REPORT ON PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

REVIEW OF THE INSPECTOR'S REPORT TO THE PREMIER: THE INSPECTOR'S REVIEW OF THE ICAC

At Macquarie Room, Parliament House, Sydney on Thursday, 8 September 2016

The Committee met at 10:50 am

PRESENT

Mr Tudehope (Chair)

Legislative Council	**Legislative Assembly**
The Hon. T. Khan	Mr R. Hoenig
Reverend the Hon. F. Nile	Mr K. Humphries
The Hon. L. Voltz	Mr P. Lynch
	Ms T. Mihaulik
	Mr C. Patterson
	Mr M. Taylor

The CHAIR: Good morning, and thank you for attending this public hearing of the Joint Committee on the Independent Commission Against Corruption. Today's hearing will consider the Independent Commission Against Corruption's Inspector's May report to the Premier reviewing the ICAC. My name is Damien Tudehope; I am the Chair of the Joint Committee and the Member for Epping. With me today are my colleagues from the Legislative Assembly—Mr Kevin Humphries, the Member for Barwon; Mr Chris Patterson, the Member for Camden; Mr Mark Taylor, the Member for Seven Hills; Mr Ron Hoenig, the Member for Heffron; Ms Tania Mihailuk, the Member for Bankstown, who I anticipate will soon be joining us; and Mr Paul Lynch, the Member for Liverpool, and who is new to the Committee. Also joining us are Committee Members from the Legislative Council—Reverend the Hon. Fred Nile; the Hon. Trevor Khan, who should be joining us also shortly and who is at a doctor's appointment at the moment; and the Hon. Lynda Voltz.

This morning the Committee will first hear from the ICAC Inspectorate and then from the Office of the Director of Public Prosecutions, before hearing from a former Inspector of the ICAC, the Hon. Harvey Cooper, AM, and then the Rule of Law Institute of Australia. The Committee will then break for lunch before hearing from Mr Bruce McClintock, SC, and later from the Department of Premier and Cabinet. At the outset I thank the witnesses appearing today for making themselves available. I remind everyone to switch off their mobile phones as they can interfere with the Hansard recording equipment. For the benefit of the gallery, I note that the Committee has resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines covering the coverage of proceedings are available. Please note that any filming is to be as unobtrusive as possible and should not disrupt Committee proceedings or focus on Committee documents. In addition, filming of individuals in the public gallery should be avoided.

I now declare the hearing open. I firstly welcome witnesses representing the ICAC Inspectorate: the Inspector himself, the Hon. David Levine, AO, RFD, QC; Mr John Nicholson, SC, who is the Assistant Inspector; and Ms Susan Raice, who is a Principal Legal Advisor. Thank you for appearing before the Joint Committee today to give evidence.

DAVID DANIEL LEVINE, Inspector of the Independent Commission Against Corruption, affirmed and examined

JOHN CECIL NICHOLSON, Assistant Inspector of the Independent Commission Against Corruption, sworn and examined

SUSAN RAICE, Principal Legal Advisor, Independent Commission Against Corruption, sworn and examined

The CHAIR: Before we proceed, do you have any questions concerning procedural information sent to you in relation to witnesses and the hearing process? No. For the *Hansard* record, state your full name, occupation and the capacity in which you appear before the Committee.

Mr LEVINE: David Daniel Levine: I am here in my capacity as Inspector of the ICAC.

Mr NICHOLSON: John Cecil Nicholson: Assistant Inspector of the ICAC. I am here in support of and with the Inspector.

Ms RAICE: Susan Raice: Principal Legal Advisor of the Office of the Inspector of the ICAC.

Mr RON HOENIG: Mr Chairman, before you begin I should inform the Committee that I have known Mr Nicholson of Senior Counsel for many years. When I was first appointed a Public Defender, I read with Mr Nicholson. Over the years when I was a Public Defender and when Mr Nicholson was also the Senior Public Defender, at times I was answerable to him. I know him very well, although I have not seen him much in recent years or from the time his appointment was made to the District Court bench. I have a high regard for him. There are many views we share but probably more views that we do not share. I wish to disclose to the Committee my knowledge of Mr Nicholson so that if any credit issues arise that might affect my judgement of his evidence, I will inform the Committee and withdraw from that consideration.

The CHAIR: Thank you, Mr Hoenig. Mr Nicholson, do you have any difficulty with Mr Hoenig participating?

Mr NICHOLSON: I have very little difficulty and I anticipate that there will be very little I will be saying.

The Hon. LYNDA VOLTZ: That will make it easier.

The CHAIR: Mr Levine, do you have any difficulty with Mr Hoenig—besides the fact that you probably have a different view of him from that of Mr Nicholson?

Mr KEVIN HUMPHRIES: You do not have to answer that. It is a leading question.

Mr LEVINE: I have known Mr Hoenig for a few decades, but only in a purely professional judge-barrister relationship.

The CHAIR: Yes. Okay, that is fine. Inspector, do you have any opening statement that you would like to make?

Mr LEVINE: Yes. The report dated 12 May in effect constitutes my opening remarks. There are some additional matters that must be dealt with, in my view, however. First is the matter of the calendar. My term of office expires on 31 January 2017, which effectively means, taking into account the summer and Christmas breaks, that I will have departed from the Office of Inspector before the end of 2016. Next, the report of 12 May, see pages six and following, has a particular history. In its final form, the report was the result of discussions which took place in 2015, especially consequent upon the decision of the High Court in Operation Hale on 15 April that year. I had meetings with Mr Comley, Mr Miller and Mr Atkins, with Ms Raice, and a meeting with the Premier.

The original request of me as Inspector of the ICAC was to prepare a comprehensive review of the history of the ICAC since 1988. That is what might be described as a big ask involving the equivalent, in my view, of at least two post-doctoral academics and other experts, together with staff and other support. There would have been the necessity to amend statutes to permit the revelation of secret or confidential material and the like. The report of 12 May must represent, in effect, what I indicated that my resources would permit me to do. It is, in my view, fairly bland. It should be read as a whole to contextualise the suggestions and the recommendations. It is also to be recalled that the resources of my Inspectorate had to be diverted to deal with the Tink report concerning the Police Integrity Commission, another instance in which the Government diverted to an independent panel the consideration of a major area of reform and policy. I would be less than frank, Mr

Chairman, if I did not remark that I seem to have been spending more time over the past two years or so writing reports for the purposes of other reports than performing the more usual functions of the Inspector of the ICAC whether they be of the kind performed by my predecessor by way of audit or the one 77A report I was able to prepare in relation to Operation Hale. It also strikes me, given the time remaining in my term, the number of sitting days remaining for Parliament, little will be achieved in the finalisation of what is a profoundly important component of governance—I stress the word "governance"—for a mere political shuttlecock being bounced back and forth between one inquiry and another or one Committee and another.

As to the report, there was one rather odd aspect to it, which came as a surprise to me. Following a series of anxious phone calls as to when it would be ready, upon my informing the Premier's Department that it was ready, I was told merely to put it on my website, which I did. Plonk. That was done immediately and subject to any unlawful hacking of my computer system, unread by anyone in the Premier's Department before it was made public. Looking back, knowing I was free to put it on my website, I would have raised matters about the traffic in Castlereagh Street, judicial pensions and the like, but there it is. It has been there since 12 May and, since then, there have been delivered to this Committee well over 20 documents in response to it. I stress also each of those documents should be read with care and given such weight as the Committee deems appropriate. One thing I wish to stress for the purposes of the conduct of this meeting is that I do not propose to deal with any of the documents lodged with the Committee in any combative or other sense. I have spoken; that is my report. Others have spoken; they are the documents in the folders. There are two exceptions.

The first matter to be clarified relates to remarks I made in respect of local government and the ICAC, which, given the way in which I expressed myself, understandably aroused Mr Kelly, the first Inspector, to protest in fairly vigorous terms. That is a result of a misunderstanding. I agree entirely with Mr Kelly that the amount of work provided by local government is overwhelming to the point where at present, as I understand it, inquiries are being conducted by bodies other than the ICAC. The volume of work local government has created in respect of corruption investigations is astonishing, going back to the Wollongong catastrophe some years ago to the institution of the more recent inquiry into asbestos dumping somewhere, or alleged dumping, and the necessity, as I have said, of other entities to be called upon to conduct inquiries. The resolution of the intrusion into the work of the ICAC of this material from one source, namely local government, will no doubt receive much consideration. It certainly should.

The second exception to my not going into debate in relation to the documents filed relates to the use of the expression of "falling into a trap", used by the former Director of Public Prosecutions, Professor Cowdery. I have no objection to him using those words in relation to myself; I have known him for as long as I have been in the profession. The trap, of course, is the confusion of the ICAC investigatory process with the criminal prosecution process, or, to put it in another way, confusion between the more generally understood adversarial system as opposed to the inquisitorial system employed by bodies such as the ICAC. That there are the two systems is a fact of life. One, the adversarial system, is more generally understood to be concerned with the administration of justice in public—

The CHAIR: Can I ask you to hold on. We welcome Tania Mihailuk as a Member of the Committee.

Mr LEVINE: —and the public determination of matters in dispute between citizens, between citizens and the State, and between citizens and other institutions, or between other institutions themselves. On the other hand, the inquisitorial system is little understood, thus is likely to be feared and gives rise to the question that I have referred to in my report, namely the critical issue as to whether those proceedings should be in public or in private. That perhaps is the most important issue to be resolved by what I suggest to be yet again a further independent panel made up of people hitherto not connected in any way historically with the ICAC of this State.

I must say that in my experience as Inspector I have come to understand, first, a great deal more about the inquisitorial system and the awesome powers it can and does confer upon such a body as the ICAC. Also, I have come to understand, in my capacity as Inspector, that the community is more acquainted with the traditional tenets of the administration of justice and is thus more intimidated by the ICAC. This gives rise to a question of culture and of the best way of inducing a sense of confidence in and an understanding of the necessity for such a body as ICAC. That would be another matter for the consideration of my suggested panel.

Just as I have suggested or presumed to suggest that anyone interested in the subject should read my report in full and not just the recommendations, I invite the panel and interested members of the community to read three other reports. These are public reports filed by the ICAC for dissemination to the public and for the information of the public. Chair, it might be a big ask to suggest that interested people read the whole of the report of Operation Spicer handed down last week—171 pages. I must say that I have not read it yet. In general terms, and for the purposes of the point I am trying to make, Operation Spicer on its face appears clearly to deal with matters of high government, governance, politics and the political process. It could not be argued that the

dealing by the ICAC with those matters reflected the exercise of judgement in a proper way to hold public hearings and pursue the investigation. That was big-time stuff.

The other two reports with which Operation Spicer can be compared, in relation to the exercise of the judgement-making decision as to whether or not there should be public hearings or anything should be done, are the following. I interpolate that in each of them there were adverse findings made. The first is Operation Misto, from June 2015, which dealt with the investigation into the conduct of a university manager and others in relation to false invoicing of the university over a period of three years—in fact, three universities—and involved a relatively small amount of money. The second is the report known as Operation Elgar, involving a Mr Jason Meeth, who has expressly permitted me to mention it. Adverse findings were made and have had consequences for his life, his family, his employment and so on.

The point that I stress is: Read those two short reports if you have managed to deal with the larger one, Operation Spicer, with great care. In my respectful view, they aid in the consideration of how judgement is exercised by the ICAC to conduct an investigation, to hold public hearings and to identify the very important but elusive in content notion of the public interest. The three reports are indicative of the range of matters investigated pursuant to decisions to do so by the ICAC. I have referred in my earlier report connected with the Gleeson-McClintock panel to many other matters. But, in relation to my suggested proposed new panel, one issue that will demand the closest of consideration is the definition of, the components of, the criteria for, the elements of and the content of this notion of the public interest.

To recapitulate, Operation Spicer, involving areas of the whole political process, hardly could be argued not to be in the public interest or relate to an important component of the public interest—namely, the legitimate interests of the public in how it is governed. The other two relate to relatively minor matters and arguably could be said not to relate to matters of public interest, despite in one case what is said to be a connection with the Auditor-General by reason of a university being involved and in the other by reason of the minimalist nature of the found misconduct. That concludes the matters I wish to add.

It is unfortunate, but it does appear that I have to make it clear that in my capacity as a citizen, in my capacity as a retired judge and in my capacity as the Inspector I am in favour—positively—of a strong corruption-fighting body such as ICAC. But also am I in favour of the strength and integrity of such a body as ICAC being reinforced only by the existence of an oversight body—not an overruling body, not a controlling body, not a directing body but an oversight body—in which people can have confidence, especially absent any merits review and, as I have said, in which people can have confidence that the body with oversight will ensure that, to the extent that people are entitled to have a fair go before the ICAC, they in fact get that fair go. That concludes my opening remarks.

The CHAIR: I will come to questions in a moment, but can I ask you this, Inspector: Mr Babb is due to give evidence at 11.30 a.m. and has a commitment at 12 o'clock. If we need to interpose him, would that be objectionable to you?

Mr LEVINE: I am here and he is a lot taller than me.

The CHAIR: It is for his convenience and, as Members have no objection, we will interpose Mr Babb at 11.30 a.m.

Mr CHRIS PATTERSON: Thank you for your consideration.

Mr PAUL LYNCH: Mr Inspector, in your opening comments you talked about Operation Spicer, the report of Operation Spicer and its importance. I wonder whether that means you have reconsidered your recommendation in the report to abolish section 74BA (2). The vast majority of the findings and recommendations that Operation Spicer made were covered by that provision; they were not findings of serious misconduct. It seems to me there is something of an inconsistency in what you said in your opening comments and what you put in your report.

Mr LEVINE: I am prepared to accept that might well be the case but I have not read the Spicer report.

Mr PAUL LYNCH: I have. It is a good read. You talked also about the number of reports you have had to do and the impact that has had on your other functions. Does that mean you have not been able to carry out any audits at all?

Mr LEVINE: No, because I have decided that I would conduct the office without conducting separate audits, unlike my predecessor. If I was to conduct an audit it is more likely than not to be part and parcel of a more thorough examination. I would not regard conducting an audit for the sake of conducting an audit, with respect to my predecessor, as the complete discharge of the role of the Inspector.

Mr PAUL LYNCH: But it must be an important part of the discharge of the role of the Inspector, though—I mean, it is specifically referred to in section 57B?

Mr LEVINE: I don't disagree.

Mr PAUL LYNCH: And finally on your opening comments you raise the issue of local government. It seems to me that your report was saying that ICAC should have no jurisdiction over local government. Is that the position you are adopting?

Mr LEVINE: No, no. That is why I made specific mention. If I was in America I would say I misspoke.

Ms TANIA MIHAILUK: It has been used around here too.

Mr LEVINE: It was poorly written and the reaction from the first Inspector was entirely appropriate and I have corrected it.

Mr PAUL LYNCH: I turn now to your principal recommendation, that is, that ICAC hearings be in private rather than in public. I am wondering what your response is to what you might call the traditional criticism of your position. I quote to you something that Ian Temby said in his submission simply because it is a neat way of putting the argument.

> The Courts sit in public. Why? Because public confidence in them is essential, and if the Courts fail to perform as they should the public are entitled to know. The same arguments apply to the ICAC, and to Royal Commissions and like bodies.
>
> If the ICAC was driven behind closed doors, with nobody really knowing what it was doing unless and until it reported to Parliament, it would become just like the old and infamous Star Chamber in England.

I am wondering how you respond to that argument?

Mr LEVINE: Is it an argument?

Reverend the Hon. FRED NILE: Bruce McClintock's argument—the barrister?

Mr LEVINE: I really do not know what you are asking me to say. Do I agree? What is the argument that you say Mr Temby is putting forward?

Mr PAUL LYNCH: Public confidence in the courts and bodies like ICAC is essential; that is assisted by things being done in public. Things being done behind closed doors simply breed suspicion and uncertainty. Temby put it better than I did but that is not a bad summary of what of what he said.

The CHAIR: In your judgement.

Mr LEVINE: Do I agree with that?

Mr PAUL LYNCH: What is your response to that?

Mr LEVINE: "Response" is such an airy-fairy word, with respect. Do I agree or not agree? I would have thought by now I have made it patently clear to this Committee that it is with the greatest reluctance that I have come to the view that the proceedings of ICAC should be in private and then exposed if there are adverse findings and if there are no adverse findings no-one is hurt. I have been troubled by having to come to a decision by reason of my traditional background in open justice. I do not agree with the current position adopted by the ICAC that public hearings are a part of the investigation process.

I think to avoid the immense collateral damage which seems to be of little interest to the ICAC, have your inquiry in private. It can be done efficiently. There is no occasion for performance, the circus, and if you come to an adverse finding, then you shine the light on it. But if you find that there is none, you say nothing. That's it. The dilemma I cannot really ultimately resolve myself. I am intuitively opposed to secret hearings of any kind but if they are to be in private, that is not public, or to be secret, they should not be anything other than efficient, fair and involve full disclosure of all material available to both sides.

Mr PAUL LYNCH: You say intuitively you support public hearings. Why?

Mr LEVINE: I am sorry, I didn't hear.

Mr PAUL LYNCH: I thought you said that you intuitively supported public hearings?

Mr LEVINE: Yes. That's me, right.

Mr PAUL LYNCH: What are your reasons for supporting public hearings?

Mr LEVINE: Because I think the public has a legitimate interest in the public exposure of matters that are being investigated, how they being investigated, how they are decided and why they are decided.

When I say "intuitively" I mean that that is a deeply held personal view based upon over 50 years in the business, and inherited from someone who was also in the business for 50 years. I just do not like secrecy and what I see as the increasing obsession with it.

Mr RON HOENIG: There is a problem when you have private hearings. I have seen videoed interviews of private hearings of the NSW Crime Commission of clients who have been charged where, in my view—in one of the trials Mr Nicholson represented the co-accused so he would know the trial I am talking about; it involved the death of somebody that most Members of Parliament would know—the conduct of the Crime Commission was disgraceful. It was treating accomplices or suspects behind closed doors. In any closed-door environment you need some form of checks and balances to make sure that these investigations treat people fairly, don't you?

Mr LEVINE: I agree.

The CHAIR: I ask you to hold that thought. I have noticed that Mr Babb is here. We can perhaps interpose Mr Babb and come back to you later.

(The witnesses withdrew)

LLOYD ADAM BABB, SC, Director of Public Prosecutions, Office of the Director of Public Prosecutions, NSW, sworn and examined

JOHANNA PHEILS, Deputy Solicitor, Office of the Director of Public Prosecutions, NSW, sworn and examined

The CHAIR: Thank you for appearing before the Joint Committee today to give evidence. Before we proceed do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Mr BABB: No, we do not.

The CHAIR: Mr Alder has made a submission on behalf of the Director of Public Prosecutions [DPP].

Mr BABB: Yes.

The CHAIR: Have you got anything that you wish to add to that? Is there an opening statement that you would like to make?

Mr BABB: I have nothing to add and no opening statement.

Mr RON HOENIG: Mr Babb, when matters get referred to you and you are considering presenting an indictment—and you do, in fact, present an indictment—aren't you concerned about the publicity that may well have arisen as a result of the Commission's previous hearings about the fairness if a trial that an accused can get? I know Glennon is only in theory the law, which is never applied, but are you not concerned about the fairness of a trial following all that publicity?

Mr BABB: I am always concerned about the fairness of a trial. I work within the law as it stands in this State, and consider each matter on the relevant evidence. There is, necessarily, in high profile matters, some pre-trial publicity. That happens not just in ICAC matters but in police investigations and in other matters.

Mr RON HOENIG: A police investigation does not necessarily take place in the full gaze of the public.

Mr BABB: No, it does not, but the media will report extensively on high-profile crime and serious crime, so publicity usually surrounds decisions made in relation to all sorts of matters.

Mr RON HOENIG: You act in accordance with the existing law, which is your obligation, but in the submission that was made on behalf of the DPP you submit that there is no change needed to the determinations of ICAC's public hearings. Isn't it preferable that, if there is to be an examination of the law, there be some amendment to ICAC's legislation that does not impinge upon the fairness of someone's trial?

Mr BABB: In terms of ICAC matters, a very small proportion of matters proceed to trial. Those are the matters where there is sufficient admissible evidence that leads to a determination that there is a reasonable prospect of conviction. In determining the ICAC process, considerations are made about matters that are going to trial. Other considerations include the exposure of corruption and the many other matters where no proceedings in a criminal court ever take place.

Mr RON HOENIG: In terms of the practice of dealing with matters that get referred to you from that organisation, it embarks upon its own statutory investigation of material without, it seems—because they are not obliged to—considering whether or not evidence will be admissible or not admissible. Some of those investigations are huge. When that organisation refers the matter to the DPP what form does it come in? Does all this material just get dumped on you and some poor solicitor has to sift through it and find the admissible evidence to make a submission as to whether there is a bill to be found, or whether someone is to be charged? Is it given to you in admissible form? Is there a mixture of forms in which it is given to you?

Mr BABB: There is a Memorandum of Understanding which, in summary, says that the ICAC will provide to me admissible evidence and disclosable material for me to consider. So it is not a matter that everything that has been looked at and collected is being dumped on the Office. There is a filtering process that the ICAC undertakes prior to sending a brief to my Office for consideration.

Mr RON HOENIG: Normally, if a matter comes to your office from the police—say, for an indictable offence—usually the DPP takes over the prosecution when it is still in the Local Court.

Mr BABB: Correct.

Mr RON HOENIG: The solicitor often provides advice to the police that more investigation or more evidence needs to be obtained. Effectively, the police are producing to you, anyway, admissible evidence—not inadmissible evidence—and then, once the matter leaves the Local Court it comes to you and you decide to present an indictment on that material that has been put together. Under this protocol, is the Commission, as the investigator, obliged to provide you with the same standard as other criminal investigators?

Mr BABB: That is the aim of the protocol—to put the ICAC in the same position as other investigative agencies that send me briefs of evidence. That limits what comes to me to either admissible evidence or disclosable evidence. They are not necessarily the same thing because there is a need to disclose material that may assist an accused person or lead to a line of inquiry that could assist an accused person. I would expect that I would receive both admissible evidence and disclosable material.

Mr RON HOENIG: It seems from the material we have seen and from stories in the media that your office is having some difficulty obtaining both inculpatory—well, you have no trouble getting inculpatory material but you certainly are having trouble obtaining exculpatory material. In one recent matter it was discovered during the hearing by the issuing of subpoenas. How do those things occur and how do you ensure that your prosecutions are fair, that you actually have access to that exculpatory material? Do you just rely on a certificate given to you by the Commission?

Mr BABB: We raise requisitions where we believe further material is required or may exist that appears to me and those officers in my office would either be admissible evidence or disclosable material. Together with that there is a reliance upon all of the investigative agencies—the New South Wales Police, the Crime Commission, the ICAC—that they have a good understanding of their obligations and duties and are providing my office with disclosable material.

Mr RON HOENIG: Having read, for example, the comments made by the Magistrate in the Kear matter, clearly there was material that your office was unaware of that became apparent during the hearing. That is right, is it not?

Mr BABB: I must say I do not want to state categorically. I am not sure in terms of timing. I would have to look at particular matters in terms of answering questions about when people became aware and what was provided. I do not want to mislead here. To be honest, I read the judgement and made some inquiries but I just cannot answer that question now.

Mr RON HOENIG: I would infer, and I could be corrected by later evidence, that the DPP would not withhold exculpatory evidence in a criminal prosecution. I think all of us would proceed on that basis.

Mr BABB: That would be completely contrary to the Prosecution Practice Guidelines.

Mr RON HOENIG: And those things when they do occur very rarely are usually through bureaucratic error or human error as a rule. Very rarely is it ever deliberate.

Mr BABB: Yes, I would hope that to be the case.

Mr RON HOENIG: If that exculpatory material was made available to you, assuming that it was, prior to the Kear prosecution you may well have not even prosecuted?

Mr BABB: I cannot answer that. That is hypothetical and I would need to consider all the material to be able to answer that question.

The Hon. LYNDA VOLTZ: The Inspector has recommended that the word "forthwith" be taken out of notices to produce. Do you have a view about the use of "forthwith" within those notices to produce? Obviously there was the issue about mobile phones and how that is used.

Mr BABB: I do not have a strong view about that. I think there should be the capacity to obtain material in a way that is going to stop the destruction of important material. How that is done, it could be done in a number of ways. I think even if there was a change to remove the capacity to have a notice to produce with the word "forthwith" in it there should be some process for obtaining material in a way that is not going to necessarily give an opportunity to someone who was minded to do so to destroy evidence or material.

The Hon. LYNDA VOLTZ: Then there was the other view about material being moved. For example, mobile phones would not necessarily be in the one place. Is it common that "forthwith" is used to produce those kinds of devices?

Mr BABB: I am not sure.

The CHAIR: I take you back to the Kear case. Clearly the Magistrate was of the view in dismissing the charges against Mr Kear that the prosecution had not been in possession of material which it should have

had in respect of making that prosecution. Have you made inquiries as to why you were not in possession of that material?

Mr BABB: I would have to check in relation to exactly what has been done there. I am not sure.

The CHAIR: It is of some concern, is it not, because there was a costs order against the DPP in relation to that.

Mr RON HOENIG: I think the Director has had a lengthy absence. You have been away for a while, have you not?

Mr BABB: I have.

The Hon. TREVOR KHAN: I suppose it would be practice in your office, would it not, that where a costs order is made the officer from the DPP who was appearing in the matter would provide a report up the chain that would set out the circumstances in which that costs order was made?

Mr BABB: Yes. That would happen in most instances.

The Hon. TREVOR KHAN: Are you able to check whether such a report was provided to your office?

Mr BABB: I am able to check that.

The Hon. TREVOR KHAN: Having checked as to whether the report is there, are you able to provide us with a copy of that report?

Mr BABB: If there is a requirement from the Committee and if it is a legal obligation then I would provide the report.

The Hon. TREVOR KHAN: I suppose that is two bob each way. Are you prepared to provide us with a copy of that report if we request it whether by letter or otherwise?

Mr RON HOENIG: It is not privileged so if we ask for it he has to provide it.

The Hon. LYNDA VOLTZ: I am not sure that is true.

The CHAIR: Just continuing that, are you aware of any other cases where material which would assist in relation to fulfilling your obligations as a model litigant has not been provided to you by the ICAC in circumstances where you believe it should be?

Mr BABB: I am not sure of that. I have made requests of the ICAC in relation to the provision of material but, because I do not know what is included in that material, I do not know whether it is material that was properly disclosable. There are other matters where I have requested the provision of additional material in addition to what came in the brief of evidence.

The CHAIR: Are you aware of any circumstances where the ICAC is not complying with those requests?

Mr BABB: There is one instance that I am aware of where they declined to comply with a request that was made.

The CHAIR: Can you give us the details of that?

Mr BABB: Yes. It is in relation to a prosecution that is still in the Local Court, so it is at a relatively early stage. It was the matter that was reported in the *Australian*. It was misleading to say that it was for trial or that it was late in the piece. I still believe there is an opportunity for discussions to be had and to make sure that all relevant material is provided at an early stage.

Mr RON HOENIG: What reason do they give when they do not want to hand over to you material that you know they have? What is the justification that they give?

Mr BABB: In relation to that particular case there was compulsory examination material subject to a non-disclosure order which in its form applied to disclosing it to anyone else.

The CHAIR: That includes you?

Mr BABB: Yes, that is as I understand it. There would need to be a variation of that order for it to come to me, particularly because in the normal course anything that I get that is disclosable I will pass straight on to the defence.

Mr RON HOENIG: If we are considering recommending to the Parliament a change in legislation, would it not be advantageous in the prosecution of alleged offenders and the fairness of their trial to require any investigative agency including ICAC to hand over material that you require to be handed over subject to very narrow exceptions such as matters relating to informants or national security—that sort of stuff?

Mr BABB: I expect that relevant material will be handed over when I make a request. In some instances the material may not be relevant and the investigative agency may know that to be the case. In general relevant material is disclosed and I am confident that will be the case here as well.

Mr RON HOENIG: It certainly was not the case in the Kear matter though.

Mr BABB: That seems to have flowed from what the Magistrate said in his decision.

Mr RON HOENIG: I suppose my concern and the Committee's concern is: if it happens in one matter, does it happen routinely?

Mr BABB: That has not been my experience. There is an element of "you do not know what you do not know".

Mr MARK TAYLOR: But there is no legislative impediment that you think needs some reform or anything to open up that exchange.

Mr BABB: No. I think the obligations on investigative agencies—

Mr MARK TAYLOR: Are already there.

Mr BABB: —are palpably clear. I have to work under the expectation that investigative agencies are complying with their duties of disclosure because it would simply be unworkable for every investigative agency to dump anything that has ever been collected in relation to a matter on my office. My resourcing would need to be increased.

Mr MARK TAYLOR: But you are certainly saying you are not impeded and you do not have your hands tied by any means.

Mr BABB: No. There are obligations on investigators and I expect and understand that they are complied with.

Mr RON HOENIG: I would assume, Mr Babb, from my limited secondment to the Crown Prosecutors a number of years ago, once a matter gets referred either by ICAC or the Coroner, particularly if it has been a large inquiry, it is a huge exercise and takes up a lot of resources of your office to get on top of it and then put it in a form to consider whether or not a bill should be presented. It is not just an easy hand-up brief from the police, for example. It is a huge exercise, is it not?

Mr BABB: It varies depending on the complexity of the matter. Sometimes it is a big exercise. There have been some changes in the protocols since the time that you were working as a Crown Prosecutor on secondment. There has been an attempt to ensure that the brief is in its best form when it comes to my office.

The CHAIR: And in fact you—or Mr Alder on your behalf—have suggested that ICAC personnel have enhanced powers to continue investigations even after the matter has been referred to your office.

Mr BABB: That is my wish in a limited sense in that when I am raising further requisitions there should not be an impediment to the investigative agency complying with the raised requisitions on the basis that their statutory jurisdiction has been exhausted.

The CHAIR: Is that the only basis of extending those powers? You do not want them to act like police officers again, collecting—

Mr BABB: No. I would think it would be under request and requisition. I would expect that the ICAC had exhausted what they thought were the relevant inquiries by the time the material has been sent to me and then issues that have occurred to me and my staff are raised with them and they should be able to assist me by attending to that.

The Hon. TREVOR KHAN: In terms of the line of questioning that Mr Hoenig was asking you, if either by statutory amendment or by a change in the nature of the non-disclosure order that is made, would it be appropriate that the DPP be excluded from any non-disclosure order so that the refusal or inability to answer a requisition is overcome as a future problem?

Mr BABB: I would expect that, if it is disclosable material, that order would be amended to allow disclosure of the material to me. It is important that I have any relevant material for a number of reasons. Full

disclosure has to take place to any accused person. In some instances even if the material is privileged because of a public interest such as national security or some other public interest—the disclosure of informers, which is a well-known protection under public interest immunity—it is important that I know about the existence of the material because in fairness to an accused person it may dictate that the prosecution not proceed even though there is otherwise a reasonable prospect of conviction. If we cannot disclose important disclosable material then I need to consider it and assess the unfairness that is visited on an accused person by not being able to access that material.

The Hon. TREVOR KHAN: I think you have probably got us all onside on that.

The CHAIR: That is procedural fairness—inherent in that is the fairness which is owed to the accused.

Mr BABB: Absolutely.

Mr RON HOENIG: In other words, if you are aware of exculpatory material that could not be produced and it impacts upon the fairness of a trial, you may decline to prosecute for that reason.

Mr BABB: There are a number of options. I may decline to call evidence in a particular case entirely because I cannot disclose the fact that that person is an informer, for example. I may decide that that is not sufficient protection to the fairness of the hearing and that the trial simply should not go ahead in light of the legitimate public interest in not disclosing the material. So, yes.

The CHAIR: Mr Babb, Mr Hoenig has expressed a view that he would like to ask you some questions but those questions relate to a matter which he wanted to ask you without the gallery being in attendance, so I am going to ask that the gallery be cleared for a period of time while he asks those questions.

(The witnesses withdrew)

(Short adjournment)

(Evidence continued in camera)

(At the conclusion of the evidence in camera the public hearing resumed)

DAVID DANIEL LEVINE, Inspector of the Independent Commission Against Corruption, on former oath

JOHN CECIL NICHOLSON, Assistant Inspector of the Independent Commission Against Corruption, on former oath

SUSAN RAICE, Principal legal Advisor, Independent Commission Against Corruption, on former oath

The CHAIR: We are back in session.

Mr LEVINE: I think Mr Hoenig was talking about Mr Phuong Ngo.

The CHAIR: He was.

The Hon. LYNDA VOLTZ: I do not think we had mentioned who.

Mr LEVINE: On whose appeal I sat, by the way.

Mr RON HOENIG: Just as well you were not looking at my text messages at the time because he would have been the subject of some criticism. The ICAC is a statutory body that is part of the executive body conducting examinations of corrupt conduct in accordance with their Act. That is its status, is it not? It is an investigative body?

Mr LEVINE: Yes. Are they conducting examinations of corrupt conduct, or are they conducting an investigation as to whether there is corrupt conduct or has been corrupt conduct is an important distinction.

The CHAIR: Can you make that distinction?

Mr LEVINE: The question assumes that there is corrupt conduct.

The CHAIR: Yes.

Mr RON HOENIG: When they conduct an investigation and lead evidence for that purpose, they do not, in that process, test the credibility of the witnesses that they call, do they?

Mr LEVINE: I do not know. I will be honest, at some point they do because in relation to those matters in which there has been public hearings which then gives rise to a report being filed with this Parliament, they make findings about credibility, so presumably at some stage there has been a testing of credit.

Mr RON HOENIG: I have not observed, in the limited number of transcripts I have read, cross-examination by Counsel to test the credibility of witnesses, their ability to recall and their motives. There does not seem to be the same extent of testing of evidence as there would be in adversary proceedings.

Mr LEVINE: Yes.

The CHAIR: Is that a defect? Should there be?

Mr LEVINE: If it leads to an adverse finding then it is an immense injustice rather than a defect.

Mr RON HOENIG: Ultimately, if they are making administrative findings of corrupt conduct against an individual on evidence that is not admissible and has not been tested then that is a concern, is it not?

Mr LEVINE: Yes.

Mr RON HOENIG: It does not apply like that in practice. In reality it is simply an administrative body conducting an investigation. When it makes a finding it should have the status of only an investigative body making a finding.

Mr LEVINE: Yes.

Mr RON HOENIG: But in practice it gives the impression to the public that it is similar to the adversarial justice system. As a result, its findings are given similar effect as judicial findings.

Mr LEVINE: Are you asking me to agree with the proposition that the ICAC is, in effect, committing a fraud upon the public? That is what you are suggesting.

Mr RON HOENIG: No. It is discharging its responsibility in accordance with its Act. I am talking about how the public view it. After all, it sits in what looks like a courtroom, with barristers appearing. To the public at large it looks like a court, does it not?

Mr LEVINE: Do you mean in public hearings?

Mr RON HOENIG: Yes.

Mr LEVINE: I have never seen one in which, after someone like Mr Watson has exercised an apparently exclusive right to be filmed while making an opening address, any member of the Bar at the Bar table has taken such an approach or performed in a way that one would expect in the adversary system. I have not seen that. I am not in a position to go into the mind of the ICAC as an institution to suggest that it is deliberately seeking to create a false impression in the mind of the public. I will not do that.

Mr RON HOENIG: The concept of procedural fairness does not apply under the ICAC Act, does it?

The CHAIR: The rule in *Browne v Dunn* does not apply.

Mr LEVINE: I do not think you will find in the ICAC Act a section that says, "Procedural fairness does not apply," but there is a section about informality.

The CHAIR: You have made recommendations, have you not, that certain things should be done that are analogous to procedural fairness? For example, you have recommended that the person be made aware when the summons is issued.

Mr LEVINE: Yes. Notice should be given. The Act says:

> (1) The Commission is not bound by the rules or practice of evidence and can inform itself on any matter in such manner as it considers appropriate.
>
> (2) The Commission shall exercise its functions with as little formality and technicality as is possible, and, in particular, the Commission shall accept written submissions as far as is possible and compulsory examinations and public inquiries shall be conducted with as little emphasis on an adversarial approach as is possible.

Then there is an exception in relation to religious confessions under the Evidence Act 1995. It is open slather.

Mr RON HOENIG: Would you recommend that the Committee review that provision?

Mr LEVINE: Too right. That brings me to something I said in my report, which generated a response from the ICAC, I believe, about there being some set of rules even for the ICAC. In 2005 the Uniform Civil Procedure Rules for New South Wales were introduced. There should be a set of rules about what can and cannot be done, like practice rules.

The CHAIR: It appears to be an uneven fight. The ICAC is not subject to any rules in relation to what it can do, yet it imposes a set of rules on those people who are representing accused persons. They are not able to make opening addresses or explore the credibility of witnesses who appear before them. You would agree with that as a proposition?

Mr LEVINE: If that is the case, yes.

The Hon. TREVOR KHAN: Some rules of fairness that might apply could be different at different stages of the investigation that ICAC is undertaking, could they not? For instance, what a person who is called before ICAC needs to know about why they are being called for a compulsory examination and what is done in that compulsory examination may be entirely different from what is appropriate in a public examination that a person may be put through. Would you agree with that proposition? For instance, if you call somebody before a compulsory examination and ask them a series of questions they may not know what is going on. Until that compulsory examination is published, it could be a fishing exercise but it may be useful in identifying corrupt conduct without any damage being done to anyone, including the person being questioned. That would be right, would it not?

Mr LEVINE: Yes.

The Hon. TREVOR KHAN: The problem with not having procedural fairness as allowed under the rule in *Browne v Dunn* applies in particular to the public examination phase, when such things as opening addresses are allowed or not allowed and Counsel is allowed or not allowed to ask questions on a particular field. That is the problem. We have moved from an investigative procedure to a far more formal, court-like procedure.

Mr LEVINE: One could ask even in the private hearing or private examination: Why should the person being examined not have the right to say, "Whilst we are in private I would like to present this evidence."

The Hon. TREVOR KHAN: That may be quite a reasonable proposition.

Mr LEVINE: I do not know whether, if that situation arose before ICAC, that person would be permitted to do so; I just do not know, but that would be a level of procedural fairness that would not trouble me.

The Hon. TREVOR KHAN: Can I just ask that? Would you assert that in the compulsory examination phase, for instance, it would be necessary for Counsel or the lawyer who is appearing with the person of interest or the witness to have any rights to intervene in the proceedings at that stage; to ask questions, for instance?

Mr LEVINE: Yes, procedural fairness to me would underpin that. The fact that it is a private examination, in my view, does not exclude the rules of procedural fairness. I agree with something that you said right at the beginning that the current state of the law, as I understand it, is that there are various levels of procedural fairness and those levels are often determined by the nature of particular proceedings. I cannot expand upon that because that is a little out of date but in the instance to which we have just referred, I cannot see why in a compulsory examination the rules of procedural fairness should be excluded. There might be reasons for limiting them but I do not see any reason, merely because it is a compulsory examination, for the person to be denied some fundamental procedural fairness, one of which would be, "Well, if you put A, B, C, D and E to me, here we are in secret, I can answer that by putting E, F, G and H". That is fair and that might close one area of the investigation off completely.

The CHAIR: I take you back to the issue of public hearings. Justice Peter Hall has made a suggestion that the jurisdiction of ICAC, as contained in section 12, relates to serious corrupt conduct or systemic corrupt conduct and has suggested that section 31 relating to public hearings be amended to only allow the having of public hearings in circumstances where the ICAC is alleging serious corrupt conduct. Do you agree with that as a proposition?

Mr LEVINE: I do. That was His Honour's paper.

The CHAIR: In fact, he suggested an amendment to section 31 (1) to make that a compulsory criteria for holding a public hearing and not discretionary as contained in section 31 (2). You have been critical of the notion of public interest and how that is assessed. There also seems to be some tortuousness in relation to the interpretation of the concept of corrupt conduct and we apply the notion of corrupt conduct to all sorts of things which do not fit within the ordinary meaning of corrupt conduct. Do you think there should be some narrowing of the definition of corrupt conduct?

Mr LEVINE: Yes. Where in the context of corruption there is an area of doubt, look at it and clear it up. There should be no room for questioning whether something is serious corrupt conduct. That should be defined either by statute or by a judgement or something, so I am agreeing with you.

The CHAIR: One of the other issues you raise is in relation to the so-called exoneration protocols which have been largely vilified. However, the absence of merits review is what underpins your call for some sort of exoneration protocol. I put this as a proposition to you: in circumstances where an adverse finding is proposed against a person of interest, generally the person of interest is given an opportunity of making a submission. That submission generally is the subject of a suppression order. Would you, as an alternative to your exoneration protocol, support a proposal that the submission of the person of interest be reported by the ICAC, as part of its proposal in circumstances where a finding is made which does not allow a merits review and we do not have the opportunity of hearing from the person of interest against whom the adverse finding is made?

Mr LEVINE: As a general proposition any person against whom an adverse finding is going to be made was made should have the benefit of it being made public that that person's position is otherwise. I will take this opportunity, Mr Chairman, in relation to the vindication protocol, of admitting that those two words came to me at this table the last time I was here out of my lightning-like intellect. They fell out of my mouth and I have been stuck with them ever since.

Mr KEVIN HUMPHRIES: So it doesn't strike twice.

Mr LEVINE: It was a form of getting to the position where if a person is vindicated in court proceedings following an adverse finding by ICAC, there should be some mechanism for having the vindication of the court, in my view, transcend the antecedent adverse finding of ICAC to draw in one of the—we will be here all day—I invite your attention to the pieces of paper that Mr Watson saw fit to lay before you about the comparison between a judge and the magistracy at I think paragraph 26.

Mr RON HOENIG: Can I just ask you, if there are public hearings should the Commission be obliged to call both inculpatory and exculpatory evidence?

Mr LEVINE: Yes.

Mr RON HOENIG: If the Commission is making adverse findings of corrupt conduct, should it do so applying the laws of evidence, or should it be able to take information from anywhere?

Mr LEVINE: Under the statute presently they can inform themselves in any way at all. That is not an uncommon statutory provision for bodies such as ICAC. I happen to know from experience in relation to the Defence legislation that a similar regime can exist there. I have not been persuaded, in the two-and-a-bit years that I have been honoured to be the Inspector of the ICAC, that there is any sound reason for the rules of evidence not applying.

Mr RON HOENIG: Not applying?

Mr LEVINE: Not applying.

The CHAIR: In view of the time, and the fact that you have been with us for some time—and because there are other witnesses we want to hear from—would you be happy to take any further questions as questions on notice?

Mr LEVINE: I was just beginning to enjoy it!

The CHAIR: You were warming up to the task. I know that Members do have some other matters that may want to raise with you so if you are happy to take those on notice—

Mr LEVINE: Yes.

The CHAIR: —we will thank you for being here today.

Mr LEVINE: I would like to make a comment, because, as I said in my opening remarks, this might be the last time I will have the pleasure of appearing before this Committee. The whole issue is so profoundly important it has to be tidied up. I have been here three or four times and there has been one step forward and two steps back. Frankly, I really do not know to what end I am here today—other than the end that has always been raised in this Committee: Does ICAC work and is there a better way of doing it?—and the like.

My suggestion ultimately flowing from my report is: one more time, at least, get another panel made up of people not connected, hitherto, with ICAC, to see if something can be done. The other thing I would want to stress—because a suggestion has been in the papers you have received to the contrary—is that I reaffirm my support for the existence of a body such as ICAC, particularly one that has the benefit of a strong oversight body. Thank you.

(The witnesses withdrew)

ROBIN SPEED, President, Rule of Law Institute of Australia, sworn and examined

The CHAIR: Thank you for appearing before the Joint Committee today to give evidence. Before we proceed, do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Mr SPEED: No, I do not.

The CHAIR: Is there any opening statement you wish to make before we go to questions?

Mr SPEED: I was going to make an opening statement but, having regard to the shortness of time—

The CHAIR: Would you like to abridge your statement?

Mr SPEED: No.

The Hon. LYNDA VOLTZ: You can always table it. This submission is not representative of the Rule of Law Institute, is it? Is it your own submission?

Mr SPEED: Yes, it is my own submission but I have made it clear that other members of the institute may have a different view.

The Hon. LYNDA VOLTZ: Did you go to the issues that were raised—other than the Kear case—to look at issues such as section 22 and the use of the word "forthwith" in those notices to produce?

Mr SPEED: No, I have not.

The Hon. LYNDA VOLTZ: So it is specifically one case that you have referred to.

Mr SPEED: It is one case that I have looked at—a real case; ICAC operates in practice—and it has implications across the ICAC Act.

The Hon. TREVOR KHAN: If we are looking at the possibilities—I think you were here whilst the Inspector was here—what rules and procedural fairness would you see would be appropriate to apply to compulsory examinations and then to public hearings?

Mr SPEED: There are two issues there. The first issue is that you have to get the culture of the organisation correct. There is no point in having an amendment to the Act, and there is no point in having procedural fairness, without the culture of the organisation being correct.

I would like to suggest that the culture is clearly wrong. It does not work. You have to address that issue first. Then you have to address the separate issue of procedural fairness. Procedural fairness generally has to be followed but there are exceptions to it. I recognise that there are exceptions to it but you have to start off with the culture of the organisation.

The Hon. TREVOR KHAN: Taking into account that my question related to procedural fairness issues, are you able to identify the sorts of rules that you would seek to see apply in compulsory examinations and then, if there are to be public hearings, the sorts of rules that you would seek to apply in public hearings.

Mr SPEED: The Kear case is a real example of how it works. It was clear in the Kear case that the evidence—the possible witness statements—was not produced that should have been produced. The hearings should have dealt with all the witness statements. It either did not deal with them or dealt with them in a partial fashion. So, in respect of whether procedural fairness applies, an essential part of procedural fairness is to make sure that all the evidence is available.

The Hon. TREVOR KHAN: You would see that there would be similar rules that apply under the Criminal Procedure Act in terms of service of a brief in a timely manner?

Mr SPEED: Yes, both at the level of an ICAC hearing and also at the level of instituting proceedings because in the Kear case neither applied, neither were observed. There was neither observance of that nor observance in the prosecution proceedings.

The Hon. TREVOR KHAN: Taking into account that I think probably all people here have read your submission and some of us might agree with some or all of what you say, in terms of a public examination you would see the service of a brief with all material upon which the Commission would rely. Would there be any other procedural fairness rules that you would see applying?

Mr SPEED: In the sense of if ICAC is likely to make an adverse finding then it would obviously be in accordance with procedural fairness that you be given the opportunity to respond to that. The practical effect of

ICAC handing down its decision or carrying out a public inquiry has great consequences and so you must give the individual the opportunity of putting the contrary position even if it is not accepted. I would expect that procedural fairness would require any adverse submissions or any adverse likely findings to be made available to the person and they be given an opportunity to address it publicly. I can see no reason why those submissions should be kept in private. I think you cannot have this idea of the Commission dictating what will be dealt with in private and what will be dealt with in public because it leads to obvious great unfairness because it just leaves evidence which is favourable to the Commission and you never hear the evidence which is to contrary. That is exactly what happened in Kear.

The Hon. TREVOR KHAN: Are there any other rules of evidence that you would see as appropriate to apply to public examinations?

Mr SPEED: None that immediately come to mind.

The CHAIR: Would you advocate, for example, that the credit of witnesses be able to be tested by the person of interest or representatives of the person of interest?

Mr SPEED: Yes, I would regard that as procedural fairness because certainly you would want to test those witnesses. Particularly when they are able to say matters which are not based on admissible evidence I would want to test that.

Mr RON HOENIG: When you refer to the Commission's culture do you mean that they are pursuing their theory of the matter to the exclusion of other matters? Is that what you are talking about?

Mr SPEED: What I mean by that is, again taking the Kear case because I think you have to take a real case to understand how the ICAC really operates, there was the failure of ICAC to come out with any sort of an apology or any sort of a statement. Contrary to that you have David Ipp, who comes out with an attack on Murray Kear. The whole culture of the organisation is that they are totally infallible. They cannot bear the thought of making a mistake and they will not ever admit they made a mistake. I think that is wrong and I think that is an example of what their culture is. If you appear before the ICAC it is exactly the same culture. If they make a finding it is exactly the same culture. When they are briefing the DPP it is exactly the same culture that we will keep things secret to ourselves because we know what is good for you. That is what I think is so unfair to the average person.

The Hon. LYNDA VOLTZ: To an extent they are acting within the Act that they are given by the Parliament, are they not?

Mr SPEED: I do not agree with that. What the Act says is that they must be independent and accountable.

The Hon. LYNDA VOLTZ: That is what the Act says because we gave them that power, yes?

Mr SPEED: That is right, but you asked me the question whether or not they are acting within the power.

The Hon. LYNDA VOLTZ: No, I said they are acting within an Act of Parliament that we gave them.

Mr SPEED: Yes, but I do not accept that. I think if you look back five years and you ask the question why is it that this present confrontation did not exist over five years ago, I suggest to you that is both situations—one was occurring largely because what has now happened is a complete change in culture.

The Hon. LYNDA VOLTZ: You would say it did not happen under O'Keefe but it is happening now. Is that what you are saying?

Mr SPEED: Exactly right. It is a change of culture from the personalities that are involved and that culture therefore extends down to all of their investigating officers. Those investigating officers then look at the matter through effectively suspicious eyes, which they should do, but they close them when it comes to any evidence which favours the person concerned.

Mr PAUL LYNCH: When do you say that change of culture occurred?

Mr SPEED: That occurred approximately five or six years ago. When you appeared before ICAC in the old days that was quite a different culture. What you have now is a culture of infallibility and I suggest to you that has occurred in the last five years.

Mr PAUL LYNCH: You say that was not the approach of ICAC prior to that?

Mr SPEED: No, we never had all this confrontation and these issues which now arise over five years ago.

Mr PAUL LYNCH: How closely have you followed ICAC hearings?

Mr SPEED: I follow them closely.

The Hon. LYNDA VOLTZ: I am wondering why you think that is a new view then. I can think back to a number of cases ranging back well over a decade that there have been these views about.

Mr SPEED: I would like to suggest to you that the intensity of them and the volume of them is much greater now than then. The point is not so much whether that is right or wrong. I may be wrong on that, you may be right. The point is that today you have a situation where the culture of ICAC is wrong.

The CHAIR: Maybe consistent with your view is that the culture potentially changed—and you may have heard Mr Levine refer to this—when ICAC allowed Counsel Assisting to perform in the way that it performed. Is that consistent with your view about a change in culture?

Mr SPEED: Yes, it is. Yes.

Reverend the Hon. FRED NILE: Is that the fault of the recent Commissioners? Are they the ones who have deliberately changed the culture?

Mr SPEED: Yes.

Reverend the Hon. FRED NILE: To get results?

Mr SPEED: Yes, and this question about public examination is a really difficult question for lawyers because all lawyers are trained that they should have them in public. That is what all lawyers want to have. But the problem is exemplified by Kear that as soon as you get people with that sort of power you have a transformation of the organisation. You have the effect that the public inquiries are used to be a public execution. The public inquiry becomes a public execution. In the old days of the Star Chamber they all did it in private but it has now reversed itself, if you can understand that. Not on every occasion but they use the public hearings when they have already made up their mind—as in Kear—what the result is and the reason they have the public investigation is to execute the person.

The Hon. TREVOR KHAN: The investigation or the public hearing?

Mr SPEED: The public hearing. I mean, I dramatise for the purpose of effect but that is the situation. The public is normally welcomed in any of those sorts of proceedings until it is used by that organisation for unworthy principles. In that sense people then want to make a flowery statement, they want to make presentations. In that circumstance it becomes inverted; the fact that it is being held in public is then used to say that we will do this because we will effectively damn the person for what we think he has done wrong.

The Hon. TREVOR KHAN: Is not one of the bases underlying the Act and why we adopted public hearings in the first place because there is an educative benefit in exposing corrupt conduct?

Mr SPEED: That is exactly right.

The Hon. TREVOR KHAN: That is not about public execution. That is about demonstrating to the public that there are areas of public administration where corrupt conduct occurs from time to time.

Mr SPEED: Can I suggest to you that is a change of culture and I illustrate it this way: Assuming that this Committee has an agenda before I even walk in the room—

The Hon. TREVOR KHAN: Which inevitably all of us will.

Mr SPEED: In that sense, this Committee could then exercise its powers to control effectively who is called and in what order they are called and in what importance they are called.

The Hon. LYNDA VOLTZ: That is exactly what happens, isn't it?

Mr SPEED: Effectively you could use these proceedings to gain whatever advantage you wished to gain out of them.

The Hon. TREVOR KHAN: Yes.

The Hon. LYNDA VOLTZ: It is the very nature of politics.

Mr SPEED: It is the nature of politics, but it is different here. It is different because it is ICAC and ICAC is not a political organisation. ICAC is not there doing that organisation. When you have ICAC performing this function, it is not a political organisation.

The Hon. LYNDA VOLTZ: I am not saying they are. It is your assertion that we would not do that here that I question—anyhow.

The CHAIR: Does anyone else have any further questions?

Reverend the Hon. FRED NILE: Do you think the Commissioners have been encouraging the Counsel Assisting the Commission to take on this more theatrical role as has been occurring in recent years?

Mr SPEED: Unquestionably yes.

Mr PAUL LYNCH: For completeness I put it to you, Mr Speed, that the culture and the performance of ICAC hearings now is no different to the way that things were carried on in the Driver Examiner Inquiry 25 years ago.

Mr SPEED: Can I suggest to you that that is actually irrelevant, because whilst I said it was different it makes no difference to the point. The point is: What is the culture today and what should be done to change the law? That is the question.

Mr PAUL LYNCH: Except that you said the culture has changed as part of your argument. If you are now retreating from that argument, that is fine, but that should be on the record.

Mr SPEED: No, I am not retreating from the argument, but do you want to debate about whether it has changed or not? I am happy to have that debate. What I am saying to you is that in the shortness of time the question is whether or not this culture is there today and how best to fix the problem. If you want to debate whether I am right or wrong about five years ago, I am delighted to do that.

The Hon. LYNDA VOLTZ: No. We put to you that we were—

The Hon. TREVOR KHAN: It is essentially called the rule of Browne and Dunn.

Mr PAUL LYNCH: Yes, precisely—because I was in the driver examiner inquiry 25 years ago and I know exactly what ICAC was like then.

The CHAIR: Does anyone else have any further questions of Mr Speed?

Mr RON HOENIG: I ask one quick question. Do cultures of organisations occur because of the quality of the oversight?

Mr SPEED: Yes. Do you mean the oversight inside the organisation?

Mr RON HOENIG: The oversight of the organisation.

Mr SPEED: Of course it must do. Whoever is the Chief Executive effectively creates his own culture for that organisation. In business you see it all the time.

The CHAIR: I think Mr Hoenig is—

Mr RON HOENIG: I am talking about the oversight of the Commission itself.

Reverend the Hon. FRED NILE: The Inspector.

Mr RON HOENIG: Any form of oversight—I mean, if there is effective oversight of the organisation, does that prevent adverse cultures developing?

Mr SPEED: No, it does not, because it is too late. It is too late and it is too little. If you take the role of what the Inspector can do, for example, or what your Committee can do, you are essentially too late and too little and the culture already exists. The culture comes from the Chief Executive—here, the Commissioner—and it does not come from you, nor does it come from an Inspector. It always must come from the Chief Executive. The buck stops with him. That is why we have had no apology or statement of regret by the Commissioner about what has happened to Murray Kear—dead silence. That sends a message to the whole organisation that this treatment effectively will all go away. No-one will really hear about it. You do not hear of anybody being sacked or the subject of any inquiry—that is all silent. That must send a message to everyone in the organisation that they can get away with that.

The CHAIR: If there are no more questions, thank you very much, Mr Speed. You have been very helpful.

(The witness withdrew)

HARVEY COOPER, AM, former Inspector of the Independent Commission Against Corruption, sworn and examined

The CHAIR: I welcome the Hon. Harvey Cooper, AM, former Inspector of the Independent Commission Against Corruption. Thank you for appearing before the Committee today to give evidence. Before we proceed do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Mr COOPER: No.

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

Mr COOPER: Yes. I have indicated in my written submission I do not want to repeat what has already been postulated by other people. I want to concentrate on the relationship between the Independent Commission Against Corruption [ICAC] and its Inspector. I just want to add something to the first submission I made, that the power of the Inspector should be increased as the current Inspector postulates. I think this overlooks the fact that the Inspector already has power to require information, documents, et cetera, from the ICAC.

My personal practice when I received a complaint was to obtain a copy of ICAC's files and look at them, and you would very quickly determine whether a particular decision that they have made was sustainable or not. Usually they were. On occasions I felt that perhaps ICAC should have followed up another line of investigation than it did. I made a suggestion or recommendation to the Commissioner that that be done and invariably my recommendation was followed. So really the Inspector does have in fact considerable power to do things and to correct what might be errors on the part of ICAC. That is the main thing I wanted to say.

So far as the other two recommendations I have made, it may seem quite strange that one should ask the Parliament to legislate for procedural fairness. The point I have tried to make in my submissions and arguments in support is that the person who is exercising the duties can have a magnificent career on the bench, at the Bar and in other fields of service to the State, but a time can come when that person just falls into error. What I have suggested will not stop that happening but hopefully it will reduce the harmful effects that might follow from it. That is all I wanted to say.

The CHAIR: Does anyone have any questions for Mr Cooper?

The Hon. LYNDA VOLTZ: Sir, given your opening statements, I am not sure now if this is an appropriate question to ask. I know you have been sitting here and have heard some of the concerns that have been raised.

Mr COOPER: I have been sitting but I have not been able to hear them.

The Hon. LYNDA VOLTZ: You have not been able to hear them?

Mr COOPER: Yes.

The Hon. LYNDA VOLTZ: That kind of makes my first question difficult.

Mr KEVIN HUMPHRIES: Is it a cultural issue?

The Hon. LYNDA VOLTZ: No, it is not a cultural issue, although I am sure Mr Cooper probably has some questions in regards to that. In regards to the issue of ICAC and how it operates, you had been the Inspector of ICAC for quite some time previously to the current Inspector.

Mr COOPER: Five years.

The Hon. LYNDA VOLTZ: The fundamental issue of ICAC has always been the idea that it seemed in some people's eyes as almost replicating what the police do; that it is a court of law that operates along certain rules of evidence and chains as opposed to perhaps its legislative role, which is almost that of a Royal Commission that operates with special powers and gathers evidence in a completely different way. That unresolved view between the two different camps seems to lie at the core of why we have these arguments around procedural fairness. I do not think that there is ever going to be a way to resolve that, but you may have a view on that.

Mr COOPER: Well, let us put it this way: I do not see any conflict there because the function of the police is to go out and gather evidence—evidence which will be admissible in a court of law in a criminal trial. That is not the function of the ICAC. The function of the ICAC is to root out corruption by means which the police cannot do and also to establish facts to a lesser standard of proof than exists in the criminal jurisdictions.

Clearly, you are going to get a complete opposition of views there. Now, there are those who hate the police and there are those who hate ICAC. I am afraid we cannot do anything about that. Perhaps we need to make the functions of ICAC clearer to the public rather than have a complete change of policy or functions.

The Hon. LYNDA VOLTZ: One of the fundamental underlying methods for ICAC is actually the exposure of corruption. It is not necessarily the convictions, which if the police could get them they would get; it is the exposure of corrupt or questionable practices, and the public hearings form an important part of that exposure.

Mr COOPER: It does.

The Hon. LYNDA VOLTZ: And, indeed, without them those actions would probably not come to light.

Mr COOPER: They probably would not.

The Hon. LYNDA VOLTZ: And it is the fear of the exposure of those practices—and this is a fundamental tenet of the ICAC Act—that actually changes behaviour within the public sector in terms of corruption.

The Hon. TREVOR KHAN: Or at least you would hope so.

Mr COOPER: It used to be called, not so much the fear of exposure, but a breach of the eleventh commandment—do not get caught. I think there are a few getting caught. What is it? There is no more careful driver than the one who has a police car following him.

The Hon. LYNDA VOLTZ: Yes. That explains the Hon. Trevor Khan's driving.

The CHAIR: You may or may not have heard evidence given in relation to the Murray Kear case. Do you agree that in respect of evidence which is provided by the Commission to the DPP it should include all evidence, including exculpatory evidence?

Mr COOPER: Of course. Yes, definitely.

The CHAIR: So it would be wrong if the ICAC withheld evidence from the DPP in circumstances where it would be exculpatory?

Mr COOPER: If it knowingly withheld such evidence, I would regard it as the same as if a Crown Prosecutor knowingly withheld evidence during a criminal trial—that is, withheld such exculpatory evidence during a criminal trial.

The CHAIR: And you agree with this as a proposition that, in the event that there was material related to the credit of a person that was relied upon for a finding by ICAC, then at least the person of interest or against whom a finding may be made should be given an opportunity of testing that credit.

Mr COOPER: You mean testing it during the course of a public hearing?

The CHAIR: During the course of a public hearing.

Mr COOPER: Yes.

The CHAIR: They are procedural fairness-type notions, are they not?

Mr COOPER: Of course.

The CHAIR: And they should be applied.

Mr COOPER: Yes.

The Hon. TREVOR KHAN: Since we have dealt with exculpatory evidence in the context of a criminal trial being available, should a person of interest in an ICAC inquiry be entitled to be provided with exculpatory evidence that ICAC has obtained during the course of their investigation?

Mr COOPER: The answer is, generally, yes. Then we get to the question of what is exculpatory. For example, if it were that there is a person alleged to have offered a bribe to a council officer at a particular time and place, and he denies it, and there was evidence from other sources that the person of interest was not anywhere near there; he was having a holiday over in Fiji. Well, that would be exculpatory evidence and one would certainly hope that that would be brought up and disclosed.

The Hon. TREVOR KHAN: Of course. But say in the Kear case, it would seem that material available to ICAC not only at the end of its investigation but, it would seem, at the time of its compulsory

examination, which was exculpatory of Kear, was not disclosed to Kear either during the public examination or subsequently.

Mr COOPER: Well, look, I do not want to answer a question about a specific case, about which I know virtually nothing.

The Hon. TREVOR KHAN: That is all we can really go on.

Mr COOPER: I will certainly answer in terms of a general principle. As a general principle, I would expect as a matter of fairness that exculpatory evidence would be adduced to the Commissioner and made available to the person of interest.

The Hon. TREVOR KHAN: Can I just ask you on that: You say "adduced to the Commissioner". In the nature of the inquiry that the Commissioner is undertaking, the evidence that is produced in the course of a public examination is either going to be available to the Commissioner because it has been adduced for the first time or, alternatively, has been collected by the Commission in the lead-up to that hearing and has been available to the Commissioner prior to the actual adducing of the evidence. Is that not right?

Mr COOPER: Yes.

Mr RON HOENIG: Or Counsel Assisting.

The Hon. TREVOR KHAN: No. I am not dealing with Counsel Assisting. I am dealing with the Commissioner because the nature of the proceedings is not the same as of a judge. The Commissioner actually has intimate knowledge of the nature of the material that will be introduced in the public examination.

Reverend the Hon. FRED NILE: And is an active player.

The Hon. TREVOR KHAN: And is an active player. Yes, that is right, is it not?

Mr COOPER: Yes.

The Hon. TREVOR KHAN: You are agreeing with that proposition?

Mr COOPER: Oh, yes, certainly. I think there should be procedural fairness all round.

The Hon. TREVOR KHAN: Excellent. Good. I am finished.

Mr COOPER: No argument about that, with me anyway.

The Hon. LYNDA VOLTZ: You are in furious agreement.

The Hon. TREVOR KHAN: He has clarified his position. I am happy.

Mr COOPER: But let me just say that you may get an argument in some cases as to whether procedural fairness requires production or disclosure of certain matters.

The Hon. TREVOR KHAN: Sure.

Mr COOPER: I am not in a position to argue any particular case on that.

The CHAIR: We heard also today about Counsel Assisting requesting that his opening address be televised. In your experience, was there any other occasion where Counsel Assisting sought that level of exposure?

Mr COOPER: When you say "televised", you mean publicly broadcast.

The CHAIR: Publicly broadcast.

Mr COOPER: Because I do know that the procedures in the public hall were televised, but privately. They were not broadcast. They were not for publication.

Reverend the Hon. FRED NILE: They were recorded.

Mr COOPER: Yes. They were recorded. Thank you.

The CHAIR: They were publicly broadcast.

Mr COOPER: Yes. Look, he can make whatever request he likes. It is up to the Commissioner to decide what to do and, if to allow it, then on what conditions it should be allowed.

The Hon. LYNDA VOLTZ: There you go.

Mr RON HOENIG: Mr Cooper, do you have an expectation before a public hearing commences when Counsel Assisting opens on the evidence that Counsel has the evidence on which he or she is opening?

Mr COOPER: One would expect so, yes. That, again, is part of the duties of Counsel, and I do not want to get into a fight as to what is the responsibility of the ICAC and what is the responsibility of Counsel. They are not necessarily aligned. I would expect, speaking as a former barrister, that you do not start putting propositions unless you have something to support them.

Mr RON HOENIG: The same would apply to Counsel's questioning as well, would it not?

Mr COOPER: Yes.

Mr PAUL LYNCH: Unlike questioning in parliamentary Committees.

The Hon. LYNDA VOLTZ: I am finished. Thank you.

The CHAIR: Are we all done?

Reverend the Hon. FRED NILE: We had a quick discussion that the culture of the ICAC has changed. You were there for five years. Have you discerned any change?

Mr COOPER: The first Commissioner was—

The Hon. LYNDA VOLTZ: Mr Temby.

Mr COOPER: No, sorry, the first Commissioner I dealt with was—this is what happens when you get old.

The CHAIR: Mr O'Keefe?

The Hon. TREVOR KHAN: Not only when you get old.

Mr COOPER: The predecessor to me.

The CHAIR: Mr Cripps.

Mr COOPER: Of course, Jerry Cripps. Sorry. He had his own way of doing things, very thorough, moved at a steady pace. That was his way of doing things, but I got on well with him. I thought he was a very fair person, always prepared to listen to what I said. He did not necessarily agree with it, but that does not matter, he listened and we got on well. Mr Ipp was a more active type of person. His policy was to get more work done, more investigations done and he, to a great extent, altered the investigation staff; he increased it so that he could increase the amount of work. Of course, when he started on the Obeid and other kindred matters, that was time-consuming hard work. That was the difference in culture that I saw. I had no dealings at all with Ms Latham. She came after I retired. They both worked for the benefit of the ICAC as they saw it.

Mr CHRIS PATTERSON: Sir, from your opening and following on from Reverend the Hon. Fred Nile, it seems evident that you had a healthy or respectful relationship with the two Commissioners that you worked with over the five-year period. Is that accurate? It comes across that way.

Mr COOPER: I would hope it was. We both started off our respective posts as saying, "Look, we have different functions under the Act, but ultimately the goal we have to work for is the same. Let us not have a fight about whether we should do this or do that, let us sit down and work things out." You would go down and have a cup of coffee, have lunch together. It is amazing what may appear to be problems how easily they are overcome by a friendly chat. Particularly when you are dealing with people who are highly skilled, highly motivated and really want to get on with the job.

Mr CHRIS PATTERSON: With that in mind, I have two quick questions to finish. If that was not the case or the relationship clearly had broken down, hypothetically, would you say that that would have an impact on the Commissioner and/or the Inspector to do their job?

Mr COOPER: Theoretically, no, but in practice it has to. When you have a breakdown, you cannot ring up someone and say, "I am looking at this particular thing. Why did you do that?", or, "Why did you not do something else?" You cannot do that with relationships breaking down. If you have got a good relationship, you can. What appears to be a problem may well not be a problem. I was lucky. I had two very fine Commissioners and no trouble at all.

Mr CHRIS PATTERSON: I am happy if you take this on notice, if that relationship had broken down, do you have any thoughts from your experience how you would fix that? I know you have suggested a good lunch? Would there be any other ways?

The Hon. LYNDA VOLTZ: A good lunch is always the best way to go.

Mr CHRIS PATTERSON: Not necessarily a long lunch, a good lunch.

Mr COOPER: A good lunch was part of the good relations. I do not know. I honestly do not know how you can repair a breakdown in relations, particularly when we are dealing with people who have occupied highly responsible positions. They are used to making decisions and sticking by them. They are used to having power over other people, so it becomes very difficult to achieve any rapprochement if they do not want to have a rapprochement. I am sorry—

Mr CHRIS PATTERSON: That is very helpful, thank you.

The CHAIR: No further questions? Thank you very much. I apologise for delaying you from giving your evidence.

(Luncheon adjournment)

BRUCE McCLINTOCK, Senior Counsel, affirmed and examined

The CHAIR: Good afternoon. Welcome, Mr McClintock. Thank you for appearing before the Joint Committee today to give evidence. Before we proceed, do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Mr McCLINTOCK: No.

The CHAIR: Do you have anything to add about the capacity which you appear?

Mr McCLINTOCK: The capacity in which I appear is, I assume, because I was one of the joint authors of the report last year, along with Mr Murray Gleeson, AO, QC, on the various aspects of the ICAC legislation prompted by the High Court's decision in the Cunneen litigation.

The Hon. TREVOR KHAN: Very prescient.

The CHAIR: You are also the author of a previous report, published in 2005, that led to amendments to the ICAC Act.

Mr McCLINTOCK: Indeed. There are number of parts of the ICAC legislation that I take responsibility for.

The Hon. LYNDA VOLTZ: That is a big call at this point in the Committee hearings.

Mr McCLINTOCK: I said a number, Ms Voltz, not all of them.

The CHAIR: The Committee has your submission. Is there any additional information that you would like to add? We have your email from yesterday, which we have included as a supplementary submission.

Mr McCLINTOCK: No. I am here to help the Committee as much as I possibly can. I will say two things. This legislation and this body are important and significant. There cannot be any doubt about that. It is very important that we get them right. The nature of the body, in many ways, was determined in 1988-89 when the Greiner Government first enacted it. Different models could have been followed then. The Committee will of course know these things. For example, Hong Kong has a completely different model, even though it is said that our legislation is based on that of Hong Kong. The Hong Kong model is a body that can inquire into any kind of corruption, whereas our ICAC inquires only into corruption in public administration. The Hong Kong body, for example, has its own armed police force.

The CHAIR: God forbid!

Mr McCLINTOCK: That is not something that anyone in this room would welcome for New South Wales. The point of mentioning that is to say that, while some of the decisions that were made back then were not set in stone, change could be very hard in some respects. I suspect it would be hard, for example, to extend the oversight of the body to all forms of corruption, such as corporate corruption, for example. There is nothing else I wish to say. As I said, I am here to help the Committee with anything it wishes to ask me about, within my areas of expertise.

The CHAIR: The New South Wales ICAC is held up as the model ICAC. It seems to be the ICAC that all other international bodies view as pre-eminent. Would you agree that is the perception?

Mr McCLINTOCK: It is very hard for me to answer that. If that is the view, in a sense it is inappropriate, not because of anything that our ICAC is but because the body in question has to be tailored for the jurisdiction within which it operates. For example, there are very different concerns in Hong Kong from those in New South Wales. I have to say that, from my observation, generally ICAC has worked well over the years. That is not to say that there could not be improvements in some areas. Obviously there could be—it is a human entity. That is one reason why I was so interested by what the Department of Premier and Cabinet had to say in its submission on the signature of Mr Comley because that suggests some governance changes, which seem to me, as I said in my email yesterday—

The CHAIR: Potentially reasonable.

Mr McCLINTOCK: Yes, and very worth thinking about. As I said in my email yesterday—and this is straying away from answering your question, so if you feel I should not please stop me—I hesitate to use the word "deficiency" but one of the issues with an organisation such as ICAC that is so dependent upon having one Commissioner is that its nature is determined by the personality of the Commissioner. As I said yesterday, if you bring a greater breadth of experience and a greater number of minds to the task it is highly likely that the functioning will be improved.

Mr RON HOENIG: I have a basic question. How do you reconcile in the public's mind the concept of the presumption of innocence with a finding that someone is guilty of corrupt conduct?

Mr McCLINTOCK: You have to step back and analyse what is happening and why ICAC was set up as it was. When the Greiner Government came to power there was a perception that there were unaddressed issues of corruption in New South Wales. It was thought by those structuring ICAC back then—so I understand; I was not directly involved, although was I Counsel Assisting in an inquiry into Randwick City Council not long after ICAC was established—that there was no way that those issues could be dealt with appropriately by the courts for a number of reasons, one of which was the lapse of time. The Government decided that there should be a special purpose ICAC body, empowered to make findings of corruption to which the rules of evidence could not apply—that is, it was set up as a special purpose investigative body with the power to make findings of corruption.

The presumption of innocence is something that applies in criminal cases and there is a loose analogy with ICAC where they have to be satisfied not just on the balance of probability but to a considerably higher standard—lawyers call it the Briginshaw onus—that the conduct has in fact taken place. It is obviously a very serious matter to make a finding of corrupt conduct and as I understand the position ICAC only does so when it is satisfied on that standard that it has been made. Does that answer your question? It may not.

Mr RON HOENIG: I suppose where you have an administrative body like ICAC making findings against individuals and the findings effectively are, for practical purposes, of a punitive nature should they, for example, be required to call both exculpatory and inculpatory evidence? Should they act on evidence that is admissible? I mean, the Briginshaw standard does not help much if the witnesses are not tested as to their credibility so should there be other procedural fairness-type provisions placed in their determination to ensure that those adverse findings are of substance?

Mr McCLINTOCK: Mr Hoenig, there are several question in there. I will see if I can remember them all. I will take them one by one. Should ICAC call exculpatory evidence? You have to remember that the ICAC process is an investigatory process and that the public hearings, which is what I think you are referring to—

Mr RON HOENIG: Yes.

Mr McCLINTOCK: —at the point at which they should call the exculpatory evidence is the culmination of an investigation and there will have been a substantial amount of work done by ICAC before then. If what you are suggesting is exculpatory evidence that would overcome the inculpatory evidence, one would hope that the Commission itself would take account of that and either not proceed with the public hearing or if it was a situation where, for example, they wanted the public hearing to exonerate someone, as sometimes happens, that they would put it forward. But if you are asking whether the legislation should be amended to do that, I think the answer is: If you have a body like ICAC those procedural matters are areas where you really have to trust the people actually running ICAC and the Commissioner. I do not think I need say any more. I think I have answered your question but, as I said, the overall thing is I do not think it is an area for legislation. ICAC obviously has strong due process procedural fairness requirements and if they do not comply with them they can and will be set aside by the Supreme Court. For example, you will remember Mr O'Keefe was disqualified by the Supreme Court from hearing an inquiry a long time ago involving—

The Hon. TREVOR KHAN: Because of comments that he made.

Mr McCLINTOCK: Yes, which showed a bias. It was the inquiry involving Ms Nori and Mr Kelly—no.

The Hon. LYNDA VOLTZ: Gibson.

Mr McCLINTOCK: Mr Gibson, yes, that is it.

Mr RON HOENIG: That is a classic one but generally speaking you know better than I the bar to get up in the Supreme Court is virtually impossible. It is not necessarily a protection, is it?

Mr McCLINTOCK: I think you are being a bit unfair on the Supreme Court, Mr Hoenig.

The Hon. LYNDA VOLTZ: Not for the first time.

Mr McCLINTOCK: That comes from someone like myself who makes a career of being unfair on it.

The Hon. TREVOR KHAN: If there are no requirements, for instance, to serve a brief, then one of the problems when you say, "Let's take it off to the Supreme Court", is that you may not know the evidence, both inculpatory and exculpatory, that ICAC has accumulated?

Mr McCLINTOCK: That is quite true.

The Hon. TREVOR KHAN: So that in those circumstances saying the answer is, "Well, you can always go off to the Supreme Court to fix your problems", if you do not actually know what was there, you are really pushing it up hill?

Mr McCLINTOCK: That is true, but again you have to remember, as I think I heard Mr Cooper say, you are dealing with people who have been judges—all of the Commissioners have been judges at some stage, with two exceptions; that is Mr Temby and Ms Moss. I would have thought they are the sort of people you can rely upon to comply with obligations of procedural fairness. It is very hard for me to comment on individual cases. I understand the reasons for the concern, which of course is a concern about whether this body is treating people fairly, and obviously I understand that, but one of the problems in a sense—and this comes from the original decision as to what it was going to be—is the hybrid nature of ICAC. It is a specialist investigative body. That is, in that sense it is like a police force.

The police force is not there, for example, to tell people what the evidence in their favour is. Obviously a prosecution later must do that but that is a different thing. In that sense, though, when it is investigating it does not. On the other hand, it has the power to make findings and make them public. That is the kind of thing that courts do but one of the things I tried to say in 2005 and jointly with Mr Gleeson last year is the perception of ICAC—and this is one of the areas where the problem comes from—that people think about it as if it were a court. It is not a court. It does not do the same things that courts do. That is the reason I recommended—I fear it had very little effect—the renaming the "hearings" as "investigations". I recommended that in order to make it look as though it was not a court. A lot of these things come from the very nature of the body that was created by this Parliament 27 or 28 years ago. It is always open the to Parliament to change those things. While ICAC has the current characteristics it is difficult to see how it can be done in any other way.

Mr RON HOENIG: So should the hybrid be removed and should it become the specialist investigator it is supposed to be so that people are actually charged?

Mr McCLINTOCK: That is how it is in the Hong Kong model. That is beyond my competence. That is uniquely a matter for you and this Parliament. I have my own personal views which come from my wider civil liberties concerns. Those are only my personal views and my views are no better, in that respect, than anyone else's. My expertise comes from the fact that I have looked at the legislation in detail on two occasions in the last 11 years. As I said, if you turn it into a Hong Kong model it would be a very different body. I can understand arguments in favour of widening it so that it did not merely deal with public administration corruption but also, for example, dealt with bribery in a corporate context. But that is really a matter for people charged with the administration of the law of this State, which is Parliament.

Mr RON HOENIG: How do you avoid the collateral damage that may flow? For example, the matter that prompted your review with the Hon. Murray Gleeson. Had that public hearing continued there would have been a substantial reputational impact upon Ms Cunneen, who ultimately was not charged and is presumed, by the law, to be innocent. In the case of Murray Kear, a magistrate made some very critical comments in respect of both the prosecution and the disclosure of material. Even in one of the recent reports there was no adverse finding against a Member of the Legislative Council but her career was finished as soon as—

The Hon. TREVOR KHAN: So was the dog's.

Mr RON HOENIG: Yes, so was the schnauzer's. How do you allow an organisation to do the very good work that it is capable of doing without the incidental collateral damage that can occur?

Mr McCLINTOCK: There are several ways that I could answer that question and they would all be accurate. One former Commissioner said to me in the course of the inquiry last year, not in any sense confidentially, "When I was ICAC Commissioner I used to insist that Counsel Assisting provided their openings"—that is, what they were going to say at the start of the public hearing—to me well before the inquiry started."

"I would go through them," he said to me, "and I would delete all of the adjectives." So he was conscious of the damage that Counsel Assisting can do in the way that Counsel Assisting opens a case. Please do not think that I am making any specific comments about any particular Counsel Assisting. If you have a body like ICAC you have to repose trust in the people who run it—that is, the Commissioner. And you really have to hope that they will control things in the way that that former Commissioner would have done. I am not saying anything about any particular Commissioners, either. I am not in a position to.

I do not see a way in which you could avoid that risk totally by amendment and still enable ICAC to do the job that it has. As I said before, it is a body that is critically dependent upon the personality of the Commissioner and, indeed, upon the personalities of Counsel Assisting. There are ways that those matters should be controlled, and I do not see that they are legislative ways.

The Hon. TREVOR KHAN: Legislatively—for instance under the Criminal Procedure Act—we set down various things that the prosecution must do in the lead-up to a trial. Those various steps are designed to provide a degree of fairness to an accused person. One is the requirement to serve a full brief of the evidence upon which one is to rely. You could pull all of those things out of the Criminal Procedure Act and say that it was up to the judge or justice to make a decision as to what is fair and reasonable to do in a particular trial—repose all discretion within that judge.

Mr McCLINTOCK: That was the case, in fact, for hundreds of years. I appreciate the fact that there is a reason it is in the Criminal Procedure Act.

The Hon. TREVOR KHAN: Indeed. That was because it did not happen.

Mr McCLINTOCK: I am not sure that it has been terribly effective.

The Hon. TREVOR KHAN: I know that. I know that you get terrible surprises along the way. But at least there is, in a sense, a set of principles upon which people are to proceed. At the moment if we take your example of leaving it up to the Commissioner, you would repose in that Commissioner a very wide discretion as to what they are going to do in their hearings.

Mr RON HOENIG: Hope and trust.

The Hon. TREVOR KHAN: Hope and trust, yes.

Mr McCLINTOCK: Yes, but the problem you have is that you repose a very wide discretion on the Commissioner, who is at the head of an investigative body but who has the hybrid function of making findings. The very wide discretion it reposes in the Commissioner applies to the power to make findings, as well. It would be very dangerous to be overly prescriptive about these things. I can see serious problems in drafting it, too.

For example, does material that might in a sense be exculpatory but is trivial have to be handed over? You also have to realise that the material that ICAC gathers can be extraordinarily voluminous. There may be rooms full of documents and thousands of pages of transcripts of private hearings. A consequence of having to hand all of that over—or even a substantial proportion of it—would be a considerable delay, as can happen in criminal trials. While I appreciate the consequences of a finding of corrupt conduct are of the utmost seriousness they do not lead, as you know, to anybody going to jail.

I appreciate that some people would rather go to jail than have their reputation destroyed in a way that it has been being destroyed. I can easily sympathise with that view. Bear in mind that in my general practice I have acted for people who have come in contact with ICAC and have not enjoyed the experience.

Reverend the Hon. FRED NILE: In your most recent submission to us you have argued that public hearings are very important as it will control ICAC's power. How does it control ICAC's power?

Mr McCLINTOCK: For the simple reason that it is perceived that the exposure of what courts do to public scrutiny will control their power. To my mind it does. Judges, for example, are very conscious that they are being looked at. You see criticisms of judges in the papers. To pick an example from 10 or 20 years ago, there was a South Australian judge called Bollen, who made some supposedly inappropriate remarks—

The Hon. TREVOR KHAN: They were inappropriate

Mr McCLINTOCK: I say "supposedly".

The Hon. LYNDA VOLTZ: Alleged.

Mr McCLINTOCK: I was trying not to make any judgement either way because it is not my place to make judgements, but that is a good example of what happens. I do not wish to overstate this but it would be appalling if ICAC just had private hearings and then suddenly it is in the paper that Mr X has been found guilty of corruption by ICAC without any understanding of what went on. It is perfectly obvious that there has been a great deal of public criticism, particularly in the *Australian* newspaper, of ICAC's conduct. I think it is salutary and ultimately to the public good that that happens. That would go if you did not have that. The only model I could see where it would be acceptable not to have public hearings would be if you stripped away the power to make findings totally and turned ICAC into the kind of investigative body that Hong Kong is, where it ultimately brings the charges and presumably has its own—

Mr RON HOENIG: Or the Crime Commission.

Mr McCLINTOCK: Yes, that is probably a good example closer to home. I accept that. Again I emphasise if one steps back from it there is no absolute right or wrong about any of these things. If you get rid of public hearings you have to get rid of findings as well. I can understand the arguments in favour of doing that

but if you are going to retain something like the current model I think it is crucial that there be public hearings so that people can know what is going on.

I went down to ICAC last year or the year before to represent a barrister who had been subpoenaed in one of the inquiries and I ran into the headmaster of my old primary school, who is very, very old now. I am very old now. He had been sitting all through these hearings. Because he is retired in his eighties he does not have enough to do so he goes along. He was making intelligent judgements about what he had been witnessing. They were ones that I did not agree with but they were intelligent. That is how you inform the public, by having open hearings that people like that can go along to and members of the press like Ms Markson, who I thought I saw here earlier on today. As I said, I think that is important.

The Hon. LYNDA VOLTZ: People get exposed in investigations outside of ICAC anyway. If you look at the *Daily Telegraph* today you will see the Crime Commission is running an investigation into NRL players and people are named in that. There is a dynamic where it happens anyway, is there not?

Mr McCLINTOCK: There is although I am not sure that it should be happening, frankly, what is going on in the *Daily Telegraph*. I do not mean the investigation should not be happening.

The Hon. LYNDA VOLTZ: But people being exposed publicly before a charge is laid is not something that is specific to ICAC.

Mr McCLINTOCK: That is true, it is not unique but there is something very powerful and very different about a finding of corruption or corrupt conduct as opposed to the mere knowledge that there is an investigation into match fixing, for example. Again, that was something that those involved in the original structuring of ICAC were fully aware of—the then Premier, the then Attorney General, the then head of Premier's and so on.

The CHAIR: There are two things I want to raise with you about that. If you were redesigning ICAC today the climate against which it would be constructed would not be the same as it was in 1988. In fact, one of the witnesses before this Committee has made observations in relation to the manner in which technology has a great ability to expose corruption much more readily than it did potentially in 1988 and so you might have a different model today.

Mr McCLINTOCK: Absolutely. That is the reason why I found the Premier and Cabinet submission interesting and fertile ground for going forward. I thought that was a very impressive piece of work, frankly.

The CHAIR: We will come to that. I accept the rationale behind not abolishing public hearings but Justice Peter Hall in his submission suggested that it should be limited to those matters which involve serious corrupt conduct or systematic corrupt conduct as defined in section 12 of the Act. Would you share a similar view that public inquiries be limited to those matters?

Mr McCLINTOCK: That is not easy to answer. The reason why it is not easy to answer is this: What if the situation were that as a result of the hearing the Commission decided that there was no corrupt conduct? It is an a priori restraint on whether it has a hearing or not in circumstances where the hearing might lead to a finding that there is—

The CHAIR: That is the case at the moment, is it not?

Mr McCLINTOCK: It is. You would bear in mind that was a result of my recommendation in 2005 that the serious corrupt conduct and systemic corrupt conduct point was put in there. I thought that was the most important thing, other than the creation of the office of Inspector, that was in that 2005 report. In last year's report it was made even more stringent by saying that the Commission can only make findings of corrupt conduct when it is serious corrupt conduct. Frankly, I would have thought that would have been the case anyway because if it is not serious corrupt conduct the Commission should not be bothering with it. But it also leaves out of account the issue about the electoral laws which is a really live thing.

As Mr Gleeson and I said in that report—and please do not think I am referring to anything that has been the subject of the recent report by ICAC. I am not. There were things that everyone in this room would agree were genuinely corrupt but did not fall within the definition of corrupt conduct because someone who is running for election is not a public official and therefore they are not picked up. Just say someone is handing out $5 bills outside the Birchgrove Public School, which is where I vote. One would have thought that is something ICAC should be able to deal with. That was the concern, that you really wanted to pick up that kind of conduct. The problem was that the Electoral Commission was not really equipped to do that. It does not have the investigative powers. They wanted ICAC to have that. But it is a big stretch to call it corruption. That is the reason why the 2015 report says to give ICAC the power in relation to elections but do not call it corrupt conduct. You can make findings in breach of the elections law and so on.

The CHAIR: Part of the problem with that is where it does not make a finding of corrupt conduct there is no merits review available which may have followed if there was a prosecution which followed. The person who had the finding made against them is stuck with that finding. One of the suggestions made by the Inspector was that he wanted to introduce, as a result of a lightning strike in this place, an exoneration protocol. I wonder whether you may support, for example, along the lines of procedural fairness that in the event that there is a potential adverse finding against a person where there is potentially no merits review the submission in answer to that potential finding also should be published by the ICAC?

Mr McCLINTOCK: The short answer to that question is yes. This again is a personal view but that is what I am here to give, I suppose. As you will be aware, ICAC routinely suppresses the submissions. ICAC's expressed reason why it does so is that it would not wish the submissions of Counsel Assisting to get out and prejudice people. My own view is that that is probably true up to a point in time but that I do not see why all the submissions should not ultimately be made public. In fact, I—

The CHAIR: You could potentially form a view that I do not want to made public because it might be prejudicial to me or alternatively, if there is a criminal charge which flows, I want to keep my power to drive. So it should be potentially at the election of the person to have their submission published as part of the report.

Mr McCLINTOCK: Or made available. The normal way would be to make it available online so you can say anyone can actually read it, as people in fact do. Personally I strongly support that. It could be done in various ways by establishing a prima facie rule that submissions should be made public after a particular time, subject to exceptions—if, for example, the person did not want it published. There are other issues too. It is not merely the submissions of people who are possibly the subject of findings of corrupt conduct.

It would be interesting to know, for example—and I do not know whether this has ever happened—whether there is a disparity between the findings made by ICAC and the findings recommended by Counsel Assisting. Depending on a number of factors, that would make a difference to me in how I assessed the finding of corrupt conduct. If, for example, I knew that Counsel Assisting who was someone I knew and respected had said, "Do not make this finding," but the Commissioner had gone ahead and made it, that would impact upon me. The only reason for mentioning that is because it is not merely what the people who are subject to the findings of corrupt might say; it is what Counsel Assisting has said as well.

Mr RON HOENIG: Because the Commission has been engaging in a number of high profile matters over a number of years, most people impacted by it complain and because of the nature of the people they are given more publicity than normal. It is not unusual for people to complain about organisations that might be investigating them. Also in recent years there have been a number of very eminent Senior Counsel who anecdotally have complained about the manner in which ICAC have embarked upon their public hearing—quite a number of them.

Mr McCLINTOCK: People I respect too.

Mr RON HOENIG: Yes—who are not giving evidence but they have certainly transmitted to me over a period of time that something is happening there that is causing concern to eminent members of the Bar who are appearing down there that should concern us, but we actually do not know what that is.

The Hon. TREVOR KHAN: We have a fair idea, don't we? We know that, for instance, Counsel is only getting access to material the day before—they are suddenly told, "You can go and now download the material," and it can be hundreds or thousands of pages of material that is suddenly made available. That is the sort of matter that is complained about. There are circumstances in which there is a refusal to provide access to various intercepts or the like. There are examples whereby they wish to cross-examine a witness on matters going to credit and they have been refused. It is in the area of essentially procedural fairness issues that various Counsel have had serious concerns as to what has been happening with ICAC. Is that not the case?

Mr McCLINTOCK: What you have just said, Mr Khan, is unquestionably true, but what Mr Hoenig was asking, I thought, was what the underlying reason for that is. I do not think Mr Hoenig would disagree with you. We have all heard those complaints.

Mr RON HOENIG: Yes. And I have not got them in detail. They are anecdotal complaints of quite eminent Senior Counsel. Following that there is something written in the metropolitan media. I look at the story. I recall some of the complaints that I have received. Ultimately all of that impacts on the reputation of the very organisation that the public have to have confidence in. I am sort of attuned to that. Your answer to the issues that Mr Khan has articulated in greater detail is not a legislative response but hope and trust.

Mr McCLINTOCK: I do not see how else you can do it, realistically. That is not meant to be a counsel of defeat or anything like that. If you are going to have a body like that, it comes down to the integrity,

the ability and the moderation of the person you put in charge of it. It does not matter what legislative controls you have. If the Governor appoints someone who is a fanatic, for example—I am looking for the right word—you are always going to have problems.

The Hon. TREVOR KHAN: "Zealot" might be appropriate.

Mr McCLINTOCK: Thank you, Mr Khan. You are right. That is a much better choice of words.

The CHAIR: That is a really live issue though.

Mr McCLINTOCK: Oh, I know.

The Hon. LYNDA VOLTZ: How is it a live issue?

The CHAIR: Because of the practice that occurs down at ICAC or is perceived to, as Mr Hoenig indicated. If in fact issues of credit arise upon which a finding might be made and Counsel have not been given an opportunity of cross-examining on credit, that person is entitled to say, "I have not had a fair hearing here," are they not? At the end of the day, someone might be believed in preference to someone else.

Mr McCLINTOCK: Mr Chair, my answer to that question is: Yes, they are entitled to say that.

The CHAIR: So how do I fix that?

The Hon. LYNDA VOLTZ: I just want to put two different propositions on credit and questioning on them. I have actually been down at ICAC and have been questioned completely inappropriately by Defence Counsel—questions that should never have been asked of me. To say that an ICAC Commissioner is stopping cross-examining of people on credit, if I walk into ICAC and someone asks me how I voted in a secret vote in Caucus on leadership I do not think those are questions Defence Counsel should be asking.

Mr McCLINTOCK: No, of course not.

The Hon. LYNDA VOLTZ: But that was what I was asked.

Mr McCLINTOCK: I would have refused to answer that question if I were in your position.

The Hon. LYNDA VOLTZ: Yes. I did answer it but I felt like saying something else.

Mr McCLINTOCK: To answer the question, there are several issues in there. You may well be thinking—and I am happy to take it as an example—about the witness who was ultimately cross-examined in the Federal Court in the proceedings brought by the Australian Competition and Consumer Commission [ACCC] against Mr Obeid's company. His name was Gardner Brook. It was apparent that the cross-examiner in that Federal Court case, as the phrase goes, made a mess of Mr Gardner Brook in a way that the opportunity had not been given in the hearings before ICAC. Again, I cannot vouch for these things myself and a lot of this stuff is anecdotal, but sometimes anecdotal material is important—

The Hon. TREVOR KHAN: It is pretty clear he was colourful.

Mr McCLINTOCK: —because it shows how an entity like ICAC is perceived, which is important. I was told that Counsel Assisting in the private examination of Mr Gardner Brook had eviscerated him but then held him up as a witness of truth in the public hearing. I have no idea whether that is true or not, but in situations like that, yes, it would seem very wrong that the witness does not know that the person has not been given the opportunity of testing the credit of a person like that, particularly when it may be crucial. But again many people come away from ICAC feeling that they have been badly done by. Many of them have not been hard done by. Long Bay jail is full of people who assert that they are innocent.

The Hon. LYNDA VOLTZ: They are all innocent.

The Hon. TREVOR KHAN: Some of them were my clients.

Mr McCLINTOCK: But there may be a small but significant proportion of people who have a justifiable complaint. I have to say this: There are mechanisms for dealing with these things. There is the Inspector, who has two functions. Again, that was put in on my recommendation in 2005. One is the audit function, which is to monitor the ongoing activities of ICAC to see that the law is being complied with and, going beyond that, best practice is adopted. Mr Cooper, who I saw giving evidence, when he was Inspector used to carry out regular audits of a number of functions, such as, for example—

The CHAIR: The issuing of search warrants?

Mr McCLINTOCK: —search warrants, which is important because they are an invasion of a subject's civil liberties, unquestionably. I understand that he received very few complaints about the other

function, maladministration, but that equally is a function. I do not see why those things themselves are not properly, if they reach that height, the subject of the Inspector's jurisdiction. I would have thought they were. I would have thought that, for example, the deliberate suppression of relevant evidence by the Commissioner or by ICAC staff would be an example of maladministration, which would fall within that part of the Inspector's function. In other words, what I am saying is that it is not merely a matter of the Supreme Court. There is an Inspector there and that is an important part of his function.

Again, I appreciate what Premier and Cabinet said about upgrading the Inspector's role. I said in my original submission to the Committee that if it stays—in fact, it was premised on the premise that the Inspector's role stays as it is—it should not be a full-time position because I do not think it is necessary. I think it can be done on an average of between 90 and 100 days a year. But if you were to have a model like Premier's, it could be equally appropriate too. There are ways of dealing with this but, ultimately, it really does come down—I hate to say it—to the integrity and the moderation of the man or woman you appoint as Commissioner. There is no way of avoiding that.

Mr PAUL LYNCH: Mr McClintock, I accept your argument that these things flow naturally from the nature of the institution. You have to be dependent upon the Commissioner.

Mr McCLINTOCK: Yes.

Mr PAUL LYNCH: What would be your view of whether they could be resolved by the institution of rules that people have been talking about? Would that not be the case that inevitably those rules—assuming you can draft them in a legislative form—are still going to be subject to the use of discretion by a Commissioner and you are still going to come back to having a problem of choosing the right Commissioner. That institution of rules and legislative provisions about natural justice or fairness are still going to end up being subject to the exercise of discretion by the Commissioner.

Mr McCLINTOCK: That really puts my position, I think. I cannot emphasise how important the actual individual Commissioner is, which is one of the benefits of going to, maybe, the model of three that Premier's and Cabinet have suggested.

Mr RON HOENIG: Because a model of three provide some check and balance—to provide some check and balance?

Mr McCLINTOCK: Absolutely. And, as I said, three heads are always better than one.

Mr RON HOENIG: People often believe that when the Court of Appeal goes out and considers their judgement, they each write their own judgement. They do not know that there is only one author.

Mr McCLINTOCK: Yes.

Mr RON HOENIG: In 2005 in terms of the review, at that stage there was an Operational Review Committee in existence.

Mr McCLINTOCK: Yes.

Mr RON HOENIG: It obviously was not effective as an oversight body; otherwise, you would not have recommended its removal.

Mr McCLINTOCK: No.

Mr RON HOENIG: Why did it not work? Should some other more effective change be put at the beginning? The Inspector is sort of after the event. We have some critical Inspector's reports that we are hearing about, but it is all too late for the individuals involved.

Mr McCLINTOCK: That is true. The problems with the Operations Review Committee were—and I might say that this is the reason why I find that the model of three Commissioners is attractive because it brings in more than one person at the start, so to speak. The Operations Review Committee had become completely useless and, with great respect to the people who are actually on it, by the time 2005 came around. There was simply too much for it to do and it was a part-time body made up of people who had busy full-time careers; some of whom I knew. It just ceased to function, really.

I do not wish to be discourteous to anyone who was on that Committee but it really had become a rubber stamp. It had ceased to actually be an active review body. I did not express it in those terms in the 2005 report, but that is what had happened. When I wrote that report, which I should say—bear in mind I think what I did was I came into that report because Mr Cripps had been appointed ICAC Commissioner. He commenced it and I finished it off. There were matters where I differed from his tentative views, but it is my report, not his. However, he did have considerable input into it.

The Operations Review Committee by that model had gone by then. Mr Gleason and I considered it again last year. It really was not effective and I do not think it would be effective now. But your point about the Inspector being after and the oversight—it being desirable to have some oversight before—I think is a good one, Mr Hoenig. It is true and I think that is the reason that the more people you bring in early, the better. That is the reason why I find the suggested model attractive.

Mr RON HOENIG: The reason I ask you is that a former Police Commissioner, one of ours, was part of the Management Committee of the Crime Commission.

Mr McCLINTOCK: Yes.

Mr RON HOENIG: He said to me that, effectively, that was about the only civilian oversight we have ever had to go through. Even the hurdle of effective police techniques were not sufficient to be able to continue the investigation. On the change of government, the new Government Police Minister removed himself from that Management Committee, despite the advice of his predecessors. Then the Crime Commission ended up in some sort of difficulty. When Governments set up Royal Commissions, they set them up for a particular purpose—because there is no other mechanism to be able to do it. They are given unlimited power and finite jurisdiction. Ultimately, the Commission makes recommendations. Here there is just a standing Royal Commission that is effectively unaccountable and on which, as you say, we rely on trust and hope.

We need some sort of mechanism by which the public can be confident that that immense power is being utilised for proper purposes. As I say, in my view public interest is that if someone commits a criminal offence, they should be charged, brought before the court, and brought to justice. Why should not the organisation, when it embarks upon its investigation of corrupt conduct, which is invariably criminal, stop when they reach a point where there is evidence that someone has committed an offence and get the DPP to charge them? I mean, they can always come back to it later.

Mr McCLINTOCK: In many cases, they do. There have been situations to my knowledge where ICAC has discovered unassailable evidence of the Commission of a criminal offence. On occasions they simply pass the information straight onto the DPP or to the police.

Mr RON HOENIG: Okay. So that happens.

The CHAIR: But should they, as a matter of policy, do that? There are cases where they do have that information and continue the hearing anyway, potentially prejudicing a criminal hearing. I am thinking of some of the university cases or even some of the fraud cases involving councils and those sorts of things.

Mr McCLINTOCK: Sure.

The CHAIR: Where it proceeds to completion by way of report whereas it must have been eminently perceptible that at some point a criminal offence had been committed, so they are referring it to the police or to the DPP.

Mr McCLINTOCK: Yes, but the difficulty is that, Mr Tudehope, ICAC was never established to get criminal convictions.

The CHAIR: I know.

Mr McCLINTOCK: It always comes as a surprise when I say that to people. But as I said in 2007 and I said it in 2005, it was not there to get convictions. If it gets a conviction, that is a bonus, so it is thought; but it is there to expose corruption and thereby to improve standards of public administration in New South Wales. You would make it into a different body if you did that. I have to say as I said earlier, Mr Tudehope, there is no right or wrong about these things. It all depends upon how—we all agree on the aim. We want to have public administration as clean as it possibly can be in New South Wales.

There are potential ways of getting to that result. There are upsides and downsides to every one of them. Every one of them has some interference with the previous rights of citizens. The Crime Commission that Mr Hoenig mentioned is a good example and of how it interferes with those rights. Again, a lot of these things depend on one's own individual views about the best way of getting to that ultimate agreed result. As I said, there is no right or wrong, I do not think.

The CHAIR: In previous hearings we have heard some discussion about the ICAC's relationship with the media. Do you have any observations you would make about the manner in which the ICAC relates to the media?

Mr McCLINTOCK: I should separate out what the public perception about that is and what the ICAC says. The ICAC says adamantly that it does not leak to the media. I hope that is true—I hope that is true.

If the ICAC were leaking to the media, if the ICAC were using the media to advance matters, I would regard that as completely wrong—very wrong, indeed. Equally, I would regard, and I do not know whether this has happened, for example, Counsel Assisting giving briefings to journalists as completely inappropriate, but I do not know if that has actually happened. I do not know but, as I said, it would be completely wrong if it had happened. The ICAC is there to do its duty under its legislation. It is not there—except by conducting public hearings and making reports—to plant stories in the media. I hope that has not happened.

Mr RON HOENIG: Absent a different view I have to the Commissioner about the right of forthwith notices to produce being lawful, the response of the Commission to any of the discretionary matters about any of the issues before us is that it is acting in accordance with its Act. The reality is that they have been acting in accordance with their Act. There is no evidence that they have acted unlawfully. For those things where there is a preference that they might have acted in another way, that be our view, the only way in which we can cause them to act that way is by legislative change, is it not?

Mr McCLINTOCK: You can always abolish the notice to produce, which is what you are talking about in relation to the forthwith notice, which is how they obtained the phones in the Cunneen case.

Mr RON HOENIG: Even in the Cunneen matter they conducted an investigation down a particular path. It was not an unreasonable interpretation of the law that it was within their power or discretion to do so.

Mr McCLINTOCK: Mr Hoenig, I expressed the view last year publicly that that inquiry, whatever the rights and wrongs of what Ms Cunneen had done—again, which I know nothing about—did not fall within the definition of serious corrupt conduct and systemic corrupt conduct. I remain of that view. Nothing has changed my mind about that. I expressed that view at the time, and I think I was quoted in the *Sydney Morning Herald*. That remains my view about that inquiry. Yes, in a sense, the serious corrupt conduct and systemic corrupt conduct was framed in such a way in the legislation, and still is, that the Commission shall, so far as practical, direct its attention to serious corrupt conduct and systemic corrupt conduct. I did not intend those words, when I wrote them in that report, to be ignored and I did not think they fitted—I still do not think that inquiry fell within that definition. I am not going to rehearse the reported facts, but you will understand why I think that.

That is straying away from answering your question, which goes back to the notice to produce power. Again, you can make a reasonable argument that the notice to produce forthwith was not intended for use in a situation like that and that it should have been a search warrant that was obtained. The ICAC, under the legislation, has powers to issue its own search warrants but it has never done so; it has always gone to a magistrate or judge to get the search warrant. I can readily understand the argument. You will bear in mind that when Mr Gleeson and I wrote that report last year, we were focusing on legislation and what changes should be made there, not upon the specifics of the Cunneen case. Although we were directed by the letters in appointing us to take account of the Inspector's report into the Cunneen case, but that did not become available until long after the reporting date for our report, so we had no specific information ourselves—that is not quite true. We did not have the benefit of that report by the Inspector into what had actually happened in the Cunneen case.

Reverend the Hon. FRED NILE: You have raised an issue and it is in the Premier's response to this issue, and we will be looking at that later. What happens when someone is found innocent in the court after they have been found guilty by the ICAC of serious corrupt conduct? Is there a responsibility for the ICAC to publish that or for the Department or the Government to publish it?

Mr McCLINTOCK: I think there should be an obligation on the ICAC to place on the same part of the website where it reports the finding of corrupt conduct that the person in question was in fact charged but acquitted, and give the date and details. My understanding is—

Reverend the Hon. FRED NILE: Same prominence or something?

Mr McCLINTOCK: Yes. My understanding is that that does not happen now. If my understanding is wrong, no doubt someone will correct me. While I disagree with what the Inspector said about the exoneration protocol, I think it is obviously right that if the ICAC is publishing the fact that they recommended a prosecution, as it does, as part of the finding for corrupt conduct, it is obviously right that they should say that the prosecution resulted in an acquittal and the person is entitled in that respect to have published that they have been found not guilty by a jury, or judge, or magistrate, in the particular matter. I strongly support that.

The Hon. TREVOR KHAN: If the DPP decides not to proceed, equally that should be disclosed?

Mr McCLINTOCK: Yes, Mr Khan.

The Hon. TREVOR KHAN: That would be a more frequent—

Mr McCLINTOCK: It is, yes. Yes, I agree. I can perceive no rational argument to the contrary.

The Hon. LYNDA VOLTZ: Except for Lance Armstrong.

Mr McCLINTOCK: Yes, but some people—

The Hon. LYNDA VOLTZ: That was a throw-away line. Going back to the search warrant as opposed to the notice to produce, that would make no difference to forthwith, would it?

Mr McCLINTOCK: Except you would not get forthwith used in a search warrant because a search warrant authorises the ICAC officer just like it authorises a police officer.

The Hon. LYNDA VOLTZ: Yes, to go to a certain venue.

Mr McCLINTOCK: To go to a certain place.

The Hon. LYNDA VOLTZ: That was always their argument about mobile phones; mobile phones could be anywhere at any time—sorry, I do not want to rehash the case.

Mr McCLINTOCK: It is a perfectly fair question, Ms Voltz. If you look at the ultimate aim, you are dealing with two conflicting things. You are dealing with the need for a body like the ICAC to be able to obtain the evidence. That is, in that case, the mobile phone, on the one hand. On the other hand, you are dealing with the fact it is a major intrusion, a major infringement of the civil rights of the person who is the subject of the order or notice to produce.

The Hon. LYNDA VOLTZ: I should point out I have a military police background. Civil rights were not high on our list. A signed search warrant by the Commanding Officer would suffice.

Mr McCLINTOCK: My grandfather was a military policeman, Ms Voltz.

The Hon. LYNDA VOLTZ: So you get the hint.

Mr McCLINTOCK: In the New Zealand army.

The Hon. LYNDA VOLTZ: It does not count then.

The Hon. TREVOR KHAN: I know it is going back over old ground, but there is something uncomfortable about a circumstance where you proceed by way of notice to produce and some days later you go back armed with a search warrant and go through the farce of presenting the phone and then taking it away again. Does that not leave you feeling uncomfortable about what in heaven's name is going on? That is creating a legal mirage.

Mr McCLINTOCK: I do not necessarily disagree with you, but let us analyse that. Say that it became apparent that the original "search" was not in accordance with the law. Do you give the phone back and say that it is all over or do you take steps to retrospectively legalise what you have done? The right answer is that it should be done right the first time.

The Hon. TREVOR KHAN: Mr McClintock, I would be comfortable with that proposition if the Commissioner came before us and said, "There might be something wrong with the manner in which we proceeded in the first instance."

The Hon. LYNDA VOLTZ: I think you are paraphrasing the Commissioner.

The Hon. TREVOR KHAN: I think you know that that is not the evidence that we have received. The evidence that we have received is that everything is hunky-dory with using notices to produce in the current circumstances. I am left uncomfortable with the original procedure and with the evidence that we have received. For some reason, unexplained to this day, the Committee has never had an admission from the ICAC that it was in any way concerned about the procedure that was adopted.

The Hon. LYNDA VOLTZ: We did receive an explanation.

The Hon. TREVOR KHAN: Yes.

The Hon. LYNDA VOLTZ: She gave an explanation of why she followed the process.

The CHAIR: We should allow Mr McClintock to give evidence.

The Hon. LYNDA VOLTZ: I do not want Mr McClintock to comment on whether he has or has not read the transcript.

Mr McCLINTOCK: There is something in the back of my mind about the Commission's justification for the original procedure. There was a case in the Federal Court about the use of the word "forthwith".

The CHAIR: It was a copyright case, I think.

Mr McCLINTOCK: I cannot comment on what the Commissioner said.

The CHAIR: You highlighted previously that notices to produce would be an entirely appropriate matter for the Inspector to audit, to see how they were being used and whether different processes ought to be adopted.

Mr McCLINTOCK: Absolutely. As I said in my earlier submission, it worries me that there have been no audits by the current Inspector. In fairness to him, I realise that he has had a lot more to do than previous Inspectors.

The CHAIR: He said that.

Mr McCLINTOCK: I appreciate that. That is for a number of reasons. I heard Mr Cooper say earlier—and it is undoubtedly true—that Mr Ipp stepped up the level of activity and it has taken a while for those things to filter through to the Inspector. That is the sort of matter that I would have expected the Inspector to consider from two points of view. Please do not think I am making a judgement. I would have thought it would be right to audit that and to pull in any other examples of the use of the procedure outside producing evidence for the hearings—which is what prima facie it is intended for—to see whether it was being done properly. Also, if there were a concern about it, it would be important to focus on that concern to see whether there was any breach of the legislation and any maladministration. I do not believe that has happened. I know the Inspector considered it in his report. The first part does not seem to have happened, which concerns me.

The CHAIR: I am conscient that the Committee has kept Mr McClintock sitting here for a long time.

The Hon. LYNDA VOLTZ: We could go all day, but I do not think we should.

The CHAIR: Thank you very much, Mr McClintock, for your compelling evidence. It has been a pleasure to have you here. Thank you for your time.

Mr McCLINTOCK: Thank you very much. It has been a privilege to speak to you. In many ways I do not envy the Committee for the task in front of it. The ICAC is a very important body. I have no doubt that the Committee will come up with the solutions that I have not been able to.

The CHAIR: The Inspector made a suggestion that the issue of public and private hearings ought to be referred to yet another expert panel. The Committee is reluctant to go down that path. Do you have any view on that? The Committee has received a lot of evidence and submissions about the right or wrong of public and private hearings. The Inspector is of the view that it is something we need to get right.

Mr McCLINTOCK: He is right that it must be done correctly. In the two reports that I have been involved with I set out the arguments both ways. I do not know that anything would be added by having a further inquiry. Odds-on it would be me who carried out the inquiry.

The CHAIR: You might find your name on the list.

The Hon. LYNDA VOLTZ: Do you have that 10-foot pole out?

Mr McCLINTOCK: I would actually do it, Ms Voltz, because it is significant. It is the sort of matter that the Government might wish to go to someone more senior than a barrister, such as a judge or a retired judge. I think the arguments are all pretty well set out now. It is a matter about which there has been a lot of debate. The decision has to be made and it will ultimately be this Committee that has to make it—or the Premier, if it is sent off to an inquiry, but I would not have thought so. You can have too many inquiries.

The CHAIR: Thank you very much.

Mr McCLINTOCK: Thank you.

(The witness withdrew)

PAUL RICHARD MILLER, Deputy Secretary, Cabinet and Legal, Department of Premier and Cabinet [DPC], affirmed and examined.

The CHAIR: Thank you for appearing before the Joint Committee today to give evidence. Before we proceed, do you have any questions concerning the procedural information sent to you in relation to witnesses and the hearing process?

Mr MILLER: No.

The CHAIR: Do you wish to make an opening statement before Committee Members ask questions?

Mr MILLER: I might make a short statement. I will not repeat what is in the submission having regard to the time but I will make a short statement to outline the context and to explain very briefly the purpose and also the limits of the DPC submission. The first point I probably need to make is to confirm that this submission is in fact a submission of the Department of Premier and Cabinet and is not a submission of the Government as such. Although quite appropriately the Department informed the Premier and his office of its intention to prepare a submission the Department was not directed as to its contents nor were they endorsed.

As I understand it, the Government has indicated that it will consider the matters and recommendations arising from this Committee in due course. Given that, it is important to bear in mind that the DPC has not itself sought to undertake the kind of process it would have undertaken if, for example, we had been charged by the Government with conducting a review of the kind that you, yourselves, are now pursuing. Certainly had the Department been undertaking such a review we would have engaged early and directly with key stakeholders, with a range of relevant interests, perspectives and expertise; not least, we would have consulted with the ICAC itself.

Instead, given the current committee process and noting that the Committee itself will be engaging with all of those stakeholders, the Department's submission has been prepared internally based on our experience and expertise as well as information available to us publicly. Given that, and bearing also in mind the position of the Department as an apolitical public service agency, the submission carefully avoids making any definitive recommendations. The approach we have tried to take in the submission is to provide factual historical and comparative material which we thought would be of benefit to the Committee. In some areas we have also provided information about the administrative implications of particular reform options that you might consider.

Given the breadth of the Committee's terms of reference it was clearly not possible to be comprehensive in our submission, although we are very happy to provide any further assistance and information on request. Our submission is primarily focused on the Committee's second term of reference—the current structure and governance of the ICAC. That reflects the areas where the Department considers that it might be best placed to provide relevant information and assistance to the Committee and indeed in that respect the Department is somewhat uniquely placed in this regard.

DPC is the principal department for the cluster of which the ICAC is a part. We have responsibility for supporting the Government in all of the major legislative reforms relating to the ICAC from its very establishment. We also have responsibility as the Government's central policy agency for machinery of government matters generally. Our submission draws on those experiences as well as the expertise of executives in the department who have experience working in and with a range of organisations across various jurisdictions.

In coming to our decision to put forward a submission we were mindful that, given the Committee's other terms of reference, the issue of the structure of the ICAC might not be raised in other submissions. For that reason we thought it might be particularly helpful if the Department itself raised that issue if only to provide a platform for the Committee's further consultation and discussions. I note that since we provided our submission the Committee requested further information from the Department about one matter raised in it. That goes to the practical implication of should the ICAC staff be brought within the government sector employment framework. I understand that further information was provided to the Committee this morning by the Department Secretary and I am happy to take questions on either that or the submission.

Mr PAUL LYNCH: Mr Miller, the part of the submission that troubles me is the proposed bringing in of the staff agency of the ICAC within the government sector employment framework. Does that not give rise to an almost impossible conflict, that those who are meant to investigate wrongdoing in the Government are in fact employed by the Government?

Mr MILLER: In our submission—and I will refer primarily to the supplementary information we provided this morning—we recognise that there are issues, if only of perception, related to the continued

independence of the ICAC. There is a bit of history because back in 2006, I think it was, the Public Service at that time literally meant the public service. It meant the departments were subject to the direction and control of the Minister. In 2006, in response to the Commonwealth's WorkChoices legislation, most employees in the broader what was then called the government sector were brought into the New South Wales public sector framework. That included organisations such as the Ombudsman and other organisations that exercise independent functions. It did not include at that time the ICAC or the Audit Office—I suspect for the reasons that you have raised.

The difference now with the introduction of the government sector employment [GSE] legislation is that it makes clear provision for the establishment of what are called separate Public Sector agencies, which are not subject in any way to an employment relationship with the Government, either the Minister or a secretary of a department and so the separate Public Sector agencies now include independent bodies including the Ombudsman, the Police Integrity Commission and the Electoral Commission. It still does not include the ICAC.

One issue with respect to the ICAC is that the ICAC has jurisdiction over another independent officer, who is the Public Service Commissioner, who does have functions in respect of the GSE legislation. As our further information makes clear, if the ICAC were to be brought into the GSE framework, I think that modifications would need to be made to ensure that there was not at least the perception of a body with oversight of another body being subject to the jurisdiction of that officer.

Mr PAUL LYNCH: I understand the logic of what you are saying and I have read your second submission but isn't the perception going to be that the Independent Commission Against Corruption is no longer independent if that sort proposal goes ahead?

Mr MILLER: I hope that would not be the case and I hope it is not the case for the Police Integrity Commission or the Ombudsman. That said, it is a relevant consideration.

Mr RON HOENIG: Can I just ask this question because it might allow Mr Lynch to actually comment. It is comment because I want to follow this line. The Legal Aid Commission solicitors over the years were public servants and the Government was on the other side all the time in respect of everything that they pretty well did. What is the difference? Am I missing something?

Mr PAUL LYNCH: Are you asking me?

The CHAIR: Perhaps ask Mr Miller?

Reverend the Hon. FRED NILE: You have to ask the witness.

Mr PAUL LYNCH: If and when I get to be in his position, then you can ask me.

Mr RON HOENIG: Okay; all right. I am just trying to follow the line; that is all.

The CHAIR: In relation to the issue that Mr Hoenig has raised, would you like to comment, Mr Miller?

Mr PAUL LYNCH: Yes, but he wasn't asking him.

Mr MILLER: The only point I would make is that given the structure of the legislation I think the issue is one of perception rather than actual interference with the independence of the ICAC, so I accept that it is a relevant consideration but I think it is an issue of perception.

Reverend the Hon. FRED NILE: Perception is important in this area?

Mr MILLER: Indeed.

Mr PAUL LYNCH: And in answer to Mr Hoenig, it is probably fatal. Having said all that, the other proposals you have made in your paper are not dependent upon that, are they? You could proceed with the other proposals but not proceed with that?

Mr MILLER: Absolutely, that is correct.

The CHAIR: Just let me ask you this. This is a model which has been used in respect of the Police Integrity Commission [PIC] and which follows, in some ways, the recommendations which were made by Mr Tink in relation to that organisation. In respect of bringing employees under the Government Sector Employment [GSE] Act, following that recommendation, have there been any issues?

Mr MILLER: No, there have not. The difference is that the Police Integrity Commission and the Ombudsman's staff are already within the GSE framework.

Mr PAUL LYNCH: The Police Integrity Commission are investigating police rather than—

The CHAIR: I understand the point that you are making. I understand that point entirely.

The Hon. LYNDA VOLTZ: They are already Government sector employees.

Mr MILLER: To be fair, I am not sure that Mr Tink, in his review, directly considered the issue of whether they would, or would not, be under the GSE framework.

The Hon. TREVOR KHAN: Where does the Crime Commission fall with regards to its employees?

Mr MILLER: I am not sure. I can take that on notice.

Mr PAUL LYNCH: A lot have been seconded from the NSW Police Force.

The Hon. LYNDA VOLTZ: It is the same with PIC.

The Hon. TREVOR KHAN: I would be interested to know if that is a more recent transition that is going on and if there have been some problems associated with that transitioning process.

The Hon. LYNDA VOLTZ: I think that came up as a court case, did it not?

The Hon. TREVOR KHAN: I am not saying anything; I just have a thought in my mind.

The CHAIR: In respect to the three-Commissioner model, would you anticipate that the three Commissioners would all be judges.

Mr MILLER: They could be. In preparing the submission we have drawn from the approach taken to other similar but not identical bodies—the reason being that there is no identical body to the ICAC. In some respects you can talk about a best-practice model or a contemporary approach but you cannot really talk about a cookie-cutter approach to each agency, given its unique functions. Given the functions of the ICAC there may well be an expectation that the three Commissioners would satisfy the judicial-officer criteria that currently applies to the ICAC Commissioner, yes.

The CHAIR: Is the workload sufficient to justify three Commissioners?

Mr MILLER: That is perhaps a question better addressed to the ICAC. There is the facility, even if the workload does not warrant three full-time Commissioners, that they may not necessarily all be full time.

The CHAIR: You could have part-time Commissioners.

Mr KEVIN HUMPHRIES: Like the Mental Health Tribunal.

Reverend the Hon. FRED NILE: The Commissioner now does delegate hearings to other people.

The Hon. TREVOR KHAN: We know.

The CHAIR: You would anticipate that the model of appointment of Commissioners would again be the subject to a veto of this Committee.

Mr MILLER: The assumption of the model is that all three Commissioners would be subject to veto; yes.

Mr RON HOENIG: You might have to bear in mind, with respect to part-time Commissioners, that you do not fall into the same trap that the Operational Review Committee fell into—which Mr McClintock referred to. Once you get into the realm of part-timers the checks and balances you are trying to put in place may not, in practice, apply because they are busy doing other things.

Mr MILLER: I accept that point if they have other positions. If you are talking about judicial officers they could not remain judicial officers while they were Commissioners of this body—for obvious reasons. If you are talking about ex-judicial officers one would assume that even though this would be their part-time job it would be their only job.

The CHAIR: Is a similar model proposed for the Inspectorate?

Mr MILLER: The Inspectorate is more difficult because it is a smaller organisation and some of the issues with such a small organisation that have led us to suggest a similar model are different to the considerations that apply to such a relatively large organisation as the ICAC. But in principle there is no reason why a similar model could not be applied to the Inspector and, in some cases, for similar reasons.

The CHAIR: I have to say that universally the recommendation and the drafting of the recommendation by the Department of Premier and Cabinet was very well received.

Mr MILLER: Thank you.

The Hon. LYNDA VOLTZ: In your opinion.

The CHAIR: You are free to express an opinion. That concludes the hearing for today; we will reconvene at 9.30 tomorrow morning.

(The witness withdrew)

(The Committee adjourned at 15:35)