REPORT ON PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

REPUTATIONAL IMPACT ON AN INDIVIDUAL BEING ADVERSELY NAMED IN THE ICAC'S INVESTIGATIONS

At Macquarie Room, Parliament House, Sydney, on Friday 18 September 2020

The Committee met at 10:45.

PRESENT

Mrs Tanya Davies (Chair)

Legislative Assembly	**Legislative Council**
Mrs Wendy Tuckerman	The Hon. Taylor Martin (Deputy Chair)
Mr Ron Hoenig	The Hon. Rod Roberts
Ms Tania Mihailuk	The Hon. Adam Searle
Mr Jamie Parker	
Mr Dugald Saunders	

PRESENT VIA TELECONFERENCE

Legislative Assembly

Mr Justin Clancy

The CHAIR: Thank you for attending this public hearing of the joint Committee on the Independent Commission Against Corruption. Today's hearing is for the Committee's inquiry into the reputational impact on an individual being adversely named in ICAC's investigations. My name is Tanya Davies. I am the Chair of the Committee and the member for Mulgoa. With me today are my colleagues the Hon. Taylor Martin, MLC, who is the Deputy Chair of the Committee; Mr Justin Clancy, the member for Albury, who is connected with us via teleconference; Mr Ron Hoenig, the member for Heffron; Ms Tania Mihailuk, the member for Bankstown; Mr Jamie Parker, the member for Balmain; the Hon. Rod Roberts, MLC; Mr Dugald Saunders, the member for Dubbo; the Hon. Adam Searle, MLC; and Ms Wendy Tuckerman, the member for Goulburn. Mr Mark Coure, the member for Oatley, will be joining the Committee at around 12.30 p.m.

Before we commence I acknowledge the Gadigal people, who are the traditional custodians of the land on which we meet here in Parliament. I pay my respects to Elders past and present of the Eora Nation and extend that respect to other Aboriginal and Torres Strait Islander people who are viewing the proceedings on the internet. Today we will hear from witnesses taking part via teleconference and also attending in person here at Parliament House. At the outset I thank the witnesses for making themselves available to appear today. I remind everyone to turn their mobile phones to silent, unless they have done so already. I note that the Committee has resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines governing coverage of the proceedings are available. I now declare the hearing open.

ANDREW CHALK, Chair, Public Law Committee, Law Society of NSW, sworn and examined

DONNA WARD, member, NSW Bar Association's Inquests and Inquiries Committee, affirmed and examined

The CHAIR: Mr Chalk and Ms Ward, thank you for appearing before the Committee today. Before we proceed, do you have any questions about the procedural information sent to you in relation to witnesses and the hearing process?

Mr CHALK: No.

Ms WARD: No.

The CHAIR: Would either of you like to make a brief opening statement before we commence questions?

Ms WARD: We just wanted to thank the Committee for the opportunity to provide our written submissions. I do not want to repeat anything that is in there. Colleagues of mine have worked very hard on those submissions. That is all I need to say by way of opening.

Mr CHALK: I would also like to thank the Committee for the opportunity, on behalf of the Law Society, to make a submission. The Law Society regards ICAC as a critical element in the integrity branch of government in New South Wales. The ability to hold public hearings, in appropriate circumstances, is essential to its effectiveness and the maintenance of public confidence not only in the Commission, but also in government generally. The Law Society also recognises that there is a risk that reputations of people who have not been engaging in corrupt conduct may be tarnished or trashed by findings made by the Commission. The Law Society accept that the Commission is not infallible and that from time to time mistakes may be made. We would quickly add, though, that we see these as far and away the exceptions. For that reason, the Law Society has not closed to the idea that an exoneration protocol may, in some circumstances, be appropriate.

But it does not support the view of some that the touchstone of the operation of such a protocol should be criminal prosecution or conviction. It also agrees that the establishment of the terms of any such protocol are likely to be extremely problematic. There is a sensitive balance in the Act between protecting the rights of individuals from unfair reputational damage and the fundamental public interest in ensuring the integrity of government. The impact on the former is easy to see, whereas the erosion of public confidence in government can be less obvious, more insidious and potentially far more harmful. This sensitivity and balance is reflected in differences of opinion within the Law Society, as it probably is within society generally. What can be said, however, is that the reforms—both legislative and procedural—made in the light of this Committee's 2016 report have gone a long way to satisfying earlier concerns, and that the level of controversy that this issue attracted previously has diminished significantly. There is a strong view that the current system is working well and that any further adjustment should probably best wait a while to give the current systems time to establish themselves.

The CHAIR: Thank you, Mr Chalk. In reference to your last couple of sentences about the changes that the Parliament made following the 2016 report, in your letter you mentioned that the recent legislative and operational reforms struck a better balance. Could you elaborate on what was occurring beforehand that necessitated those changes, from your perspective of the ICAC's operation?

Mr CHALK: I should actually make a slight correction to our submission, in that I think there is a reference to 2015 amendments. They were important, but I think it is really the 2016 amendments that have had, perhaps, the biggest impact. One of the key changes, obviously, was the introduction of a requirement for two Commissioners, including the Chief Commissioner, to support the holding of a public inquiry. The public dimension is where the greatest risk of reputational damage can arise. The other significant change, I think, is around the positive obligations of the Commission to publish its procedures to ensure procedural fairness. I think once you get to the point of ensuring that the hearings themselves are fairly conducted—I am not saying that in the past they were not, but there was much wider discretion in the Commission as to how they were conducted, whereas following the amendments there are these clearer protocols that the Commission has published. That goes a long way to giving people who have the misfortune of having to appear in front of ICAC some confidence that they will be dealing with a playing field where the rules are known and the risk of unfair ambush is diminished.

The other aspect is that the two-Commissioner approach provides a clearer basis, I guess, for the public interest test to be considered and determined where it is not one Commissioner arguing with themselves over which way to go. I think both those aspects have made a significant difference. I should say that my experience in ICAC stretches almost from the first inquiry into corruption amongst North Coast councils and I still have a matter that is in front of the Commission. I think we have had various minor excursions down there in between,

but my own experience of the Commission has always been that the Commissioners approach their task very fairly and I think, again my experience of Counsel Assisting is that they approached it in the same way. But I realise that there have been problems to which I have not got personal experience with where there were issues.

Mr RON HOENIG: I am attracted to that part of the submission that relates to the risk of reputational damage and the use of nonpublication and suppression orders. I had not applied my mind sufficiently to that until I read your submission—perhaps I should have. Is it the case that much of the reputational damage of a public inquiry could be addressed if greater use was made of nonpublication or suppression orders or the use of pseudonyms? That would address significant concern, would it not?

Mr CHALK: I think that the starting point is where you do have a public inquiry that you need to make the case why there should be suppression rather than the presumption being that the Commission will suppress names. Where there is doubt as to what the evidence might be as the inquiry progresses, then there could be justification for the suppression of names. As you get closer to the end of the inquiry, obviously, and it becomes clearer what the evidence is, that justification may start to fall away. But it is certainly a useful tool in protecting people who the Commission has not formed a strong view as to what the conduct is when that public hearing starts. Bearing in mind that often there are private examinations, in fact that is the usual process, there are often extensive private examinations before there is a decision to hold a public hearing. It is a tool but one where it is hard to generalise where it is appropriate to use it or not.

Mr RON HOENIG: We made recommendations that Parliament adopted from extensive investigations that imposed, over the top of the objection of ICAC, the procedural fairness guidelines, the three-Commissioner model and to provide for requirements of procedural fairness and guidelines. Since that occurred and since the appointment of the three Commissioners, anecdotally and particularly the feedback from senior members of the profession and from the Inspector, Mr McClintock, there has been a huge cultural change in the way in which the Commission has been conducting its activities. That has been the evidence that we have heard and are satisfied that is the case. But the Inspector has made very clear to us as well that the success of the Commission depends on the quality of the appointments, and the quality of the appointments currently is exceptional. If one looks at the Commission's history that has not always been the case. Because of the nature of the powers given to it, are there sufficient checks and balances in place to stop error? One error, for example, that brings down the Premier of the State, one might think is too high a price to pay in a democracy.

Mr CHALK: Again, it is probably not appropriate to comment on any particular matter, but I certainly agree with the proposition that the effectiveness of the Commission depends very heavily on the quality of the people who staff it, particularly the Commissioners. They provide the leadership. How counsel assisting, how the investigators, how the solicitors do their job in large part is dependent on the leadership that is provided by the Commissioners themselves. The standard at the moment is somebody who is eligible or has served as a superior court judge: Supreme Court, Federal Court, High Court. That is not always a guarantee either, but at least if you have got three Commissioners and two of whom have to agree on a public hearing, you can go some way I think to managing the leadership end of it. I take the point, we do not say that the Commission will not make mistakes. But I think the reforms that have been put in place so far have proved to be very effective.

Mr RON HOENIG: If we look at legacy issues, for example, prior to the current Commissioners where there is a whole series of people, dissatisfied litigants, where the administrative law provisions have been too high a bar to overcome, where the Inspector has, for example in one case, reviewed the Commission's determination and said "they were wrong". What value is that to, say, someone like Mr Kazal? How does he restore his reputation? The Inspector's opinion that might relate to three years later about either maladministration or say if the Commission is wrong, where does that lead? Should he not have some right to some public declaration?

Mr CHALK: I do not want to comment on any particular case.

Mr RON HOENIG: Well, it is public. The report on Mr Kazal has been tabled in Parliament, so everybody knows about it.

Mr CHALK: That is correct. There is a process of fact-finding that goes on. The best that we can do really is to ensure that it is a fair process and it is a thorough process, including that the Commission has the resources to do its job. But the Law Society certainly does not agree that the touchstone of whether there should be a right of redress is founded in whether or not there has been a conviction. I, for example, could be summoned to give evidence. I could be served a question, "Did you take the bribe?" I can comfortably admit in front of ICAC, "Yes, I took the bribe." And I do it claiming privilege, and I walk out of ICAC and there is no basis to prosecute me because that is the only evidence that there has been corrupt conduct. Does it mean that the finding was improper or unwarranted? No. The ICAC does serve a different purpose and there are many other investigative inquiries and bodies that also have the potential to impact a person's reputation that do not sound in prosecutions

or convictions. Even the definition of corrupt conduct in the Act does not presume that all matters of corruption constitute criminal offences.

Mr RON HOENIG: The legitimate forensic purpose is to let the public know that this person is corrupt or taking a bribe and therefore impose one of the penalties that principles of sentencing apply upon conviction because there is no evidence to prosecute the person?

Mr CHALK: It does not directly affect the rights of the individual beyond reputation. There may be other consequences that flow from it but the ICAC itself does not have that power.

Mr RON HOENIG: How do you reconcile that with the presumption of innocence?

Mr CHALK: Again, I think they are different things. Our legal traditions have set a very high bar for a criminal conviction. That is not to say that a person's reputation is otherwise immune from damage short of criminal conviction. Regulatory bodies are constantly finding fault with people's behaviour that as an administrative decision may not result in any risk of prosecution. Health bodies finding doctors negligent, lawyers face the same regulatory findings and in some cases these bodies have the power to make orders that affect their rights to practice and probably go much further than, in those respects, than ICAC itself can go. All I can do, really, is shine a light on the problem.

Mr JUSTIN CLANCY: Mr Chalk, further to Mr Hoenig's question, you spoke earlier about recent changes, particularly 2016, have assisted to find a better balance. Do you feel that there should be a remedy or a course of action for those who feel that they have been adversely impacted prior to striking that better balance?

Mr CHALK: I think it is a fair question but it would be a difficult exercise to go back. Were that to happen it would essentially need to involve reopening of the investigation and there would need to be some sort of threshold to establish that there was a serious denial of procedural fairness, for example, to justify doing that. Then the question would arise perhaps if there was this fundamental problem whether the option of judicial review should be taken up at the time. Can I give one example where an exoneration protocol may have some operation where I think there may be a gap and that would be in circumstances where somebody is found by the Commission to have engaged in corrupt conduct on the basis of a particular set of primary facts and after the Commission had reported some other evidence emerges that was not available or it arises afterwards. For example, where there is a contest between two witnesses as to which should be believed and the Commission goes one way and the witness who was believed, after the Commission has reported, later admits that they were lying.

Something that is seriously exculpatory, like an admission that false evidence was given and that founded the basis of the corruption finding, there would be no prosecution in those circumstances and there may not be any right to judicial review either because on the evidence before the Commission at the time there may not have been any error. It is only the additional evidence that creates the problem, or the new evidence. If it were a criminal conviction there would be grounds to ask for a pardon. What does somebody whose reputation has been damaged in the ICAC do in that instance? This goes to your earlier question. One option would be to make it clear, for example, that the Commission had power to reopen an investigation to correct the record. It may want to take some additional evidence to satisfy itself about the fresh evidence. On the application of an affected person it could do that. Alternatively, if the Commission refused to review its report then there may be justification to allow a right to have that decision reviewed by the Supreme Court. That is one example where there may be a gap.

The CHAIR: Ms Ward, if you wish to add further to what Mr Chalk is saying, I encourage you to please jump in.

Ms WARD: I broadly say that there seem to be two separate issues confronting the Committee. Firstly, your concern with any systemic reform to the ICAC so as to prevent future cases where people might feel that they have been unfairly targeted or sustained reputational damage in a way that is unwarranted. Reputational damage is in some respects part of the function of the ICAC if they are to shine a light into dark places and to uncover corruption in our important public bodies. The concern is with unwarranted reputational damage. As I have read the work of the Committee, including the report of November last year, you have this two-pronged concern. Systemic reform to try and prevent further unwarranted reputational damage, and in that respect the Bar has placed some emphasis particularly on the procedural guidelines. I will make sure I get the title correct.

The procedural guidelines of public inquiry providing exculpatory evidence ensuring the capacity to apply for legal representation with sufficient notice to try to appear. Our submission is that forward looking focus is very important because we want to try and limit any further problems. I accept that the Inspector seems to have said to the Committee last year that the current Commissioners play such a great role in minimising any recurrences but the system also needs to work regardless of the current Commissioners. It is things like those guidelines that will continue to have effect, regardless of who sits in the chair, that are in our submission

fundamental to the ongoing work of the Commission and which we, of course, acknowledge has arisen as a result of the work of this Committee. Separate to that we have the question of the—let me get the phrase correct—exoneration protocol in relation to previous cases. To an extent the Bar has struggled with the fact that we are being asked to respond to a proposal that does not yet exist in any concrete form. No doubt the Committee is also struggling with it.

I have gone back and read the 2016 and 2017 reports from the Inspectors that first raised the prospect. From reading that, I understand that what the Committee is considering at the moment is something that is without precedent within Australia, but there are provisions in the Australian Capital Territory, referred to at least in the 2017 report, that have not yet been enacted within that jurisdiction for something similar. I acknowledge the difficulty that is facing the Committee. You are being asked to come up with some sort of protocol when there is no pre-existing model. The bar's great concern is that, if there is to be an exoneration protocol that allows someone to apply somewhere for something, we do not have those details yet. On the basis of some trigger having been enacted, it is important to make sure that we compare like with like. For the reason that Mr Chalk has given, criminal proceedings may not follow for very good reason. Criminal prosecution may not succeed for very good reason. But the finding of the ICAC that gave rise to that review in the criminal sphere might also still stand for very good reason. I am just acknowledging the difficulty that is facing all of you in trying to find a way to compare like with like, because you are not actually being asked to compare the same things.

The Hon. ADAM SEARLE: My questions will go to two areas. I will start with the proposals for an exoneration protocol. Submissions that we have got—I think submission 13 from the Rule of Law Institute Australia and submission 25 from Mr John Nicholson—do go some way to fleshing out what those two bodies at least would see as being the exoneration protocol. In my understanding, it seems to fall into this category: They seem to propose imposing on ICAC reports and findings standards that you would find applicable in a criminal trial. If the findings and report are found to be wanting on that basis, then the ICAC report should be set aside. I think one submission articulates that, if there is either a failed prosecution or, indeed, no prosecution and the DPP says you could not have a prosecution because of a lack of evidence, in those circumstances the ICAC report should formally be set aside. Do either of your bodies have a view about what impact that kind of reform would have on the efficacy of the ICAC as an institution?

Mr CHALK: I think the Law Society would think that would effectively destroy the value of ICAC. The imposing of a criminal standard really undermines the whole rationale for the establishment of ICAC in the first place. I think, as Premier Greiner commented when ICAC was established, corruption is something that of its nature happens in secrecy. It is often a crime of the powerful. It can be very hard to detect, which is why these extensive powers have been given to the Commission. I did have a look at the Rule of Law Institute Australia submission. It is certainly very focused on the rights of the individual, but there is a balancing here and that is with the rights of society generally to have confidence in their governments and public institutions. It is one reason we think that the availability of public hearings is so important. The ICAC does play this critical role in exposing and, as Ms Ward has said, shining a light on corruption. It is given very wide powers to do that, but the corollary in terms of the protection of the individual is that those powers cannot of themselves be used to support a criminal prosecution where the individuals involved claim protections and privileges.

The Hon. ADAM SEARLE: Ms Ward, do you broadly agree with those views?

Ms WARD: I do broadly agree with them. I have not read those submissions. I do not know the details of what is proposed. But what work will be left for the ICAC if they are being asked to an extent to conduct themselves on a level or to prepare evidence at a level that the Director of Public Prosecutions [DPP] would have to consider in terms of considering any criminal proceedings? Sorry, I cannot be any more help because I don't know the details.

The Hon. ADAM SEARLE: To unpack that a little bit, is it correct that in the ICAC proceedings the rules of evidence do not apply?

Mr CHALK: That is right.

The Hon. ADAM SEARLE: The cohort of material that is able to be adduced in an ICAC proceeding is far wider than a criminal trial. Is that correct?

Mr CHALK: Correct.

The Hon. ADAM SEARLE: Mr Chalk, as you adverted, the way in which the ICAC can obtain its evidence through compulsion is not available to the criminal prosecution authorities, except in some limited circumstances. Is that correct?

Mr CHALK: Not to the same degree. That is right, particularly in relation to self-incrimination.

The Hon. ADAM SEARLE: Particularly in relation to self-incrimination. A lot of the material of the ICAC does rely on—it seems to me at least—and does fall into that category. Would you accept that?

Mr CHALK: Yes.

The Hon. ADAM SEARLE: The third thing is that, when assessing the material before it, the ICAC uses what is loosely called the civil standard, whereas there is a much higher, more stringent standard rightly expected in criminal trial.

Mr CHALK: Balance of probabilities as against—

The Hon. ADAM SEARLE: Beyond reasonable doubt.

Mr CHALK: Correct.

The Hon. ADAM SEARLE: Yes. Those are different, so unless you somehow synchronised the admissibility and the weighing of evidence in both kinds of proceedings—

Mr CHALK: The other thing I would add is also the definition of corruption and the relationship to particular criminal offences.

The Hon. ADAM SEARLE: The definition of corruption does not apply to any particular cohort or individual crime. Is that correct?

Mr CHALK: That is right.

The Hon. ADAM SEARLE: So your submission is that the idea of treating or holding ICAC to a sort of criminal standard is not really comparing like with like.

Mr CHALK: Yes.

The Hon. ADAM SEARLE: Unless you somehow synchronised the approaches taken in both bodies, which, as I think you said, would ultimately pretty much destroy the efficacy of ICAC.

Mr CHALK: Yes.

Ms WARD: There is also a public aspect to the work of ICAC. It is set out within section 2A of the Act, which talks about the need to educate public authorities, public officials and members of the public around these issues relating to corruption and its detrimental effects on public administration. That is an additional and important part of the role of the ICAC that does not neatly fit within the criminal standards that the criminal investigative bodies prepare their cases to.

The Hon. ADAM SEARLE: Neither of your bodies would welcome a situation where anything that had been admitted in the ICAC proceeding should automatically be available to a criminal trial. You would not accept that, would you?

Mr CHALK: No.

Mr RON HOENIG: Or to infect a future jury.

The Hon. ADAM SEARLE: Correct. Ms Ward, the NSW Bar Association submission on pages 7 and 8, paragraph 17, distils the views of Justice McDougall in the Duncan matter, which sort of summarises the judicial review principles.

Ms WARD: Yes.

The Hon. ADAM SEARLE: I think the Inspector's submission to this inquiry essentially says that there is no need to make any changes but, if we were to make a change, I think it would be in accordance with what the Bar Association has put as part C of its submission. It says that, where there is a finding that is not supported by any evidence, that could be used to sort of set aside—would there be any utility in codifying these principles in a sort of appellate mechanism or a more discreet, user-friendly codification of these principles, so that people who did feel aggrieved by what had happened at ICAC at least have a set of clear standards that they could seek to apply?

Mr CHALK: New South Wales has never actually gone down the path of the Administrative Decisions (Judicial Review) Act, or ADJR Act, approach of the Commonwealth and codifying the basis of judicial review. I guess that there would probably be no reason not to do it. The grounds of judicial review are forever evolving. Even in the case of the ADJR Act there are areas where the statute has been left behind by the common law. There would be nothing to stop, for example, the Commission being required to give notice of potential grounds for

review. But I have got to say that most people who seem to be particularly concerned about what ICAC is doing to their reputations generally have the resources to ascertain what their rights of review are. That is not to say that requiring to publish it would not be useful, and that would be one way of keeping it updated. But the no-evidence rule is a very longstanding rule or basis for judicial reviews.

The Hon. ADAM SEARLE: There is no mystery about these principles.

Mr CHALK: No.

The Hon. ADAM SEARLE: Competent lawyers know about them and they are available broadly.

Mr CHALK: That is right.

Ms WARD: They are available broadly in fields that stretch far beyond the work of the ICAC. Sometimes the concern is that when we start writing things down—a broad area of discretionary relief—when we start writing things down we do not want to limit or infringe upon the ability of the Supreme Court to actually give relief that fits the circumstances, if jurisdiction has been triggered.

The Hon. ADAM SEARLE: Is it your understanding that, in terms of the cohort of aggrieved persons, it is not usually in the no-evidence space; it is more the meaning you derive or the weighing of the evidence that is given that is where the dispute tends to arrive in these matters? Is that your understanding?

Mr CHALK: That is the difficulty for people who feel that their evidence should have been accepted over somebody else's evidence: that they do not meet the judicial review threshold.

The Hon. ADAM SEARLE: Again, leaving aside the one example I think you raised, Mr Chalk, where either there is just a clear wrong fact or, to use a less elegant phrase, the facts change in the light of later material, that is really where the gap is in the current regime as you both see it. Is that correct?

Mr RON HOENIG: Could you repeat the question?

The Hon. ADAM SEARLE: The real gap in the regime is where either there is a wrong fact—i.e. let us say ICAC makes a fact finding that is unsupportable on the evidence or is somehow perverse—or the facts change in the light of further material—either a witness says they told an untruth or the Commission has to make a decision about competing witnesses and then maybe some kind of objective piece of evidence, such as a contemporaneous email or another document, comes to light that was for some reason not available at the time. But there is another way forward on that—

Mr CHALK: In the first instance, the perverse reasoning or decision—

The Hon. ADAM SEARLE: That is covered by—

Mr CHALK: —there is judicial review available. In the second instance, I have got to admit I have not looked closely enough at it. It may be that the Commission, on its own initiative, could reopen an investigation, but there is no obvious right for somebody who has this new exculpatory evidence, or no process to apply to have it reopened.

The Hon. ADAM SEARLE: The Commission may have that power now, but if it chose not to use it there is no real administrative law basis to compel them through, I think, section 69 of the Supreme Court Act 1970—

Ms WARD: It is section 69.

The Hon. ADAM SEARLE: —or like applications. There would be no obligation, because at the time it made its decision it was okay, administratively speaking. There may need to be some—

Mr CHALK: The best you could potentially get to would be to try and challenge the decision not to reopen. But that is not something that we have a clear view on at the moment.

The Hon. ADAM SEARLE: Thank you. Those are my questions.

The CHAIR: Thank you. Just one more question, from Mr Roberts. He can sneak it in.

The Hon. ROD ROBERTS: Madam Chair, I have two lines of questioning but I am going to try and condense the first line of questioning into one bulk question, Mr Chalk, so I apologise. In your opening submission you used—and I do not want to place words into your mouth—but something along the lines of people who had been "trashed and tarnished" along the way. Question one: Could you please expand on that just a little bit more? Question two, bearing in mind I have to shorten the time: How could that be avoided?

Mr CHALK: The qualification to that was people who have not been engaging in corrupt conduct, who in reality have not done anything wrong—not, as Ms Ward had mentioned, the people who have been rightly found to have engaged. That is the first class that we are really talking about.

The Hon. ROD ROBERTS: Taking you further to that point—and, again, bearing in mind the time—how can that be avoided?

Mr CHALK: The steps that have already been taken go a long way, in our submission; a fair process, which, when you look at the procedures the ICAC has published—particularly around having to disclose exculpatory evidence to persons who may be adversely affected—is a very important principle. Giving them notice of the allegations that are against them and the substance of evidence that might be put against them are important steps.

The Hon. ROD ROBERTS: Notwithstanding that, though—and I am sorry to interrupt again; I am just mindful of the time and I will just take you directly to the point—notwithstanding all those protocols you say are in place you have said people have been left "tarnished and trashed".

Mr CHALK: I guess—

The Hon. ROD ROBERTS: Taking you further to it, and maybe you can answer this: For those people an exoneration protocol holds no benefit whatsoever, does it?

Mr CHALK: I guess my comment was as a matter of theory on the assumption that, like any other body, the Commission will on occasion get it wrong. I was not necessarily saying that there were people who could be identified who are in that situation. There is a risk, but there is no easy solution to how they can be exonerated. The damage is done, I agree. The Commission goes some way, in relation to the prosecution question, by publishing the results of any prosecutions. But no, there will be victims.

The Hon. ROD ROBERTS: There will be human collateral along the way. Bearing in mind our time, I will just take you to my second point. I notice in your written submission, under the heading "Public hearings", you state: "The capacity of ICAC to hold a public hearing can play an important deterrent role." I note from your evidence today—I think you said you have been involved in ICAC for quite a few years now; North Coast council or something, I think you said?

Mr CHALK: That was 1988, yes.

The Hon. ROD ROBERTS: Okay. It was 1988 when the legislation was introduced for ICAC. We are now in 2020. It is some 32 years that ICAC has been going. I put it to you that ICAC is as busy today as it was at the beginning, if not busier. How do you reconcile the fact that public hearings are of good deterrent value?

Mr CHALK: Part of the issue is that the Parliament is passing more regulation. With each regulation there is incentive, or the potential for incentive, for corruption. There is opportunity. Society is at least as complex now as it was in that period. You can have education—I think it is critical—but is it going to solve corruption? No.

The Hon. ROD ROBERTS: The ICAC's role, basically, is to forensically investigate potential corrupt conduct. In your opinion, could it successfully do that part of its job—not the education part that Ms Ward alluded to, but that part—in closed and private hearings?

Mr CHALK: To some degree. The "some degree" comment or qualification is really around the issue that the transparency delivered from the public component gives the wider public confidence that not only is corruption being investigated and examined but also that the institution set up to do it is accountable and open to public scrutiny. So, it is a two-way street there. I have also seen jurisdictions—Western Australia in particular—where most of the work is done in private and people are forever wondering what exactly is going on there. What is happening? That public dimension is critical.

The CHAIR: Thank you, Mr Chalk. We will have to wrap it up. Thank you very much for appearing before the Committee today. The Committee may wish to send you some additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to provide your written reply within two weeks of those questions being forwarded to you?

Mr CHALK: Yes.

Ms WARD: Yes.

The CHAIR: Thank you very much, Mr Chalk and Ms Ward. We really appreciate your time.

(The witnesses withdrew.)

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

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

Mr BABB: No, I do not.

The CHAIR: Fantastic. Would you like to make a brief opening statement before we commence questions?

Mr BABB: No, thank you.

The Hon. ADAM SEARLE: Mr Babb, the exoneration protocol as it has been articulated to us in different ways is essentially to hold ICAC reports to the standards found in criminal law. If there is no prosecution or there is an unsuccessful prosecution then somehow the ICAC reports and its findings should be set aside in a formal way. You do not agree with that proposal. Is that correct?

Mr BABB: That is correct.

The Hon. ADAM SEARLE: Okay. The admissibility of material to ICAC and the way in which ICAC weighs it is fundamentally different to what happens at a criminal trial?

Mr BABB: It is.

The Hon. ADAM SEARLE: The criminal trial holds its evidence and the weighing of that evidence to a much higher standard. That is correct?

Mr BABB: That is correct.

The Hon. ADAM SEARLE: What would be the impact on the efficacy of ICAC if we were to hold the ICAC reports and its findings to that criminal standard?

Mr BABB: I think it would make ICAC's job more difficult. I think that the aims of ICAC are quite different to the aims of the criminal justice system. Investigation of corruption would be more difficult because it would necessarily mean a winding back of the powers to compel evidence, which would make investigation of corruption extremely hard. It would make it more difficult to expose corruption because the investigations would be hampered. I think it would impact on corruption prevention because without being able to properly investigate and expose it there is less deterrent for other people not to engage in corrupt conduct.

The Hon. ADAM SEARLE: That would pretty much denude the ICAC as an institution of much of its effectiveness, would it not?

Mr BABB: I believe so.

The Hon. ADAM SEARLE: What about the alternative approach? If the idea is to hold ICAC to the criminal standard, why would we not look at synchronising the admissibility of evidence and the standards by which that evidence is weighed in some way? Would that be a solution to this problem?

Mr BABB: In the criminal system?

The Hon. ADAM SEARLE: Yes. For example, if we are worried about ICAC not meeting the standards of criminal law, why would we not just simply say that if it is a criminal prosecution everything that was admitted to an ICAC proceeding should be admitted in the criminal trial?

Mr BABB: I strongly believe that the rules against self-incrimination are important in criminal proceedings. I do not think they should be abrogated. It is a fundamental principle and a very sound one. There is a difference between exposing corrupt conduct and then compelling someone to incriminate themselves when they are facing a penalty of prison. I would not be in favour of admitting compelled testimony in criminal proceedings. I would not be in favour of adopting a lesser threshold—a balance of probabilities threshold—when someone is facing prison. It is again too low a standard; we hold people to a much higher standard before we impose a penalty against them. Those two features in and of themselves are important differences and I do not think the criminal justice system should be held to any lesser standard.

The Hon. ADAM SEARLE: No, but you have said that ICAC and its work is directed to a different purpose. The criminal justice system is about putting people who commit crimes in jail or stopping them from doing those crimes. ICAC is meant to shine a light on individual and systemic corruption and, by exposing it,

prevent it from happening. It is a very important public objective but it does not formally have the criminal justice consequences.

Mr BABB: Exactly.

The Hon. ADAM SEARLE: So, is it your evidence here to ask that the public policy underpinnings of both the criminal justice system and the ICAC are equally valid, directed to their different purposes, and essentially—more or less, with some exceptions—they are both working okay?

Mr BABB: I believe so. Parliament had clear policy objectives in mind in establishing the ICAC and they are quite different to prosecutorial standards.

The Hon. ADAM SEARLE: And you do not think fundamentally we should be winding back the operation of ICAC?

Mr BABB: No. On balance, it has been a body that has benefited the community.

The Hon. ADAM SEARLE: What about circumstances where ICAC findings are fundamentally unfair because, say, the basis upon which an ICAC inquiry reached certain findings is later found to be false, either because the evidence given was wrong or incomplete? Should there be a mechanism in place for correcting that where simply the facts have been wrong?

Mr BABB: I think the best course is to strive to ensure that procedural fairness is afforded in the ICAC. The fairer the process there and the greater the ability of those who are appearing before it to have time to properly consider and meet the issues that are being raised and to adduce before the ICAC the relevant documents or the relevant testimony or call witnesses that can give the full picture—is the solution. Today ICAC is more committed to procedural fairness than ever before because of legislative change, the guidelines they have published and their commitment to those guidelines.

Mr JUSTIN CLANCY: Thank you, Mr Babb, for your time. My question is probably a follow-on from Mr Searle's final question. You speak of procedural fairness and you have spoken in your written submission about the importance of adverse reputation in terms of the deterrent effect. You write in section (g):

> Any reputational impact is a necessary and intended consequence of ICAC exercising its functions …

In that regard, you have said that ICAC is now more committed than ever before. Do you think there are some instances either in the past or potentially in the future in which the reputational impact suffered as a result of an investigation of ICAC would be unreasonable?

Mr BABB: I am not sure I understand your question, Mr Clancy. I think that at times there has been questioning that has occurred at ICAC that has not given people full notice of the case against them and at times that has been problematic.

Mr JUSTIN CLANCY: Okay. For those times it has been problematic, do you think that there could be avenues of redress for those situations?

Mr BABB: I feel like the best course is the one going forward to ensure that there is a better opportunity to prepare and to ensure that exculpatory material is made available to everyone involved in the process so that you can try and use it as a truth-seeking inquiry and not have a particular result in mind.

Mr JUSTIN CLANCY: Thanks, Mr Babb. I suppose one of the concerns for the Committee is, as you said, moving forward and exploring potential redress for that part in that regard. As you said, moving forward, is there anything looking back that could be explored?

Mr BABB: Nothing that is practical, Mr Clancy.

Mr JAMIE PARKER: Thank you very much for coming today. I appreciate the effort that you have put into this submission and for taking the time to come. I wanted to address this issue of ICAC findings and prosecutions. I know this Committee has already looked at the matter in some significant detail. Nevertheless, we still received submissions from people claiming that because there was no prosecution that the findings of ICAC are somehow are invalid or do not meet a test which is sufficient for them to be held with any negative perspective from the community. You set out quite clearly why the fact that there is an adverse finding in ICAC is not necessarily pursued for prosecution as a matter that you deal with. Could you elaborate on that and explain why an adverse finding from ICAC and the fact that the Office of the Director of Public Prosecutions does not pursue it is a matter that should not have any negative reflection on the original finding?

Mr BABB: It is quite different. My role in reviewing the material referred is to review the admissible evidence to determine whether a criminal prosecution should proceed. In that regard, I am applying a test to

whether there is a reasonable prospect of conviction and whether the public interest favours prosecution. Breaking that test up into its two parts can indicate why it does not follow that a decision by me not to prosecute means that corrupt conduct has not been engaged in. Firstly, looking at the admissible evidence, I may not have sufficient evidence to establish that there is a reasonable prospect of conviction for any criminal offence. However, ICAC may be well justified in determining that corrupt conduct had been engaged in.

An example of that might be where the main evidence of the corrupt conduct comes from the person themselves who is giving evidence having availed themselves of their right to not have that evidence used against them in any criminal prosecution. They take objection to the giving of evidence, they are required to answer despite having taken objection, and the Act then works so that that evidence is inadmissible in any subsequent criminal proceedings. It is similar to taking a statement with an inducement in a criminal case. We do this in criminal cases as well.

The police can say to someone, "I promise you that what you tell me will not be used against you in any criminal proceedings, except in relation to the falsity of what you tell me." Those are the same rules that apply in ICAC. If the police say that to someone in order to get some information that might be able to advance their investigations, then we are stuck with that and we cannot use that in a criminal prosecution. It is the same with the ICAC materials. It may be very clear on the evidence given subject to objection that either criminal conduct has taken place or that a series of criminal offences could have been made out had those statements be able to be admitted into evidence. They cannot. I believe that is for good reason. There is a difference between gathering information to expose corruption and prevent it in the future, and prosecuting people on their own compelled testimonies.

That is a concrete example of why there may not be reasonable prospects of conviction. The public interest test can sometimes mitigate in favour of not prosecuting even though there is admissible evidence. An example might be for someone where there is a sufficient case for me to predict a reasonable prospect of conviction but the person has a terminal illness. For example, there is reliable medical evidence that their life expectancy is very short. I may make a decision that a prosecution is not in the public interest despite that fact. Another example is, in some limited instances, the Attorney General will grant an indemnity against prosecution to someone in return for them giving evidence. That is a third example of someone who would not be prosecuted coming out of an ICAC hearing despite the fact that the finding of corrupt conduct against them should and could still stand.

The Hon. ROD ROBERTS: Thank you for attending today. Your office prosecutes briefs on behalf of the NSW Crime Commission as well?

Mr BABB: Yes.

The Hon. ROD ROBERTS: The Crime Commission holds their hearings in private?

Mr BABB: Yes.

The Hon. ROD ROBERTS: Are the briefs that they provide you in any way deficient compared to the briefs that you receive from ICAC?

Mr BABB: Just to clarify, generally the Crime Commission work in partnership with the New South Wales police and it will generally be the New South Wales police that are the instructing agency having had the benefit of some material that has been collected by the Crime Commission. We do not actually take briefs directly from the Crime Commission. It is a little bit different to ICAC but your point still is valid. There has been problems with Crime Commission briefs in the past in some instances. Similarly, the Crime Commission have powers of compulsion, so I face similar sorts of challenges with the Crime Commission briefs as I do with ICAC briefs in that not everything collected by the Crime Commission can be used by me in a prosecution. The difference, of course, is that the Crime Commission generally does not conduct public hearings and have a different mandate. They really do not function in the same way as the ICAC.

The Hon. ROD ROBERTS: Mr Babb, I will get straight to the crunch of it. I am coming down to public hearings and we are talking about reputational damage. One operates public hearings, one operates private hearings. The ultimate result is the same, is it not?

Mr BABB: You would have to clarify that question or give me a little bit more of an idea of what you mean.

The Hon. ROD ROBERTS: My proposition—which you may reject—is that simply because the ICAC holds its hearings in public and runs the risk of reputational damage to those who are completely innocent, does that make the evidence that they provide to your office any better or any worse than that from the NSW Crime

Commission, for example? Could the ICAC efficiently do its job with closed and public hearings and, therefore, avoid a lot of the issues of reputational damage?

Mr BABB: The ICAC could do part of their job. Part of their job is to investigate corrupt conduct and, where they believe there is sufficient admissible material, to refer it to me for consideration of criminal charges. That could be done if they conducted the hearings in private. The other part of their job is to publicly expose and prevent future corrupt conduct, and my view is that that part of their role would be hampered if the hearings were conducted in private. I believe that there is a benefit in exposing corrupt conduct in preventing future behaviour because I think at least some people would be deterred from corrupt behaviour, knowing that they risk public exposure.

The Hon. ROD ROBERTS: One of the great principles of law is innocent until proven guilty, as we know and as we all respect. You will often see with police investigations, for example, that when a suspect—we will call them a suspect at that stage—is arrested, their identity is concealed. Their face is covered, perhaps. Their face is pixelated in the media for the purpose of not prejudicing a potential jury. I do not want to put you on the spot so I will not ask your opinion, but when you see—I will use the colloquial expression—"the walk of shame" outside of ICAC hearings, I cringe knowing the maxim of law of innocent until proven guilty. What are your thoughts on that in the lead-up to a potential criminal trial down the line?

Mr BABB: It is something that is important when we are thinking about criminal trials. What we do currently is when a trial is coming up, we contact ICAC and talk about them removing from their website publicly available material to minimise the ability of people to go and read material off their website. It is a challenge. You raise the media and limitations there; there is generally a principle in the media that the papers can report on the identity of people who have been charged. There is a cut-off—a period of time before trial that they tend to stop referring—

The Hon. ROD ROBERTS: They are not obliged to, though, are they?

Mr BABB: They are not obliged to, no.

The Hon. ROD ROBERTS: Again, you must cringe sometimes.

Mr BABB: I accept your proposition. I want people to have a fair trial.

The Hon. ROD ROBERTS: As we all do.

Mr BABB: I want a jury to decide the case on the evidence that they hear. My experience has been that juries are true to their oath. They are told in the course of a criminal trial that "You may have read a lot of material and seen things on TV, and you may have formed some sort of view before this case even started, but that is all irrelevant material. What you need to look at now is the evidence that is admitted in this court." It is pretty amazing that in high-profile cases, where there has been a lot of media and a lot of conclusions have been drawn by journalists, juries seem to be able to focus on the admissible evidence and make a judgement on what is admitted in court.

The CHAIR: Thank you, Mr Babb. Our next witness is running 10 minutes late. Can you stay for 10 minutes longer?

Mr BABB: I can.

The CHAIR: Thank you.

The Hon. TAYLOR MARTIN: Mr Babb, following on from the Hon. Rod Roberts's line of questioning, should we have a greater propensity for private hearings? Would that not remove the need for what we are talking about in this inquiry, which is an exoneration process? Would it not significantly remove the risk of unsubstantiated damage to people's reputations? That is at the heart of what we are discussing in this inquiry: people whose futures have been cancelled—effectively ruined—because accusations were made and these people, whether they are in the public service or whether they are elected members, effectively do not get a day in court. Accusations are made and aired publicly and, to the Hon. Rod Roberts's line of questioning, that is not the case in other bodies. Should not justice come at the stage at which your profession, the DPP, give the accused their day in court?

Mr BABB: They are policy decisions, and there are competing arguments there. I do not purport to say that unfair reputational damage is not a serious concern; it is. Against that, you are balancing the public exposure of corrupt conduct and the salient message that that is sending in those cases where people have engaged in corrupt conduct. There are two methods of doing that: one is private hearings and the other is non-publication orders where there has been a public hearing.

The Hon. TAYLOR MARTIN: I note that you mentioned earlier—and the point has been made by other witnesses as well—that one of the functions is to publicly expose and air what is accused to be going on and what actually is going on. Should that not, really, be left solely to the process undertaken by ICAC? Should not that be the responsibility of the part of the process that comes in when the DPP has carriage of the case?

Mr BABB: The challenge with limiting the criminal process to being the public process is those cases where corruption is exposed but, because of the different evidentiary provisions, there is no criminal case that can proceed. So we are going to miss out on some significant corruption where the main evidence comes from people who have taken objection to answering questions. The corruption is clear, but there is no opportunity for a criminal prosecution. They are important cases for public hearings because they are exposing corruption and sending a message with the aim of preventing others from engaging in corrupt conduct, but there will never be a criminal prosecution.

The Hon. ADAM SEARLE: I have a brief question that goes back to your earlier evidence: The Crime Commission is fundamentally a law enforcement body and it is very much concerned with gathering admissible evidence for criminal prosecutions. That is correct, is it not?

Mr BABB: Yes. I think it is law enforcement primarly, but also breaking up organised crime.

The Hon. ADAM SEARLE: Sure, but to that extent the idea that it would use private hearings makes sense, whereas the role of the ICAC is very much to shine a light on impugned conduct and deter it in that way.

Mr BABB: I think so. I think they have different objectives.

The Hon. ADAM SEARLE: The second thing is that some years ago the current Government gave your office some special money to deal with prosecutions emerging from ICAC matters. How much is the budget of that unit? Does it still exist? Where it is up to in terms of its operations?

Mr BABB: I do not have those figures to hand.

The Hon. ADAM SEARLE: I am happy for you to take that on notice.

Mr BABB: If I could take that on notice, that would be great.

The Hon. ADAM SEARLE: It is not a gotcha moment. That would be useful. One of the submissions we received in this hearing—I think it was Mr Nicholson's, submission 25—I do not think he was critical of your office but he was sort of saying in and around the activities of the special prosecutions unit there was a relationship between the ICAC and the DPP which was unduly close, to the degree where maybe the independence of your office was being compromised. Do you have anything to say to that suggestion, that your office has been compromised in any way in the exercise of your prosecutorial duties?

Mr BABB: Yes. I reject that. I think we remain independent and I do not think the assessment of ICAC breaches has been compromised in any way.

The Hon. ADAM SEARLE: You do not act at the dictation of the ICAC?

Mr BABB: Certainly not.

The Hon. ADAM SEARLE: I just wanted to make sure that was fundamentally clear. The last thing I will say is this—and I know it is very different because the criminal justice system works differently—but it is the case, is it not, that in a criminal prosecution persons are accused of sometimes very serious matters and even though they are later acquitted they still suffer reputational damage because not everybody who followed the publicity of the trial is in fact aware that they may not have been convicted? That is the case, is it not?

Mr BABB: It is the case, yes.

The Hon. ADAM SEARLE: So reputational damage can occur even in the criminal justice system?

Mr BABB: Yes.

The CHAIR: Thank you very much, colleagues. Mr Babb, thank you very much for your attendance today. I would also like to make you aware that the Committee may wish to send you some additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to provide written replies to those questions within two weeks of receiving them?

Mr BABB: I would.

The CHAIR: Thank you, Mr Babb. We really appreciate your time and expertise.

(The witness withdrew.)

(Short adjournment)

JOHN NICHOLSON, Former Acting Inspector of the Independent Commission Against Corruption, sworn and examined

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

Mr NICHOLSON: No, I do not, thanks, Madam Chair.

The CHAIR: Would you like to make a brief opening statement before the commencement of questions?

Mr NICHOLSON: I have got one, yes. I put as the introductory remarks to this: The answer to unintended consequences—to past experience with ICAC's flaws—is to fix the design of the institution, not to deny its value. Interestingly enough, that is a quote that comes from ex-Premier Greiner. I thank the Joint Committee for an opportunity to speak in support of my submission into the reputational damage inquiry. I hope my report and the evidence will be of some assistance in progressing the Committee in its inquiry. I understand a substantial number of submissions are before the Committee with a range of views. I am happy to have contributed to that range of views in the hope a best outcome can come from this inquiry.

I have sought to confine myself to four of the reference areas the Committee is interested in and any related matters found in my introduction and history of the ICAC; identifying what I regarded as matters requiring safeguards, the existing safeguards and reasons why I came to a view the existing safeguards were inadequate; what additional safeguards are needed and why; that an exoneration protocol was required and why; and finally, what an exoneration protocol might look like. Former Premier Greiner and former Minister Moore were, I think, among the first persons to approach the Court of Appeal—in fact, there was a High Court case before them—in respect to the ICAC findings. Their cases came before that court in 1992—Balog came two years earlier—some four years after ICAC had been established. The court upheld their appeal and in so doing made a number of what I regard as critical comments—none of which appear to have been addressed all these years later.

Chief Justice Gleeson noted that the ICAC was an administrative body that performs investigative functions. He noted its determinations could have devastating consequences for individuals. He noted when a determination is made by ICAC that a person has engaged in corrupt conduct it is necessarily based upon a finding that the conduct of the person could constitute criminal conduct. It was the Chief Justice's view the conditional nature of the premise upon which an ICAC determination is made could easily be obscured by the unconditional form expressing that determination. I might interpolate into my opening remarks, this is something I tried to explain—I do not mean to be demeaning—in language a six-year-old could understand, in my submissions to you. Justice Mahoney notes judges were limited by what they may do by the laws of parliament; that laws may create an injustice; or injustice might result from the application of the law. I have sought in my submission to identify some of the circumstances in which the present state of the ICAC Act merits the criticism of all three judges who heard the Greiner appeal.

Another reason why particular attention needs to be paid to the reputation, privacy, honour and interests of those adversely named in ICAC investigations is that ICAC is founded upon a necessary and justified discrimination that is experienced by New South Wales State Government workers, including members of Parliament, and other workers associated with State governments. This is by comparison with other government employees and other members of other parliaments, private company employees and small business employees who do not have this extra layer of potential investigative oversight.

State Government employees, therefore, it seems to me, are entitled to a strong and effective protection of their rights against unnecessary naming and shaming as a consequence of their being in the public service. I have sought to highlight in my submissions the importance the legislation places on the public interest. Again, if I can interpolate what I have written here; I cannot remember any other Act where in five different places in the Act the Commission is referred to concerning itself with the public interest. Particularly in section 31. I am concerned about whether permitting the ICAC to interact with the DPP, after a public hearing and determination, presents to the ICAC a conflict of interest that it would not tolerate in any other public authority.

I argue for steps to be taken to regulate that access to interaction so that the potential to interaction after the DPP has made its final determination so that the potential for public interest can be mitigated. I return to a theme, also in these submissions, identified in 1992 by the Chief justice arguing that the word "could" in sections 7, 8 and 9 creates a test of corrupt conduct too easily reached and to indefinite to embark upon a criminal

prosecution. Only 50 per cent of the 40 matters finalised over three years resulted in successful outcomes, so far as or from the perspective of the ICAC. The criminal law requires essential facts that constitute an offence to be proved beyond a reasonable doubt. The ICAC determination requires two steps whereby facts constituting an offence could exist to ground a determination of corrupt conduct.

The difference between the levels of certainty proof beyond reasonable doubt gives is far higher than the possible existence the same facts proved on the balance of probability offers. I have argued that the finding of corrupt conduct is too strong and offensive a finding for offences that merit discipline or some form of termination. Not surprisingly, given all that has gone above, I also advocate for an exoneration protocol and set out what an exoneration protocol might look like and how it might work. Without, I hope, sounding critical of the work of this Committee may I argue that reform of the ICAC Act in the areas I have identified is long overdue.

Mr RON HOENIG: Mr Nicholson, as the Acting Inspector you wrote the report relating to Kazal, did you not?

Mr NICHOLSON: Yes, Vesta.

Mr RON HOENIG: I do not know the details of the facts, but you did a review of that matter and came to the view that the Commission was wrong in their findings?

Mr NICHOLSON: No, I did not. I came to a view, although I felt that the Commission was wrong, that it was open to the Commissioner because of the language of the Act to make those findings. I could understand why somebody sitting in Mr Kazal's position could have felt that that was an unfair finding.

Mr RON HOENIG: Under the exoneration protocol that you propose, would he be one of the prime candidates that might benefit from that protocol?

Mr NICHOLSON: He would be. The answer to that is, yes. But, I think the number of people who have been named and shamed by the ICAC exceeds or probably reaches the hundreds, particularly if you count in the last group I mention, that is the group who are found to have been corrupt or engaged in corrupt conduct only to the point of allowing them to be disciplined in their job or terminated. There are a number of those. If you look at the statistics that I put in my report there are a number of people—if you look at pages 15 and 16—where no further action was warranted. There were 83 in 2017. They have been named and shamed and then nothing more needs to be done. It is hardly serious and it is hardly systemic, one would think, if that is the case. I have mainly concentrated on people who were adversely affected, I think is the language of section 74, I recognise there is another group of people below those involved in public inquiries who, within their organisation, have been named and shamed.

Mr RON HOENIG: When Mr Greiner introduced this Act his second reading speech is often quoted. What is often not referred to, but you have, are the extensive powers would require accountability. You also make reference on page 4 of your report to the consequences of humanity and individual human failings. Through the court process judge's decisions are constantly reviewable and done publicly and they are answerable and their discretion is restricted.

Mr NICHOLSON: Precisely. Even to the point of on occasion finding it was not open on the evidence to come to those determinations. I had to concede that because of the use of the word "could" in my view the Commissioner could come to findings that I would not have come to. It was open to him.

Mr RON HOENIG: In the event, through human failings, through an activity which the Commission involves itself that is not subject to regular review, and knows they are not subject to oversight or review, is the accountability of having the Inspector write a report afterwards enough to restore someone's reputation?

Mr NICHOLSON: In my view, no. At the same time I have not really thought this through, to be perfectly frank, Mr Hoenig. If you are looking at an administrative body who has exercised a power incorrectly it is more likely that the proper place for that should be a court, a judicial function, not an administrative function, which is all that the Inspector is entitled to.

The Hon. ADAM SEARLE: Mr Nicholson, your reform proposals around the exoneration protocol would have the effect of holding the ICAC to the criminal justice standard, would it not wish to mark

Mr NICHOLSON: No, if I have understood your question correctly, it would lift the findings of the ICAC to the old committal standard.

The Hon. ADAM SEARLE: Right. But it would lift from where it is now?

Mr NICHOLSON: It would lift it from where it is now. The language used by Justice Priestley, which is the language that I have adopted is, "would if proved". In other words, the word "could" should be replaced with "would if proved" and, if you will remember, that was almost the test for committal hearings.

The Hon. ADAM SEARLE: Yes. But would you not accept that the criminal justice system and the purposes for which the ICAC were created are quite distinct and separate? The ICAC was deliberately created to get at information and expose situations that in most cases would not and could not see the inside of a court of law.

Mr NICHOLSON: Mr Searle, that might be the attitude of people in the legal profession and in Parliament, but it is not the attitude of the people in the street. That is why it is so important to have an exoneration protocol.

The Hon. ADAM SEARLE: But if your exoneration protocol operated in a manner where the ICAC, on the basis of evidence it received, makes certain findings and simply because no criminal prosecution is launched—and we have heard from the DPP earlier that sometimes there are very good reasons why there is no evidence. For example, some of the evidence that the ICAC has relied upon has been compelled from witnesses.

Mr NICHOLSON: That's right. Section 17.

The Hon. ADAM SEARLE: That evidence cannot be used in a criminal proceeding. Unless we are going to synchronise the admissibility requirements of evidence between ICAC and the criminal justice system, holding ICAC to that standard seems to be guaranteed only to disable the ICAC from doing its important work.

Mr NICHOLSON: I am not sure I understand why that should be so, because committal proceedings worked very well for years and years. They were only abandoned in the end because they took time. But they worked very well to sort out who was available for prosecution and who was not.

The Hon. ADAM SEARLE: But this is the thing: An ICAC proceeding is not concerned with a prosecution necessarily. Using what you have said as the committal test, "would if proved"—presumably "proved" means proved beyond reasonable doubt.

Mr NICHOLSON: No. It means proved prima facie.

The Hon. ADAM SEARLE: Okay. But the point is that that will often not be available in an ICAC matter, if you are talking about restricting the material to only those matters which will be admissible in court.

Mr NICHOLSON: I have suggested within the submissions that one of the things that ICAC should look at when it is looking at the public interest and calling an inquiry is whether they will be relying on section 17 type evidence—that is, evidence that is compellable notwithstanding that it is not admissible. In other words, that is something that they should consider at the outset as to whether or not they want to embark upon a public hearing instead of getting the same information privately. It is very difficult to see what the advantages are other than two, and I do not think there is any evidence to support either of them. One is—it is said—they get some response and the other is, if you like, to get more particular or more precise evidence of something.

In other words, they could do the same job using section 17 type evidence, that is, giving evidence in circumstances where you are compelled at a private hearing. I forget what they call it. A compulsory inquiry, I think it is. I do not have any problem with that. ICAC could still do its work without the public naming and shaming. The other aspect of it that appeals to me is that, if you are going to have a body as prominent and as controversial as ICAC, it should be in a position to guarantee at least to those people who have been what I might call its victims that they can have some way of redeeming their position.

The Hon. ADAM SEARLE: Mr Nicholson, could I ask what you mean by their victims? In what circumstances are we talking about this? They are not being held to an accusation or a finding that they have committed a crime—although that may be the case in some instances. They are being held, in some cases, to the finding that they committed corrupt conduct which is not synonymous with any particular crime but is quite a profound moral judgement.

Mr NICHOLSON: Correct me if I am wrong: In the normal course of events the ICAC identifies a specific crime. One of my concerns is that they do not do it soon enough. They wander through the evidence looking for the appropriate charge, which makes it very difficult for legal representatives. What am I defending this fellow from? What am I protecting him from? A corrupt finding can take any one of a multitude of forms.

The Hon. ADAM SEARLE: That is because it has a different function. It is not about securing conviction of a particular crime.

Mr NICHOLSON: But when the report comes out, a particular crime is usually specified.

The Hon. ADAM SEARLE: It is not always a crime though. For example, in matters involving breaches of the electoral law that is not, strictly speaking, a crime.

Mr NICHOLSON: No, but it is unlawful behaviour.

The Hon. ADAM SEARLE: It is an offence, yes. Again I am not wishing to be semantic, but it is not synonymous with a crime under the Crimes Act, if that is what we are talking about here.

Mr NICHOLSON: That may be correct, but I am concerned about what people in the street might feel and how *The Daily Telegraph* may report things.

The Hon. ADAM SEARLE: Getting to the "person in the street" test and leaving aside any legal technicality, ultimately what ICAC tends to find is that people did wrong however you want to describe that. When you are talking about "their victims", are you talking about people who did not actually do the things that they were accused of or that those things are not necessarily crimes and therefore they should be exonerated?

Mr NICHOLSON: In a sense, it might be both. Not the same person, of course, but it might be both. I had a concern in the Kazal matter as to whether the conflict of interest that was discovered in respect of one of the people was such as to amount to a criminal offence, because conflicts of interest can be managed. It was open for him to argue that he had managed the conflict of interest, assuming it was one. Secondly, the code of conduct which was relied upon as far as I was aware was not a legislated or regulated. In other words, there was no parliamentary backing for it. It was simply what an employer thought was a good way to run a business.

The Hon. ADAM SEARLE: Are you saying that he did not do anything wrong or that there was no specific offence that could be associated with his behaviour?

Mr NICHOLSON: I don't even know that he did anything ethically wrong myself. At the end of the day I would have had a very reasonable doubt about it.

The Hon. ADAM SEARLE: Yes, but reasonable doubt was not the test. Are you suggesting that the ICAC should have to be satisfied beyond reasonable doubt for making its findings?

Mr NICHOLSON: That is the point I am making, I think. Really, we need a higher standard. He can't get a job.

The Hon. ADAM SEARLE: If you are going to have a higher standard for ICAC, why wouldn't we then make everything that goes into an ICAC inquiry admissible in a criminal trial? If we are talking about an equivalence between an ICAC hearing and a criminal trial to the point where an ICAC finding should be thrown out if it does not meet the standard of the criminal law, then you run the risk of legislators saying, "Well okay, we will do that, but everything that goes into an ICAC hearing will just go into a criminal trial is well."

Mr NICHOLSON: Well, if Justice Priestley was satisfied with "would if proved" as an appropriate test for ICAC, who am I to disagree with it?

The CHAIR: Mr Nicholson, that concludes your half an hour attendance before the Committee. We very much appreciated that dialogue. It was very rich with a lot of detail and very informative. Thank you very much for your time and for appearing before the Committee today. The Committee may wish to send you some additional questions in writing. Replies to those questions will form part of your evidence and be made public. Would you be happy to provide a reply within two weeks of receiving any further questions?

Mr NICHOLSON: Yes.

The CHAIR: Thank you very much, Mr Nicholson.

(The witness withdrew.)

(Luncheon adjournment)

BRUCE BAER ARNOLD, Assistant Professor, Canberra Law School, University of Canberra, before the Committee via teleconference, affirmed and examined

The CHAIR: Thank you for being verbally present before the Committee today. Before we proceed, do you have any questions regarding the procedural information sent to you in relation to witnesses and the hearing process?

Dr ARNOLD: None, thank you.

The CHAIR: Would you like to make an introductory statement?

Dr ARNOLD: I am conscious that the Committee is busy so I will keep it short. The submission from Arnold and Murphy was made in a private capacity. I teach law at the University of Canberra; Dr Murphy teaches law at the Australian Catholic University in Sydney. Dr Murphy apologises; he is teaching criminal law at the moment. Our submission reflects work on public trust and integrity agencies in Australia. In our view, the naming of individuals by ICAC is a legitimate aspect of the Commission's operation under the Independent Commission Against Corruption Act 1988. Adverse shaming has a significant deterrent effect. Individual and collective shaming, or the potential for shaming, changes behaviour.

It provides appropriate transparency in a world where there is growing mistrust of government—and, sadly, some of that mistrust is justified. Naming is a feature of investigation by other anti-corruption agencies and of investigations by royal Commissions and other bodies that conduct inquiries in the public interest. Individuals who have been adversely named but not convicted do have mechanisms outside the Act to affirm their integrity. We consider that development of an exoneration protocol should not be at the expense of higher priority activity activity and that, overall, sunlight remains the best disinfectant for corruption and for the community disengagement that is sadly evident at all levels of Australian government. Thank you.

The CHAIR: Thank you, Dr Arnold. We had a little bit of technical interruption with the statement that you read out, where some of those words or a couple of words in a sentence dropped out. Would you mind forwarding that statement through to the Committee members so we can ensure we accurately capture that?

Dr ARNOLD: Yes, I am happy to do so. I apologise; I am using a mobile from one of the weak parts of the network in Brisbane.

The CHAIR: Maybe if you could speak quite closely to the microphone on your phone that may assist.

Dr ARNOLD: Yes, okay.

The CHAIR: Wonderful, thank you. We will turn to some questions now from the Committee.

The Hon. ADAM SEARLE: Professor, your submission is that an exoneration protocol is not necessary. If one was to be implemented, in terms of the way in which it has been put to us, at least one of the examples is to essentially say if there is no criminal conviction flowing from an ICAC finding or the DPP does not think there is the admissible evidence to sustain such a prosecution the ICAC finding should be set aside in a formal sense. Do you have any views about what that would do to the ICAC as an institution and to its work?

Dr ARNOLD: I think it would fundamentally erode ICAC. We are not persuaded that there is a need for such a broad protocol. We can appreciate that people may be unhappy about being named, but the way to deal with unhappiness is, again, transparency. The media, government and individuals should understand that simply being named is not a determination of guilt.

The Hon. ADAM SEARLE: You indicate that one area where some change might be useful is where the ICAC was clearly mistaken, either wrongly identifying an individual or otherwise committing a pretty clear factual error that underpins its findings.

Dr ARNOLD: Yes.

The Hon. ADAM SEARLE: For example, a witness before ICAC later admits to having told ICAC something untrue, or ICAC has to choose between competing witnesses and later some maybe objective evidence becomes available that makes it clear that the wrong choice was made. Do you think there is some utility in considering that kind of mechanism?

Dr ARNOLD: Yes, and it is quite possible to deal with that through a clear statement. If there has been an obvious factual error then, again, transparency: that should be disclosed. But simply having someone claiming,

"My reputation has been damaged, I have not been convicted in a court and implicitly I am innocent and, therefore, I am very unhappy" is the wrong way to approach this sort of investigation.

The Hon. ADAM SEARLE: Yes. The phrase "innocent until proven guilty" is really "innocent of a criminal charge until proven guilty in a court of law", is it not? That is the proper way to understand that.

Dr ARNOLD: Yes.

The Hon. ADAM SEARLE: The ICAC appears to have been designed to secure a very different objective to the criminal justice system, which of course is to identify and punish people who have obviously committed criminal acts. The ICAC has more of a public-interest objective to identify corruption and to, by shining a light on it, deal with the individuals who are engaging in it but also to deter people in future that they may well be exposed in this way.

Dr ARNOLD: Yes. Apologies if I am interrupting, but one of the rationales for our comment that people do have alternate mechanisms—if they believe that they have been wronged or they are simply unhappy, they can go to the media. I am sure that the media will often run with that because it is newsworthy. They can talk to a member of Parliament, who can use parliamentary privilege. They can complain to the committee. They can complain to the Inspector. So, we do have some accountability for ICAC.

The CHAIR: Dr Arnold, thank you for your statements thus far. I have a couple of questions. You mention on page one:

> Development of an exoneration protocol should be considered as part of ongoing review of ICAC's operation. However, absent an egregious misuse of power by the Commission that substantively erodes an individual's public standing without cause we do not consider establishment of a protocol is imperative.

Dr ARNOLD: Yes.

The CHAIR: This Parliament in 2016 passed a number of changes to the New South Wales ICAC. That has delivered operational changes to the ICAC since that period of time, including—they need to follow and publish procedural guidelines on procedural fairness and they need to divulge exculpatory evidence in their findings, et cetera. Those changes came into effect from 2016. Prior to those changes coming into effect those operational matters were not in a term guaranteed to be followed and to be used in their investigations. In that scenario would you deem that that scenario could be an egregious misuse of power by the Commission?

Dr ARNOLD: No. What we would need to see would be that there has been a clear wrong; so, for example, there has been an incontestable factual error.

The CHAIR: How could we see that if there is not some sort of review or reopening of the case or exoneration protocol for that revision to take place?

Dr ARNOLD: In the first instance the complaint mechanism or the ventilation mechanism that I mentioned a moment ago—if we had it, for example, and there are some out there who consider that they have been egregiously wronged, then among other things, complaints can ventilate that way.

The CHAIR: But it would not necessarily feed back to amending an incorrect finding by ICAC. If provision of exculpatory evidence would deem that the person of interest was now no longer to be found corrupt or whatever finding ICAC came to and then, post that finding being published, they went to complain to the media or a member of Parliament—that complaint or that action would not necessarily force the ICAC to revise its finding, would it?

Dr ARNOLD: You are right; that would not force ICAC. But ICAC, as what appears to be a conscientious body and a body that already has several layers of oversight, would take a positive view. It would not be forced to do this but it might choose to. Again if we are talking about damage to reputation then reputation is not just formed by a statement by ICAC. If we are thinking in terms of defamation, which is a different matter, reputation is formed through how people are seen, how people are perceived and how reputation is viewed and disseminated through a range of mechanisms—through Twitter and Facebook, statements by MPs and Ministers, and possibly by statements that occur in a judgement. ICAC is not the only and not the definitive basis of someone's reputation.

Mr RON HOENIG: Professor, what do you do then if, for example, counsel assisting has acted with impropriety? What is the solution—just wait for an Inspector to write a report three years later or five years later that counsel acted improperly?

Dr ARNOLD: I am somewhat cynical or just realistic about whether any complainant would wait for several years. This gets back to the question of resourcing. The prevention of corruption is the primary function

of ICAC and one that must be appropriately resourced, which is one of the reasons why in our submission Dr Murphy and I refer to properly feeding the watchdog and prioritisation of investigation. An exoneration protocol is something that should be considered, but it is not, if you like, the highest priority. We would hope—and as far as I am aware there is no reason to believe otherwise—that if there was impropriety it would be detected fairly quickly because ultimately ICAC's reputation and the committee's reputation is of importance. It would be detected fairly quickly and there would be some response. It might be a response by the Inspector. It might be a response by the committee. Given that ICAC, if you like, is a high-profile agency, I would suspect that the mass media would be onto it fairly quickly.

Mr RON HOENIG: So, when the Greiner Government 32 years ago introduced this bill in the second reading speech—much is always quoted from that second reading speech but they always leave out the phrase "powerful and accountable". If you give enormous power to an individual for a particular purpose there needs to be some mechanism of accountability to prevent abuse. How do you install the checks and balances in that system?

Dr ARNOLD: I think we have got them. It is a conundrum; there is an inevitable tension here. It is one that is generally recognised; for example I have been giving talks in this area for about 20 years now. I am concerned with accountability and ventilation. Like many academics, I am giving students this problem. It is common to see ICAC referred to as a star chamber and legal academics and practitioners do not like star chambers. There is a recognition, however, that we do need a body that is prepared fearlessly and independently to ventilate questions about misbehaviour. So, we do need to give it some freedom. Ultimately my understanding is that this is why we have an Inspector, we have a committee and ideally we have a lot of thought going to the appointment of people at ICAC. We have got what we hope is a fairly vigorous media that will concentrate on ventilating any wrongdoing by ICAC. It is not a perfect system but you are not going to get a perfect system when you are dealing with corruption.

The CHAIR: Dr Arnold, your submission mentions the importance to the ICAC's mission of individual and institutional naming to provide a significant deterrent effect. Do you think there are any other ways in which the ICAC could achieve this deterrent effect?

Dr ARNOLD: We do not really know. One suggestion that is kicked around in some circles and in some of the academic literature is that you have the equivalent of a super-agency that functions as judge and jury. It is the European model where it is very much a prosecutorial system. Your court does the investigation and your court punishes. In Australia we would not be happy with that—and I think justifiably so. So, if you like, the naming of people of interest, people of concern and the referral for prosecution is an effective and appropriate way to deal with some fairly serious problems.

Mr JAMIE PARKER: Thank you for taking the time to speak with us today. In your submission you talk about the opportunities that are available to respond if you feel that you have been unduly named by ICAC. We have the Committee, MPs, and the Inspector. Also, of course, we have a case in the Supreme Court that was successful in overturning a corrupt finding that ICAC had made. One issue that has been raised and that some people in submissions have talked about is this issue of open or closed hearings. You are very supportive of the public hearing model and you make the case for that. We know that some other jurisdictions, who we will be hearing from later today, do not have the same kind of public hearings. Could you give us a bit more insight into your views about the comparative effectiveness or otherwise of public hearings?

Dr ARNOLD: Our rationale here is ultimately a matter of transparency. It is transparency about people who have been called before ICAC; it is also transparency about how ICAC is operating overall. Overall, closed-door investigations may not be effective in deterring this behaviour. And though, with a strong body, as I have mentioned, a body that is not a court, secrecy will foster fears that we have this very powerful body possibly going on a crusade, possibly misbehaving. Openness is one way of addressing those perceptions and perceptions are important in terms of dealing with corruption or perceived corruption.

Mrs WENDY TUCKERMAN: Your submission says that an exoneration protocol may be able to apply retrospectively. How far back in time do you think it might be reasonable for it to apply considering ICAC has been operating for 32 years?

Dr ARNOLD: In principle it could go back to year one. The issue there is whether it is required or permitted committed under legislation and whether there is a sound basis for it.

The CHAIR: Dr Arnold, let me pose a scenario to you: The purpose of public hearings in the ICAC is to explore evidence, to try to elicit further evidence, to present views that the ICAC senior investigators have come to present to the witnesses, and, we have been told, to use public hearings to expose corruption. Is the process of ICAC not to look for hard evidence? For example, looking for text messages, phone calls, correspondence, photographs of meetings being held, phones being tapped, documents, letters, emails, contracts,

or whatever hard evidence? And then using that hard evidence as well as witness statements to demonstrate that the corrupt actions have in fact been conducted? It is not necessarily, at the point of investigation, pertinent to identify the individual that at the end of the investigation once the evidence has been gathered and the assessment has been done that corrupt conduct has been conducted that you could then attach the person's identity to that finding? What is your professional view of that type of scenario?

Dr ARNOLD: We have issues in terms of questions about someone being publicly identified in the course of an investigation and someone who is assisting ICAC as a witness rather than alleged wrongerdoer.

The CHAIR: Sorry, Dr Arnold, you have started dropping out quite a lot in those last two sentences. Could you repeat those?

Dr ARNOLD: Sorry. There is a conundrum here. We would not want subversion of ICAC's role in ventilating wrongdoing. That means ensuring anyone who is a witness, anyone who assists in an inquiry does not experience a threat, does not experience what I referred to with whistleblowing. We know that typically whistleblowing can be career terminating. We would want to make sure there was protection against any retaliation within any government agency or retaliation by business or individuals from outside simply by someone being a witness, someone contributing to ICAC's investigation. In terms of that, there should be scope for taking into account the suppression of information identifying witnesses but again, it is a conundrum. This is the same problem we face with criminal investigations. There are no perfect solutions here.

The CHAIR: Thank you. Dr Arnold, do you have any final comments to make?

Dr ARNOLD: If the Committee wants to ask further questions I am sure Dr Murphy would be happy to do a follow-up supplementary submission.

The CHAIR: Thank you, Dr Arnold. You almost took the words out of my mouth. Thank you for your participation before the Committee today. The Committee may wish to send you and your colleague additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to provide a written reply within two weeks to any further questions?

Dr ARNOLD: We would be happy with that.

The CHAIR: Wonderful. Thank you very much, Dr Arnold. We very much value your time.

Dr ARNOLD: My pleasure.

(The witness withdrew.)

CHRIS MERRITT, Vice-President, Rule of Law Institute of Australia, sworn and examined

SALLY LAYSON, General Manager, Australia's Magna Carta Institute — Rule of Law Education, Rule of Law Institute of Australia, sworn and examined

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

Ms LAYSON: No.

Mr MERRITT: No.

The CHAIR: For the record, could you please state your occupation and the capacity in which you are appearing before the Committee.

Mr MERRITT: I am a journalist and a researcher. I appear before the Committee in my capacity as vice-president of the Rule of Law Institute.

Ms LAYSON: I am a chartered accountant and the treasurer of the Rule of Law Institute.

The CHAIR: Would either of you like to make a brief opening statement before the commencement of questions?

Mr MERRITT: Yes. First up, thank you for inviting us to take part in these public hearings. We really appreciate it and we hope we can help your deliberations. The approach taken in the Rule of Law Institute's submissions is based firmly on the need to protect the presumption of innocence. This provides the basis for the conceptual framework of our submission. Our approach is closely related to the views expressed by John Nicholson, a former Acting Inspector of the Commission. The analysis of Mr Nicholson and his predecessor, the late David Levine, has provided the intellectual framework that informs our approach. What we are proposing is a remedy for wrongs that have been inflicted on people who, at law, are innocent of any wrongdoing. This would fill a gap in the law that has left these people without an effective means of redress. The mechanism we have suggested would not be available to those who are guilty of any offence arising from ICAC's investigations.

Our proposal for the structure of the exoneration protocol is intended to address the erosion of the presumption of innocence arising from the current procedures of ICAC. It would be wrong to view our proposed changes as an attack on ICAC. On the contrary, the changes we propose are intended to strengthen the Commission by eliminating a possible basis for criticism, by ensuring its procedures no longer undermine the presumption of innocence. The exoneration protocol is simply the first stage of reforms that we favour. It would address past wrongs. The second stage, which is foreshadowed in our submission, aims to eliminate future wrongs. The presumption of innocence is a fundamental element of the rule of law, which is of constitutional importance. The Commission's declarations of corruption are a direct attack on the presumption. In substance, if not in form, they are a penalty imposed on people outside the justice system.

This is an improper incursion by a statutory body into an area that is supposed to be the exclusive responsibility of the courts. It should therefore come as no surprise that the Commission's actions have given rise to criticism. In practical terms, the remedies associated with the protocol need to be accessible and low cost. This is why we have suggested remedies that, on the whole, would not take up large amounts of court time with complex and costly hearings. The remedies would generally be available when specified circumstances are present. This would be a question of fact. ICAC would have a role in verifying that the circumstances outlined in the protocol are present. If the circumstances are not present, ICAC's role would be to inform the court of that fact. These hearings should not be permitted to degenerate into a rehearing of matters that have already been dealt with by the justice system. Thank you.

The Hon. ROD ROBERTS: Thank you both for attending this afternoon. It will come as no great surprise to my colleagues that I thoroughly endorse your submission. Let us look at the word "remedy" in relation to the exoneration protocols. A remedy is a solution or a treatment for something that has already happened. I am more for looking for the prevention of these things in the future. I notice that your submission is in two parts. I celebrate the fact that neither of you have identified yourselves as legal practitioners. Am I correct?

Mr MERRITT: I must admit that I am admitted to the Bar, but I have never practised.

The Hon. ROD ROBERTS: That is fine. Ms Layson, you said you were a chartered accountant.

Ms LAYSON: I am.

The Hon. ROD ROBERTS: I celebrate the fact that we have laypeople—and I do not use the term derogatorily—coming in and giving us their impression, as distinct from just the legal profession's view.

Mr RON HOENIG: I apologise.

The Hon. ROD ROBERTS: No disrespect intended to Mr Hoenig and the Hon. Adam Searle.

The Hon. ADAM SEARLE: No offence taken.

The Hon. ROD ROBERTS: In a nutshell, how do you think we could prevent these issues from happening in the future?

Mr MERRITT: In a nutshell, the second stage of the reforms that we have proposed would eliminate public hearings. That is the source. It is inevitable that there will be infringements of the presumption of innocence whenever public hearings take place because not everybody who appears at a public hearing and is accused of wrongdoing is even found to have been corrupt by ICAC, let alone convicted in a court of law. The preferred structure, I would suggest, for ICAC should be that of an investigator, rather than a decision maker. Much the same as the police investigate crime and present their findings to the Director of Public Prosecutions for independent assessment, that should be what ICAC's role should be. This is similar to the approach in Hong Kong. As I understand it, the Hong Kong ICAC is integrated deeply within the mainstream justice system. It does not conduct public hearings and, by reputation, is very effective.

Mr RON HOENIG: Mr Merritt, what do you say to those people who say, "Look, public sector corruption is such a big, important thing. You have got to give integrity to the government system. You won't catch them because they operate in secret and it is a terrible evil, as distinct from other types of evil. So this way you can use coercive powers. You can have them admit their guilt by force on the basis that it can't be used against them to prosecute. Ultimately, everybody knows these evil people are corrupt because we have been able to show that in public. You'd never be able to successfully prosecute them anyway, so why shouldn't they be named and shamed as corrupt people? That way the rest of society will know that these people are corrupt and they'll all be frightened to act in a corrupt way"?

Mr MERRITT: It is a very good point. The response is this: If ICAC's public hearings were true investigations, there would be a complete inconsistency with the logic of conducting those hearings to expose corruption because, by definition, an investigation is incomplete until it reaches its conclusions. So how can you know who is being exposed amongst all the witnesses who appear at a public hearing? If anything, public hearings confuse the public about corruption.

Mr RON HOENIG: It means you can sell plenty of newspapers, though, and they read plenty of your stories. That is very right. That is very correct. The courts are the most rigorous and reliable method of identifying wrongdoing. ICAC's methods are inquisitorial. They have removed many of the checks—I am talking about the appeal mechanism that is used by the courts to identify error. ICAC's procedures are not as reliable as a guide to wrongdoing as the courts are. That is a fundamental point.

Mr RON HOENIG: What should the Parliament do then to deter serious and systemic corruption that you cannot deter by other means? How else could you force Mike Gallacher out of office than to put an improper question to a witness in the witness box? There are all these evil people that you have to fix up, do you not, that the law would not enable you to fix up? How do you do that?

Mr MERRITT: I presume you are not being serious about Mike Gallacher.

Mr RON HOENIG: As you would appreciate, I have not got much support though, even from his own party colleagues. But I will keep going.

Mr MERRITT: The end of public hearings is not the end of ICAC's powers. It would still have coercive powers. The wrongs associated with public hearings are so great and the benefits are so small and illusory, I would argue, that the case for continuing with them as a tool to end corruption, it is transient. There is no substance to it. If you accept that the purpose of a public hearing is to expose corruption, it just does not make sense. It does not work. There is a legislative inconsistency that needs to be resolved. Parliament needs to determine whether it wants ICAC to be an investigator and prepare a case for the mainstream justice system, or whether it wants to be a decision maker. If it wants ICAC to be a decision maker it should be subjected to the same—not the same but an equivalent series of checks and review as decision makers in the courts. At the moment ICAC is presumed to be perfect, infallible. There is no merits review system. A determination by ICAC, the merits of it cannot be examined by the Inspector. They certainly cannot be examined by this Committee. If ICAC gets its facts wrong, it stands forever.

Mr RON HOENIG: If you amend the Act by taking away the requirement for it to determine whether someone is actually guilty of corrupt conduct, then that solves the problem. You could even remove the procedural fairness guidelines, could you not?

Mr MERRITT: I think that would come very close to solving the problem. There would still be issues relating to people who might appear as witnesses at a public hearing and are treated as if they are corrupt without a follow up finding of corruption. The Mike Gallacher case is the clearest example of that. There was no finding of corruption against Mike Gallacher. There was an unsubstantiated accusation, which made headlines and led to his departure from Parliament. Removing the ability to make a public declaration of corruption is the primary reform that is needed but it is not the only one.

Mr JAMIE PARKER: Thank you very much, both of you, for taking the time to come and speak to us today, I appreciate it. I am really interested in the submission because we have heard from a range of people today in submissions about how to grapple with this question, which is a very difficult one. The issue you talk about is presumption of innocence. Obviously, a determination by ICAC is very different in terms of its implications to a determination by a court, because a court has implications for your liberty, has far more significant implications than ICAC just making a determination of corrupt conduct. When it comes to the presumption of innocence, obviously there are different tests there, in my mind. What I am interested in is what the DPP spoke about today. The issue that has been outlined is there are clearly situations when the DPP does not act to charge somebody who has had a corrupt finding against them, for a whole range of reasons.

Those reasons have nothing to do with the veracity of the determination by ICAC. The example that was used, someone will sit in ICAC under compulsion and say, "Yes, I took the bribe. I did this that led to this very bad outcome for the public purse." But that person is not able to be prosecuted because that evidence is not admissible. It is clear that the person was a crook. It is clear they took a bribe, they admitted they took a bribe but there is no chance of any prosecution because there is no other evidence that the DPP has before it. It might be a case where the person is very old, it will be a long trial, or they have a terminal illness, it is not worth pursuing. That test about whether or not a criminal prosecution has commenced or been successful does not necessarily determine, we have heard, whether or not that person may have acted corruptly. What is your sense of that test that you are trying to use, the found guilty in court test, when that may not actually be able to be implemented because of the situation around the matter?

Mr MERRITT: That argument—I am surprised to hear that from the DPP.

Mr JAMIE PARKER: You should read his own testimony. I do not want to put words in his mouth. Feel free to read his own testimony. I hope I did not misrepresent his position.

Mr RON HOENIG: No, you are pretty accurate.

Mr MERRITT: If you applied a similar logic to any other area of law you would simply say: Let's throw away 800 years of protections in the common law for the rights of the individual and subject everybody to closed door coercive hearings. If in those closed door coercive hearings they incriminate themselves—there are all sorts of things that they are not required to do in a normal court. Why have the courts at all?

Mr RON HOENIG: Good point.

Mr MERRITT: In this country the fundamental principle is that the law governs everybody. If you say: Well, it governs everybody except those who are unfortunate enough to he hauled before ICAC, they lose all their rights. That is the consequence of the way ICAC was established. It removed fundamental rights and that is why we have got ourselves in this position. If you were to say: Well, people accused of criminal offences should lose all their rights too. They should be forced to incriminate themselves. That argument just does not make sense. Why have one area of law where fundamental rights do not apply, while fundamental rights apply in others? It introduces an inconsistency. That is the fundamental problem. ICAC has been established as a parallel system of justice that applies a very serious penalty on people, the destruction of their ability, in many cases, to make a living. People who have been subjected to an ICAC finding and never prosecuted are suffering years and years and years later. Their businesses have been destroyed, their reputations have been destroyed.

Mr JAMIE PARKER: But that does not mean they were not acting corruptly, just because they were not prosecuted.

The Hon. TAYLOR MARTIN: It does not mean that they were.

Mr MERRITT: Well, it depends what conception you choose. If you choose to trust ICAC above that of the justice system, well that is fine, you can do that. Parliament needs to make a decision though. Is that the

way Parliament wants to go? Is it happy with a parallel system of justice, two systems of justice, one governed by the rule of law and one not? That is a policy decision that Parliament needs to make.

Mr JAMIE PARKER: I would love to have this discussion all day, but there is not much time left, so I will leave that. Thank you very much, I appreciate it.

Mr RON HOENIG: So, why would you not apply the same standards to murderers or paedophiles as you do to—

Mr MERRITT: Very similar.

Mr RON HOENIG: —corrupt licence examiners who take a bribe to issue a driver licence?

Mr JAMIE PARKER: Because the penalty is completely different.

Mr MERRITT: That is a very good point. Which is the most significant wrong? Why should one category of wrongdoing be subjected to coercive methods, while a more serious category is not? It is a very good point.

Mr JAMIE PARKER: Because what is at risk is life imprisonment, as opposed to a finding. That is what the risk is.

Mr MERRITT: There would be people who would say that their reputation is more valuable than their liberty. There are a lot of people. That is why we have laws of defamation.

The Hon. ADAM SEARLE: Mr Merritt, you say that your proposals are not designed to destroy the ICAC but rather to strengthen it. We have had evidence today from both the Bar and the Law Society to the effect that the practical impact of these sorts of changes would be to effectively destroy the ICAC as we currently understand it. Even the DPP said that the ICAC's functioning would be seriously impaired by these kinds of proposals. Do your proposals not proceed on this understanding: You have used the term parallel system of justice, but ICAC was designed to not secure criminal convictions but rather to expose wrongdoing in the public sector. A finding of corruption is not synonymous or the same as saying you are guilty of a specific criminal offence or set of criminal offences. It is effectively a moral as well as a legal judgement. It is simply a fact-finding. It is not preliminary to a prosecution. Your protocol has a number of elements, which are usefully summarised on pages two and three of your submission. Effectively if a finding by the ICAC does not meet the rigours of the criminal justice system, under your proposal, that finding will be able to be set aside. That is correct, is it not?

Mr MERRITT: That is very close to it, yes.

The Hon. ADAM SEARLE: Again, using the example Mr Parker used of evidence that is being compelled or evidence that would not meet the test of admissibility in the criminal law which might be used in an ICAC hearing would have to be set aside. That would fundamentally change the ICAC as we now know it, would it not?

Mr MERRITT: The change is absolutely necessary. I make that very clear in the submission. That is not a bad thing. The system has been established, I would argue, with a flawed presumption, that it is possible to establish a separate system and it does impose penalties.

The Hon. ADAM SEARLE: They are practical effects, they are not formal penalties though.

Mr MERRITT: Well, let us look at the substance of it. If you are able to put someone out of business, destroy their reputation, I think that is a penalty.

The Hon. ADAM SEARLE: Are you suggesting that people who have been adversely named by the ICAC are truly innocent in a moral sense or are you just saying that they have not been convicted of a crime and if they have not been convicted of a crime that they should not be subject to any criticism?

Mr MERRITT: I do not think that Parliament should be passing judgement on people's morals.

Mr JAMIE PARKER: I wish you were right.

The Hon. ADAM SEARLE: Just on that, Parliament has delegated this role to the ICAC.

The Hon. ROD ROBERTS: I pass judgement on the morals of the Liberal Party all the time.

The Hon. ADAM SEARLE: Just on that, there has been mention of Mr Gallacher, I was not necessarily going to go there, but in Operation Spicer Mr Gallacher was not found guilty of corrupt conduct for certain technical reasons, but nevertheless he and others were found to have engaged in a scheme to circumvent the electoral laws of the State.

Mr MERRITT: I think it was found to have intended. Being found guilty of a thought crime is something very unusual.

The Hon. ADAM SEARLE: I think it went a little further than that.

Mr JAMIE PARKER: They did not just think about it.

The Hon. ADAM SEARLE: They actually executed the scheme. The point is that by the time this was brought to light at the ICAC the time for any legal action under the electoral law had come and gone. Using your approach these findings would all have to be set aside because no one was ever prosecuted because they could not be legally prosecuted. Is your submission here that we should adopt a legal regime that would exonerate Michael Gallacher and all those other Liberal MPs that lost their jobs?

Mr MERRITT: Yes. Mike Gallacher, if there was a case, should have been brought to court.

The Hon. ADAM SEARLE: It could not have been because no one knew about it until it was brought to light in the ICAC hearing and the time for prosecution had passed. When I moved in the Parliament to actually allow a wider timeframe the Parliament said no. When we reconsidered the new penalties proposed by the Government my side of politics proposed widening the two-year timeframe for prosecutions to 10 years and that was not accepted.

Mr JAMIE PARKER: How convenient.

The Hon. ADAM SEARLE: Your proposition would mean that these things could never have been brought to light.

Mr MERRITT: I think what you are getting at is the technical difficulties that arise when you have two parallel systems of justice. You have one that is able to secure convictions and officially impose penalties and another one that has been vested with coercive power and the ability to obtain information that cannot be obtained in the mainstream justice system. It is no good complaining that information obtained in one cannot give rise to a penalty in the other. If Parliament chooses to change the law for the mainstream justice system to secure a conviction more easily that should happen but I think it makes too much of an inroad into fundamental principles to simply say, well, we are able to obtain this information which would not pass muster in the justice system.

The Hon. ADAM SEARLE: I think we may be talking about different things, Mr Merritt. Do not misunderstand me, while I do not necessarily agree with your submission I respect the intellectual rigour with which you have brought your argument. The purpose of the ICAC, as I understand it, and as the Parliament has confirmed in the reforms of 2016, is to say, yes, where there is a crime it should be investigated and prosecuted as a crime or under other similar laws such as electoral funding laws. But sometimes where, because the time for prosecution has passed or for reasons of difficulty obtaining evidence, we have a specific function allocated to this body. Using again the example of Operation Spicer, whether or not a major political party has or has not complied with electoral laws in this State is a matter going to the integrity of our electoral system and our system of government.

The ICAC was not just designed to get evidence to put people in jail it was also to shine a light on conduct of that nature. Under your proposal those sorts of things would not be able to be brought to light unless they rose to the level of a criminal conviction. The problem with that is that I do not know whether the electoral law would actually satisfy that test because I do not know that they are, strictly speaking, crimes. The second thing is, in the case of Mr Gallacher, there would be no prospect of a prosecution or a conviction, not because of reasons of admissibility, but because the time had come and gone. Is it right that we should not be able to at least bring into the light wrongdoing of that kind simply because the time for prosecution, in a penalty sense, had passed?

Mr MERRITT: That is a question for Parliament.

The Hon. ADAM SEARLE: Well, it is.

Mr MERRITT: My fundamental point is this, once you go down this road of establishing a parallel system of justice with different rules and the ability to erode fundamental rights you are on a very slippery slope. You are able to destroy people and impose penalties without giving them the benefit of fundamental things. All barristers, when they appear in court for a defendant are given the case against the client. You are not given that at the ICAC. You are simply there to be grilled on who knows what. You are not given the ability to test the case against you. You are only able to cross-examine a witness by leave. There are all sorts of fundamental flaws that weaken the rigour of the ICAC's findings. To set the ICAC up as a paragon of rigour is fundamentally wrong.

The Hon. ADAM SEARLE: I know you have been critical of the ICAC and I used to be an avid reader of your articles in that respect. A number of those concerns culminated in the 2016 reforms. I know there are

divided views about previous management of the ICAC under different Commissioners, but there appears to be consensus that at least under its present leadership the ICAC is conducting itself in a way that is regarded as fair and as avoiding all of the criticisms made about the body under its previous management, whether they were right or wrong those criticisms.

Mr MERRITT: I would agree with that. I have not seen anything under the three-Commissioner model that will give rise to concern. That, however, does not provide an answer to past wrongs.

The Hon. ADAM SEARLE: No, but as you would appreciate from your scholarship they say hard cases make bad law. But you cannot fix every wrongdoing in the past, even when there are cases that have been regarded as wrong or because of the law that stood at the time there was an unjust outcome, even when Parliament has changed the law for the better, it does not do so retrospectively to provide a remedy to people who have lost out in the past. That would be a fundamental change, retrospective changes of that kind.

The Hon. TAYLOR MARTIN: It has changed it to retrospectively make people guilty.

Mr MERRITT: I was about to mention that. Remember the Validation Act that said that—

The Hon. ADAM SEARLE: Yes, I remember it very well.

Mr MERRITT: That had retrospective effect.

The Hon. ADAM SEARLE: Well, it retrospectively overcame the High Court ruling in Cunneen with the exception of the Cunneen matter itself.

Mr MERRITT: What it did was it retrospectively validated unlawful conduct by ICAC where ICAC was unable to understand the limits on its own jurisdiction, so the precedent has been set.

The Hon. ADAM SEARLE: That was a choice made by the Parliament.

Mr MERRITT: If Parliament is able to protect unlawful conduct by a public sector agency, I think it is fundamentally inconsistent for Parliament to refuse to protect the victims of that unlawful conduct.

The Hon. ADAM SEARLE: Just on that term "victim", are we talking here about people who, in your view, have not done anything that was morally censorious or are you talking about people who are victims because they have not been convicted of a crime?

Mr MERRITT: I am not the moral guardian of society. Society passes laws; we live by those laws. People who have not been convicted of wrongdoing in a court of law are entitled to a presumption of innocence and that should be accepted.

The Hon. ADAM SEARLE: Sure. They are entitled to a presumption of innocence that they are not guilty of crime, but there are a lot of things that fall short of criminality, for example, the matters dealt with in Operation Spicer. Surely that nevertheless should be the subject of some legitimate criticism, notwithstanding it falls short of something for which you should go to jail.

Mr MERRITT: If Parliament chooses not to provide a remedy for people who have suffered wrongs because of matters that fall short of criminal conduct, that is a matter for Parliament. But it should be aware that it is sending a very dangerous signal. It means that the normal framework by which society governs itself, which is the law of the land set by Parliament, has been subcontracted to a public sector agency which can make moral judgements.

The Hon. TAYLOR MARTIN: What is your opinion of the current amendments and powers as they stand now versus the lack of procedural fairness and rules just a few years ago?

Mr MERRITT: I think there has been a significant improvement. I think it is absolutely necessary. But I make this point: The effect of those has been to effectively put three people in charge to keep an eye on each other. That is great. I would be happier if the law governing ICAC provided a more substantial framework rather than depending on the common sense of the people who hold office.

The CHAIR: Thank you, Mr Merritt and Ms Layson. We appreciate your time appearing before the Committee today. The Committee may wish to send you some additional questions in writing. The replies to those questions will form part of your evidence and will be made public. Would you be happy to provide a written reply within two weeks to any further questions?

Mr MERRITT: Yes.

Ms LAYSON: Yes.

The CHAIR: Wonderful. Thank you very much.

(The witnesses withdrew.)

WENDY ENDEBROCK-BROWN, Director, Legal Services, Corruption and Crime Commission of Western Australia, before the Committee via teleconference, affirmed and examined

ROD JENSEN, Director, Legal Services, South Australian Independent Commissioner Against Corruption, before the Committee via teleconference, affirmed and examined

The CHAIR: Thank you for being present before the Committee today. Would either of you like to make a brief opening statement before we commence questions?

Ms ENDEBROCK-BROWN: No, thank you.

Mr JENSEN: I do not intend to make an opening statement, but I just want to clarify something since the submission was filed. The Committee received submission 26 from the Independent Commissioner Against Corruption for South Australia, dated 30 July 2020. That submission was signed by the Hon. Bruce Lander, QC, who was then the ICAC. Mr Lander's term came to an end on 1 September 2020. A new Commissioner commenced on 2 September 2020 and that is the Hon. Ann Vanstone, QC. Commissioner Vanstone has considered the submission and there are no changes. Thank you.

The CHAIR: Mr Jensen, I understand that your legislation requires you to conduct all of your investigations in camera. Is that correct?

Mr JENSEN: Yes. Corruption investigations are conducted in private. There is also the ability, under our legislation, to conduct inquiries in relation to serious or systemic misconduct or maladministration. They are also conducted in private.

The CHAIR: In today's hearing we have heard a lot of views and professional opinions around the benefits of public inquiries and their necessity. I am interested in your view and your expertise. In your view, does the fact that you conduct your investigations in private lessen the ability of the South Australian ICAC to publicly expose corruption?

Mr JENSEN: Dealing with corruption separately to serious or systemic misconduct or maladministration, corruption investigations take place in private and are very much considered an investigation under our legislation. At the conclusion of the investigation, consideration is given to whether or not a prosecution would be commenced, but that is done independently by the Director of Public Prosecutions in South Australia. All of the powers that are exercised during the course of a corruption investigation are exercised as part of the investigative process and the Commissioner sits at the top of the process. It is the Commissioner's investigation.

In the misconduct or maladministration space, there is also the ability for the Commissioner to carry out an investigation into serious or systemic misconduct or maladministration and those terms are defined in the ICAC Act.That is done using the powers under the Ombudsman Act 1972 and the Royal Commissions Act 1917—but again, they are conducted in private. You may or may not be aware that last year the Parliament of South Australia considered legislation to have those inquiries sometimes in public, depending on whether or not the Commissioner was minded to do so, but that legislation did not pass Parliament. However, I emphasise again that that legislation only related to serious or systemic misconduct and maladministration investigations, not corruption.

On the occasion of a number of appearances before the oversight committee at Parliament in South Australia the then Commissioner, Mr Lander, made clear that, in his view, corruption investigations should always be done in private, because ultimately they are the same as a police investigation and you are looking at a person in relation to potential criminal offending. Obviously that is going to have an effect on a person's reputation. Here in South Australia we do not have the ability in the ICAC to do a public hearing in relation to a corruption investigation. The submission that was put before the Committee identifies that the Independent Commissioner Against Corruption Act 2012 here in South Australia is very much structured on the idea that in relation to corruption investigations the reputation of a person has to be considered at each stage of the process.

The CHAIR: Mr Jensen, to the second part of my question, in your professional opinion does that structure lessen the ability of the South Australian ICAC to publicly expose corruption?

Mr JENSEN: There are a number of facilities in the ICAC Act that allow the Commissioner to consider whether or not to draw attention to a corruption investigation. On each occasion that the Commissioner might be minded to do that there are criteria set out in the Act. Amongst those is obviously the effect that would have on a person's reputation. I am obviously familiar with the process that takes place in New South Wales and the fact that there can be public hearings, as it were, in relation to corruption-related matters. Here in South Australia the focus is more on it being a criminal investigation. To answer your question, a criminal investigation is undertaken in relation to a matter that might be alleged corruption. At the conclusion of that, consideration is given to whether

or not the DPP would prosecute the matter. If the DPP so chooses, that is the point at which the corruption matter would become public. Then there would be a public trial subject to different criteria dealing with the Evidence Act 1929, suppression orders and things like that.

There is still that ability to have corruption examined publicly, but it is done at the point after which a person has been charged and the person is before the court and is able to avail themselves, if necessary, of the protections that the court might offer in relation to that prosecution. If the prosecution is concluded—or if indeed there has been an investigation in relation to corruption where there has not been a prosecution commenced—consideration could be given to whether or not there might be some public reporting of the matter. But again, the ICAC Act is very strict in relation to the nature and extent of what can be reported, and the Commissioner's submission identified the relevant provisions of the ICAC Act—section 42, in particular, which deals with making a report and identifies the protections afforded to a person who has been investigated in relation to corruption if such a report was made.

The Hon. ADAM SEARLE: Mr Jensen, if your ICAC conducts an investigation and finds that there was corruption and then the DPP decides notwithstanding that finding that there is not enough admissible evidence to sustain a criminal prosecution, what then happens to the matter? Is there a report of the ICAC on the matter that was investigated? Or is the ICAC just a function leading to a criminal prosecution?

Mr JENSEN: Just to pick up on a couple of terms that you have used there, the ICAC—and I am talking here about corruption; I am not talking about misconduct or maladministration investigations, clearly focusing on corruption investigation, which is an allegation of a criminal offence. The ICAC is there to serve the investigative function; we are not a prosecuting agency. The agency is like the police, a law enforcement agency that investigates the allegation of corruption. At the conclusion of that investigation the Commissioner would make an assessment of the evidence that has been gathered. It would not be necessary to make a finding of corruption. What the Commissioner would be looking at is whether there is sufficient evidence to warrant the matter being referred to the DPP in order for the DPP to consider whether a prosecution should be brought; or, in the alternative, if the Commissioner is of the view that there is not sufficient evidence to warrant that, whether there would still be sufficient evidence in relation to a potential matter of corruption to perhaps warrant the matter being referred to the police for them to do some further investigation of part of the matter or something along those lines.

In any event, if the matter was referred to the DPP and the DPP then decided, in its independent discretion, not to prosecute the matter then the Commissioner would give consideration to whether or not any issues of misconduct or maladministration arose which would be less than the corruption. They could be referred to another public authority for investigation in relation to misconduct or maladministration or, if the Commissioner was of the view it was serious or systemic, potentially the Commissioner could undertake an inquiry or investigation into that, but only under the umbrella of serious or systemic misconduct or maladministration. The long answer to your short question is that at the conclusion of a matter, depending on what happens, if a corruption prosecution does not take place there are still avenues open to the Commissioner to consider what to do, which might also include making a report, but there have not been many occasions where that has been done.

The Hon. ADAM SEARLE: Mr Jensen, in New South Wales the ICAC is not an investigator in the sense of investigating a potential crime, necessarily. It investigates matters it has been made aware of that have come to it, and then it does conduct hearings—sometimes in private, mostly in public—and then produces a report. It is not designed to be part of the criminal justice or criminal investigative apparatus of the State. Sometimes there are prosecutions arising from ICAC reports, but that is not always the case. It sounds like your ICAC and our ICAC are not really the same kind of body. Would that be a fair assessment?

Mr JENSEN: To a certain extent, yes. I think both bodies are interested in corruption, obviously, but it seems to me from my reading of the New South Wales legislation and various readings around it that the ICAC in New South Wales has a different responsibility in relation to this corruption investigation aspect, where you can make a finding of corruption that may or may not then lead to a prosecution, and that an aspect of that can be done in public. That is quite a different beast to what we are familiar with.

The other thing I would observe, and I did not touch on it before, is that the ICAC legislation sets up an Office for Public Integrity [OPI]. That office, as we explain in the Commissioner's submission, is the initial assessment point for a matter. A complaint or report is received from a member of the public or a public officer, depending, and the OPI makes an initial assessment of that and assesses whether the conduct is potentially misconduct, maladministration or corruption. Then the Commissioner gives consideration to whether the Commissioner would conduct a corruption investigation. But as you identified before, that then follows the path in our legislation and that is very much about investigating corruption with a view to seeing whether or not there is sufficient evidence to warrant a prosecution. That is a matter for the DPP.

The Hon. ADAM SEARLE: Mr Jensen, in your situation "corrupt conduct" has a meaning equivalent to or the same as specific criminal offences?

Mr JENSEN: Yes. The definition of corruption in our legislation can be found in section 5. When you go there you see that there is a definition of "Corruption in public administration". It very much focuses on the behaviour of a public officer. Basically, "corruption" in our legislation means a criminal offence or potential criminal offence committed by a public officer, when acting in his or her capacity as a public officer and whether before or after the commencement of their role as a public officer. It is very much targeted in that regard.

The Hon. ADAM SEARLE: Ms Endebrock-Brown, is your Corruption and Crime Commission more like the South Australian body or is it more like the New South Wales ICAC?

Ms ENDEBROCK-BROWN: I would say it is more like the New South Wales ICAC. We have the ability to have private or public examination. Our default, though, is private and it sounds unlike the New South Wales situation. Most of ours are conducted in private and sometimes they are conducted in public.

The Hon. ADAM SEARLE: Does your Corruption and Crime Commission regularly produce reports that are tabled in the Parliament?

Ms ENDEBROCK-BROWN: Yes, we do.

The Hon. ADAM SEARLE: And do all of your investigations more or less result in those reports? That is your prime function—to produce reports and findings rather than lead to a criminal prosecution?

Ms ENDEBROCK-BROWN: It is one of our functions. It is one of the ways that we deal with serious misconduct. One of our functions under our Act is to ensure that an allegation about or information or matter involving serious misconduct is dealt with in an appropriate way and there are a number of ways that we can do that. One of those ways is by investigating and one arm of an investigation may be examination in private or in public. Another way the Act enables us to perform that serious misconduct function is by making recommendations and furnishing reports on the outcomes of investigations. They may be reports in Parliament. They can be reports also to the relevant agencies where the serious misconduct was investigated.

The Hon. ADAM SEARLE: In relation to your investigations do the rules of evidence apply or is it a wider capacity to receive material?

Ms ENDEBROCK-BROWN: In the examination process the rules of evidence do not apply. But, as I said, examinations are really just one part of our investigation. Our investigations are conducted very similarly to the way a law enforcement agency, I would expect, would conduct an investigation.

The Hon. ADAM SEARLE: So, when you evaluate the material that you have, what is the standard that is applied? Is it the civil standard or the criminal standard?

Ms ENDEBROCK-BROWN: The Commission does not make—I will take a step back. The wording of our Act is very clear. Our role is to make assessments, form opinions and perhaps make recommendations. We do not make findings of guilt. Again we also are not a prosecuting agency. Our matters might be referred to or might go to the DPP or another prosecuting agency, but we do not do that. Our Act contains, as we set out in our submission, specific provisions that ensure that any assessments or opinions that we form and are set out in any of our reports cannot be read as being a finding or opinion that a particular person has, for instance, committed a criminal offence or a disciplinary offence.

The Hon. ADAM SEARLE: Do your reports make findings of corruption—that one or more persons have engaged in corrupt conduct?

Ms ENDEBROCK-BROWN: Our definition of "serious misconduct", which is what we investigate, is in section 4 of our Act. There are three types of serious misconduct, if you like. Two of them do involve a finding—or, I should say, an element of corruption. The third is a criminal offence of two or more years imprisonment. The Commissioner may form opinions as to there having been corrupt conduct but we do not make a finding, as you would in a criminal court, of corruption.

The Hon. ADAM SEARLE: But is it styled as a finding of fact or is it just styled as an opinion in your reports?

Ms ENDEBROCK-BROWN: Our Commission is very cautious and conservative in the wording that is used. The Commissioner will use the word "opinion" rather than "finding" although our Act does use both phrases.

Mr JAMIE PARKER: Thank you very much to both of you for your attendance today and for the submissions. If I could just ask a question to both of you in terms of review mechanisms—obviously here in New South Wales the ICAC may make a finding that corrupt activity was undertaken and someone has a corruption finding. We have only had one instance where one of those findings was overturned in the Supreme Court. What are the mechanisms for review in your jurisdictions? Obviously in South Australia it sounds like there is not really any finding because if it is not prosecuted then there is no finding. In Western Australia it sounds as if there are opinions. Maybe Western Australia is a more reasonable place to go first. Has anyone tried to get a review of an opinion in a report or tried to overturn an opinion?

Ms ENDEBROCK-BROWN: Not in my time, I have to say, but our opinions or our reports are definitely subject to judicial review. I am aware that that has happened in the past. There is one case that I could probably refer the committee to, which is *Cox v Corruption and Crime Commission WA* [2008] WASCA 199. That is a case that is often referred to for explanation as to the Commission's reports having no operative legal effect, as they point out. In that case they said the ambit of our jurisdiction is to assess and, having regard to the essential character of its misconduct function, to make assessments, form opinions and perhaps put forward recommendations. We are not to make authoritative determinations which affect legal rights or obligations. So, it has happened in the past—

Mr JAMIE PARKER: But if an opinion comes from the Commission saying, "Well, in my opinion Mr Edwards acted in a way that would constitute serious misconduct," obviously that is an implication for his reputation.

Ms ENDEBROCK-BROWN: It could be, definitely. I could see that.

Mr JAMIE PARKER: Okay. So, there is judicial review. That is great.

Ms ENDEBROCK-BROWN: There is.

Mr JAMIE PARKER: And that is from 2008. Was that right? Can I just ask that same question that is probably not so relevant in the South Australian context?

Mr JENSEN: Yes. Again I would draw the distinction between those investigations involving serious systemic misconduct and maladministration, put those to one side and only deal with corruption investigations. In the course of a corruption investigation it would be open, potentially, to a person being investigated to bring a challenge in relation to aspects of the investigation, but there would not be any finding that you are talking about at the conclusion of the investigation. Rather what would happen is, if the Commissioner was of the view that there was enough information or evidence gathered to warrant the matter going across to the Director of Public Prosecutions, the DPP would be the reviewer. The DPP would make an independent assessment of whether or not there was sufficient evidence to warrant prosecution and whether the public interest required it. I think that would be the process here, based on what you have talked about.

Mr JAMIE PARKER: My final question is about private hearings. We have had evidence today that suggests that there are some negative implications from private hearings: lack of transparency; suspicion about the process; the potential that the organisation can go on a little bit of a crusade; and that if it is not exposed to the view of the public then there could be a lack of confidence. I think one of the witnesses today even mentioned that there was some controversy in Western Australia. I could be wrong on that but that is my recollection. Are there any negative implications that you have found in that regard to any of those issues that have been raised that you feel might apply in your situation? I ask that to both of you, so maybe South Australia first. Mr Jensen?

Mr JENSEN: Sure. As I mentioned before, there was some discussion in South Australia last year about expanding the powers of the ICAC to conduct public examinations in relation to serious or systemic misconduct maladministration matters. The exact issues you are talking about there were ventilated at that time. There was considered to be a benefit in there being public hearings because it allowed for transparency. But at the same time there was the argument that they should be conducted in private because basically it was an opportunity for someone to come forward and to give a version that they might not necessarily give publicly.

Putting that to one side and focusing only on corruption, as I said before, a corruption investigation in South Australia is treated as a criminal investigation and is conducted in private. There is the capacity under the ICAC Act to conduct what are known as coercive examinations. Those powers are set out in schedule 2 of the ICAC Act and are given effect by section 29 of the ICAC Act. Those examinations are conducted in private and there can be non-communication directions made in relation to them. But otherwise, the standard corruption investigation would be looking to interview witnesses et cetera and gather evidence that way, not through examinations of any sort.

Ms ENDEBROCK-BROWN: Just briefly, in Western Australia the fallback position or the beginning position is that all our examinations must be in private, but the Act does provide in section 140 subsection 2, as we have set out in our submission, that the Commission can open up an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements, it considers that it is in the public interest to do so. The Commissioner will only make an order that an examination be held in public after very careful consideration of the factors that go into that balancing equation to determine whether or not he then considers it is in the public interest to open it to the public.

The Hon. ROD ROBERTS: Ms Endebrock-Brown, you pretty much answered the first part of my question in your answer to Mr Parker. We heard from people today and there are assertions that our hearings should always be held publicly because those public hearings are a deterrent to further corrupt activities. Could you comment on that in light of the fact that WA does not defer to public hearings?

Ms ENDEBROCK-BROWN: It is a factor that our Commissioner will take into account in doing that balancing equation. Because one of our functions is to ensure that an allegation or information involving serious misconduct is dealt with in an appropriate way, having a public examination may be a way to ensure that in a particular matter but also across the public sector more generally.

Mr JUSTIN CLANCY: My question is to Ms Endebrock-Brown. One mechanism we have not explored is that Western Australia's Corruption and Crime Commission has the capacity when the Commission tables a report to thought given as to whether or not the person should be named. Is that a frequent occurrence and, based on consideration with regards to public interest, does that take into account the reputational impact?

Ms ENDEBROCK-BROWN: Yes it definitely does. Our Act is silent, so unlike the position with examinations where the Act tells us what we need to do in deciding whether or not an examination should be public, there is nothing in relation to our reports. Our Commissioner's view is that we should be very cautious and careful about that. I should say our former Commissioner. We do not have a substantive full-time Commissioner at the moment but I do not expect any future Commissioner would have a different view given the terms of our Act. His position was that, as we have set out in our submission, where an opinion of serious misconduct has been formed about an individual, the usual approach would be to name that person in a report but where there has been no opinion of serious misconduct formed then it has been highly unlikely in my experience for that person to be named.

The CHAIR: That concludes the questions from the Committee. Thank you both very much for your participation in the process today. The Committee may wish to send you some additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to provide a written reply within two weeks to any further questions that the Committee may send you?

Mr JENSEN: Yes, of course.

Ms ENDEBROCK-BROWN: Yes, of course, and thank you for the invitation to appear today.

The CHAIR: Thank you both. On behalf of the Committee, we appreciate your expertise.

(The witnesses withdrew.)

(Short adjournment)

DAVID HARPER, Accountability Round Table, before the Committee via teleconference, sworn and examined

The CHAIR: Thank you for appearing before the Committee today. Before we proceed, do you have any questions on the procedural information sent to you about witnesses and public hearing?

Mr HARPER: No, I do not.

The CHAIR: Mr Harper, would you like to make a brief opening statement before the commencement of questions?

Mr HARPER: No, I do not wish to make an opening statement.

The Hon. ADAM SEARLE: In relation to Accountability Round Table submission No. 18 you say:

> … that redress is only warranted when an integrity Commission makes a finding of corruption that is unjustified on the materials …

Is that equivalent to a reasonable basis for a finding of the kind that would sustain a judicial review of an ICAC decision?

Mr HARPER: It certainly has characteristics of the same kind. The legislation, as the Committee is aware, already provides that a review may be held on the application of a person against whom a finding of corruption has been made. The basis for such a review is either one or more of:

> … material error of law on the face of the record; a failure in reasoning such that no reasonable and fully informed person could have reached the Commission's conclusion; a finding unsupported by "any evidence whatsoever"; a failure to take into account relevant matters, or to take into account that which is irrelevant; and, finally, a material denial of natural justice.

It seemed to the Accountability Round Table that a person might have suffered an injustice in the hearing before a Commission, which resulted in the Commission making a finding of corruption where, for example, the Commission failed to provide the affected person, the person accused of corruption, with exculpatory evidence of which the Commission was aware.

That is something which section 31B of the ICAC Act requires of the Commission. It is something that is clearly a matter of great importance and directly relates to the fairness of the Commission's procedures. A failure of that kind ought be a failure about which a person who has been found to be corrupt could properly complain. We think there ought to be an avenue afoot to take that complaint to the courts. We think, therefore, that the ICAC Act should be amended to make it clear that in cases of that kind, the affected person would have that avenue of relief.

The Hon. ADAM SEARLE: Just to be clear, where someone is put through a criminal trial on the same facts as led to the ICAC inquiry and finding, and they are acquitted, that is when that person's right would be triggered to apply to that same trial judge to review the ICAC finding against them; and then that judge would be empowered to make a decision either confirming or overturning the ICAC finding. Is that right?

Mr HARPER: Yes.

The Hon. ADAM SEARLE: What about where no prosecution is brought? For example, we have heard significant evidence today that much of the evidence that ICAC gathers would not be admissible in a criminal trial for one reason or another: either because it is compelled or because the admissibility standard is different or the standard of evaluation for ICAC is balance of probabilities, whereas in a criminal trial it is beyond reasonable doubt. What would happen in your model? Someone who is tried but acquitted would have the right to review. What would happen to someone who was not put on trial? Would they have no remedy? Is that correct?

Mr HARPER: No, they would have a remedy. Under our model, the affected person would be able to apply to the court for relief under the amendment that we propose. That would be so because the amendment, if it is enacted, would give the court power to hear a complaint about the process by which the Commission has conducted the hearing that resulted in the finding of corruption. If the court were to be satisfied that the finding of corruption was tainted because the Commission had not provided the affected person with the appropriate standard of fairness—because the Commission had failed, to give another example, to provide the affected person and other witnesses with relevant documents so that those persons could answer the material in those documents—then that would be an error in the finding of the Commission, which the court would have power to correct. That would be so whether or not a prosecution followed the finding of corruption.

The Hon. ADAM SEARLE: How is that different to the capacity of a person aggrieved to seek judicial review? The grounds in page 6 of your submission sound very much, to me, like McDougall J's summation of the grounds of judicial review, as was in the Bar Association's submission to us. Are you talking about simply

codifying, as a review mechanism, the existing law for judicial review? Would that be the substantive effect of your proposal?

Mr HARPER: Yes. We would submit that our proposal not simply codifies but expands the grounds upon which a review could be sought from the Supreme Court of New South Wales.

The Hon. ADAM SEARLE: What would be new? What would be different or additional?

Mr HARPER: If one takes the present grounds, a material error on the face of the record. That material error would not appear on the face of the record if the Commission had—to go back to my first example—failed to provide or disclose to the affected person evidence that was exculpatory.

The Hon. ADAM SEARLE: At present at common law, it is presumed that a body like ICAC is bound by procedural fairness requirements, and I think there is actually legislative provision now requiring the provision of exculpatory evidence. So if the body now failed to do what you are suggesting, that would already give rise to a ground of judicial review under the present law.

Mr HARPER: Yes, I agree.

The Hon. ADAM SEARLE: Your proposal might have the benefit of putting it more explicitly, but it would not be new.

Mr HARPER: Yes. I agree with respect that under the present Act, the point that I just made would certainly be strongly arguable and would probably result in the court accepting, if the error that I mentioned was found to have occurred, to grant the review. But it did seem to the Accountability Round Table that there might be some doubt about it and it would be much clearer if our amendment were incorporated in the Act. That is because we do accept that it is very important that people who wrongly are the subject of a finding of corruption should have an appropriate avenue for redress.

The Hon. ADAM SEARLE: I understand that. Again, I am not being critical but as I understood the substance of your proposal, it neatly summarised the existing judicial review grounds and maybe strengthened them and made them clearer, and it would put them explicitly in the statute. But you are really enlarging upon something that may largely be present already.

Mr HARPER: I think that is right, yes. We do not suggest a major change to the legislation. What we do suggest is we think something that would make it quite clear that a failure of the Commission to observe fairness in circumstances where a failure to provide fairness might not otherwise be uppermost or, say, clear in the issues between the affected person and the Commission.

The Hon. ADAM SEARLE: One other submission we have had today—I think it was from the gentleman from the Law Society, Mr Chalk—was that there may be a gap, and the gap may be this: That on the basis of the material before the ICAC, it reaches a decision or a finding that may have been perfectly regular given the information it had, but subsequently a witness who gave evidence to the ICAC discloses that they gave false evidence, or subsequent evidence comes to light—maybe objective evidence—that shows that when the ICAC chose between competing versions of an event, it might have chosen the wrong one. There needs to be a mechanism to go back and correct the fact in some way. Is that something that your roundtable would also be open to?

Mr HARPER: Absolutely. I think there would be no doubt that, in those circumstances, the person affected should have the right to have a court review the finding of the Commission.

The CHAIR: Mr Harper, in 2016 the New South Wales Parliament passed the Independent Commission Against Corruption Amendment (Validation) Bill in response to the High Court matter *Independent Commission Against Corruption v Cunneen*. Do you see any issue with that validation Act prohibiting or standing in the way of persons of interest who have been found to have engaged in corrupt conduct, or any other findings of ICAC, being prohibited from approaching the Supreme Court for a judicial review?

Mr HARPER: I confess that I have not specifically examined that Act with a view to answering that question, so I would not be confident in giving you an answer about that. I would certainly hope that the amending Act did not affect the person affected from pursuing relief if there was otherwise an appropriate ground for such pursuit.

Mr JAMIE PARKER: Thank you very much for allowing us to question you. All of us agree that we have been pleased to have the benefit of so many people and their experience and skills. It is clear that the submission does not support an exoneration protocol, and you have come forward with a proposal that the Hon.

Adam Searle discussed with you. Can you maybe in a little bit more detail take us to why you think anything beyond what you have proposed, or a broader exoneration protocol is not appropriate?

Mr HARPER: In general terms, yes, it is not appropriate to take the matter any further in the opinion of the Accountability Round Table because it is very important that the Commission be enabled to function as it should and expose corruption in accordance with its statutory procedures and obligations. The question of exculpation is certainly one that needs to be alive in the minds of all those who are concerned about the way that a Commission, such as ICAC, delivers its findings in accordance with the law and with justice. But if the Commission acts in that way, then being human, even so it may make a mistake. The question is whether that mistake was one that properly gives rise to a review by the court. In the opinion of the Accountability Round Table the propriety of an application, or at least the efficacy of an application, to the court should be one that is limited so that a person who has in fact committed a corrupt act does bear the consequences.

Although innocent of corruption all the procedures of fairness and all the requirements of lawfulness that the Commission is bound to accept and uphold are in fact accepted and upheld by the Commission and if nevertheless there is a mistaken finding of corruption one would hope that such a finding would be very rare if it happened at all. And one would say that in those circumstances, being human and being therefore capable of making mistakes, even with the best will in the world and even following all the right procedures, then terribly bad luck for the person who was wrongly found to be corrupt. But no system can be made perfect. The search for perfection is damaging to the search for the good, and the good of society clearly, in the opinion of the Accountability Round Table, justifies, indeed requires the existence of a Commission such as ICAC, even though there is a possibility that mistakes will be made with all the right procedures being followed.

Mr JAMIE PARKER: That is an interesting philosophical point as much as anything, because we have had some other evidence where people say: Well, any potential risk to an individual outweighs the powers that ICAC has, and even if there were findings that politicians acted to evade electoral laws or similar, that should not be brought into the eye of the public because there is a risk of reputational damage or other impacts on other individuals. Do you feel that your proposal, which extends on the judicial review approach, would ameliorate potential concerns around reputational risks, that that would be sufficient? Because you have also referred to the Inspector. Do you think that there is any additional role for the Inspector, or your judicial review kind of approach—if I can give it that clumsy name—is sufficient?

Mr HARPER: We would certainly accept at once that if the Inspector has the appropriate powers, those powers will extend to the ability of the Inspector to investigate the procedural fairness of a Commission hearing, and not just fairness but investigate the hearing in every aspect to ensure that the Commission obeyed the restrictions and generally which the Commission must obey. The Inspector must have all those powers. Yes, that is a very important aspect of the prevention of the ill about which we are concerned and which ART certainly sees as something that needs to be the subject of every possible means of prevention, that is a wrongful finding of corruption.

The CHAIR: If there are no further questions, I thank Mr Harper for his assistance and contribution to the Committee today. Mr Harper, the Committee may wish to send you some additional questions in writing. The replies to those questions will form part of your evidence and be made public. Would you be happy to provide a written reply within two weeks to any further questions?

Mr HARPER: Yes, I would.

The CHAIR: Thank you for that. On behalf of the Committee I thank you very much for your time and the Accountability Round Table for its submission to the Committee's inquiry.

Mr HARPER: I am grateful for the opportunity to address the Committee and I commend the Committee for its work.

The CHAIR: Thank you.

(The witness withdrew.)

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

PATRICIA MCDONALD, Commissioner, NSW Independent Commission Against Corruption, sworn and examined

STEPHEN RUSHTON, Commissioner, NSW Independent Commission Against Corruption, sworn and examined

ROY WALDON, Solicitor to the Commission and Executive Director, Legal Division, NSW Independent Commission Against Corruption, affirmed and examined

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

Mr RUSHTON: No.

Mr HALL: No.

Ms McDONALD: No.

Mr WALDON: No.

The CHAIR: I now move to the Chief Commissioner and anyone else who wishes to make a brief opening statement before the commencement of questions.

Mr HALL: The Commission has lodged and relies upon its written submission. As the members of the Committee will have seen it is divided into three parts. Overview of the Commission's role and work. Part two is the reputational impact, addressing in particular public inquiries. Part three deals with matters concerning the expression "exoneration proposal" under the subtitle "There is no need for an exoneration proposal". Many submissions have been lodged with the Committee and I do not see it as my function to set about criticising or referring in detail to the other submissions other than to make some general observations that might affect them. The terms of reference of this Committee, in particular the first two terms of reference, concern existing safeguards and remedies and how they are used and whether they are adequate, whether additional safeguards and remedies are needed.

Many of the submissions travelled well beyond the terms of reference, almost to the point of some suggesting that the ICAC Act should be totally rewritten in relation to substantive provisions. The remit of this Committee is essentially to examine any safeguards and the remedies and whether they are adequate for purpose and if not in any respect, or in any respect, whether there is need for the issue of reputational impact to be addressed in some way. There are various suggestions as to how the reputational impact could be addressed. Some of the proposals put forward would create enormous difficulties, both in terms of jurisdiction and other legal questions. I start with the proposition that the Commission has a range of safeguards, many of which are not even referred to in many of the submissions. The safeguards are those involved, firstly, in evidence gathering before a public inquiry.

The process involves, amongst other things, compulsory examinations. Compulsory examinations are of great value. Firstly, in determining the credit worthiness of witnesses, to identify other lines of inquiry, to identify evidence that is relevant in terms of it being inculpatory in corrupt conduct or evidence that is exculpatory. It is a thorough process that is undertaken. Many of the matters that the Commission inquires into our what might be said to be historical. They might have occurred last year, two years ago, three years ago, et cetera. As is well known, corrupt conduct or corruption, is a secretive process kept secret by those who are party to it ensuring that there is little by way of records, as this Committee has heard before. It became more than apparent before 1988 that law enforcement agencies, in particular police agencies, simply did not have the powers, technique or methodology to be able to run down corrupt conduct.

It is a specialised area that requires specialists. It requires extraordinary powers which Parliament gave to the Commission we represent. The use of those powers, being as extreme as they are and equipping a permanent standing Commission of inquiry, must be exercised responsibly. Accordingly, the evidence gathering processes are themselves safeguards that protect those being investigated and others. They serve the public interest in ensuring that we do not act upon sources that are untested, uncorroborated or cannot be verified. The work of reconstructing historically what happened, who made the decision, who joined in the decision, what material did they rely upon, how do they go about it, what processes did they follow or not follow, what were the prescribed procedures that they should have followed, what departures were there, involves a minute examination of events past in order to reconstruct what happened. It is what I refer to as the corruption mosaic. It is as if we are putting

pieces of evidence together to complete the picture and it is an exhaustive process. Accordingly, some of our investigations do take considerable time and enormous resources before we are in a position to determine whether there is a public inquiry to be held or not.

There are other safeguards, including the power to make directions to suppress information, evidence and the identity of witnesses, to prevent publication of evidence that is given in public inquiry if it is seen to be prejudicial and if its prejudicial value outweighs its probative value, and also to protect people where that protection is required. There are safeguards whereby people are entitled to apply for legal representation. If they are affected persons under the Act, in most cases, if not all, they would be expected to be granted legal representation. There is a whole regime whereby the Commission is required to—and does, in any event—expose exculpatory evidence. We are not simply out after scalps; we are after the truth. We are mindful of the responsibility to serve the public interest by going after the truth, whether it be in inculpatory or exculpatory. The Commission is, of course, bound by the principles of procedural fairness, although those principles, as worked out by the courts over the years, are adapted according to the nature of our jurisdiction. In other words, we do not have to show our hand to a witness before that witness gives evidence. That is just but one difference between a criminal trial process and Commission processes. We must maintain tactical advantages in order to obtain admissions and the truth.

In relation to the procedural fairness principles, we could speak about those here for hours—I will spare you that. But one of the principles that is not commonly spoken of is the first principle—that is, the principle of what might be called rationality. It is not the principle of procedural fairness in the running of a hearing; it is in the decision-making: whether the decision was soundly based or whether it was based on evidence that could not support such a finding. If it is of that kind then the Supreme Court has jurisdiction to nullify or declare null and void a decision that is not well supported by evidence. To my knowledge, in 31 years of its operations there has not been one case in which a court has found that a corrupt conduct finding by the Commission was based on flimsy evidence or inadequate evidence and set it aside. What does that say? It says, I think, a lot about the care with which matters are investigated and evidence is collected. We would not go to a public inquiry unless we had, to use the expression, road-tested the evidence and chased down every other burrow that the evidence revealed we should look at.

The other principles of procedural fairness—namely, to serve notice of possible adverse findings, to provide the opportunity to be heard, to give evidence, to test witnesses in cross-examination—are all safeguards which, of course, the Commission abides by. There is not, to my knowledge, any case in which a court has held that the Commission denied procedural fairness of that kind to a witness or to an affected person. That is to say, the processes in practice do adhere to the principles of procedural fairness in the Commission and always have done. Otherwise you would be sure that there would be a decision of a court in 31 years that would indicate that at some point in time there was a failure to accord procedural fairness, but not so. I think all these matters are relevant in taking into account and determining whether we have the safeguards necessary that guard, naturally, the public interest and individuals in the exercise of our extraordinary powers and whether or not the safeguards are adequate.

We must not lose sight of the fact that, of course, corrupt conduct is an evil in our society. It directly undermines trust and confidence in government and public administration. But unfortunately there are been people—some have been in high office—who betray the public trust and the honour of holding the office they held. If this Commission is not fully equipped with the power to investigate people of that kind, you will never be able to uncover corrupt conduct. We know in times gone by of a Minister of the Crown being jailed for the early release scheme. We know of a Chief magistrate who similarly was jailed for corrupt-type behaviour. It is hard to believe that it has happened. It is very believable that it will happen again unless there is corruption prevention that is promoted and there are services the Commission provides to various agencies to close the gap on the corruption opportunities. It will happen again. Our submission is that the safeguards and remedies are there and they are applied.

I will divert to deal really with the nub of what a lot of the submissions deal with, which is that you can have what is said to be inconsistency between a corrupt conduct finding on the one hand and acquittal on the other, or the decision of the DPP to not prosecute after a corrupt conduct finding. Some of the submissions refer to this as a parallel process: You have got the courts on the one hand and you have got the Commission on the other. It is not parallel at all. There is always a Commission inquiry that goes first and a corrupt conduct finding made. Then following—not in parallel—is the criminal trial, if there is to be one. The Commission's submissions which are—I will not take the Committee to these because we know that members will read in their good time what is said here, particularly in part 3 of the submissions. But the position is that the matters we have raised in these submissions, which we have earnestly put to the Commission as being factual and truthful, do not stand alone.

The Director of Public Prosecutions, Mr Lloyd Babb, a very highly respected member and senior counsel at the Bar, has been DPP now for I have forgotten how many years. His submissions are entirely in line with and consistent with the submissions of the Commission. Mr Nicholas Cowdery, his predecessor who was also DPP for many years, has put in a submission, which is not as lengthy as Mr Babb's, but in essence he supports exactly what the Commission is saying. You would think that if a director of public prosecutions thought that there was something wrong with the system—that the Commission's process cut across or interfere with the administration of justice, or that they deal with people unfairly—they would be saying that, but they are not; they are saying the opposite. They are saying that the system that exists now is the system that should continue. Neither Mr Babb nor Mr Cowdery suggest that there are not adequate safeguards and that there should be something else. They certainly do not back what is called an exoneration policy—whatever that is meant to mean.

As Mr Babb said, if somebody is acquitted, it does not mean they are innocent. That does not mean they are not guilty, I should say. There may be a not-guilty finding but, as in some jurisdictions, a finding of "not approved" is the equivalent of what we call "not guilty". In a criminal trial there is an indictment. It sets out the offence, and every offence has a number of elements. The Crown has to prove each of those elements—every one of them, not just the majority, but every one of them—beyond reasonable doubt. It is evident that in a corruption trial the Crown has to prove what the state of mind of the individual was: Did they intend or have knowledge that what they were doing was wrong?

It is a difficult thing to prove sometimes. If somebody takes to somebody with an axe to hit them over the head, actions speak louder than words. You know what that person had in mind; they wanted to inflict grievous bodily harm on that person. But it is not the same with corrupt conduct. The Commission uses its powers to extract information, overriding the citizen's right to silence—as the Act permits—and even overriding the privilege against self-incrimination, a very drastic derogation of citizens' common-law rights. But that has been balanced by the provisions of our Act—sections 37 and 38—which state that the evidence they give under objection in the Commission cannot be used against them in a criminal trial. If somebody says, "I knew what I was doing was wrong" in a compulsory examination under objection the Crown court cannot of course use that admission in a criminal trial.

One of the elements that the Crown has to prove beyond reasonable doubt may be very difficult to prove, and it accounts for acquittals in many cases. The fact that there has been an acquittal does not, as Mr Babb would indicate, indicate that the Commission got it wrong, because the Commission was operating on compelled evidence and a range of other evidence that is often not admissible in a criminal trial. But there is no criticism by the DPP of that fact; it is a reality. The Parliament established the Commission for that very purpose, knowing how difficult it is to prove, to uncover and expose corruption. These powers have been given to the Commission to extract information from people, even though the common law confers on all of us here and all the citizens out there the right to silence and the privilege against self-incrimination.

With great respect to many of the submissions that have been made—including that of Mr Nicholson, the former assistant Inspector—those submissions that there is an inconsistency between a corrupt conduct finding on the one hand and a decision by the DPP not to prosecute—or an acquittal—is based wholly on a misconception, a fundamental misconception. The fact that we have these submissions from the current and former DPPs confirms that. The New South Wales Bar Association—many members of the Bar would appear in the criminal jurisdiction. For those charged, rightly or wrongly, with criminal offences, does the Bar Association find that there are inadequate safeguards, or the way in which we conduct our proceedings, that would warrant an exoneration proposal? No, it does not. The New South Wales Bar Association that represents the majority of barristers in this State agrees with the Commission, like the Director of Public Prosecutions. The system exists. It works well. There are no more safeguards required—certainly nothing such as exoneration statements and the like.

The CHAIR: Thank you, Mr Hall.

Mr HALL: The Inspector—I am sorry?

The CHAIR: Sorry, we are just—

Mr HALL: Time wise?

The CHAIR: Yes, if perhaps you could just summarise.

Mr HALL: Then perhaps I will just complete by simply saying the Inspector has of course put in a submission, too, which is consistent with our own. Members of the Committee, there are other matters that I can deal with and that perhaps might arise from questions that are asked. Thank you.

The Hon. ADAM SEARLE: Thank you, Chief Commissioner and Commissioners for coming along, and for your submission. Just taking the point you have raised, we have had the New South Wales Bar Association

and the Law Society of New South Wales put to us that if the exoneration protocol idea was implemented in the way, for example, that is put in Mr Nicholson's submission or in the Rule of Law Institute's submission that the ICAC as we now know it would effectively be destroyed. The DPP perhaps put it on a slightly different basis, that it would severely hamper the work that the ICAC is now doing. I take it from your opening submission that you would largely concur with those observations?

Mr HALL: I would, Mr Searle. It would undermine the integrity of our work. By that, I mean this: The Parliament, having given the power to the Commission to make a corrupt conduct finding—assuming it has been made correctly in accordance with the laws of procedural fairness and the like, and within jurisdiction—the finding of corrupt conduct in that case becomes a legal fact, just like a judgement of the court. You cannot have somebody devise an administrative protocol to say years later we can go back and undermine that finding and find that it should be set aside—set aside how, and why? You cannot as a matter of the law do that. The Parliament has given the power to the Commission. The Commission has exercised the power. If you set up a system designed to, if you like, erode, change, review a corrupt conduct finding it diminishes the status.

The Hon. ADAM SEARLE: As I understand the way in which the exoneration protocol idea has been articulated to us, essentially it would apply the criminal trial standard to the work being conducted by the ICAC. You evaluate material on a different basis—I think it is the civil standard, is that correct?

Mr HALL: Yes. My understanding is the submissions are focused on the question, as you say, of a criminal trial situation.

The Hon. ADAM SEARLE: By holding the ICAC to that standard a lot of what you currently do, the material you currently receive and evaluate—you just would not be able to do that if that was the standard you had to meet.

Mr HALL: I am not sure if I am following.

The Hon. ADAM SEARLE: The protocol is said to work this way: If someone is not convicted of a criminal offence or is not even tried for a criminal offence, on the Rule of Law Institute submission—and I think Mr Nicholson's—someone should be able to go to the Supreme Court and essentially have the ICAC finding and report set aside. That would mean that every ICAC report would be amenable to being set aside, except in that minority of cases where there was a successful criminal conviction.

Mr HALL: Yes, that is exactly right. But there is one problem with that proposal, and it is a very fundamental one. It was referred to, in essence, in the joint review conducted by the former Chief Justice, the Hon. Murray Gleeson, and—

The Hon. ADAM SEARLE: And Mr McClintock.

Mr HALL: —Mr Bruce McClintock. It is in the context of a merits review, if you like. Moving away now from administrative law principles, it entitles the Supreme Court to exercise its jurisdiction over ICAC. A more general power to review what ICAC has done, as learned authors Murray Gleeson and Bruce McClintock said, would require the Supreme Court's jurisdiction to be changed by legislation. I do not think the Chief Justice would welcome that. But leaving that speculation to one side, the point is well made in that report. It is not as easy as waving the wand and saying, "Let's have a protocol of this kind, an exoneration protocol so that there can be a review of the corrupt conduct finding to terminate it". To do that you would need to reform and change a whole jurisdiction of the Supreme Court of New South Wales, because the Supreme Court can only intervene on those restricted grounds which the Committee would be well aware of, and no other.

The Hon. ADAM SEARLE: Just on that point, of course the Parliament could create a different review mechanism—

Mr HALL: Pardon?

The Hon. ADAM SEARLE: The Parliament could create a different review mechanism for the ICAC.

Mr HALL: Yes, it could do so.

The Hon. ADAM SEARLE: It could codify the judicial review grounds if it wanted—

Mr HALL: And change the jurisdiction of the Supreme Court.

The Hon. ADAM SEARLE: It could do that. But leaving that to one side, what about a situation where a finding made by the ICAC rests on the facts as the ICAC understood them to be and then, subsequent to the handing down of the decision, witnesses reveal that they gave false evidence or some objective material becomes available that was not available at the time, which puts the findings in a different light and shows that the findings

were somehow incorrect—not incorrect because of any failing of the ICAC but simply incorrect because of the material that the ICAC had available. Someone who is found to have done wrong in that situation does not have a judicial review remedy because there is no irregularity in the administrative making of the decision.

Mr HALL: No.

The Hon. ADAM SEARLE: What about that unusual situation? Should there be some sort of possible corrective mechanism to deal with that?

Mr HALL: I do not know of any such case that has ever arisen. But, dealing with it as a theoretical possibility, it would seem to be in a similar area to whether judgements of the Supreme Court should be set aside because of a lying witness, et cetera. The principles that apply there pretty rigidly apply—understandably so. There may need to be a consideration for a legislative remedy in cases within that narrow compass.

The Hon. ADAM SEARLE: You mentioned that the ICAC strives to arrive at the truth whether it is exculpatory or inculpatory. Rightly or wrongly there has been a narrative—which is broad, you can see it in these submissions and in the media, and it has been around for some time—that if not presently under its current leadership the ICAC in the past failed to make available to persons appearing before it exculpatory evidence and that somehow persons in the past were materially disadvantaged and were treated unfairly because exculpatory evidence was hidden and kept under wraps by the ICAC and its officers. What do you, as Chief Commissioner—or any of you here giving evidence today—say to that narrative or about that narrative?

Mr HALL: If it be the case that there was exculpatory material within the knowledge or possession of the Commission and there was a deliberate decision made that it would not utilise that material for the purposes of the investigation, that would be a most serious situation. There would need to be consideration given in those circumstances—depending upon the probative value of the evidence that was excluded by a deliberate decision—as to whether or not, for example, the procedural fairness rules were not adhered to, such as to warrant the finding to be treated as a nullity. If that situation ever came about I certainly would wish that there be a remedy of some kind. I imagine, going back to first principles, if it be the sort of case you have instanced, that the existing general law would admit of a remedy.

The Hon. TAYLOR MARTIN: Sorry. Was that or was that not the case with Murray Kear that evidence was not then provided to the DPP?

Mr HALL: I think you would need to read the Inspector's report on Mr Kear. I did review the Kear matter myself, personally. I read the transcripts and so on and so forth. I was satisfied that there was a major error of law by the magistrate in that case—that the finding of corrupt conduct against Mr Kear by the then-Commissioner was very soundly based. In fact, it was the only outcome, in my view, that the Commission could have come to. There has been a lot of publicity about the Kear matter and about a certain other matter over the years—a lot of newspaper articles written about it. A lot of it has been completely misconceived, without giving offence to journalists and others. But rather than me trying to articulate why that is so I strongly recommend that any member of the Committee who does want to find out the foundations of the Kear matter are—Inspector McClintock's report is extremely lucid and lays it all out bare. There was a very sound base. It was a very well-run Commission inquiry, investigation and public hearing—very sound reasons. I have not one hesitation in saying that it was a very solidly based finding, properly found.

The Hon. ADAM SEARLE: In relation to the magistrate's finding, it is the case that there was no appeal against the acquittal, was there?

Mr HALL: No, there was not.

Ms McDONALD: But that would have been on restricted grounds. It was a summary prosecution. I think it would have been restricted to something like a question of law to a single judge of the Supreme Court—so, difficult to ground that jurisdiction from a Crown perspective.

Mr HALL: The error was so gross, in my view, that—yes, I would have wished the Crown to have perhaps considered some finding or some basis for an appeal, but that is ancient history now.

The Hon. ADAM SEARLE: Mr Waldon, you are not aware of any particular case in the past where the ICAC or its officers deliberately withheld exculpatory material from affected persons?

Mr WALDON: No, certainly not. I think if anyone had concerns about that, one of the ports of call would be to the ICAC Inspector to lay a complaint and the Inspector would then look at it.

The Hon. ADAM SEARLE: I think, Commissioner, it is your evidence that in the 31 years no decision of the ICAC or no report has been set aside on those grounds?

Mr HALL: Not to my knowledge.

Ms McDONALD: Mr Martin, the other aspect about the Kear matter—it was before the amendments to the Act, which then put in black and white the importance of exculpatory evidence and that it should be disclosed and admitted during a public inquiry. That led to the development of the section 31B guidelines, which has been front and foremost of those guidelines. I think in the past we have discussed this with the Committee, with our counsel assisting and our investigators and our lawyers. It has emphasised the importance of identifying exculpatory evidence and bringing it to the attention of either the Commissioner or counsel assisting the lawyer, to ensure that it is disclosed.

The Hon. TAYLOR MARTIN: Thank you.

Mr HALL: I should add one further comment. I should refresh my memory, but my recollection is there was no exculpatory material excluded in that matter. But again I suggest that the reading of Mr McClintock's report will make it plain as to what the position was, so far as that issue was concerned.

The Hon. ADAM SEARLE: We have heard some criticism of the number of public hearings that the ICAC conducts. We have heard, for example, that the South Australian ICAC and I think the Western Australian ICAC largely do their work in private hearings. What would you say to the proposition that ICAC should not have public hearings, except in the most extraordinary cases, and that you should do all of your work behind closed doors before producing a report?

Mr HALL: I would adopt what former Chief Justice Murray Gleeson and Mr McClintock, the present Inspector, have said in their report—the Independent Panel report dated 30 July 2015—in which they strongly support and express the reasons why the Commission's power to conduct public inquiries should continue. My own interpretation of that was—this has been an issue, as members of the Committee would be aware, over the years. People talk about, "Why have public inquiries? They shouldn't have them and they're not worth having," and so on and so forth. When I read the Independent Panel report the first time I was convinced that that debate had been finally buried.

If you get somebody of the eminence of Murray Gleeson, QC, and Bruce McClintock strongly endorsing public inquiries for the reasons they expressed, there is no doubt in my mind at all that the power to conduct public inquiries should remain and should be untrammelled; that is to say, it should be left to responsible decision-making by the Commissioners as to whether there should or should not be a public inquiry in a particular matter. In respect of the new provisions concerning public inquiries, we carefully follow the procedures that we are bound to follow, to ensure that all relevant matters are considered before such a decision is taken.

The Hon. ADAM SEARLE: We have also heard evidence from the South Australian ICAC about what its remit is and how it conducts its work. I do not pretend have a perfect understanding, but it sounds like its functions and role is really as part of criminal investigation. It receives complaints, it conducts an investigation and then hands it over to the police or to the DPP to take action.

Mr HALL: That is exactly right.

The Hon. ADAM SEARLE: It does not seem to have the same fact-finding function as the New South Wales ICAC. This is a bit of a leading question, of course, but do you think the future of the New South Wales ICAC should be to become like the South Australian body—to become a mere instrument of criminal investigation?

Mr HALL: Definitely not. It should not be that. The origins of these various Commissions around Australia are interesting to explore. I think it might be said without being critical of anyone that the South Australian Independent Commissioner Against Corruption legislatively was a compromise. Part of the compromise was no public inquiries, as I understood it. The power to conduct a public inquiry is, for the reason again that has been written about in the joint panel report, is available from a number of points of view, particularly deterrence. To get the message out there that this kind of conduct is not tolerated and can be exposed, and the consequences of exposure, whether it is a criminal trial or not, are immense.

We are mindful of the impact on people's reputation; that is why we take the care that we do in investigating these matters. I know that Bruce Lander, who has just recently retired from the position in South Australia, through discussions I have had with him and the reports I have read, that Commission has done a very good job indeed in a number of major investigations. But his inability to publicly identify the problems in public administration that he has encountered is a deficit in that Commission. As you say, Mr Searle, as I understand it too, the nature of the investigations are essentially like police investigations, although they have some powers, of course, which police do not have, and then they parcel that up and send it South Australia Police.

The Hon. ADAM SEARLE: The last matter I want to ask some questions about relates to an annexures (a) and (b) that are attached to the submission of Mr Richard Poole. I will have copies provided to the Chief Commissioner and Mr Waldon. It goes to the issue of 2015 legislative changes. The first one is Crown Solicitor's advice, presumably between parties to litigation, and the other appears to be something in the nature of short minutes to be entered into the Court of Appeal. I am just trying to understand these two documents. It sounds like this is before the Independent Commission Against Corruption Amendment (Validation) Act 2015 was passed. It sounded like parties to this litigation were proceeding along a similar basis to that which the High Court upheld in the Cunneen matter. If I am right, the complaint of these litigants was essentially that the ICAC had in these cases exceeded its jurisdiction in the way in which it was said to have in Cunneen, and that there was a recognition from the ICAC that that was so. The matter was to be resolved on that basis in early May but before the Court of Appeal was able to make those orders, the Parliament enacted the validation Act, which retrospectively validated everything the ICAC had done in the past, save for the Cunneen matter.

Mr HALL: Yes.

The Hon. ADAM SEARLE: Are those understanding is correct and at the time when these two documents were created, did the ICAC know that the Government was to legislate the validation Act? If you do not know, Chief Commissioner, may be Mr Waldon will know.

Mr HALL: Yes, Mr Waldon is in a better position than I am.

Mr WALDON: This all arises out of Operation Jasper. There were some corrupt conduct findings made against Mr Duncan and others. They challenged those as they were entitled to in the Supreme Court. My understanding is that that challenge was not on the same basis as the challenge in the High Court in Cunneen. With one exception, and that was Mr Kinghorn from memory, they basically lost their case in the Supreme Court. They then appealed to the Court of Appeal. Before that appeal could be dealt with, the High Court handed down its decision in Cunneen. I should go back and say that the basis of the corrupt conduct findings against Mr Duncan and others was that their conduct could have affected the efficacy of the exercise of public official functions. As a result of Cunneen, it was established that, in fact, you cannot make a corrupt conduct finding on that basis. At that stage, the appeals had not been heard but the Commission conceded that it had no basis upon which to dispute the appeals, but before the matter could be brought before the Court of Appeal, the Government passed the validation legislation, which validated it.

The Hon. ADAM SEARLE: The Court of Appeal was due to enter the decision on 8 or 9 May and the Parliament enacted the validation Act on 6 May, is that correct?

Mr WALDON: I am not sure of those dates but it was roughly about that.

The Hon. ADAM SEARLE: It is fair to say that the ICAC and its officers and officials would have known about the Government's intention to put the validation Act?

Mr WALDON: Yes, but not the timing of it.

The Hon. ADAM SEARLE: No.

Mr WALDON: Subsequently then, Mr Duncan challenged the validity of the validation Act, lost on that, and then the appeals went before the Court of Appeal and the appeals were lost.

The Hon. ADAM SEARLE: It is fair to say, based particularly on the short minutes before the Court of Appeal that, but for the passage of the validation Act, the ICAC would have consented to those decisions being set aside in the Court of Appeal?

Mr WALDON: We had no basis on which to oppose the appeals so we would have allowed the appeal, yes.

The Hon. ADAM SEARLE: And it was only the validation Act that made that happen?

Mr WALDON: That is right. That is correct.

The Hon. ROD ROBERTS: On procedural fairness, Mr Hall, I would like to present a document to you. It is fair to say that my area of interest and concern is not ICAC itself. It is about the public hearings and the potential for reputational damage for those who do not have an adverse finding made against them. That is an area I would like to take you to. For the rest of the members of the Committee, I am referring to our Committee's document *Discussion Paper—Reputational Impact* at item 1.51 where Commissioner Hall gave evidence to us on 21 October. I have a highlighted area down the bottom.

Mr HALL: I have reread that recently.

The Hon. ROD ROBERTS: I will read it on to the record for the sake of other Committee members:

> The Chief Commissioner of the ICAC, the Hon. Peter Hall QC, provided the Committee with an example of where this discretion has been exercised:

And we are talking about the discretion of not making a finding of corrupt conduct, which I applaud you for in the circumstances that I have read into this. Chief Commissioner Hall says:

> Many years ago now I recall when I was an Assistant Commissioner at ICAC, there was a case in which a ministerial adviser is said to have leant on a woman who worked somewhere in public administration. She was leant on to falsify a report which detrimentally affected the then Director General of the particular department in question. She was placed in a position—the proverbial position between a rock and a hard place. From what I could determine she had been an outstanding public servant. I decided that I would not make a corrupt conduct finding against her even though she actually did the deed in terms of falsifying the information. She had been to hell and back through this public inquiry—shamed in public almost. I thought it was not appropriate in that case that a corrupt conduct finding be made.

As I said, I applaud you for that because that appears to be the appropriate decision. Clearly—and this is just a statement and observation of mine—there is no need for an exoneration protocol for this poor lady because there has been no adverse findings made against her. Effectively, she has been punished for no corrupt conduct whatsoever. In fact, in your own words, you said that she has been, "to hell and back and shamed in public".

I listened to what you said carefully today, Commissioner Hall, and you talked about preliminary investigations that are made before we go into public hearings; there are safeguards in place; there is the availability of suppression orders. "We road test the evidence", you said before. Taking that into account, what happened to this poor woman, whoever she happens to be? Let me state clearly for the record that I do not know who this woman is and I have no involvements. In fact, I do not even know what the case is. Clearly, here is a person who is completely innocent. We might use the term that she is an "innocent agent", if we wanted a description of her activities, who has been to hell and back and shamed in public. Could you comment on this one, please?

Mr HALL: I do remember this case very clearly. The wrongdoing in this case was that of her superior officer, who—in my words—leant on her to fix this assessment process in some way; I have forgotten the details. We knew at the time that the assessment process was an important aspect of the whole investigation because, if the assessment was to be accepted, then it was going to have a very severe effect on the then director general's position. So the wrong that was done to that woman was done by her superior, not by ICAC. But I do recall clearly that she, of course, was called as a witness because—I do not now recall, but we must have had evidence that she was somehow involved in the assessment process at some stage in the assessment process. I do not recall now how we knew that she had actually helped fix the improper assessment. She had herself, you might say, done the wrong thing by acquiescing, but the circumstances she was placed in by a superior—she was a more junior person—amounted to such exculpatory circumstances, in my view, that I recall looking into the legal question as to whether the Commission had a discretion.

It is now legislated, of course, in the Act that there is a discretion not to make a corrupt conduct finding even if there is evidence of corrupt conduct against a person. I do remember at that time there was one other decision of the Commission by an Assistant Commissioner—I remember it was Ron Sackville, who later became a judge of the Federal and Supreme courts—in which he determined there was a discretion, even though it was not express. I followed that and applied that decision. When I say she was shamed in public, I still have a mental image of pictures of her leaving and going into the Commission premises. She looked terrible. My expression "shamed in public"—I think the media highlighted her as if she was a terrible woman. I took the view she was not, but she was placed in a very terrible situation.

The Hon. ROD ROBERTS: Can I rudely interrupt and ask how the media got into a position to form that opinion? Again, further to your evidence just now, you say that she was leant on by a superior, which I accept. Clearly he is the target of an ICAC investigation, and rightly so.

Mr HALL: Yes, he was.

The Hon. ROD ROBERTS: But you are trying to deflect an issue of ICAC's operation back to him. If you want to use that, surely you are then an accessory after the fact of the treatment of this poor woman. As I say, I am not critical of ICAC. I am critical of the public hearing process with the media involvement that you have just brought in. The media harassed or hounded this woman. The media only knew she was there or that there was an ICAC hearing because ICAC had told people, "There's a public hearing on today; best you come along and see what you can drag up." Why was this not held in private? At what stage of your investigation did you become aware that this woman was an innocent agent? Was it prior to the public hearing, or did it miraculously come out in evidence during the public hearing? Surely the preliminary investigation would have said to you, "She's

involved in this, but we think she's being leant on. Perhaps we should suppress her name. Perhaps we should go into a closed hearing for taking her evidence and put a suppression order on her name." Can you respond to that?

Mr HALL: The power to conduct a private hearing or to take evidence in a public inquiry in private is available to use in appropriate circumstances such as, for example, a witness whose life or wellbeing—

The Hon. ROD ROBERTS: Granted, but would this have been an appropriate circumstances?

Mr HALL: No.

The Hon. ROD ROBERTS: I know hindsight is a wonderful tool, but would it have been?

Mr HALL: I do not believe it would have been. She had done wrong, to use the expression.

The Hon. ROD ROBERTS: But she had been leant on. She had been forced to do it, using your words.

Mr HALL: Yes, all that came out. The story unfolded and it became clear to the public at large that this woman had, in a sense, been victimised herself by reason of the fact that the superior officer was very much the focus of that investigation and was exposed as such—

The Hon. ROD ROBERTS: How did that become clear to the public—

Mr HALL: —and a corrupt—

The Hon. ROD ROBERTS: —when the media have got her plastered everywhere?

Mr HALL: A corrupt conduct finding was made against her superior. In the circumstances in which she acquiesced, she should not have, because it was going to impact on another human being—namely, the director general. If that assessment had gone through, there was a risk that he would have lost his job because it was so unfavourable to him. So she was allowing herself to be used as the instrument to get at him. I do not know why they wanted to get rid of him but, anyway, that was what the whole thing was about. It was important to expose that to the public: that employees can be placed in a very difficult situation, but they must not overstep that line to breach the public trust. By having the discretion exercised not to make a corrupt conduct finding against her, in a sense she did very well. Had she had a finding made against her, she would have lost her career for sure. So, in a sense, it was a balancing exercise. I could have exercised the discretion to take her evidence in private but decided, in the circumstances, it was not appropriate to do so. But I did exercise the other discretion in her favour.

Others might not agree, Mr Roberts. I can see that different minds sometimes think differently about these things. Sometimes they are lineball decisions. Anyway, the publicity can damage people; there is no question. It has been acknowledged that in ordinary court proceedings witnesses who give evidence are only witnesses; often they are not involved as persons who are being sued. But because they are associated with one party or the other, there is an exposé of the court hearing. But as the Chief Justice—as I recall, it was Murray Gleeson in one of his cases—said, that is part of the open justice principle: People do get named in court cases, even though they have done nothing wrong. People might have suspicions about them, but that is part of the process. It is part of open justice—better than having secret justice in a closed room. It is a bit the same, at times, with the Commission. I understand the point that you earnestly make. I cannot really improve on the answers I have given.

Mr JAMIE PARKER: Thank you for taking the time to come. I hope you can also thank the authors, whoever they are, of the report. In particular, the very detailed and thorough arguments made aboutthe necessity of maintaining public inquiries are very compelling. I just wanted to acknowledge that. I want to ask about reputational impact when it comes to the passing of time. For example, ICAC has recently announced an inquiry into a matter to do with an MP, which happened several years ago. We have a now former Minister who is going through a preliminary inquiry and has been going through that for about eight or 12 months. Obviously, having those matters resolved—either taken to an inquiry quickly or investigated quickly—is relevant in this case. I wonder whether the length of time that it takes to examine these cases is a resourcing issue. If there were more resources for ICAC, would you be able to investigate and deal with them in a more expeditious matter? Or is it because of the complexity of the cases or a combination of both? That would be useful for me to understand as a part of how we assess how to optimise the role of the ICAC in terms of safeguards and processes.

Mr HALL: Yes. Mr Parker, thank you for your question. As you would understand, I make it clear, firstly, before I do answer it that I would not comment on matters that are currently being dealt with by the Commission.

Mr JAMIE PARKER: No, of course—as a general principle.

Mr HALL: I am not in any way directly or indirectly referring to the two matters you have mentioned. The question you raise is important in that time is important; that is to say, the time it takes to undertake an investigation sometimes is lengthy for the two reasons you have mentioned—complexity and also resources. That is a common problem. We do understand that people, especially those who know they are under investigation, do have this Damocles' sword hanging over their head. None of us would want that, so we are conscious of the need to deal with matters as efficiently as we can. It may seem to some that it takes an inordinately long time for ICAC to be able to finally reach a position to deal with a particular matter. It is not because the matter is parked. In fact, often matters are expedited or at least given priority.

But even with priority listing of some matters, the nature of the investigation takes so many turns, often, that the time that may be required to utilise a number of our different powers, number of witnesses and so on, does make it a lengthy process. It is regrettable but necessary, unfortunately. If we had more resources could we do our job in shorter time frames? I think the answer to that has to be yes, it would. The reason for that is that we have investigators in teams of three. They are heavily engaged in one particular matter, or more than one, and then you either have to take them off that matter to deal with something else that now is to be treated as a priority, so the other matter slows down. It is parked, in effect, which is not desirable.

We simply do not have the resources that are required to be able to operate more efficiently than we do. We do have monthly meetings to review every investigation to see what has happened and what is being planned. There are KPIs, which we are always mindful of, to be met in terms of time and so on. Sometimes there has to be an extension of the KPI, for one reason or another. In any event, I am sorry if this is a long way around to try to deal with your question, but your question is, with respect, very apposite in explaining sometimes the time it takes to do the job properly, and that is the question of resources, and very often complexity is an issue.

Ms McDONALD: These types of matters often involve very complex financial accounting analysis and also analytical work, which is quite different from your bread and butter investigations. Those two resources, a forensic accountant and an analyst, is an obvious area where to have more resources would help us speed up the investigation process.

The CHAIR: Thank you. Our time has expired. I thank you for appearing before the Committee today. The Committee may wish to send you additional questions in writing. The replies to those questions will form part of your evidence and will become public. Would you be happy to provide a written reply within two weeks to any further questions?

Mr HALL: Yes, Madam Chair. We thank the members of the Committee for hearing our submission today. We would be happy to respond to any request for further information within that time frame.

(The witnesses withdrew.)

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

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

Mr McCLINTOCK: No. I have been here before, Ms Davies.

The CHAIR: Would you like to make a brief opening statement before the commencement of questions?

Mr McCLINTOCK: I will. There are five points I want to make. I have listened to the evidence today, at least the vast bulk of it, online. The first thing I want to say is this; many of the witnesses do not understand, or do not have the historical understanding of what lay behind the creation of the Commission in 1988. Those who are as old as I am will remember that for years in relation to both sides of politics, there had been a stench of corruption around. I am not going to name any names, but it was notorious. That was the reason the Greiner Government in its first term—and these things are always in first terms—introduced the legislation in 1988 and brought the Commission into existence.

Lying behind that though–and this is something that the Chief Commissioner touched on—is the nature of corruption itself. It is not like other crimes. It is not like murder or armed robbery where everyone knows that a crime has been committed. Corruption is secretive and it is obviously in the interests of those who engage in it to keep it secret. I have come across recent examples myself in the course of carrying out an audit of the Commission's activities in one area. I will not trouble you about that. Also behind that too was the fact that it was absolutely clear the New South Wales Police could not, for good reasons, deal with the kind of corrupt conduct that the Greiner Government was then concerned about. It is not the sort of thing that a police force is readily equipped to handle. You do need, as Commissioner McDonald just said, for example, forensic accountants who can deal with it, people who can analyse financial data, which particularly then in the 1980s the police were not equipped to do. That is why the Greiner Government thought that corrupt conduct on the part of public officials needed special treatment.

The second is that many of the witnesses reveal a misunderstanding about the ICAC and its role. That role is not to secure convictions. That is obvious from the legislation itself. Section 9 of the Act, which is one of the definitions of corrupt conduct, does not depend solely upon criminal conduct. It can be corrupt conduct that makes you liable to dismissal or if it breaches a code of conduct and so on, not a crime. That is the real flaw in what the Rule of Law Institute of Australia says. But, rather, ICAC's role is to expose and prevent corruption on the part of public officials. There have been repeated references to removing ICAC's power to hold public hearings because of the reputational impact that can have. May I say that every public process involving adversary systems has the potential undoubtedly to cause reputational damage to people. Every time I cross-examine a witness in a civil proceeding and put to them that they are a liar and it is reported, I have done that. There may be no findings, my attack on that person's credibility may be entirely unsuccessful, but there will be reputational damage. No-one thinks there should be an exoneration protocol for court hearings. Nobody thinks that they should be conducted in private.

It would be a very serious mistake to make ICAC's hearings private or to take away its power to conduct public hearings. It would damage ICAC's ability to perform its important functions. It would also be seriously detrimental to the public interest. There is also a further point about that suggestion, that ICAC should proceed in secret. That would turn it into a form of Star Chamber, a hidden inquisitorial agent, more akin to the French system before 1789 where lettres de cachet were issued. The real point is that it would remove the exposure to public scrutiny. That is a significant reason why court hearings, for example, are in public. The same applies to ICAC. Personally, I would find that appalling, if ICAC were to proceed in secret, which is the necessary corollary of not having public hearings.

May I point out that the reason why members of this Committee were able, or are able—and did so today—to criticise Mr Watson's question to Mr Gallacher—justifiably as I found in the report that I prepared last year about that matter—was because the hearing was in public. If it had been in secret they could not have done that. Mr Watson's conduct, which was criticised in the press at the time, would never have come to public notice. Finally on this point, I want to point out, because it was mentioned earlier, there is no analogy with the Crime Commission. The Crime Commission is a completely different beast to the ICAC. It is a law enforcement agency with no function similar to the ICAC of preventing corruption. It is just not the same. Third, the so-called exoneration protocol, similar considerations apply to it. It is flawed and would be deeply damaging, I believe, to the Commission.

Many of these points have been canvassed and I think well canvassed by some of the witnesses like the ones from the Law Society and the Bar Association and, indeed, by the Commission itself. What is exoneration? As has been said repeatedly today, because a conviction does not result does not mean that the person has been exonerated. Take the Kear case that the Rule of Law Institute mentioned. Mr Kear had actually admitted to the ICAC in a hearing the act that constituted the corrupt conduct. He did not quite say, "I did it", but that was, in practical terms, the effect of what he did. That evidence was not admissible before the magistrate who tried him on the particular charge under the protected disclosures legislation.

Had it have been admissible he must have been convicted, or should have been convicted. It cannot be said that he was exonerated by that acquittal in any sense because he had admitted it. I might say that the rule of law in the submission never grapples with that fact that he admitted. When Mr Merritt criticised the report I gave about that to Parliament last year or the year before he conveniently omitted to deal with the fact that Mr Kear admitted the corrupt act. There are other reasons. I thought this was the case with Mr Kear, the magistrate misunderstood the law, the evidence, can be wrongly acquitted, an acquittal does not mean that the ICAC is wrong.

Fourth, the presumption of innocence. Having listened to the evidence today I fail to see how in any sense the presumption of innocence is affected at all by the ICAC legislation as the legislation stands. Because ICAC makes a finding of fact on the civil standard, which it has to for the lawyers amongst you to satisfy the Briginshaw standard, which is it has to be very seriously proved. It is not just this one is a bit more likely than the other, you have to be affirmatively satisfied. The ICAC does not go into the matter thinking this guy is guilty. You heard the Chief Commissioner say that very thing, they do not. They are after the truth. The suggestion that in some way the presumption of innocence is at risk or has been damaged or delegated from by the current legislation or the current system is simply wrong. No one, not one of those witnesses, could explain how that was the case.

Fifth, in a sense this is perhaps the most important thing that I have to say, all of these things, as has been pointed out today, are legacy issues. Not one of the matters that was raised has occurred since 2017 when the current Commissioners were appointed and the current system was adopted. I gave evidence in 2016 in support of the three-Commissioner model and I did so because I thought that it would deal with some of the issues that have previously arisen. I will never forget Mr Trevor Khan, when I was searching for a word to describe what the three-Commissioner model would do, saying, "The word you are searching for, Mr McClintock, is it would prevent zealots." I accepted that enthusiastically. He was right.

That is what the current situation does. None of these things have occurred since the current Commissioners were appointed. On that point that leads me to something that is fundamental, and this is where I disagree with the representative Bar Association, the only way—and I mean the only way—to ensure that an agency like the ICAC performs fairly and adequately and carries out its important public duties in a balanced way weighing on the one hand the right of the public not to be victims of corruption—because corruption has very serious effects, and all you have to do is look at countries where it is endemic to know how dramatically it affects faith in the political system and faith in, for example, local councils. When you think someone is on the take it destroys the faith that is critical to the functioning of democracy.

The only way is by appointing the right people. It does not matter what protocols or procedures or prescriptive things that you put in place, if you appoint the wrong people you will get the wrong results. There is nothing you can do about that except appoint the right people. It is in the nature of the system. I know this from personal experience and not just with this Commission, which I have been involved with one way or another now for 30 years through reports I have done, counsel assisting, and so on, but also what I did last year in relation to the Law Enforcement Conduct Commission where I was Acting Inspector. If you appoint the wrong people the wrong things will happen. That has not been an issue since 2017, whatever the issue was before then.

I have my views about some of those things. I cannot comment on it because I was counsel opposing and briefed on behalf of Kazal, who was mentioned in the inquiry this morning. Yes, I have views about that. In a sense, every system like this allows for the possibility of incorrect results. It is in the nature of humanity. There are ways it can be corrected in relation to the ICAC, but ultimately it is a balancing exercise of the cost and the time involved against correcting it. That is what I wish to say by way of opening remarks.

Mr JUSTIN CLANCY: You made a salient point that for the system to work it does not matter what protocol you have you need to appoint the right people. One of the things on my mind is the quality of the people that are currently there, looking to the future and safeguarding for the future, have we got the safeguards around selecting the right people? Do we have enough appropriate safeguards moving forward?

Mr McCLINTOCK: The way the current system works, Mr Clancy, is that it is supported by the Government but this Committee has the power of veto over the appointment. Again, so much depends upon the

Attorney General and the Premier at the time as to the people they are going to appoint. I personally do not think there are going to be any problems right now because I know the Attorney General. I have to say one thing, it is very easy for governments to go and appoint a retired Supreme Court judge to these positions. It is like the old line about no one ever got sacked for buying IBM. I sometimes wonder though whether the gene pool might be a little too narrow. The qualification is someone who is entitled to be appointed as a Supreme Court judge and whether it might not be wiser for the Government, whose power this is, to look a bit wider than simply to Supreme Court judges.

That is said without any implied criticism of Chief Commissioner Hall. Just on that point there are a lot of things I could say about that. It is not really what the inquiry is looking into. There is a problem. For example, judges usually being ex-barristers they have no management experience and one of the functions in the Commission is to manage the agency. In a real sense that has been slightly ameliorated by having a CEO but there are still real issues about it. I have no criticisms of the current Chief Commissioner, still less of the current CEO, but there are issues like that that you see in these areas. There are other agencies where it has been particularly acute because of lack of management experience. I always thought if I was ever appointed I would go off and do an MBA to equip myself to do it because I am fully aware of my deficiencies in that area having been a solicitor and a barrister for 45 years now—depressingly.

Mr JAMIE PARKER: If you start an MBA we should be vigilant.

Mr McCLINTOCK: I am only entitled to one term as Inspector under the legislation so I have to find something else to do.

Mr JAMIE PARKER: Fair enough.

Mr McCLINTOCK: Run for Parliament. I live in Mr Parker's electorate.

Mr JAMIE PARKER: I could have a competitor, you never know.

Mr McCLINTOCK: You should be frightened.

The CHAIR: You are on notice now, Mr Parker.

The Hon. ADAM SEARLE: Mr McClintock, I entirely agree with both your written and verbal submission today. I think the points are well made. It seems that a number of the submissions that we have received about the exoneration protocol essentially seem to proceed on the basis that, unless the matters in relation to which people's conduct is impugned rise to the level of an actual and specific criminal offence, criticism of those persons by ICAC is somehow unfair and makes them a victim. I did ask at least one of the witnesses when they said "victim" whether they were saying that these people did nothing wrong or saying that they just should not have been criticised because it was not a crime. The question was not addressed directly, but that seems to be the substance of the submissions that call for this exoneration protocol. Is that how you see it?

Mr McCLINTOCK: That is how I see it. As I said, in every public adversary process—while I know the Commission is an inquisitorial agency—you have barristers appearing for the people with an interest. In the various inquiries like Cascade and so on—I have forgotten the names of them—there are a lot of barristers. Barristers make allegations against people. They have got to have a basis for doing it but that can in itself have an impact. ICAC itself, for example, can make findings of credibility about a witness, about whom they later make no finding of corrupt conduct. They just say this man is not believable. You can see in a sense—it is part of that process. It happens in courts. You can it see very acutely in the example that the Chief Commissioner gave in the dialogue he had with Mr Rod Roberts. The woman in question was not innocent; she had done the corrupt act. She had, in a sense, a good excuse for it, because she had been led on, as the Chief Commissioner said, by her boss. That makes it, in a sense, morally forgivable, but it was still a criminal offence and, if she had blown the whistle, she could have stopped it.

It was an act of mercy to her on the part of the Commission to not make a finding of corrupt conduct against her when it was clearly open to do it. Yes, I appreciate that the press do terrible things to people. I appreciate what Mr Roberts said about the walk of shame. We have seen it on television. That may be better dealt with by looking at the media rather than at the Commission. I say that—this came up with Mr Babb—some of the things that I have seen on television clearly—and he did not say this, but I will—constitute a contempt of court, because they clearly pre-charge the person in question and it is clearly capable of affecting a fair trial. That is not this Committee's function, but there might be room for investigation by Parliament into why there have been so few prosecutions of media organisations for contempt of court in the past 20 years. I have my own views about that.

Ms TANIA MIHAILUK: I do not know if politicians are going to push for that.

Mr McCLINTOCK: I know, but the point is that it is not a political decision. It is actually part of the remit of the New South Wales Solicitor General. There is a very good reason for that because it would not be fair to require politicians or members of Parliament to make that decision. There are things that I see happening every day that 30 or 40 years ago would have been the subject of contempt prosecutions. I might say in my younger days at the Bar I participated in a number of them. I will never forget the one for the Dubbo *Daily Liberal*.

The Hon. ADAM SEARLE: Mr McClintock, in your submission you do seem to leave the door open not so much with an exoneration protocol but a ground of review that there was no evidence, or material rather, to justify making the decision that says if you are going to do something, that might be something you can do. The Bar Association in its submissions tries to summarise Justice McDougall's views in Duncan about the grounds of judicial review. The question has been posed to a previous witness about whether there would be any utility in codifying that review in legislation or at least identifying it. Others have said that might restrict the development of the common law. What is your own view on that?

Mr McCLINTOCK: I think that area is entirely judge-made law and it has come up with a pretty good restriction on what agencies like ICAC and all the other public service agencies can do: due process—or procedural fairness, as it is called in this country—not to be manifestly unreasonable, the Wednesbury test and so on. All those things were invented by judges. I think it is probably best to leave it as it is so that there is scope for further development. As you know, a statute—even the most well-intentioned statute—sets things in crystal. It is very hard to change them, whereas the common law has real flexibility. Mr Searle, I think I heard you say to one of the witnesses that, if the Commission makes a finding of no evidence, it means that there has been an error of law and the courts can intervene.

The fact is that, on all the cases there have been, there has been evidence of some sort upon which the Commission can base them. In the cases where it has been set aside, like in Duncan—I think it was Mr Duncan who succeeded in having the findings set aside. That was because Justice McDougall found that the conduct in question, given his position inside the company, could not be a crime and that that was an error of law and set the finding aside there. As the Chief Commissioner said, there has never been a finding where it is set aside because of the issues that he was talking about: bias and so on. The Commission was injuncted on one occasion into an inquiry into two members of the Legislative Assembly, Ms Nori and—I forgot the name of the other Labor member.

The Hon. ADAM SEARLE: Mr Gibson.

Mr McCLINTOCK: Yes. The Commission was injuncted from continuing the inquiry because of manifest bias on the part of the—

The Hon. ADAM SEARLE: A speech he gave at the town hall.

Mr McCLINTOCK: Yes. It was more than that. I think it was the conduct of the inquiry. That was Mr O'Keefe, who was the Commissioner at the time back in the 1990s. That is the only occasion that that has ever happened. It was a decision by Justice Einstein.

The Hon. ADAM SEARLE: One issue that has come up that might conceivably require legislative attention is the situation that Mr Chalk from the Law Society raised where, although there is no administrative irregularity in the making of an ICAC finding, subsequently it turns out that witnesses may have given false evidence or witnesses are giving competing versions. ICAC has preferred one version, but later evidence comes to light that shows that it is clearly wrong and that there may need to be a corrective mechanism.

Mr McCLINTOCK: That is a really difficult question. I have to say I have not given enough attention to it myself. It is a real issue. I can remember one Supreme Court judge telling me with real stress—he was really upset—that he had found a case one way because one of the witnesses, who was one of the parties, had a diary. The diary corroborated his version and he disbelieved the other guy. Subsequently, another Supreme Court judge found that that man had fabricated and forged that diary. This judge realised that the subsequent judge was right. He knew that he made an incorrect finding but, of course, nothing could be done about it by then. He was a fundamentally decent man and the fact was he was suffering for it. Those things happen, Mr Searle, but I do not know exactly what is the best way to deal with them. In fact, some of them provide their own exoneration. If it turns out that, say, there were criminal proceedings and the star witness goes to pieces in the witness box and everything he said to ICAC was a lie, that is an exoneration. That is not the only situation where it can happen. I think it might be worthwhile taking that under review and, if the Committee wanted to hear any further from me, I would be happy after I have given it some thought to provide any further answers.

The Hon. ADAM SEARLE: We might have to come back to that.

Mr McCLINTOCK: That may be the case. It is not an easy one, but I appreciate what Mr Chalk was saying. I heard it with interest.

The Hon. ADAM SEARLE: Just getting back to what you were saying about the adversarial system, with criminal trials, and even in the civil area, people are often accused of terrible things, and often the newspapers or the electronic media will breathlessly follow a trial but they will not always report in the same lurid way the fact that somebody is subsequently acquitted.

Mr McCLINTOCK: Yes.

The Hon. ADAM SEARLE: Even though they are not guilty in the law, they have still had the reputational damage of being put on trial as well as a trial by media. This reputational damage issue that we are grappling with is well established in the mainstream criminal law as well.

Mr McCLINTOCK: Absolutely. As you know, I am a defamation lawyer when I am not being Inspector. The problem is that when a newspaper is reporting it is not bound to report the whole of the case. The question under the law is, did it report what happened on that day accurately? I have seen it happen. You can see absolutely devastating evidence given on one day, then the next day the cross-examination happens and it happens that the journalist has got a more interesting thing to do and it is never reported. That is an issue of journalism rather than of law, but it is inherent in the system. If you ever have a chance to read newspaper reports in the 1920s and 1930s on that database run by the National Library of Australia, Trove, you will see extraordinarily detailed court reports—partly because I think there were so fewer things happening to actually report and courts gave free theatre. You would see three or four closely printed pages of *The Sydney Morning Herald*, each dealing with court reports in the Supreme Court, the District Court, and the Magistrates Court. That is gone now. That is just me being nostalgic; it does not really respond to your question, Mr Searle, so I apologise.

The Hon. ADAM SEARLE: But it was nevertheless very entertaining. In relation to legacy issues, it is often the case that Parliament has to grapple with situations where courts make legal rulings that are found or viewed as having unfair consequences and the law is changed. But it is changed going forward; it is not retrospectively changed to give a remedy to those people who lost out in the past. Part of what some of the submissions appear to be inviting the Committee to recommend is that not only should there be this exoneration protocol going forward but that it should be retrospective, so that persons who may have been unfairly impacted in the past can achieve some remedy. What is your view about that?

Mr McCLINTOCK: Frankly, I think there should be a line drawn under this. Frankly, it is time to move on. Many of the people who put in submissions made complaints to me and I dealt with them—I dismissed every one. For example, Mr McGuigan put in a complaint, but the finding of corrupt conduct about him was upheld by the Supreme Court and the NSW Court of Appeal. There was no prosecution of him—I do not know the reasons why from Mr Babb—but I cannot see how he could be said to have been exonerated. He might have quibbled about the finding, but it stood after challenge when he was represented by extremely competent lawyers. I can understand that those gentlemen will always be aggrieved. I can understand that. But is it really a matter for Parliament to introduce a system so that they can retrospectively, after almost 10 years—which is what it will be—deal with those matters?

The Hon. ADAM SEARLE: The one thing in this space that does give me some concern is the matter that I took the Chief Commissioner and Mr Waldon to, which was litigation brought by a number of persons to have findings of corrupt conduct set aside in the Supreme Court. I think Mr Waldon said ICAC had essentially recognised it had no legal defence and was going to agree to that. Two days before that was to take effect this Parliament of which we are members legislated those rights out of existence retrospectively. I was a member of that Parliament and I voted in favour of that legislation. But the existence of that litigation and the reaching of that in-principle settlement between the ICAC and those persons was never disclosed to the Parliament. Had it been, it is possible that the Parliament, as well as not retrospectively taking Ms Cunneen's victory away from her, might have reached the view that those litigants were entitled to the finding if the court was otherwise persuaded to make it.

Mr McCLINTOCK: Mr Searle, I can easily understand your disquiet about that. But you see, that is a political decision.

The Hon. ADAM SEARLE: I understand that.

Mr McCLINTOCK: There were a number of other decisions around about the same time. The decision to retrospectively legislate to uphold the removal of the exploration licences was another one. Many of the people involved in the submissions here complained to me about that, but of course there was nothing I could do about it because I am the Inspector of ICAC, and it was not ICAC's decision. It was the—

The Hon. ADAM SEARLE: Parliament.

Mr McCLINTOCK: It was Parliament's decision. But yes, I could easily understand that disquiet. I have no idea myself—and this is the thrust of the your question to the Chief Commissioner or to Mr Waldon—whether ICAC itself knew about the legislation.

The Hon. ADAM SEARLE: I think his evidence was that they did know about it—

Mr JAMIE PARKER: But not the timing.

The Hon. ADAM SEARLE: —but they did not know when it was going to be progressed.

Mr JAMIE PARKER: It was two days, was it not?

The Hon. ADAM SEARLE: I did not put it directly on Mr Waldon, but I intuited that they did not know that the fruits of that settlement were about to be whisked away from those litigants.

Mr McCLINTOCK: It happened very fast, I know that.

The Hon. ADAM SEARLE: Yes, it did.

Mr McCLINTOCK: Very fast indeed, and probably with some justification. I know it was presented as a crisis, but it was a crisis in a sense.

The Hon. ADAM SEARLE: Yes. I was in that Parliament. I do remember it.

Mr McCLINTOCK: Just on that point, sure, the High Court by majority upheld the Court of Appeal, but you have to remember what actually happened in the course of the litigation. The point that Ms Cunneen won on was never run by her counsel before the trial judge. It only came up because one member of the Court of Appeal tossed it out. You also have to remember that when you read the judgement of the dissenting judge, Justice Gageler of the High Court, it is pretty compelling.

The Hon. ADAM SEARLE: A very learned judge.

Mr McCLINTOCK: A very learned judge. That was the basis upon which Mr Gleeson and I made the recommendations that ultimately became legislation in relation to—we basically adopted, with some modifications, what Justice Gageler had said. I can give you the reference. It was to pick up things about not so much what Ms Cunneen had done—It is subsection 2A of section 8 of the Act. I have to say this: At the time when the Commission commenced the investigation of Ms Cunneen I said myself that they should not do it, not because I thought it was invalid—I thought what they were doing was valid—but I did not see how it could possibly be serious corrupt conduct or systemic corrupt conduct, assuming everything against her. That was the criteria that I had recommended be introduced to the Act in 2005. It just was not those things and I did not think they should be wasting public money investigating it. That is a different question from validity. Every now and then I run into Ms Cunneen in the street and we have a conversation about the iniquities of ICAC. I just wanted to make sure that I am protected from—

The Hon. ADAM SEARLE: Just on the matter of that, I think Ms Cunneen is currently in my former chambers now.

Mr McCLINTOCK: She is too, actually.

The Hon. ADAM SEARLE: My name is still on the plaque.

Mr McCLINTOCK: Yes, indeed. Mr Kenzie's chambers, too, I remember.

The Hon. ADAM SEARLE: Correct.

The CHAIR: Our time has expired. Thank you very much for appearing before the Committee today. The Committee may wish to send you some additional questions in writing. The replies to those questions will form part of your evidence and will be made public. Would you be happy to provide a written reply within two weeks to any further questions? Do you need extra time, Mr McClintock?

Mr McCLINTOCK: I am doing something very unusual next week: I am actually doing a trial, my first one since March because of the virus. No, I can do it in two weeks.

The CHAIR: We are happy to extend the period for longer. That is perfectly fine. Would four weeks be—

Mr McCLINTOCK: Three weeks would do, yes.

The CHAIR: Three weeks? Okay.

Mr McCLINTOCK: I was just thinking of my schedule.

The CHAIR: Fantastic. Thank you very much, Mr McClintock. It is wonderful for you to give us your time.

Mr McCLINTOCK: Thank you, members of the Committee. It is always a pleasure to be here.

The CHAIR: That concludes our public hearing today. I place on the record my thanks to the witnesses who appeared today. In addition, I would like to thank the Committee members, committee staff, Hansard and facilities team for their assistance in the preparation for and the conduct of the hearing today. Thank you.

(The witness withdrew.)

The Committee adjourned at 17:25.