

REPORT OF PROCEEDINGS BEFORE

**COMMITTEE ON THE INDEPENDENT COMMISSION
AGAINST CORRUPTION**

**REVIEW OF THE 2006-2007 ANNUAL REPORT OF THE INSPECTOR
OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION**

At Sydney on Thursday 3 July 2008

The Committee met at 10.00 a.m.

PRESENT

Mr F. Terenzini (Chair)

Legislative Council

The Hon. G. J. Ajaka
The Hon. G. J. Donnelly
Reverend the Hon. F. J. Nile

Legislative Assembly

Mr R. D. Coombs
Mr D. R. Harris
Ms L. A. McMahon
Mr J. R. O'Dea
Mr R. G. Stokes
Mr J. H. Turner

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

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

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

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

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

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

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

One of the questions raised by the Committee, and if I may so say so very helpfully, was a question on the premises of the Inspectorate. When I met with the Premier to inform him that I did not wish to take on another full term, I raised the issue of the premises with him and there is some prospect that a new location can be found in the city. I have not personally pursued that, because I think that is probably a matter for the new inspector to take up and find something satisfactory to the circumstances under which the new inspector will conduct the role. I do not think there was anything else in particular that I wanted to raise.

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

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

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

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

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

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

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

Mr KELLY: Very rarely.

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

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

CHAIR: You have said in past reports that when you do audits and checks on the commission you do them on investigations that have been completed. I know that has been a conscious decision on your part. You are not suggesting there is no power to do it during an investigation, as I understand it, but you have chosen not to. Can you explain to the Committee why that is?

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

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

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

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

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

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

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

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

CHAIR: I noticed in your report you set out a number of cases you have looked at, complaints not warranting investigation, et cetera. You just set out the general nature of the allegation. Would it be better to put those together in table form? For example, would it be better to put in a table of total complaints received, total finalised, ongoing complaints, and then another table which might indicate how the complaints were treated, for

example, outside jurisdiction or not warranting an investigation, referred back to the ICAC, and another table with the outcomes—complaints sustained or not sustained—a further table, method of receipt of complaints—by email, facsimile, telephone, et cetera? On turnaround times, for example, would you envisage it would be favourable to put in a table with turnaround times for complaints finalised? What I am getting to is that the ICAC report itself sets out tables so we can look and get fairly quickly a general picture of how the commission is operating—general statistics. You have a series of examples in there that do not really tell us anything, I think, and I know you have your reasons for that, and my view—and other Committee members might have a different view of this—is that it would be easier to comprehend if they were in table form.

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

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

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

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

Mr KELLY: Yes.

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

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

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

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

Committee accordingly. But that is not the way they interpret the section. Therefore, I think one can be relatively comfortable that they will take up matters that fall within the terms of it.

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

Mr KELLY: Decided not to do it, yes.

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

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

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

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

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

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

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

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

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

Mr KELLY: Resources.

CHAIR: —resources of the office?

Mr KELLY: Yes.

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

Mr KELLY: It depends what you are asking.

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

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

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

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

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

Mr KELLY: Yes, that is right.

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

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

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

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

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

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

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

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

Mr KELLY: Yes.

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

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

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

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

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

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

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

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

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

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

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

Mr KELLY: There are two levels to the answer to that question. At a personal level, the commissioner and I have a very good working relationship. We meet regularly; it is an open and frank relationship. We have disagreements, but that does not impact on the quality of the working arrangement. So, at that level it works I think very well. Does that depend on pure personalities? It probably does. At the institutional level, I think you have a situation where ICAC for very many years was completely unaccountable, and an organisation that has had a history of that finds it unusual and often unpleasant to have accountability thrown over it. You have to see that also in the context that they have a full workload and then suddenly we come over the top in our own time frame and demand something. So, that diverts their resources. In a sense it necessarily creates a friction and I do not think there is any solution to that. I think that is simply the price of that measure of external scrutiny. I do not know what they would say about me; maybe you should ask them. In fairness, I should say whenever it has come to the crunch, it has not been a difficulty.

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

Mr KELLY: Formally, one ends and one starts. When someone is identified and put forward for appointment, I do not control. All I have done in that regard is that the Premier did ask what sort of characteristics an inspector should exhibit. I expressed the view—Reverend the Hon. Fred Nile will remember that this view has not changed very much from when the Committee first questioned me about the original appointment—that you have to have someone who takes a very pragmatic attitude. If a highly legalistic attitude

were taken by the inspector, you would run a very substantial risk that the effectiveness of ICAC would be seriously compromised. It would be very easy to cause them to have to devote an enormous amount of resources to things that are never going to produce any kind of outcome that has any significance. I would say more than anything else you need a person that is pragmatic.

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

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

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

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

Mr KELLY: That is not a matter for me.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms LYLEA McMAHON: My third question relates to the issue that we will probably discuss in camera, which is the recurrence of corruption in agencies in relation to what I see as a gap in ICAC being able to review and ensure that organisations have implemented recommendations. Is that something you could comment on now or would you prefer to do so in camera?

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

The Hon. JOHN AJAKA: If I can put this in the most simplified, general terms, do I understand that maybe one of the things we should be looking at to put recommendations in is a greater funded and better resourced ICAC that looks at the far bigger picture—if I may use that terminology—in far more serious and far

more systemic corruption, and looks at completing the investigation and then in fact having the provision and the powers to lay charges and having then the provision and the powers to prosecute those charges? So that is kept in house to some finality without having to involve the police and the DPP unless they have been brought in under some secondment method. It would take away the educational aspect but have a body that deals with the very serious and the very systemic aspects of corruption within government departments from beginning to end. There is really no excuse as to why a report takes two to three years, a DPP briefing takes another two to three years and we suddenly find ourselves in a situation of five or six years having elapsed since the original investigation started. Is that something—I am not saying that you are recommending it—that we should have a close look at?

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

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

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

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

Mr KELLY: I have not really thought about that. My immediate response is that I think that the corruption of public officials does have a different character to it from the commission of speeding offences. You end up putting someone—we will call him or her the Commissioner of Police—in the invidious position of having to make resource allocation decisions that should be made at a policy level and not at an administrative level. I think that when you think it through in that kind of theoretical way, you probably come to the conclusion that it should be a separate agency.

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

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

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

Whether you go so far as to further detract from the right against self-incrimination to enable the evidence extracted under compulsion to be used in a criminal prosecution is a fairly serious policy issue. To be

honest, in this day and age I do not see many good reasons against that. If a person has confessed to criminality, that ought to be used against them, and the only thing that stands between it being used against them or not being used against them is a relatively technical formula. If a policeman arrests someone and gives them a perfunctory warning and they burst into tears and tell all the truth anyway, it is usable. But if they say the right words, it is not usable. Well, that seems to me to be an artifice, to be frank. But that is a very, very big policy issue, and it is for the Parliament.

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

Mr KELLY: Let us start with the physical aspect. I think it is absolutely imperative that there be separate premises. Let me be quite practical in this answer. For example, I have an office at a major law firm. There is no way in the world I would have ICAC files in my other office; there is no way in the world I would have ICAC files in my home office. In fact, the ICAC would rightly object to either of those things. I think you have to have stand-alone, secure premises. I do not know how, for example, the Western Australian Parliamentary Commissioner does it, but I certainly would feel very uncomfortable and would not be prepared to do it, and I know that the commissioner feels equally.

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

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

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

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

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

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

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

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

Mr KELLY: The short answer is—

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

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

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

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

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

Mr KELLY: I cannot comment at all on the Independent Commission Against Corruption except that I know when any of us go there we have to go through a process to get inside. In relation to us, I am unaware of anything that has even vaguely approached a security breach. There are two or three concerns though. One concern is a little bit laughable: for some reason or other there are regular fire drills and we have to rush down the stairs from level seven, having locked the office up. That is not very satisfactory because if there were a real fire we have very little in the way of redundancy. A supplementary aspect of that is something that I find very awkward but we are stuck with it: we are a sub-tenant and a condition of the sub tenancy is that their head tenant is able to evict us on virtually no notice for a period. I cannot publicly go into the details of that but in the event that that should unfortunately happen, our redundancy arrangements comprise a very large suitcase on wheels. That does not seem to me to be entirely satisfactory but at present we cannot come up with much better. That issue goes to the suitability of the current premises. I think that has probably covered the point.

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

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

Mr JONATHAN O'DEA: I am not going to go through each of your responses but as to your second response on the functions of the inspector and areas for consideration for future audits, you have perhaps ducked that question by handing it on to your successor. Given that your successor is not going to be in the role for three

months, and given that understandably there is going to be a lead time for your successor, are there some areas that you might suggest are worthy of audit? One that I would suggest myself, and invite your comment on, is the practice of how the Independent Commission Against Corruption goes through the process of selecting people and how that is or is not consistent with their stated code of conduct? I am aware of two cases in the last year where there has been a controversy in that regard.

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

Mr JONATHAN O'DEA: I followed, as I have no doubt the whole Committee did, with great interest your comments in relation to the possible scope for ICAC's further activities in relation to education versus enforcement and naming and shaming. It struck me that in one sense if there was a measure of success around corruption prevention it would probably be the lack of successful findings on investigations. In a sense, that is in conflict with the other measures and I find that rather worthwhile of further consideration. On the other hand, you rightly pointed out that in the past there have been a number of recommendations that appear not to have been acted on by various government bodies and agencies. If you removed the educative or recommendation type role from ICAC and put it in another central government agency, would there not be more of an inherent risk that other government agencies would treat those recommendations with less serious force? Although not compulsive, would it not be better if those recommendations came from ICAC, which in turn is accountable to a Committee like this?

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

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

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

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

Mr KELLY: Yes.

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

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

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

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

Mr KELLY: That is a mistake.

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

Mr KELLY: My recollection is yes.

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

Mr KELLY: Yes.

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

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

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

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

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

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

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

Mr KELLY: Yes.

CHAIR: You did not think to contact one or two? You say you have looked at the files and nothing has come out at you in the files to say, "I had better go and see Mr Smith or this agency". But do you think it

would have been a good idea to talk to a few people to see how the ICAC treats other people, for example, heads of agencies or individuals, and how they go about their work?

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

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

Mr KELLY: Yes.

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

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

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

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

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

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

CHAIR: You are happy with the document?

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

CHAIR: The members of the Committee have used this opportunity, probably because it is your last time here with us, to ask you general questions about the ICAC, which I believe is quite proper. They have raised some interesting points. I want to ask you one or two questions. I will introduce my questions this way. As you are aware, when the ICAC was first put in place the problems in the public sector were far different in magnitude than they are today. The ICAC was put together as a statutory investigating body with very coercive

powers where the presumption was that everything was to be held in public and the expositive nature of the corruption was the prime concern. It was always an investigatory authority and very much a secondary function was to gather admissible evidence if there existed any. It was not a priority at all. The Office of the Director Of Public Prosecutions under its Act prosecutes, and the ICAC under its Act investigates. As you know, there has been a great change in the way the ICAC operates now.

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

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

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

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

CHAIR: With the inherent conflicts that that would engender?

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

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

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

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

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

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

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

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

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

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

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

CHAIR: I want to ask you one more question in this session about resources. The Act envisages that you receive and deal with complaints, but section 57B clearly requires you to perform audits. You can check on maladministration issues and be proactive in your role—something about which I am very much in favour because you are the only accountable mechanism that we have. However, I detect from what you have said that on many occasions in the last few years you would have wished to have had more resources. Am I correct in my assumption? If you had had more resources you could have spent more time on producing more reports and being more proactive in monitoring the ICAC. If another inspector believed it were appropriate you could also have looked at matters during an investigation, et cetera.

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

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

complaints were not terribly important, if that is its real role, in my view only minimal resources should be devoted to it.

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

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

Mr KELLY: Yes.

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

Mr KELLY: Yes.

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

Mr KELLY: It follows just as night follows day.

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

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

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

Mr KELLY: Yes.

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

Mr KELLY: No.

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

Mr KELLY: Yes.

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

Mr KELLY: Yes.

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

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

CHAIR: Before we receive in-camera evidence I want to point out something for the benefit of members of the Committee. Currently you are investigating a matter that has taken up an enormous amount of

resources in your office. In one report that I read I think reference was made to about 900 hours that had been taken up. That matter is yet to be concluded but it is nearing completion. We will ask you about that matter in camera. However, I want to put on the record that all members are aware that the report will refer to matters that should be considered as being in the public interest.

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

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

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

(Evidence continued in camera)