REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

REVIEW OF THE 2005-2006 ANNUAL REPORT OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION

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At Sydney on Tuesday 11 September 2007

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The Committee met at 2.00 p.m.

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PRESENT

Mr F. Terenzini (Chair)

Legislative Council	**Legislative Assembly**
The Hon. J. G. Ajaka	Mr R. D. Coombs
The Hon. G. J. Donnelly	Mr D. R. Harris
Reverend the Hon. F. J. Nile	Ms J. L. McKay
	Ms L. A. McMahon
	Mr J. R. O'Dea
	Mr R. G. Stokes
	Mr J. H. Turner

JERROLD SYDNEY CRIPPS, Commissioner, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, sworn and examined:

THERESA JUNE HAMILTON, Deputy Commissioner, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, sworn and examined:

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

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

LINDA MICHELLE WAUGH, Executive Director, Corruption Prevention, Education and Research, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, affirmed and examined:

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

CHAIR: It is the function of the Committee on the Independent Commission Against Corruption to examine each annual report of the commission and to report to Parliament on that examination. In accordance with section 64 (1) (c) of the Independent Commission Against Corruption Act, the ICAC committee welcomes the commissioner and senior officers of the ICAC to the table for the purpose of giving evidence in matters relating to the 2005-2006 annual report of the Independent Commission Against Corruption. I convey the thanks of the Committee to all of you for appearing today.

First of all, the Committee has received a detailed submission from the Independent Commission Against Corruption in response to a number of questions on notice relating to the 2005-2006 annual report. Commissioner, do you wish this document to form part of your evidence here today?

Mr CRIPPS: Yes, I do, thank you.

CHAIR: Do you also wish to have this document made public?

Mr CRIPPS: Yes.

CHAIR: I direct that the material attached to that document, being a 25-page document with attachments A, B and C, and also an attachment, the Code of Conduct, be made public. Also, with the concurrence of the Committee I authorise that that be made public and be made part of that evidence. Would you like to make an opening statement?

Mr CRIPPS: Yes, I think I would. I will not be very long. Thank you for giving me the opportunity to put matters to you before you ask questions. I think there are only two members of this Committee here who were formerly members of the Committee. What I am about to say may be superfluous information to people who have already been here but I think it may be of some value to those who are newly members.

It is apparent from the questions asked that the Committee has some concern about the relationship between the commission and the Office of the Director of Public Prosecutions. In particular, question 12 asked by this Committee raises the question whether the commission is satisfied with the operation of the present memorandum of understanding between the commission and the ODPP, particularly in relation to the provision of advice given by the ODPP on criminal charges. As you have been told, I am sure, before, the commission is not entirely satisfied, as appears from the question's answer, with the present memorandum of understanding, or at least the interpretation put on it by the DPP. Hence, I have had a meeting with the DPP himself and he has agreed to have the memorandum reconsidered after consultation between the Deputy Commissioner, Theresa Hamilton, who is here today, and an officer of his nomination. He has made that nomination

and I understand Theresa Hamilton has arranged to meet that officer to rediscuss the memorandum of understanding.

In these circumstances I think it is necessary to explain to the Committee my view at least of the role and function of this commission with respect to the prosecution of criminal offences or disciplinary offences. The stated principal functions of this commission are to investigate and publicly expose criminal conduct and to undertake work to prevent corruption occurring, that work being by form of research and education, and relying upon the investigations we have conducted. The commission is given a secondary function, namely to assemble legally admissible evidence and to provide it to the ODPP for the purpose of getting advice as to whether specified criminal charges should be laid. It is in this context that the High Court made it clear that the commission should not be regarded as a criminal law enforcement body. Its activities are directed to the conduct of public servants and the legislation expressly prohibits the commission from finding a person has been guilty of a criminal charge or even recommending that a person should be charged with a criminal offence.

The commission has wide powers of investigation, many of which are enjoyed by the police—for example, we can tap telephones, install listening devices, undertake controlled operations and the like—but the commission has coercive powers that are not available to the police. These powers preclude people from relying on what I call their common-law privileges and liberties such as the right of silence, the privilege against self-incrimination and legal professional privilege. These are doctrines—as those of you who are lawyers will know—that have developed for 3½ centuries in western democracies and are regarded as extremely important and only to be overridden by legislation in cases where it is deemed necessary, as it has been here. These liberties and privileges are protected zealously by the courts and they must be observed by the police. However, as I have said, Parliament has decreed that the importance of corruption is such that, for the purpose of discharging the functions of this legislation, these rights and liberties have to stand aside.

The commission can conduct compulsory examinations and compulsory inquiries and it can require a person to furnish information to it. People may object to doing so, but they are subject to penalties if they refuse to talk. Hence, they have lost the right to silence. The legislation also provides that where a person has objected on the ground of one of these traditional privileges or liberties, that objection can have the consequence that the answers and documents and things cannot be used in criminal proceedings against that person at all. So, it is in this context that one has to consider the role of the commission in its secondary function, to provide admissible evidence to be ODPP for the purpose of advice with respect to possible criminal charges and what has become the practice of the ICAC to commence those proceedings on its own—and that is what we do. We start the proceedings after we get the advice, which I do not think we should be doing.

Plainly, in accordance with the legislation, if in the course of the investigation legally admissible material—and by that I mean material that is admissible in a criminal prosecution—becomes known to the commission, that information would be furnished to the DPP as mandated by section 14. But what of the case where the commission is requested by the ODPP to provide further evidence by interviewing people, which is what he has done now, when the allegation of corruption is no longer being investigated? In these circumstances, I think a number of issues arise, some ethical, some discretionary, some legal and, of course, some practical, namely the budget constraints that are imposed upon us when we have to discharge our two main functions and what budgetary allowance we have to discharge with the secondary one.

For example, the commission cannot use its powers under sections 21, 22 and 23—that is to compel information, when people no longer have these rights that I referred to—to get information, because those powers allow the commission to get material and deny people the privileges to which I just referred. This cannot be exercised unless the commission is actually investigating a matter before it. If an investigation has been completed, the commission, in my opinion, has no power to coercively require information to be produced to it; nor in my opinion would that evidence obtained as a result of the exercise wrongly of that power be admitted into evidence in a criminal court.

As matters presently stand it is my understanding that the ODPP will not as a matter of policy undertake its own interviews or its own investigations. I am not quite clear why that is so. It may be a doctrinaire view it has, it may be a budgetary view but it will not investigate. It requires the bodies associated with it to do the same. This plainly works in the place of police, because they are a criminal

law enforcement agency. The question is should the same approach be taken by this commission? What happens at the present time is that we send material to the Office of the Director of Public Prosecutions, and advice is given, say, as to whether consideration should be given to prosecution. Yes, it should. We, the commission, then start the prosecution. On the return date at the court the DPP arrives and replaces its name for the commission's name—it often does not, but it should—and then goes on and takes the proceedings much further forward. That that occurs in the case of police matters is plainly appropriate because the Police Force is a criminal law enforcement agency and that is obviously a way to deal with criminal cases. However, as I have said, one can see good reasons that it is not an appropriate course to follow in the case of a commission which is not a criminal law enforcement agency and which should not give the public the appearance that it is.

It has been brought to my attention that the police remain relatively uninterested in matters the commission is investigating—which, in fairness, are often very complicated—and the reference of matters to the police has the practical consequence that nothing happens. As I have said, the ODPP would not himself investigate. This has left the commission with adopting a policy—which I do not wholly favour but which I think I must bow to for now—of accepting that if it does not continue the criminal enforcement proceedings no-one else will. People are getting off scot free who we know from answers they have given have committed criminal offences but that evidence cannot be used in a criminal prosecution. As a result, the commission has taken upon itself to adopt this role. A misgiving has developed in the two years I have been with the commission about whether an institution which is not designed to be a criminal law enforcement agency and which denies people a number of their traditional liberties and privileges gives the appearance that it is a law enforcement agency by pursuing prosecutions.

As far as the commission is concerned, once it has information based upon which it can confidently say there has been corrupt conduct—and that is often obtained using its coercive powers, which cannot be used in a criminal trial—it has largely discharged the obligation that the Parliament has imposed on it. The question is how much further it goes and whether it should be involved after it has stopped investigating by assisting the office of the DPP when takes over the prosecution effectively to prosecute the case. As I said, there is an issue about this because I am told that the police and the DPP will not do it. Therefore, if the commission does not do it, no-one does. We have tried to accommodate that in the way we deal with matters. I want members to understand that it is not merely a budgetary constraint that holds me back from the sort of role that the commission is asked to perform. The issue is that the commission is asked to perform it when it appears to me that the Parliament has endeavoured to ensure that the commission is not a crime authority.

However that may be—and that may be a broader view—two other smaller issues arise that Ms Hamilton will talk about with the DPP. Of course, the first issue is how the DPP treats the material the commission hands over and what we should do about it. A matter that I will not go into in detail has recently come to my attention. A person wanted to plead guilty to an offence on legal advice. The matter went to the DPP and we were told that the office would not open a file unless it received all the evidence that would be necessary if the person pleaded not guilty. That was the DPP's policy and its interpretation of the memorandum of understanding. I cannot say that that interpretation was entirely wrong.

However, this person's desire to plead guilty to a quite serious fraud offence was not entertained by the DPP because it did not get the full brief it believed was necessary. I will come to the reasons that the DPP thinks it is necessary to do this. I am not arguing with that; I am simply saying that it is a problem that must be solved. The result was that we had to prepare a document comprising 23 folios and 92 witness statements before a file could be opened relating to whether someone was going to plead guilty on legal advice to the charge we discussed in the report. For self-evident reasons we must come up with a better solution than that.

The second matter that concerns me is the practice of the commission starting the proceedings. When one looks in the newspapers or the court lists ones sees reference to the ICAC against Cripps. When the DPP comes down on the first return day to take over the matter it becomes the DPP against Cripps. In my opinion that is what it should always be. The DPP should always do it because it is given the advice and it will carry the prosecution through to conviction or acquittal. ICAC should not be seen as having any part in the criminal process.

I am drawing these matters to the committee's attention because not infrequently I have discovered since I have been in this job the commission is judged by the number of criminal convictions that arise as a result of its investigations. We have made consideration to be given to certain things and people ask how many resulted in conviction. In my opinion it is wholly wrong to evaluate our performance by reference to criminal scalps. The fact that someone is not prosecuted may be due to many reasons. It may be due to the fact that the commission has some reluctance to pursue a criminal prosecution after it has discharged its main function, it may be for budgetary reasons or it may be that the commission lost total control of the case once it went to the DPP. We do not know how it is prosecuted in proceedings and we do not know whether the jury involved is as good as juries are reported always to be. We should not be judged by reference to that feature. We should be judged by reference to our effectiveness in the discharge of our two principal functions; that is, to expose corrupt conduct and to promote and put to the various bodies concerned those policies and the like that we hope will have the effect of inhibiting corrupt conduct—of course, it will never be eliminated.

I have now been the commissioner for a little more than two years and I have presided over almost every public inquiry and most compulsory examinations. For what it is worth, I point out to the committee that during that entire period there has been no reference to the Supreme Court that the commission has in any way abused its powers. I cannot recall an occasion when someone has made even a suggestion or submission to me that the commission had strayed beyond the bounds of propriety in the course of its hearings.

CHAIR: Many and varied legislative changes have been made since the McClintock report was presented. For example, section 20E allows for the commission to report back to a complainant and give reasons that a matter was or was not investigated. Has that caused any additional work for the commission and has there been a resultant decrease in the number of dissatisfied complainants who have taken matters further?

Mr CRIPPS: No, but I will ask my colleagues who are better qualified to answer that because they see this on the ground. I do not think it has added too much to our problem. As members know, I was very enthusiastic about the creation of the inspectorate because I felt that the ICAC should be accountable to some person and this committee cannot view our investigations. I do not have any problem doing it. Sometimes I think there is a tendency for people to think that the commission could be a bit more courteous. Courtesy is desirable as an aim, but I do not believe that a little bit of discourtesy affects our work—although it is not wholly acceptable—and it has not.

CHAIR: Appropriate firmness?

Mr CRIPPS: Yes, that is a better way to put it.

Ms HAMILTON: Obviously we have a pro forma response letter for complainants, and that is used in most cases because it generally covers why we have decided not to investigate a matter. We have discretion as to what matters we investigate. Even if something may appear to be corrupt conduct, if we do not believe it involves serious or systemic corruption, we do not investigate. I do not believe that that has added considerably to the work of the assessment section.

CHAIR: Are you able to discern any decrease in the number of complainants who take matters further or who tell the inspector that the ICAC should have investigated a complaint and it has not and has not provided reasons?

Ms HAMILTON: I do not have any figures. I think it would because most people just want an explanation of why their matter is not being dealt with. In general, some complainants seem very difficult to satisfy in any circumstances. It is mainly that category of complainants that takes matters further and goes to the inspector. Those complainants have complained to many bodies, not only the ICAC, and are not satisfied in any circumstances with the responses they receive.

CHAIR: Division 4A allows the commission to deal with disposal of property. Have you had any cause to make application to dispose of property?

Mr CRIPPS: No.

CHAIR: Past reports have referred to activity-based costings. Has a model been developed for that?

Mr FAVELLE: We have developed a model over a couple of years to apply to major investigations. That model picks up costs across the organisation, because most investigations involve multidisciplinary teams. We can then determine the cost of a major investigation.

CHAIR: Will that enable you to assess the costs of major investigations and complaints handling?

Mr FAVELLE: It tends to look at one-off situations. Investigations do not tend to be homogeneous; they are not the same every time. One investigation could involve many resources over a long time whereas another might involve few resources and be completed quickly. It does not provide any trend analysis in terms of investigation work.

CHAIR: I refer to the performance targets the commission has set for 2006-07. Table 2 of the report details corruption prevention recommendations implemented by government departments. In 2003-04 there was 90 per cent implementation; in 2004-05, the figure was 95 per cent, in 2005-06, the figure was 85 per cent, and the target for 2006-07 is 80 per cent. Did any factors determine that figure?

Ms WAUGH: One must keep in mind that we cannot enforce corruption prevention recommendations, we can only make them. We then rely on the agency to determine whether to take them up, and we know that a number are not taken up. That might be because the agency has decided against it or that there is a better way to address the risk we are addressing in our recommendation. I wanted to ensure that the report contained a figure that allowed for a performance measure we cannot control.

CHAIR: A benchmark?

Ms WAUGH: Yes.

CHAIR: Is that followed through with government departments?

Ms WAUGH: When we release an investigation report we write to the departmental head or the responsible person and say that in three months we will ask for an implementation plan. We then follow up for another two years. The documents they give us are loaded onto the website so the public can see how well they have implemented the recommendations and, if not, why not.

CHAIR: I note that in 2004-05 there were 45 training sessions and in 2005-06 there were 61. Was that increase in training sessions a conscious decision by the commission or was it the result of the work that it is doing?

Ms WAUGH: One of the challenges we deal with is conveying messages to departments and organisations that fall within our jurisdiction across the State. Over the past few years we have been working on a training strategy. We had a part-time trainer but we now have 1.5 trainers. We focus on delivering training to the training sections of large departments, which can then roll out our messages across the State. We now have a suite of ten training modules. It is something we have been doing consciously. We do have criteria for doing presentations, but again it is focusing on those individuals who have jobs which can help us in rolling out the training modules.

CHAIR: I notice at table one of your report regarding the investigations—I might be wrong about this, but in past reports I think there was "percentage of investigations completed within six months". You now have, "percentage of investigations completed within 12 months". If that is the case, why has there been a change from six to 12 months? Although, I notice you have "investigations finalised within six months" and "no targets set".

Ms WAUGH: I think that is in response to the amendments to the Act. I think section 76 added in a few performance measures that we must report against.

CHAIR: That 12 months figure reflects that change in the legislation, does it?

Ms WAUGH: I think so, yes.

CHAIR: I notice you have a 90 per cent target that you have set for 2006-07, coming from 82 per cent. You have set yourself a 90 per cent target for matters investigated to completion within 12 months. Is that target as a result of any changes you have made, or is that something you consider achievable?

Mr SYMONS: It depends. One of the biggest problems with investigations is that it depends on the complexity of the investigation. One would hope to complete investigations within that time frame, and hence the 90 per cent ruling. But we are at the whim of the complexity of the investigation. Some of them drag on much longer, depending upon their nature. But we have set 90 per cent and we believe we can achieve that. We have adopted a different method of pooling investigators in this financial year, which gives us an ability to allocate resources and a more rapid response, and hence the ability to focus a lot more on getting jobs done.

CHAIR: In table one we have investigation reports completed within three months of completion of public inquiry. We had a 30 per cent completion rate as at 2005-06. You set yourself 80 per cent in 2006-07. Is that percentage reflective of any changes you have made?

Mr WALDON: No. It has always been a percentage, I think.

CHAIR: The figure jumped from 30 to 80?

Mr WALDON: No, the target is 80 per cent. As I understand it, the target has always been 80 per cent.

CHAIR: The actual amount achieved is 30 per cent?

Mr WALDON: Yes. Once again, as with investigations, that would depend on the complexity of the investigation and the complexity of the report. You will have seen our report. Some of them are fairly short; others are lengthy. Operation Ambrosia, for example, was a very lengthy report involving close to 40 individuals, which had to be looked at in some detail. Once again, the time taken to produce the report will depend on the complexity of the investigation we are reporting on.

CHAIR: The figure of 80 per cent is something we are striving towards?

Mr WALDON: It is an aspirational target, yes.

CHAIR: With regard to surveillance, in answer to question 5 of the questions on notice you indicated a desirability of increased self-sufficiencies in your technical surveillance and limited reliance on other agencies. Firstly, did the ICAC have adequate funds to purchase the surveillance equipment that you required?

Mr FAVELLE: Yes, I think we do. On a regular basis we update our surveillance equipment, so I do not see that as a major issue.

CHAIR: How does your surveillance intelligence capacity compare with other investigatory commissions, and how much do you rely on other agencies to do that for you?

Mr SYMONS: I have only recently come on board; I have had my own agency prior to this. We have investigation capabilities in line with most policing agencies and other commissions within Australia. It is extremely rare that we would have to go outside. We do offer the service to other agencies on major operations that may be involved, on an agreed basis. If it were a requirement of a particular job to go outside of our resources, we would do so, but to my knowledge that has not occurred for some years now. We do have sufficient resources and extremely good equipment. As Mr Favelle said, one of the dramas with funding is that we do have enough, but you never know what is being developed behind a closed door. We are always assessing new equipment in determining

whether or not that equipment would meet our needs, and obviously looking at budget ramifications of that.

CHAIR: It is the exception rather than the rule?

Mr SYMONS: It would be the exception, yes. But there is always something better, and regrettably they come with a price budget. But I am satisfied with the equipment we have. We do have the ability to upgrade as required, and have done so.

CHAIR: With regard to accountability for assumed identities, in your audit under section 11 of the Act you reported that there was one minor irregularity. Is the commission able to tell the Committee about the nature of that irregularity?

Mr CRIPPS: I think the simple answer is that we would not be able to at this stage; we would have to take the question on notice. We will take the question on notice and notify you what that is and what we did about it.

CHAIR: There was discussion under a previous committee examination about your auditing under section 11 of the Law Enforcement and National Security (Assumed Identities) Act, that perhaps you may give the job to the inspector. Has the commission given any further thought to that?

Mr CRIPPS: No, I do not think I have. It has not been raised in the discussions I have had with the inspector. You said it was raised as to whether it should be done by the inspector?

CHAIR: Whether you had given any thought to that.

Mr CRIPPS: I will if you wish, and let you know what we will do about it. I am told that if we do it, we will have to amend the Act. However, I would give some thought to it and let you know what we think is the most efficient way of handling it.

CHAIR: I thought the Act referred to someone appointed by the commissioner.

Ms HAMILTON: Yes, that could be right. You will have to forgive me; I have only been here since January. Under the Queensland Act, the Act specifies the people who may undertake the audit.

CHAIR: With regard to the transcripts that you have produced as a result of your investigations, it has been the case in the past that the commission has made public transcripts of what we now call compulsory examinations. Are you able to tell the Committee generally, without pointing to any specific case, what factors you take into account when deciding to publish the transcripts of a compulsory examination?

Mr CRIPPS: I do not know that we have done it, in respect of a matter where we have not had a public inquiry. But mostly it comes out as a result of the public inquiry. The compulsory examination that is going to be used in that public inquiry has to be made public, so the public know why it is we have reached the decisions we have reached. But I am told that before I came here the Menangle Bridge—

Ms WAUGH: I believe that the commissioner at that time, who was Irene Moss, conducted it in compulsory examination and made a public report. I think it was partly not to use the resources to run a public inquiry to repeat exactly what was heard in compulsory examinations. All the transcripts were made public. I think she thought it was in the public interest to make them public, rather than run it all again in a public inquiry.

Mr CRIPPS: As you can see when you have compulsory examinations and then it moves to a public inquiry, in the compulsory examination with people hurling insults and accusations towards each other, you have to put it all out in public so they can be given the opportunity to answer each of the other's allegations.

CHAIR: In the past, before your time I think, they were published. You have just quoted one factor that Commissioner Moss used.

Mr WALDON: There has been the Menangle Bridge, which Linda cited. More recently, I think a couple of years ago, we also did an investigation into the alleged leaking of a draft Cabinet minute, and that was also about whether it should be compulsory examinations or private hearings. In both cases, the factors which were taken into account were basically the same, and I think they were spelled out in public reports at the time. That was that, having heard the evidence in private, there was no need to have a public inquiry because we were in a position of being able to establish the facts, based on the evidence that had been given in the compulsory examinations. I think it was also taken into account that to have then held a public inquiry would simply be to rehash all the evidence which had been given in the compulsory examinations and that to go through that process would then delay making public our findings and making a public report.

In each case, the parties who had given evidence in private were provided with a copy of their transcripts and a copy of any transcripts of other witnesses which might affect their evidence, and given an opportunity before we drew up the report to make any submissions as to whether they wished to give any additional evidence, whether they wished any additional witnesses to be called, or whether they wished to cross-examine any of the witnesses who had already given evidence. The main considerations were basically public interest considerations of the delay in reporting the investigation situation where we thought we had sufficient evidence to make that determination.

CHAIR: When you conduct a compulsory examination and you interview someone, are they told that the evidence may be made public?

Mr CRIPPS: Not necessarily, no—at least not at the compulsory examination. But if it were to be made public, those people would be told, and I suppose representations they might make as to their not been made public would be considered.

CHAIR: In regard to the Office of the Director of Public Prosecutions and your relationship with that office and the memorandum of understanding, I think it was the case that the last examination under the previous committee, I think Mr Small at that time indicated to the Committee that what was happening in the commission was that whilst investigations were proceeding, along the way statements in admissible form were being prepared and there was an initiative to get the DPP involved earlier in the investigation proceedings. Back then it was too early to tell how that was going; I think the process had been going for about 12 months. Has that been happening? Before we get into the issues you raised with the commissioner, did that proceed?

Mr CRIPPS: Not satisfactorily, I do not think. It is because of that that I have had this meeting with the present Director of Public Prosecutions. I have not got into what we can do or cannot do but other people will do, and Therese may have some views about this. One thing is, for example, that officers from the DPP can be kept au fait with what is happening from the word go. The tendency was for us to investigate. But you have to remember that the stuff we investigate is often very complex. Then we present a report, then if you are not careful the people think they have to move on to the next examination, then they start talking about what they are going to do to the last one, and the delay means that you have to do twice the work eventually. The best way of doing it is to do it while it is going on. I understand that there was general agreement in principle that something like that would happen, but I do not think it did happen, and that is really why we raise the matter again.

CHAIR: What you are saying is that, although the Commission was doing that, it did not work satisfactorily.

Mr CRIPPS: I do not think so, no.

CHAIR: And the Director of Public Prosecutions [DPP] did not wish to get involved in it.

Mr CRIPPS: I do not want it to be thought that I am trying to bucket the Director of Public Prosecutions over this. There is a self-evident problem associated with two agencies doing things towards a common end and neither agency is responsible to the other.

CHAIR: Can I say that I think those initiatives that you have spoken about are admirable, and that would be a commonsense way to go about it, but I know that the Director of Public Prosecutions holds very tightly onto this rule that they are prosecutors, not investigators. They are reluctant to do that.

Mr CRIPPS: I should not ask you the question, I appreciate, Mr Chairman. But bearing in mind your background, is that because of the money or because of principle?

CHAIR: I suppose there are many ways that could be taken. I am aware of that. That is why I wanted to ask whether that was happening or what the cooperation was that you are getting from the Director of Public Prosecutions. I know that one of the matters you wish to raise in your negotiation with them is to do that.

Mr CRIPPS: Yes.

CHAIR: I ask that the Commission keep the Committee informed.

Mr CRIPPS: And the Director of Public Prosecutions has told me that he will cooperate in that. He has already nominated some person that Theresa will speak to, this being one of the issues they will discuss.

Ms HAMILTON: I think the commissioner said I had arranged to meet with that person. I just want to clarify that I have not yet arranged to meet with the person nominated by the Director of Public Prosecutions because I have not been able to contact her, but will be doing so this week. I just wanted to set the record straight on that.

Mr CRIPPS: It shows how I have my finger on the pulse.

CHAIR: All right.

Ms HAMILTON: Certainly I think that one very important issue we will be discussing is involving a prosecutor early in the piece, not as an investigator, but to keep that person informed as the investigation is progressing so that, at the end of the day when the brief arrives, it is not a total surprise that the person knows what is being investigated and what possible charges were being considered. I do think that would be very useful in speeding up the process.

CHAIR: It is also something that will reduce the number of requisitions that you get from the Director of Public Prosecutions.

Mr CRIPPS: It should.

Ms HAMILTON: That is exactly right.

Mr CRIPPS: We hope it will exactly do that, yes.

CHAIR: Another area that you mentioned was a sentence proceeding where there had been an indication of a plea of guilty. You mentioned in your opening the particular reasons why the Director of Public Prosecutions will not, for example, accept a statement of fact.

Mr CRIPPS: I can only mention the reasons that the Director of Public Prosecutions has given me—one given by the Director of Public Prosecutions himself, and another given by an officer of the Director of Public Prosecutions. The one from the officer of the Director of Public Prosecutions was that there was a fear that someone wanted to plead guilty to an offence that they in fact could not be convicted of on the evidence. I have to say that my professional life has not been riddled with people pleading guilty to offences that they should never have pleaded guilty to.

But the second thing is that the fact that they want to plead guilty, even if the evidence is not good enough. If they want to plead guilty, they can plead guilty. I mean, the plea of guilty means—you prove it. That was one reason, and the other reason that the Director of Public Prosecutions himself gave me, and I can see some substance in this, was—well we want to make sure that the

offence for which the person is going to plead guilty is the offence for which they should plead guilty and we want to eliminate the fact that they should be facing a far more serious charge. He said that he wanted to have that information so that they could make an assessment of that.

CHAIR: Can you indicate to the Committee what your attitude is toward that reason?

Mr CRIPPS: Generally speaking, my attitude is that the cheaper and quickest way we can get over this problem, the better. I do not claim to have expertise about the risks associated with somebody pleading guilty to a minor offence when they should plead guilty to the more serious offence, but I know, just from my experience, that plea bargaining is not something that everyone runs away from in New South Wales.

CHAIR: I anticipate the fear would be that the facts would disclose an offence higher than the charge.

Mr CRIPPS: That is what the Director of Public Prosecutions said. He wanted to be sure that they did not accept the plea to what might be even a lesser offence that police had begun in the full knowledge of what could be the subject of any charge.

CHAIR: I assume that negotiation will involve this topic as well.

Mr CRIPPS: Yes.

Ms HAMILTON: Yes.

CHAIR: I must say, Commissioner, as far as instituting proceedings is concerned, I must concur with what you said. It is my personal opinion that if the Director of Public Prosecutions takes over or wants to prosecute, it could.

Mr CRIPPS: They do that anyway.

CHAIR: I do feel as though it is a hangover from what the police do and police practice.

Mr CRIPPS: I think that is what has happened.

CHAIR: I think that is what is happening, so I imagine that they also would be part of that.

Mr CRIPPS: I think I can say, without disclosing any confidence, that when I had the meeting I had with the Director of Public Prosecutions, although I am not committing him to any particular view at the end, he was very much of the view that you have just expressed. He thought there was a great deal in it, but he naturally wanted to think about it more.

CHAIR: Because the police usually institute proceedings. From time immemorial, the culture of thinking has been probably along those lines, and this is a bit outside the square.

Ms HAMILTON: Yes.

Mr CRIPPS: Yes, and there is a bit of a philosophical reason, as I have put to you—because we are seen as prosecuting, when we are not allowed to.

CHAIR: There was talk before also, again with the Director of Public Prosecutions, about putting in your annual report information about the delay between the submission of the evidence and also the decision by the Director of Public Prosecutions to come up with a decision themselves or advice. I know in the case of Mr King and Operation Muffat it was four years, and then there were seven separate requests for requisitions. Would the Commission be willing to put the information in the report?

Mr CRIPPS: Yes, I think so, but subject to this: I think I would like the opportunity, before I just put those raw figures in the report, to consult with the Director of Public Prosecutions to make sure that he did not have some legitimate reason why that happened. I do not want to be—

CHAIR: You put it in an attachment C in your reply.

Mr CRIPPS: Yes.

CHAIR: We would leave it to you, of course.

Mr CRIPPS: Yes. We will consider that. Do you have anything to say to that, Roy?

Mr WALDON: No, although once again, we do not want to be making the Director of Public Prosecutions look worse than they are. I mean, sometimes they obviously send us requisitions and sometimes it takes us time to respond to those requisitions, so it is not just always a case of the brief going to the Director of Public Prosecutions and then at some later stage proceedings being commenced. There is a toing and froing between both organisations with requisitions coming, us answering requisitions, and maybe further requisitions coming. So maybe a table that is just too simple that just looks at when the brief went to the Director of Public Prosecutions and when prosecutions commence might be a little bit too simplistic. It does not give the overall picture of what has gone on in between. Some of the delay may be due to the Director of Public Prosecutions, but some of it may well be due to us because we have not been able to resource the requisitions as appropriately as we would like.

CHAIR: Would you consider putting in the delay from the Director of Public Prosecutions and also the delay in chasing up the requisitions?

Mr WALDON: I think we could take that into consideration. I think it might turn out to be a complicated table.

Mr CRIPPS: I would ask that the Committee bear in mind that this is one of the main things we are trying to avoid for the future with this meeting that the deputy will have with the nominee of the Director of Public Prosecutions.

CHAIR: At the previous meeting with Inspector Kelly, the Committee asked the inspector to monitor this issue with the Commission and the Director of Public Prosecutions. Would you consider that monitoring role helpful?

Mr CRIPPS: I would consider helpful any discussions I had with the inspector which advance the efficiency of the Commission and its ultimate objective. Yes, I would be quite happy to do that.

CHAIR: They are all the questions I have.

Mr DAVID HARRIS: In question 23 on management of risk, your answer indicated that when it came to control operations, execution of search warrants and conduct of physical surveillance, the Independent Commission Against Corruption [ICAC] worked very closely with the auditor to standardise documentation of these risks.

Mr CRIPPS: Yes.

Mr DAVID HARRIS: Are you able to let us know how the levels of risk are calculated, what sort of training and risk assessment is provided to staff, and what are some of the ways in which the Independent Commission Against Corruption endeavours to minimise the impact of the risks associated with these activities?

Mr SYMONS: I appreciate the opportunity of your asking this question because I have just gone through the process of a magnificent spreadsheet that was developed at great cost and which does the Australian Standard risk assessment. It was developed in consultation with the auditors. The training is there. All our chief investigators are aware of the assessment of risks, both through experience as well as being exposed to training and looking at the standard. It is an ongoing factor now with that matrix that comes up.

We have a spreadsheet, as I said. I am in the process of reviewing that at the present moment. We look at all the aspects of all the operations. In fact, let me quite candidly say that the risk assessment within the Independent Commission Against Corruption puts South Australian police to shame in the sense that we do not, as a matter of course in that State, conduct the same intense assessment of risks that is done here in operations with the Independent Commission Against Corruption, and I am extremely impressed with the professionalism that I have seen and that has been displayed in recent weeks.

In short, to answer your question, yes, we are on top of it. We are looking at it. We are using a spreadsheet. To use the vernacular, I am playing around with a spreadsheet that we have got because we have identified, in putting it to use in recent days, that there is a need to adapt some of that spreadsheet. Without getting into too much detail, it is a locked-in matrix in the sense that you identify risk. You understand the concept of a matrix?

Mr DAVID HARRIS: Yes.

Mr SYMONS: You put in the two indicators and it automatically tops up what it is. For example, it might be extreme risk. Because we identify, we take action to reduce that but there is no indicator within that table that recognises that what we have done reduces it. As such, I have now played with this magnificent product that we got from the auditor in setting some different spreadsheet calculations in it as a test trial at the present moment, which will then allow us to accurately assess, after we have taken our preventative measures for the controls.

Mr DAVID HARRIS: Thank you. In question 24 on the code of conduct, your answer indicated that the views of the Independent Commission Against Corruption's inspector were not sought in regard to the revision of the code of conduct. Would it be useful in your opinion to get the inspector's views on the revised code and to make this a practice in future revisions?

Mr CRIPPS: Linda may have more to say to that than I have, but can I say that the inspector has available to him the code of conduct. If he wants to make any representations that we should improve it, alter it, or change it, I would certainly be happy to consider what he says about the matter.

Mr FAVELLE: We did go through an extensive process internally with a lot of people and we do have people with marketing skills. We produced a book that we may have sent to you which to my mind simplifies the document that we previously had and puts through messages that we have reinforced the whole principle of having a code. We use it very intensively during the induction process so that people are aware when they come to the organisation what is expected of them because we are the sort of organisation we are. We could take on any views that the inspector would like to put to us—that would be fine—but in the normal course of events I would not have thought that this would be necessary for this particular code.

Mr DAVID HARRIS: You would not necessarily offer that advice when he sees the draft?

Mr FAVELLE: He could well do and he often would express that to the commissioner because he has regular meetings with the inspector. That may be the vehicle to do it.

Mr CRIPPS: Also we have made available to the inspector all the documents within the Commission that he ever wants to look at, with unrestricted access except, and he agrees, we have a very careful system about the higher security documents: that they cannot leave the Commission and how they will be dealt with. But this does not come within that, of course. He would have access to this.

Ms WAUGH: I should also add that my officers provide advice to other agencies on the codes of conduct. Those officers were used as part of the team to review our own as well.

Reverend the Hon. FRED NILE: Ms Hamilton, in regard to this memorandum of understanding, I understand that the one you are looking at updating is 2005.

Mr CRIPPS: Yes.

Reverend the Hon. FRED NILE: If there is some disagreement between the Director of Public Prosecutions and the Independent Commission Against Corruption, our role is to assist the Independent Commission Against Corruption. Do you feel it would help you if you gave a copy to the members of the Committee? You indicated that there was some problem.

Mr CRIPPS: I have no problem with members of the Committee seeing that memorandum of understanding at all. As I say, perhaps I would prefer to see if I can solve it with the Director of Public Prosecutions before calling in the big guns. I think it could all be seen as far as I am concerned, but could I just say that I would just like to clear this with the Director of Public Prosecutions. After all, they are the other signatory to this memorandum. But as far as I am concerned, it is fine.

Reverend the Hon. FRED NILE: It would only be necessary if you felt that you needed the Committee's assistance.

Mr CRIPPS: Yes, and I would avail myself of it, if I thought I needed it.

Mr JOHN TURNER: Just two points that arose out of the Chair's questions: one was the section 20 reporting back to the complainant in relation to why their complaint did not go forward, and there is no problem there. I wrote to you as a private member of Parliament, not a member of this Committee, expressing some concern in relation to where a highly publicised complaint has gone to you, where people have been named in public disclosures and public places as to be investigated by ICAC, and in this case the Tweed inquiry. In your case I understand a letter went back to the complainant who was the investigator—and I do not know the contents of that letter because that was the subject of my inquiry to you and subsequently to the inspector. But it has left those people that were publicly named out there. They do not have any explanation as to why you did not proceed; the complainant has but those people have not and those people in this case have been named publicly.

I just think in fairness and equity that there should be some arrangement for those people where you have not proceeded but they have been publicly named, to have some statement to clear the air in that regard. You will probably say it is up to the Parliament to enact legislation similar to section 20 but you did say that I was not entitled to an answer on the basis that I could not inquire into your section 64 ongoing inquiries, which I accept. I just ask that question of you: is there not some process particularly where publicly stated people have been left high and dry to be able to—

Mr CRIPPS: I just want to get the question clear in my own mind because you know this Committee is precluded at law from asking questions in respect of any investigation and it does seem to me on the face of it that—I am not refusing to answer this question but I want to be clear that in answering it I am not breaching any legislative provision.

Mr JOHN TURNER: In fairness, you did write to me and say those very words.

Mr CRIPPS: Did I? There we go.

Mr JOHN TURNER: That is the reason you did not wish to answer it then and then when I went to the inspector you added in that I was a member of this Committee and I was not entitled to an answer.

Mr CRIPPS: Are you asking me whether the legislation should be amended?

Mr JOHN TURNER: It is two-pronged, I suppose. Is there any way where people have been aggrieved or seen to be held out to be getting sent to ICAC, as in the usual thing before a council election or a State Government election—which was not that bad this time—then there is another case to answer where a complainant has got a letter saying, "We did not proceed for this reason" and that he or she will be happy or unhappy, but at least they have got a bit of paper, whereas Bill Smith has been named in the paper and it is assumed because you have got your name in the paper then you must have done the wrong thing.

Mr CRIPPS: I think on occasions people have been told that, but I will have a look at this one you are talking about. We do not have a golden rule about this for obvious reasons, that we cannot be put in the position where our response from confidential information is going to be dictated by

somebody getting up and saying something publicly and then saying, "Well, I have opened it up, now you have got to come good". On the other hand, we are, I hope, motivated by the circumstance that we want to be fair to people. We have had occasions, as you are probably aware, particularly in the run-up to elections and local government elections, where allegations are made of corruption publicly when they have not even been made. So we have often on occasions said we have never received a complaint.

Mr JOHN TURNER: It could be as simple as, "Dear Mr Smith, a complaint was received and the ICAC resolved not to proceed with it".

Ms WAUGH: In the past we have handled these sorts of situations on a case-by-case basis. I think back in 2002 local government elections were in a particular area and one candidate was making allegations against the other candidate and the candidate wrote to us and said, "This has been printed in the press. Apparently it has come to you", and that was a matter where we wrote back to him and told him what had happened so that he could do whatever he had to do.

Mr JOHN TURNER: I agree you should not disclose to anyone your investigations or anything like that. There was only one other very minor matter of interpretation. You mentioned under the disposal of property provisions that are now in the Act and you have not used that provision. I just had a quick look at the Act. It appears on the face of it that more funds go back into consolidated revenue. Is there any provision for you then to ask for an implementation for your budget from the funds seized?

Mr CRIPPS: I do not know. I have never thought about it.

Mr JOHN TURNER: I think there is some provision for the police where they can get some percentage back.

Mr SYMONS: Yes, some of the agencies can sometimes get back some of the seized money.

Mr CRIPPS: Sort of an annuity or something.

Mr JOHN TURNER: I do not know how it works exactly but I know in my local command they seized $800,000 recently and got X amount back because of the extra cost involved in the investigation to seize those funds.

Mr SYMONS: I think what they are talking about in that area is the confiscation of assets legislation. In this situation here my reading of the section is that—it is hard to give an example—we may seize a vehicle or something like that that we believe is relevant to an investigation. It lies dormant and we could put it up for auction but it is not in the case you are talking about. I should stress and point out that if we in the course of an investigation identify matters that may come within the confiscation of assets procedures then we do liaise with the Crime Commission. They take the action and they get the money back.

So, that is what we do. We do address that. We do have an ongoing liaison there and if we identify it then we raise it with them and would assist them within the boundaries of how we can assist them.

Mr JOHN TURNER: Just one other technical question. You say that you take the prosecutions right down to the court. At that time it is Cripps v X and the Director of Public Prosecutions then takes it over as you are walking through the front door. What is the status if the Director of Public Prosecutions is held up in the traffic?

Mr CRIPPS: I suppose it gets struck out.

Mr JOHN TURNER: That is what I thought.

The Hon. JOHN AJAKA: You mentioned earlier on, and I think basically your quote was unless the commissioner continues with the criminal enforcement no-one else will and it puts you in

that terrible dilemma. The concern I have is that does it not also then create a serious problem or conflict with the intent and spirit of the Act, that you are never really to be seen in any form of being a prosecutor or involved in prosecutions but purely being an investigator?

Mr CRIPPS: Being an exposure of corruption?

The Hon. JOHN AJAKA: Yes.

Mr CRIPPS: I do not see the conflict.

The Hon. JOHN AJAKA: You do not see a conflict that once you are seen as having to, in a sense, be compelled, if I can use that word, to proceed with prosecutions because the Director of Public Prosecutions or the Office of the Director of Public Prosecutions is not, that there is some dilemma there?

Mr CRIPPS: No. I have just simply adopted what appears to me to be a self-evident interpretation of the legislation, and that is why the Parliament did it; why the Parliament said, "You confine yourself to declaring whether people have engaged in corrupt conduct". That has legally no legal consequence at all. It is not like a conviction, which does have legal consequences, that is all it has. "We want you to steer clear of saying people have committed crimes or they should be prosecuted for committing crimes because you are going to get information in the course of this that no police system in Australia would ever get".

As I understand it the argument you are putting would need to be taken out with the Parliament. Is that what the Parliament wants? Does the Parliament want us to go further and say once we get it in this capacity we will have sort of a compartmentalised role? There could be debate about this. I am not saying they should not at all, all I am saying is my interpretation of the meaning of the legislation at the present time is that we should distance ourselves from criminal prosecutions. You may be right in saying that it is not effective. It depends how far you want to go in reducing these common law privileges and liberties, I think.

The Hon. JOHN AJAKA: The second part of that is if you start bringing in Director of Public Prosecutions officers to observe do you not then in a sense create that synergy—

Mr CRIPPS: I suppose you do in the way it is at the present time. I suppose one does that. But the legislation actually says we have got to assemble admissible evidence and the question from our point of view is twofold: What is the most efficient way of doing it and the second one is even if that is the most efficient way is it the fairest way of doing it? We think that having somebody there at the beginning who is not, as Theresa said, part of the investigation but is just saying, "It looks to me as though this is heading for prosecution under section 178B of the Crimes Act", or something, "and this is the sort of evidence we should be looking at", and then we say we have got the function of doing it. We do have the function of doing it to that extent.

My problem is what happens when we stop investigating? Are we still seen in the public as really being another arm of the Police Force? That is my problem.

The Hon. JOHN AJAKA: Talking about equipment, and it was lovely to hear that you were not seeking more money for more equipment—

Mr CRIPPS: I did not necessarily say that.

The Hon. JOHN AJAKA: Is there a procedure for you or the availability for you to access other government departments? Would there be a scenario where, for example, you may need additional equipment for six months only and the last thing you want to do is go spend the money buying it only to find you will not need it again for a couple of years and it becomes obsolete, that you can, via the police department, Director of Public Prosecutions or any other investigative agency, have a synergy where you can use their equipment?

Mr SYMONS: One of the greatest advantages of our units is they seem to have their own network and the answer to your question is yes, it would be looked at. Obviously there would have to be an acknowledgement through the corporate area of ramifications.

Mr CRIPPS: But we do get cooperation from the New South Wales Police Commission on telephone intercepts and the like.

Mr ROBERT COOMBS: Commissioner, I have just got a question in relation to scope when an issue is reported to you. Can you enact investigations yourself?

Mr CRIPPS: Yes.

Mr ROBERT COOMBS: That leads to the second question that if through your investigation of an issue or of a report to you and that then unfolds and leads into a whole range of other issues that could be at the end of the day deemed to be corrupt, you can investigate those too?

Mr CRIPPS: Yes.

Mr ROBERT COOMBS: In relation to issues or reports that are investigated against total complaints it seems that there are a large number of complaints that are not, and I think it would be pretty fair to say that a number of those complaints and that sort of thing are frivolous or vexatious. Has there been any consideration given to how we might cut back on those frivolous incidents that you are asked to investigate? It would seem to me that it would take up a lot of your work and if we could cut back on that it might indeed free you up in other areas so you could make more investigations.

Mr CRIPPS: That is true. Everything you say is quite true, but the legislature enacted that people were to be encouraged to make complaints to ICAC. So, chief executive officers of organisations are bound to report things, members of the public are encouraged to complain. We tell people when we go on these visits around the country, "Look, if you are in any doubt, we know it is more work for us but we prefer you to complain to us because we prefer to be the person that has to decide whether this should go further". We get 2,500 complaints or something and we end up investigating hardly any of them. Some of them, particularly in local government, involve someone who is just dissatisfied with a decision; other times people will say the Taxation Department has behaved badly.

But we do like to do it because it also helps us in our corruption prevention work because we get all these complaints and although one cannot say 100 times nought equals anything but 100, at least if people are always complaining about things that you think are really minor and we should not be dealing with them—and we often do that—if you keep getting it from areas, you might after a while think it is systemic so you should go further. On balance, what we do is encourage people to report and we just hope, but not always with any degree of success, that people will just report and accept the decision. But, of course, once we get what we call the frequent flyers, once they start they never stop.

Mr ROB STOKES: Commissioner, my question relates to page 17 of the annual report, and it follows on from the previous question relating to the number of complaints. I just noticed since 2003-04 there has been a fairly significant decline in the number of overall complaints. I was wondering if you had a view as to why. Are people getting better? Why is that happening?

Mr CRIPPS: I do not know. Other people who claim to be able to divine the public purposes—Linda may know.

Ms WAUGH: It is always a problem when you get statistics like this because you cannot tell whether it is because there is less corruption. Maybe it is because people are becoming less aware of reporting. It is very hard to interpret the up and down of complaints figures.

Mr JOHN TURNER: Of course, they are right in the middle of the local government, State Government cycle.

Mr CRIPPS: Look at the Strathfield case—I think it was in 2005. If you do a big, sensational case—remember, this was the one where the mayor was caught taking money—that tends to inspire everybody to start making complaints. I have been unable to draw any reasonable inferences as to what the cause of this is. I just do not know.

Ms LYLEA McMAHON: My question is in relation to figures 3, 4, 6, 7, 9 and 10. I will summarise it. When I came in this afternoon I noticed that you have this position paper around what appears to be your most frequent type of complaint, which is regarding building and development applications.

Mr CRIPPS: Yes.

Ms LYLEA McMAHON: Your second-largest category appears to be employment practices and then that reappears in terms of protected disclosures and section 11 reports as well as breaches of policy and procedure. Is that an area where you have any further analysis or details in relation to what the key issues are?

Mr CRIPPS: No. That is a good question. I look at this and I think, "What's collusion; what are you colluding about?" We know in the local government one that it is almost exclusively—perhaps not exclusively but mostly—due to people being dissatisfied with councils deciding development applications. That is fair enough. But when we get to employment practices, I am not sure what—

Ms WAUGH: It is things like recruitment and selection—someone was promoted unfairly or they did not follow the correct procedure. In answer to your question, in my area in particular we will do further breakdowns of this sort of information and maybe slice it up a little differently. But we use this information to inform us in planning our work priorities for corruption prevention, education and research. But like Jerrold was saying before, you do have to be careful and you do need to look more deeply into these because, for example, a lot of ones around local government are because people do not understand the processes. So we would not necessarily launch into a major CP project stating there were corruption risks when we thought it might be misunderstanding. Does that answer your question?

Ms LYLEA McMAHON: So if you are getting a large number of complaints in that area it is either an issue of fact or an issue of perception.

Ms WAUGH: Yes.

Ms LYLEA McMAHON: So I suppose in terms of the prevention aspect you would be either looking to clarify people's expectations and understanding or, alternatively, provide some best practice guidelines for agencies.

Ms WAUGH: Yes, that is correct.

Ms LYLEA McMAHON: My next question is: Is that on the agenda?

Mr CRIPPS: As far as I am concerned it is. I have discussed this with people. I think perhaps we can in the next report give a little explanation as to what is inherent in all these bar graphs—what we are talking about—so that people can look at it as well as us and find out what it is we are talking about.

Ms LYLEA McMAHON: What little bits add up.

Mr CRIPPS: Yes. There is a limit to it—otherwise you would be like the New York telephone book and just stop.

Ms HAMILTON: I think it is true, in particular with complaints about employment practices—you are right—it almost always is a question of perception. When you look at it you almost always find that there was not nepotism or a conflict of interest but because it involves people's livelihoods and promotions they are always very suspicious when somebody else gets a job. So it is up

to the agencies to be more transparent in the way they do it. So I think there is a lot of scope for corruption prevention and education work in making sure that people understand why certain employment decisions have been taken and then they will not complain to us that it was done for corrupt motives.

Ms LYLEA McMAHON: I look forward to seeing next year's annual report.

The Hon. GREG DONNELLY: Commissioner, I refer you to the bottom of page 6 of the answers to our questions, specifically question No. 8. The last sentence says that in-house lawyers are also now being appointed to act as counsel assisting in some compulsory examinations or public inquiries, saving the cost of engaging a private counsel. Can you give the Committee some approximate percentage of how much work is done by in-house solicitors or lawyers?

Mr CRIPPS: I do not know that I can do that off the top of my head. Since I became commissioner I have adopted a policy of as far as possible either me or the deputy commissioner doing the public inquiries and compulsory examinations. So they are, as it were, kept in house. There may be occasions when that does not happen. For example, if allegations are made against ICAC I have to be careful that whoever was conducting those inquiries should be independent. I have also had a policy of encouraging people who are the lawyers in the commission to take part in these compulsory examinations—indeed, one of them I have had running a public inquiry—because I think that although there are occasions when you need someone from the independent bar, and that often happens, there are occasions when you do not and it seems to me that it is good for the career progress of people who are employed in the commission.

ICAC is not big and people's career prospects are not that good if they stay in the commission. There are only a few big jobs available. So it is good to have people being able to have a lot of experience. Although I always speak of these compulsory examinations and public inquiries, correctly, as being administrative structures—which they are; not judicial ones—nonetheless they behave a bit like judicial ones and it gives these people that experience. That is why I encourage that to happen. But as to how often it has happened, I think I can say that so far as compulsory examinations are concerned it is nowadays just about always done by an in-house lawyer. So far as the public inquiries are concerned, I have only done one where I have taken an in-house lawyer to do it but I am hoping that there will be more in the future.

The Hon. GREG DONNELLY: I have another question about matters or complaints that are made to the commission pertaining to issues that go beyond the borders of New South Wales. Do those complaints come before you? If the answer is yes, how are they handled?

Mr CRIPPS: Do you mean complaints from Victoria, for example?

The Hon. GREG DONNELLY: It could be a complaint in New South Wales, for example, that involves public servants in another State or Territory.

Mr CRIPPS: We do not have jurisdiction over them.

The Hon. GREG DONNELLY: I appreciate that, but is there a process of responding to those types of complaints?

Mr CRIPPS: Yes, we can respond to other agencies that are responsible for the same sort of work or police work we do. The legislation makes provision for us to do that.

Reverend the Hon. FRED NILE: In regard to the recommendations, you have outlined the follow-up procedure. If there are 500 recommendations, for example, can you give us a rough estimate of how many are implemented? Are the majority implemented?

Ms WAUGH: The majority of recommendations are implemented in almost every case.

Reverend the Hon. FRED NILE: So it would be like 90 per cent or 100 per cent.

Ms WAUGH: Yes, it would be. In fact, the report with the lowest implementation rate was one to Parliament. Generally the uptake is good. My officers have quite a lot of dealings with departmental staff. They need to get information from them so they have a good sense of what will work in that department. We try to make recommendations that are practical and that can be implemented. So the uptake is quite good.

Reverend the Hon. FRED NILE: So they are taking them seriously.

Ms WAUGH: Yes.

Reverend the Hon. FRED NILE: That is good.

CHAIR: Commissioner, I refer to your answer to a question on notice regarding a medical tribunal case where documents were summonsed. In that case this came within a clear statutory exemption to what would otherwise be no obligation on your part to produce these documents. You answered that it was a case decided on particular facts—I think the credibility of the complainant and the balancing by His Honour Judge Blanch—

Mr CRIPPS: Of which was the more important of the two.

CHAIR: Yes. That was a public interest immunity claim. I take it from your decision not to appeal that you considered the discretion by His Honour within the law and unappealable. Is that correct?

Mr CRIPPS: Yes, I do. We have not taken the view that the judge got it wrong. We have taken the view that his was a reasonable approach to this—and I suppose in one sense it could be said that we have probably taken the view that we took the wrong approach originally. But our approach was to protect—we hoped—people who complain to ICAC and how that might be damaged. I think if you read it you will see that Judge Blanch did not say that did not happen; he just said that was not as important as a person's right to a fair trial.

CHAIR: It is a balancing exercise.

Mr CRIPPS: So we took the view that it was a reasonable judgment and there was no point in taking it further.

CHAIR: There was a decision made that to some extent protected the identity in any case.

Mr CRIPPS: Yes, I suppose so. He indicated that that could happen—and I suppose it did happen.

CHAIR: One thing I have noticed in the report—I should have brought this up before—is that there are many more compulsory examinations than public inquiries. Is that comparison reflective of a particular way in which you now approach these matters? Earlier in the piece there was a presumption that investigations would be public. That has turned around over the years—more so in the past few years. Is that a change in policy?

Mr CRIPPS: As you point out, when the legislation was first introduced there was a presumption that all investigations were to be held in public. This, as you probably know, led to certain people having their reputations shattered when we could have done it differently. I am making no criticisms of people who did this because the legislation said they had to—they did not have to but the presumption was that they should. Since then, we have been told to take account of the fact that people can have their reputations unjustifiably vilified and all those things. So we take that into account. I think I can tell you this: Generally speaking, it is not true to say that we have a public inquiry simply when we know beyond doubt what the truth of the matter is. But you can assume that we are fairly confident that what the public inquiry is directed to will turn out to be made out. But it is not always—as you know, in cases such as Orange Grove it was not. But we tend to do that and we are conscious of people's reputations. I suppose I cannot really say because this has been the law since I became the commissioner—it has either been private hearings or compulsory examinations. But I

tend to take the view that you do not expose people to this type of publicity unless you are fairly sure it is in the public interest to do so.

CHAIR: When you became commissioner was section 31 already in place?

Mr CRIPPS: Yes.

CHAIR: Turning to a question that was asked from a few quarters today—the Hon. John Ajaka raised it, for example—do you consider that once you have put in a report and put in your brief to the DPP that if they raise a requisition it is not your place to conduct further investigations? Do I understand that correctly?

Mr CRIPPS: That is what I think.

CHAIR: That has been happening for some time.

Mr CRIPPS: I have to say in fairness to people who have been doing it against the background if it was not done nothing would happen.

CHAIR: I think that is being done because you are apprised of all the facts and background connections having done the investigation and it is considered you are best placed to carry out those further investigations. Did you say that the commission has no power under the Act to carry on and answer those requisitions?

Mr CRIPPS: No, I do not say that. Let me say this: They cannot use those coercive powers under sections 20, 21 and 22 unless they are investigating because they are preceded by "In the course of an investigation, you may do this." So if we are not investigating we cannot do it. The question that I find more difficult to resolve is: What happens when you stop investigating but the DPP says, "I want you to go out and get statements that will make this a more successful prosecution"—and we are not investigating corrupt conduct, incidentally? So my way of thinking is that, although the Legislature says that we can do it, issues such as discretion, fairness and the like have to start being operative as to what we really do—particularly the budget. That is a matter that has to be sorted out once and for all. Having said that, the view I have about this is not the view everybody has.

CHAIR: Your view, then, would be that the police should become involved?

Mr CRIPPS: Yes, I think so, if the DPP cannot. And I cannot buy into that, whether it is principle or money. I never quite understood why. Major firms, when they conduct litigation on behalf of private people, they investigate it. Just because you go to court does not mean you cannot investigate. In any event, I do not want to buy into that. You come from the DPP so you probably have a good grasp on that.

CHAIR: With protected disclosures, an inquiry was done not long ago by the Committee on the Protected Disclosures Act. One of the issues that came up was the definition of a protected disclosure and who would be protected. The concern of the Committee was someone may be told they are protected or may proceed on the basis they are protected and later they cannot be. Have you had any of those cases at the commission where you have had to re-evaluate or reassess the protection? I am trying to monitor how that is going. One of the concerns of the Committee was whether that cropped up as an issue in practice.

Mr CRIPPS: We tell people, when they make protected disclosures, that we will do our best to honour it, but we cannot guarantee it. If someone comes in and makes a protected disclosure about a murder, say, and it turns out that unless people know who is making the disclosure it cannot be solved, the protected disclosure probably goes out the door.

CHAIR: We are aware of that.

Mr CRIPPS: We do our best. I do not know an occasion when we have not taken steps to protect the identity of a protected disclosure or, on the other side of the coin, where someone's identity

was made public in circumstances where we would have preferred it not to but had to do it. Can you think of any?

Ms HAMILTON: There has been a case recently where the Ombudsman, the DPP and our office took a different view as to whether a matter was a protected disclosure, because of what was raised in that report. The definition seems to turn on whether the matter bears fruit, and it turns out there are allegations of corruption there. That is fairly undesirable. I note the report suggested following something similar to the Queensland Public Interest Act, where the definition turns on whether the person who made the disclosure had a reasonable belief that what they were disclosing was a protected disclosure. Personally, I think that would be better. At least there is a test there that you can use: Did this person have a reasonable belief that this was a public interest disclosure? Different bodies, as in the case referred to, can have different views as to whether something is a protected disclosure.

CHAIR: Would you consider the use of a checklist or something? The concern was, it was thought by the Committee that the Court of Criminal Appeal said these matters are to be determined by a court, and it makes it very difficult. That is why I am asking, have you had any occasion to go back to a complainant?

Mr CRIPPS: That is what I am not sure about, as I said earlier. People here have been here longer than me.

Mr WALDON: We have had occasions where people have made complaints to us where they thought they were protected disclosures but on reflection and further consideration we have determined that they were not. But they are generally not matters we have taken any further.

Mr CRIPPS: We had a case where we believed they were protected disclosures but we had to disclose their identity in the public interest, but it has not happened since I have been here.

CHAIR: One further matter I wish to raise, Commissioner, and it may not be one you wish to talk about, but we have talked before about a merit review.

Mr CRIPPS: Of an ICAC outcome.

CHAIR: A situation where a case has gone to prosecution, there has been an acquittal and the corruption is still there. In the past report it was asked of you whether you would make that known in public that the ICAC can do that. I know the logistical issues it raises and I noted what you told the Committee on the last occasion about the difference in the role and the standard of proof and all those issues. Have you given any further thought to that?

Mr CRIPPS: No, I do not think I have changed my mind from what I said on that last occasion, but this ties in with what I have talked about, the public perception of what our role is. For example, I do not think anybody suggests that if a doctor is struck off the role or a lawyer is struck off the role for improper conduct and then he is charged and found not guilty, that the disciplinary body should not reverse the decision, because it is viewed plainly as an administrative act in the interest of the public. It is not meant to punish him. If you strike people off it is not to punish them, it is to protect the public. In a sense, that is what we are doing with corruption. So, it is in that context that I think it largely should remain the same. Other people may have a different view.

I have also expressed this view, that although I have seen statements along these lines, "Well, there was a stinging finding of corrupt conduct by the commission and there was an acquittal of a person who was later charged, why is the commission leaving it that way?" We have the jurisdiction, in my opinion, to revisit any decision we have made. If it turns out in the future that we become aware of reliable and relevant information that demonstrates we have made a mistake, I hope we would rectify that mistake. To date, although people have complained about the probability, no-one has asked us to reverse that decision.

CHAIR: I hear what you say, Commissioner, but it is not solely a mistake on your part, but other information that may come to you.

Mr CRIPPS: No, that is right. Something may happen that we did not know and had we known we might not have come to that conclusion, but nobody has done it yet.

CHAIR: Do you think you would be amenable to having something like that kind of information included for the public somewhere?

Mr CRIPPS: I suppose they ought to know it. I do not know that I want to encourage everyone to keep asking us every year to revise our earlier decision. I think they know it. They elect not to advance it because they can become potential victims without having to do anything to redress the issue. Whereas, I think people would know if something turned up that was a mistake, they could come back to us.

(The witnesses withdrew.)

(The Committee adjourned at 3.37 p.m.)