

**REPORT ON PROCEEDINGS BEFORE**

**COMMITTEE ON THE INDEPENDENT COMMISSION  
AGAINST CORRUPTION**

**REVIEW OF THE 2017-2018 ANNUAL REPORTS OF THE ICAC AND  
INSPECTOR OF THE ICAC**

**At Macquarie Room, Parliament House, Sydney, on Friday 18 October 2019**

**The Committee met at 9:30**

**PRESENT**

Ms Tanya Davies (Chair)

**Legislative Council**

The Hon. Taylor Martin (Deputy Chair)  
The Hon. Rod Roberts  
The Hon. Adam Searle

**Legislative Assembly**

Mr Justin Clancy  
Mr Ron Hoenig  
Ms Tania Mihailuk  
Mr Jamie Parker  
Mr Dugald Saunders  
Ms Wendy Tuckerman

**The CHAIR:** Good morning everyone and thank you for attending this public hearing of the Joint Committee on the Independent Commission Against Corruption. Today's hearing is to review the 2017-18 annual report of the Inspector of the ICAC. We welcome Justin Clancy, the member for Albury, who is joining us via teleconference. Before we commence the public hearing I would like to acknowledge the Gadigal people of the Eora nation, who are the traditional custodians of the lands upon which we meet here in Parliament. I also pay my respects to elders both past and present and send respect to any Aboriginal and Torres Strait Islander peoples either present or hearing the proceedings on the internet. Today the Committee will hear from the Inspector of the ICAC, Mr Bruce McClintock, SC. Next Monday the Committee will hear from witnesses representing ICAC, including the Chief Commissioner, the Hon. Peter Hall, QC.

May I remind everyone to please switch off their phones or put them on silent as they can interfere with Hansard's recording equipment. The Committee has resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines covering coverage of proceedings are available. I now declare the hearing open.

**BRUCE McCLINTOCK**, Inspector of the Independent Commission Against Corruption, Office of the Inspector of the Independent Commission Against Corruption, affirmed and examined

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

**Mr McCLINTOCK:** The only question is how would you like me to address you. Madam Chair? Ms Davies? What would you prefer?

**The CHAIR:** Tanya. It is just quicker.

**Mr McCLINTOCK:** I am happy to do that.

**The CHAIR:** Whatever you are comfortable with, I am fine. Would you like to make a brief opening statement before the commencement of questions?

**Mr McCLINTOCK:** By all means and in doing so I will bear in mind that some members of the Committee are old hands and have heard from me on at least two previous occasions—the Hon. Adam Searle in other circumstances as well. There are others here who, while I have met them informally in the meeting we had some weeks ago, I have not appeared before presently. So I will try to deal with those who have the background and those who may not yet have the background. Thank you for inviting me here today to discuss my role as Inspector. I welcome the opportunity to do so. We are focusing on the report for the year ended 30 June 2018. This morning I presented to the Speaker and the President my report for the year ended 30 June 2019 and a copy will be delivered to the Chairman today, I believe. It may already have arrived.

**The CHAIR:** We have one.

**Mr McCLINTOCK:** If the Committee felt on top of that, I will also be happy to answer any questions in relation to that year and not restrict myself nearly to the 2017-18 year as well. It is an opportunity today to discuss not just the reports but the work that I do and our perceptions about how the Commission is going because bear in mind I am not the important person; the important person is, so to speak, the ICAC itself. My role is to ensure that it complies with the law in two ways by dealing with complaints about the Commission—this is the role under section 57B of the Act—dealing with complaints about misconduct, abuse of power, maladministration and so on. I also have a role to audit the operations of the Commission to ensure that it complies with the law. I personally believe that the legislation is wide enough for me to be looking at what should be best practice for the Commission.

When I took over I was appointed as Commissioner—as Inspector, I apologise, I am getting above myself—from 1 July 2017. That came at the end of a period of considerable controversy for ICAC, which you would all be aware of. I had given evidence myself before this Committee before I was Inspector because I had written two reports: one in 2005 into the ICAC legislation and one with the Hon. Murray Gleeson in 2015, prompted by the Cunneen decision. I, for example, supported—over the opposition, I might say, of former Commissioner Ipp—the three-person model that Parliament wisely, I believe, went to. When I took over in 2017 I faced 23 outstanding complaints of misconduct on the part of the Commission. Some of them had been outstanding for two to three years, a matter of very great concern to me at the time.

I did a triage on them. This is in the report that you and the Chair are examining. I found some that I could dismiss or postpone immediately. For example, there were some complaints that were the subject of court proceedings. There were two obvious examples: the ones against Mr Obeid and the ones against Mr Macdonald. I took the view that I should not be determining those complaints while there were outstanding criminal proceedings against those men and so I deferred doing that. That was, in a sense, easy. In relation to the others, though, there were some that were easier to deal with because they did not raise a real question of misconduct or maladministration.

There were others, however, that were of real substance. In the ultimate, I did not uphold any of the complaints but there were others that had to be approached with a considerable amount of care. What actually happened was—it was completely unrealistic—that I thought I could get them done within my first six months by 31 December 2017. That was, in fact, ludicrous, I realise now. For those of you who are lawyers, it was like starting off and having, say, 17 reserved judgements that I had to get through. Then at the start of 2018 I got sick myself and had to have spinal surgery. That slowed me and cost me probably about three months because I was too unwell to really do the work. I finally got rid of all the complaints at the end of July or August 2018. All of the outstanding complaints were dealt with by then. I think I had also dealt with all of the complaints that came in, although they were easier than the legacy ones.

I deal with complaints in two ways—actually, under the Act, there is probably one way but I have taken two approaches to it. I present, as I am required to under the Act, a special report to the Speaker and to the President, like the annual report I did this morning. But whenever I think that there is a significant issue that deserves to be ventilated publicly because, of course, as you know, they become parliamentary papers and they are on the Parliament's website so people actually access the report, I do that by way of special report to Parliament. A recent example is the report that I did in relation to the complaint by the Labor Party in relation to the execution of the search warrant at Sussex Street. Because that was already public I thought that I should present a special report.

There is always something out of the ordinary, something above and beyond a standard complaint, that makes me give a special report. The other way I deal with complaints is I write to the complainant and explain what I am doing. This is invariably when I am dismissing the complaint, because if I ever upheld a complaint I would do it by way of special report and then I include a reference and an explanation in my annual report to Parliament, which I think complies with my statutory obligations in relation to reports. There has been a considerable drop in the number of complaints that I have received after the end of the 2017-18 year, after getting rid of all the outstanding legacy ones.

In addition, I think the decline in complaints can be attributed probably in large part to the fact that ICAC itself is working extremely well in my observation. The three-person Commissioner model adopted by Parliament has been effective. You have three very hard working, very diligent people who are eager to do work. Some of the issues that were around previously just do not occur. I can talk in more detail if you wish to ask me about why some of them are not there.

**The CHAIR:** I think we are keen to start asking some questions of you but you actually started to answer one of the questions that I had. If you perhaps just wanted to wrap up the introductory comment.

**Mr McClINTOCK:** That is essentially all I wanted to say other than that I welcome any questions about any aspect of my work and my perceptions about ICAC.

**The CHAIR:** Thank you, Mr McClintock. I would like to commence questioning. In your introductory comments you mentioned that you have a desire to see ICAC operating at best practice. In reviewing the various complaints you would perhaps see ICAC's operations from a different perspective. Having looked at those complaints, investigating them and now with your couple of years' experience dealing with ICAC, can you identify ways that you can actually see how ICAC can be improved?

**Mr McClINTOCK:** There are a number of specific things. The answer to your question is yes, I can. Some of them are matters of detail. For some of them if you pushed me to answer them I would. There are one or two of them that I would prefer to actually raise directly with the Chief Commissioner rather than saying it publicly.

**The CHAIR:** Certainly.

**Mr McClINTOCK:** I am not trying to hide anything.

**The Hon. ADAM SEARLE:** Perhaps an easier question to start off with. Based on your perceptions of ICAC when you did those reports, and now that you have the role of Inspector, how has the role of the ICAC improved, or has it improved?

**Mr McClINTOCK:** Unquestionably it has improved.

**The Hon. ADAM SEARLE:** In what ways?

**Mr McClINTOCK:** I will answer that perhaps elliptically. I said on one occasion here before in this Committee when the three-Commissioner model was being discussed, and I supported it, that the issue is always the quality of the people that you appoint to do the job. You could have the best model in the world but if you appoint inappropriate people, and I can remember Mr Khan, while I was looking for the right word, interjected and said, "You mean a zealot." I said, "Yes." If you appoint people like that you will have problems. I think the model is a very good one, in that it is an improvement over the previous one-Commissioner model, but again the real point here is the people who have been appointed. I am not exaggerating but I think they are really outstanding.

The State of New South Wales has been very lucky to obtain those three Commissioners. That is the big-picture difference, Mr Searle. The other difference, perhaps lower down the scale, I think is that the hearings are being run differently, I think the choice of counsel assisting is being done differently and better, which I think has cured, resolved or removed a whole series of problems that were there.

**Mr RON HOENIG:** And the guidelines for procedural fairness.

**Mr McCLINTOCK:** Exactly. And there are some of them built into the legislation, obviously, Mr Hoenig. Yes. I mentioned this in my last report—I have not finished it completely yet—but I was concerned about some of the things I noticed as a result of reading some of the complaints. I have said this to some of you before. I will not use specific examples, but one of the regular complaints was about the conduct of counsel assisting in the inquiries. The problem was—well, perhaps not a problem—counsel assisting is not an officer of the Commission and therefore I have no jurisdiction over counsel assisting directly. If, however, there was an improper failure to supervise counsel assisting by a Commissioner, I would. But in the course of dealing with some complaints, I became concerned about some of the things that happened and, as a result, I am performing an audit of how the Commission deals with counsel assisting. I can foreshadow my conclusion by saying that I am satisfied now that whatever the position was prior to the current regime, the Commission is dealing with counsel assisting appropriately. Some of the things that happened in the past have not happened and I do not believe will happen again. There are things like that. That is an indirect way of answering your question.

There are other things too. This I have not raised with the Chief Commissioner and that is why I feel diffident about it, but I have a bit of a concern about how their audit committee is working. I should introduce Ms Zekanovic, my principal legal advisor. We have made it our business to go along to meet a lot of the ICAC staff and go to ICAC committee meetings. We have been to one audit and risk committee meeting. We have met the corruption prevention unit. We meet regularly with the Chief Commissioner and the two Commissioners. We get all the papers from all the committees that come in. A large part of our job in auditing is just knowing what the Commission is doing by reading the material they send us. I think I have probably strayed away from answering your question—and your question, Mr Searle.

**The CHAIR:** That is okay. It probably was a good warm-up question, perhaps. You were talking about, in essence, the difference that a culture of an organisation can deliver in terms of outcomes. While culture is determined by the people in the environment, particularly the leadership of the organisation, as Chair of this Committee I want to be satisfied that the structure of the ICAC—insofar as the Government and Parliament can change legislation, that we have developed the ICAC legislation to be such that we can in any way prohibit the behaviours of the past without, of course, going so far as to try to influence culture. Can any further improvements be made to the ICAC functioning or to the ICAC legislation that will strengthen the current practices that are now in train so that we do not go back to the previous era that we are all very well aware of? Can we do anything further in that respect, from your perspective?

**Mr McCLINTOCK:** That is a hard question to answer. It would be a very foolish person who said there never can be an improvement made. There is always the possibility of providing more information on the Commission's website about what is happening and things like that. In terms of actual governance, though, my perception is that it is working well at the present time. I do not perceive, myself, in relation to the governance structures and the internal operations of the Commission, a need to impose any more prescriptive things on it. I also suspect that it probably would be unwise to do so at this stage.

There was a review in 2005. That review was a general review, not prompted by anything but a desire on the part of the then Government to see how things were going with their Act and how they could be improved. There was the review in 2015 by Murray Gleeson and myself that was prompted by a specific problem. I would have thought that the way of doing it might be to have a similar review. I am not offering myself for it.

**The Hon. ADAM SEARLE:** Go for the trifecta.

**Mr McCLINTOCK:** The only thing is that I think it would be unwise to have me do it because it should be someone different, but it might well be. Perhaps after the current legislative scheme has been in operation for three or four years, to have a formal review. Whether it is done by an appointee like I was or the committee itself doing it formally and having public hearings where people are called to give evidence—not just people like me, there are a lot of people who have an interest in the area. For example, I saw Mr Merritt from *The Australian* outside. While he expresses his views to the pages of *The Australian*, he is someone who might also be an appropriate person to listen to. Again, that is a long winded way of answering your question. The answer is: I do not think there is any pressing need for change right now but these things should always be kept under review. My own personal view is that a review next year or the year after would not be a bad thing at all—specifically focusing on how the most recent legislative changes are operating.

**Mr RON HOENIG:** In respect to those legacy matters there is one issue I want to raise with you. It arises from some evidence you have just given in terms of counsel assisting. These do arise prior to the latest amendments to the Act, prior to the three Commissioner model, prior to amendments to the bar rules in 2015—

**Mr McCLINTOCK:** I should not interrupt you but I should have mentioned the bar rules because they are significant in keeping counsel assisting under control. There are now specific bar rules dealing with counsel assisting and royal commissions, commissions and entities like ICAC. I apologise for interrupting you.

**Mr RON HOENIG:** From your website, one of your functions is to prevent an abuse of power, the considerable powers which Parliament has vested in it.

**Mr McCLINTOCK:** Yes.

**Mr RON HOENIG:** Arising from those legacy issues, you took one complaint to commence an investigation at your own initiative?

**Mr McCLINTOCK:** I did.

**Mr RON HOENIG:** That was an issue in relation to Michael Gallacher.

**Mr McCLINTOCK:** It was. That was the matter I was referring to without naming it earlier on.

**Mr RON HOENIG:** In your letter to Michael Gallacher on 30 August 2018—I have the letter but I do not have the attachments—in the fourth paragraph you said:

That said, I have unresolved concerns about Mr Watson's conduct in asking the impugned questions of Mr Williams. In particular, I find it hard to see how the allegations that you and Mr Williams "hatched a corrupt scheme" was warranted by the document upon which ICAC realised it justified. I am also concerned about the denunciatory nature of the question which I do not regard as appropriate for a public inquiry of this nature. One, amongst a number of reasons, for that concern is the possibility that serious adverse consequences may flow to persons who have not had a chance to answer the denunciation.

That is what you wrote to Mr Gallacher.

**Mr McCLINTOCK:** Yes. I would not change a word of it either.

**Mr RON HOENIG:** Just so that everybody understands the nature of the questions that were asked in the circumstances because it is important for the Parliament to know whether it needs to make any further legislative changes arising from, say, an instance such as this in case there are others. You said there are other issues in relation to it or other complaints about counsel assisting. The evidence to which you refer, which was the impugned questions, Mr Gallacher was not a person of interest when Operation Spicer started.

**Mr McCLINTOCK:** No, he was not. You know the circumstances in which he learned about that question.

**Mr RON HOENIG:** Yes. Now Mr Gallacher was the leader of the Government in the Legislative Council, Vice-President of the Executive Council, the Minister for Police and Emergency Services, formerly a highly regarded, decorated, undercover police officer with a reputation for integrity.

**Mr McCLINTOCK:** All of those things are true.

**Mr RON HOENIG:** He was attending the swearing in of new police officers.

**Mr McCLINTOCK:** In Goulburn, yes.

**Mr RON HOENIG:** In Goulburn, talking to them about the integrity of New South Wales police, effectively himself being a role model as a police officer.

**Mr McCLINTOCK:** That is all completely correct, Mr Hoenig.

**Mr RON HOENIG:** This question was asked by counsel assisting in Operation Spicer of a witness that was being examined by counsel assisting. From the transcript, Mr Watson said:

You see, just so it is clear, and I want you to know, Mr Williams, we don't go off half copped [sic], we wouldn't put something as serious to you as this without knowing plenty of stuff. The truth is you had a close longstanding personal connection with the Shadow Minister Mike Mr Gallacher?

Mr Williams said:

Yes.

Mr Watson said:

It was through him that the two of you hatched a corrupt scheme to make donations to the Liberal Party using the EightByFive business, correct?

Mr Williams said:

No.

Mr Watson then said:

Well can I tell you by the end of this you're going to regret having giving [sic] that answer, Mr Williams.

You have seen that exchange between counsel and the witness?

**Mr McClINTOCK:** Of course I have. That is the exchange I was referring to in my letter to Mike Gallacher. I am very familiar with that exchange.

**Mr RON HOENIG:** The practical effect of that was that Mr Gallacher had to resign as a Minister of the Crown and the offices that he held.

**Mr McClINTOCK:** Well, I do not know that he had to but he did. The consequences of those questions for him were extremely serious. It ended his career in politics.

**Mr RON HOENIG:** As it transpired, no such evidence was called in the public hearing.

**Mr McClINTOCK:** That is correct.

**Mr RON HOENIG:** No adverse finding was made against Mr Gallacher in terms of the findings of corrupt conduct or anything of that nature.

**Mr McClINTOCK:** There was no finding of corrupt conduct made against him.

**Mr RON HOENIG:** Mr Gallacher through his solicitors did not just complain to you as Inspector. His counsel, Mr Moses of senior counsel, complained on a number of occasions in relation to this issue during the public hearings of the Commission.

**Mr McClINTOCK:** Yes. I am aware of that too. He did. What he actually did was he both complained and demanded to see the evidence upon which Mr Watson had based, supposedly, his question. My understanding is that that evidence was never produced in response to Mr Moses' demands.

**Mr RON HOENIG:** And was never led in the public hearings either.

**Mr McClINTOCK:** So I understand.

**Mr RON HOENIG:** So the reputational damage to Mr Gallacher is enormous, you would accept?

**Mr McClINTOCK:** Yes. I would not dispute that for a second. You quoted what I said in my letter to Mr Gallacher and, as I said, I would not change a word of that.

**Mr RON HOENIG:** My concern is, it is interesting as I read your 2005 review, and I read your review that you did with Murray Gleeson, lawyers and judges have a habit of approaching things in a legal way.

**Mr McClINTOCK:** That is hard to avoid when you are a lawyer.

**Mr RON HOENIG:** Yes. But when the Parliament gives enormous—and in terms of our review that involved the latest amendments, we went back and took evidence from those who originally set up the Commission and the purpose of setting up the Commission.

**Mr McClINTOCK:** It was Parliament at its best, actually.

**Mr RON HOENIG:** The purpose of Parliament giving these enormous powers was to—and we accepted this evidence—was to address this really serious, systemic corruption at significant levels at which I think Mr Sturgess said there would be no admissible evidence. But it was that level of corruption. Yet the Commission, as it was then constituted, embarked upon an inquiry and destroyed the reputation of a highly regarded senior Minister of the Crown. Ultimately, your response as Inspector is that in your view of the law you have no power to address a wrongdoing occasioned by counsel assisting because he is not an officer of the Commission?

**Mr McClINTOCK:** That is not entirely correct, Mr Hoenig. My view—it is the view that I express in that letter and this was addressed in the 2015 report—was there was a submission made to us—I need to take a little bit of time to answer this question to be absolutely accurate—there was a submission made to Mr Gleeson and myself that we should make counsel assisting officers of the Commission, so that the Inspector had power over counsel assisting. We rejected that for a number of reasons, which are set out in the 2015 report. Obviously, given the report in 2015 I had no idea that ultimately two years later I would become Inspector. But the principal reason why we said that that should be rejected was because if there was a wrongful failure on the part of the Commission to supervise counsel assisting or to keep counsel assisting under control and that the counsel assisting did things that were improper, that would be misconduct on the part of the Commission and therefore the Inspector did have jurisdiction to deal with it.

In the Gallacher case, my view was that whatever I thought—it is pretty clear what I did think—whatever I thought about conduct of counsel assisting that I could not find on the requisite standard that the Commission itself had wrongfully failed to supervise him. Had there been a repetition, for example, of something like that the next day and the next day, it might have been a different matter. But as I say in that letter, that was

the reason I undertook the inquiry or the audit of how the Commission presently deals with counsel assisting. I have to say that things are very different from what they were then.

**Mr RON HOENIG:** Can I just follow on from that: So no findings were made against Mr Gallacher?

**Mr McCLINTOCK:** Yes, none.

**Mr RON HOENIG:** The failure appears to be counsel assisting.

**Mr McCLINTOCK:** Yes.

**Mr RON HOENIG:** Mr Gallacher wants, quite justifiably—he has no access to a court because there is no finding against him. How does Mr Gallacher have his reputation restored by someone in authority? That is for him. Secondly, I must say that Mr Gallacher aside—and I said this to Mr Gallacher; he has suffered severely personally as a result. However, so have the people of New South Wales. When, as a result of impropriety, the practical effect is to remove a senior Minister of the Crown it is really an attack on the entire democratic fabric of the State. It is far more serious than Mr Gallacher just losing his political career. You can just envisage—and I will not say what they are—how improper conduct could impact the democratic fabric of the State, because it is not the lawfulness of the removal of the Minister, it is the practical effect and the reputational damage. These days, as soon as there is any suggestion of impropriety to an elected representative, it is man overboard.

**Mr McCLINTOCK:** I am not sure this is the appropriate metaphor, but you are pushing on an open door. I agree completely. These things strike me as absolutely correct. What you are saying is—going further, one of the consequences of this is that people with the appropriate skills and abilities will be discouraged from coming into Parliament and engaging in politics, if they feel they could be dealt with in this way. Again, I agree.

**Mr RON HOENIG:** Even the exoneration protocol, which was floated in the latest review, that does not help Mr Gallacher because he does not get an exoneration protocol. So, what does he get? Is he reduced to having to have an Opposition backbench member of the New South Wales Legislative Assembly saying in the ICAC oversight committee that he was removed from office for no purpose through the impropriety of counsel assisting? Is that all that he gets at the end of the day?

**Mr McCLINTOCK:** Just bear in mind he was not removed from office, he resigned. I am not a member of Parliament. You know that. I am not a politician.

**The CHAIR:** I believe in some circumstances certain people in that situation are presented with no other choice.

**Mr McCLINTOCK:** I can understand why Mr Gallacher in the circumstances felt that, I really can.

**Mr RON HOENIG:** He was told that by the Premier.

**Mr McCLINTOCK:** I did not know that.

**The Hon. ADAM SEARLE:** Mr McClintock, in this situation, looking at it from a systemic point of view, if someone in your role had no jurisdiction over counsel assisting in that situation, counsel assisting even at that time was bound by the bar rules, by the prosecutor's duties.

**Mr McCLINTOCK:** Yes.

**The Hon. ADAM SEARLE:** If you are putting affirmatively a proposition in an inquiry, for which there is no evidence, how is that not a departure from the bar rules?

**Mr McCLINTOCK:** Personally, I think it is. As you know, I am not going to enforce the bar rules.

**The Hon. ADAM SEARLE:** I understand.

**Mr McCLINTOCK:** I will enforce the Act. Mr Watson was dealt with by the Bar Association. I am unfamiliar what exactly happened there.

**The Hon. ADAM SEARLE:** Nothing very profound, it would seem.

**Mr McCLINTOCK:** That is my understanding.

**Mr RON HOENIG:** In fact I had not thought of it until it was raised by senior counsel who has regularly appeared down there. Having senior counsel put that question, was it not open to the presiding commissioner to direct a non-publication order saying that he will take that evidence in private hearings, or alternatively deal with the matter through compulsory examinations prior to it being published? It was the published nature of the matter. As you and I know, but others do not know, most of these royal commissions, commissions of inquiry, inquests,



matters, are usually carried by counsel or counsel assisting. The presiding commissioner may or may not be on top of the issues.

**Mr McCLINTOCK:** It all depends on the Commissioner and the counsel assisting. There have been examples where, as you say, counsel assisting does everything, and the presiding person is like a judge, in the sense of not knowing anything in advance. On the other hand, there are situations where it works the other way around.

**Mr RON HOENIG:** In this case in the transcript, if my recollection is right, there was some response from the Commissioner that they were only told these things—or by somebody—"at seven o'clock last night", the night before. Why can these matters not have been subject to non-publication orders and the counsel pulled into line by the Commissioner at that point?

**Mr McCLINTOCK:** Mr Hoenig, they could have been. I cannot recall—because I have not looked at that transcript now for a year and a half—whether there was any application by counsel representing Mr Gallacher at that stage. But, again, a lot of these problems can be solved by discretion on the part of people who are exercising the powers, that is counsel assisting. It is obvious what I think about what happened. You know what I think because I said it in that letter.

**The Hon. ADAM SEARLE:** Apart from the steps the Commission has taken under its current leadership, what other steps do you think need to be taken, if any, to guard against a repetition of that particular situation? I have in mind the policy the new Chief Commissioner has made in relation to exculpatory evidence. I would have thought the Commission was always bound legally by the rules of procedural fairness and if it was not in the habit of providing all the information it had previously that would have been a legal problem anyway? Does that accord with your view?

**Mr McCLINTOCK:** Yes it does. I would have thought that if the Commission has evidence that, firstly, indicates guilt of corrupt conduct but, secondly, evidence that contradicts the initial evidence and shows no guilt—that is what you are talking about when you say exculpatory evidence?

**The Hon. ADAM SEARLE:** It is.

**Mr McCLINTOCK:** It would be an elementary breach of the rules of procedural fairness to make a finding based only on the first category rather than—

**The Hon. ADAM SEARLE:** Or just not to produce all of the evidence.

**Mr McCLINTOCK:** Not to produce it and not to disclose it to the person—

**The Hon. ADAM SEARLE:** It is the non-disclosure to the impacted parties.

**Mr McCLINTOCK:** Clearly. Because my strong view is that the Commission is working well now and these things are not happening, in the course of the audit I referred to, I have interviewed some of the people who have been counsel assisting recently to find out how the Commission deals with them. I can say, with some certainty, that the matters that were of concern to me—as I expressed in that letter, and that is not the only example, there was one other—will not happen again. If it were to happen again and it came to my attention as Inspector, I would consider intervening directly with the Commission and expressing my views about it.

**Mr RON HOENIG:** How does Mr Gallacher restore his reputation and how does New South Wales restore its reputation?

**Mr McCLINTOCK:** Under the current legislation, there is probably no way it can do that other than something that might appear in the audit report I prepare in relation to counsel assisting in the current operations when I explain why I am doing it. But you have to be careful when approaching legislation like this. In 1989, Parliament made a decision that it would sacrifice certain significant rights of ordinary citizens in favour of enhancing public administration and reducing corruption in this State. It was a calculated decision and those of you that have spoken to the people—like Mr Sturgess—who were there, will tell you that is exactly what they did. They overrode the privilege against self-incrimination and a whole series of things.

The decision to have public hearings—where the root of this issue comes from—was made by them. That is the reason why, ultimately, the Office of the Inspector was created in 2005 to oversee a body with significant powers which were intended to and did overcome significant rights of the citizen, including their right to their reputation, I might say—which I regard as a right as much as the right against self-incrimination. Whether you can come up with a way of dealing with specific issues such as the damage to someone's reputation, as opposed to the provisions about disclosing the results of inquiries and charges on ICAC's website, I do not know and I frankly doubt. Sometimes you have to stand back and say as the legislators did in 1989 that we are sacrificing these things for what we perceive to be a greater good.

**The CHAIR:** Mr McClintock, in relation to your response to the line of questioning, I want to read out into the *Hansard* and to remind everyone an extract from the second reading speech by the then Premier, the Hon. Nick Greiner, when we introduced the ICAC Act. I quote from his second reading speech:

Third, the commission will be required to make definite findings about persons directly and substantially involved. The commission will not be able to simply allow such persons' reputations to be impugned publicly by allegations without coming to some definite conclusion.

That was in the second reading speech when they were introducing the ICAC Act into the New South Wales Parliament. But as we have been hearing from Mr Hoenig and Mr Searle this morning, the operations of the ICAC in relation to Mr Gallacher completely do not adhere to the directions and the purpose of the ICAC as it was introduced in 1988. I am seeing a serious problem that still does not have any direction to resolve. It is one thing to talk about moving forward but we are talking about catastrophic damage done to, in this case, Mr Gallacher; there could be others as well that are not mentioned here.

In the past, the purpose of the ICAC Act was never to see that damage delivered. I think that as legislators we have an obligation to redress the problems of an Act that is operating. When it was introduced it was explicitly determined not to see that damage delivered. I think we are wrestling with the origins of the ICAC, the rollout of the ICAC year by year and seeing the unintended consequences or perhaps the inappropriate behaviour of some people and the damage that that affords. We have an obligation to do what we can to repair and also prevent that happening in the future.

**Mr McClINTOCK:** I would not dissent from anything you said. Can I ask what year did Watson ask that question of Williams?

**The CHAIR:** It was 2014.

**The Hon. TAYLOR MARTIN:** It was 2014, from memory.

**Mr McClINTOCK:** About then, I think.

**Mr RON HOENIG:** It was 2 May 2014.

**Mr McClINTOCK:** You see, there was no repetition since then. It is obvious. I wrote to Mr Gallacher. I had a very, very considerable degree of sympathy for him. I did and I do. Yes, I think personally what happened to him was wrong and unfair. That is a personal view. Yes, I concluded that there was nothing I could or should do about that under legislative constraints that bind me. It is a different question, though, if you go further and ask the question: Should the legislation be changed? The problem, I think, as in so many of these problems, as I said before—I appreciate what was said to me earlier on—is the choice of people. You can have the best statutory structure in the world and you can have the best rules but if the people who administer them are not the appropriate people, you are always going to have problems. I personally do not think you can fix these things by legislation. As I have said, I have my views about Mr Gallacher and they are strong views. I would not myself be changing the legislation to deal with that one issue.

**The Hon. ADAM SEARLE:** Just to be clear, in terms of the jurisdiction you have to oversight all of the different functions of the Commission, you feel that insofar as legislation can deal with those matters, given that so much else is a matter of judgement by people, are you relatively satisfied on your present knowledge that the legislation is in as good a shape as it needs to be?

**Mr McClINTOCK:** Yes, I am satisfied that it is working well now. Again, as I said earlier, there is nothing that cannot be improved and there is nothing that should not be examined. But this is crucial legislation; it is crucial to the functioning of the State. If it is not administered well, there can be dire consequences both to the people of this State and for an individual also—Mr Gallacher.

**The Hon. TAYLOR MARTIN:** You said, "Nothing should not be looked at and that we should review these protocols", then a moment ago you said that we should not look at changing the legislation. Am I correct?

**Mr McClINTOCK:** No, what I said was that the two fit together.

**The Hon. TAYLOR MARTIN:** Okay.

**Mr McClINTOCK:** My own view is that the legislation is working well. My own view is that you would not change the legislation to deal with the specific issue like Mr Gallacher's issue no matter how sympathetic I feel for him.

**The Hon. TAYLOR MARTIN:** I understand.

**Mr McClINTOCK:** But, as I said, particularly in an area like this, there is nothing that cannot be improved to some extent. But it requires a process that, in my view, should be like the full inquiries that this

Committee has had in the past, or an inquiry like the ones that I was involved in in 2005 and 2015. I am a bit wary about ad hoc solutions to ad hoc problems.

**The Hon. TAYLOR MARTIN:** Is it fair to say that there really is no remedy or exoneration for fellows like Mr Gallacher, maybe Mr Spence as well, others like them who have been caught up in investigations and had no findings, nothing brought forward?

**Mr McClINTOCK:** That is the case, except that the Commission can always say, "We found is not proved," or, "We found there was no evidence about it in relation to any particular individual." They can always do that.

**The CHAIR:** But they are not compelled to?

**The Hon. TAYLOR MARTIN:** This is the thing, these people's futures are in the hands of—

**Mr McClINTOCK:** Not compelled to, there is no compulsion.

**The CHAIR:** To wrap up their investigation and inquiry. "These people are in this column and these people are in this column." To clear up the matter. They are not compelled to clarify that?

**Mr McClINTOCK:** They are not compelled. These are matters that—and I know you want my views—I frankly would not have thought you would get much resistance from the Chief Commissioner to a proposition or a proposal that said if someone is adversely referred to at some point in the inquiry the Commission should make clear in its ultimate report whether the adverse reference was warranted or not. I cannot see any particular—

**Mr JAMIE PARKER:** And the Premier should not try and force them out, which is a key issue here as well.

**The CHAIR:** We will just finish this final question.

**Mr McClINTOCK:** Mr Parker, I cannot comment on that.

**The Hon. TAYLOR MARTIN:** You have a conflict of interest where the people investigating are making the allegations and then at the end of the day they are expected to turn around and admit they were wrong to have brought such allegations. I mean, it just does not fit. There needs to be some kind of remedy where a third party can identify that that person had not, in fact, done any wrong.

**Mr McClINTOCK:** Except that the people you have as Commissioners, you have an extremely experienced Supreme Court judge, a man of complete integrity who is not wedded to his own opinions. Look, when you engage in decision-making, and I have never been a judge but I have been an arbitrator and things like that, and my reports are decisions of a sort, you can start off thinking, "This is the case," and as you work through the materials you realise that your first thoughts were wrong and you change it. I would not be putting an oversight body on top of them to compel them to state accurately on my perception that they do. You also have to remember that the current model actually commenced in August-September 2017. There have been quite a few reports. I think you would be very hard pressed to identify any of the same problems since then that we have been talking about now. But again, these are matters for Parliament. All I can do is give you my views.

**Mr DUGALD SAUNDERS:** On that, you are saying that legislation probably does not need to be changed. You are saying nothing like this has happened since, but could it happen again if the Commission changed?

**Mr RON HOENIG:** If you get another zealot.

**Mr McClINTOCK:** If you get, to use Mr Khan's word, a zealot. Yes, of course you can. But again, that emphasises the thing that is really fundamental in this, which is the choice of the people who you make Commissioners. If you have a body like ICAC and give it the enormous powers it has—deliberately, under the Greiner Government—you will always have problems if you choose the inappropriate people, always. And there have been.

**Mr RON HOENIG:** A number of them.

**Mr McClINTOCK:** I am not going to comment on the individual Commissioners. I have been in the privileged position of having known every one of them since the very first one, Ian Temby. For what it was worth, I was counsel assisting myself in an inquiry at ICAC in the early 1990s, when I was still a junior in Randwick council—actually, not Randwick; the town planning department of Randwick council.

**Mr RON HOENIG:** You had a history of the Greiner matter, then you had that matter involving that Labor MP, Gibson, with Barry O'Keefe.

**Mr McClINTOCK:** Yes, who was disqualified by the Supreme Court for actual bias. They appointed retired Justice Badgery-Parker, who exonerated both Sandra Nori and Gibson.

**Mr RON HOENIG:** Now the Chief Commissioner is the man who wrote the book on royal commissions and commissions of inquiry. It was apparent to me when I was at the bar that nobody knows, either at the bar—it is apparently cases that you do, or judges—what the considerations are in the political process. You do not understand those until you are actually elected. When Parliament gives enormous power to an organisation like this to deal with those very serious areas of corruption that Sturgess intended that it deal, even though the body is technically subject to oversight by an inspector and by a parliamentary committee, the ability for committees and governments to actually intervene to a white knight body is politically very difficult because political parties would be seen to be soft on corruption.

These substantial reviews, these changes, these appointments—including yours—only came about because of the Cunneen matter, her ability to defend herself, and the intervention of basically the News Limited media's attack on the organisation. The Government eventually—not at the time it handed it over to you and Murray Gleeson, but eventually it got so hot they handed it to this committee to make recommendations. So it was dragged screaming into doing it after 29 years because governments of the day and, I foresee, probably this committee probably thought they would be looking at being soft on corruption, so that protection mechanisms that are in place are not necessarily there. So it is the Inspector that is being relied upon, not from the political process, to be able to ensure protection for individuals' reputational damage and propriety of all officers of the Commission and all those who appear in it.

**Mr McClINTOCK:** That is absolutely true. But, remember, I am bound by what the Act says I can do and cannot do. My powers are limited by section 57B.

**Mr RON HOENIG:** Does that need to be reviewed?

**Mr McClINTOCK:** If Parliament wants to give me additional powers, I suppose I might be the first public official who rejected additional powers. But that is entirely a matter for Parliament, although if you were actually considering that I would hope you would talk to me and consider my evidence first. But the background of the creation of the inspectorate was this: When the legislation was originally set up in the eighties, there was a thing called the Operations Review Committee. It was made up of laymen, of non-commission people, and it was intended to review the decisions of the Commission, including the decisions to have public hearings.

By the time the early 2000s came around, that committee had become dysfunctional because of the amount of work and because the people themselves—company directors—had very busy lives already. So as I said, it was dysfunctional. In the 2005 review, I recommended the creation of the Office of Inspector to fill in for that. But the powers given to the Inspector are, as I said, limited. It is a big hurdle to establish maladministration, abuse of power, misconduct or other forms of impropriety. That is conscious wrongdoing and that is a big hurdle. If you wanted to change the legislation so it gave the Inspector power to make findings about individual people, that does not quite fit within the model, but that seems to be what you are suggesting.

**Mr RON HOENIG:** I am looking for some mechanism that people like Michael Gallacher can, from some determinative authority, have his reputation restored rather than just producing the transcript of this hearing.

**Mr McClINTOCK:** Yes. And my letter to him.

**Mr RON HOENIG:** And your letter to him.

**Mr McClINTOCK:** Which no doubt he supplied to you.

**Mr RON HOENIG:** Yes, but you would need a lawyer to understand it.

**Mr McClINTOCK:** Give me a break, Mr Hoenig. I am a lawyer.

**The CHAIR:** I am not a lawyer and I understand it. Do you have a suggestion?

**The Hon. ADAM SEARLE:** No, he already said he did not think the legislation could be changed in this way.

**Mr JAMIE PARKER:** There should be a full review if there is going to be. That is the answer.

**Mr McClINTOCK:** It is a significant question and, before I answer it, I would like to have some time to think about it. I am not bucking it. I am perfectly willing to answer it. You are entitled to hear an answer from me. If you wish me to, I would be happy to think about it and come back to the Committee with an informal response letter.

**The Hon. ADAM SEARLE:** We would like to know what you think.

**Mr McClINTOCK:** By all means.

**The CHAIR:** We are having another hearing on your tabled report that we got today early in the new year.

**Mr McClINTOCK:** Good.

**Mr JAMIE PARKER:** The other questions we have seem so insignificant compared to how we manage an issue like that.

**Mr McClINTOCK:** I do not think anything is insignificant in this area.

**Mr JAMIE PARKER:** That is true. I wanted to ask a little bit around the area of complaints handling. In the report you have outlined a range of procedures, almost informally, about whether you would decide that special report is appropriate or a letter, whether you will or will not determine if there are criminal proceedings if it is already been subject to comment. There is a whole range of things informally that have been done. Is there somewhere where those procedures are documented which the public can see? For example, before they make a complaint, so we can have a more informed complaints process?

**Mr McClINTOCK:** There is an explanation on our website as to how we deal with complaints. I do not know that it has the details.

**Mr JAMIE PARKER:** It does not have that detail from when I have looked at it.

**Mr McClINTOCK:** Now that you have raised that with me I am more than prepared to consider even quoting that extract of the report on the website so that people can see it and understand. With respect, it is a very good idea to do that. I am perfectly happy to consider it and probably adopt it.

**Mr JAMIE PARKER:** When we had our informal discussions, I asked the question about if you are happy with the resourcing? Do you feel that the organisation is being adequately resourced and you are being supported adequately? I wanted to ask a question about the change in the way that the retainer is undertaken for your role. There was a \$10,000 retainer, then a daily rate and now there is no retainer and a daily rate. Does that work better? Is there something that we should be doing to examine how that works?

**Mr McClINTOCK:** The instrument of my appointment is a public document so I am perfectly happy to talk about it. Bear in mind, my role is a part-time role and is intended to be a part-time role. I still have a practice as a barrister although I have reduced so I can do my job as Inspector properly. The instrument of appointment specifies a daily rate which happens to be the same rate as the Attorney General's rate for Senior Counsel for ordinary court cases. There is an annual cap on the amount that I can get. I can safely say that I have not exceeded two-thirds of the annual cap. I am satisfied with the resources that I have available to me.

I share resources with the Inspector of the Law Enforcement Conduct Commission, Mr Terry Buddin. I share Angela, my principal legal advisor who is also his principal legal advisor, and we have one administrative staff person. He also has two other people who have other functions that I have nothing to do with, and we share offices. I am perfectly happy with my resources. I can get the work done. There are resourcing issues, as you know, with the Commission. That is a different question. But my resources I am happy with.

**Mr JAMIE PARKER:** I just wanted that to be on the record.

**Mr McClINTOCK:** Yes. As I said, I would not be asking for anything more. I might also say that the daily rate I get is capped at the rate as it was on 1 July 2017 for the five years of my term, so there is no inflation increase or anything like that.

**The CHAIR:** I want to ask a question in relation to page 3 of your report in which you were discussing the decision you came to that you would not proceed investigating on a complaint against ICAC and making a decision about that complaint if there was any pending criminal proceedings afoot. You were waiting for the DPP to respond to you about that proposed decision but you would not conduct an investigation. Has the DPP responded?

**Mr McClINTOCK:** Yes, the DPP has responded, saying, "Basically, it is a matter for you."

**The CHAIR:** That is very helpful.

**Mr McClINTOCK:** "It is a matter for you," but it is fair to say it is supportive of the decision generally. The reasons why are specified there, Mrs Davies, but I was concerned for two specific reasons. I was concerned that it would inhibit my decision-making process because if, say, I made a finding that the Commission had engaged in this conduct in relation to a matter that was the subject of pending criminal proceedings, that could

have two effects. Firstly, it could be used in those proceedings; and second, it would receive publicity and that might influence a jury, for example. It worried me because they are serious matters.

I would wish to come to those things unhampered by the concern that it might have an impact outside of the actual terms of the report. There have only been two of those, as I said earlier: the Obeid matters and the Macdonald matters. There was no resistance to my decision by the Obeids but as I say I would defer that. There was some resistance from Mr Macdonald but I believe that has been accepted, pending. What I will do is, when those cases are resolved, I will write to the complainants and ask them whether they wish me now to resolve the complaints. That is only a postponement. It is not a rejection or a dismissal.

**Mr RON HOENIG:** I actually agree with what you propose. I have always been troubled with the Commission being an investigative body. It is in possession of admissible evidence that shows someone has committed an indictable offence. The highest public interest is for the Commission to charge the person for those offences as distinct from carrying out some statutory investigation and making some determination down the track that either impacts upon a prospective jury or alternatively unfairly uses a coercive power to investigate something it does not need to investigate if it is in possession of admissible evidence that would enable someone to be charged.

**Mr McCLINTOCK:** There have been examples—not recently or not that I am aware of recently—where the Commissioner has received information clearly indicating commission of a crime, passed it on to the police and the person has been charged within a matter of days after. It has happened. Remember that the Commission has resourcing issues. If there is clear evidence of a crime and it is in its interest to pass it on so it is dealt with rather than expending its resources drilling down further when there is clear evidence. That is my understanding: If it is as clear as that, the Commission will pass it on to the appropriate authority—not necessarily the New South Wales police; sometimes it is the Australian Federal Police force or the Australian Taxation Office, as I understand. I am not speaking of anything I have learned in the course of my duties as Inspector, just from the things I knew from earlier inquiries and so on.

**The CHAIR:** Noting the time, I do want to ask one final question.

**Mr McCLINTOCK:** My time is yours, Ms Davies.

**The CHAIR:** I know that some other members have other appointments. Do any other members have burning questions before I perhaps finish off with this last one? I have had fantastic assistance from the Clerks of the Parliament, who have begun to look at your tabled report ending 30 June of this year. In your conclusion, you mention that you are considering an audit into how the Commission looks after the welfare of Commission witnesses, given the recent suicide of a witness. Are you able to perhaps give some introductory thoughts around how you might conduct that audit?

**Mr McCLINTOCK:** I am happy to do that. When I was counsel assisting in the inquiry into the town planning department at Randwick, on the day before the public hearings were to commence I was called into the then headquarters of ICAC, then down in Redfern. On the Friday one of the people who was going to give evidence had committed suicide. I had the genuinely unenviable task of having to listen to a 40-minute recorded suicide note. The death was wholly unnecessary. He was not a person of interest. His evidence was relevant. He was actually a solicitor. His evidence was relevant because of things he had been told in the course of his practice as a solicitor. That affected me deeply, personally.

As you know, there was the suicide that happened last year in connection with the ALP electoral funding inquiry. The Victorian Inspectorate is a much bigger operation than mine. The Victorian Inspector covers a whole series of agencies, including the Victorian Independent Broad-based Anti-corruption Commission [IBAC]. There had actually been a suicide on the premises of IBAC, which led to a report by the Victorian Inspector. It made some very critical findings of what happened there. The Victorian Inspector and I trade information, for obvious reasons. In fact, we have annual meetings, one of which is on in two weeks' time in Melbourne. He said in his report—and of course, my mind went back immediately to that Randwick inquiry. I thought it was something that was very much worth looking at.

I have started making preliminary enquiries. I have to say that my enquiries indicate that there is a very considerable difference between the death in relation to the ALP electoral funding inquiry and the one that happened in Victoria. Nevertheless, I propose to take that further. People can overreact when they find out that their evidence is being sought. Some people can overreact and feel that they themselves are the subject of blame, which is not necessarily the case. Sometimes that is very hard to avoid because an agency like the Commission cannot disclose precisely what it is looking for because, of course, that would defeat the purpose. But I want to inform myself as to whether there are things that can be done to improve the way they approach that. Deaths like

that are far too high a price to pay. I do not know where it is going to go. I will do it and I will report on it in this reporting year, the 2020 year.

**The CHAIR:** We look forward to seeing your report.

**Mr McClINTOCK:** It is one thing where I may need some external advice myself. Lawyers may not be the best people to consider the answers to some of these questions. We have our virtues, but also our failings.

**The CHAIR:** Thank you. I think we might wrap it up there. Thank you very much, Mr McClintock, for appearing before the Committee today. The Committee may wish to send you some additional questions in writing. I would just like to let you know that the replies to those questions will form part of your evidence and may be made public. Would you be happy to provide a written reply within five days of receiving those questions?

**Mr McClINTOCK:** Absolutely, yes.

**The CHAIR:** Is five days a satisfactory time? Ten?

**The Hon. ADAM SEARLE:** Make it 10 days just in case. Yes. Make it safe.

**The CHAIR:** Okay, 10 working days. Thank you very much for your time. That concludes our public hearing. Thank you again to the Inspector for appearing today. Thank you also to Committee members and staff for your assistance.

**Mr McClINTOCK:** Thank you for listening to me. It is always a privilege.

**(The witness withdrew.)**

**The Committee adjourned at 10:45.**