviction, the officer will not go through the disciplinary process.

Mr GREG SMITH: You do not need to go through the disciplinary process?

Mr CHILVERS: That is right, yes.

Mr GREG SMITH: Or you might find other things, but normally if there is an acquittal or discharge at committal, he would normally still proceed under 181D, would he not?

Mr CHILVERS: That is correct

Mr TUNCHON: That is correct.

Mr GREG SMITH: Let us make this clear. The association acts for these people in various ways. You finance them before the Industrial Relations Commission?

Mr TUNCHON: Some of them. We have a process in place where we filter them out, those that have no merit.

Mr GREG SMITH: So you yourselves can see the merit of the finding in that particular case, do you, and get rid of them?

Mr TUNCHON: We act largely on the advice of lawyers, of course.

The Hon. TREVOR KHAN: That is a worry.

Mr CHILVERS: It is a worry.

Mr GREG SMITH: Yes, but they can see merit in the actual finding of the Commission.

Mr TUNCHON: Yes.

Mr GREG SMITH: Do you agree that it is a matter of public scandal that if someone goes into ICAC and admits to, for example, showing favouritism to a contractor for hundreds of thousands of dollars worth of work because he is his mate or his brother, but there is no evidence of money passing hands, it would be a matter of public scandal if that person is not dismissed from that position?

Mr TUNCHON: I would be asking myself the question why there was not a proper investigation to establish the criminal facts first.

Mr GREG SMITH: But apart from that: I mean, you may get only one bite of the cherry. These people are in the mood to admit at a particular stage that they have misconducted themselves in relation to their duties.

Mr TUNCHON: Yes.

Mr GREG SMITH: In that situation, do you not think it would be wrong for the evidence they give not to be able to be used, if that is the only material that can get rid of them from a position of trust?

Mr CHILVERS: That is a very strong argument to support that, and it is very easy to feel that about the very, very big, obvious, significant, high-end areas. I guess that if you move down the other end of the spectrum, perhaps where it is not as clear, what you are suggesting would put them all into the one category.

Mr GREG SMITH: Yes.

Mr CHILVERS: I think that is where you start to meet difficulty. You can run an argument on the very high level big picture stuff, and I would agree with that; but I think that the line becomes blurred the further down we move, and that is the difficulty that the law and Parliament have to deal with.

Mr GREG SMITH: But you would agree that so far as police misconduct is concerned, probably 95 per cent of evidence taken by compulsive organisations comes from PIC these days. There might be the occasional policeman that comes across the sights, in relation to Roger Rogerson or some civilian, and has misconduct that ICAC is investigating, so it might be ICAC that deals with that. Correct?

Mr CHILVERS: Yes.

Mr GREG SMITH: Even so, that police officer who gets involved in an ICAC inquiry would still be the subject of 181D proceedings. Correct?

Mr TUNCHON: Yes.

Mr GREG SMITH: We are mainly talking about the people who belong to other areas of the public sector, who do not have provisions like 181D, but their return to the job causes embarrassment to the state and perhaps further corrupt activity. Who knows? Do you understand that?

Mr CHILVERS: Yes.

Mr GREG SMITH: So you would agree in those cases that there was a strong case for using the evidence that they gave at ICAC in disciplinary proceedings thereafter. Correct?

Mr TUNCHON: Well, it never stopped them historically doing that. If you go back to Operation Maloo, that was the case. There were a few police officers who went to jail over their activities.

Mr GREG SMITH: But that was criminal prosecutions coming out—

Mr TUNCHON: And then there were a significant number of police officers who were dealt with in a disciplinary sense as well.

Mr GREG SMITH: That is right.

Mr TUNCHON: They had to resign and move on.

Mr GREG SMITH: But was the evidence used from ICAC?

Mr TUNCHON: I understand it was, yes.

Mr GREG SMITH: But things have changed in recent years, have they not, in that the PIC has taken over the primary activity in relation to police misconduct.

Mr TUNCHON: Yes.

Mr GREG SMITH: So they have the power under the PIC Act to refer the evidence given before it to the Police Commissioner for his further action.

Mr TUNCHON: That was a particularly negotiated set of circumstances to ensure that we retained our appeal rights on dismissal, yes.

Mr GREG SMITH: Did you not have appeal rights under the previous regime, where the ICAC Act was dealing with police as well as other public servants?

Mr TUNCHON: It was a very convoluted process.

Mr CHILVERS: It was a very complex process.

Mr GREG SMITH: So the changes advantaged people charged with or alleged to be misconducting themselves in the Police Force—the changes that were made in the PIC legislation?

Mr CHILVERS: No, I do not think so. In fact, under the old system—I might briefly explain how it worked. The organisation could not take any disciplinary action against a police officer without formally charging them under the Police Service Act as it was at that time. Those charges were either misconduct or omission of duty, a whole range of things. I am talking about really minor stuff. A person would be charged and their boss literally could not give them a dressing down without formally charging them, and then a person could say, "No, I am pleading against this" and that would be heard in the Police Tribunal, as it was then. On conviction in the Police Tribunal they could appeal to the review division of the Police Tribunal, which was constituted by three District Court judges; then at the end of that review the review division could make a recommendation to the Commissioner, a recommendation only. The Commissioner then could set a penalty, and if the officer was not happy with that penalty they then could review that penalty on severity to the Government and Related Employees Appeal Tribunal.

Mr GREG SMITH: Only on severity?

Mr CHILVERS: Only on severity. Then the decision of the Government and Related Employees Appeal Tribunal, as constituted by at the most a magistrate—not necessarily but at most the magistrate—and a representative of the employer and a representative of the employee could make a binding finding to the Commission. This is ludicrous stuff. A police officer could be subjected to disciplinary proceedings and literally not have that finalised for three or four years. Under the current system it is very quick.

Mr GREG SMITH: Very quick?

Mr CHILVERS: A lot quicker.

Mr GREG SMITH: Is that better?

Mr CHILVERS: I think it is, and certainly the police officers feel that it is quicker, better, less stressful.

Ms DIANE BEAMER: Do you represent civilians who work in—

Mr TUNCHON: No.

Ms DIANE BEAMER: And whilst they are subject to the PIC, they are represented by the PSA, I take it.

Mr TUNCHON: Anyone who is called before the Police Integrity Commission has legal representation by the Legal Representation Office, which is funded by the government. We do not appear for members at the Police Integrity Commission.

Ms DIANE BEAMER: And you do not track how those civilians who work for the Police Force go?

Mr TUNCHON: No.

The Hon. TREVOR KHAN: What you were saying earlier, Mr Chilvers, was that if a determination is made under section 181D, that is a loss of confidence, that is deemed thereafter to be a resignation for the purposes of entitlements. Do I take that to mean that if the Commissioner makes a determination following a

PIC inquiry that a person is not warranting of his confidence and that that may have been based on admissions of significant impropriety, that person still can, in a sense, leave and get all entitlements as if they were resigning?

Mr CHILVERS: Yes.

The Hon. TREVOR KHAN: Is that right?

Mr CHILVERS: Yes.

The Hon. TREVOR KHAN: If that were applied to, say, the State Rail circumstance, in circumstances where the admissions could be used that would mean, would it, that an employee who has engaged in systemic corrupt conduct with regards to the allocation of contracts could lose the confidence of the director general of the relevant department or, depending on its corporate structure, whatever it is and still gain all entitlements?

Mr TUNCHON: Superannuation, long service leave, all this sort of stuff, that would occur.

The Hon. TREVOR KHAN: As opposed to it being deemed to be a termination where they lose some of those entitlements?

Mr CHILVERS: That is right.

The Hon. TREVOR KHAN: Do you think that outcome is what the public of New South Wales either believes would happen or would think is appropriate?

Mr CHILVERS: This is a policy issue and I am thinking now of spreading the pain, if you like. We have to sit down and think, "You have an officer who has been working for 20, 30 years, has contributed superannuation, who has long service leave and that sort of thing, and may have a family who are not aware of the conduct or behaviour or not complicit or whatever". When you start to look at those sorts of broader entitlements, I think there are also issues impacting on how far you spread the pain and whether it is appropriate to start to punish spouses and children and all that sort of thing for the wrongdoings of the officer. I think that is something you need to look at as well.

What are you trying to achieve? You are trying to get rid of the corruption, you are trying to get rid of the corrupt officer. Certainly in terms of policing, we just want to get them out of the job, and I think that is reasonable. There are other interesting areas. I have just come across some legislation in the Northern Territory and Western Australia—I do not know whether you are aware of it—called the unexplained wealth legislation. It is very interesting legislation that perhaps New South Wales should be looking at as well.

The Hon. TREVOR KHAN: I think we might be within a couple of weeks, I suspect.

Mr CHILVERS: So there are other ways to do it. There may be other ways to do it without impacting on families.

Ms DIANE BEAMER: The Parliament itself has done that, impacted on families.

The Hon. TREVOR KHAN: I am thinking of precisely the same case and I will not mention the name because it will get me into trouble again.

Mr JONATHAN O'DEA: Going back to your comments regarding use of findings as opposed to evidence—and I had a similar reaction to Mr Khan in terms of perhaps suggesting that the focus needs to be on evidence rather than findings—if I am correct I think what you are saying is not that evidence should not be used at all but that we need to be careful to afford natural justice and to give the evidence the correct weight, not that you should not use the evidence at all. Is that correct?

Mr CHILVERS: I think that would be closer to where we are coming from. Put police aside, police are usually pretty good about giving evidence. They know what they are talking about and they are used to the system. A lot of the public sector is not used to these sorts of things, and all sorts of things can be led and admissions made and all that sort of things. Completely untested, I think it could be very dangerous.

Mr JONATHAN O'DEA: But you are not saying that the evidence should be totally ignored. I do not want to put words in your mouth, but when someone makes a clear admission, yes, you might question the evidence or the circumstances in which that was made. Do you not think it is quite reasonable to use that as evidence?

Mr CHILVERS: Yes, but the problem is that you are talking about changing the way the ICAC operates so that evidence given can be now just picked up and taken to another jurisdiction and used. What I am saying is that if you had a system in ICAC where there was an appropriate way that evidence could be tested, cross-examined, back and forth, back and forth and all that sort of thing, and necessarily possibly call other witnesses, then the evidence given might be a little bit better than what could potentially happen.

The Hon. TREVOR KHAN: I am interested by your use of the term "tested or untested". My understanding of the term "testing" of the evidence is generally that evidence is given by a witness and essentially tested in cross-examination. What we are talking about here is evidence by perhaps a member of the Police Association or a police officer where that officer may be called once, twice or three times before PIC and in the course of perhaps the second or third occasion, when confronted with certain evidence, then makes admissions of criminality. They may make those admissions of criminality because of concern about other prosecutions from false and misleading evidence given in a prior statement or in the box. I suggest that that is tested evidence. It is the subject of questioning and it is the subject of what is perhaps unusual compared with a normal court process but nevertheless it is evidence that is subject to some rigour. I suggest that that is not—and I invite your comment—in any way untested evidence, far from it?

Mr CHILVERS: That is fine.

The Hon. TREVOR KHAN: If you are arguing that the evidence is in some way suspect, why it is suspect?

Mr CHILVERS: No. And that is fine if that is what has occurred. If you can build that into the process and the legislation to make sure that that sort of thing occurs before the evidence is used in other areas, fine—potentially fine. Apparently that is not the case. I would suggest the proposal that I have seen does not suggest that. It is a simple proposal that says any admissions that are made can be used somewhere else.

The Hon. TREVOR KHAN: I invite you to tell me why an admission that is made by any officer, in the light of the knowledge of the fact that they are likely to be subject to a criminal proceeding, is not cogent evidence which is actually pretty damn hot.

Mr CHILVERS: It might be. Again it strikes me that a member of the public service who is not used to operating in the sorts of jurisdictions that police officers are used to operating in are presented with all sorts of stuff, may be making admissions under coercion that, on advice, they would not be doing otherwise.

Mr JONATHAN O'DEA: That is where I was heading with my next question. You said there was a risk of untested evidence adduced through coercion being used by employers to discipline or remove employees. Will you provide some examples of where you think evidence has been adduced through coercion? My impression, like that of the Hon. Trevor Khan, is on the contrary. It is almost that there has to be such a weight of evidence given before somebody before the ICAC might, in fact, admits to what the truth is.

Reverend the Hon. FRED NILE: Reluctantly!

Mr JONATHAN O'DEA: Reluctantly. I would be interested to hear of cases that you can point to where there has been evidence gained through coercion.

Mr CHILVERS: Through the Police Integrity Commission?

Mr JONATHAN O'DEA: Particularly the ICAC. If you cannot say through the ICAC then the PIC?

Mr CHILVERS: I am not aware of the ICAC. As I said, I do not have a great deal to do with it. Let me say there have been some concerns expressed by us as well about some of the methods that are used by the Police Integrity Commission on occasion. We are quite open about that.

Mr JONATHAN O'DEA: Would you give some examples so that we can test that in the context of the ICAC?

Mr TUNCHON: Perhaps if we could take that question on notice. We made submissions to the PIC Inspector about a range of issues that were conducted by the PIC that gave rise to concern. I am happy to make that document available.

Mr JONATHAN O'DEA: Essentially I have listened to what you have said and I can see your logic but I cannot see it necessarily in practice. I can see the concerns but I think we need to test those to see whether there is some merit.

Mr CHILVERS: Some of these are currently before the Commission, the inspector.

Mr NINOS KHOSHABA: In relation to section 181D and the officers still receiving entitlements, I certainly understand and appreciate your answer in regards to the number of people it affects. If a person is going to be the subject of further criminal proceedings are his or her entitlements frozen? In the case, say, that person was investigated for fraud, had taken money from the department or wherever, and there might be significant fines that may be imposed later on, if that person received his or her entitlements he could quite easily disburse those entitlements as well as his or her assets and therefore could not cover—

Mr CHILVERS: The simple answer to that is no. Indeed, I can recall Justice Wood during his Commission accepting this as an appropriate way to go. Part of the problem of attacking entitlements, particularly when we are talking about financial entitlements and its impact of families, is that a police officer subject to section 181D has got nothing to lose. They are going to go down fighting, kicking and screaming in every jurisdiction to attempt to retain that. I think His Honour's approach was "Just get them out. We need a police force insofar as is possible that is corruption resistant and the best way to do that is to make sure that people are removed quickly and efficiently."

Mr NINOS KHOSHABA: In relation to section 181D obviously you want officers out because of their behaviour. By giving them their entitlements you are sort of saying that they will agree to leaving quietly whereas if their entitlements were frozen—I thought they did not have a say either way!

Mr CHILVERS: If they are subject to a criminal investigation that does not stop. They can resign, get out of the job, they are no longer police officers but they will still be subject to the criminal prosecution procedures and they might end up going to gaol.

Ms DIANE BEAMER: At the same time the entitlements one receives as an employee are received honestly, if you like whereas kickbacks, contracting, that comes under the confiscation of the proceeds of crime.

The Hon. TREVOR KHAN: I understand that but if there is a difference under a Commissioner's notice between where the Commissioner is in a sense terminating the person's employment, to deem it as a resignation should be recognised: that is the difference.

Ms DIANE BEAMER: What you are talking about is long service leave, not superannuation?

The Hon. TREVOR KHAN: It may have impact on various areas of employment.

Ms DIANE BEAMER: I could not imagine superannuation.

Mr CHILVERS: It is the same as any other member of the workforce.

Ms DIANE BEAMER: Are you talking about long service leave—that would be the only one I would imagine?

Mr GREG SMITH: You would keep your long service leave?

Ms DIANE BEAMER: But if you are terminated it would be redundancy.

The Hon. TREVOR KHAN: It is a long time since I have worked as an industrial officer.

CHAIR: One of the questions the Commissioner of the Independent Commission Against Corruption was asked concerned changes to disciplinary proceedings resulting in a reluctance by witnesses to make admissions. The Commissioner's firm evidence was that witnesses only tell the Commission what they think the Commission already knows. Part of your evidence impliedly backed that up when you said that witnesses will be careful of what they say because they think around the corner there will be a taped played so any untruthfulness of their evidence will sink them, if they deny something that is later played on tape. You mentioned that you have concerns about people who are not police officers giving evidence because they are not used to the surroundings and they find it difficult to do so.

Is the Commissioner's firm response that witnesses, no matter who they are—a grade five clerk, a manager or a public servant—will only tell the Commission what they think it already knows? That cuts across your argument about looking out for the grade five clerk giving evidence because you think evidence is not tested, not reliable or whatever. Does the Commissioner's response to that question counter your concerns?

Mr CHILVERS: I cannot comment. It is a long time since I have had anything to do with the ICAC. Our experience has been exclusively in the past dozen years.

CHAIR: Do you understand what I am putting to you about ameliorating those concerns?

Mr CHILVERS: I would have thought that by the time telephone intercepts had been taken and all this sort of stuff has been done and the Commission comes to a hearing, they are going to make allegations of serious criminal behaviour particularly. You do not put an allegation of serious criminal behaviour without any evidence to back it up.

CHAIR: Is it fair to say that the admission is really not a big step?

Mr GREG SMITH: It makes things a lot easier.

(The witnesses withdrew)

(Luncheon adjournment)

ALAN ROBERTSON, Senior Counsel, 5 St James Hall, 169 Phillip Street, Sydney, affirmed and examined:

CHAIR: Thank you for attending today, Mr Robertson. In what capacity do you appear before the Committee?

Mr ROBERTSON: I am appearing in a private capacity, but as a barrister of some 28 years or so standing.

CHAIR: Would you like to make an opening statement?

Mr ROBERTSON: Yes, I think it would be useful to say a few things. First, I am not representing any organisation today, I am here maybe partly because I gave some evidence many years ago in another inquiry, but also perhaps because I have had some experience on the Federal side in appearing for parties in Federal royal commissions such as the Cole QC, oil-for-food inquiry and more recently the Callinan inquiry into equine influenza. There were a few others as well, but those are the more recent ones. I am really here to give such assistance as I can. I have read the material that the Committee forwarded to me.

As to the terms of reference, everyone seems to be in total agreement that there should not be any connection between paragraph 3 and paragraphs 1 and 2 despite the "if" that paragraph 3 begins with. That seems to be a separate issue altogether. As to paragraph 3, that seems to be a purely intra-agency question or a question of pure resources; it does not seem to raise any issues of fairness or other policy. Maybe I am not doing it justice, but it seemed a fairly technical change so that instead of there being an argument that the place of that function or power in section 14 meant that it has to be ancillary to something—the idea was to move it up to the primary functional purpose so there could be a free-standing exercise where necessary. That is probably not something I could add much to.

As to paragraphs 1 and 2, the use in disciplinary proceedings or use in civil proceedings generally, it seems to me that involves at the end of the day a value judgement on which, no doubt, different people have different views. Fairness, on the one hand, that is the fairness, or lack of it, in saying to someone, "You must answer this question even though you object to it", and then it can be used in disciplinary proceedings or civil proceedings, that sort of fairness. Fairness on the other hand, that is the efficiency factor, or the public importance of rooting out corruption and the benefits of corruption when people have benefited, such as taking whatever money or money's worth in a corrupt way in the course of their employment. Those seem to me to be the competing considerations. There is the personal fairness aspect and the public morality, efficiency aspect.

The only two additional comments I would make about paragraphs 1 and 2 are that as they are cast, and in terms of what I have read so far it seems to be all disciplinary proceedings or all civil proceedings. It may be that there is scope for narrowing that idea to disciplinary proceedings arising out of the corrupt activity, or civil proceedings arising out of the corrupt activity. For example, in an ordinary civil case if it happened to be that the corrupt person was a party, but unrelated to their gains, at the moment if the immunity is taken away entirely, someone could say in an unrelated proceeding, "Well, you admitted before the ICAC that you had taken bribes, and, therefore, you are a person of no credit and, therefore, your evidence should be discounted." There may be scope for targeting a little in that way.

My only other thought is whether, although the Committee is focusing on amendments to the Independent Commission Against Corruption Act, it may be necessary to look as well, in due course, at the legislation under which, for example, disciplinary proceedings may be brought, or, indeed, termination of employment proceedings. I do not have anything in particular in mind, but it could well be that some attention needs to be given to that legislation to make sure that there is no conflict or potential conflict between amending the Independent Commission Against Corruption Act the manner in which we are discussing and, for example, in the Government and Related Employees Tribunal Act, if that is the Act that is still in force for public sector employees dealing with some disciplinary matters. That is what I would say by way of opening statement. I am here to be of whatever assistance I can be.

CHAIR: Obviously you have vast experience as counsel in a private capacity. On the civil side, the proposal is to remove the immunity so that evidence can be used in civil proceedings. The terms of reference refer to civil proceedings or restricted civil proceedings for the recovery of assets or money derived from corrupt or illegal activity. What are your thoughts or concerns about that? Some evidence has been given to the Committee that it would open the way to employers suing or taking civil action against employees or ex-

employees, which could involve an injunction, or the garnisheeing of wages, or a whole raft of measures that are available in civil proceedings. Do you have any concerns about letting that occur? Could the present recovery of assets legislation—the Criminal Assets Recovery Act for example, which can be used by the Crime Commission—be used by the Independent Commission Against Corruption? In your view, would that suffice for those purposes? Lawyers might like that, but do you have any concerns of releasing that availability?

Mr ROBERTSON: I do not know very much about the criminal recovery processes but I have been giving some thought to the ordinary civil case; say, for example, the employer who says, "I am going to bring an action in equity because you are my employee, you've got this money you shouldn't have got, so I've got a right to claim that." I suppose one thing that needs to be thought about is how it is going to work in a civil case. I noticed the Commissioner said that nobody ever admits to anything in ICAC processes until they have to. I wondered how it would work in a civil case and whether part of this idea is to use in a civil case material that, as it were, led to the admission in the ICAC. I am not sure what sort of material that would be, but documentary material, I suppose. Sometimes it might be telephone intercepts and that sort of material.

One of the things one needs to think about is that if that material was admissible according to ordinary rules, what extra mileage would you get from being able to say, "Now I'm going to tender that page of the transcript where you said, 'Yes, it was me. I did it. I've got $100,000 that I shouldn't have'." When one is balancing the two aspects that I mentioned before—the fairness on one side and the efficiency/morality idea on the other—one has to focus on how much better off are you going to be as the person seeking to use this material in a civil case if you have all the other material. Perhaps it will not matter that much.

In terms of your question, Mr Chairman, I think it comes down to a personal evaluation of the utility, on the one hand, and the fairness on the other hand. Personally, I think that unless you are going to achieve something quite substantial in a morality aspect, given the idea of somebody in one inquiry being told, "You have to answer this question, even though you object, and when you answer it, it will have potential consequences in terms of your employment and in terms of making civil claims against you", I would err on the side of caution. Obviously, there are different views about that. No doubt the Commissioner is best placed to give evidence as to the nature of the problems. Certainly he said that corruption, as he has seen it in his years as Commissioner, is endemic in the areas he has been looking at.

I suppose another angle is whether having this new capacity is actually going to have an effect on the corruption or whether it is just going to satisfy public morality in saying, "It might not have an effect on anybody else but at least we are going to get the money back from you." That is another factor. What I do not know is how the criminal recovery processes intersect with ordinary civil processes. Obviously, you cannot get the same amount back from the same person more than once, but I do not know enough about that aspect.

CHAIR: As I understand it, the Crime Commission can take action under the Criminal Assets Recovery Act as a civil proceeding but you do not need a conviction or an admission of guilt to pursue someone for the recovery of assets or money. It has been used in a recent case with the New South Wales Fire Brigade where an order was made for around nearly a million dollars. I am saying that on the one hand there is a proposition to release this immunity and have all these civil actions occur, which could involve all the actions that I described—employers suing ex-employees—if we release this raft of litigation. If you could see that legislation such as the Criminal Assets Recovery Act was doing that job, would the caution you spoke about relate to releasing that immunity on civil actions?

Mr ROBERTSON: I suppose what I would need to know is whether these other processes that you have been describing are in substitution for the private pursuit in a civil action of the ill-gotten gains, if I can call them that.

CHAIR: I know what you mean. I suppose what I am asking is why you are saying we should exercise caution in these civil proceedings. Is it because of the uncertainty it would release?

Mr ROBERTSON: No, it is not really a pragmatic idea. If you start with the principle of fairness that I have described, that is whether a person should be compelled over objection to give evidence to their disadvantage, you then ask what are the values that that involves. To put it a little more crudely, is this a case where the means do justify the end? You have to have a clear idea of the extent of the corruption and how it can be dealt with. We are not talking directly about prevention of corruption at this end; we are talking about the other end where a person has got some money through their corrupt conduct.

I guess the question is: Should the means that we have been discussing—that is, being able to use that person's evidence over objection, which he or she has unwillingly given—be used against him or her? In this context does that justify taking a step that in the ordinary case might be seen to be unfair? I do not have any technical difficulties in mind; it is just that balancing aspect.

Mr DAVID HARRIS: Thank you for your presentation. It has been suggested that the moving of these amendments would be taking away someone's privilege against self-incrimination. A number of people have said in their submissions that the ICAC does not ask questions about which it does not already know the answer; therefore, the information already exists. I am having trouble getting my head around one issue. If that evidence already exists and someone is already gone, what is the value of not self-incriminating?

Mr ROBERTSON: I touched on that issue earlier. Let me add to your question: What is the value of not incriminating yourself? I use that in a civil context because nobody is talking about using this material in criminal proceedings. Equally, one could ask: What is the value of incriminating yourself in that civil context? In other words are you talking only about a 1 per cent increment in somebody's knowledge, that is, the answer to the question, "Here is this document, this document and this document. You admit that you took the money"? If it is only that ultimate question that we are talking about here and not all the underlying material, what is the cost benefit analysis of that?

I am not sure whether your question leads to one answer or the other. You have a mass of material. If that material can be gathered by another entity—a plaintiff in a civil action for the recovering of the money—why would you need the last question when the focus on the last question gives rise to the perception of unfairness about which I am talking? That is, it was at that last point that the person said, "I do not want to answer that question", and the ICAC says, "You have to", and then somebody can go and use that in a civil case. One needs to see the benefit of that last step when one is trying to get a handle on this other value of fairness or unfairness.

In a sense, that is what I meant earlier when I said I had looked at the Commissioner's evidence in which he said, "Nobody makes that final admission until it is inevitable anyway." My thought about that was that it cuts both ways. You might not need that last answer because everything else is overwhelming anyway. That might give rise to questions about whether the ICAC can and does make available what we have been talking about as the other material to other people. I suppose ordinarily—I do not know what the Act says about it—if the ICAC has got material in through a compulsory process the Act would have to state expressly that that was what was intended, and it can be used in this other way within the state functions.

I would be surprised if it said, "Any civil litigant can get access to it just by applying to the ICAC." Usually Acts are written on the basis that if you have a compulsory power it is limited to the purposes for which you have it in the first place. That might be something that needs to be explored—whether there is a structure in place that the ICAC has all this material but perhaps other people outside state agencies might not have it. In the context that we are talking about—the employer suing in a civil action—the crooked employee might not have that material and might have to start again.

Apart from the fact that it has taken a very long time, I do not know what the processes have been that we have mentioned before relating to the Oil for Food inquiry, the directors of AWB Ltd, and so on. I am not sure how all that worked in relation to the material that was got in under the Commonwealth Royal Commissions Act and whether that has had to be regathered from some other sources by the Securities Commission and other people taking proceedings against the directors and former directors.

Mr DAVID HARRIS: Would there be any negative consequences if a body such as the ICAC had more broad powers under the proposed legislation?

Mr ROBERTSON: Are you referring to the third term of reference?

Mr DAVID HARRIS: No, I am referring to the first two. If the ICAC were given the power to use that evidence in civil cases, et cetera, would there be any major negative consequences generally?

The Hon. TREVOR KHAN: It is not really the ICAC that would have the power, is it?

Mr ROBERTSON: I had not understood it to be the ICAC. My mental picture was—

Mr DAVID HARRIS: Giving the employers the power to use that evidence.

Mr ROBERTSON: My answer is that I think it would depend on what other material they were entitled to get. I am not sure whether ordinary employers could sit in an open session of the ICAC and take notes—presumably they could—or whether they could get access to the documentary material. I would be surprised if they could. Maybe there is something in the Act. Should the Act be amended so that they could? I think that is another rather large question. As I said, you would again have the issue that you are grappling with but just in another form—compulsory powers for a particular purpose and whether the material could be used for it.

No doubt it would be for a related purpose but it would be different from the one under which the material was originally gathered. Maybe as part of items (1) and (2) the question that needs to be addressed is: How would the people taking the disciplinary proceedings or civil proceedings get access, or to what extent would they get access, to the ICAC material? That is the question that you are grappling with, in a sense, only because that is all they have. They have only the answer that they received when they were in the open session of the ICAC and they heard it, or it is in some open transcript and they do not have any of the other material that has led to that point.

Reverend the Hon. FRED NILE: Thank you, again, Mr Robertson for giving evidence before the Committee today. If all the evidence is there the admission is not that important. However, if some process were being followed the admission would speed up the whole process, would it not? The admission is important; it is akin to saying, "I plead guilty." Would it have the same effect as that?

Mr ROBERTSON: In a civil trial the plaintiff employers would have to prove their case. They would have to say, "While in employment you got this money under certain circumstances", and so on. I suppose that the employer could tender in the civil proceedings, for example, a page of the transcript, or the answer. Of course, I guess it would then be open to the defendant in the civil proceedings to say, "I said that but that was not the truth anyway."

Reverend the Hon. FRED NILE: Or the defendant could say, "I withdraw it."

Mr ROBERTSON: The defendant could say, "I was put under pressure by the ICAC and I meant something else", and so on. I think you would have to say that it would be useful. Would it make things faster? I guess in some cases it would and in other cases it would add a further dimension of people spending a day or two explaining why the apparent clear answer that they gave to the Commissioner was not the true position.

Reverend the Hon. FRED NILE: The ICAC inspector has proposed taking the amendments to section 37 one step further in relation to disciplinary proceedings. It is suggested that it should have the effect of making any "finding of fact of corrupt conduct against a person by ICAC prima facie evidence of the truth of that finding" and then for the onus to shift to the individual to rebut that presumption. Do you have any comment on the suggestion?

Mr ROBERTSON: I suppose if the findings were admissible, that would probably be the effect of it anyway. If somebody said, "Here are some findings by ICAC" and tendered them in evidence, I guess it would then be down to the other side to say, I mean, in a sense that would be prima facie evidence. I suppose if you amended the Act, what you would be really doing would be to say in any civil proceedings of a particular nature evidence of this sort is admissible and prima facie because it may be that that would be the shortcut as it were. Maybe that is what the Commissioner has in mind, that the finding would be admissible in, I think you are talking about, disciplinary proceedings?

Reverend the Hon. FRED NILE: Yes.

Mr ROBERTSON: Again I suppose the heart of it comes back to this idea we were talking about before—that is, the competing values of saying, "Well, you had to answer that question otherwise you were going to be committing an offence against the ICAC Act." Do we think that having disciplinary proceedings running in that way efficiently is more important than allowing people the choice, which otherwise they would have had to say, "I am objecting to answering that question. I know I have to answer for your purposes because ICAC is trying to find out the cause of corruption" et cetera, but taking the next step and saying that it is admissible in other proceedings? The example that came to my mind, and perhaps this is just a side line on it all, if you are thinking really about other purposes of the ICAC Act, is when you have accident inquiries.

That is quite an easy case because people's rights were temporarily displaced because the people needed to find out urgently why did the aircraft fall out of the sky. It does not matter whether people's legal-professional privilege was put to one side and so on, but their answers are inadmissible. Whether there is any analogy there with ICAC, that is, what they have really got to do is find out the causes of the corruption, obviously they have got to do that, make recommendations and try to fix that. We are now really talking about what other consequences should there be, what other prejudice if any should there be to witnesses, people who have got ill-gotten gains as it were. Should there be other consequences so that the public money that has been spent on getting to that point actually has a further return on it, that is, that they can be sacked, to put it crudely, because of the answers that they have given?

You would think in most cases the fact that ICAC had gathered material et cetera, had made findings, would be very powerful. Again, you would still have to look at the question of fairness though because it is one thing, I think, in disciplinary proceedings for somebody to say, "We're not going to reinvent the wheel; we're going to allow to be admitted the material the ICAC had so that we can make up our own minds about it as members of the tribunal"; it is another thing to say, "The Commissioner is not here but we're going to take as prima facie evidence of the truth what it was he found as a fact in his own inquiries." I can see a bit of scope there for people saying, "Well, that's all very well, but what are we going to do? Bring him here and cross-examine him? I always objected to those findings. I thought they were unfair, I thought they were not supported by the weight of the evidence" and so on. I apologise for the long answer but there are quite a few things in play there I think.

Mr GREG SMITH: If the finding of corrupt conduct were to be used, it would be like a conviction that can be used against a lawyer or a doctor in disciplinary proceedings. You have got to that stage of conviction following either a plea of guilty or a finding of guilt by a tribunal. They would be putting the finding of corrupt conduct by the ICAC where you are entitled to be heard, make submissions on the findings and are entitled to be represented. There is a process for that finding and the courts have even explained how it is to be used—for example, in the Greiner case. Do you see that as a reasonable use of that finding?

Mr ROBERTSON: As I understand it, this is really on the Commissioner's extended proposal?

Mr GREG SMITH: Yes, for a disciplinary procedure.

Mr ROBERTSON: One could see it saving a lot of time. It may go back to what I was saying before, that you would actually have to look at the legislation under which the disciplinary proceedings were brought because you would have to amend that to achieve, I think, this result or you would have to look to make sure that it meshed in with what was being done under the ICAC Act. If it then said something like, "where an employee"—I am just trying to tease out—"has been found by the ICAC to have committed certain sorts of offences of a value of X dollars and so on, then that is a ground for dismissal."

Mr GREG SMITH: Yes, a redrafting. You mentioned about using the primary evidence. You would be aware, would you not, that with telephone intercepts the material often is used only in criminal proceedings. There is an exception for ICAC to use it in its hearings, but it is not normally admissible in civil proceedings. Are you aware that the Act has certain prohibitions on the use of the material?

Mr ROBERTSON: Yes.

Mr GREG SMITH: So that the admission somebody makes having regard to the tapes or other material that was put to a witness is a very useful piece of evidence, or could be, both in an action for recovery of assets acquired as a result of corruption or a disciplinary matter. Would you agree with that?

Mr ROBERTSON: I can see how that works. No doubt the telephone intercept limitations on the use are in part, I suppose, because of the seriousness of the conduct or the alleged conduct. You say, "Well, we're going to have this unusual interference with their rights and so on, but there is an important social evil here", and then in a sense you say, "Well, there's an extra exception because that can be used by ICAC". Then you get the ICAC's findings built on all of that and then the proposal is, "Well, those findings built on all of that are actually going to be moved across into these civil or quasi civil proceedings." So, in a sense you have gone further perhaps than the people who are focusing on the limited use to which telephone intercepts could be put. The exception to that in ICAC is that because of the importance of ICAC's function you are then saying there is going to be this add-on in a civil or disciplinary proceeding. So that needs to be evaluated as well.

The Hon. TREVOR KHAN: I am interested in the use of the findings regarding a couple of matters raised by Mr Smith. Fundamentally, there is a difference between a conviction and a finding of corruption, is there not? For a person to be convicted they are self-evidently a party to the proceedings, are they not?

Mr ROBERTSON: Yes.

The Hon. TREVOR KHAN: Under a criminal proceeding, they are entitled, almost without exception, to legal representation. Is that right?

Mr ROBERTSON: Yes.

The Hon. TREVOR KHAN: They are also entitled to cross-examine all witnesses.

Mr ROBERTSON: Yes.

The Hon. TREVOR KHAN: In a proceeding before a royal commission or ICAC, there is no right of appearance, is there? It is all by leave of the Commissioner.

Mr ROBERTSON: Yes, that is true.

The Hon. TREVOR KHAN: Indeed, even when the leave of the Commissioner has been obtained, it can be withdrawn at any stage.

Mr ROBERTSON: And may be limited.

The Hon. TREVOR KHAN: I was getting there—and may be limited in terms of the witnesses to be cross-examined, or the extent to which a particular witness can be cross-examined.

Mr ROBERTSON: Yes.

The Hon. TREVOR KHAN: So, without suggesting anything inappropriate on the part of the Commissioner, it is certainly possible for conclusions to have been reached by the Commissioner that impact upon a party where the party has not had the full right of access to the witnesses that the Commissioner has had.

Mr ROBERTSON: That is very true because one of the things that happens in royal commissions—and, I am sure, in ICAC as well—is that there is an enormous amount of material gathered, analysed and deployed by counsel assisting, and so on, which almost by definition the people who are giving evidence have none of, or very little of. So I agree with what you say about that. The implication of course of what you are saying is that the recommendations or findings of a Commissioner may have a different quality to a conviction by a criminal court after a criminal trial.

The Hon. TREVOR KHAN: Yes.

Mr ROBERTSON: And that perhaps leads one to need to be more careful about how that material is to be used and whether you would say, "Look, if it is only prima facie, that's okay in a civil or disciplinary proceeding because the defendants can still displace that". But there again one goes back to what we were talking about a minute or two ago. One tribunal of fact might be very much persuaded by the quality of the material because the Commissioner had so much, but by definition, the defendant—even when they are still there in the civil disciplinary proceedings—will not have had that. They will not have had, in the ordinary case anyway, the opportunity to analyse the entirety of the material and the basis of what the Commissioner said by way of findings.

The Hon. TREVOR KHAN: Let me go to a different circumstance. Let us suppose that there is relief in terms of the use of some of the evidence in civil proceedings. We can use the State Rail circumstance as an example. A contract supervisor or overseer of contracts has claimed some benefit and has been in a position to award some contracts because of some benefit received. The employer/principal then decides that the contract that has been entered into was plainly not for the benefit of the organisation, but rather was for the benefit of a corrupt individual, and seeks to terminate the contract in those circumstances. Could you envisage the use of the evidence obtained, say, by ICAC as being valuable in some form of civil proceeding that has been brought

perhaps by the corrupt contracting party, the co-conspirator in the corrupt conduct? That could be useful to the employer-principal in defending a proceeding for terminating a contract in those circumstances.

Mr ROBERTSON: So the corrupt contractor would bring an action, for example—

The Hon. TREVOR KHAN: For breach of contract.

Mr ROBERTSON: Yes. In other words, you purported to terminate this contract, and then in that civil action the employer-defendant would seek to deploy the findings—

The Hon. TREVOR KHAN: Not necessarily the findings, but the evidence and the admissions obtained by the co-conspirator—that is, the public servant.

Mr ROBERTSON: Well, of course, ordinarily you would have to call the witnesses—

The Hon. TREVOR KHAN: Ordinarily you would, yes.

Mr ROBERTSON: —in a civil action. I suppose what needs to be evaluated is the capacity of all this to give rise to a collateral inquiry. By "collateral" I mean an examination of the circumstances in which the Commissioner came to say what he said.

The Hon. TREVOR KHAN: Again, I am trying to avoid the finding issue. As you might have gathered, I have some concern with regard to the use of the findings of the Commission. I am more interested in the substantive evidence—the substantive admission made by the corrupt employee.

Mr ROBERTSON: I think you would still have that difficulty, or potential difficulty, of being the corrupt employee who gave the contract to the plaintiff in this case. I suppose somebody would have to decide who was going to call him as a witness. You then have, I guess, a lot of time spent on why it was that they gave that evidence, if they sought to resile from it. Those are things that certainly need to be explored. It feeds into, I think, what I said in my opening statement: One needs to look at whether the exception should be removed from all civil cases, or all civil cases of a particular character.

The Hon. TREVOR KHAN: That is why I was going there. I could see a wider circumstance than simply a proceeds of crime circumstance where the evidence could be potentially useful.

Mr ROBERTSON: So it would be, if you took that broader view, in a civil case in which that behaviour, or those corrupt actions, were an issue in the litigation.

The Hon. TREVOR KHAN: Yes.

Mr ROBERTSON: For either: I suppose a plaintiff in one case, and a defendant in another, would seek to deploy it.

The Hon. TREVOR KHAN: Yes.

Mr ROBERTSON: I am not sure whether the Commissioner has thought that far. Probably he is not so much interested in those sorts of, say, more remote consequences. But perhaps it goes back to what Mr Smith was talking to me about—the extra proposal, which is not so much within your strict terms of reference, to say that there should be this capacity for other people to use the findings that the public money has been spent on.

The Hon. TREVOR KHAN: Let me just conclude with this. Using the oil for food inquiry as an example and going directly to the question of admissions, I could envisage a circumstance in which, whilst one has admissions and you say you can rightly rely upon the primary evidence to prove some form of proceedings, that may involve, for example in the oil for food circumstance, calling people from Jordan and Iraq, some of whom may be somewhat indisposed from time to time, and people from London and the like.

Mr ROBERTSON: Yes.

The Hon. TREVOR KHAN: The utilitarian benefit of being able to use the admission is the strong possibility that, the admission having been obtained, it will at the very least substantially shorten if not militate

against the necessity of calling this cast of thousands of people from across the globe to give evidence; or, if you use the State Rail example, calling various miscreants who are co-conspirators in the exercise to come and give evidence so as to be a small part in the equation for which the employee or the defendant is being brought before a proceeding. Is not the utilitarian benefit of reducing the amount of hearing time that is involved in prosecuting a case in itself a valid thing for this inquiry to take into account?

Mr ROBERTSON: I think it is. That is why in my opening statement I was talking about a balance. I was not suggesting where the balance might fall in a particular case between, on the one hand, what I have described in broad terms as the fairness aspect of being compelled to answer and so on as against the efficiency aspect partly because you would not be reinventing the wheel. You have had substantial public money spent on getting to that point. Certainly I do not think there could be any denial that it would be more efficient.

Then the question becomes: In this particular case, having looked at the competing values, does this particular means of achieving that efficiency justify the end, which is the unfairness idea of somebody having to go along and say, "Look, I really don't want to answer this", but saying, "Well, not only have you got to answer it, but it is going to mean that you are going to get the sack because somebody is going to be able to tender that admission in your disciplinary proceedings. And it means that your employer will be able to get a very good start in terms of recovering the $50,000 or $100,000 that you should not have had." So I think at the end of the day it is that balancing which is the sort of evaluative exercise. It is not a legal question, I do not think; it is one of public policy. No doubt that is why this Committee is charged with looking at it, bringing those communal values to bear on that issue.

(The witness withdrew)

NATASHA FIONA CASE, Senior Solicitor, Public Interest Advocacy Centre, Level 9, 299 Elizabeth Street, Sydney, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee today?

Ms CASE: I appear in my capacity as senior solicitor of the Public Interest Advocacy Centre.

CHAIR: We have received your submission. Would you like that to form part of your evidence today?

Ms CASE: Yes, I would.

CHAIR: Do you have an opening statement to make to the Committee?

Ms CASE: I do. Thank you to the Committee for inviting the Public Interest Advocacy Centre [PIAC] to appear today. I have prepared a short opening statement. PIAC has expressed its concerns about the proposed changes to the ICAC Act and its written submissions to the Committee make four main points. First, the current form of section 37 achieves a balance between individual rights and the public interest in maintaining public service integrity. Second, we have expressed our concern about the creeping nature of breaches of fundamental rights. Third, ICAC's view that it should be granted a prosecutorial role in the identification and prevention of corruption is a matter of some concern to PIAC. Finally, while PIAC opposes any winding back to section 37, it might be possible to justify a winding back in regard to disciplinary proceedings by reference to comparable legislation in other Australian jurisdictions.

What I would like to do next is take this opportunity to outline what PIAC would consider to be a rights approach to the proposed amendments to the ICAC Act. The starting point is that the right to freedom from compulsory self-incrimination is Article 14(3)(g) of the International Covenant on Civil and Political Rights [ICCPR]. That article reads:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality …
>
> (g) Not to be compelled to testify against himself or to confess guilt.

The UN Human Rights Council, as it then was, has observed that "the law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable." On this analysis, section 37 of the ICAC Act currently provides own use immunity and not derivative use immunity for compulsorily obtained oral evidence and is therefore already in breach of Article 14. It has also been observed by the Human Rights Committee that all the provisions of Article 14 apply to all types of proceedings, both civil and criminal, so Article 14(3)(g), while it refers to criminal proceedings, is not necessarily limited in its application just to criminal matters.

Within the scheme of the Act as a whole, section 37 is a device by which it is intended to assist in the exposure of corruption in the public sector by compelling witnesses to give evidence. Section 37 presently abrogates the right to silence but it mitigates that abrogation by limiting the uses to which the evidence given pursuant to it may subsequently be put. Unlike some rights articulated in the ICCPR, Article 14 does not contain a separate provision stating that in some circumstances governments or states' parties might be required to balance individual rights against each other. For example, the right to freedom of religion might need to be balanced in some instances against the right to freedom from discrimination.

Article 14 could usefully be described as an archetypical individual right; it is pitting the individual against the powers of the State, so there is not that balancing of individual rights against each other. However, in our view, the Committee is involved in a balancing exercise in this inquiry and the approach taken in relation to human rights at an international level is to balance those rights by reference to the principles of necessity and proportionality. Our view is that that is the approach that the Committee should adopt in this instance as well. The difference, of course, is that in this case the Committee is balancing the public interest in maintaining integrity in the public service against individual rights.

Ordinarily, when demonstrating the necessity of justifying a breach of a human right, one would expect some empirical evidence illustrating the extent of the problem that the breach of the right is said to remedy. In this case PIAC would have expected some evidence, for example, of the number of people who confessed to

criminal activity under the protection of section 37 who are not dismissed from their employment or who are not prosecuted for their crimes, or, if they have confessed for example to stealing under section 37, the proceeds of that crime have not been successfully recovered against them.

Similarly, we would expect some evidence from jurisdictions which are said to lead in the field of achieving better prosecutorial outcomes in disciplinary, civil or, indeed if it extended that far, criminal matters, and that that information would be useful to the Committee in its assessment of the proposed amendments. No such evidence has been presented to the Committee as far as we are aware. The proposals to remove the section 37 immunity in respect of disciplinary and civil procedures would obviously represent a further breach of Article 14(3)(g) of the ICCPR. In this regard we support Mr Odgers' recommendations on behalf of the Bar Association in respect of making the immunity afforded by section 37 absolute in the event that the proposals are adopted.

I have two other points to make. One is that it appears from the submissions and evidence of the Police Integrity Commission, the DPP and ICAC that many of the problems in enforcing civil and criminal sanctions against witnesses arise because of the level of resourcing of these agencies and the level of responsibility each can therefore take and the coordination that can be accomplished between those organisations on their current budgets. A legislative or bureaucratic approach may be taken to remedy these problems, but the primary complaint appears to us to be budgetary.

Finally, ICAC's prosecutorial role and whether it should have one does not in our view fall strictly within the terms of reference. However, this is a persistent suggestion. For example, Mr Harvey Cooper of the Office of the Inspector of ICAC suggests that ICAC findings should be sufficient to reverse the onus of proof in certain circumstances. We express our concern about such proposals and in particular that it would bring the integrity of the ICAC itself into question. Who watches the watchdog? Any serious consideration of such proposals would require review, in our view, of the entire Act, its objects and the powers of the ICAC as a whole.

CHAIR: Page seven of your submission has the paragraph headed "Possible Compromise". Are you aware that the ICAC has power to compel someone to incriminate themselves but the balance is that the evidence cannot be used against them in disciplinary or criminal proceedings? You state that the Public Interest Advocacy Centre [PIAC], the organisation you represent, "does not believe that section 37 should be repealed in its entirety" and then you talk about comparisons with other jurisdictions. You then say:

> However, that there is potential for an amendment which provides that, despite section 37, evidence gathered under objection is admissible for purpose of disciplinary proceedings under specific statutes dealing with public sector misconduct, while remaining inadmissible in any other criminal, civil or administrative proceeding.

What does that mean? The terms of reference state that the evidence of the admission is to be used in disciplinary proceedings. What is your compromise? I am having trouble understanding exactly what you are saying with that compromise? Are you narrowing it down to specific disciplinary offences that you are saying it could be used for or is that totally wrong?

Ms CASE: PIAC clearly has not in its submission identified specific disciplinary offences. I think the position we have taken in our submission is that we oppose the proposed amendments but that on the basis of the law in other states and territories within Australia there seems to be some level of consistency around using evidence given pursuant to provisions similar to section 37, can be used in disciplinary proceedings, you know, other protections provided in relation to criminal and other civil proceedings.

CHAIR: What do you say about the notion that someone who works in a government department, for example, who has defrauded that department of a good deal of money by taking a bribe et cetera and was in the position of trust as a public servant has admitted that, should that be used in a disciplinary proceedings? When I say "used", included in the overall armoury that a government department may have in pursuing an employee for disciplinary purposes. Should that be used because it is completely incongruous and unfair that the person who has committed those offences should not be able to avoid disciplinary proceedings? Do you have any comment to make on that public expectation of the New South Wales community about that notion?

Ms CASE: I think I will limit my comments to what we have said in our written submissions and also my oral submission today which is that evidence obtained by the ICAC can be used in pursuing disciplinary and other proceedings against a witness who gives evidence under section 37. We have made that point and I think other witnesses have made that point to the committee that secondary or derivative use can be made of evidence, including evidence given under section 37. So I think that information can already be used.

CHAIR: You say in a derivative way?

Ms CASE: In that derivative way, that is right. As I have said today that is a breach of article 14 of the International Covenant on Civil and Political Rights [ICCPR] and extending the abrogation of article 14 further would need to be justified in a rational way. Reference to public expectation is compelling in some contexts but I guess my question would be, what is the rational basis for that? Is it justifiable given the abrogation of individual rights that you are suggesting?

Reverend the Hon. FRED NILE: The Police Integrity Commission already has the powers that the ICAC is seeking: It wants parallel powers. The fact is that the PIC has the powers and the ICAC believes it does not have them and that is why this inquiry is being conducted. Do you argue that the ICAC has the powers although it believes it does not?

Ms CASE: I have not said that the ICAC has the same powers as the PIC. I have to say to the committee I am not an expert in the area generally, and I am not actually familiar with the particular powers of the PIC. I do not feel I can comment on that.

Reverend the Hon. FRED NILE: To put the question in another way, if the ICAC does not have the powers and that is why it has asked this committee to consider amending the legislation to give it the powers, do you argue that the ICAC does not need these changes? Is there a dilemma between your view and that of the Independent Commission Against Corruption?

Ms CASE: I have not made any submission that the ICAC has the same powers as the PIC, but by way of comments what I could say is that the PIC is limited, to my understanding, to investigating complaints against police, and the ICAC's powers are far broader.

Reverend the Hon. FRED NILE: Does that make it more dangerous to give the ICAC the extra powers because it covers a wider area?

Ms CASE: If the ICAC were given broader powers they would need to be specified and confined in similar ways to the Police Integrity Commission Act and the other Acts that are referred to in the committee's position paper.

Reverend the Hon. FRED NILE: I note in your submission you quoted Commissioner Cripps. The same quotation was given to this committee in such a way that he does not agree with it. You use it to suggest that he thinks his powers are leading to a police state. He said that is what some people think but he did not think that. That is how I took the comment. I think you have misrepresented him with your quotation as if he is supporting your argument but I do not believe he was when he made that comment.

The Hon. TREVOR KHAN: Page four of your submission.

Ms CASE: Is this under the heading "A prosecutorial Independent Commission Against Corruption"?

Reverend the Hon. FRED NILE: Yes, page four of your submission. You say "people may well think" but he did not think that: that was my impression when he gave it to us.

Ms CASE: I have got the quote.

Reverend the Hon. FRED NILE: I am not saying the quote is not correct but the quote was the opposite to what you are implying. He did not think it was leading to a police state. Some people may say that, but he was not saying that?

Ms CASE: I cannot really comment on what Mr Cripps intended when he made that statement.

Mr GREG SMITH: In your submission, you concede, at page 5, that the Police Integrity Commission Act can be used for disciplinary proceedings under the Public Sector Employment and Management Act 2002, that is evidence taken under the Police Integrity Commission Act. Do you agree with that?

Ms CASE: Sorry, I think my page numbering is different from yours.

Mr GREG SMITH: In your submission, at about point three, you talk about using evidence gained in the Police Integrity Commission. You say that it cannot be used "for the purpose of any civil or criminal proceedings, except for an offence under the PIC Act, the Commissioner's confidence provisions of the Police Act, or disciplinary proceedings under the Public Sector Management Act 2002. PIAC does not believe there is a warrant for the ICAC Act going further." Do you think it is legitimate for the Independent Commission Against Corruption Act to be amended at least to allow for evidence to be used in disciplinary proceedings under the Public Sector Management Act?

Ms CASE: Our starting point is that we oppose the proposed changes. However, in light of the fact that, for example, the Police Integrity Commission Act allows certain evidence to be used in certain disciplinary proceedings and that is the case in several jurisdictions in Australia, there may be some justification for extending the use of section 37 evidence to similar types of disciplinary proceedings.

Mr GREG SMITH: Despite the fact that you say section 37 generally breaches the ICCPR, the International Covenant on Human Rights basically—

Ms CASE: The International Covenant on Civil and Political Rights, yes.

Mr GREG SMITH: Nevertheless, you would allow an exception and allow the ICAC to at least use evidence in disciplinary proceedings against public servants?

Ms CASE: In the framework that I have just described, our submission would be consistent with what we have put. That is, if you are going to expand the abrogation of article 14(3)(g) rights by amending section 37 in the way it is proposed, it needs to be justified. You have to take a rational approach, it has to be rationally justified and proportionate to the purpose you are trying to achieve by breaching human rights.

Mr GREG SMITH: The general covenant does not apply to the general law of New South Wales does it?

Ms CASE: Yes, it does.

Mr GREG SMITH: How does it bind New South Wales?

Ms CASE: The Human Rights Committee, as it then was—it has recently changed to the Human Rights Council—has said that states parties' obligations extend to states and the federal system. It is not just the Federal Government that is responsible for complying with human rights, it is all governments within Australia.

Mr GREG SMITH: As distinct from that, the High Court of Australia said in Sorby's case that the right to silence can be abrogated by legislation. Is that correct?

Ms CASE: I am not familiar with that case, but the framework that I have just described agrees with that proposition; yes it can. Most human rights can be compromised or abrogated, but they can be compromised or abrogated only on a rational basis that is demonstrably necessary and proportionate to the objects that are intended to be achieved by that abrogation.

The Hon. TREVOR KHAN: In what could be described as a scenario, supposing we are in Wollongong and sitting around the table of knowledge, looking out over North Beach—

CHAIR: Could you explain to the witness what is the table of knowledge.

The Hon. TREVOR KHAN: Suppose there is a conspiracy by a group of people sitting down looking over North Beach. Amongst those are various officers of the planning department of Wollongong City Council and also seated at the table are various developers. They are all drinking their lattes and in the course of their discussion it is agreed that for a quantity of money the council will approve certain developments that will knock down, for instance, the dressing sheds at North Beach and will build a high-rise development. Suppose that those council officers go back to the council chambers and approve the development.

Under the compromise proposal, on page 7, suppose that council officers are called, as are the developers, and they all make admissions as to what occurred at the table. I take it that under your proposal the

admissions made by council officers that they were involved in a conspiracy could, under the compromise, be used as evidence against those council officers in disciplinary proceedings, leading to their dismissal. Is that right?

Ms CASE: Yes.

The Hon. TREVOR KHAN: Let us talk about the developers who have paid over large sums of money but are actually the ones who will make a packet from the development on the dressing shed site. They have obtained an approval by corrupt conduct. Under your proposal, the developer's admissions could not be used in some way to set aside the development application to bring to an end part of the corrupt conspiracy. Do you think that is an appropriate balancing of the public good? You have got the little fish, but you have not got the big one.

Ms CASE: Well, firstly, to the extent that the broad objectives of the Independent Commission Against Corruption Act are to maintain integrity in public office, if I can summarise it in that way, the developers do not really come within the ambit of the Act. Secondly, as I understand it, part of the ICAC's responsibilities is to gather information and hand it on to the Director of Public Prosecutions and various other bodies so that they can pursue those types of matters. While the ICAC has a role in that, in terms of gathering information and intelligence—of which evidence obtained under section 37 is not the only kind and indeed, from the Commissioner's own evidence, appears not necessarily to be the most important kind of evidence gathered by the ICAC—it still has a role in pursuing the developers, although not on the basis of an admission made under section 37.

The Hon. TREVOR KHAN: Right. I am limiting my comments to section 37 issues. I am not asking about what prosecutorial role ICAC should have, but rather whether an admission, if it is obtained, should be useable beyond the simply disciplinary purpose. You are saying it is useable only for a disciplinary purpose, is that right?

Ms CASE: That is right.

The Hon. TREVOR KHAN: Suppose that one of those council employees had received $100,000 or $200,000, as well as a case of scotch, for the pleasure of putting through the development and has put that money into a property at Coffs Harbour. Are you saying that the admission that that person had received the money and used it to invest in the property should not be able to be used as an admission for recovery of the moneys that had been improperly obtained whilst in the employ of the council?

Ms CASE: Yes, but I repeat the comments I made about ICAC having a range of other evidence that can be used to pursue those proceeds of crime. Other legislation is in place to do so.

The Hon. TREVOR KHAN: In terms of the balancing act, do you think the community as a whole would be comfortable with the view that an admission of what may be gross impropriety cannot be used against someone to recover the proceeds of their criminal activity?

Ms CASE: Sorry, can you ask that again?

The Hon. TREVOR KHAN: Do you think there is a reasonable expectation on the part of the public that if a person concedes to gross criminality and the receipt of funds, that that admission cannot be used in civil proceedings against that individual?

Ms CASE: If the reason the admission has been made is because the person making the admission believes it will not be used against them in other proceedings, I think the public would understand why that admission would not be usable in other contexts. I think the public's view depends on the information the public gets.

The Hon. TREVOR KHAN: I would agree with that.

Mr JONATHAN O'DEA: Is your argument in relation to article 14 of the International Covenant on Civil and Political Rights [ICCPR] in this written submission as well?

Ms CASE: No, it is not.

Mr JONATHAN O'DEA: It is over 20 years since I looked at anything to do with international law so I do not have much idea, but obviously some sort of framework operates counter to article 14 in terms of, to use your language, something that is rationally justified or proportionate to the matter that needs to be addressed. Where is that contained and where is the framework that you are talking about so that we know how to justify what is already supposedly a breach of article 14 and potentially would be a further breach?

Ms CASE: I have not found anything that specifically attaches the framework approach that I have outlined to article 14, but it is the approach taken by the Human Rights Committee to get a balance between competing human rights. The example I used was the right to freedom of religion against the right to freedom from discrimination. That is the approach taken by the Human Rights Committee when faced with that kind of problem. We say that that is a valid approach to use in relation to the current problem, which is balancing the right to freedom from compulsory self-incrimination against the public interest in integrity in the public service.

Mr JONATHAN O'DEA: So you are saying that there is not an absolute bar but you are perhaps advising or counselling us to make sure we get the balance right between those competing interests.

Ms CASE: Yes, we say article 14 clearly does apply and there is already a breach of that, and given that we are considering human rights and that good government is an important part of maintaining the rule of law and so on, that balancing framework is an appropriate one to apply.

Mr JONATHAN O'DEA: And also that the international community accepts that these things are not black and white and there is an appropriate balancing exercise that needs to be undertaken in circumstances like those with which we are presented, but we should get the balance right.

Ms CASE: Yes, we think that that human rights approach is appropriate in the circumstances.

CHAIR: Thank you very much for taking the time to see us today and give us your evidence. We appreciate it.

(The witness withdrew)

PHILLIP ALEXANDER BRADLEY, Commissioner, New South Wales Crime Commission, 453 Kent Street, Sydney, affirmed and examined:

CHAIR: Thank you for appearing before the Committee. We have received your submission on this matter. Do you wish that to be part of your evidence today?

Mr BRADLEY: Yes, please.

CHAIR: Do you wish to make an opening statement?

Mr BRADLEY: No, thank you.

CHAIR: Can you tell the Committee a little bit about the Criminal Assets Recovery Act, which you are involved with and use, particularly your views on the adequacy of the Act to recover proceeds of corrupt conduct or crime?

Mr BRADLEY: The Act is designed to recover the proceeds of crime from persons who have received them through criminal activity. That can be done without the need to record a conviction, so it is a civil action based on the civil standard of proof, which is the balance of probabilities. There are a number of orders that can be obtained under the Act. The main relief is in the form of a proceeds assessment order, which is, loosely stated, the profits of crime. The other is an assets forfeiture order, which is the recovery of specific assets that cannot be demonstrated by the defendant to be lawfully obtained. There are also lots of ancillary or enabling provisions, restraining orders being one, which are similar to mareva injunctions; examination orders, which are similar to bankruptcy examinations; and other orders that can be obtained under the Act to facilitate the process.

As to the applicability to corruption-type matters, the Act specifically defines offences involving bribery and corruption as being caught by the Act. Therefore, the Act obviously addresses the types of offences that might be discovered by ICAC. The definition is in section 6, "serious crime related activity", which refers to offences punishable by imprisonment for five or more years. It involves various things including bribery and corruption, where people have committed such offences and an assessment can be made as to whether proceedings should be commenced in the Supreme Court by the Crime Commission to recover the proceeds of crime by one of the two methods that I mentioned earlier.

CHAIR: Can you explain the workings between your Commission and ICAC insofar as ICAC refers matters to you for action under the Act? Do you have a Memorandum of Understanding? How does that operate? Is it operating to your satisfaction? What I am getting at is that one of the terms of reference relates to compelled admissions in an ICAC hearing for civil proceedings. I am seeking information about the adequacy of the present system in the Criminal Assets Recovery Act and whether in your view that would suffice to recover the proceeds of corrupt conduct. We are looking at that side of things perhaps as an alternative to dropping the immunity from civil proceedings in the ICAC Act. Do you think the Criminal Assets Recovery Act system is sufficient? Could the ICAC have a direct involvement in pursuing matters under that Act?

Mr BRADLEY: There are a few questions in there, so if I leave anything out let me know. One question is whether the ICAC should be able to commence proceedings under the Criminal Assets Recovery Act as is done by the Police Integrity Commission. Another is whether the arrangement between the ICAC and us is satisfactory in terms of our being informed about matters in relation to which we should commence proceedings.

CHAIR: They are the two main ones.

Mr BRADLEY: I do not have a particular view about ICAC doing their own, as it were, except that it would probably be more efficient to do it in my organisation, which commences 150 cases a year and finishes 150 cases a year. It is a big litigation load and a couple more do not make a lot of difference to us. I would say it is done efficiently. If you had to set up a new arm of ICAC to do what we currently do it would be costly and one of the factors obviously to be taken into account in setting up things and commencing individual cases is whether there is a cost benefit in terms of the public interest. If ICAC did a very small number of matters, which the flow of work to us suggests would be the case, to have a specialised branch of ICAC—it would need to be something along those lines—as we do, dealing with those sorts of cases would probably produce a negative effect in terms of revenue. Obviously that is not the only consideration but it is a big one.

CHAIR: In your view does what we are talking about operate well? Are you happy with the way in which it operates to recover the proceeds of crime and corruption?

Mr BRADLEY: By and large, yes. There are always things that we would like to tweak. Over the years we have made some submissions about those things. There are some around at the moment.

CHAIR: Essentially, is it working okay?

Mr BRADLEY: Essentially, yes. The second limb of your questions was about the relationship between the ICAC and us in doing the work. There has not been that much work. However, of late there have been quite a few cases. The RailCorp people, the Fire Brigades people and the Wollongong people were referred to us. The ICAC differs from other agencies in that the matters are usually fairly well developed in the areas of investigation and public disclosure before we get them. The development of a criminal brief for prosecution of people often is some way off, whereas most of the referrals that we get are from the police.

We are either in them in some capacity or other, so we are well informed about the matters as they proceed and we are in a good position to know when to commence proceedings, or, alternatively, someone has been arrested by the police and found to be in possession of unexplained assets and we commence very promptly after that event. In those cases you have a degree of confidence about the provability of a case. If a person is charged with, say, drug trafficking and he or she is found in possession of a kilo of heroin and a pile of money, and he or she has a house that cannot be accounted for from lawful sources, there is a fairly high degree of confidence about whether we are likely to be able to succeed in proving our case to the civil standard and what might flow from that.

That is not always the case. The ICAC is not specifically involved in the development of criminal briefs of evidence, although obviously that does work. It gathers evidence and that comes to the third or fourth matter in your terms of reference. I think it is just a matter of us tweaking the relationship a bit so that we get in a bit earlier and develop what we think needs to be developed in order to launch the action at the appropriate time.

CHAIR: It does not sound as though the ICAC refers many matters to you over the course of a year.

Mr BRADLEY: No. Of late there have been quite a few of those three well-known topics that I would say have produced a dozen or so possible defendants. Not all of them have had proceedings commenced against them. In the past there has been a trickle. I think that might change in time as the ICAC becomes more accustomed to referring on those matters.

CHAIR: Do you see that as a possibility or as an increasing trend?

Mr BRADLEY: I think it ought to be a trend. Corruption is usually done for money. With the exception of gamblers, drinkers and others who fritter it away, at the serious end—which is where the ICAC is—people accumulate assets as a consequence of corrupt activity and the public should be getting it back.

CHAIR: Do you have any comment to make on the proposal for disciplinary proceedings to be used in a similar vein to parallel the people who admit to illegal or corrupt conduct? Should that evidence be used against them in disciplinary proceedings so that they discontinue their work more quickly than would otherwise have been the case?

Mr BRADLEY: I think there is a lot of precedent for public employees being subjected to proceedings that do not give them the same privileges as criminal interrogation and proceedings. I think there is a good reason for that. If they are employed by the public and they do the wrong thing it should be possible to use some directive powers to find out what they have done and to move them on for reasons that have been stated many times—so that they can be distinguished from ordinary members of the public who have committed crimes about which there are a lot of rules.

CHAIR: Thank you, Mr Bradley.

Reverend the Hon. FRED NILE: Mr Bradley, obviously you are efficient in the confiscation of ill-gotten gains. From what you said earlier, you get some referrals, but not many, from the ICAC. If you were aware of a case that the ICAC had handled but that it did not refer to you, do you have the power simply to

intervene? You could read the evidence and say, "This person has $1 million from corrupt activities", or do you have to wait for the ICAC to refer it to you?

Mr BRADLEY: Strictly speaking we could do that. I suppose that we could do that with anyone. In the ordinary course of events the investigating agency informs us or gives us the material that allows us to act. Because the ICAC's matters involve corruption, money changing hands, and things like that, we have financial investigators and other types of investigators who are interested in that. They are alert to the significance of financial transactions and the availability of our processes. I do not think a situation would ever arise in which we went to the ICAC and said, "We read in the paper or on the internet or something that someone had got a lot of money out of this. Why have you not referred it to us?" We would expect the ICAC to do that in the ordinary course of events.

Reverend the Hon. FRED NILE: From what you have said it has obviously not been doing that. Going back some years, I do not remember hearing about any confiscations.

Mr BRADLEY: There have been some but I would agree that it is not a large number. I am not aware of any cases where officers in the Crime Commission have thought, "We should have that case. Why has the ICAC not referred it to us?"

Reverend the Hon. FRED NILE: It could be that the ICAC did not see this as a priority for it and it was not something that was on its agenda.

Mr BRADLEY: I do not think that; I think it is more likely to have been the ICAC balancing the usual factors, "This person got a lot of money, blew it all at the casino and there are no prospects for recovery action", or "This person got a certain amount of money but there are problems in demonstrating where it came from", or, "This person had a taxable income." A whole range of issues might affect the decision to commence proceedings under the Criminal Assets Recovery Act.

Reverend the Hon. FRED NILE: If the New South Wales Crimes Commission were the body that went after the assets perhaps it would be more feared or less challenged than the ICAC. Would you say that it would be a more straightforward operation if you rather than the ICAC handled it?

Mr BRADLEY: I cannot say that that would be the case with the ICAC. I do not know how it would do it. It is certainly true that we have a high throughput of cases compared with other agencies that have confiscation powers. We have a degree of success in recovering money—measurable quantities of assets—and some other agencies do not. There are a number of reasons for that. First, there is a lot more pay dirt in Sydney than there is, say, in Hobart or somewhere else. Second, we have developed expertise over nearly 20 years. We try to do it as efficiently as possible but there is not much point in having a confiscation function if it costs you more to get it than you get.

Reverend the Hon. FRED NILE: On the surface it is better to remain in your area of activity, that is, the confiscation area?

Mr BRADLEY: Yes, but perhaps not for the reasons that you stated. The reason I stated at the outset was that if there were a relatively small number of matters that the ICAC processed it would take some argument to justify setting up a branch that specialised in that area when there was already an agency that did it.

Mr GREG SMITH: Do you have competition with other agencies such as the Commonwealth for their assets?

Mr BRADLEY: Never.

Mr GREG SMITH: Do you get in first?

Mr BRADLEY: I know where you are coming from, Mr Smith, having worked in both jurisdictions. There is a perception that we tend to go first and that other agencies miss out when there is a crossover application of legislation. That is an available perception. It is also the case that we tend to be quicker in commencing and we tend to be quicker in completing.

To that extent we think there are some efficiencies in that. The real remaining issue is whether, if New South Wales as a jurisdiction recovers assets through the Crime Commission, there should be some recognition of the contribution made by other agencies, because undoubtedly those other agencies do make a significant contribution to the recovery process. So that if the Australian Federal Police, the Australian Crime Commission or, indeed, other state police forces conduct an investigation and there are assets available for attachment under the Criminal Assets Recovery Act and we are successful in recovering those assets, then New South Wales has committed to, as I understand it, a process whereby the contribution of the other agency—not on a cost-recovery basis but just on a recognition basis—would get a proportion of the assets recovered and vice versa.

Mr GREG SMITH: Do you clash with the taxation department over recovery of assets?

Mr BRADLEY: No. I think our relationship with them is much better described as a cooperative one. We have an agreement with the ATO under which we notify them of our interest and once we have done that they tend to not go down the path of assessing and recovering until the process is over. They feed us information subject to section 3E of the Taxation Administration Act.

Mr GREG SMITH: The ICAC process of having public hearings gets a lot of publicity usually and it takes months before we get a report. Is it your experience that a lot of people who have benefited from corruption have hidden their assets over that period of time or transferred them overseas or whatever?

Mr BRADLEY: No, that is not the experience, but it is an apprehension. I think as people become more conscious of the fact that after ICAC they have got the Crime Commission to worry about, those who have received corrupt payments, they will then be thinking about concealing assets. I think that as the relationship between us and ICAC builds, which it has undoubtedly done over the last couple of years and should continue to do, we will be in there earlier and in a better position to decide when to commence proceedings. That is obviously a big issue. People, especially organised criminals, are very attuned to what we do and they do try to conceal and dissipate assets as soon as they think they are coming to attention, often before they come to attention.

Mr GREG SMITH: So you would be seeking restraining orders to stop them moving their assets?

Mr BRADLEY: Yes.

Mr GREG SMITH: In your cases and those that you deal with from the police, often you move in very quickly after arrest and the criminals might only find out at the time of arrest that they are being pursued, so there is less chance of them getting rid of their assets?

Mr BRADLEY: Yes. Sometimes we go shortly before arrest so that we actually have got the orders and when the person is apprehended they are served with the orders, because we know what the timing of the arrests are going to be. But the typical case from police with whom we do not have a task force arrangement is in the example I gave—someone gets pulled over with a kilo of heroin in their possession and is arrested and they are found to have cash and assets they cannot account for—we try to commence very soon after that event because people become conscious of the need to have some assets, or cash in particular, available to them. And as you know, it is possible to encumber a piece of real estate in 30 seconds if you wanted to, and so we need to go very quickly.

Mr GREG SMITH: But they can then apply to the court to get money for their costs, can they not?

Mr BRADLEY: They can apply for a number of things. There are things like living expenses and hardship. So that if a person is arrested and they have got a family and bills to pay and rates to pay and food to put on the table, then they can make application for what we call a hardship application. They can apply for their legal expenses to be paid subject to the rules in the Act and that does not always happen, but it can. But that is all done in a way that is controlled by the court; whereas if there is no restraining order in place, then the assets could be quickly dissipated.

Mr GREG SMITH: Under your Act you can compel people to give answers that might incriminate them, is that right?

Mr BRADLEY: Yes.

Mr GREG SMITH: They are protected generally?

Mr BRADLEY: This is the Crime Commission Act you are talking about?

Mr GREG SMITH: Yes, the Crime Commission Act.

Mr BRADLEY: Yes.

Mr GREG SMITH: They have a similar provision to section 37 of the Independent Commission Against Corruption Act?

Mr BRADLEY: Yes.

Mr GREG SMITH: In that people can refuse to answer and then be compelled or directed—

Mr BRADLEY: Over an objection.

Mr GREG SMITH: Yes, over an objection, and then that evidence can only be used against them subsequently for false swearing or similar offences?

Mr BRADLEY: That type of thing, yes.

Mr GREG SMITH: Can you use the evidence obtained under compulsion in proceedings under the Criminal Assets Recovery Act?

Mr BRADLEY: No. Well, subject to what we just said about objections, the way in which the Criminal Assets Recovery Act works is that there is an examination not dissimilar to a bankruptcy examination whereby you can compel people to answer questions before the court. Under the Crime Commission Act, if there is an objection, then we could not use it; if there is no objection, then it is possible that it could be used and you would be aware that there are some unclarified legal issues about that. But it seems to me that in the ICAC example, which is the question that was asked at the beginning, it would be much more efficient—and I know that efficiency is not the only test—to use the evidence obtained before ICAC, which is necessarily concerned with financial transactions, bribery and corruption, being a variant, in the confiscation proceedings, because if they are not we just have to go through the process again. That is essentially it, asking questions under coercion about financial transactions and the sources and purpose.

Mr GREG SMITH: You are not seeking such a change to the Crime Commission Act?

Mr BRADLEY: I could see that there would be some efficiencies for us as well, but because we have an area of operation that looks after the confiscation proceedings, then for us it is not such a big step to go from the restraining order process through the examination process and into the final hearing, if it occurs. But I would think that if there is a case for ICAC using its evidence in confiscation proceedings, that it would almost equally apply to us.

Mr GREG SMITH: Can you use telephone intercept material in crimes asset recovery proceedings?

Mr BRADLEY: Yes.

Mr GREG SMITH: That is specifically built into the interception Act, is it?

Mr BRADLEY: Yes.

Mr GREG SMITH: Because normally it cannot be used in civil proceedings?

Mr BRADLEY: Yes, that is right.

Ms DIANE BEAMER: You have talked a bit about tweaking—I think that was the word you used—your relationship with ICAC. After it has gone through its hearings, and you have mentioned the three high-profile cases that came to your office to look at confiscation, how did you find the evidence you were given? Was it readily available for you to start the confiscation proceedings?

Mr BRADLEY: I think it varies a bit. The evidence is essentially there. The difference is that it is harder with an agency that has not been concerned with the development of a prosecution brief, whether it be criminal or civil, to make a judgement about the likelihood that we will be able to prove our case under the Criminal Assets Recovery Act. Police briefs are typically prepared on the basis that someone is going to be prosecuted criminally. We can make an assessment on that basis, on the evidence that has been gathered and in the form that we are accustomed to, so that there are statements or in the case of someone who has just been arrested a facts sheet, which sets out all the evidence which will lead to a charge of possession of prohibited drugs, for example. So the judgement is much easier for us. That is a critical judgement for us, just as in the DPP the critical thing it does is to make the decision to prosecute based on the sufficiency of evidence. We have to make a decision to prosecute based on sufficiency, but it is a different standard. The consequences for us, if we get it wrong, is a liability to damages and a lot of unnecessary litigation. So, we have to have a degree of confidence when we make that decision and it is often made very quickly because of the dissipation problem that we have referred to.

Ms DIANE BEAMER: The real problem is getting a brief that does not meet your standards, and while you are re-examining it as such, those assets can be shifted. It has not happened so far but—

Mr BRADLEY: I do not think I have said any of those things. I do not think it is a problem. It is just a question of what I have described as tweaking. We need to perhaps work on, if there is going to be a lot more of these, the form in which the material comes to us, the admissibility of it, to make a judgement, and to make our work a bit easier. I am not aware that there have been any lost opportunities as a consequence of it not being in that form. My view is that I think they do have some former police investigators at the ICAC doing that sort of work, so it should not take much to redefine the process.

Ms DIANE BEAMER: In some of the things that we are looking at directly regarding the changes that have been requested to the ICAC Act, it is also about going after an investigation because of the search warrant or the ability to get warrants very easily, or to use them very easily, and the ability then to get those from the banks, et cetera. Their concern is that when they have finished an investigation, they have stopped it and they cannot move beyond that. Would you see merit in actually then being able to continue—when you ask very quickly, "Can we have more evidence?"—with the powers that they have while they are investigating?

Mr BRADLEY: I might have to think about that one, but my immediate reaction would be that, having done their part of it—establishing the corruption, revealing the corruption and reporting on it—they probably would want to move on to the next case rather than nail away every aspect of the recovery process. We have as much or more power than the ICAC in that regard because on the one hand we have our coercive powers under the Crime Commission Act, subject to reference, and there are lots of powers under the Criminal Assets Recovery Act, including production orders, examinations and things like that.

Ms DIANE BEAMER: And you also have the added advantage that you can look at corrupt people who are not in the public service but who have had dealings with those sorts of agencies.

Mr BRADLEY: Yes. We can do that.

Mr JONATHAN O'DEA: Mr Bradley, obviously if the proposed reforms went through, it would make it easier to recover money following the ICAC findings of corruption against certain individuals.

Mr BRADLEY: It would make it more efficient probably, or quicker, but I do not know that it would be much easier.

Mr JONATHAN O'DEA: Potentially there would be more evidence that was more readily admissible?

Mr BRADLEY: Potentially, but I think what I tend to focus on is that all of the material covered or gathered by the ICAC in the course of its hearings could be regathered, if that is inadmissible, in an admissible form before the Supreme Court. To that extent, there probably would not be any more or any less evidence. If we use the second process, probably there would be more evidence. I really just thought that if you merge the processes, it would be more efficient.

Mr JONATHAN O'DEA: Can you put forward any examples where perhaps money has escaped because of an inability or a problem with capturing the evidence that you might otherwise have known was there?

Mr BRADLEY: In the case of the ICAC, it has not happened. There have been instances in which assets have been moved out of our reach through delays or slowness in notifications—things like that. I am a bit reluctant to publish a manual for people who want to avoid the CAR Act, but if we were aware of a large amount of money, say, in some simple repository like a bank account, then we could act fairly quickly to restrain that money, subject to having established the basis. But that money could very easily be moved offshore, and once it is offshore, that task is much more difficult.

Mr JONATHAN O'DEA: As I hear it, your argument is that you are not going to have access to any more evidence, it is just that you would have access to it more quickly and thereby be more efficient in pursuing, but also in collecting?

Mr BRADLEY: No. I am not saying that. I think if the ICAC and the Crime Commission have an optimal relationship—and it must be near that—then there is no great disadvantage through the evidence gathered by the ICAC not being admissible in the CAR proceedings. What I am saying is that under the present arrangements, you have to do it twice. They do it, and then we do it, and in fact we ask the same people the same questions and take up the court's time whereas, if we tender the transcript which is one way of doing it, it would just save time. It is not really a notification or a dissipation risk; it is a different issue.

Mr JONATHAN O'DEA: Why does the PIC run its own cases? Is it efficiency?

Mr BRADLEY: These days, now that they also have jurisdiction over the Crime Commission, I suppose there is a stronger argument for why they would want to run their own cases. But they were given the power a few years ago. They could not exercise it unless they consulted us before they did it, and they do not do that many of them. They do consult us, and it seems to work fairly well, but I just do not know what resources are applied to it and what amounts are recovered.

Mr JONATHAN O'DEA: I am just trying to understand whether, if you put the ICAC in a position closer to the PIC which is what we are talking about, there is some rationale for some argument along the efficiency lines that might be run under the PIC model for saying that the ICAC might be even more efficient or more timely in pursuing recovery of crime money, if in some ways they were doing it themselves.

Ms DIANE BEAMER: That is the opposite to his evidence.

Mr JONATHAN O'DEA: No. I am saying under the current dynamics—

Ms DIANE BEAMER: What about someone who ran 150 cases a year?

Mr JONATHAN O'DEA: I understand. That is why I am trying to understand the dynamics under the PIC. If we are moving closer to a PIC model, I am just trying to understand—

Mr BRADLEY: I think you can make an argument that if the ICAC forensic accountants, as we call them, are working on the matter and the person who is responsible for commencing the proceedings was working shoulder to shoulder with that person, then there is a likelihood that there would be some efficiency in that the conveying of the information outside the ICAC to the Crime Commission for the purpose of commencing proceedings might be slower, more formal, or something. But you have to balance that against the establishment of a litigation branch within the ICAC to commence proceedings for what, on past indications, would be a fairly small number of matters.

Mr JONATHAN O'DEA: Which might then tie in with the third point of the term of reference of this Committee of gathering or taking on a more investigative albeit prosecutorial type of function.

The Hon. GREG DONNELLY: Mr Bradley, my question is more general in its nature. The ICAC Commissioner in his evidence explained to us the ongoing challenge that he faces in his role of, put it this way, getting people to tell the truth. Telling the truth seems to dwell in a number of people only when it is about to smack them right in the face. This obviously means that the whole proceedings of the ICAC obviously in many cases are very carefully programmed to get people to the position of ultimately conceding the truth. I am just

wondering, with respect to the New South Wales Crime Commission, is that the experience that you have as well—difficulty in getting people to actually concede the truth of the matter?

Mr BRADLEY: It is difficult to get criminals to tell the truth about crimes that they have committed, but I notice that there are people who have put forward the argument that if the answers are not going to be used against them, they are more likely to be truthful. I just do not think you could run that argument. My experience is that the thing that causes people to tell the truth is the consequences of not doing so, which in our case is five years in jail.

The Hon. GREG DONNELLY: That is what I was actually getting to—whether or not that was your experience.

Mr BRADLEY: That is my experience. You would have seen in the ICAC hearings that people are inclined to eliminate or minimise their own involvement in corrupt or criminal activity until, as you say, they are confronted with irresistible evidence to the contrary. In the case of the ICAC, that often takes the form of listening devices and telephone interception products, which often is irrefutable. It certainly has an impact on people when they realise that there is the possibility of that evidence being available when they are turning over in their minds whether to tell the truth or not. I do not think the question of whether the evidence will be admissible against them is high in their priorities.

Mr JONATHAN O'DEA: When do you start proceedings in relation to ICAC investigations or findings? Do you wait until the end of the ICAC investigations for them to make a finding before your start your recovery?

Mr BRADLEY: No. The way it should always happen, in my view, is that the agency responsible for restraining the property, which is the most important step in terms of securing the interests of the public against future recovery, should, in consultation with the investigation agency, be evaluating the evidence as you go along. For example, if the ICAC were about to have a hearing involving a witness whom it wanted to accuse of corrupt activity or interrogate about corrupt activity and we were to serve a summons with a supporting affidavit on that person setting out the ICAC's case a fortnight before, it might not suit the ICAC's interests. You need to weigh those things up. It is possible for us to commence a short time before the arrest because that reduces to zero the time between notification through the arrest process and the opportunity to disperse assets. But that is just a process of collaboration that I think we all should engage it. It is obviously not possible in the examples I gave about people just being arrested in the course of supplying drugs or possessing drugs, or committing some other crime.

Mr JONATHAN O'DEA: With RailCorp or the Wollongong Council case, for example, at what point did you get involved?

Mr BRADLEY: In those cases, latish. I would say in those cases the risks were relatively low. Firstly, there was not much evidence of dissipation. The people were unfamiliar with our practices, and when we came along the assets were still in tact. As time goes on people will be more conscious of what can happen to their assets if the ICAC should find them paying or receiving corrupt commissions or bribes.

CHAIR: Do you have any issues with getting the matters too late, when they have been dissipated?

Mr BRADLEY: Not from the ICAC.

CHAIR: Not from the ICAC. That is not an issue. You work together with them to come in at an appropriate time.

Mr BRADLEY: I think there is potential for it, and as people become more educated about what we do—that is, the potential defendants become more educated—we will have to be watching a bit more closely and collaborating more closely with the ICAC about the commencement.

Reverend the Hon. FRED NILE: Do you have a Memorandum of Understanding with the ICAC?

Mr BRADLEY: Not on that, I do not think we do. I am pretty confident we do not.

Ms DIANE BEAMER: How much did you actually get from prosecuting criminals last year with your 150?

Mr BRADLEY: Last year was a good year from the public's point of view. I think it was in the order of $30 million, and that depends on how you measure it. The main assets are real estate and cash and chattels. In the case of organised criminals chattels are often quite valuable. In one case there was $750,000 worth of furnishings in one house, but I should tell you that we would not value that—that did not come into the accounts as $750,000 because by the time you go and try to dispose of some furniture bought by some organised criminal—

Mr GREG SMITH: Tastes differ.

The Hon. TREVOR KHAN: Yes, Romanesque.

Mr BRADLEY: So what we tend to do is look at historical cost and depreciation, motor vehicles' red book value, Residex for real estate, things like that. So it is pretty accurate.

Ms DIANE BEAMER: I understand. It was just curiosity.

Mr BRADLEY: That is in the bank. That is an asset of the Crown. When we say $30 million we mean that is what the state's balance sheet has gone up by. The amounts restrained, which are often published by some other agencies, often do not reflect the recovery. You can restrain about a $1 million worth of assets and get next to nothing. Sometimes we do restrain millions of dollars worth of assets and get next to nothing because there is a range of factors that comes into play as to how much of that should be disgorged.

(The witness withdrew)

(Short adjournment)

PETER PAUL PATRICK McGHEE, Committee of the Criminal Law Committee, Law Society of New South Wales, of 170 Phillip Street, Sydney, sworn and examined:

CHAIR: The committee has received your submission. Do you want that to form part of your evidence today?

Mr McGHEE: I would. I work at the Legal Aid Commission of New South Wales. I have made some points in addition to the paper that the committee made, and I sent that to the committee today to seek endorsement and I did receive that endorsement. But I do not wish to go on and waste your time. I do not want to add to it today but if you wish me to answer questions, I will answer questions. I do have a few points to make but I can do that during the course of the inquiry. This is my first inquiry that I have participated in.

CHAIR: Are you aware of the terms of reference and what this committee is looking at doing?

Mr McGHEE: Yes, I am.

CHAIR: In relation to the civil action term of reference number two, the proposal is that compellable evidence of an admission in an ICAC hearing be used in civil proceedings whether generally or strictly in respect to the recovery of assets or money. It is obvious that there could be a breadth of possible civil actions undertaken—injunctions, garnishee of wages, breach of contract, which we talked about earlier today, and so forth. What comments do you make about that? Do you have any concerns that you want to tell us about?

Mr McGHEE: I do. The concern I think that I have is that whilst there are a great many rackets that have been exposed by the ICAC and much excellent advice has been given to public authorities to tighten procedures, on the other hand a very careful audit of its achievements needs to be carefully kept in mind bearing the concerns of civil liberties in respect to giving evidence of a witness coming before the ICAC. A witness that comes before the ICAC may be a corrupt civil servant, and no-one wants to see a corrupt civil servant gaining moneys and hiding behind the shield of objection which is entitled to be made under section 37. No-one wants to see that.

In particular, the witnesses that come before the Commission are often spouses of, partners of, associates, contractors who have given tenders, or their neighbours, relatives or friends. Now they are lawyers, accountants and politicians; they often appear. Removing that shield and the benefit of having that shield, and seeing clients appear in the ICAC, the first thing that we would do is talk about the right they have to seek that entitlement to give objection, ensuring that their evidence will not be able to be used against them if they are honest and frank. Now whether that is used in civil proceedings or in disciplinary proceedings, there might be a tender issue, a document which is not an authentic document; it might be a tender which has been used or copied inappropriately which has pricked the conscience of a public servant or someone else in their ladder. They have reported it and there are going to be consequences. Because if the evidence is provided to the Commission, and that shield is not able to be used, then recourse will be taken.

Whilst defamation cannot be used, certainly if a reputation has been affected or if damages have flowed from a company that has had a tender document used, then certainly recourse can be taken. That is something that needs to be very carefully monitored. Due process, 99 times out of 100, where any persons have gained inappropriately, would see that money clawed back appropriately in the proper course of what our justice system entitles to be done. These proposed amendments cast a net far wider than I think, and the committee thinks, would be procedurally fair, particularly for those other people who are just related to the proceedings, whether that is a declaration on their tax return, on the difference between a small donation or a contribution—which I have seen over $50 in a Commission hearing I have appeared in—or whether it is a document which has been used to seek a tender which is a fraudulent document.

CHAIR: I have asked you about civil proceedings. When you speak of casting the net, do you mean you are concerned about casting the net wider because of the available civil actions that someone may take? For example, an employer may want to sue an ex-employee for the recovery of money; might garnishee their wages, might seek an injunction. I am not an expert in civil law but it opens up an array of possible remedies. Is that what you mean by casting the net? My next question is, would you rather see the civil action be restricted in some way or not proceeded with at all? I am referring to proposal number two.

Mr McGHEE: Yes. In relation to the use of the information, a transcript that is tendered in civil proceedings can contain evidence which would otherwise not be available to go in via the Evidence Act. That would mean hearsay opinion and leading evidence can be put through, transcripts can be tendered—

The Hon. TREVOR KHAN: But if a document is capable of being tendered now it can contain hearsay evidence, for instance, that otherwise would be inadmissible because the document itself is capable of tender. The Evidence Act allows that.

Mr McGHEE: Yes, under certain circumstances where there is a prior inconsistent statement, or if there are other issues that have arisen, or other documents that could have been utilised to provide to the court, there has been consistent information provided.

The Hon. TREVOR KHAN: Or if it is a business record?

Mr McGHEE: Yes.

CHAIR: There is a specific exception of business records under the Evidence Act.

The Hon. TREVOR KHAN: That is right, but it allows hearsay evidence and the like.

Mr McGHEE: To a point, yes. Thank you for that point. I would indicate that there would be a situation where there may be an interest for someone just to wilfully forget rather than face the consequences of the vast civil action which will flow, which could be $1 million or $2 million, with $300,000 in legal costs. If there is a body which can act for that person, such as a union, then that is great but for those people who do not have the benefit of having that relationship with someone to assist them and act on their behalf and civil proceedings then flow, they will be open to a very dangerous situation of being exposed to losing their only assets, their house, or having major costs orders against them in that event.

Now if powers were given to broaden the use of the information given under the shield you would possibly face situations where people have complaints made against them, for whatever motive that the complainer might have, whether for a purely political motive or one based on the absolute right and cause to expose corruption. There have been a number of complaints referred to the Commission which you could infer were political.

When Mr Greiner referred 70 matters to the Commission from the Wran Government, only a few were picked up. But there is certainly some recourse, which might be exposed to certain persons who come before this Commission, and if they are not given the shield, they may be placed in the position where they are wilfully forgetting. That is something that we would always tell a witness when appearing before ICAC: "Don't wilfully forget. Don't mislead this Commission. Be honest. But know this, if you are honest there is a benefit—to get to the truth." And that is what the aim of this Commission should be; it is the vastly most important aspect of this Commission. You may well find that there are situations in which someone chooses to take that course because some civil recourse is exposed to them. That is, losing their livelihood, their family. Would they prefer to cop a three-month sentence or a good behaviour bond, or even a five-year sentence in certain circumstances.

CHAIR: The Committee heard evidence from the Bar Association. One concern expressed by Mr Odgers, who represented the Bar Association, was that if the immunity is removed as far as disciplinary proceedings are concerned, for example—and I am talking about proposal 1, compelled evidence, under which ICAC is able to compel someone to incriminate themselves—that evidence can be used by an employer or other tribunal for disciplinary proceedings against that person. There was a concern that that person would then not tell the truth or be forthcoming with admissions. That was a concern of the Bar Association.

The evidence of the Independent Commission Against Corruption Commissioner is that in his experience in a hearing people only tell the Commission what they think the Commission already knows. The Commissioner rebutted that concern by saying that people only give evidence of what they think the Commission knows. If they think the Commission knows something they will admit to it. That is how the Commissioner dealt with a concern by the Bar Association. You represent lawyers, do you not?

Mr McGHEE: Solicitors, yes.

CHAIR: What do you say about that? That was the main concern of the Bar Association. As a representative of the Law Society what do you say about that? Is it your concern as well? Do you think that the Commissioner's answer is correct?

Mr McGHEE: I respectfully disagree with the Commissioner on that point. Having clients before the Commission, the solicitor acting on behalf of that client has no say in the way in which witnesses are called, the order, or if other witnesses are called at all. The perception of a balanced hand is unbalanced when evidence unfolds such as telephone intercepts, or information produced under warrants, which the lawyer acting on behalf of the client has no knowledge about.

The Hon. TREVOR KHAN: Or the prospect of someone coming in through the side door?

Mr McGHEE: Yes, certainly. The balance here is that whilst police officers have that very high and powerful standard that enables the information to be used for disciplinary proceedings, I would not concur that the same should apply for public servants. If there is enough information to have them disciplined, there are adequate laws that do that at the moment. In the RailCorp inquiry, in which I assisted many clients, prior to them getting home that day, even clients who were not mentioned or recommended for charges to be laid, were dismissed; having some recourse at a later date, only to be faced with a transcript of evidence going straight in, is an unbalanced and unfair result for someone who is protecting their rights, their rights to their livelihood and their rights in relation to further consequences of other actions flowing.

Would someone want to come forward? When you disclose information about someone up the ladder in your association, or under, you can bet that there will be some accusations made against yourself. Having an ability to cross-examine by the use of the Evidence Act is a powerful tool. That is not available to someone representing someone at the ICAC. We are told to sit down if we are entering areas of cross-examination that are inappropriate according to the Commission. Whilst we have a very fair Commissioner now, I wonder what will happen down the course of events. I would be very careful before losing a right that we have to a shield.

In my limited experiences, and people who have been in this Commission have taught me, the real way that evidence that came out was truthful was by us saying to them: "This is the shield. It is in your best interests to be honest here. And there is some protection." If there is other information, such as evidence of other witnesses or documentary evidence obtained under warrant, that information will be used against them. There are very adequate Acts that remedy clawing back moneys that have been inappropriately obtained. Police officers do not seem to face the problem of having to pay back money when they inappropriately obtain it through the confiscation legislation. I cannot remember the name of the Act.

Mr GREG SMITH: The Criminal Assets Recovery Act?

Mr McGHEE: Yes, that is it, thank you. Where a civil servant is placed in that position, or with the more difficult task of a contractor who has been caught through the process, there are very able Acts that enable recovery in those circumstances. Where that is not so, where those few injustices occur in our State, the countervailing considerations of losing that right are of an infinite superior magnitude. I would respectfully ask that this honourable Committee not endorse the proposal in relation to proposal 2.

CHAIR: In relation to proposal 1, is it your view that someone who has been found to have taken or has admitted to having taken a bribe at RailCorp, for example, or to have organised a contract, had acted corruptly?

Mr McGHEE: Yes.

CHAIR: And if the person admitted that at an Independent Commission Against Corruption hearing, concerning $1 million or whatever, should that evidence not be used against them if RailCorp takes disciplinary proceedings against their employee? As I understand it, that is your view. What do you say to a member of the public who asks why that person should be able to keep on working, keep on earning their superannuation, or keep on gaining entitlements, when they had admitted this in an ICAC hearing and got away with this money? He or she is a public servant and there is a high expectation on behalf of the public that they do the right thing. Are you saying that your position, notwithstanding all that, is that you would not like to see that evidence used against that person?

Mr McGHEE: I certainly would not like to see that employee remain in work and I certainly would not like to see that employee retain those moneys. I think it would be very dangerous to throw away this right in order to get that person whose confession has provided the only evidence for ICAC to recommend charges. I consider that the number of persons who have fraudulently obtained moneys and have been through the Commission but got away by hiding behind that shield are very few. That has to be compared with the good that this Committee can achieve by maintaining those rights and getting to the truth. Blurring that right, even having exceptions to it, opens up a lot of doors. If anyone was appearing before ICAC they would want the civil and common law rights that we have.

CHAIR: I understand what you are saying. An educated member of the public might say that we are not looking to use this in a criminal proceeding in which a person can be sent to jail and get hit with penalties; we are looking to use this in a disciplinary proceeding where you lose your right to work. It is assisting the employer to take proceedings against that person. What do you say about that? Do you think that in disciplinary proceedings those factors that you are talking about far outweigh the public expectation that someone not avoid disciplinary proceedings for corrupt conduct? Is that the sum total of what you are saying? It seems your main objection is that you will not get those admissions if you take away the shield.

Mr McGHEE: That and the fact that a witness may risk contempt if he says, "I am going to be marshalled into disciplinary action. I am now going to weigh it up and go into the forgetful witness category." We have all seen that; it frustrates the Commission greatly. A member of the public, or any of us, could one day be called before the Commission and you would want to know that you had rights. They are so important to get to the truth. There will always be a few that get away, but they may be caught in criminal proceedings when evidence comes out via the Evidence Act, after cross-examination and a thorough review of all witnesses. That is when a decision should be made and it is the only time a decision should be made that affects a person's livelihood and their ability to provide for and support their family.

Mr DAVID HARRIS: Can I just clarify something? So far we have mostly heard about witnesses who have been accused of corruption. Are you asserting that if section 37 were amended it could inadvertently cover other witnesses and mean civil action could be taken against them for revealing certain documents and other things? Is that what you are saying?

Mr McGHEE: I think there could be recourse in civil jurisdictions against not only civil servants but also people associated with them. Even having a specific narrow change that affects only employed civil servants creates risks for others of their associates who are called before the Commission. I think that putting a blinker on what can be brought forward by way of changes to section 37 would create injustice for people who are not associated directly with the action but have been called before ICAC and issues have arisen during their evidence that exposes them to proceedings in another court and another jurisdiction. How do we know that the evidence in private hearings will not end up one day in another jurisdiction and expose a person not only to civil recourse but also risks to their safety? Evidence may be given against people such as bikies. A person may have given truthful information that comes out in another forum. That is a risk that also adds to the concerns about the changes.

Reverend the Hon. FRED NILE: In the conclusion to the submission from your chief executive officer there are the strong objections to amending section 37 along the lines you have outlined. The submission says it "may place a witness in the situation where they are potentially unfairly exposed to litigation for assisting an inquiry". Then it lists all these possibilities. I am not a lawyer and I think it is probably stretching it a bit, but maybe they all potentially could occur. If we amended section 37 of the Act would it not be possible to have something that stated that the information supplied could not be used in litigation, whatever the legal words might be, except for the purpose for which the inquiry was being held? In other words it can only be used in a disciplinary proceeding and could not be used in all the other matters you have listed, such as disclosing trade secrets, bankruptcy and other matters. Could we not draft the Act to provide that protection for the witness?

Mr McGHEE: If that happened and a narrow use of the information was permitted the problem would be that once it was in the forum of another jurisdiction it could be used in different contexts, such as statements and affidavits from other persons, after that information was revealed and looked at. If it is given to the Commission confidentially and in an honest and truthful way, that information can be revealed if it is used in another forum even if it is just for disciplinary proceedings. It can then be used against a person in another way in other proceedings. It opens doors that will put the person in a position where disciplinary action leads to civil actions for damages. The information will then be in the public forum. Even if it is narrowed to the one issue of

disciplinary measures, due process will work and effectively provide a person with the ability to pay back what they have to pay back.

With the vast resources available for information to be gathered against them, those who are smart enough to get around the Commission and give evidence from behind a shield so that it cannot be used against them, although they have failed to carry out their duties as a civil servant, will be few and far between compared to the honest witnesses who are afforded the protection that the legislation has provided them. Dismantling that, even for disciplinary actions, sets a dangerous precedent and opens doors that will open even more doors. That is the risk and I would urge the Committee to exercise great caution. The Committee has to decide about some extraordinary powers, not only incrimination issues that have been vehemently detailed by the Bar Association but also the penalties that apply and the recourse. I expect there would be a number of witnesses who when advised about the protections available under section 37(3) would give the information in an honest fashion. They would do that if investigators from ICAC told people before they gave a statement that they had a legal right to representation and to say nothing, as a police officer does in dealing with a sexual assault allegation or a murder allegation. But all this information goes on the record and they do not get a copy of it.

It would then go to a private hearing. If there were inconsistencies in the evidence that they had given at that private hearing they would face a criminal charge. These are extraordinary powers. We are going further and we are saying, "You will now be provided with a copy of the transcript. It will go to your employers and this will be used against you." The employers in that ICAC room—they would all have lawyers appointed to them free of charge—would be able to cross-examine that witness, possibly a whistleblower, who would be faced with dire consequences if the only information available were that evidence under oath. That witness should be afforded the benefit of the doubt and not have that evidence used against him or her in disciplinary proceedings. It would open other doors that could never be closed.

Reverend the Hon. FRED NILE: You are saying that, with all our skills, we could not draft legislation to prevent that?

Mr McGHEE: I believe it would be too difficult to stop injustices from occurring in the future.

CHAIR: In view of what you just said I am compelled to ask you another question. Last week Mr Odgers, Senior Counsel, gave evidence. Mr Odgers, an eminent person, has a great deal of knowledge about the Evidence Act.

The Hon. TREVOR KHAN: Which is what he tells everyone.

CHAIR: One needs a great deal of finance to buy his books. I am sure you are aware of section 128A(7) of the Evidence Act?

Mr McGHEE: Yes.

CHAIR: It states that evidence under that certificate regime cannot be used directly or indirectly in other proceedings. Mr Odgers said to us that we needed to prevent a person from being cross-examined on that evidence in further proceedings. He said that evidence gained in a disciplinary proceeding—not the evidence adduced by the ICAC but evidence in the proceedings gained from the evidence from the ICAC—could then be used in a further proceedings, for example, criminal or civil proceedings.

Mr Odgers suggested we should insert that section in the Independent Commission Against Corruption Act to make it clear that evidence obtained under compulsion from the ICAC could be used in disciplinary proceedings, and the evidence gained in the disciplinary proceedings, together with the evidence gained from the ICAC, could not be used either directly or indirectly in other proceedings. Mr Odgers put forward that proposal to assist this Committee in achieving that narrow aim of using compelled evidence solely for disciplinary purposes. Does that address your concern?

Reverend the Hon. FRED NILE: That is the point I was trying to make.

Ms DIANE BEAMER: You can take this question on notice and get back to us.

CHAIR: Certainly. You might wish to get back to us at a later date.

Mr McGHEE: I would like an opportunity to get back to you. My first response would be—and it probably would be wrong—

Reverend the Hon. FRED NILE: Give us the draft amendment.

Mr McGHEE: It is like getting immunity from prosecution, but in a civil proceeding.

CHAIR: It is to prevent what you were talking about.

The Hon. TREVOR KHAN: It is a derivative use.

CHAIR: It is derivative use of evidence in further proceedings. For example, if in a disciplinary proceeding you led evidence of an admission in the ICAC and you cross-examined an employee on that compelled evidence, that cross-examination, which is further evidence, could be used in criminal or civil proceedings.

Mr McGHEE: Would that have to be endorsed by the Attorney General?

CHAIR: I do not know.

Mr McGHEE: I think that was the situation. There have been criminal proceedings. There are so many experts around the table that I am nervous about opening my mouth. As I understand it, the immunity that has been provided under such certificates has a requirement that the Attorney General would have to sign off on it.

CHAIR: I do not think that applies under section 128A.

Reverend the Hon. FRED NILE: There would be no trouble in getting that.

Ms DIANE BEAMER: If we were to get a considered opinion from you I would prefer it if you took this question on notice and you wrote back to the Committee.

Mr McGHEE: I would very much appreciate an opportunity to do so. I am in over my head on this issue.

Ms DIANE BEAMER: We will give you an opportunity to do that. We have enjoyed hearing the things that you have had to say today but I think you should have time to give us a considered response.

Mr GREG SMITH: You can already be prosecuted for false swearing.

Mr McGHEE: Yes.

Mr GREG SMITH: And the evidence that you give is used against you.

Mr McGHEE: Yes.

Mr GREG SMITH: You say that that is a greater infringement on the right to silence of a witness than using that same evidence in those disciplinary proceedings?

Mr McGHEE: There is a problem with giving false evidence. As a direct consequence, if these references were to be put through there would be a substantial increase in the number of recommendations for charges of false evidence. I think that wilful forgetfulness would be an issue. It is different from the courts where a person perjuring himself or herself in court has to satisfy a higher test. If the Commission is of opinion that you are misleading it, which is much more—

Mr GREG SMITH: It still has to be proven in court.

Mr McGHEE: It does, but it is vastly different to the test that has to be provided, say, by a police officer misleading a court in evidence as to a recommendation of perjury being made, or another officer or person giving evidence under oath that is false. It places a great amount of power in the Commissioner, which would be open to interpretation or abuse if, say, there were a political witch-hunt, which has happened before.

I am saying that in future it might put people at great risk of being interpreted as misleading the Commission because they are concerned about the consequences.

Mr GREG SMITH: You might have a client who wanted to tell the truth and that client might say, "Yes, I have been receiving secret commissions for the past five years from certain companies. I have been making sure that they got the contracts to supply certain goods. They made a lot of money and I have been paid a lot of money." Why should a person who says that be protected when the public are aware of it? Why should that person keep his job? Why should he be put in a position where he is able to do it again?

Mr McGHEE: If that person can say, "Five people on the ladder ahead of me also signed off, approved or endorsed those tenders, or failed to take risk management issues that should have been done, or people below them have neglected their duties", that person should be able to give that information and do so in an honest and truthful way. The recourse might be the loss of that shield or that narrow issue of protection. I would say that that person, who would be prosecuted in any event, should go through those proceedings and all the evidence should come out in due course through due process. Being able to jump in quick and to fast track the disciplinary process would result in injustices to that person. You would want to be careful about saying, "I want to put in the second in charge. I want to put him in because risk issues and consequences could flow from that evidence."

Mr GREG SMITH: Prosecutors need that sort of person to give evidence against people who are higher up. I think the expression that is used is that you use a sprat to catch a mackerel. Would you not assume that that person would get an indemnity to give evidence against the other people? He has direct knowledge of what they have been doing because he has been helping them. Do you not think that those sorts of people are looked after by the system now in the sense that they are given indemnities to protect them against future action?

The Hon. TREVOR KHAN: That relates to the fellow coming in through the side door.

Mr McGHEE: Yes. The process to get those indemnities is very blurred. It depends on the people with whom you are dealing. A lot of the time the Assistant Commissioner would shoo you away when you were inviting an indemnity for a rollover. I think that several people do not get the benefits that are available. They should be able to get those benefits if they give substantial evidence that exposes them to civil litigation and they are told, "In this transcript you said this against the following people" and it came out in the disciplinary proceedings. But I would not like to be that person.

The Hon. TREVOR KHAN: Your evidence so far is that you have acted for a number of people who have appeared before the Independent Commission Against Corruption?

Mr McGHEE: Yes.

The Hon. TREVOR KHAN: And that your general advice is along the lines of, "Look, you're entitled to certain protections, so be honest to avoid being charged with offences of giving misleading evidence"; is that right?

Mr McGHEE: Yes.

The Hon. TREVOR KHAN: "And that it can't be used against you in employment proceedings or disciplinary proceedings"; is that the general drift?

Mr McGHEE: That specific information that you are giving, but certainly you would indicate to them, "Well, all the other evidence that's going to come out and all the other telephone intercepts which you've been involved in and all the other documentary evidence which has been obtained under warrant and that statement you've given to the investigator when you just thought you were having a chat, it's all going to be used against you, but this little piece of evidence, today you can be honest and maybe you should clarify some issues which you didn't think to clarify to that investigator," because the investigators certainly do not tell them—this is anecdotal evidence—that they have a right to get legal advice.

The Hon. TREVOR KHAN: Of course not. I know how it works.

Mr McGHEE: It really does frustrate the process because we will say, "Let's give that evidence under the benefit of an objection," and the information as it unfolds can be done in a way where the rights of that person are protected whilst they are giving that evidence to get to the truth—not only for them, but for people up the ladder.

The Hon. TREVOR KHAN: Do I take it that you actually tell them, "Look, all the accumulated evidence that they might have can be used against you in the criminal proceedings, but once you walk in the door and have a chat, that bit can't"; is that essentially what you tell your clients?

Mr McGHEE: The chat to the investigators?

The Hon. TREVOR KHAN: Yes, the other evidence they have accumulated before they have come in to see you can be used in a disciplinary procedure?

Mr McGHEE: Yes.

The Hon. TREVOR KHAN: But not just what you say in the courtroom?

Mr McGHEE: That is right.

The Hon. TREVOR KHAN: Well, is not a response of the client something along the lines of, "Well, look, I'm stuffed, aren't I?"

Mr McGHEE: Some have, but others, particularly those who are, say, contractors or have that relationship, will be completely oblivious to the conversations that they have had on the phone, which will be played at morning tea time and we will watch the differences in their demeanour after morning tea.

The Hon. TREVOR KHAN: The only point I am making is that the certainty with which you expressed that an outcome would follow—I do not want to be rude but, essentially, the sky would fall in if this immunity is removed—in fact does not reflect the complexity of the circumstances with which you are confronted with myriad clients? Some of them would deny the sky is blue, would they not?

Mr McGHEE: Yes.

The Hon. TREVOR KHAN: They have done absolutely nothing wrong?

Mr McGHEE: Yes.

The Hon. TREVOR KHAN: Others would say, "I'm rooned" and others will just be critical. That is right, is it not?

Mr McGHEE: Very much so.

The Hon. TREVOR KHAN: So it is very difficult in the circumstances of the broad range in the way clients respond to you for you in truth to be able to assert any clear outcome as to the impact of a change in this legislation in the quality of the evidence given before a Commission?

Mr McGHEE: Taking into account the differences such as cultural backgrounds, whether or not the client has a mental illness, the great pressure and stress of witnesses that come before the Commission, taking those factors into account. An inquiry held last year was of a person of Chinese background who could not speak English but had spoken and given quite a lot of details to an investigator.

The Hon. TREVOR KHAN: This is in the context of an education issue?

Mr McGHEE: That is correct, yes. The concern in those situations is that whilst you are trying to explain the importance of being honest, you are also looking at the other evidence—which is a balancing act—that would get tabled afterwards. Having considered the different witnesses that come before the Commission, looking at the cultural backgrounds, looking at the different types of intellectual disabilities or mental illnesses that people have, I would say that removing this right would expose across the board a great injustice to people who are directly related or employees.

The Hon. TREVOR KHAN: Let me suggest that that is non-responsive to the question. You are now talking about injustices. I was asking about the quality of the evidence adduced. I will put to you another scenario. During the Wood Royal Commission police officers were rolled in over a period of time. Over many months they were rolled in, some of them were rolled out the door and essentially into an employment purgatory. It was known throughout the Police Force that that was happening.

Mr McGHEE: This was police officers?

The Hon. TREVOR KHAN: Police officers. Yet more officers came in knowing that if they made truthful admissions they were likely to get speared from the force. That was the case, was it not?

Mr McGHEE: Yes.

The Hon. TREVOR KHAN: Even though they knew that the consequence of them giving evidence was that they would be speared from the force, they reacted in the giving of the truthful evidence to the circumstances in which they gave that evidence in the knowledge that if they gave false evidence they were going to go to jail, yes?

Mr McGHEE: Yes.

The Hon. TREVOR KHAN: So what really motivated them to give quality truthful evidence was the almost certain prospect that lying to the Commission was going to result in them going to jail, yes?

Mr McGHEE: Yes.

The Hon. TREVOR KHAN: So if we apply that to the context of ICAC and the inevitable advice that you give to a client that if you lie to the Independent Commission Against Corruption you are going to go to jail, there really is no reason to believe that removing the immunity with regards, for instance, to disciplinary proceedings will have any consequence different from what it had before the Wood Royal Commission—that is, the fear of going to jail as the primary motivating factor for the giving of evidence, not whether they would keep their job because before Wood they knew they were out?

Mr McGHEE: Yes, certainly. To go through from 2003 and the annual reports of the Independent Commission Against Corruption and look at each year as it goes on to see the recommended charges and the actual offence that results in a witness going to jail, and the charges that are actually prosecuted successfully, there are so many charges that just never get off the ground, but the recommendations—

The Hon. TREVOR KHAN: Sure, but that is a different issue from what is in the mind of the witness at the time of entering the box and giving the evidence?

Mr McGHEE: Yes. When there is the option of lying or wilfully forgetting, you might take that option if you know there is going to be a consequence that is going to be hitting your pocket not only by way of damages but by way of heavy legal costs. A witness might take that option of not being open and frank in every possible way that they would if they were given the benefit of that objection being exhaustive. But, yes, police officers and several witnesses in the RailCorp inquiry certainly had to have the evidence fronted in their face by way of telephone intercepts and other evidence before they would then agree, "Yes, I have now lied."

Mr JONATHAN O'DEA: I wanted to make sure that you absolutely understood there is no proposal—it appears twice in the written submission—to allow evidence to be used in subsequent criminal prosecutions?

Mr McGHEE: Thank you for that. The self-incrimination issue, which was the third point of reference, is something—

Mr GREG SMITH: Is a bit vague.

Mr McGHEE: Yes.

Mr JONATHAN O'DEA: On a number of occasions you say, "If the current amendments proceed it will follow that the evidence obtained under objection could be used in criminal proceedings"?

Mr McGHEE: Yes.

Mr JONATHAN O'DEA: In another spot you say that you are concerned with the next step, again along similar lines. You understand that that is not entertained?

Mr McGHEE: Yes, the primary function issue of the Independent Commission Against Corruption—

CHAIR: Did you mean in a derivative sense used in criminal proceedings or did you understand the proposal to be that the releasing of that immunity is then only to be used in criminal proceedings? What do you understand?

Mr McGHEE: The philosophical change in changing the primary function of the Independent Commission Against Corruption to include assembling evidence on a police brief. It already happens, but having it as a primary function would change the body of what is perceived to be this Commission's unbiased way of using compulsory examinations to get to the truth.

For this to be done in a highly publicised forum would put information before the prosecution which would otherwise not be a part of a brief. That may be that having someone who has some nexus with the New South Wales Government is being investigated for an activity whereby information has been obtained. If they have had a transcript which might be compiled as part of a brief, that information may contain leading questions, that information may contain information that would otherwise not be a part of the brief, and it may be a way of gaining information in a manner which is unfair because there is a relationship to the New South Wales Government, whereas that does not apply with other matters.

Mr JONATHAN O'DEA: I am sorry?

Mr McGHEE: This is the third point of reference.

Mr JONATHAN O'DEA: I just make it clear that the Committee is very concerned that if one of ICAC's primary functions is to assemble permissible evidence for criminal prosecutions, the next amendment to the Act will be to allow the evidence to be used in subsequent criminal prosecutions, assuming that that is not already intended.

The Hon. TREVOR KHAN: You do not have to *Brown v Dunn* him.

Mr JONATHAN O'DEA: No. All I am saying is: Do you understand that that is not currently intended because the letter makes no reference that that might be intended?

Mr McGHEE: Yes.

Reverend the Hon. FRED NILE: A hidden agenda.

Mr McGHEE: As I was preparing over the weekend for today, I did come to understand that, yes.

Mr GREG SMITH: Others have put in detailed submissions about that too.

Mr JONATHAN O'DEA: I wanted to ask about the composition of your committee. How many people are on the committee?

Mr McGHEE: We have, I think, probably about 20.

Mr JONATHAN O'DEA: How many of them were involved in evaluating this?

Mr McGHEE: It goes to every member.

Mr JONATHAN O'DEA: That is fine: I just wanted to understand. Certainly we have an overrepresentation of previous prosecutors around this table. I am just wondering to what extent representation

on your committee is constituted by those on the prosecution side as opposed to those who might defend. I recognise that perhaps there is not the same balance around this table, but just on your committee there might be a particular perspective.

Mr McGHEE: There might be, but it does not. We have the Deputy Chief Magistrate, we have the Commonwealth DPP and the State DPP, we have Corrective Services and we have had, up until recently, the New South Wales Police Force.

Mr JONATHAN O'DEA: So when you say that the committee is completely opposed to the proposed amendments, would all of those people have had input into that complete opposition?

The Hon. TREVOR KHAN: Is this a matter of privilege?

Reverend the Hon. FRED NILE: What was the vote?

Mr JONATHAN O'DEA: I am just trying to understand.

Mr McGHEE: It comes to a vote.

Mr JONATHAN O'DEA: I am just trying to understand because I am hearing what you are saying very much as a lawyer representing a defendant. Okay?

Mr McGHEE: Yes.

Mr JONATHAN O'DEA: I am being frank, and around this table perhaps you have certain people who maybe have a perspective coming from a different direction.

CHAIR: It is a legitimate viewpoint.

Mr JONATHAN O'DEA: Absolutely. It is completely legitimate, but I am just trying to understand to what extent your committee's view is one of lawyers representing defendants.

Mr McGHEE: It is a very good question. The bottom line is that, if anyone has an objection to anything, they put in their comments, and then we will have a discussion about it, and then a final is made and settled. While there might be members of the DPP there, their comments do not necessarily reflect the DPP's actions; likewise with Legal Aid. I am not speaking on behalf of Legal Aid today.

CHAIR: Sure.

Mr McGHEE: Nor the civil liberties that other members are on as well. It is the Criminal Law Committee, and it is the case that it is defence orientated: It is. When the President of the Law Society makes comments, it is to be defence orientated.

Mr JONATHAN O'DEA: That is fine, and that is how I took it, and I just wanted to clarify it.

The Hon. TREVOR KHAN: Even I would admit that.

Mr JONATHAN O'DEA: A number of times you have indicated that the amendments might have the effect of discouraging or obstructing witnesses from coming forward or volunteering information to ICAC investigators.

Mr McGHEE: Yes.

Mr JONATHAN O'DEA: I find what you say and what the Law Society's Committee says hard to reconcile with the view put by the Commissioner—that those views are a total furphy or a myth, from his experience. Do you wish to comment on that?

Mr McGHEE: By removing the protection of immunity against self-incrimination, say, even if limited to civil disciplinary proceedings, it will inevitably cause a greater resistance for a witness coming forward in giving information to ICAC because witnesses come up during the hearing who are not issued with summonses.

If I was in a position of a public servant, I would probably be very concerned before putting myself in a completely exposed, naked position of sitting there, knowing that every single word of what is being provided, immunity or no immunity, is going to be possibly used against you. I would be resisting my urge to come forward and disclose information which I would not otherwise disclose. Just putting my hat on as a public servant, I believe that that will reduce the Commission's effectiveness, and that is in detecting and exposing corruption.

Mr JONATHAN O'DEA: The final question I have in part goes to previous evidence but also goes to a comment that you make on the risk of potentially arbitrary, overbearing domination by superior forces. Can you point to any examples in the past where witnesses before ICAC have been coerced in some way, or have been subject to arbitrary or overbearing domination in your experience, perhaps through the RailCorp investigations, for example? Is that a reality, or is it just an apprehension?

Mr McGHEE: While the Assistant Commissioner is supposed to be unbiased, and while that is supposed to be an unbiased forum for the truthful evidence to come out, a witness appearing in ICAC, giving evidence, say, against a person in an organisation, can be then faced with a barrage of close examination investigation and having no control over whether or not someone is going to kick in the door and take every piece of information from them under a warrant which would not then be able to be used under the protection of evidence. So, yes, there is an imbalance.

Having someone such as an investigator speak to a witness who, say, is a vulnerable witness under LEPRA, that person might give a whole range of disclosures under mental illness and not have a memory of what was said. Now, getting a copy of the transcript: It is not going to happen. You are not going to be able to give that person any advice at all, especially if you cannot even say, "Well, you've got a right to a protection, a shield", or to explain that shield. So a vulnerable person I would say is extremely exposed.

Then the effect of having evidence confronting them, especially if they are from a non-English speaking background, and trying to explain to them, "Now you are facing a situation where I believe you will be having this transcript read elsewhere," puts them in a position where they feel that the Commission's Assistant Commissioner is not giving a balanced and unbiased approach to the investigation. So in that way, yes.

Mr JONATHAN O'DEA: Thank you.

CHAIR: Thank you very much, Mr McGhee, for attending, and if you could turn your mind to that matter of onus under section 128, that would be appreciated.

Mr McGHEE: Thank you. May I keep that section?

CHAIR: Certainly. I declare the meeting closed. I thank members for their contribution.

(The witness withdrew)

The Committee adjourned at 4.58 p.m.