REPORT ON PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

INQUIRY INTO PROTECTIONS FOR PEOPLE WHO MAKE VOLUNTARY DISCLOSURES TO THE INDEPENDENT COMMISSION AGAINST CORRUPTION

At Jubilee Room, Parliament House, Sydney on Friday, 15 September 2017

The Committee met at 10:30 am

PRESENT

Mr Damien Tudehope (Chair)

Mr Ron Hoenig
The Hon. Trevor Khan
Mr Paul Lynch
Reverend the Hon. Fred Nile
Mr Geoff Provest
Mr Mark 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 is the Committee's second hearing to examine the adequacy of the current law in protecting people who make voluntary disclosures to the Independent Commission Against Corruption [ICAC]. This morning the Committee will hear from witnesses from the New South Wales Independent Commission Against Corruption: the Chief Commissioner, the Hon. Peter Hall QC; Commissioner, Ms Patricia McDonald SC; and Commissioner, Mr Stephen Rushton SC. I thank the witnesses for making themselves available to appear today. For the benefit of the gallery, I remind everyone to switch off their mobile phones as they may interfere with the Hansard recording equipment. I note that the Committee has resolved to authorise the media to broadcast sound and video excerpts of the public proceedings. Copies of the guidelines governing coverage of proceedings are available.

PETER HALL, Chief Commissioner, Independent Commission Against Corruption, sworn and examined

PATRICIA McDONALD, Commissioner, Independent Commission Against Corruption, sworn and examined

STEPHEN RUSHTON, Commissioner, Independent Commission Against Corruption, affirmed and examined

The CHAIR: Before we proceed, do you have any questions regarding the procedural information sent to you relating to witnesses and the hearing process?

Mr HALL: Not at this stage.

The CHAIR: I will take that as a response given on behalf of all three witnesses. Is there an opening statement you would like to provide in respect of the Committee's terms of reference?

Mr HALL: Yes, thank you Mr Chairman. Members of the Committee, this statement is an opportunity to record some matters arising relating to the Commission in the relatively short time that Commissioner McDonald, Commissioner Rushton and I have been appointed. The establishment of the Independent Commission Against Corruption as a three-model Commission represents a new chapter in the history of the Commission. Based on our admittedly short time in office, we have every reason to believe that the new model will work extremely well. I will briefly say why.

At the earliest possible stage Commissioners McDonald, Rushton and I visited the Inspector of the Independent Commission Against Corruption, Mr Bruce McClintock, SC. We had the benefit of early discussions with him. We are confident that there will follow a constructive professional relationship between us and the Inspector. The overriding interest, of course, is the public interest. We look forward to working with Mr McClintock in the performance of our respective roles and responsibilities in achieving our common goal—enhancing integrity in public administration in New South Wales. It is well accepted that for any anti-corruption commission to be effective in the exercise of both its investigative powers and its functions in corruption prevention it must be properly resourced. In corporate speak these days, resources includes people.

In the short time we have been at the Commission one thing quickly became apparent to us. The professionalism and the dedication to task of the highly skilled staff of the Commission was evident to us. We are heartened to know that we are working with persons of considerable experience, and considerable skill and ability. Every organisation, of course, needs to have good communication. As the new Commissioners, we are pursuing a system that ensures we will have direct communication on a reasonably regular basis, not only with the executive directors of each division of the Commission but also with every person in each of those divisions.

The objective of having that form of direct communication is twofold: first, to ensure that we understand and monitor how processes are working, as it were, on the ground and, secondly, to consider where change or innovation is appropriate and, if it is, how that should be achieved. In that respect we propose members of the staff will be consulted. They will be involved and they will be encouraged to put forward suggestions based on their experience and, as appropriate, we propose to trial any new changes and innovations in order to continue to maintain and enhance, if possible, the Commission's processes.

The roles, the participation and the consultation between the three of us as the Commissioners of the Commission, both in relation to management and discrete activities of the Commission, are ongoing and they have been directed to sharing both the responsibility and the workload of the Commission and all that that entails. It is sufficient for me to say at this point in time that I consider myself as Chief Commissioner to be fortunate to have two Commissioners of the calibre and the reputation, both in the legal world and in our community, as I have in Commissioners McDonald and Rushton.

Finally, in this opening statement I note that the Commission has undertaken and has developed what is referred to as an "outreach program". Recently the Commission visited Albury and undertook a full program of instruction and workshops. Commissioner McDonald, Commissioner Rushton and I attended in Albury at the opening of the program. I had not previously seen or appreciated the work of the Commission, including in particular its corruption prevention work, and advice and services in various regional areas of New South Wales. Speaking as I did to members of the Albury community who were there, and there was a very good attendance from community leaders and other interested persons, I found the citizens of Albury were extremely grateful to be able to engage with the Commission through its staff and to benefit from information sessions and workshops that took place in that week. I am firmly of the belief that the Commission's presence must continue to spread out in New South Wales. It is my firm belief that our fellow citizens in rural and regional centres should have the same opportunities that are available to people in Sydney.

Although technological innovations assist in communications these days, there is no substitute for face-to-face discussions, interaction and problem-solving, whether it may concern or involve issues of conflicts of interest, control of confidential information, procurement issues, property development issues, fraud risk, delivery of government services through public-private partnerships, delivery of government services through contracting out, designing corruption risk controls, and such like matters, to name but a few. Those services in relation to such matters, as I said, should be available to all in New South Wales. Having raised a few matters about our early experiences at the Commission, I thank the members of the Committee for meeting with us today. It is my aim and my purpose to assist the members of this Committee in its important and valuable oversight role.

The CHAIR: One of the aspects of the revamping of the Independent Commission Against Corruption [ICAC] was the appointment of a Chief Executive Officer. How is that progressing?

Mr HALL: I have given that close consideration, and done so in consultation with Commissioner McDonald and Commissioner Rushton. I have also examined the question as to precisely what role a chief executive officer would perform over and above those services that are already being provided by particular staff members. I have for the moment deferred any recruitment process or appointment of a chief executive officer because I want to be satisfied that such an appointment should be made. Accordingly, I anticipate that in about six months I will re-evaluate the question as to whether or not a chief executive officer is required and, if so, what functions that person will perform and how that will impact upon various functions already performed by at least one member of the staff of the Commission. I think it is important that I evaluate those matters before starting any recruitment of that officer.

Mr PAUL LYNCH: You mentioned meeting with the recently appointed Inspector. Was there any discussion between you and him about the process of auditing ICAC's functions?

Mr HALL: No. It was an initial meeting to establish the will that we both have to work collaboratively. We discussed a number of issues about what the role of the Inspector involves and how that interacts with the Commission. However, that was not a specific matter. We did not have an agenda, as such, for the meeting. It was really a meeting on a preliminary basis to discuss generally how we should relate to each other in those terms. The emphasis was placed by me—and agreed to, of course with, the Inspector—on the need for there to be an arms-length relationship between us by reason of our different responsibilities and roles. At the same time, we should also, where it is appropriate, not hesitate to have any informal contact with one another to ensure that any requests he has made of us are being properly met and such like matters. It was to establish the beginning of what I see as being an cooperative relationship.

Mr PAUL LYNCH: You mentioned in your opening remarks the topic of change and innovation. What are we likely to see that is a change or an innovation?

Mr HALL: I am not in a position to say that there are concrete proposals. It will take some time before the information gathering comes in to be able to make a judgment about it. There is one matter that I think is worthy of exploration—and the process has commenced—that is, to what extent the Commission's powers should be employed both proactively as well as reactively. A great deal of the work is facilitated and done in response to complaints and notifications under the Act. That is an extremely valuable source of work. On the other hand, there has been a trend in certain commissions such as ours. I have in mind in particular the Independent Broad-based Anti-corruption Commission in Victoria, although it is in a different jurisdiction, and the Western Australian and Queensland Commissions.

They have pursued processes to enhance their proactive capacity to detect and to investigate corrupt conduct. I think that is worth exploring and we have taken the first steps towards obtaining information to examine to what extent it is worthwhile developing that capacity, what it would entail from a practical point of view, and to get feedback from other commissions as to whether or not the processes they have established to that end have proved to be fruitful and worthwhile. I do not anticipate that we will be in a position in a matter of weeks, but in perhaps a period of months it will be capable of assessment so that we can determine what we do in that regard. I think it is an important area to look at.

Mr RON HOENIG: Section 104 of the Act provides that the Chief Commissioner may appoint a Chief Executive Officer.

Mr HALL: Yes.

Mr RON HOENIG: Do I take from your opening statement that you are considering whether a Chief Executive Officer is necessary?

Mr HALL: Yes. I paid particular attention to that provision.

Mr RON HOENIG: I thought you might.

Mr HALL: As you said, the word "may" provides for a discretion or an evaluation, and that is exactly what is happening at the moment. As I said, I did not think it was appropriate to proceed without due inquiry about the recruitment and without evaluating what the chief executive officer would do and how that would enhance the Commission's existing capacity. Therefore, I have not made a decision one way or the other. I thought the appropriate approach was to defer and, as I said, that has been done for a period of approximately six months. I think I have proposed that there be a meeting within the Commission in February next year to look at that issue further. There have been one or two other issues that have arisen in the meantime that might bring forward that reconsideration to an earlier date. However, it is too early to say whether or not a recruitment process will take place this year. I am simply not in a position at the moment to say that it will or will not; I am just saying it could be brought forward.

The CHAIR: If I can bring you back to the terms of the inquiry we are currently conducting.

Mr PAUL LYNCH: Far less interesting.

The CHAIR: We have heard evidence relating to discouraging people from making voluntary disclosures unless there is some protection to ensure they are not prejudiced by the making of that disclosure. There are two categories of people who are affected: those who become aware of potential corrupt conduct and report the corrupt conduct and the category of persons who are involved in corrupt conduct and would want to make a voluntary disclosure. Can I have your views about the manner in which those two categories should be treated? Are they treated the same or what protections should we adopt to encourage people to make voluntary disclosures under the Independent Commission Against Corruption Act?

Mr HALL: We have given consideration to these questions. I will start by saying section 13 (1) (j) of the Independent Commission Against Corruption Act specifies as one of the principal functions of the Commission to "enlist and foster public support in combating corrupt conduct" and "promoting the integrity and good repute of public administration". That principal function, as I understand it, is directed to enlisting and encouraging members of the community, whether they be public officials or what might be called private complainants, to come forward. I think everyone around this table is in furious agreement that people should be encouraged. In drafting any possible amendments it should be done in a way that does not have the unintended effect of discouraging people to come forward or give rise to concern that they might be said not to have reasonable grounds for a complaint.

I will ask Commissioner McDonald to elaborate on some inquiries we have made as to the sorts of complaints that have been made over time, the incidence of what might be called vexatious complaints, and that sort of thing. In short form, the Commission and I—and I understand my Commissioners—are fully in favour of an amendment to the Act that will ensure private complainants, along with public officials, have protection and immunity from making disclosures. That should be in the Act. There should be two matters taken on board in that respect. First, there already is in the Act a provision that deals with vexatious complaints. Section 81 states:

> 81 Complaints about possible corrupt conduct
>
> A person shall not, in making a complaint under this Act, wilfully make any false statement to mislead, or attempt to mislead, the Commission or an officer of the Commission.

Any provision put in the Act by way of amendment would cross reference to section 81. Section 81 should remain in the Act and should not be removed; it serves an important function. Secondly, however it is drafted it should be made plain—it would be a straightforward drafting exercise—that any immunity or protection that is given to a person making a disclosure would relate to the disclosure but it does not relate to any underlying substantive criminal offence that might be the subject of or related to the disclosure itself.

In other words, a person who is an offender who is making a disclosure would be protected from any liability from making the disclosure but the criminal liability of that person remains a matter for the authorities to deal with. In other words, I think the intent is obvious; that is what would be intended. But for abundant caution consideration might be given to inserting a provision such as that to make it plain that is the way the immunity or protection operates. I do not think there is any need to put more in about vexatious complaints or having to have sound and reasonable grounds and such like matters.

Section 81 protects against the incidence of people misusing the disclosure or complaint provisions vexatiously. As I have said it is necessary to put a provision in to encourage people and to enlist the support of the community. That is not an issue between us. Commissioner McDonald may have further material to put on the question of the number of complaints we get, the number of complaints that end up being actioned as matters for further investigation, either a preliminary investigation or further investigation, and also the question of the incidence of vexatious complaints.

Ms McDONALD: The Committee has heard before that within the Commission we have an assessment section. It has been described as the triage area of the Commission. In the last financial year the Commission received 2,489 matters. Within that number we have to distinguish matters that do not go any further. That may be because they are clearly outside jurisdiction—for example, a complaint about a Federal politician or a Federal public servant. We also get general inquiries and feedback, sometimes a pat on the back and sometimes a criticism. That group which consists of—I will roughly do the maths—about 700 matters, are dealt with by the assessment panel and do not go any further within the Commission.

There is another group which totals 1,766 matters. Those are the matters that are triaged by the assessment panel, are subject to initial inquiries and ultimately are provided not only to the Commissioners but also to the executive of the Commission where we consider the reports on each of these matters and look at the recommendation of what should be done with these matters. Breaking down that 1,766 we find that 1,096 were complaints under section 10; reports whereby a public official must report possible corrupt conduct under section 11 was 650; seven referrals were from law enforcement agencies under section 16; and own initiatives were three. As I said, when those inquiries are made, if the discloser reveals who they are, there might be further contact with that person and discussion about the provision of further information.

I should note—unfortunately, I do not have the statistics for this but it is evident in the reports that we get twice a week—that a number of complaints under section 10 are anonymous. The handicap with that is if we want to make further inquiries we cannot. I can only speculate that if a more general protection for disclosure was included in the Act whether that would mean we would have more named complaints which would allow further investigation at the triage level. Of those 1,766 matters, roughly 1 per cent moves to the next stage which is the preliminary investigation stage. The investigation stage is obviously where we have our four teams of investigators and under the preliminary investigation stage the matter is subject to more rigorous and far-reaching investigation. It then becomes under the auspices of the investigation branch which reports to us in a different way and then, depending on the results of the preliminary investigation, it may move to a full-blown investigation, which then involves considerations of compulsory examinations, maybe public inquiries, et cetera.

Mr GEOFF PROVEST: How long will that process take or would it vary, depending on the case?

Ms McDONALD: The initial triage assessment—again, it is hard to generalise—depends on the case. One of the things that has struck me is the Assessment Panel reports that we get twice a week. They are substantial. The work done by the assessment group is thorough, because the concern is that you may have a report and there is a kernel of serious corrupt conduct there and we do not want to lose it, in a sense. We do not want to say, "We won't proceed with that" or anything like that. It is an essential task of the Commission, taken very seriously. I cannot give you, off the top of my head, how long it generally takes because it depends on what is raised and what initial investigations are capable of being undertaken. Then, when it moves to investigation, it brings in other considerations of: What are we going to do under our preliminary investigation, wearing that hat, and what is involved? Is it going to involve the issuing of some notices, et cetera, which all takes time? But I can say that once it hits the investigation area investigation plans are then developed which are subject to suggested targets of the days or months within which matters have to be finalised. They are often reached; they are often dealt with more quickly. Sometimes when something becomes more complex or other possible corrupt conduct emerges during that preliminary investigation, it then broadens.

Mr GEOFF PROVEST: On the street there is a term "ICAC time".

Ms McDONALD: Yes. All I can really do is echo the Chief Commissioner's comments in his opening statement. The diligence and, I think, enthusiasm of the staff of the Commission have been quite striking, and their willingness to embrace the new structure and assist us. But it is something about the timing that we are cognisant of and do take into account.

I move to the next aspect. I then made some inquiries of our Assessments Branch, about whether it gets an indication of whether it is a vexatious matter or made in bad faith. The difficulty there is that often a complaint is made in good faith but the problem is that it is made by somebody who is outside the decision-making process or the particular public entity and who does not quite realise they are upset by the actual result, but they might not have all the material that was available to the decision-maker. They are not quite aware of the decision-making process. And even though they make a complaint, in a sense in good faith, ultimately during that triaging process it becomes evidence that, no, the processes were followed, it was an appropriate decision and there really is no possible corrupt conduct there.

The other aspect I should mention is that within assessments matters also, even if they do not go to our investigation section, they also can be referred to the Ombudsman and can also be referred back to a particular

agency or overview department for further investigation to report back to ICAC, so that a supplementary decision can be made about whether we progress it to a preliminary investigation.

Mr RON HOENIG: What percentage of matters go to the Ombudsman?

Ms McDONALD: Off the top of my head, I cannot assist you with that. I can make some inquiries and give you that information subsequently.

Reverend the Hon. FRED NILE: I return to our earlier discussion about the amendment. To avoid confusion, we have had a big debate over words such as "could", "should" and "would"—could you give a suggested amendment to the ICAC Act, so there is no confusion? Not today, but in due course.

Mr HALL: It is, as earlier indicated, an important but relatively straightforward drafting exercise and we have, in fact, discussed possible terms in which it could be framed. I am happy to pass on what we have considered, so that the legislature can consider what might be the better formulation. We certainly can assist by forwarding information to the Committee and will do so.

Mr RON HOENIG: It might be straightforward for a former judge but it has never been straightforward if you are sitting on this side of the table.

Mr HALL: It is true that legislation often does give rise to litigation and different judges can interpret provisions differently. In this case I do not see any problem. I think the parliamentary draughtsman would be well capable of framing it in appropriate terms.

Reverend the Hon. FRED NILE: We have also had a request from the Director of Public Prosecutions for another amendment to be inserted in the ICAC Act that permits the taking of induced statements by ICAC. Do you have a view on that proposal?

Mr HALL: I have noted Mr Babb's written, and some of his oral, submissions on that question. There can be a place for induced statements. The Commission's practice, as I understand, in the past is that on occasions induced statements have been taken but it is not our general practice to do so. One possible reason that may indicate that it would not be standard practice is that informants can provide us with a statement of information and it could cover a range of issues. Some of those issues might raise suggestions of corrupt conduct in other areas about which we already have information, so it starts to build up an intelligence database that concerns a person or entity. It may also contain information that is, from a corruption prevention point of view, of importance for us to be on notice so that corruption prevention officers can take it on board and examine it.

It may provide information that is valuable not as evidentiary material on corrupt conduct per se but as "intelligence". The intelligence information may be important not just to the particular matter that the complainant is trying to focus on but to something that we already know about, so to tie our hands with an induced statement might in some cases cut across our ability to use that statement for other purposes, be they intelligence purposes, corruption prevention purposes, et cetera. So I highly respect what Mr Babb has said about the matter, and I will look into the question as to whether or not we should be increasing the use of induced statements, but it is a matter that we would do so only after close consideration as to whether it is worthwhile doing or whether we should just leave it as it is—and that is to say, on an ad hoc basis, to take the step of taking an induced statement.

The CHAIR: It comes back to the issue of whether the person who is involved in the actual corrupt conduct themselves, and against whom a potential criminal charge may lay, had an inherent objection to them getting any protections by virtue of making a voluntary disclosure.

Mr HALL: That is right.

The CHAIR: Would you agree with that?

Mr HALL: I do.

Mr RON HOENIG: Should legislation provide for the protection of the identity of informers?

Mr HALL: To my knowledge, it does not expressly deal with informers.

Mr RON HOENIG: It does not, but should it?

Mr HALL: Of course, we do have powers to suppress and make non-publication orders.

Mr RON HOENIG: If somebody is concerned and they want to provide information—as they would to a law enforcement agency—on the basis that their identity not be disclosed, should there be legislation to enable a similar provision for them to be able to do that to the Commission?

Mr HALL: Again, it is not a matter I would deal with off the cuff. There may be cases—I think these were canvassed with Mr Babb in his oral testimony—where there is a public official who has been party to corrupt conduct, but who has been a party to corrupt conduct by reason of having been placed in an impossible position which could, for example, constitute duress. A person like that who comes to the Commission—I am speaking in general terms—would certainly be considered a person against whom corrupt conduct findings should not be made. It is in the interests of the Commission for persons, even if they have been involved in some way—I am talking about cases of duress in particular when I make these comments—not to be subjected to the prospect of an adverse finding of corrupt conduct if indeed they have been caught up in a situation in which, in effect, they have been manipulated.

There are two examples that I have in mind. I remember many years ago when I was Assistant Commissioner in ICAC that there was a woman, a public official, who had been a public official for quite some time. She was well regarded. She had been placed in an impossible position. She was required to re-evaluate a particular matter in question in a way that would produce the outcome that her superiors wanted. With reluctance she did so. The subtext was that if she did not she would probably lose her job. I examined the Act to see if I had any discretionary powers not to make a corrupt conduct finding against her. I found there was none. I did find, nonetheless, by reasoning which I do not need to go through, that a Commissioner does have the discretionary power not to make a corrupt conduct finding even if the person has, in effect, almost confessed to being party to it.

I took the view that it would have been quite wrong to exercise the power to make a corrupt conduct finding against that particular female public official. There has been only one other inquiry in which a similar approach was taken, and that was by now Acting Justice Sackville in the Supreme Court when he was an Assistant Commissioner in a Fast Track or RailCorp matter. To some extent one hopes that the judgment of Commissioners will be a safety valve. There are other cases where persons have been party to a corrupt scheme like paying a contract manager a lump sum to get the renewal of a contract.

I have in mind an inquiry that then Commissioner Ipp undertook. He, too, did not make findings against some of those who stepped forward and frankly told the Commission that they knew that if they did not pay the manager his lump sum that they, as others, would lose the contracts. The Commissioner took the view in those cases that he would not make corrupt findings against certain of the contractors. They had been frank with the Commission and it had assisted the Commission in that inquiry. He did make mention of the fact that he did not do so because in those cases to make such a corrupt conduct finding deters people from stepping forward and assisting the Commission. Coming back to your initial question, I would like to consider further whether or not there should be any amendments made to the Act in relation to this area.

Mr RON HOENIG: I would like your views or the Commissioners' views. The success of law enforcement agencies is based on information that is provided to them by informers. As you would know, Chief Commissioner, law enforcement officers go to their graves before they reveal who those informers are.

Mr HALL: Yes, indeed.

Mr RON HOENIG: That intelligence is usually very valuable. There is no mechanism at the moment to protect people if they come to the Commission, for example.

Mr HALL: It would be a matter I think we would need to raise with the Director of Public Prosecutions if we were considering a grant of immunity from prosecution. I think in that way the matter can be dealt with. I wholeheartedly agree with what you say: It is terribly important to get information from people on the inside. It is notoriously challenging—not difficult—to prove corrupt conduct. It is usually heavily dependent upon circumstantial evidence. Sometimes admissions being caught on electronic surveillance devices and so forth assist greatly. As you correctly point out, with respect, the informer is valuable.

Reverend the Hon. FRED NILE: Should there be a threshold that has to be met before people who make voluntary disclosures to ICAC are protected from criminal, civil and disciplinary liability? Should there be a threshold, and should that differ between members of the public and public officials?

Mr HALL: As I have said, there is already a provision in the Act which makes it an offence for persons to provide misleading information. I am not sure this is answering the question but I think I indicated earlier that I do not see it as necessary to have a provision which requires a certain standard to be met, such as reasonable grounds for the disclosure. For reasons which Commissioner McDonald has indicated, people sometimes think there is corrupt conduct when there is not. You do not want to deter people from reporting or to make it difficult for them to do so. If complaints are made which are vexatious it is different from ordinary litigation. Vexatious claims in court cause angst for the recipient, the defendant, and are costly and so on. Those sorts of proceedings should be stopped early in their tracks, but still there is a lot of disadvantage to the hapless

litigant who has to face a vexatious claim. It is different in the Commission. The Commission has the facility of sifting and sorting the wheat from the chaff—the vexatious from the not vexatious. That is part of its function in its assessment panel, as Commissioner McDonald mentioned.

I think it is really a question of there being a provision which will not deter—which will encourage—people—and that the protection should be built in. If somebody, for example a wrongdoer, has made a disclosure that is totally baseless that person would have criminal liability under section 81 of the Act. That person would not have the benefit of the immunity extending beyond the disclosure itself. I am not sure whether that answers your question.

Mr RUSHTON: Sometimes when complainants or people lodge a concern it may not be made out but the information they provide has intelligence value. It may, unbeknownst to them, trigger something in relation to another investigation. To put a threshold on it at that stage may deprive the Commission of very useful intelligence. I, too, suggest that a threshold is not appropriate.

Reverend the Hon. FRED NILE: Some of the other States specifically have no threshold. That is why I was wondering whether you think it should be introduced in New South Wales.

Mr HALL: Like Commissioner Rushton, I am of the view that the threshold should not be imposed at a level which starts to make people second-guess whether it is worthwhile making a complaint. I think they should be encouraged to make a complaint. If it is a vexatious we, the Commission staff, will soon sort that out.

Mr RON HOENIG: The issue we see every day that you are not going to see—that some members have discussed and asked some of the Commissions interstate about it as well—is people asserting vexatious complaints publicly, either to induce an elected person to act in a particular way, or for political purposes. They assert a view, for example, that a councillor or member of Parliament might have is corrupt and they are going to complain to ICAC about them. In most cases, nearly all, they are vexatious and are done for political purposes or to try to induce a member of Parliament to take a particular position. The last thing members of Parliament want to do is have to respond to the Commission because of a vexatious complaint. They do not want to go through the process. To provide a deterrent, is there a way to stop that occurring? That becomes the newspaper story. Politicians worry about what appears in the next newspaper, whether it be local or otherwise. How can you deter that sort of vexatious conduct?

Mr HALL: We have expressly discussed that political scenario you have made reference to amongst ourselves in considering the questions which the Committee has put to us. As you suggest, people have ulterior motives sometimes for making a complaint and then making it public that that complaint has been made to the ICAC. If it were the case that such a complaint was totally baseless and was simply done with that ulterior purpose, it would in my view be a plain breach of section 81, which is already there. There have not been, to my knowledge, any prosecutions under section 81. The risk of the sort of vexatious complaint you are talking about is high in political circles, perhaps, but particularly in local government. It seems to not be a coincidence that they happen to come out in the lead-up to an election.

Mr RON HOENIG: Or with every contentious development application that is lodged, or rezoning, there will be the same assertions. The reality is this: If you have some people in the community who are regularly vocal and aggressive, the last thing you want is those elected people to adopt the practice that discretion is the better part of valour, lest they pick up the local newspaper next Tuesday to find this environmental group has said that they are going to complain to ICAC. It is not just vexatious, but you also risk infecting the decision-making process. It has far greater impact than simply waiting for the assessment panel of the Commission to dismiss a vexatious complaint.

Mr HALL: Yes. I can see the problem and have no ready answer to it.

Mr RON HOENIG: We are looking to you for an answer because we do not have one. We do not want to see anything happen to deter genuine complaints, even if people are mistaken in terms of their complaints. At the same time we are trying to address that.

The CHAIR: It encapsulates this notion that the brand ICAC has been weaponised for political purposes. How do you address that issue?

Mr HALL: I would imagine that most, if not close to all, people in local government—or perhaps even in higher levels of government—do not know about section 81. Perhaps there should be steps taken to properly inform the community as to the ramifications of making complaints of the kind we are discussing at the moment, whether it be in the political field, or as Mr Hoenig has suggested, in the area of property development, which is calculated to try and deflect decision-makers from impartial, objective, sound decision-making. The

first thing is to inform and warn people against that form of abuse of the notifications or complaints made under the ICAC Act. There has been no discussion about it in the community that I am aware of.

Mr RON HOENIG: No, there has not.

Mr HALL: I am unaware of whether the Commission itself has been involved in a campaign to bring that message home.

The CHAIR: Who is the prosecutor under section 81? Is it ICAC itself?

Mr HALL: No.

The CHAIR: Would it refer to the prosecution?

Mr HALL: It would be referred, yes.

Mr GEOFF PROVEST: Do you have a list of repeat offenders?

Mr HALL: That is a matter that would be dealt with on sentencing.

The CHAIR: I do not want to deflect you from this topic. Mr Hoenig makes a very valid point: that proper decision-making should not be impacted by a potential headline of a referral to ICAC. If the making of a complaint to ICAC was prohibited from publication, would you support that as a proposal?

Mr RON HOENIG: Have you prohibited a prospective complaint?

The CHAIR: Not a prospective one.

Mr RON HOENIG: There is no complaint made when they make the assertion.

Mr HALL: I think this is an important point.

Mr RON HOENIG: Very.

Mr HALL: It is worthy of consideration as to whether or not there should be in certain circumstances— such as perhaps what may be attacks using the Commission's processes in election time—early intervention by the Commission to be able to deal with the matter if the circumstances are shown to warrant intervention by the Commission to make—

The CHAIR: An early assessment.

Mr HALL: —an early assessment, a bit like an interim injunction in the Supreme Court, to try to maintain the status quo until this complaint is properly investigated and persons are made aware of the fact that no finding has been made.

Mr RON HOENIG: A minute ago the chairman asked: Who does investigate and prosecute offences under section 81? Frequently throughout the State people are infringing on section 81. Where does one go to report these breaches?

Mr HALL: I thought I answered that. First, there have not been any prosecutions to my knowledge—that does not mean there have not been any. Secondly, it would be a matter referred out to the Director of Public Prosecutions [DPP].

Mr RON HOENIG: That means that in the first instance the complaint should be made to the local police that this person said so and so. I am not sure you would get past the front counter. You are perfectly right. There are other things that can flow. The Office of Local Government can ensure that councils are aware of section 81 and that councils can promote the provisions of section 81. Communities can be warned, for example, and people who appear before a local council meeting or council committee meeting can be warned of the provisions of section 81. I had not thought of it in that light until you mentioned it to the Committee. There are many things that can be done by governments and councils to ensure that people are aware of the provisions.

Mr HALL: For all the reasons you have mentioned it is an important issue. I would think it is a matter that would warrant being taken on reference of some kind. We would look into whether or not there are other steps that could be taken other than prosecution in order to prevent—as the member has said—any tainting of the political environment or the environment in which councils have to make decisions and such like.

Mr RON HOENIG: Or attempt to.

Mr HALL: I agree.

Reverend the Hon. FRED NILE: There has also been the suggestion, or allegation, that the media section of ICAC has been overactive in some cases. How do you as the Commissioners monitor your own media?

Mr HALL: I am sorry. I did not—

Reverend the Hon. FRED NILE: Media releases have been issued from ICAC to key journalists in certain newspapers.

Mr HALL: Are you raising the question of leaking information?

Reverend the Hon. FRED NILE: Not so much leaking but deliberately forwarding it—almost officially.

Mr HALL: I do not want to get into the area of how the Commission operates in terms of its secrecy provisions, obligations and processes to ensure it does not happen. The Commission is not in the business of feeding the media or anyone else information about what it is doing or might do. There are extremely tight processes that operate within the Commission, without going into the details, that ensure that no-one in the ICAC leaks or gratuitously provides to the media or anyone else information about what is going on in any investigation unless and until it becomes public knowledge through a report of the Commission or hearings of the Commission. I think that is my answer to your question.

Reverend the Hon. FRED NILE: I suppose a delicate area is where ICAC feels the need to defend itself. A media report may be not true.

Mr HALL: The only response I can make is that I hold to the view that the independence of the Commission is fundamental, and with independence comes the obligation to proceed with its statutory charter without fear or favour to the end. Whether or not the Commission is attacked, that should not impact in any way on our focus, which is to investigate and to prevent corrupt conduct. It is in the nature of things that people will not agree with everything we do or say. It comes with the territory. As far as I am concerned, that cannot and will not—I know my fellow Commissioners agree—dissuade us from doing what believe must be done. If people attack us, we are not in the position of entering the public arena to defend ourselves.

When I was a judge in the Supreme Court often there would be dissent if it was a matter of some public notoriety, the judge had erred or there was criticism of what the judge said. All of that went over our head. If I wrote a judgment in a matter, that was the end of it. If anyone wanted to attack it or challenge it, there was a route to do so—you go to the Court of Appeal. We are human and none of us likes to be unfairly criticised. However, it is not open to us to enter the public arena to defend ourselves.

The CHAIR: This potentially is not something you may have prepared for, but you can take the question on notice. You may be aware that the former Acting Inspector, Mr Nicholson, prepared a report about Operation Vesta. He made five recommendations in respect of the operation of ICAC, including amendments to sections 8 and 9 to remove the word "could" and to replace it with another test in terms of the publication of corrupt conduct and referrals to the Director of Public Prosecutions. I would like your views in respect of that recommendation.

Mr HALL: I will take that question on notice. We will look at that and provide an early response.

Mr RON HOENIG: Mr Nicholson raised with the Committee the issue of the blanket section 38 objection that is taken at the beginning of everyone's evidence, even though a great portion of the evidence is not inculpatory. That can then cause difficulties for the Director of Public Prosecutions because evidence of the fact that is not inculpatory of anything can then not be used.

The CHAIR: It then means he has to take another statement. He must get someone to retake a statement in admissible form because the previous statement was taken in circumstances where the whole of the statement was inadmissible.

Mr RON HOENIG: That is if the person of interest who is not being charged is prepared to give one.

The CHAIR: That is right.

Mr RON HOENIG: There is no urgency, but can you reflect on that Commission process? Everyone who is offered it takes the blanket objection probably for time reasons and because the Commission is focused only on doing its statutory task.

Mr RUSHTON: One alternative would be, as they do this in some other investigative bodies, for the witness to take objection to every question. I think what you are referring to is that having a blanket ruling is convenient because otherwise there will be an objection before every answer.

The Hon. TREVOR KHAN: I think I am right in saying that in either Operation Acacia or Operation Jasper a gentleman by the name of Gardner Brooke gave evidence. He was a witness who had attended various meetings with one or other of the Obeids. My recollection is that at the start of his evidence he was offered and took the statutory protections. He was not a person of interest in the sense that he was not a public official; he was a purported investment banker. It struck me as odd that someone—and I am not trying to be disparaging—who was being used by the Commission to demonstrate the conduct of a public official was being provided with a statutory protection.

Mr RUSHTON: Can we look at this from both sides? From the witness's side, he may not have known what was coming and so he sought that protection. From the Commission's side, it may have been inappropriate to say no because it may not have been entirely sure about what was going to come out. It is a very difficult situation.

Ms McDONALD: In the Federal sphere there are certain regulatory agencies that can compel evidence and the blanket objection is not available. My experience of either acting for people who have been summonsed before that investigative body or from reading the transcript is that the legal representative puts in front of the witness a little card with "I object" written on it as a trigger that whenever a question is asked the answer starts "I object..." Unfortunately, you get the same effect as a blanket objection at the beginning. I think a lot of it may be lawyers being very—

The Hon. TREVOR KHAN: Risk averse.

Ms McDONALD: Yes. I must admit, if a client of mine were brought before such an investigative agency, my advice would be to claim whatever protection you can just in case.

The Hon. TREVOR KHAN: I am a simple traffic court lawyer, so I am not used to those jurisdictions. However, I regularly appeared in the Coroner's Court, where similar sorts of issues arose. I am getting old, so it is a long time since I have been there, but my recollection is that witnesses rolled in and gave evidence that was relevant that may in due course have been relevant to, for instance, the driver of a motor vehicle or the like. Those ancillary but important witnesses were not provided with any form of statutory protection in terms of the evidence that they were giving.

Ms McDONALD: Section 128 of the Evidence Act—

The Hon. TREVOR KHAN: That rings a bell.

Ms McDONALD: —allows a certificate. There is a corresponding provision in the Coroner's Act. Your example is a good one. In the Coroner's Court if you are brought along because you are giving evidence that the car you saw was red, but you are suddenly asked some questions that may incriminate—

The Hon. TREVOR KHAN: Then the section 128 equivalent certificate is produced.

Ms McDONALD: Yes.

The Hon. TREVOR KHAN: Indeed, there is a discussion about the appropriateness or otherwise generally when application is made by one of the legal representatives in court at the time. If we go back to Gardner Brooke, he is in a sense—and I might be being unfair—like one of those witnesses at the inquest who may have been standing at a corner and saw the car speeding down the road and so on. From my perspective, it was difficult to work out how he could become directly implicated in the exercise. Again, I might be using the wrong example. If one were to go through the transcripts—unfortunately perhaps my job gives me too much time; when inquiries are on I get a thrill out of reading the transcript twice a day—it seems that as a matter of course those invitations to take the protection were being offered without a reasoning process being applied to whether that person should take it.

Ms McDONALD: Yes.

Mr PAUL LYNCH: Isn't the problem with taking the objection on every question that the witness is going to spend too much time worrying about whether they are taking the objection and not giving the correct answer? Isn't the purpose to get the correct answer, rather than the formality of whether they object?

Ms McDONALD: Yes. My Federal example is you put the card in front of the witness and if they forget the objection you often see they are elbowed to remind them.

The CHAIR: If the objection has been taken at the commencement, is there potential at the conclusion of the taking of evidence to withdraw the objection?

Mr HALL: The evidence that has already been given under objection stays under that protection. There are two ways to look at it. If you look at it from our point of view, the law gives Mr Citizen the right of

silence. It has always been controversial as to what extent our right of silence should be taken from us. The wisdom of the legislature is that it should be taken away from us in corruption inquiries, hence the section is there. There is an inbuilt tension between the long hallowed right of silence, privilege against self-incrimination on the one hand, which we all have conferred by law over the centuries, and on the other hand the absolute need for an anti-corruption or a crime commission, which often has to try to establish secretive activity when there is no witness or what witnesses there are have suppressed any knowledge of what they saw, heard or engaged in.

Without the power to interrogate, and for the right of silence and privilege against self-incrimination to be put aside, an anti-corruption commission or crime commission will not get very far. That is the reality. It is not only conduct relating to a particular incident; it is also evidence that can be very valuable from an intelligence point of view. It is hard to predict, as both of my Commissioners have said, whether or not a line of questioning is just an intelligence gathering exercise or whether it is moving down to establish criminal liability or some other form of liability in the person being questioned, or as to whether a witness to a transaction has knowledge of the corrupt nature of that transaction.

It is difficult. To my knowledge there has been no formulation developed, other than the question and answer objection that Ms McDonald referred to, or to have the blanket form of objection which is written into our statute and permitted for practical reasons. There is nothing more irritating—and I heard it years ago—than somebody being interrogated in an inquiry and every question is "Object!" As Mr Lynch pointed out, the mindset of the witness is distracted because he or she is waiting to try to work out whether the question could be incriminating and, if so, whether to object or not, rather than focusing on the point of the question. The evidence process can be warped or tainted through the serial objections to questions. To my knowledge there is no other formula.

The Hon. TREVOR KHAN: I was in no way inviting that would be the way. Because of my limited understanding, I do not quite understand it. The other circumstance involved a member in the other place when Troy Grant gave evidence before the New South Wales child abuse inquiry, where he had been one of the investigating officers into a range of child abuse matters. One of the matters we had discussed prior to his giving evidence is whether he would take the protection in the circumstance of that. It was offered to him. I do not think I am betraying a confidence, but I know he and I found it quite odd. He was the one pursuing people up hill and down dale and resisting pressure from other coppers, yet he was offered a statutory protection against incrimination. It seemed odd. As I understand it, it is not something that is done in the Coroners Court. There is that parallel.

Mr HALL: I will add one more comment: I have no doubt we all have seen where a person in a senior role in an organisation is offered the protection and they say, "No, I do not want the protection. I'm going to give my evidence."

The Hon. TREVOR KHAN: That is what Mr Grant did.

Mr RON HOENIG: The tension that attends those hallowed principles arises not from the investigative function but from the determinative one. It is a hybrid commission. You do not know whether the witness will be giving evidence as part of the investigative function or the determinative function. It is the determinative function that troubles us and requires legislative change for guidelines. If your function was only investigative, many of the amendments that were enacted probably would not have been required.

Mr HALL: Yes. On the determinative function, and I have expressed this view to this Committee on at least one other occasion, if you are going to make a finding of criminal conduct against anyone or of serious impropriety, wherever possible that finding should be based on admissible evidence. The reason is obvious: Admissible evidence is the most reliable evidence you can get. We are not bound to make findings on admissible evidence because the Act permits us to take into account any information. My personal view is that for sound decision-making purposes, wherever possible, you should base those findings on admissible evidence—hence, the development of evidence-gathering techniques such as telephone interception, electronic surveillance and more sophisticated modern forms of investigation whereby you may get admissible evidence.

There are some cases where you cannot get admissible evidence but you can still make a secure finding. I have in mind one or two inquiries over the years where the ICAC has made findings of corrupt conduct not based strictly on admissible evidence but on evidence that was sound—statements made by a particular person against his personal interest to others. It could be hearsay evidence in a criminal trial. In the inquiry I have in mind it was accepted as sufficiently reliable evidence, as people do not normally make statements incriminating themselves, as this particular person did to more than one person. There are exceptions, but the determinative process is where sound fact-finding comes into its own. It is a serious business to make findings of criminal activity or serious impropriety, and accordingly the bar is lifted, in my mind, to a high level to ensure the evidence well supports such findings.

Reverend the Hon. FRED NILE: We have had reports from the Department of Public Prosecutions about that very issue, where the Independent Commission Against Corruption has sent it a brief and expected it to carry the prosecution. It has told the Committee, "When we examine the brief there is not enough admissible evidence to proceed. We would not win the case and it would be wasting the tax payers' money". It is a frustrating situation.

Mr HALL: It is frustrating, but a lot of that evidence is probably given under objection, so it cannot be adduced in a criminal trial. Nonetheless, if it is obtained, it will facilitate the ICAC to make findings. That is another example of a finding not based on strictly admissible evidence. It may have come from the horse's mouth and people have made admissions under objection. It is frustrating for a prosecutor to say, "We can't build a case on this," but that is the difference in functions of the Independent Commission Against Corruption and the functions of the Department of Public Prosecutions.

Reverend the Hon. FRED NILE: I sometimes wonder whether they should still proceed in the public interest, even though they may lose the case. After the publicity, nothing happens, and there are question marks over whether the ICAC did its job. Is it better to take the risk that you may get the prosecution before a judge or a jury?

Mr HALL: It is included amongst our functions, wherever possible, to gather admissible evidence for the purpose of handing it over to the Director of Public Prosecutions [DPP]. I am ever mindful of the fact that we should try to get admissible evidence wherever possible, and to facilitate the DPP's consideration of those matters. It is not always easy.

Mr RON HOENIG: Your view on how to approach the determinative function seems to be the way in which the former Acting Commissioner approached the last few reports that he wrote. He seems to have analysed the evidence carefully, acted only on evidence on which he could safely act, incorporated submissions from persons of interest and resolved the dispute between their submissions and counsel assisting. I thought the report was quite a good and comprehensive template.

Mr HALL: Yes. You have an experienced mind at work there. It takes me back. I recall reading former Commissioner Fitzgerald's report on his notorious, well-known inquiry. He said that, wherever possible, he would make particular findings based on admissible evidence. I think his inquiry was a successful one. In his public report he did not make specific findings about individual people, but that was packaged up and sent to a special prosecutor. Nonetheless, his approach heralded and reflected an experienced mind at work. There is a potential for error if you do not have admissible or sound evidence upon which to make those sorts of serious findings.

The Hon. TREVOR KHAN: This is perhaps outside the scope. I have not looked at the website recently but is material from what I would describe as the old ICAC essentially still on the ICAC website—former reports and the like?

Ms McDONALD: Yes.

The Hon. TREVOR KHAN: And media releases?

Ms McDONALD: I cannot help you with media releases. I know the section on past investigations, which will pick up reports and transcript, et cetera, that are still there. I do not know about media releases.

The Hon. TREVOR KHAN: I raised it because even though some of the reports might have come down there was some material that at least for a period was on the website. However, it might have exceeded the period that one might have anticipated it to be there—for instance, response to decisions of higher courts and the like. I do not speak for anyone else but people might have found it surprising that it had not been taken down.

Mr HALL: The only information I have is that sometimes what would be taken off the website would be a report of the Commission relating to an imminent prosecution or hearing and that sort of thing. I am not sure about anything else.

The Hon. TREVOR KHAN: There was one for instance that was critical of the Cunneen decision.

Ms McDONALD: Critical of the Court of Appeal or High Court?

The Hon. TREVOR KHAN: Yes. That was on the website for a period. I raised this issue as some reports are still there. Perhaps the new body might review such things.

Ms McDONALD: I will take that on board.

The CHAIR: We might revisit that, Mr Khan. Mr Hall, one of your functions is to have a further meeting with us, which no doubt you will enjoy, to review the reports of the Commission. We have not had a

review in relation to the 2014-25 annual report and the report for 2015-16 is also to be reviewed. You may not have had an opportunity of forensically testing those reports and getting yourself across them. What date would be good for you? We could do it either in October or November. Perhaps you might come back to us, bearing in mind that we would like to get a fresh sheet of paper on the table, get those reports dealt with and establish whether there are any issues that you want to raise with us or we want to raise with you.

Mr HALL: Yes, I am hopeful that in the second half of October we might be able to meet again if that is suitable to Committee members. If there are any aspects concerning the annual report in which Committee members are particularly interested and we are given notice, we will try to address them.

The CHAIR: Mr Khan's issue, for example, might be addressed—just the process of putting up and taking down media releases.

Mr HALL: Sure.

The CHAIR: Thank you for coming in today and making yourselves available for questioning. We may wish to send you further questions in writing. I take it you have no objections to answering those questions?

Mr HALL: Not at all; we are happy to assist in answering questions.

The CHAIR: That concludes today's hearing. I thank the witnesses who appeared today. In addition I thank Committee members, staff and Hansard for their assistance in the conduct of the hearing.

(The witnesses withdrew)

(The Committee adjourned at 11.55 a.m.)