# COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

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

## Review of the Inspector of the Independent Commission Against Corruption's audit report of the Independent Commission Against Corruption's compliance with the Listening Devices Act 1984

## Review of the Inspector of the Independent Commission Against Corruption's special report on issues relating to the investigation by the Independent Commission Against Corruption of certain allegations against the Hon. Peter Breen MLC

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**At Sydney on Monday 1 December 2008**

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**The Committee met at 2.10 p.m.**

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**PRESENT**

Mr F. Terenzini (Chair)

| **Legislative Council** | **Legislative Assembly** |
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| Mr T.J.B. Khan | Mr D. R. Harris |
| Reverend the Hon. F. J. Nile | Mr R. S. Amery |
| | Mr N. Khoshaba |
| | Mr J. R. O'Dea |
| | Mr G.E. Smith |
| | Mr R. G. Stokes |

**MR GRAHAM JOHN KELLY**, former Inspector of the Independent Commission Against Corruption, and

**Ms SEEMA SRIVASTAVA**, Executive Officer, Office of the Inspector of the Independent Commission Against Corruption, Level 7, Tower 1, Gibbons Street, Redfern, affirmed and examined:

**CHAIR:** The committee has received the report into the Breen matter, the annual report for the financial year 2007-2008, and the audit report with regard to the Listening Devices Act 1984. Before we commence questions do either of you wish to make an opening statement?

**Mr KELLY:** Yes. When one finishes a term of appointment one inevitably reflects on it. I have done that and there are a couple of things that stand out. Firstly, the support from a very small staff, and in particular Ms Srivastava, without which it would not have been possible to function not just at the level at which the office functions but frankly at all. I would like to record before the committee my appreciation of that support. Secondly—and I do not mean this in any inappropriate way at all—the general support of this committee, and the encouragement of the committee from the beginning of this office, has been vital to its success. The office has had to deal with some difficult issues both vis-a-vis the people who complain to it and, to some extent, with the commission itself and, certainly to a greater extent, with people in respect of whom the Inspectorate has found reason to be somewhat critical. If there had been a feeling that there was a lack of support or, even worse, hostility from this committee, it would have been more difficult to go forward. So without in any sense seeming to be ingratiating oneself, I would also like to put on record my thanks for the support of this committee during my term.

**CHAIR:** I turn firstly to the Breen report. You have indicated in the report that the procedures and protocols of the Independent Commission Against Corruption have been revised and changed as a result of this investigation and report. Do you feel confident that the Independent Commission Against Corruption now has the correct and appropriate processes within its procedures and staff to ensure that something such as this does not reoccur? Can I put it as broadly as that? You indicated that in August 2008 there was a new revised procedure, which was still based on the original protocol. Can you tell us what the nature of that procedure is and are you able to provide the committee with a copy of that information?

**Mr KELLY:** If I can deal with the questions in the order in which they were asked. I cannot sit here and fulfil my affirmation by giving you an unqualified Yes answer to your question. That is because I do not think any procedures will prevent the reoccurrence of Breen-type mistakes. What will prevent the reoccurrence of those kinds of mistakes is the care and attention given by the people administering the procedures. I am confident from my dealings with the current commissioner that he would be stringently alert to ensure that those kinds of mistakes did not occur again. In other words, as usual, these things depend upon the people and the people have changed and the people have learnt lessons I think.

**CHAIR:** The final conclusion in your report is that the conduct of the Independent Commission Against Corruption and its officers did not amount to maladministration under the Act. Section 57B (1) (c) sets out the definition of "maladministration". Is the committee to infer from that conclusion that there is a need to change or widen the definition of "maladministration" under the Act? Would you consider that to be an appropriate matter to address, given the fact that you have indicated deficiency in the procedures and how they were adopted—you termed it "a rush of blood to the head" to quote your report.

**Mr KELLY:** Yes.

**CHAIR:** The Independent Commission Against Corruption has now updated those procedures and changed them—obviously they were deficient in some way back then. It is a very serious and important matter that we are dealing with—I will get to parliamentary privilege in a moment—but do you see the need now to revisit or look at the definition of "maladministration" in the Act?

**Mr KELLY:** The short answer is, yes: the long answer is more complicated and has a bit of history to it. The committee will recall on a number of occasions over the years I have effectively alluded to the complex nature of the provisions that govern the jurisdiction of the Inspectorate. Now that I am no longer inspector, I guess I have no particular obligation to support any particular state of the law and therefore I probably feel freer than otherwise to express a view to the committee about policy related matters, I think the Inspectorate would be much more effective if it had a broader jurisdiction and without a blunt meat axe in its hand.

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

Your question, Chairman, also takes me to some of the outlying questions that were delivered before the meeting. I think there is a real case for a significant review of the Act, particularly the role of the inspector but also in terms of the jurisdiction of the commission. The experience of my term turned out, as everyone on the Committee knows, to be quite different from what was expected. It has been dominated by complaints by complainants to ICAC, to which ICAC did not respond and overwhelmingly did not respond for good or at least justifiable reasons, whereas it was generally expected that what would come primarily before the inspector would be accusations of excesses of power. They were very few and very few of them turned out to have any degree of substance at all.

The inspector does have an audit power but that audit power is also arguably similarly circumscribed by very narrow concepts such as whether the way in which ICAC exercises its powers is in accordance with the law, instead of saying, for example, should they have issued the search warrants in the Breen case rather than whether they were legally entitled to do so. I think if an inspector had looked at the Breen case unconstrained by the provisions of the Act, the report probably would have said much the same thing. It would not have felt inhibited by whether it was a finding of maladministration or not and would have said that the case was not properly handled and that is the end of the story. It also takes me to the question that has been raised, and rightly so, about to whom you report. As this Committee knows only too well, we were delayed at various stages and for a variety of reasons in finalising the Breen report, but not least because of at least veiled threats of litigation against us if we proceeded in various directions. So there were continuous pressures to confine ourselves strictly according to the provisions of the Act.

Let me just take this opportunity to show how that impacts. Assume for the moment that the Parliament was not in session and assume for the moment that all this had occurred very recently and there was a need to move urgently. The obvious thing would have been to send a report to the commission and send a report to Mr Breen or his solicitor, and to make it public. As Inspector Moss has pointed out in connection with the comparable provisions in the Police Integrity Commission Act, there is a very great doubt whether the inspector has power to make a report public in those circumstances, yet I would have thought it was the obvious thing to do. My recommendation to the Committee would be that you should over the period of the next two or three years really start to think through what kind of jurisdiction there should be for ICAC and then what kind of general supervisory powers there should be for the inspector.

One of the issues that arises is the relationship between this Committee and the inspector. I see one big difference and that is that the inspector has the power, and should have the power, to go into ICAC and see its files and to see its individual cases, have a look at what happened in individual cases and then extrapolate the conclusions about the way processes are carried out, whereas it would be in my view completely inappropriate for the Parliament effectively to look at individual cases in ICAC. That is the very great difference and that is why one might answer that the office of the inspectorate is justifiable to do that. But you do not get maximum value for your money under these constrained powers. I am sorry for a very long answer but as I say that was the reflection after a few months' refreshment.

**CHAIR:** Thank you, Mr Kelly. Can I just bring you back to the realm of a question I asked you before about the definition of maladministration? Do you think it is worth investigating the possibility of perhaps adopting the definition of maladministration under the Ombudsman Act, which is wider? Do you think that would be a suitable course? It is wider and it has more provisions for different sorts of circumstances and factual scenarios. Do you think that would be worthwhile pursuing?

**Mr KELLY:** It probably would be but I think what I am struggling to formulate and advocate is that we ought to get away from technical legal concepts and we ought to make it plain that we are looking at the practical way in which these extraordinary powers are carried out. So although I can see that what is implicit in the question has merit, I do not think that really is the end of the story.

**CHAIR:** Just on parliamentary privilege, one matter that concerns me is that in your report you set out an opinion of a solicitor in the ICAC who, turning their mind to parliamentary privilege cited a well-known case of *Crane v Gething* for authority that they were able to enter the Parliament and that that case dealt with parliamentary privilege and authorised them to do so, whereas we all know that is not the case. In that case that claim was abandoned and it was not decided either way. There is no authority in that case for the proposition. That to me showed an inadequate grasp of this topic and that area. Have there been any moves or any training there to educate these solicitors or bring them more in tune with the idea of parliamentary privilege and the law pertaining to it?

**Mr KELLY:** Chairman, as usual that is a very searching and good question and consistent with my affirmation I cannot give you an unqualified yes. I think it will be plain from the report either in terms or by inference that my view is that at the time sufficient consideration simply was not given to the fact that this was an incursion into the Parliament of the people of New South Wales, and that that necessarily involved most fundamental issues that should have been dealt with with utmost care, and that care was not exercised. Ex post facto there was a certain amount of justification given, but it does not really matter. The fact of the matter is that there was not sufficient care given beforehand, in my view.

Nor in a sense was there sufficient consideration given to whether it was necessary in the first place to undertake this adventure, particularly considering the very important issues of fundamental constitutional law that were going to be activated by it. What I can say in a more positive vein is that I do not think this will occur again because I think if there were a proposition to seek a search warrant on Parliament, first off, it would go very, very clearly and explicitly to the Commissioner. I am confident the current Commissioner would say, "Look, this commission has been there once before. There was a very adverse report on it and this time we had better make sure that every "i" is dotted, every "t" is crossed and, by the way, do you really need to do this?" That frame of decision-making or framework for decision-making would permeate the organisation.

**CHAIR:** You relied on some advice from counsel.

**Mr KELLY:** Yes.

**CHAIR:** One of those you used was Tom Hughes, QC, and also Bret Walker, SC, both eminent counsel.

**Mr KELLY:** Yes.

**CHAIR:** As I remember, Mr Hughes gave an opinion that the office of a parliamentarian in Parliament was basically a privileged area and that it was inviolate, to use an expression that has been used for centuries. Then Mr Walker, talking about documents, said that most of those documents would probably not be protected under parliamentary privilege. You relied on Mr Walker. They seemed to be looking at two different issues, and you relied on Mr Walker. How did you approach those two pieces of advice? How did one take sway over the other in this case?

**Mr KELLY:** They were quite different issues and therefore it was correct for both to be right. Mr Hughes we accepted entirely. I should just disclose to the Committee so that there is no doubt about it, I am a very long-term colleague of Mr Hughes from when I was a very junior officer in the Federal Attorney-General's Department and Mr Hughes was Attorney-General. So I should say that I have the utmost respect for him personally and professionally and particularly for his views in public law areas. I have no difficulty whatsoever in adopting his views in relation to the issues that he expressed them on. My recollection is, and I have just verified it with Ms Srivastava, we did not brief Mr Walker. Mr Walker was briefed by the Legislative Council on issues specifically on parliamentary privilege. I think everyone is at one about parliamentary privilege. At the end of the day it is for the Parliament to determine the extent of parliamentary privilege. The courts do have some measure of a review role but inherent in the notion of parliamentary privilege, the Parliament itself can determine it. Mr Walker was briefed by the Parliament and gave that advice and we, in a sense, had no option but to accept that advice. I am not saying it is wrong, by the way.

**CHAIR:** You briefed Mr Hughes?

**Mr KELLY:** Yes, but on a slightly different issue—a somewhat considerably different issue. Mr Hughes focused very intensely on the Search Warrants Act.

**CHAIR:** Mr Walker did not address the parliamentary precinct, as such?

**Mr KELLY:** No.

**CHAIR:** On this particular topic you based what you said on Mr Walker's advice, would that be fair to say?

**Mr KELLY:** No, I do not think that is a completely accurate characterisation that we did that. We did not ultimately seek to express a view about parliamentary privilege as such because we came to the conclusion that that was for the Parliament, not for us. Then to the extent that the Parliament had relied on Mr Walker, well so be it.

**CHAIR:** Mr Kelly, would you be willing to provide us with a copy of Mr Hughes's advice?

**Mr KELLY:** Yes. We have provided it to ICAC. We do not have any particular privilege about it. I think as a matter of courtesy I would like to make sure that Mr Hughes does not have any difficulty, but I would be surprised if he does.

**CHAIR:** And would it be a problem to provide Mr Walker's advice as well?

**Mr KELLY:** That is within the control of the Parliament, I think. Ms Srivastava has brought my attention to the precise details. It was advice on 9 October 2003 to the President of the Legislative Council. So I guess I should not volunteer.

**CHAIR:** Now that you have mentioned it, Mr Kelly, I think I have seen it in the material. It is about two or three pages long.

**Mr KELLY:** Yes.

**Mr DAVID HARRIS:** At page 172 of the report you conclude that the *Parliamentary Precincts Act* 1997 affects the approach to be taken to the execution of a search warrant on a parliamentary office but does not confer any general immunity from the execution of a warrant on such an office. What is the jurisdictional basis for the inclusion of such a pronouncement on the extent of the Parliament's immunities in your report?

**Mr KELLY:** That follows effectively from Mr Hughes's advice. I suppose a simplistic way of putting it is that the Parliamentary Precincts Act at the end of the day in a sense is based in courtesy and procedure, whereas immunity is a more general proposition based on parliamentary privilege.

**Mr DAVID HARRIS:** I think you have just answered my question about the extent of parliamentary privilege being a matter for the Parliament's respective Houses.

**Reverend the Hon. FRED NILE:** In your investigation into the Breen case have you noted, and I assume you have, the tension that ICAC faces in that it has to ensure that the members' code is observed by members? The ICAC has been given that power, rightly or wrongly, by the Parliament. So that the ICAC, if it believes there has been an action by a member such as over-claiming allowances, has an obligation to investigate. Obviously it has to investigate the member's records, which are in the member's office. How do we resolve that tension, if the Parliament has given the authority to the ICAC to enforce the operation of the members' code of conduct?

**Mr KELLY:** Thank you, Reverend. I think, in effect, it is a procedural issue but behind the procedural point there is a very great principle. The principle is that at the end of the day the Parliament has a right through parliamentary privilege to assert its exclusive occupation of the building. It will not in fact do that if there is a very good reason not to do so, but it is Parliament's call. As you were asking your question—and I do not mean this to be in any way a facetious kind of answer—it reminded me of an experience that I had yesterday. I was at the opening ceremony of the Pacific School Games in Canberra. An elder of the Ngunnawal tribe did a welcome to country ceremony. She did that by explaining its cultural background: that it should not be seen as exclusion—rather, in Aboriginal cultural terms, it should be seen as protection of the spirit of the person coming to the country.

In a sense that is what we are talking about here. The incursion that is necessarily involved in a search warrant must be carried out properly and with due regard to the rights of the Parliament. That was the problem in the Breen case because, as I said in the report, it was done with a rush of blood to the head without thinking about the significant competing interests, without thinking about whether there would be seriously privileged documents in Mr Breen's office, and without thinking about whether that would inhibit the capacity of a member of the Parliament to represent the people in the Parliament, or whatever. I think the real answer to your question is: It is a procedural issue, but it is a procedural issue that is intended and calculated to guard the important rights of the Parliament.

**Reverend the Hon. FRED NILE:** Behind that question was an implication about whether the ICAC should have the power to investigate members at all. Was that an error in the initial legislation and should there be some other procedure for investigating the actions of members, for example, a privileges and ethics committee? Do you have any comment on that?

**Mr KELLY:** I beg the indulgence of the Committee to answer, effectively, as a private citizen. I do not want this answer attached to the Office of the Inspector. I think it was a mistake. I think it is for the Parliament—and this is my constitutional point of view—to police the conduct of its own members. That is consistent with the responsibility that is placed on members of Parliament as representatives of the community. To put it bluntly, in trying to subcontract that out, it is avoiding its own responsibility. I think that was a mistake, but I emphasise that I answered that question from a personal perspective and I do not want that answer attributed to the Office of the Inspector.

**Reverend the Hon. FRED NILE:** Does the inspector have a view on that?

**Mr KELLY:** No.

**Reverend the Hon. FRED NILE:** I cannot extract a view from you?

**Mr KELLY:** I think you should ask the current Inspector if you want an answer from the Office of the Inspector. You have my clear answer as a citizen.

**Mr RICHARD AMERY:** How long were you an inspector with the ICAC?

**Mr KELLY:** Three years and three months.

**Mr RICHARD AMERY:** When did that end?

**Mr KELLY:** On 30 September.

**Mr RICHARD AMERY:** I was encouraged to hear you say that things depended on people. Operations at the ICAC have improved parallel to that. You said earlier that you believed there should be some sort of significant review of the ICAC legislation and the jurisdiction of the ICAC. Of course, that is an all-embracing statement. We have had the Breen case and I could refer to a number of cases over the years involving members of Parliament. How prescriptive do you think the legislation should be? For example, some actions have been criticised and the courts have overturned some cases.

How prescriptive do you think the legislation should be in defining the jurisdiction of the ICAC and in setting out what it cannot do? I pick up the point made earlier by Reverend the Hon. Fred Nile. In your view, what is the appropriate body to deal with members of Parliament? How prescriptive should the ICAC legislation be in solving these problems, or do these things depend on people?

**Mr KELLY:** In light of foreshadowed general questions I prepared some dot points, or an aide memoire. Your question takes me to an issue that arose as a result of that. My problem with defining the jurisdiction of the ICAC is that the budget commits about $16 million to the ICAC. Over the past few years it can only be concluded that the ICAC has done a wonderful job in exposing major areas of corruption, and it has done that fearlessly and thoroughly. If there were a difficulty at that level it would be that prosecutions had not followed.

I have previously expressed views about how I think that difficulty should be solved. At the other end of the spectrum the ICAC gets over 2000 complaints a year and, overwhelmingly, most of them are not worth

investigating. As you know, that is what generates the majority of the Inspector's work. That strikes me as a diversion of resources that could be better employed at the higher and more important end of the spectrum. With all this experience—20 years with the ICAC and three years of the inspectorate—I think it is time to sit back and to ask, "How can we deal with that?" It strikes me that there are three levels. First, there should be a very narrow gateway through which complaints off the street have to pass, and that should be quite a stringent test.

While I was the Inspector many of the complaints were based on suspicion and supposition and they had no real evidentiary foundation. Those complaints are very hard to deal with satisfactorily, in particular, by the ICAC, and they take up a lot of the time of its assessments division. I have no way of quantifying how many resources are devoted to that, but I am sure that if those resources were devoted to the more important things you would find that the ICAC produced even more important results about important corruption. The second category relates to issues referred to the commission by what I will call a public official, but I will include in that in particular a Minister.

We should be able to rely on public officials referring only important things to the ICAC. I realise that in the hurly-burly of party political controversies, party political consideration effectively would have to be given to those things that should go to the ICAC. That is a whole different debate, but we live with that and we get on with it. If an issue is important enough for a public official, including a Minister or the parliamentary Committee, to refer a matter to the ICAC, prima facie the ICAC should have a decent look at it. I again add the footnote that it should not be based merely on supposition or suspicion—it should have some factual basis.

Then the third category is where ICAC of its own initiative can take up issues. I would give ICAC very broad discretion to do that because I think you will find that ICAC will have even more of a salutary effect on public sector administration if it can of its own initiative review an agency—a bit like the Auditor-General. I remember in the old days, of course, when the auditor turned up in town to audit a bank branch everyone was absolutely paranoid. That is what we need to encourage.

**Mr RICHARD AMERY:** Going back to that first point about the large number of complaints that are lodged based on suspicion, not evidence, et cetera, and the resources that ICAC is required to divert to that sort of process of sorting out what complaints do not require investigation, are you suggesting that some other agency or some panel that is probably not directly involved with the ICAC or funded by the ICAC should vet these sorts of operations and forward them on? What was in your mind when you made that comment?

**Mr KELLY:** Some of the complaints should go to the Ombudsman; they are generally complaints about administration or they are complaints from people who, frankly, think the world is against them, but they are not appropriate to take up the time of the corruption commission; they are not really founded in corruption—not as ordinary people know that in ordinary parlance. That does lead me on to the point that I think I alluded to earlier, but I have certainly alluded to in the past, and that is that I think the concept of corrupt conduct that extends to a mere disciplinary offence should be removed. It is a disciplinary matter, it is a good administration matter; it is not a corruption matter in the ordinary parlance, and if you took that out then you would give the commission an immediate reason to say this is not an allegation of corrupt conduct because it does not involve an allegation that there was a breach of the basic laws relating to corruption, bribery, et cetera.

**Mr GREG SMITH:** You said during your evidence that you had some veiled threats of litigation against you. Who were they from?

**Mr KELLY:** I am not prepared to say that in open session.

**Mr GREG SMITH:** I wonder if we can go into a closed session to ask that question?

**CHAIR:** Maybe at the end.

**Mr GREG SMITH:** Perhaps I will come back to it. In view of the alternatives that ICAC have for search warrants, either the commissioner can issue one or a justice such as a clerk of a local court, and that is what happened here, I gather, and in view of this case, do you think it would be more appropriate if applications for search warrants involving certain classes of persons should be made to a Supreme Court judge?

**Mr KELLY:** To be frank, I had not thought of that before. At the risk of saying something off the top of my head that turns out to be wrong, I think probably yes.

**Mr GREG SMITH:** Because to get a listening device warrant you have to go to a Supreme Court judge. To get a telephone intercept warrant you have to go to a Federal Court judge, or perhaps a Supreme Court judge—I am not quite sure of where you go these days. I was a counsel assisting at ICAC some years ago so I have been there. It has probably changed quite a bit since then, but we got those sorts of warrants in my day and there was a practice then that the commissioner did not issue search warrants. Is that your understanding of the current practice?

**Mr KELLY:** Yes.

**Mr GREG SMITH:** Despite the fact he or she has the power to do it?

**Mr KELLY:** I am not aware of the commissioner issuing any search warrants.

**Mr GREG SMITH:** Do you think that that is a wise policy in view of the fact that they are an investigating agency themselves and that it might be said that they may not bring a completely objective mind to those decisions?

**Mr KELLY:** I do not want my answer to seem to be critical of the magistrates or the officers in this case. Had I thought that criticism was appropriate of them I would have made it even though they were probably technically outside my jurisdiction, but I can see the merit in what you are suggesting. Whether that should be the case generally is perhaps an open question, and I certainly feel significantly guided by the commission's view on that, but I can certainly see that in a specified range of cases there would be a very, very good case to be made for requiring the warrant to be issued by a judge having the status of a Supreme Court judge.

**Mr GREG SMITH:** You said something about whilst the ICAC has had a good success rate in exposing corruption, prosecutions have not followed and you have previously expressed views on that. What were your views on the prosecution aspect?

**Mr KELLY:** I think it was that on the last occasion, or at least the penultimate occasion, I appeared before the Committee and I said that I thought that there was a case for ICAC to have its own prosecution right. At the moment the Act circumscribes it so that it can only recommend that consideration be given to prosecution and the Office of the Director of Public Prosecutions of course is faced with its own menu of cases to digest with its own priorities, and in the range of things history has shown that there is often very substantial time lags and I think, in fairness to the Office of the Director of Public Prosecutions, the way in which the evidence is prepared has often been in a very different way than the Director of Public Prosecutions would ordinarily require it. So I think there is merit in considering whether this should be broken by conferring on ICAC its own power to prosecute.

**Mr GREG SMITH:** Do you mean that they would actually conduct the prosecutions or just charge the people that they thought should be charged?

**Mr KELLY:** I think there is a case for them conducting the prosecution. I should say that I do not mean that they should assemble a group of in-house counsel; I think you can do it on a briefing-out basis.

**Mr GREG SMITH:** Have you examined the resources that the ICAC put into preparing prosecution briefs and the timeliness of those preparations?

**Mr KELLY:** Not directly, but I had had various discussions particularly with the commissioner and there is no question that there have been difficulties in the past. A couple of years ago I met with the director as well and he of course elaborated some of the difficulties. I think, under the new memorandum of understanding, or whatever it is called, there has been significant progress. But, sitting back and looking at it, there is perhaps a lack of timeliness, in a sense, between the finding of corrupt conduct and the implementation of the prosecution.

**Mr GREG SMITH:** The vast number of prosecutions are for false swearing, are they not, or other offences under the ICAC Act that are, for example, not complying with a notice or matters of that sort?

**Mr KELLY:** I do not have those figures with me, but I do say that when there is a finding of corrupt conduct that is usually a relatively clear issue. There are other cases where, for example, people have indicated their willingness to plead guilty, particularly where the person concerned may have given a privileged statement; in other words, following the procedure in the ICAC Act where you can effectively make a privileged

statement and that cannot be used directly in evidence against you. Then, as I understand it, they have indicated their preparedness to plead guilty and still have not been prosecuted. That seems to me to be at least an unfortunate result.

**CHAIR:** Mr Smith—

**Mr GREG SMITH:** That is all I want to ask in open session.

**CHAIR:** —Mr O'Dea wants to ask a question before he leaves, and then you may continue, if that is all right.

**Mr GREG SMITH:** Yes.

**Mr JONATHAN O'DEA:** I apologise, Mr Kelly, but I do have to leave as I have a pressing appointment at 3.30 p.m. In previous evidence to the Committee you indicated that you would look for the office to undertake more audit work in relation to ICAC's use of its powers and some other areas if the funds were available to facilitate more audit programs. I am sure the new inspector will pick up a couple of suggested areas as per the transcript. Did you have an opportunity to formulate an enhanced audit program and seek any extra funds prior to the end of your term? If so, are you aware whether the Government responded to that?

**Mr KELLY:** No, I did not have an opportunity, but it struck me that I should not circumscribe the new inspector. I should say, one of the reasons, apart from some personal reasons, that I did not want another term is that I thought it was time for a new person to look at a new way of going about it. It is just a good thing in an organisation if it suits. So, I did not want to circumscribe the new inspector in that way. Off the top of my head, I could think of four or five areas that would be appropriate, but it is a question of the resources. I should say that the Department of Premier and Cabinet has not been parsimonious with funding the office. The funding of the office is not I think technically on the most sound footing, but we have not ever been really prevented from doing something by funding.

**Mr JONATHAN O'DEA:** I might point out for the benefit of your former colleague at least and perhaps the new inspector that when your report was tabled in Parliament I raised the issue of additional funding. It would be opportune perhaps, if it has not been made, for such a request to be made forthwith.

**CHAIR:** We will now move to an in-camera session. Mr Smith has one or two questions for you.

**Mr KELLY:** Mr Chairman, I am not sure about the Committee, but I am perfectly happy for the current occupant of the role of inspector to remain.

**CHAIR:** I have no difficulty with that. As the Committee has no objection, under the rules that is permissible.

**(Evidence continued in camera)**

**(Public hearing resumed)**

**CHAIR:** Mr Kelly, I know we are pressed for time. I refer to the annual report. Are you prepared to provide the Committee with a copy of the new ICAC procedures? Can we deal with that very quickly?

**Mr KELLY:** Mr Chairman, we would have no difficulty, but I think the protocol would be that you ask ICAC.

**CHAIR:** I anticipated you would say that.

**Mr KELLY:** But if you cannot get it—

**CHAIR:** Mr Kelly, one issue that will come up as the Committee conducts its 20-year review in 2009 is the definition of corrupt conduct. You refer to a gateway and you are referring to more serious matters. Are you able to tell us how you would draft a definition? Would you like to make a contribution about how you would draft that definition? There has been plenty of discussion about it. What changes would you make?

**Mr KELLY:** Can I put before you an anecdotal response before I decline? Over many years of drafting many things, including three of the only amendments that have ever been made to the Constitution, I learnt a long while ago that you do not make drafting changes off the top of your head. I think it could be quite a technical exercise. Given some concepts, one is that I think the concept of extending corrupt conduct to disciplinary offences should be removed; in other words, that should be taken out, and I think that is relatively easy. That is a question of taking some things out.

Then, rather than change the definition of corrupt conduct too much, it is a question of erecting a different structure around the way in which the jurisdiction is activated, if I may speak relatively technically. I do not have a particular set of words that I can suggest to the Committee. I would be very reluctant to do so without a lot of work with an expert.

**CHAIR:** All right. They are all the questions I have, Mr Kelly.

**Mr KELLY:** I should say, Chairman, that in the indicative questions there was a number of other quite precise questions on both the annual report and the Listening Devices Act. I have spoken with my successor. The office would be happy to provide some of those answers in writing.

**CHAIR:** Good, Mr Kelly. That would be very helpful, thank you, for both that and the Listening Devices Act. That would be of great assistance.

**Mr KELLY:** Yes.

**CHAIR:** There being no further questions in relation to the annual report or the listening devices report, I thank very much Mr Kelly and Ms Srivastava for their attendance.

**(The witnesses withdrew)**

**Committee adjourned at 3.25 p.m.**