REPORT ON PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

REVIEW OF ASPECTS OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

At Room 814-815, Parliament House, Sydney on Friday 4 November 2022

The Committee met at 9:10am

PRESENT

Mrs Leslie Williams (Chair)

Legislative Council	**Legislative Assembly**
The Hon. Chris Rath	Mr Ron Hoenig (Deputy Chair)
The Hon. Rod Roberts	Mr Lee Evans
The Hon. Adam Searle	Ms Wendy Lindsay
	Mr Jamie Parker

PRESENT VIA VIDEOCONFERENCE

Legislative Assembly

Mrs Nichole Overall

* Please note:
[inaudible] is used when audio words cannot be deciphered
[audio malfunction] is used when words are lost due to a technical malfunction
[disorder] is used when members or witnesses speak over one another

The CHAIR: Good morning, everyone. I warmly welcome you to today's public hearing of the Committee on the Independent Commission Against Corruption. The hearing is in relation to our inquiry into aspects of the Independent Commission Against Corruption Act 1988. The hearing is being broadcast to the public via the Parliament's website. We have a combination of witnesses appearing in person and via videoconference. Please note that photographs will also be taken during the proceedings. Before we commence, I take the opportunity to acknowledge the Gadigal people, the traditional custodians of the land on which we meet in Parliament House. I also pay my respect to Elders past, present and emerging of the Eora nation and extend that respect to other Aboriginal and Torres Strait people who are present today or watching proceedings on the Parliament's website. I again thank everyone who is appearing before our Committee today and I declare the hearing open.

Mr ANDREW CHALK, Chair, Public Law Committee, The Law Society of New South Wales, sworn and examined

Ms MICHELLE O'BRIEN, Member, Public Law Committee, The Law Society of New South Wales, affirmed and examined

Mr RICHARD LANCASTER, SC, Member, Public Law Section, New South Wales Bar Association, affirmed and examined

Mr SCOTT ROBERTSON, SC, Member, Inquests and Inquiries Committee, New South Wales Bar Association, sworn and examined

Mr FRANK VELTRO, SC, Acting Deputy Director, Office of the Director of Public Prosecutions, sworn and examined

Mr JAMES CHIN, Legal Policy Officer, Office of the Director of Public Prosecutions, affirmed and examined

The CHAIR: Would all witnesses confirm that they have been issued with the Committee's terms of reference and information about the standing orders relating to the examination of witnesses?

RICHARD LANCASTER: Yes.

FRANK VELTRO: Yes.

SCOTT ROBERTSON: Yes.

ANDREW CHALK: Yes.

MICHELLE O'BRIEN: Yes.

JAMES CHIN: Yes.

The CHAIR: Would any of the witnesses like to make a brief opening statement before the commencement of questions? However, considering the fullness of our program today, I would ask that each statement please be kept to one minute.

RICHARD LANCASTER: For my part, yes. Thank you, Chair, and thank you to the Committee for the opportunity to give evidence at today's public hearing. As you've introduced us, I'm Richard Lancaster, a member of the New South Wales Bar Association's public law section. With me today is Scott Robertson, who is a member of the Bar Association's Inquiries and Inquests Committee.

The Bar Association considers that it's important in the public interest that ICAC's reports are furnished promptly. Delay in such reports can have negative consequences, including that it can prolong the stress caused to persons affected by ICAC investigations and have a domino effect of further delaying the steps that might be taken consequent on an ICAC report, such as the conduct of criminal or disciplinary proceedings or the making of changes to government practices and procedures directed to the prevention of corruption. However, the Bar Association does not support legislating specific time limits or standards for the furnishing of ICAC reports. Time limits or standards of that kind risk being inappropriately inflexible and risk encouraging ICAC, for example, to cut corners in the preparation of its reports or to reduce the time made available to affected persons to prepare their submissions to ICAC.

Instead, the New South Wales bar proposes for consideration of the Committee a requirement that ICAC publish time standards for the furnishing of its reports and be required to provide an explanation when it does not meet those standards in relation to an investigation for which a public inquiry has been conducted. That approach has the virtue of providing additional transparency as to ICAC's time standards and allowing public scrutiny as to compliance with those standards whilst not imposing inflexible restrictions on the discharge of ICAC's functions that may have unintended adverse consequences. The New South Wales bar also considers, with respect, that the existing mechanism for judicial review of ICAC findings and decisions should not be altered or codified by legislation. Legal error can be corrected presently on well-established grounds of judicial review and, in the bar's view, there should not be additional layers of merits review of ICAC findings. Thank you again for the opportunity to appear today.

The CHAIR: Thank you, Mr Lancaster. Did anyone from the Law Society wish to make any comments?

ANDREW CHALK: Thank you, Madam Chair. Our comments will be very limited, in opening. The Law Society's position essentially aligns with that of the Bar Association on the three terms of reference before the Committee. The Law Society acknowledges, as Mr Lancaster has set out, the potential impacts from delays in

the reporting of investigations but, for the same reasons, does not believe that statutorily imposed time frames are either workable or desirable. In relation to judicial review, the Law Society's position is that the rules and processes around judicial review at common law are sufficient, resulting in that, again, it would be undesirable to attempt to codify the approach. Were such a position considered, it ought to be a whole-of-government approach rather than limited to one particular agency. But again, the primary position is that the common law is sufficient in that regard. In relation to the powers of the inspector, the Law Society's position is that the existing regime is sufficient for the purposes of the inspector properly exercising their functions.

The CHAIR: Thank you, Mr Chalk. Are there any comments from the DPP?

FRANK VELTRO: I don't wish to make an opening statement, thank you.

The CHAIR: We will now move on to questions. I just have one question to start, probably to Mr Lancaster. In regard to your opening comments and your submission, you obviously are not in agreement with having statutorily imposed time frames. You talked about "time standards". Who would you suggest should put those time standards in place: the ICAC itself or another body?

RICHARD LANCASTER: Could I ask Mr Robertson to respond?

SCOTT ROBERTSON: The ICAC itself, consistent with what Mr Lancaster said. What we suggest for the Committee's consideration is a requirement—and this could be by way of a statutory requirement. In our submission we've given an example of a similar Queensland provision to require the commission to produce time standards, to require it to explain in the event that those time standards are not complied with. That thereby gives an ability for public scrutiny, including by this Committee, when those time standards aren't met. We think it would be fraught to, for example, have a legislative time standard that says that you must complete an inquiry within a particular time period in particular circumstances. That could very easily cause unintended consequences.

One concerning unintended consequence is that it might lead the commission to say to persons interested in an inquiry, "Because we have this time standard that has been set down by the Parliament," or perhaps by the Executive, "we can't give you the full period of time we would otherwise give you to respond to potential adverse findings." That could visit some injustice and unfairness on individuals. We think the appropriate course is to require those standards to be published. As you would have seen from the ICAC's submission itself, they do have internal time standards. So far as I'm aware, they're not made publicly available to everyone, although they are referred to, for example, in annual reports. Put that forward and leave that open to public scrutiny in the event that the time standards aren't met.

Mr RON HOENIG: In relation to inspectors' powers, which has been one of the issues that we're looking at, it has always troubled us about what we call the legacy matters existing from when the commission was reformed, or there was legislative reform. Inspectors have found maladministration, impropriety, unlawful conduct and impropriety of counsel assisting. As a result or consequence of that, nothing happens. The commission at that stage disagreed with the inspector publicly, and the reports are still on the website. Nothing happens. People have had their bank accounts closed by banks, and they have suffered public indignation.

The Supreme Court administrative law division is not a sufficient protection for those people. It happens years after the event. Shouldn't the Parliament do something about increasing the inspector's powers—allowing the inspector to intervene and allowing the inspector to make orders if the inspector detects that sort of conduct? Doesn't there need to be some sort of additional protection put in place? The commission hasn't always been constituted by eminent people like the former chief commissioner. Its history has not always been—it has not always had quite eminent inspectors. Shouldn't the Parliament do something about providing some sort of protection for people that the commission deals with or providing for some sort of legislative intervention?

RICHARD LANCASTER: Can I begin the response? Section 57C at present provides for quite generally expressed powers for the inspector to investigate complaints in the circumstances that you've referred to in your question. That includes the power to refer to public authorities who might take action and the power to recommend disciplinary action, or even criminal prosecution, against officers of the commission. There is an existing suite of generally expressed powers that might be availed of by the inspector in the kind of situation that you've referred to. I don't know if Mr Robertson would have anything to add to that answer.

SCOTT ROBERTSON: Can I just add that I wouldn't accept the proposition that nothing happens in respect of the reports to which you've just drawn attention. To take an example, as part of my preparation as counsel assisting in some of the briefs that I've had, I've read those reports and I've had regard to them. I have seen examples of where the inspector has expressed particular views or where this Committee has expressed particular views, and I've taken that into account in the role that I've played as counsel assisting. I suspect that the commission itself has taken a similar approach.

So, from the Bar Association's perspective, we think that the powers are broad enough to deal with the kinds of matters referred to. The way that ICAC works, as you know, is to produce reports to this Parliament. The way the inspector principally works is also by producing reports to this Parliament. It doesn't strike us as there being an obvious additional form of powers that the inspector can have to deal with the kinds of issues that you've drawn attention to—absent doing something like, for example, some kind of additional merits review function. But for the reasons that we set out in our submissions and the reasons that others have set out in their submissions, we think that would be a very bad idea.

The Hon. ADAM SEARLE: Thanks for the submission. I'm pretty persuaded there seems to be a consistency in the submissions against merits review of ICAC decisions, and that's the view I've got. I also agree that, if there are to be time standards, I don't think they should be legislated. Courts, where they have time standards, have formulated them themselves and I think that would be appropriate for the ICAC. Having read the ICAC submission, I was actually surprised that there were KPIs for their own production of reports, which is good, but the appendix they've produced—and I'll take this up with the ICAC—is a bit disturbing. In the last five years, five out of nine reports are produced in excess of a year after the final hearing, if I can put it that way, and six of the nine are outside the 90-day KPI that the ICAC has set for itself. I accept the ICAC's submissions about resourcing, which has been addressed to some degree by the Government, perhaps not entirely; but I think an explanation of the kind you've outlined would be very useful. If the hearings are finished but ICAC haven't produced a report, should they be required each year to give some kind of explanation for why matters are outstanding, either in their annual report or to us as an oversight committee when we do our annual review of the ICAC?

SCOTT ROBERTSON: No, because there may be very good operational reasons as to why that information shouldn't be disclosed at a particular point in time.

The Hon. ADAM SEARLE: I understand all the submissions about matters before ICAC becoming increasingly complex and therefore more time-consuming and more consuming of resources. Maybe this is not the right question, but where there are public hearings and where they have been finalised and then a report is produced many weeks, months or perhaps even a couple of years later, is it the case that ICAC regularly does other investigations? Or is it really a case of making sense of the significant body of material that has been gathered in matters?

SCOTT ROBERTSON: That's probably a more appropriate question to the commission itself.

The Hon. ADAM SEARLE: Yes, okay.

SCOTT ROBERTSON: I guess, from my own experience, it is not unusual—in fact, it's quite usual—that some information might arise from the public inquiry that might support some further inquiries being made, for example, by way of further private hearings. So one matter it would be important to have regard to when deciding on any time standards is when do you run those time standards from. Because whilst, at least so far as the public is concerned, it might look like the investigation has come to an end when the public inquiry has come to an end, that doesn't necessarily mean that the investigation itself has come to an end. So we suggest in our written submission that a possible starting point for the time period is at the end of the submissions process, as distinct from at the end of the public inquiry, because, as I say, the public inquiry might not be the end of the investigative process.

The Hon. ADAM SEARLE: That's true, although that consideration could be dealt with in the explanation in its annual report after the finalisation. For example, ICAC's own internal KPI, I think, does run from the final hearing to the production of the report. If it was outside the time standard or the KPI, an explanation could be given in a particular matter.

ANDREW CHALK: I think they run their time standard from final submissions, rather than the hearing itself.

The Hon. ADAM SEARLE: Yes.

Mr RON HOENIG: Those who have been counsel assisting at inquests and inquiries find that you don't know where you're going to end up. Something crops up and you're required to go down a particular path. But if there's, for example, a royal commission, terms of reference are given and a time period for reporting is given, often royal commissions might ask for an extension of time and have to justify the extension of time because they're given specifically because they have these immense powers and they've got to report within a particular time frame.

If there is no time frame and an inquiry just goes, it can go anywhere, effectively. There is no time, because you keep uncovering or going down other directions. I mean, at some point there's got to be some type of

limitation, doesn't there? Or do they just readjust the terms of reference and go down every direction, or do they make their multiple operations? I mean, at some point there needs to be some sort of time frame, because citizens' reputations are being impacted by public hearings. No doubt there are witnesses—for example, I think in the Badalati case there were rumours a councillor killed themselves, and they weren't even a person of interest. There are consequences as the commission is pursuing, legitimately, its function.

RICHARD LANCASTER: Yes. So far as the bar is concerned, we absolutely agree, with respect, there needs to be time standards and there needs to be an explanation of them not being met. But the analogy with the royal commission is a good one because it points out, in a royal commission context, that the time for reporting will be specific to the character of the commission's terms of reference. Each of the ICAC investigations to which Mr Searle has referred, for example, will have a different explanation, no doubt, as to why time frames weren't met. Requiring the ICAC to provide an explanation for not meeting its own published standards, as we've suggested, is a good mechanism for assisting the public to become assured that where there is a missing of performance indicators, that that's adequately explained. If it's not adequately explained, then this Parliament or the chief commissioner himself or herself might take action to remedy that situation.

Mr RON HOENIG: As the oversight committee, on behalf of the Parliament, it's our function to ensure that this organisation, that is given immense coercive powers, is properly accountable to the Parliament. We, effectively, only see the public report. I do have to confess, the recent reports have been impressive. You can see why they've taken so long. And we see either the reporting or can look at the transcripts of public hearings. We have absolutely no idea what goes on in compulsory examinations or what has gone on previously, unless there's been some newspaper story from a leak. Then, once the public hearings are finished, we have absolutely no idea about the internal time frames for submissions of counsel assisting and for persons of interest—what other submissions are done in respect of it and what other investigations are done. All we see is this big delay.

When, for example, the commission investigates corruption of very powerful people—for example, at the heads of government—and they drag on, then it's actually interfering in the democratic fabric. We have no idea what's going on. There's public criticism. There's got to be a way in which the public can be confident that the work the commission is doing, and that is taking that length of time, is for a legitimate, forensic, important purpose. Because otherwise the whole process is open to criticism. The powerful have access to the media. They start driving an agenda and the process starts to lose credibility. That's why we're having these hearings about these three issues, because there is public pressure on the Parliament to resolve these issues. I mean, that's really the position we are in. But how do we cross that divide?

SCOTT ROBERTSON: One protection that the public has and the Parliament has is the functions of the inspector, in particular under section 57B (1) (c), which includes the power to deal with complaints of maladministration, including delay in the conduct of the investigations. And so one thing we've pointed out in our written submission is that, although we suggest that the explanation that ICAC is required to give if it doesn't meet its time standards should wait until the provision of the final report, so as not to cause any concerns as to operational matters, that doesn't mean that the inspector is in any way prevented from carrying out her function or his function in considering those questions of delay. Importantly, the inspector, as a general proposition, is entitled to every scrap of paper within ICAC.

In the event that there is what might be perceived by the public or anyone else to be unreasonable delay, it's open to them to approach the inspector and say, "Well, this looks like it might be maladministration to me. Can you have a look at it?" Although the public might not be entitled, at that point in time, to get every scrap of paper, the inspector is, and, in the event that there is evidence of maladministration, then the inspector is entitled to make a report to this Parliament and then the Parliament can deal with that as it sees fit.

The Hon. ADAM SEARLE: To follow up on that, let's assume that we're also persuaded of your submission about the powers, that there shouldn't be a merits review of ICAC decisions, and assume we're also satisfied the existing mechanism of judicial review is adequate. For people to approach the Supreme Court it can be quite forbidding—maybe there's a cost barrier for most people. Should that judicial review function currently conducted by the Supreme Court not be conferred also upon the inspector or someone like the inspector to make the existing mechanism more accessible to non-sophisticated parties who are drawn into an ICAC process?

RICHARD LANCASTER: There would be real practical difficulty with that because it would involve a whole new layer of review of what the ICAC does in circumstances where there wouldn't be any ability to exclude precisely the same kind of case subsequently being brought in the Supreme Court. The opportunity to apply to the Supreme Court for judicial review of an ICAC finding will exist and can't be excluded by Parliament, and so any amendment that provided for the inspector-general to do that would just be an extra layer and all these issues with delay in finalisation of reports and of matters would be exacerbated by adding an additional layer of review at the inspector level.

The Hon. ADAM SEARLE: The existing judicial review mechanism is relatively infrequently accessed?

RICHARD LANCASTER: Infrequently accessed, but where it has been accessed there are a number of prominent examples of it being successful, declarations being made—admittedly after the event but nevertheless Supreme Court declarations having been made that ICAC findings as to conduct were wrong, for example. So the opportunity is there. The grounds of review are well understood and the Supreme Court is an appropriate jurisdiction because, obviously enough, it has experience in dealing with those cases.

SCOTT ROBERTSON: It also shouldn't be overlooked that the Supreme Court has an entrenched jurisdiction to engage in judicial review of all State administrators, including the inspector. So the kind of approach that you're contemplating, Mr Searle, may well simply add an additional layer because whoever is unsuccessful before the inspector might then wish to seek judicial review from the Supreme Court. So that's another reason why that might not be as efficient and shortcut an approach as what it might at first appear on its face.

Mr RON HOENIG: Can I just ask Mr Veltro this question: I've often thought, with regard to speeding up the process, that, as the commission investigate a matter, if they reasonably suspect certain persons have committed a criminally indictable offence, they should refer the matter to the director at a pretty early stage. That would speed up the process and bring people to justice a lot quicker, which in my view—you won't get much support for it—is the highest public interest. Do you have a view about that?

FRANK VELTRO: It really depends on the investigation in question and what point it has reached. If the evidence is fairly obvious, it's not apparent to me why that couldn't be referred at an early stage or the process couldn't be expedited if the ICAC have already reached a particular view. Very often the process needs to have been gone through to reach that point. Of course, when the matter does reach our office, we have our own processes in place to analyse that evidence and issue requisitions and the like. We have our own time frames for dealing with those issues so that we can turn around the advices we're requested to give so the prosecutions can be launched fairly expeditiously after the receipt of the request for advice.

Mr RON HOENIG: Some of those are taking years because of the nature of the material that is provided, which I don't criticise the director for. When I have asked previous commissioners—I have asked this from the chief commissioner's predecessors—their answer as to why that sort of process is in place is a valid one. They just say that they are processing in accordance with their Act, and that's not their major function. Their function is to proceed as they are required to do under the Act. That is right, as well. It may well be that to achieve that, there needs to be a statutory review rather than an internal procedural review.

FRANK VELTRO: I don't see a conflict between those two functions. If it becomes apparent at an early stage of the investigation that a criminal offence has been committed, that's a factor that should probably cause the investigation to be expedited, I would have thought. If what you are suggesting is that the investigation should be ceased at a point just like an inquest, for example, I don't think that's an appropriate course. I think the investigation should continue until its conclusion. If the evidence is fairly clear and it's apparent that a criminal offence may have been committed, that should not result in significant delay in the matter being referred to the director for advice.

MICHELLE O'BRIEN: Could I just add something? The question that you raise is very valid, but it also highlights one of the tensions that arises when you are looking for ways to increase the efficiency with which reports are produced and also the efficiency with which the prosecution process can be exercised. The problem with that is if, say, there was a referral to the DPP because the ICAC felt that something was a clear situation that was suitable for prosecution, you've still got the ICAC investigation going along this line and the prosecution process going along this line and the ICAC still has a residual responsibility to conclude its investigation and write a report. If you've got a matter over with the DPP or, in fact, before the courts because a prosecution has commenced, then you run into difficulties because the presentation of the public report by the ICAC, which the public is all waiting for, is likely to create problems for the fairness of the trial for the person who has already been referred for prosecution.

It is often the case that the public report is released and a recommendation is made that consideration be given to prosecution, someone is subsequently prosecuted and it's perceived that there is a problem because of the public report being on the public record and containing adverse information about someone who becomes an accused. That's dealt with by the report and any related public material being taken off websites and so on. But you do run into a real problem if you've got a matter that presents a clear case of possible prosecution and you want that to commence before your report has been published because you just create problems of fairness for criminal trials that might ensue.

Mr RON HOENIG: But the public report itself can impact and has impacted upon the fairness of criminal trials as well.

MICHELLE O'BRIEN: Those arguments are often raised in trials that follow a public inquiry and a public report, but there are ways for courts to deal with that. Usually, they are dealt with in a way that is regarded as satisfactory by the court.

ANDREW CHALK: I don't suggest that any of this involves easy answers, but I think there is a risk of taking too narrow a conception of what ICAC is and what its primary function and object is. That sees it really just as an extension of the criminal justice system whereas, in fact, I think, in its conception it is much broader than that. The role that it plays in building integrity within government institutions is much more fundamental than a particular remedy in any instance that might involve a criminal process. For that reason, I do think you are obviously dealing with different evidentiary standards.

The outcome in many instances will be the report itself and the consciousness of the findings and their impact on how agencies approach the management of issues and corruption risks within the departments or the agencies, independent of whether anyone is ever prosecuted as a consequence. The more complex the corruption or risk of corruption becomes, the more important I think it is that we have a process which the Act sets up that can explore all of the factors beyond those that simply go to whether or how somebody may be prosecuted. That is, from the Law Society's perspective, a very fundamental aspect of the legislation as it stands at the moment, which would be at risk of being subverted if the entire focus just became one of how we ensure an effective criminal prosecution through this process.

Mr JAMIE PARKER: Thank you for coming today. It's interesting that our concern or the issue we've raised about time standards is generally supported. Obviously, there has been some disquiet about the period of time that has been taken for some of the inquiries, and we're really interested to make sure that ICAC is fully supported. There is a new funding model that ICAC has that may resolve a lot of the caveats about ensuring that ICAC is adequately resourced. I'm interested if you have any specific advice around when time standards should apply. This Committee will have to consider making a recommendation about time standards. We could just say that the commissioner develop a time standard to consult with stakeholders, as the DPP suggested.

Does anyone have any view about whether we should be taking the approach of, say, Queensland where they have a time standard for complex matters and matters that are not complex, or whether we should be recommending retaining this three-step process that ICAC currently has with its KPIs? Those KPIs are obviously not relevant. They're not fit for the original purpose. Are there any specific recommendations that you would have that would be important for us to consider when we're defining the actual stage that we should be considering for the application of time standards? I open that to anyone who would like to make a comment.

ANDREW CHALK: I was recently involved in what I think was ICAC's longest running inquiry. And the only point that I think it is possible to look at creating a meaningful standard is from the point which ICAC is already applying, which is, once final submissions are in, the time from that point to when the report is published. The matter I was recently involved with—and I think it ran for over five years—involved challenges that went to the High Court and the Court of Appeal. I think there were something like 53 hearing days. The principal person of interest never gave oral evidence. There are so many factors that can impact the conduct of the hearing and the investigation process that are just beyond ICAC's control. For the reasons that Mr Robertson mentioned before in terms of procedural fairness, you're in a situation where, in order to provide such fairness, it moves outside the control of ICAC itself. What is within ICAC's control is that period from once they've got their final submissions to when they release their report, and I think that's where the focus on timing should be.

The CHAIR: Thank you. Did anyone else want to make any comments? I'll just have to ask that they be brief comments because of time.

MICHELLE O'BRIEN: I will be really brief. Just to impress upon the Committee that there is such a myriad of factors outside the control of these agencies when they are getting to the finish line because, for example, final submissions might be in and a party then decides that this is looking so dire for them that they then bring court proceedings to try to prevent the publication of the report. At the beginning of the court proceeding is a public matter that can't be reported upon in a final report. But there are also other things that can delay an agency getting to that point where it has reached the end of its investigation. Somebody might say, "I want to assist you but I've got court proceedings that I need to resolve before I am prepared to tell you anything." et cetera, et cetera. It is just very difficult, I think, to expect an agency to conform with a set time frame when each investigation is so different and so subject to external factors that it can't control. There just has to be flexibility, and that is why perhaps an 80 per cent target might be the right one, but it's still arbitrary in selection.

SCOTT ROBERTSON: Just to grapple with what I think is the essence of Mr Parker's question, the Bar Association doesn't think that this Committee should suggest or dictate particular time standards. Rather, the appropriate course is to require ICAC to develop those standards and for them to be scrutinised by appropriate bodies such as, for example, this Committee. It would be open, for example, to the Committee to say, "Look, we have seen your time standards, but can't you improve your performance in relation to less complex inquiries?" The commission may have a satisfactory or an unsatisfactory answer to that in the view of the Committee. We think that is a much better approach than, in effect, the blunt instrument of saying, for complex inquiries or simple inquiries or inquiries of this particular kind or inquiries that take this particular period of time in a public hearing, the Parliament or the Committee or the Executive is saying you must do it within a particular period of time.

The CHAIR: Thank you, Mr Robertson. I thank you all for appearing again today and for the submissions that you provided to the Committee. We may send you some further questions in writing. Your replies will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions? I have to ask each of you to respond?

MICHELLE O'BRIEN: Yes, I would.

ANDREW CHALK: Yes.

RICHARD LANCASTER: Yes.

SCOTT ROBERTSON: Yes.

FRANK VELTRO: Yes.

JAMES CHIN: Yes.

(The witnesses withdrew.)

Mr MALCOLM STEWART, Senior Vice President, Rule of Law Institute of Australia, sworn and examined

Mr CHRIS MERRITT, Vice President, Rule of Law Institute of Australia, affirmed and examined

The CHAIR: Can you both confirm that you have been issued with the Committee's terms of reference and information about the standing orders relating to the examination of witnesses?

MALCOLM STEWART: I have.

CHRIS MERRITT: I have.

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

CHRIS MERRITT: I will make a very brief statement. First up, thank you for this opportunity, it's very much appreciated. A little bit about our organisation. The Rule of Law Institute of Australia is an independent, voluntary, nonpartisan, not-for-profit organisation formed in 2009 to promote and uphold the rule of law. Its work is supported by more than 1,300 members at the moment—it's growing. The objectives of the institute are to promote good governance based on the principles of the rule of law. For current purposes, they include equal treatment before the law and eliminating delays in bringing people before courts once it is clear that crimes might have been committed.

Our concern is that delays at ICAC need to be considered in a broader context of their impact on the justice system. Remedies that simply address the problem of delays at ICAC without considering the associated delays in bringing wrongdoers to trial would be less than optimal. Research by the Rule of Law Institute, which is included in our submission, has found delays of up to seven years in securing convictions against wrongdoers who have been found corrupt by ICAC after public inquiries. When measured from the first day of a public hearing by ICAC to the day on which wrongdoers are sentenced by a court, the delay has almost doubled, up from two years and six months in 2012 to four years and nine months in 2017. That research found that the average delay over that six-year period was three years and 10 months. The research identified one person who is still waiting to be sentenced seven years after the start of a public hearing that resulted in a finding of corruption.

How should this broader problem be addressed? It's the view of the institute that one way of doing this would be to oblige the commission to provide the DPP with evidence of possible criminal conduct at the earliest possible moment. That would require the commission to adopt the approach of the Coroners Court and suspend an inquiry at any stage once it's clear that an indictable offence may have been committed. Section 78 of the Coroners Act provides an appropriate model for changes to the ICAC Act. We also suggest that a new principle needs to be inserted into the Act to ensure that the commission's top priority is the interests of justice. This should prevail over other goals set down in that statute.

The CHAIR: Thank you, Mr Merritt. Do members have any questions?

Mr RON HOENIG: Mr Merritt, I've been advocating that latter view of yours for years and got absolutely no support.

CHRIS MERRITT: Well, you have support now.

Mr RON HOENIG: I might get support from you but nobody else. One of the problems, though, in relation to the time frame issue—in fact, I just asked representatives of the bar and the DPP this question as well—is that, as the oversight committee, we are oversighting this immensely powerful organisation that has these amazing coercive powers, and part of the protection is that they are oversighted by Parliament through this statutory committee, but we have absolutely no idea what goes on prior to a public hearing unless there have been media leaks. We then know what happens at the public hearing because a transcript is available and there's media coverage. When the public hearings finish, we have absolutely no idea what happens then until the commission report. We do know there are submissions from counsel assisting. There are submissions in response by people who are represented—the person of interest. We know counsel assisting makes submissions in reply. The commissioner then goes and writes a report, and the report is tabled.

We don't necessarily even know how long it is between counsel assisting's submission in reply and the commissioner writing the report, though we are entitled to know. As it has been just pointed out to us, there could be issues that arise at the close of public hearings that cause other investigations, which could well be legitimate investigations they then have to conduct because they have determined some other criminality to investigate. So it's impossible for us to oversight. The response is we've got the inspector; he can look at it. How do we meaningfully oversight, and what can we do in respect to the Act, which is basically all we can do because we

don't have the detailed knowledge? With an assumption that your view and my view will get no support from anyone, what do we then do?

CHRIS MERRITT: I wouldn't throw in the towel just yet. I think it's hardly radical to suggest that the interests of justice should prevail over all other interests. If it's good enough for the Coroners Court, which deals with matters of death and arson, to suspend a hearing in the interests of justice and pass matters over to the justice system when it becomes clear that there might have been an offence, I don't see why ICAC should be exempted from that principle. But, on the question of accountability, our submission is limited to ways in which we think delays can be addressed, but I do agree that there needs to be greater oversight. I think it's fallacious to simply point to judicial review as an effective method of oversight. The role of the inspector—I don't have any specific suggestions there but that seems to be the obvious method of increasing oversight of exactly what goes on. There have been some pretty significant audit reports by the inspector on the conduct of matters by counsel assisting, not the commission itself. I'd suggest that that might be a fruitful avenue to pursue.

Mr JAMIE PARKER: Thank you so much for coming along today. It's fantastic to have organisations like yours in civil society to make sure that there's ongoing discussion and debate around these issues. Obviously, it's really critical to make sure that people are brought to justice, that these matters are resolved quickly. I think you were here before when you saw the ODPP and you saw the Bar Association, the law council as well, all having a very similar view about this issue of introducing time standards, having that provide more transparency and more accountability. Why do you say that that's not adequate? Why do you think that the view of those organisations isn't sufficient? Because having the kind of unanimity amongst those is not common in a lot of cases. Why would you say that introducing that standard, having that level of oversight, using the inspector to help assist in ensuring that those standards are met or at least explained—why wouldn't that be sufficient?

CHRIS MERRITT: Look, I think it's necessary but not sufficient. I'd suggest that there needs to be further steps. What I'm most concerned about are the most important matters that come before ICAC, which are those that could, to use a phrase out of the ICAC Act itself, involve criminal conduct. It strikes me as completely inappropriate to set any form of time standard that would permit ICAC to delay, effectively, the moment at which those matters are handed over to the justice system. I think there should be no time standard for those matters. As soon as it becomes apparent to the commission that a criminal act might have been committed, they should not be able to proceed with their own internal purposes.

It's not their fault. This is how the Act is structured. So I'd suggest that the Committee might want to have a look at that and give greater priority to bringing wrongdoers before the courts. Parliament needs to determine what it wants to achieve here. Is the goal simply to bring wrongdoers before a public hearing and expose wrongdoing? Or is it to bring wrongdoers before a court and punish wrongdoing at the earliest possible opportunity? I see no logic in delaying judgement day for criminals in order to engage in something that falls short of anything to do with justice.

Mr RON HOENIG: Mr Merritt, whilst I agree generally with what you have said, other investigative bodies delay bringing people to justice to detect greater crime. So the police will often allow, with various approvals in place—in the old days they didn't necessarily get that approval—drug suppliers to continue to operate or trade to be able to get people higher up the list. They would be looking to allow drug suppliers to continue to operate to be able to detect someone who may have been a murderer. They are conducting investigations, not bringing people to justice at the earliest opportunity. There would be legitimate investigations that they would continue to conduct. Because some council plumber has been taking gifts for buying plumbing equipment at a council, they might be wanting to follow the dollar or the conduct at a higher level. It's not as simple as what you say. I don't see that you're wrong, but it's not that simple.

CHRIS MERRITT: I agree it's not simple. One of the things we'd suggest is a new provision in the ICAC Act that the interests of justice should take priority over all other goals set down in that Act. If that might require the commission to engage in what police would consider to be a controlled operation—for the interests of justice, not for the interests of ICAC's purposes—I see no problem with engaging in that sort of structure. The difference between what police do and what the DPP does is it aims at bringing people to justice, whereas ICAC does not. It deals with some matters that could invoke criminal conduct, but it deals with a lot of other matters as well.

Mr RON HOENIG: I put that to Justice Latham when she was commissioner: "Why aren't you focusing on collecting admissible evidence for the purpose of charging people?" She gave a specific, correct answer in saying, "That's not what the Act is and that's not what our function is."

Mr JAMIE PARKER: Yes.

The Hon. ADAM SEARLE: Although I think, subsequent to that line of questioning, they did start to publish on their website a list of prosecutions that had been conducted as a result.

Mr RON HOENIG: They did. In fact, I'm attracted to your suggestion, with some modification, that you made to the others as maybe a solution, actually.

The Hon. ADAM SEARLE: Which particular aspect?

Mr RON HOENIG: About access to the inspector, and maybe beefing up the inspector's ability to intervene and maybe make orders. I think that may well be a solution.

The Hon. ADAM SEARLE: I agree. We can at least come back to it. Mr Merritt, contrary to some expectations, I'm also attracted to the substance of what you're proposing. My concern with it was that we're here considering delays in finalisation of ICAC reports. I wasn't aware that ICAC actually had these internal KPIs, but the vast majority—

CHRIS MERRITT: They're tucked away.

The Hon. ADAM SEARLE: They are. But, again, over the last five years the vast majority of its reports are well outside its own determined time standards. A vast majority are also well outside 12-plus months. My concern with your proposal is might it not delay matters even further? The ICAC pauses a hearing, refers matters off to the DPP and then the DPP might—

Mr JAMIE PARKER: That takes two years.

The Hon. ADAM SEARLE: The DPP, because of its own resource constraints, might take some time. But it's the case, isn't it, that the ICAC, before it determines to have a public inquiry, often conducts private hearings and gathers a huge amount of its own evidence before it even decides to have public hearings? That's correct, isn't it?

CHRIS MERRITT: That's exactly right.

The Hon. ADAM SEARLE: So your proposal could be built in prior to the determination—

CHRIS MERRITT: At the earliest possible opportunity.

The Hon. ADAM SEARLE: Yes. If the ICAC was required to turn its mind to whether there was admissible evidence that a crime had been committed, to then determine whether to refer the matter to the DPP at that point, it wouldn't necessarily have to interrupt a public inquiry.

CHRIS MERRITT: It would prevent a public inquiry.

The Hon. ADAM SEARLE: Yes.

CHRIS MERRITT: And the public inquiry would take place before a judge, not before a commissioner.

The Hon. ADAM SEARLE: Yes. Or if the DPP said, "Look, we've got all this evidence you've provided to us but it's not admissible in a court of law"—because of the way in which ICAC, through its extraordinary powers, has gathered the evidence—and therefore it might shunt it back to the ICAC, then the ICAC could still proceed to have its own inquiry within its own legislation. But that's once the possibility of that criminal prosecution had been explored.

CHRIS MERRITT: This is why we suggest that it should happen at the earliest possible opportunity because if the ICAC process continues, coercive power will be used. The evidence gathered using those powers can't be used in subsequent prosecutions. Effectively, the DPP has to start again. In order to eliminate that double handling, if you like, send it off to the DPP as soon as it becomes apparent that there is criminal conduct.

The Hon. ADAM SEARLE: The problem with that isn't that you don't have the evidence at that stage. It might appear that a crime has been committed if various witnesses' assertions or complainants' assertions are borne out, but you don't know whether it is borne out until you've actually got some evidence.

CHRIS MERRITT: I have got no problem with ICAC being an investigator; I think it serves a good purpose. Trouble and inconsistency arise with the use of coercive power. If that can be minimised for the most serious matters—criminal conduct—it would streamline the role of the DPP and, therefore, the courts.

The Hon. ADAM SEARLE: This is the fundamental dialogue that we've been having for some time, including in previous inquiries. The ICAC is not conterminous with a police or criminal investigative body. It is not only investigating criminal activity, although it may. It is investigating allegations of misconduct, which is this wide in the Act, and of which criminal activity might be, say, this much. It is like a Venn diagram. There's a

shaded-in area where there is criminal activity, but it may not be criminal activity. It may simply be misconduct warranting termination of some kind because of falling short of some ethical standard.

CHRIS MERRITT: I agree. There are two potential ways of dealing with delays inside ICAC. One is simply to throw money at the organisation so that it has an endless stream of resources—

The Hon. ADAM SEARLE: I take it that's not your suggested—

CHRIS MERRITT: I am not suggesting that. What I'm suggesting is addressing—if you look at it as supply and demand, look at it as addressing the demand side of the equation. If there are perfectly good organisations, such as the DPP, that are able to deal with the most serious matters that come before ICAC, I don't see why there should be double handling. Once the investigative process has reached a stage where there is material that shows a possibility of criminal conduct, it's inefficient to allow ICAC to then proceed right up to the point where—it may be a year or two later—it then hands things over to the DPP. It doesn't make sense. It would ease the strain on ICAC, ease the demand for extra resources, increase the speed at which the DPP could deal with things and could also make life a lot easier for the Supreme Court when it has to empanel a jury that is not affected by prejudicial publicity.

Mr RON HOENIG: But that would require the Parliament to require ICAC to collect admissible evidence and require that as part of a function. They're not required, as part of that function, since ICAC has been reconstituted with the 2016 amendments and the appointment of those three commissioners. When they have determined to have public hearings, for example, which is subject to criticism by many, the commissioners have been unanimous. They have got to be in the majority. They have been unanimous. Bearing in mind who the commissioners were—they're eminent people from the bar—means that there was nothing wrong with the decision-making process of having public hearings. The conduct of the public hearings was not like the old days. I wasn't getting the anecdotal complaints, and nor were the inspectors. They were proceeding according to law and according to their function. Whatever the criticism is of the process, it is not the commission itself; it's the Act. It is the Parliament's requirement. It has to alter its requirement if it wants to change its function.

CHRIS MERRITT: I would agree with that 100 per cent. Much of the blame, if you like, for delays at ICAC can't be attributed to the personnel at ICAC. It is structural. They are doing what they're required to do.

Mr RON HOENIG: Or the DPP.

CHRIS MERRITT: True. It strikes me as passing strange that there has been, or appears to have been, very little attempt to ensure that ICAC and the justice system work as one organisation. The inconsistency in the rules that allows ICAC to deal with evidence—that so-called evidence that would not be admissible in court—makes life extremely difficult for the worst possible incidents of misconduct to be dealt with properly by the Supreme Court. What I'm talking about is the ridiculous delays that affected the eventual prosecution and conviction of Ian Macdonald and Eddie Obeid. It took six years, from recollection, from the time the DPP got hold of ICAC's material to the time that it finalised the indictment against those people.

The Hon. ADAM SEARLE: That may be because they had to conduct additional investigations—

CHRIS MERRITT: That's true.

The Hon. ADAM SEARLE: —to obtain admissible evidence.

CHRIS MERRITT: That's true. That's the point.

The Hon. ADAM SEARLE: So, in effect, it was probably starting a criminal investigation afresh.

CHRIS MERRITT: No criticism should be directed at the DPP over that. If anything, I suspect that exercise may have been hobbled by the fact that much of the information that ICAC had received could never be used in court.

The Hon. ADAM SEARLE: If we were to embrace some of what you're proposing, this could put additional strain, not so much on the ICAC but on the DPP. In the past I think it was the O'Farrell Government that created a sort of special unit in the DPP for ICAC matters and gave it very significantly enhanced resources. This unit—not the people but the creation of the unit by Executive Government for this purpose—has been viewed with concern, I guess, by a number of people in the legal and civil society sector as kind of—

CHRIS MERRITT: Look, I share those concerns.

The Hon. ADAM SEARLE: I know you do, so tell us a bit more about those.

CHRIS MERRITT: I think there needs to be internal tension between investigators and prosecutors, and I think having special units in the DPP who see—inevitably, they'd start to see the world through the eyes of ICAC and that's totally counterproductive.

The Hon. ADAM SEARLE: So a special unit, if such a thing was to exist, should exist with the police who are charged with criminal investigation.

CHRIS MERRITT: Yes, that would make sense.

The Hon. ADAM SEARLE: So to take the pressure off you have a trigger at ICAC at some point about referral of matters, if the ICAC forms the view that a criminal action has occurred or is likely to have occurred. That matter than goes to the police for investigation and, then only, to the DPP once the police have gathered evidence.

CHRIS MERRITT: Look, I agree. I think that makes sense, but long term I think ICAC's an established, big, elaborate, sophisticated organisation. It strikes me as a little strange that it operates under rules that make its work inaccessible—much of its work inaccessible—to the most important parts of the justice system. I think long term I would be encouraging ICAC to wind back the use of coercive power when it comes to investigating matters that could involve criminal conduct because the downside is horrendous. They can assemble all sorts of material and produce reports saying all sorts of terrible things, but when it comes to court, the judiciary might reach a completely different conclusion which undermines public confidence in both institutions.

The Hon. ADAM SEARLE: We've got competing public interests here. You've got the one directed to the detection and disruption of corruption in the public sector and the other one adherence to the criminal law. They might have similar interests but there are tensions, I agree.

MALCOLM STEWART: Sorry, may I say something?

The Hon. ADAM SEARLE: Yes.

MALCOLM STEWART: I did brief you a couple of times, Adam, so it's good to see you again.

The Hon. ADAM SEARLE: Yes, you did.

MALCOLM STEWART: Can I just start by saying the work of this Committee is absolutely fantastic. The institute really appreciates the work you're doing on a very, very difficult topic. You mentioned before the Venn diagram where you have criminality and not criminality, and that's true, although I think it's maybe not as drastic as that. I think corrupt conduct necessarily implies, at least in ordinary English usage, criminal conduct. You don't find ICAC often handing down a decision, "Well, there's been corrupt conduct, but no-one's going to the DPP because it's not criminal." I think the whole difficulty with ICAC stems around its ability simply to say something is corrupt. That is how I see it.

I was very interested in the debate that you promoted earlier, about if things were stopped earlier—if investigations were stopped earlier because there is a finding of corrupt conducts in the sense of the DPP, that the ICAC is going to keep investigating. Obviously, it wouldn't. Having made that decision to refer it to the DPP, the investigative function of ICAC would then simply terminate. The implication of criminal conduct by an executive body is the difficulty that it is creating for our legal and our justice system. It is that, really, that I think we are trying to grapple with.

One way of doing it is—and look at it from ICAC's perspective. They are out to find corrupt conduct, and you're asking them to stop midway through an investigation and refer it to the DPP. You're going to have some tension there, I think, as well, because their natural function is "is this corrupt conduct or not?" Certainly, I agree that we need to, as Chris has said, and as you've said as well—we need to try and shorten this and bring it speedily to ensure that we have justice done. But I do recognise there are some issues. That is how, conceptually, I see the crucial problem of things as said.

Mr RON HOENIG: As Mr Searle has corrected me before—quite rightly so—I take my puritan view. I had not contemplated the situation whereby there is no evidence against somebody of having acted corruptly, however, through compulsion, that person has given evidence. There is no report written, but there was some evidence given at ICAC about a particular person taking a bag of cash from a developer out of the back of a car. Now, it may well be concluded that that person can't be charged with an offence because there is no witness or evidence against him. Why should that corruption not be exposed?

The question then, I suppose, is should it be exposed publicly, or would it be like the Crime Commission, for example, and not exposed publicly? I mean, if the person is in public office, should that not be disclosed publicly? Or is that a de facto punishment of the destruction of reputation that you can't prove in other ways?

I mean, the ICAC Act is designed to ensure those people are in fact exposed, because they should be exposed, and to deter others. Now, there's another tension in this debate we have just had that I hadn't considered.

The Hon. ADAM SEARLE: There's a further dimension, too, touching on what I think you were talking about. There are some offences which are statute limited. It may be that an ICAC inquiry detects criminal conduct, but no prosecution could be brought because of the time at which it is detected. I mean you wouldn't want to stop the ICAC investigation in those circumstances—refer it off to the DPP for consideration, only for the DPP to come back and go, "Well, there's a few issues with admissible evidence here, by the way. We couldn't prosecute even if we wanted to."

MALCOLM STEWART: I think the easy answer to that is, if Parliament said that you're effectively treated as not having committed an offence after a certain period of time—and I'm not sure if there are. I mean, there obviously are some offences like that. Then I would have thought that's the end of the matter and Parliament's legislative power there overrides that. To turn around and say—I get back to your point about reputation, too. You're effectively using the Executive to impose on someone what I think, very much, is a very strong implication they've committed a criminal offence. You say you can't prove it, but why shouldn't that be out there? Maybe it shouldn't be out there because it can't be proved. Did they really do it or not?

The Hon. ADAM SEARLE: Except if they confessed, under compulsion—

MALCOLM STEWART: Yes.

CHRIS MERRITT: This raises another point. It's recently come to light that the UN Human Rights Committee has received a submission from Geoffrey Robertson, KC, in the matter of Charif Kazal. Mr Robertson argues that it's a breach of the International Covenant on Civil and Political Rights for an agency of the Executive to purport to deal with criminal matters without providing the protections for the criminal process, for those who come before the criminal process, that are outlined in that treaty and are available in the courts. That's another factor that, in my view, would stand against allowing the commission to proceed with investigating criminal matters in the way it does.

Mr RON HOENIG: Mr McClintock often appeared for Mr Kazal. Mr Kazal is one of those legacy matters which needs to be rectified, together with a number of others, that the validation Act doesn't enable to be rectified. I take it they are proceeding with that through the UN to try to get a resolution, are they?

CHRIS MERRITT: Yes. He's exhausted all his domestic possible remedies and it's been before the UN Human Rights Committee, as I understand it, since February. The Federal Government has been called upon to respond by 13 December, I think the date is, which strikes me as a little unfair on the Federal Government because it's being called upon to answer for the structure of a New South Wales commission.

Mr RON HOENIG: It's a bit like prisons, isn't it, not allowing UN inspectors into State prisons?

The CHAIR: We will have to wrap up, considering the time. I thank Mr Merritt and Mr Stewart for appearing before us today. We may also send you some further questions in writing and your replies will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions from Committee members?

MALCOLM STEWART: Absolutely. More than happy to assist.

CHRIS MERRITT: I would.

The CHAIR: Thank you very much, once again, for your attendance and for your submission.

(The witnesses withdrew.)

Mr JOSH PALLAS, President, NSW Council for Civil Liberties, affirmed and examined

The CHAIR: We will begin our third session. I welcome Mr Josh Pallas. Mr Pallas, can you confirm that you have been issued with the Committee's terms of reference and information about the standing orders relating to the examination of witnesses?

JOSH PALLAS: Yes.

The CHAIR: Would you like to make a brief statement before we commence with questions from Committee members?

JOSH PALLAS: Yes, thank you, Chair. Thank you for inviting the NSW Council for Civil Liberties to give evidence today. I would like to start by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to Elders past and present. I would like to extend those respects to any First Nations people here today. In the short time available to me, I would like to address some of the points made by the ICAC in their submission to this inquiry. The ICAC has KPIs in place for the rendering of reports for public inquiries of five days or less and greater than five days. In both instances, less than 38 per cent of reports are delivered within their self-appointed KPIs. This is undoubtedly unsatisfactory; however, the reasons given by the ICAC for their failure to meet the KPIs, in our view, are compelling, particularly their indication that "Resourcing is also an important constraint."

We identify in our submission at paragraphs 18 to 20 the funding constraints under which ICAC has operated in recent years. These lend support to the evidence given by ICAC in their own submission. We join with the Law Society of New South Wales who, in their submission, welcome the Government's funding increases for ICAC this year. While we support ICAC sending out a policy to explain how it assesses and manages delay and perceived delay at 34 of our submission, we do not go as far as the Bar Association call for the ICAC to publish time standards on their website. While I note that their submission is not without merit, I urge the Committee to refrain from making such recommendations at this stage. I do so because the ICAC is under new leadership and the ICAC has received an increase in funds.

Accordingly, the new ICAC leadership should be given a chance to work with the increased funds to see whether it can make progress towards meeting the revised KPIs set out in the ICAC submission at page 20. The proposal to compel them to publish time frames for the release of reports should only be revisited in circumstances where there does not appear to be positive progress in a context where the ICAC considers itself to be appropriately resourced. Thank you again for the invitation to our organisation to give evidence. I welcome any questions.

The Hon. ADAM SEARLE: Mr Pallas, welcome. We heard earlier today from the bar, and the Bar Association seemed to be comfortable with the idea that the legislation could be amended to require ICAC itself to develop its own time standards and to publish them so that its progress towards those benchmarks could be oversighted or interrogated by the community and, of course, by this parliamentary Committee. That wouldn't be an infringement of principle from your perspective, would it—for ICAC itself to say, "We think these are the appropriate standards for under five or over five hearing days or complex and non-complex matters", and to report on how it's going with those?

JOSH PALLAS: No, it's not an infringement of principle. However, we think it's ill-conceived at this point in time. They already have KPIs and they should be given a chance to measure themselves against their own KPIs, and obviously the Committee scrutinises their conduct in relation to KPIs at this point in time.

The Hon. ADAM SEARLE: This might reflect more on me than on ICAC, but until I saw the appendix to its submission— and I'm a frequent viewer of the ICAC website and of ICAC reports—I hadn't seen this level of detail about the KPIs for the production of reports from the final submissions and how you can track all the matters against that. It seems to me that this is information that should be publicly available or readily accessible to the public. Would you agree?

JOSH PALLAS: Yes, I would agree. However, if the new leadership of ICAC adopts a policy where they do this in their annual report or something like that, that would be sufficient in our view at this point in time, rather than amending the law and all of that.

The Hon. ADAM SEARLE: Amending the law may simply be formalising what is happening anyway.

JOSH PALLAS: Yes.

The Hon. ADAM SEARLE: My second question relates to the remedies. Everyone seems to be saying that the powers of the inspector are suitable and appropriate, and judicial review is suitable and appropriate and you don't need to codify it. I know the bar wasn't particularly attracted to this, but it's a bit forbidding and

intimidating for people to have to think about going to the Supreme Court. There's also a cost implication. If you are an individual rather than a sophisticated or institutional entity, that can be a real deterrent. Why should we not consider or recommend that a body like the inspector has those same powers so that a person aggrieved who thinks ICAC has not made a report according to law can make that complaint to the inspector rather than having to go to the Supreme Court? Would that not be a suitable or appropriate thing for us to consider?

JOSH PALLAS: Just to clarify, you're contemplating giving the inspector JR-style powers as opposed to merit review?

The Hon. ADAM SEARLE: That's what I've posited, yes. It's not necessarily everybody else's idea. That's my—

Mr JAMIE PARKER: That's why we're here having the meeting today.

The Hon. ADAM SEARLE: I'm just road-testing this proposition.

Mr RON HOENIG: Or enhancing the JR review.

JOSH PALLAS: I suspect there's probably a separation of powers issue.

The Hon. ADAM SEARLE: Chapter 3 doesn't exist in New South Wales.

JOSH PALLAS: It doesn't, but I would be surprised if the courts don't attempt to jealously guard their powers of judicial review.

The Hon. ADAM SEARLE: We can't oust the jurisdiction of the Supreme Court. I accept that proposition. But there's no reason why we couldn't legislatively confer the same or a similar function.

JOSH PALLAS: Yes. I don't really see what the difference would be in terms of giving those powers to the inspector, because then any way in which the inspector dealt with any judicial review-like proceedings would be almost similar to the way that the Supreme Court does.

The Hon. ADAM SEARLE: It would be very similar given that the inspector would be a very senior legal practitioner. But what I'm talking about is the availability. It's no good having a remedy in theory if ordinary people can't access it, whether by reasons of cost or by reasons of intimidation. I'm a legal practitioner. I don't feel particularly intimidated going to a court. It's what we're trained to do. But a person who is an individual or maybe a small business or not a sophisticated or institutional entity might be put off accessing a remedy that might exist because of where it is located. I'm just wondering whether or not the inspector might be a more approachable body.

JOSH PALLAS: It may well be, but I am not sure that it would, in the sense that if the inspector were exercising these functions, there would be hearings, there would be evidence being given.

The Hon. ADAM SEARLE: Well, judicial reviews [disorder].

JOSH PALLAS: But there are still going to be costs associated with that. A lay person is not going to be able to write their own application for judicial review, unless you are radically reconceiving of the way in which judicial review would be dealt with by the inspector.

The Hon. ADAM SEARLE: No, but an individual might decide to make the complaint to the inspector and not engage a legal practitioner. The inspector would still be called upon to apply the law.

JOSH PALLAS: I suppose individuals already do that in relation to reviews of prison decisions and all of that in relation to the Supreme Court. I'm not convinced that the Supreme Court is so foreboding that it would dissuade people from raising applications for judicial review. When we think about the nature of the conduct that ICAC is testing, people are ordinarily people with somewhat relative privilege and somewhat relative access to means. It's not like people are, for example, prisoners who are representing themselves on JR to the Supreme Court. I'm not convinced that the Supreme Court is such a terrible place for JR, and it already is appropriately resourced.

The Hon. ADAM SEARLE: I am in no way reflecting on the Supreme Court or its members. It was just more about providing realistic access to a remedy. Those are my questions.

Mr LEE EVANS: Further to your statement about having the new ICAC leadership have some time with the new budget to see if things improve, what time line would you put on that? Would it be seven, eight, nine years?

JOSH PALLAS: No, absolutely not. You would want to see progress made in the next year, or at least a plan set out by the new leadership of ICAC within the next year as to how they are going to address these delays.

I suspect that there may be legacy issues that the new commissioners have to deal with and there may be backlogs that may take a little while for ICAC to work through. I have no idea whether they would be able to meet these KPIs within a year, but so long as they are showing that they have got a plan and they are working towards the plan within a year, I think that would be acceptable. Then, if there is not significant progress within two to three years, I think that would be a problem. But you would want to see steps in the right direction, rather than backward steps.

Mr LEE EVANS: I agree we put in extra funding. But, again, we put in extra funding from the last tranche of ICAC, and we are sitting here today discussing how long cases are taking. I am a bit concerned that we are going to throw more money in there and we are going to have the same thing happen. In another five years we will be sitting here around the table, or a committee will be sitting around the table, discussing exactly the same subject. Do you see that as a possibility? It is hypothetical at this stage.

JOSH PALLAS: It is definitely hypothetical, Mr Evans. We collectively have no idea how the new commissioners are going to take up this challenge of dealing with the issue of delay, which is clearly of public importance. I am hopeful that even just this Committee considering this issue in a sustained way, as it is at the moment, will send a signal to ICAC that this is actually something of the utmost importance, it is in the public interest, and that in some respects they are on notice. As we have said in our submission and as I said in the opening statement, our minds are not closed to putting in place legislative standards and things like that if there is significant delay moving forward. But I think at this stage we are in almost a "wait and see" sort of holding pattern.

Mr RON HOENIG: Your submission indicates that you are of the view that the inspector's powers are adequate and appropriate. The history of the creation of the inspector was there was initially an operational review committee when the commission was first established and there was an external body to ensure that it was appropriate they exercised their coercive powers. Parliament changed that. It created the inspector as a safeguard. When the inspector found out about activity in the commission, as constituted prior to the 2017 appointments, having acted with maladministration or acted with unfairness—in fact the inspector has found that way, found that counsel assisting had acted improperly, in breach of the bar rules—there is no consequence. The reports are still on the website. There was no retraction in the media publicity at the time. Shouldn't the inspector have greater powers to intervene if he detects that sort of conduct or gets a complaint? Shouldn't he have the ability of making orders rather than writing a report three or four or five years later that appears in Parliament when the damage is done? We're not talking about really coercive powers of an executive arm of government cloaked to look like a judiciary.

JOSH PALLAS: Good question, Mr Hoenig. I am somewhat perturbed that a breach of the bar rules wasn't dealt with by the Bar Association, which is the regulator of conduct for barristers. One would have hoped that—

Mr RON HOENIG: They amended the bar rules.

JOSH PALLAS: They amended the bar rules?

Mr RON HOENIG: Yes, they amended the bar rules to strengthen and to try to avoid it occurring again.

JOSH PALLAS: That's a problem. Our position in relation to the inspector is primarily guided by what the inspector has said, insofar as the inspector has said that at this stage they consider their rules to be appropriate. We don't see any reason to diverge from their views. Ms Furness as inspector now and Mr McClintock as inspector previously appear to have carried themselves with distinction—well, Ms Furness is a distinguished barrister, but Mr McClintock has carried himself with distinction as inspector. We are comfortable in their view that they don't require additional rules.

Mr RON HOENIG: As did the late Justice Levine. All that had occurred at that stage when he made a number of findings was that the commission disagreed.

Mr JAMIE PARKER: That has been resolved now.

JOSH PALLAS: With respect, I think the commission has to be given the latitude to be able to disagree with the inspector so as to exercise its functions in a way that it is independent of the Executive. My understanding is—I was substantially younger at the time, and I didn't follow what was happening in relation to Mr Levine—but the court of public opinion was quite exercised by reports and statements that were made by Inspector Levine at the time. It wasn't as if Inspector Levine's findings went unnoticed.

Mr JAMIE PARKER: It's great to have volunteer non-government organisations taking the opportunity to provide such detailed and comprehensive submissions, so thank you for your time. I am interested in your submission at 34:

> Although we would be supportive of ICAC setting out a policy to explain how it assesses and manages delay or perceptions of delay, for the reasons expressed, we consider it is inappropriate to impose time standards ...

Could you maybe explain, with a little bit more detail, what you mean by "setting out a policy"? Do you mean that it would be in their annual report or it would be on their website? How would that be expressed? How would compliance with that be addressed?

JOSH PALLAS: I suppose, similar to the encounter that I had earlier with Mr Searle, we wouldn't be averse to ICAC benchmarking itself year on year in its annual report against the policy that it itself establishes. Almost formalising the KPIs in an internal ICAC policy, creating comprehensive dataset which measures itself against its KPIs in the annual report, and then this Committee testing ICAC's compliance against its own KPIs as set out in its annual report seems to be one way of doing it. I suppose we framed it in quite a broad, amorphous way because we would be open to commenting further on any suggestions that ICAC had about the way they could do it more transparently in a way that didn't necessarily make it a big stick that the media could use for "gotcha" moments to just hammer the ICAC when at this point in time—as we were discussing, Mr Evans—there is perhaps a transition period, there is an increase of funding and there are new commissioners. So it needs to be operationally workable but also some sort of soft accountability measure.

Mr LEE EVANS: I think that would be an ideal thing—that the ICAC tries to better its role or the cases coming through, obviously being thorough in it. Some of the cases that are currently on the table have been groaning on for years and years. The impact on the people in those inquiries is horrendous—not only the financial strain but also the mental health strain. We are trying to get to the base of how we can make this a better system with humans in it. The law stands above, as it always has. But we also have to consider the mental anguish that some of these people have gone through. We're aware of people that have committed suicide through this process. That's what we're trying to confront here today. Thank you very much for your thoughts.

The CHAIR: Time has beaten us again, Mr Pallas. Thank you again for appearing today. I reiterate Mr Parker's comments that it's great to have not-for-profit, non-government organisations here to provide us with their thoughts. It is much appreciated. We may also send you some further questions in writing and your replies will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions from Committee members?

JOSH PALLAS: Yes, of course.

The CHAIR: Thank you, once again, for appearing today.

(The witness withdrew.)

(Short adjournment)

Adjunct Professor JOSEPH CAMPBELL, KC, University of Sydney Law School, affirmed and examined

The CHAIR: We will now begin our fourth session. I formally welcome Adjunct Professor Joseph Campbell, KC. Can you confirm that you have been issued with the Committee's terms of reference and information about the standing orders relating to the examination of witnesses?

JOSEPH CAMPBELL: Yes, that's right.

The CHAIR: Thank you for appearing and for providing us with your submission to the inquiry. Would you like to make a brief opening statement before the commencement of questions from members?

JOSEPH CAMPBELL: I assume that the members of the Committee will have read the submission that I have made. There are really only two brief qualifications that I would like to make to that. The first is that, in considering the matters that are relevant to take into account in deciding whether there should be a public inquiry and generally in the actions that the ICAC takes, it's necessary to take into account section 12 of the ICAC Act, which is the protection of the public interest being the paramount consideration. Basically what that comes down to is that protection of the public interest and prevention of breaches of public trust isn't the only thing that can enter into the ICAC's considerations but other matters can only come into play when the considerations that relate to public trust are evenly balanced. There's quite a lot of law about these paramount consideration provisions that have grown up in the context of provisions about child welfare, because the provisions that the welfare of the child be the paramount consideration have been part of the law, the general law, for a long time. They've been adopted in statutory law, and they've been construed by the High Court on several occasions. I will send the secretary of the Committee a note about the relevant authorities on that.

The other thing that I'd like to add, as a qualification to what I had said, is that I have given a bit too much emphasis to the role of ICAC in actually finding out whether there has been corrupt conduct. It's important that its ambit is much wider than that. Section 13 states that it's also to investigate whether there are circumstances that are "liable to allow, encourage or cause" corrupt conduct or are "connected with corrupt conduct". If it is inquiring whether there are circumstances of that kind, its aim is not necessarily to find whether there is any corrupt conduct. The sort of circumstance in which there are often complaints about ICAC making findings that are damaging to someone's reputation is often that people complain, "I've been cross-examined extensively by someone at an ICAC inquiry and there was no finding made against me". Well, it's not always ICAC's job to make findings against people. There could be circumstances where it is justifiable to take evidence which is, as a thing turns out, damaging to a person's reputation for some purpose other than inquiring whether that person has engaged in corrupt conduct. Those are the two matters that I wanted to add to what I've said in the written submissions.

The CHAIR: Thank you, Mr Campbell, and thank you for the qualifications on your already extensive submission.

Mr RON HOENIG: Mr Campbell, just arising from your section 13 reference—which I'd not contemplated before, and I thank you for that—it is a matter of concern, isn't it, at a public hearing that somebody's reputation gets impacted because the commission, in a public hearing, is conducting—the legitimate forensic purpose of cross-examination is to determine whether or not a public authority or the law needs to be changed, or the practices need to be changed of a public authority. That's a concern, isn't it?

JOSEPH CAMPBELL: It is, yes.

Mr RON HOENIG: I'd not thought of that before. The legitimate forensic purpose usually might be to test the evidence, say, of a person of interest or a witness who may well be accused of acting improperly or corruptly. But the legitimate forensic purpose is too wide under section 13 (2). I'd not thought about that. Someone's reputation could be damaged for a purpose that is not the purpose of the cross-examination: whether the laws are adequate in relation to a public authority.

JOSEPH CAMPBELL: Yes, if the conduct of that person happens to provide an example of the ways in which the laws are inadequate.

Mr RON HOENIG: Thank you for that.

The Hon. ADAM SEARLE: Judge, thank you for your submission and for your opening statement. It's the case, isn't it, in any kind of inquiry—whether it's a civil or criminal trial or an ICAC inquiry—that when people give evidence their evidence is tested, sometimes robustly. Sometimes, in testing whether or not a witness is a witness of truth, propositions will be put to them and inconsistencies in their evidence will be explored. Often when people complain of reputational damage it's because those things occur in public. Maybe there are adverse findings about someone's credit; maybe there are adverse findings about whether somebody was a truthful witness to the ICAC. Those are the sort of things that could happen in any kind of testable proceeding.

JOSEPH CAMPBELL: It happens in any sort of litigation. There can be damage to a person's reputation from the process of cross-examination, even if there are no findings.

The Hon. ADAM SEARLE: It could also be the case, and I think this has occurred in ICAC—the definition, as I read it, of "corrupt conduct" in the ICAC Act includes criminal conduct, but it is much wider than criminal conduct. It includes a range of conduct which could be called a falling short of ethical standards. ICAC can make findings about those things. Even where it doesn't find that someone engaged in corrupt conduct, it can find that they engaged in conduct that was unworthy or unbecoming or that they were an evasive witness. Those are the sorts of things that can also happen in any kind of contestable proceeding.

JOSEPH CAMPBELL: Yes. The ICAC has the power to make findings of fact. That is expressly conferred on it. It can make those findings of fact when they're relevant to whatever ultimate issue it is investigating.

The Hon. ADAM SEARLE: If you have a situation, for example, where ICAC is looking into some matters, ICAC might find that a witness or a person who has been engaged in certain conduct which may have been contrary to ethical standards or contrary to, for example, the Electoral Act, but the time period for any prosecution has passed. Nevertheless, the ICAC investigates that and makes those findings of fact. It is not an answer, is it, for a witness in that situation to say, "But I've never been charged with any crime"? That is to miss the point, isn't it?

JOSEPH CAMPBELL: It is. In your example of an investigation into conduct that happened before a limitation period began running, that is the very sort of thing that can sometimes show an inadequacy in the law or in the administrative procedures that are in existence.

Mr RON HOENIG: The other thing to add to that, Mr Searle, is that if you were in a situation—in any proceedings, a report is written. They've got to make findings of fact. They might prefer the account of one witness to that of another witness. One witness may be more reliable than another, or a witness' recollection or account may not be something that the commission might want to accept as it makes a factual finding. The rejection of someone's evidence, or the acceptance of someone's evidence who ultimately has no finding against them—they can also suffer reputational damage as well, particularly if they're prominent people, even though there is no finding against them.

JOSEPH CAMPBELL: That's true.

The Hon. ADAM SEARLE: This morning we heard from the Bar Association. Their proposition was that they saw no difficulty—in fact, I think they would potentially welcome legislative change that required the ICAC itself to develop what we might colloquially call "time standards" and report against those so that the ICAC can be held accountable to those by the public and by a body such as this Committee or, where falling short of those standards, it is able to be explored in an annual review process, for example. Is that something that you think could be useful in giving the public some confidence?

JOSEPH CAMPBELL: The real difficulty is what is the nature of the standards?

The Hon. ADAM SEARLE: In answer to that, the ICAC, in its submission, has very helpfully given us an appendix 1, which includes time periods by public inquiry, whether there were public hearings or not, when the public inquiry was complete—by "complete", they mean the filing of final submissions, not just the final hearing date—and then looking at how many days before a report is furnished to Parliament. I don't think that information emerges generally in their annual reports. It's the first time I had seen it in this sort of detail, and I think it is very interesting. These are standards that ICAC itself has developed. Whether or not they should be required to do this on an ongoing basis, it seemed to me that this was very useful information for our purposes. I think the community would also find this very interesting.

Maybe the ICAC should be required to continue to develop and monitor these sorts of KPIs—KPIs that they already develop for their own purposes—and, in a more pronounced fashion, report publicly and have a discussion with us about those matters. I wouldn't want to put absolute limits on them and I agree with the submissions that we shouldn't legislate for them. We don't do that for courts and we shouldn't do it for the ICAC.

JOSEPH CAMPBELL: Yes.

The Hon. ADAM SEARLE: Given that they have developed their own benchmarks, which I'm very happy with, I just think it would give the community greater confidence and dispel some of the concerns, and maybe some of the myths that have arisen around how often ICAC matters are delayed and why they're delayed.

JOSEPH CAMPBELL: Well, section 75 has got a fair amount of detail already in the content of annual reports, including the time interval between the lodging of each complaint and the commission deciding to investigate.

The Hon. ADAM SEARLE: Yes.

JOSEPH CAMPBELL: And also over at (ba) (vi):

> the time interval between the completion of each public inquiry conducted during the year and the furnishing of a report on the matter,

They're already required to report on that and insofar as this Committee or any other body that wants to inquire about whether ICAC is doing its job adequately needs information about that, then ICAC's required to provide it already. I mean, if ICAC wants to explain in its report why it is that what looks at first glance like an awfully long time has elapsed for some particular report being produced, well, they're free to do it now, if they want to.

The CHAIR: You just said before in relation to the time standards it depends on the nature of them. What did you mean by that?

JOSEPH CAMPBELL: Whether they are legally binding standards, what the consequences are of breach of the time standard that is laid down. It's really hard to make a legally binding standard on a body like ICAC.

Mr RON HOENIG: We could, couldn't we, compel an explanation in their report to Parliament as to the cause; why it took so long from the time of the end of the public hearing to the time they reported. They could explain in their report to Parliament what the delay was, or at least it was public and it related to that specific investigation they conducted.

JOSEPH CAMPBELL: Oh, yes. That'd be quite possible.

The Hon. ADAM SEARLE: Or, just to put some flesh on the bones, I'm just looking again at the ICAC submission at page 30 and looking at the 2021-22 year, there are two reports: Ember, where there are 23 days of public hearings. It took 739 days.

Mr RON HOENIG: Which inquiry is that one?

The Hon. ADAM SEARLE: Ember.

Mr RON HOENIG: Yes, but what's Ember? I don't know what that is.

The Hon. ADAM SEARLE: I can't remember, either, but the point is it took 739 days from final submissions to furnishing a report to Parliament. And then again Aero, 36 days of public hearings. It took 396 days.

Mr RON HOENIG: That's a Labor Party one, Aero.

The Hon. ADAM SEARLE: Yes, I know. But the point is they're both over a year. One looks like more than two years. The point is when giving those reports, there might have been some explanation as to why. The ICAC's own time standards for these matters would have been 90 days for both matters because there are six days of public hearings. They've set their own KPI of 90 days for such a matter. It is well outside that. There's probably a very good explanation: These matters are complex, there's a lot of material, what have you. It would give public confidence if, when they do these reports, they would be required to give an explanation of why they don't meet the standards that they themselves have developed. I agree, Judge; I wouldn't want to be imposing an arbitrary standard on a body like ICAC. It's an independent body. The courts that have their own time standards developed them themselves. It's a matter for the head of jurisdiction to uphold them. But, unlike the courts, the ICAC is technically an Executive agency, so there's probably no reason why we couldn't require them to at least explain when they fall short of their own standards.

Mr RON HOENIG: If they conclude their public hearings and there are time frames for various submissions of counsel assisting and counsel for various persons of interest and then counsel in reply, or there are some other investigations to be undertaken arising from the public hearings, which may also be a cause for explaining. But, by the time that's concluded and the report has to be written, I note from—I think it was a Bar Association's submission—the Federal Court judges have their own sorts of timetables of three months. I mean, they write the most complex judgements. They're able to write them in three months. Surely a commissioner, if everything is concluded, can write a report within three months of everything concluding? It's not unreasonable, if those are the standards applied to judges who write the most complex judgements.

JOSEPH CAMPBELL: If the commissioner's got nothing else to do, then, yes, that may well be so.

Mr RON HOENIG: Judges have got plenty to do, but they've still got to meet timetables—or are requested to meet timetables.

JOSEPH CAMPBELL: The way that courts, in practice, work, is that, if a judge has got a heavy workload—a heavy load of reserve judgements—then they just get more time out of court through administrative arrangements within the court.

The CHAIR: Mr Campbell, I think we all understand the uniqueness of every case that comes before ICAC. There are some challenges in setting hard time frames. But what is your view about requiring them, as Mr Searle has indicated, in their annual report to provide an explanation to the public—to provide them with at least some confidence that there are very appropriate reasons for the delays?

JOSEPH CAMPBELL: In my submission, I said that, if it was thought useful, that it would be possible to add to this obligation to report on the time interval between completion of the public inquiry and the furnishing of the report, together with such comments as the commission wishes to make concerning any report where 12 or more months has elapsed. That means that they can provide as good or bad an explanation as they like. I mean, you might want to work and beef those words up a bit.

The CHAIR: I guess we are suggesting not "if they like" but actually they are required to provide an explanation.

JOSEPH CAMPBELL: Right. I don't see any objection of principle about that.

Mr LEE EVANS: In your opinion, does the inspector have sufficient powers to address reputational harm?

JOSEPH CAMPBELL: It depends on how he's going to address it. The inspector can't conduct another inquiry that covers the same ground as ICAC does. The way the inspector operates at the moment is that he is basically an auditor of ICAC. Sometimes, as with any audit, being that you take a few samples and see whether those samples have adequately shown proper manifestation of these standards that should be adopted by the body. The inspector can make various recommendations about ICAC reports. Just let me remind myself—the inspector can make reports and recommendations. We can publish the inspector's report on the website. If there has been a finding, for instance, that results in reputational harm, the inspector can say that, in his view, that finding wasn't a justified finding, and that report can be published. But there is nothing much more than publicity that can be done. If, for instance, in the court system a trial judge makes a finding that is harmful to a person's reputation and that finding is reversed on appeal, all that can be done is that the Court of Appeal's judgement is able to be publicised by the person whose reputation was damaged by the initial finding.

Mr LEE EVANS: Where this question came from is that reputational harm for people who have appeared before ICAC—we have had situations where people have actually committed suicide due to the impacts of being a witness. They weren't found guilty and they weren't being intimated, but in that process in the time line they committed suicide. That's where we started this whole thing. Because of multicultural background, going to ICAC, this person may or may not have thought, "My reputation in my community is now trashed." That's where that question came from.

JOSEPH CAMPBELL: Yes. I think that part of what needs to be done to resolve that sort of problem is for there to be better publicity of the things that ICAC inquiries are—that they are investigations, nothing more. They are investigations that have power to make reports and recommendations, and that's it.

Mr RON HOENIG: I think the media write whatever they want to write. I don't think educating the public through the media has necessarily been the solution. Other than one newspaper, all the rest of them seem to sensationalise every piece of evidence that arises from every public hearing. As Mr McClintock has told us repeatedly—he has written reports in relation to it—ICAC is not a court and it doesn't make judicial findings. It doesn't matter how much you say that. By that time your picture is in *The Daily Telegraph* and a portion of the evidence is published and then republished and then republished. People go and apply for a job and there is a Google search immediately done for something that has been published about someone who may well have just been a witness. I think that argument has been lost. That is the problem.

The Hon. ADAM SEARLE: Of course, that problem could arise in any proceeding. The media is a lot more interested in ICAC proceedings generally. I accept that.

Mr RON HOENIG: Except it doesn't apply in a criminal investigation. It applies when there are tribunal hearings because it's part of the public transparency of it.

The Hon. CHRIS RATH: On the reputational damage that we have been talking about, I don't know if you have looked into the Hong Kong model of ICAC or even potentially looked at the Federal proposals for the ICAC—

JOSEPH CAMPBELL: Not in any detail.

The Hon. CHRIS RATH: I suppose the Hong Kong model is more centred on in-camera hearings but public findings and the Federal proposal seems to have a higher threshold for public hearings, which, in both cases, probably addresses the reputational issue. I was wondering if you had any views or thoughts about that.

JOSEPH CAMPBELL: The proposed Federal threshold is that there needs to be exceptional circumstances to justify—and that is not a particularly high threshold. On page 5 of my submission, in footnote 12, I have set out the quotations from cases about what is required to be exceptional. It doesn't have to be unique or unprecedented; it's just something that you don't ordinarily come across.

The Hon. CHRIS RATH: So you think that when the Federal ICAC is eventually implemented, almost every hearing will be public. That's your prediction.

JOSEPH CAMPBELL: No, because you have to make a case-by-case decision about whether the circumstances are exceptional or not. There are some that will be completely mundane and everyday sorts of complaints that are being investigated.

The Hon. ADAM SEARLE: In relation to some of the other matters we've discussed, submissions have made the case—I think yours too—that the existing mechanism of judicial review works adequately or is an adequate remedy and that we shouldn't codify the common law. But there has been some discussion about whether or not that remedy lying in the Supreme Court is a bit forbidding or out of reach of what I would call individuals or not sophisticated litigants—people who might be caught up in an ICAC proceeding. They might be a bit intimidated about the idea of going to the Supreme Court to seek judicial review. Would it not make that potential remedy more accessible to ordinary people if that mechanism, or one very much like it, were to be reposed in, for example, the inspector or someone like the inspector—someone of that experience and standing but not the Supreme Court? The bar has said that you can still go to the Supreme Court because you can't oust its jurisdiction. That's correct. But given how infrequently judicial review is invoked, you wouldn't want it to happen all the time, but it's no good there being a remedy if, as a matter of practicality, it's out of people's reach. Do you see any benefit in that kind of mechanism?

JOSEPH CAMPBELL: Think about what the remedies are in judicial review. You can quash a decision, basically. You can order someone to go and do their job properly if they haven't done it properly. The inspector can make findings that a decision is one that was not justified.

The Hon. ADAM SEARLE: So the inspector can do that now.

JOSEPH CAMPBELL: Let me check.

The Hon. ADAM SEARLE: I think the inspector now can make findings of maladministration but that's quite a high threshold. That's not the same as saying the ICAC report was not made according to law.

Mr RON HOENIG: He says that, and nothing happens.

The Hon. ADAM SEARLE: That's right. The issue—

JOSEPH CAMPBELL: The definition of "maladministration" in section 57B is that it has got to be of a serious nature that is contrary to law, or unreasonable, unjust—

The Hon. ADAM SEARLE: But, for example—this is a genuine question—if the inspector receives a complaint, looks at the complaint and says, "Yes, this report of the ICAC was made contrary to the law in that it fell foul of one or more of the judicial review grounds", the inspector can now make such a finding. That's great, but it has no effect. An aggrieved person could then take the inspector's report and take it up to the Supreme Court and ask them to formalise that, but they'd still have to go through that hearing. It just seems to me that it might be better and more accessible, and might give the community a bit more comfort, if that inspector's facility was fleshed out a little bit more to make it a little bit clearer that it's not just maladministration, but the inspector could review an ICAC report on judicial review grounds and make an order accordingly.

I'm not against the ICAC and I don't want to undermine its operations in any way, but it does seem to me that the judicial review grounds are quite austere, appropriately. But going to the court might present a psychological barrier for many people—not everybody, but for many people. And it is also expensive. Whereas if you can simply make a written submission to the inspector from time to time, even if the inspector calls the

people in and has a hearing, you don't necessarily need to invoke the same time or expense as you would in a court proceeding.

Mr RON HOENIG: Mr Nicholson might remember the timing, but the inspector of his own motion in the Margaret Cunneen matter started conducting an investigation, where they got complaints. The inspector can't do anything other than write a report to Parliament. Ultimately, that matter was resolved by the High Court and the Court of Appeal. It may well be because Ms Cunneen had the resources to be able to do that or the wherewithal or the support to be able to do it. But if it is somebody else—why I am attracted to Mr Searle's idea is that there can be some intervention. The inspector is supposed to protect the use of these coercive powers. If he is of the view that there is maladministration, for example, or unlawful conduct occurring, then intervention and writing a report to Parliament is not going to rectify the situation. Maybe the inspector should be empowered to intervene and stop something that is occurring as part of the checks and balances of those coercive powers.

JOSEPH CAMPBELL: One important thing that would be involved in that would be whether the inspector was required to act on every complaint that was made to him. I could see a danger of anyone who had felt they had got a rough deal at ICAC complaining to the inspector and the inspector just getting swamped, regardless of the merits of the complaints.

Mr RON HOENIG: I think there is a conga line of complaints to the inspector now of dissatisfied people. Most of the complaints that we have been trying to deal with in the reform of ICAC seem to be what we have described as legacy matters, that is prior to the reconstitution of the Committee prior to the amendments. There are some classic examples where the inspector had made findings and nothing has happened as a result. Parliament passed the validation Act and no-one has got any remedy for those people. The commission has changed under its model and under the leadership of the former chief commissioner and the two senior members of the bar who were appointed.

The anecdotal complaints that we received or the inspector received from senior members of the bar seem to have stopped. Our examination of transcripts has indicated that the public hearings are being conducted relatively fairly, if it is looked at impartially. But there is still this organisation with immense coercive powers and there needs to be some checks and balances beyond simply an inspector writing a report three years later to Parliament. That is why I am attracted to Mr Searle's suggestion.

JOSEPH CAMPBELL: Yes. As I say, first of all it would be necessary for the inspector to have power, like the power that the Ombudsman has, to decide which particular complaints that are made to him will actually be followed up and which won't be.

The Hon. ADAM SEARLE: And the necessary protections around that.

JOSEPH CAMPBELL: Yes.

The Hon. ADAM SEARLE: Yes, I agree.

JOSEPH CAMPBELL: As well, you would need to be careful about whether the powers that he was given amounted to a vesting of judicial power.

The Hon. ADAM SEARLE: You could describe them differently. Yes, you could do that, although chapter 3 doesn't really apply.

The CHAIR: I have to interrupt the conversation, only because our next witness is here and the time for this session has concluded. I thank you again for appearing before the Committee today and also for your very extensive submission and the offer to further qualify your submission in writing to the secretariat. We appreciate that and look forward to it. We may also send some further questions in writing. Your replies will form part of your evidence and be made public. Are you happy to provide a written reply to any further questions from the Committee?

JOSEPH CAMPBELL: Yes, subject to me not being on holidays or any such thing.

The CHAIR: We appreciate that. Thank you very much, Judge, for your appearance today.

(The witness withdrew.)

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

The CHAIR: We will now begin our fifth session and formally welcome Mr John Nicholson, SC, former Acting Inspector of the Independent Commission Against Corruption. Mr Nicholson, can you confirm that you have been issued with the Committee's terms of reference and information about the standing orders related to the examination of witnesses?

JOHN NICHOLSON: I can confirm that.

The CHAIR: Thank you. We welcome your opening statement.

JOHN NICHOLSON: Before I do that, I acknowledge that I know well Mr Ron Hoenig.

Mr RON HOENIG: I've already advised the Committee of that.

JOHN NICHOLSON: I have also had dealings with Mr Jamie Parker, who I am sad to see is retiring. He has been a great help to us at the Rainbow Lodge, where I am now retired but I am still interested in their work. Firstly, I am requesting that my original submissions be replaced with what I've called a second edition. I don't know whether any of you have noticed, but I mistitled the ICAC—it must have been late at night. What I ask that you take and consider from my submission is that a protocol of time frames or a target, if you like, of time frames should be set as set standards and government expectations that, notwithstanding that, a protocol should be flexible enough to cater for the reasonable needs of the ICAC in the event that on any specific occasion the ICAC is having difficulty.

As matters stand, there's no actual transparency in causes of extensive delays. In my submission, time standards really require transparency, particularly where there is what would be regarded as unacceptable delay. The fact that it does not currently occur does lessen the integrity of a report coming out after a long delay. With respect to the reasoning of the Committee set out in paragraph 30 of my submissions—the one that argues that, because ICAC in the criminal law courts have different roles, a like-for-like comparison is not directly applicable—I would wish to disagree with that. The difficulty with that proposition is that the ICAC itself believes and points to the sufficiency of like for like. In its opinion, it refers to matters that the DPP would usually agree with reasoning, similar to a judge's finding, and usually nominates a specific offence.

Now, how can it not be like for like if it gets the detail and nominates the offence? Yet that's been used as a reason why there might be some—what's the word I want?—spillage into reputational damage. The courts have made plain that an ICAC finding is no more than a finding arising from an investigation. It has no final effect. My argument is that that time has come for that fact to be recognised by some legislative changes. The report and its acceptance by Parliament don't change the nature or the effect of an investigative finding. In the event of an acquittal or a no bill or a death, a report from the inspector should be sent to Parliament bringing the ICAC finding up to date. As Justice Priestley said, a temporary finding—not a final finding—is the ICAC situation.

Likewise, where there's a failure by the Minister or person in authority over a department to take disciplinary action within 12 months, there should be a finding. In other words, there should be clearly set out somewhere the occasions or the circumstances in which an inspector can exercise an administrative power to avoid an ICAC finding. The other thing that I wanted taken out of my submissions was the need to have a contester present when a commissioner or commissioners are considering public interest raised in section 31 of the ICAC Act. In my experience the ICAC had two or three pages of reasons why something would be in the public interest available to commissioners, or even to people who are under the commissioners who are acting in the name of the commission, and none on the other side of the question. I argue that there should be a contester.

The Hon. ADAM SEARLE: If I might, Mr Nicholson, most of the submissions say judicial review is fine; it's an adequate remedy. We've also been discussing, "Well, it may be but it's in the Supreme Court." Unless you're a sophisticated or well-resourced litigant, that may be a psychological barrier only but it may be enough so that people are unaware of the remedy or they don't see it accessible. We've discussed whether a similar remedy should be vested in the inspector. As you say, the administrative—

JOHN NICHOLSON: I'm very pleased to hear that that's being investigated.

The Hon. ADAM SEARLE: So you are in favour of that?

JOHN NICHOLSON: Very much so, yes. It is much less expensive, can be much more quickly executed and the inspector would not have power to award damages or anything like that. It would simply be a recognition of the consequence of a no bill or an acquittal and really otherwise wouldn't undermine an ICAC

finding in respect of conduct that is, in a general sense, conduct that would be amounting to conduct engaging in corrupt conduct.

Mr JAMIE PARKER: My interest in your submission was around the expanded powers for the inspector. As you know, that matter was addressed in 2015. There was a report that was looking at the inspector and that fundamentally proposed no changes. Obviously the current inspector is very new in the role and her submission is that she is still considering this but she noted that 2015 report. The previous inspector, Mr McClintock, said—to paraphrase him—that he feels that the powers are sufficient. I understand you've proposed these various expansions of powers. What motivates you to propose those expansions considering the former inspector and the current inspector seem quite comfortable with the powers?

JOHN NICHOLSON: Yes, but the inspector before him, incidentally, was very keen to, particularly in respect of reputational—

Mr JAMIE PARKER: Yes.

JOHN NICHOLSON: I will come to your question. It is the fact that some people are suffering and there doesn't seem to be a recognised pathway whereby reputational damage can be cured and cured quickly. The ICAC is losing friends right, left and centre, frankly, because of delays in giving decisions, because of its kind of imperial approach to investigations and because of the reputational damage that it does, streaming from, as I've always said, the very wide definition of "corrupt conduct" and its incompatibility with a prima facie case. I know that Mr Hoenig has always been advocating, at least in my conversation with him, the test that the Local Court used, which was—

Mr RON HOENIG: Unsuccessfully, I might say, Mr Nicholson.

Mr JAMIE PARKER: We've held an inquiry into that issue of reputational matters and we seem to be circling back to that again.

JOHN NICHOLSON: Notwithstanding that your report said it was—I can't remember quite the language now, but it was impractical or inapplicable or whatever it was; it was "in-" something. But it was always in the negative and not the positive. It's an interesting thing that you've said it wasn't a factor, and yet you've decided to continue investigating it.

Mr JAMIE PARKER: Well, we're very vigorous in terms of our attempts to gain further insights. We never rest!

Mr RON HOENIG: I've just been attracted to some suggestions made by Mr Searle during the course of the morning in relation to—

The Hon. ADAM SEARLE: I'm being fitted up here.

Mr RON HOENIG: —the powers of inspectors. It's unusual, but I—

JOHN NICHOLSON: He's been well known for that over the years, yes.

Mr RON HOENIG: You were the acting inspector and the assistant inspector when Justice Levine was the inspector. There were findings on some activities whereby maladministration was found and unfairness was found. One of those issues—I'm just quickly trying to look it up now—was the Kazal matter, where Mr McClintock actually appeared for Kazal. I've spoken to him in relation to that matter as well. Even when you found maladministration or unfairness, whatever recommendations are made by the inspector, it's just a report. The damage is done.

JOHN NICHOLSON: The damage is done. Although in respect of that report my sense was, from some feedback that I got that it was favourably received, it didn't resolve his situation. It exposed it, perhaps, but it didn't resolve it. The only thing that the inspector was doing there was exposing a difficulty.

Mr RON HOENIG: In the Kazal matter and those matters prior to the 2016 amendments, and prior to the commission as being differently constituted, there was the withholding of exculpatory material by the commission that may well have exonerated Kazal, for example, and others in their inquiries. The Parliament rectified that by amending the Act, providing three commissioners and requiring procedural fairness guidelines to be established. The experience from pre-2017 and all those legacy matters that continue to hound this Committee—and disturb my conscience, anyway—still requires some mechanism, if you have this powerful organisation, for a check and balance and some relief that's available if something goes wrong.

That's why I was attracted to Mr Searle's idea. What if the commission goes off the rails? Most commissioners haven't been like Chief Commissioner Hall. There has been Barry O'Keefe. There has been a range of unusual commissioners without procedural fairness guidelines. We're looking for some checks and balances.

You weren't here before, but when the commission starts an investigation, we know nothing about it. We don't know anything about the compulsory examinations or what is occurring, yet we're supposed to oversight them. We see the evidence of the public hearings. We see what occurs. That's the first that we know about it, and then the commission adjourns. Apart from newspaper reports and transcripts, we don't know anything. It takes a long time to report. The commission itself, through that period of time or delay, is criticised and falls into disrepute, which we can't afford to have. We are reliant on the inspector to tell us that everything is okay.

JOHN NICHOLSON: He knows less than you do, and he learns it later than you do.

Mr RON HOENIG: I think there should be a check and balance if someone is unhappy, or some mechanism whereby the inspector is empowered to decide whether to investigate a complaint or not—to have some power to intervene and make an order or have some authority as a check and balance against a very powerful organisation. We want to have a powerful corruption investigator.

JOHN NICHOLSON: You have got one of the most powerful corruption investigators around—

Mr RON HOENIG: Well, we need one, don't we?

JOHN NICHOLSON: —and one of the weakest inspectors around. An inspector in the police force has much more power than an inspector of ICAC.

The Hon. ADAM SEARLE: How should the powers of the inspector of ICAC be improved, apart from the way that we've just discussed about an administrative review?

JOHN NICHOLSON: For instance, just on the example that I have used in my submission, it seems to me that the inspector ought to know when an investigation has finished and ought to know what time frame they are going to have for the writing of advice. Some of these are perfunctory and you can get the report out. Some of them are more complex and complicated. He should have some role in that. I think he ought to also know when an investigation is about to be launched, what it is about and be able to have a contester go down there on a public interest thing, saying, "No, it is not in the public interest." Remember, that is different from the public being interested. "It is not in the public interest to run this as a public hearing."

Mr RON HOENIG: Mr Nicholson, in the public hearings that the commission has decided to have, the evidence that we have been given is that the commissioners have been unanimous. They only have to be in a majority, but they're unanimous. As constituted, the commission has a chief commissioner and two eminent senior members of the bar, which is what the model was designed to have. Senior members of the bar come in so that they're not captured by the organisation. If those commissioners unanimously decided that there needed to be a public hearing, it is because of the Act. They have judged in accordance with the Act that they're required to have it. If there is some failing about having a public hearing—if that be anyone's view—it's not the commissioners; it's the legislation, isn't it?

JOHN NICHOLSON: The point that I'm trying to make is that the legislation can be assisted by having somebody there contesting it. Of course three people are going to agree. Three people will agree to go into a pub, but it doesn't mean it was in their interest, let alone anybody else's interest, to go in there if a fight breaks out, or whatever. Three people with nobody challenging their ideas, or nobody opening up other corridors for them to think about, are most likely to come to a unanimous agreement.

Mr RON HOENIG: Except that I don't accept that a senior member of the bar who practises in a particular area and does something part-time is captured by the organisation. I'm prepared to accept that a full-time commissioner might, over a period of time, start losing their objectivity, but I don't accept that a senior member of the bar who comes in and has to make a decision based on legislation on the material in front of them—that's not a sufficient protection.

JOHN NICHOLSON: One of the things, for instance—if my memory serves me correctly—that was on the script was that having a public hearing gives an insight to the public on the way in which ICAC works. That may be something that the three commissioners could agree on. But the fact is, is it really in the public interest or, for instance, does the Crime Commission need public hearings because of its work? No, it doesn't. Yet everybody knows that the Crime Commission is a very effective and thorough organisation.

Mr RON HOENIG: Although, in a meeting privately, you and I, in a case where we were for co-accused, saw the most disgraceful behaviour of the Crime Commission in their conduct towards witnesses behind closed doors on the videotape. That's what happens, isn't it, if you have secret hearings? You have that sort of oppressive conduct.

JOHN NICHOLSON: But what you've got here is information being gathered in secret hearings and then being presented publicly.

Mrs NICHOLE OVERALL: This may be more of a statement than a question, as such. Obviously, as one of the newest members of Parliament, and also one of the newest members of this Committee, I'm endeavouring to listen and take in as much of this as I possibly can without interrupting the much more in-depth knowledge of my fellow colleagues. From that almost outsider's perspective, what Mr Nicholson is saying seems to be patently logical. When we're getting away from reputational harm and coming back to the matters of the delays and the timeliness, or the lack of timeliness, in our reporting methodologies, we keep coming back in these submissions to resourcing, and is additional resourcing and funding going to be able to address some of the delays in the current process? In looking at that, is it not right to say that with our inquiries and our reporting, the longer it goes, the more it costs. And, as the costs continue to build, funding is going to continue to be used potentially as one of the reasons we continue to say that things are being delayed, because they need more resourcing and more funding. Does it become self-defeating to suggest that this is the way out of it just by allocating more resources and more money?

JOHN NICHOLSON: A funny way to answer this perhaps is that it was initially thought that one commissioner would provide sufficient deterrence for corrupt people to stop their activities. Now we have three commissioners and we still have newspapers and outside organisations finding corrupt conduct better than the ICAC, frankly. I don't know whether you're wasting your money or whether you need better staff, but what is not working is the deterrent factor. What is not working is the assurance that if you are corrupt, you're going to be discovered. One of the reasons, for instance, that traffic cameras work is that you know, if you speed, you're going to be before the court, or at least paying a fine.

Mr RON HOENIG: Only if they don't take the signs away.

The CHAIR: Order!

JOHN NICHOLSON: That's right.

The CHAIR: Mr Nicholson, do you have a further comment?

JOHN NICHOLSON: No. I see much logic in what the questioner was asking, I think.

The CHAIR: Mr Nicholson, thank you again for appearing before the Committee. We may also send you some further questions in writing and your replies will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions that Committee members may have?

JOHN NICHOLSON: I would.

The CHAIR: Thank you again, Mr Nicholson.

(The witness withdrew.)

Mr BRUCE McCLINTOCK, SC, Inspector of the Law Enforcement Conduct Commission and former Inspector of the Independent Commission Against Corruption, affirmed and examined

The CHAIR: We will now begin our sixth session. I warmly welcome Mr Bruce McClintock, SC, a former Inspector of the Independent Commission Against Corruption. Mr McClintock, can you please confirm that you've been issued with the Committee's terms of reference and information about the standing orders relating to the examination of witnesses?

BRUCE McCLINTOCK: I have indeed, Mrs Williams.

The CHAIR: Thank you very much.

BRUCE McCLINTOCK: I suppose I'm appearing in the capacity as an interested person, a former inspector.

The CHAIR: Would you like to make some opening comments?

BRUCE McCLINTOCK: I wasn't going to, but there is one thing arising out of what I heard Mr Nicholson say and indeed what Mr Hoenig said. When I was doing the inquiry in 2015 with Mr Murray Gleeson, prompted by the Cunneen litigation, there was an issue—of course, as there always is—about public hearings. I can't speak for Mr Gleeson, although I've got a pretty good idea what he thought. The report basically said that it would be a very bad thing to have secret hearings, or predominantly or exclusively secret hearings. The reason why is that you need public hearings so that the actions of the agency in question can be scrutinised and they can be held to account. I personally think it would be a disaster to go back to closed hearings. There may be good reasons why the Crime Commission does it, although I take on board what I heard you say, Mr Hoenig, to Mr Nicholson and I don't believe that to be an isolated incident.

One thing that people don't realise is that the reason why we've been exercised or concerned about reputational damage is that everyone saw the conduct of a commissioner and one counsel assisting in inquiries before the ICAC and it was reported. People were able to make judgements about the behaviour of that commissioner and that counsel assisting. I hate to think how it would have been if those hearings had been completely secret and no-one knew. I think it would be a very bad thing for public administration in this country or in this State. One further thing, too, arising out of or partly out of the terms of reference but also out of what Mr Nicholson said—can I just say one further thing? So many of the problems that have confronted this Committee have come about because of the way that the commission conducted itself because of the people involved between 2010 and 2016—2015-16. You will not hear the similar complaints, or at least certainly not to the same degree, as to the behaviour of the commission between 2017 and 2022. Why? The reason, I personally think, is obvious. I won't labour that last point.

Going back to the role of the inspector—which comes from what Mr Nicholson said, although it is one of the terms of reference—it is true that the inspector, under the Law Enforcement Conduct Commission legislation, is probably better equipped. The reason why is that when the inspector was introduced in the legislation in 2005, as a result of the report that I completed in 2005, it was a semi-new concept. There had just been one inspector created for the Police Integrity Commission, and it was new. The Law Enforcement Conduct Commission, partly because of the efforts of Mr Tink and the inquiry he did, came up with a much more sophisticated model for the role of the inspector. For example, the inspector has power to deal with errors of fact or law. Not, I hope, as a form of judicial review—or merits review, which I would be totally opposed to. But it may well be that the Committee should be thinking about adapting or updating the powers of the inspector of the ICAC along the lines of the inspector of the Law Enforcement Conduct Commission. It wouldn't be very hard to do.

I might say, when I gave evidence in Federal Parliament two weeks ago and I proposed a draft revision for the role of the inspector, I based it upon the wording of the New South Wales Law Enforcement Conduct Commission. I'd be happy to provide the Committee with my submission to the Federal committee, if you wish. It deals with the role of inspector-general, generally, although there are some specific and odd things about the current draft of the Federal legislation. That's all I wanted to say by way of opening statement. I'm open to any questions that the Committee wishes to ask me—any way I could help.

The CHAIR: Thank you very much, Mr McClintock. Both Mr Nicholson in his opening statement and yourself in your submission, which refers to the time standards, referred to having some measure of flexibility. How would you see that flexibility? What do you imagine that would look like? Obviously, we are acknowledging that all cases are extremely different. They're complex. But both of you mentioned that, so I'm just wondering what it might—

BRUCE McCLINTOCK: It's very easy to make a statement like I do in paragraph 14 without having to think about the actual mechanism for doing it. As I sit here, I'm not sure I can actually immediately come up with a mechanism. It might be something that if you gave the inspector specific power to monitor the timeliness of reporting and so on, that that might be one way of doing it. I mean, the inspector can do that now and can intervene. May I say, there's one other thing, when I think about what Mr Nicholson said: I was made aware of every significant investigation that the commission was undertaking, led by Chief Commissioner Hall, when I was the inspector. Pursuant to the memorandum of understanding we had, there were no surprises. For example, I was aware of the issue about the former Premier, Ms Berejiklian, for months before that actually became public. It was a very cooperative relationship, so I was informed there.

The Hon. ADAM SEARLE: That's a matter of the individuals concerned and the MOU, not a matter of law.

BRUCE McCLINTOCK: Yes. But, Mr Searle, I've said this to this Committee many times—

The Hon. ADAM SEARLE: You can't legislate for good behaviour.

BRUCE McCLINTOCK: Exactly. It always comes down to the people you choose. If you choose a zealot, you'll have problems. I might also say that there is another example—

Mr RON HOENIG: Some people turn into zealots, who were all right when they were appointed, too.

BRUCE McCLINTOCK: I agree with that. That's certainly true, Mr Hoenig. But can I say this, just as an example of the way I think the inspector's role should work: Take the Cunneen case. That was before my time as inspector, and that has led to the inquiry with Mr Gleeson. I went on record publicly at the time, because I was asked by the Herald what my attitude about that was. I said it was a mistake because it didn't meet the standards of serious corrupt conduct, and certainly not systemic corrupt conduct. I thought the commission was wrong in investigating it. Had I been inspector at the time, I would have actually intervened, under my audit power. I would have said, "I want you to justify this to me, as inspector, as to why you think this is serious corrupt conduct."

Had I not been satisfied, I would have prepared a report to Parliament, as part of my audit power, saying that I didn't think it was. That was my preliminary view. I don't know whether I would have been persuaded by the then commissioner, but that's the sort of thing that the inspector can do and there's been examples where I have intervened. Sometimes they never became public because sometimes the best way of doing things is just to have a quiet word to someone and say, "What about?" But there is an armoury of powers that—I hesitate to use the word "activist", but—an activist inspector can use to deal with issues that come up in relation to the commission. There is nothing similar in relation to, I might say, my term as inspector.

Now I'm straying away from your question, Ms Williams, but I have to say I think that would be one mechanism of doing it: Leave it to the inspector. It's difficult to see any other formal method to do it because then you start straying into prescriptive things like time periods, which for the reasons expressed in paragraph 14 are dangerous. But, as I said in my submission, it is a matter of regret to me that I wasn't able to deal with this more effectively in the five years that I had. There was one example where I dealt with it behind the scenes. It was in relation to—well, it doesn't matter which particular inquiry it was in relation to. I did, by perhaps some not-so-very-gentle persuasion, induce the production of the report after a considerable delay.

The Hon. ADAM SEARLE: Just on that, Mr McClintock, in relation to the issue of time standards, I am persuaded, and I think the Committee probably is too, that there shouldn't be imposed by a Parliament any particular time standard on the ICAC, whether for investigations or the production of reports. I think that would be not sensible for the reasons you and others have outlined. But the Bar Association did indicate this morning that it would see no problem, and I think, probably, would maybe even welcome a general legislative provision that required ICAC itself to develop and report against time standards and, of course, the ICAC itself does do some reporting.

BRUCE McCLINTOCK: I would have absolutely no difficulty with that myself.

The Hon. ADAM SEARLE: We could therefore interrogate. I mean, the inspector could monitor progress and where progress wasn't made—for example, in the most recent ICAC report, I think table 22 shows that there were five ICAC public reports and four of them were well outside the 60-day standard. But there's no explanation of why that was, so maybe that's something they could be required to do in their annual report?

BRUCE McCLINTOCK: Absolutely. I'd have no problem with that at all.

The Hon. ADAM SEARLE: The second proposition I wanted to explore with you is the submissions have said there shouldn't be a merits review of ICAC reports, and I personally agree with that, and that judicial review is adequate. But there has been discussion about whether or not, because that review is only available on

the Supreme Court, for good and proper reasons, it presents a financial or at least a psychological barrier for not-sophisticated litigants, if I can use that terminology, and that maybe an administrative version of that facility could be reposed in the inspector. I think we've had this discussion before.

BRUCE McCLINTOCK: We have. One thing I can say is if you do give the inspector power to engage in merits review—

The Hon. ADAM SEARLE: No. I don't think anyone is proposing merits review.

BRUCE McCLINTOCK: But I think you'd pick up what you are suggesting, Mr Searle, by giving the inspector power to review errors of fact and errors of law, which is in the LECC Act now.

The Hon. ADAM SEARLE: Is that in section 124 or is that somewhere else?

BRUCE McCLINTOCK: It is in section 124. I'm not quite so familiar yet with the LECC Act—

The Hon. ADAM SEARLE: I'll just look at what the ICAC inspector's powers are. At the moment in 57B (1) (c) it says the inspector can deal with, by reports and recommendations, conduct amounting to maladministration. Then it defines maladministration in clause (4) as conduct that involves action or inaction of a serious nature that is contrary to law. So, on its face, if the inspector of ICAC received a complaint that the report was made contrary to law—say, for example, for reasons akin to judicial review it fell foul—the inspector now could say that that is the case. But "maladministration" has a kind of negative moral overtone, so simply being made contrary to law doesn't—maybe it meets the statutory definition, but I think there would be a problem with that.

BRUCE McCLINTOCK: I'm probably more focusing on the error of fact point in the LECC Act.

The Hon. ADAM SEARLE: What can the LECC inspector do? Let's assume the LECC inspector receives a complaint and investigates and is satisfied that there was either an error of fact or an error of law, or both, made by the LECC in producing a report. What can the inspector do?

BRUCE McCLINTOCK: I'll speak completely hypothetically. What you can do is review the report and look at it, and there are two choices that the LECC inspector has. He can report to Parliament and say, "I think this is not good enough," for whatever reason. There can be problems with that, I might say, simply because you have to accord procedural fairness to anyone who is the subject of adverse comment in the report. For example, just say a police officer was exonerated of misconduct and the inspector thought that that police officer had been wrongfully exonerated. The inspector would have to accord procedural fairness before reporting to Parliament.

The alternative is to tell the commission to do it again, to make a recommendation. While the commission is not obliged under the legislation to do that, the inspector can require the commission to state reasons why they have not done that. One would imagine that, if that actually happened, the inspector would then report to Parliament raising the issue of why the commission hadn't followed a recommendation by the inspector. I might say that I have made one such recommendation to the Law Enforcement Conduct Commission and it has been accepted and they are reviewing the matter again.

The Hon. ADAM SEARLE: We are watching that very closely. But what that might do is, akin to the unseemly dispute that was occurring between the PIC and one of the other bodies that occurred in the past—you can have this unseemly spat between the inspector and the LECC. Obviously, sensible people would not let it get to that stage. If the body decides not to set the report aside and do it again but the inspector is satisfied—on one of the McDougal or Duncan examples—that it fell foul of those standards to say, "I will void this report and you can either do it again or not do it again, but this report was unsatisfactory," why shouldn't the inspector have that power, as the Supreme Court effectively does now?

BRUCE McCLINTOCK: I don't know how it would work.

The Hon. ADAM SEARLE: The inspector would have access to all the material.

BRUCE McCLINTOCK: I'm sure. I'm thinking about the formalities. How does the inspector do it? It would involve a radical change to the nature of the office of the inspector because the powers now, as inspector of ICAC, are to report to Parliament, which I regard as a very powerful weapon.

The Hon. ADAM SEARLE: It is.

BRUCE McCLINTOCK: Could I just, by the way, raise one thing? It comes out of some of the things I was hearing here this morning, which is not very often pointed out. What you have said about maladministration, Mr Searle, actually reminded me. The notion of corrupt conduct is extraordinarily broad. It goes, under the legislation, from things that you would generally regard as trivial to the very worst things that deserve terms of imprisonment. A finding of corrupt conduct is a very blunt weapon. To say, as happened in the Canterbury council

inquiry, that one particular person who gave a job to a person he shouldn't have given a job to because he was frightened of losing his job is corrupt conduct—it was found to be corrupt conduct—is a pretty severe finding when you think that the same finding was made against, say, Ian Macdonald or Eddie Obeid. I wonder whether a lot of the problems that have been discussed couldn't be dealt with by putting gradations in some way in there so that a person who is at the lower level—and I can say, too, that there are other examples I can think of. I've said this here. There were a number of reports that I disagreed with from the previous commissioners. One of them was the member for Drummoyne. I've forgotten her name.

Mr JAMIE PARKER: Angela D'Amore.

BRUCE McCLINTOCK: Yes. I thought that was a very harsh verdict.

The Hon. ADAM SEARLE: The same thing, I think.

Mr RON HOENIG: They're still chasing her for $120,000 in costs.

BRUCE McCLINTOCK: I thought that was a very harsh verdict and I didn't know that it was justified on the evidence before the commission. But that was before my time. Someone like that is just not in the same category as the other people we're talking about.

Mr JAMIE PARKER: The test now is serious misconduct. It's serious corruption now.

Mr RON HOENIG: Serious and systemic.

BRUCE McCLINTOCK: The actual provision, section 13A, says the commission is instructed to focus on serious corrupt conduct and systemic corrupt conduct. That provision was in there when the commission pursued the inquiry against Ms D'Amore, the member for Drummoyne. That was put in there as a result of my recommendation in 2005 and it has been there ever since.

The Hon. ADAM SEARLE: Mr McClintock, would a sensible approach then be to recalibrate the legislation, perhaps, to say that a finding of corrupt conduct will be limited to the high end of maybe even criminality but that the commission would be empowered to make findings of other misconduct.

BRUCE McCLINTOCK: Yes.

The Hon. ADAM SEARLE: So that things that would be disciplinary in nature that might warrant dismissal from office or sacking if you're an employee would be termed "misconduct" as opposed to "corrupt conduct".

BRUCE McCLINTOCK: That would be one rational, sensible way of doing it. I know the Committee is looking at this, but the other thing is that there was a review of the legislation in 2005. I've said this before. There was a review in 2015 of the legislation. It might be time for another comprehensive review of the ICAC Act taking account of everything. That is not a job application, I can tell you. I've done it twice.

The Hon. ADAM SEARLE: But thrice is the charm.

BRUCE McCLINTOCK: Sorry. I've distracted the Committee, although I am trying to be helpful.

Mr RON HOENIG: In relation to time standards, if we accept the Bar Association's submission, which we're attracted to, maybe the commission should also, when they report to Parliament, explain the delay within the report, because no-one has any idea what happens, other than at the public hearing, everything else occurs behind closed doors. At least, rather than waiting for an annual report, the commission would be required to explain in its report to Parliament the reason that it took so long.

BRUCE McCLINTOCK: Yes. I don't have any difficulty with that. Something has got to be done.

Mr RON HOENIG: As far as the inspector's powers are concerned, today I started getting attracted to the suggestion that Mr Searle made along the way, improved by your suggestion, which is it's not just 2012 and 2016, although these legacy issues have been on my conscience for quite some time. But Barry O'Keefe was restrained by the court from further hearing the Gibson matter. Often reforms are done to overcome problems. There is this powerful organisation with coercive powers, more powerful than a royal commission because with a royal commission you give them the terms of reference and you require them to report within a period of time. This commission can go anywhere because—

The Hon. ADAM SEARLE: Ambulatory.

Mr RON HOENIG: —Parliament says that it wants to stamp out this public sector corruption, legitimately so. But there needs to be, in my view, a check and balance in place beyond just an inspector writing a report to the Parliament. If they're embarking on a course that they shouldn't embark upon or alternatively they

go off the rails—they have enormous power. There needs to be some sort of mechanism of intervention beyond two or three years later writing a report to Parliament. We don't know what they're doing because we don't know other than their public hearings. The commission is not always going to be constituted by Peter Hall and two senior members of the bar. Already they've put in retired judges. We did those reforms in 2016 because we wanted senior members of the bar to come in and out of the organisation, not being captured. They bounced the Committee with two retired judges, and we never even got to speak to the Attorney about why the commission was so constituted. We haven't always had inspectors of your stature or Justice Levine's stature. They had Harvey Cooper initially. People of that quality don't grow on trees.

BRUCE McCLINTOCK: No, they don't. Can I say this, Mr Hoenig—I appreciate what you are saying—again, it is always going to come down to the people, it really is. Could I also say, again I probably said this before, governments love appointing retired judges. It's like the old line about no-one ever got sacked for buying IBM. No government is ever criticised for appointing a retired judge. But they have a couple of things against them. Firstly, they have been barristers, so they have no experience in managing an organisation like ICAC.

Mr RON HOENIG: Or can add up.

BRUCE McCLINTOCK: Secondly, they are going to be in their seventies. Why don't you pick a vigorous person in their fifties who can do it? The agency would be much better off picking someone with political experience, for example, but who has the necessary legal qualifications because that has to be there. The gene pool is very narrow for these agencies. That was a problem with the Law Enforcement Conduct Commission because it was originally restricted to Supreme Court judges or retired Supreme Court judges. There are not many of those and not many of those who are necessarily interested. The people of New South Wales are lucky they got the current chief commissioner of LECC, who is a Supreme Court judge. It has always been too narrow. I am not suggesting that the Government should go out and be cavalier or adventurous in who it chooses, but it is a very narrow gene pool to be pulling people from. I have hijacked the question again. I apologise, Mr Hoenig.

The CHAIR: That is okay.

Mr RON HOENIG: No, I always find it helpful. My view is the inspector needs to be part of the checks and balances beyond just writing a report to Parliament. We had the situation recently, again, where people just don't have anywhere to go. We had Councillor Wong from Hurstville, who killed himself. That is on top of somebody killing themselves in Operation Aero, right back to the Randwick Council inquiry, where a councillor killed himself.

BRUCE McCLINTOCK: I was counsel assisting in that inquiry, Mr Hoenig. I had to listen to the recorded suicide note of that solicitor on the Sunday before the public hearing started—one of the least pleasant experiences of my professional career. I might say this, one of the strange things about that is that none of those three people were anything approaching the prime target in the operation. The solicitor in the Randwick inquiry in the early nineties was not a target at all. He was just to give evidence about what he had observed about corrupt conduct in the town planning department. Ditto the one in Aero, and I am not completely familiar with the most recent one. At least it hasn't happened where, as happened in IBAC in Victoria, someone actually committed suicide on the premises of the agency. I might say, you probably know that my successor, Ms Furness, is undertaking an audit inquiry into witness welfare, which is something the Committee has been asking me to do for a considerable period of time. I am glad that she was able to do it.

There is just one other thing I should say about that, Mr Hoenig. The more functions you give the inspector, the more staff he or she is going to have to have and it would turn it into a very different office. That itself can be problematic. One of the attractions for me was that as inspector of ICAC I could combine it with an active career as a barrister for those five years. As you know, I have retired from the bar now. But if I had to do it full-time, it would have been considerably less attractive for me at that point in my career. I probably wouldn't want to do it now because I like the fact that it is part-time and I can do the other things that I have been wanting to do for a long time—like doing nothing, for example.

The Hon. ADAM SEARLE: Mr McClintock, it could be put on the same basis as the assistant commissioners in that case, couldn't it?

BRUCE McCLINTOCK: It could be.

The Hon. ADAM SEARLE: At the moment, they're technically part time. They're sort of resourced, if we can put it that way, more than the inspector.

BRUCE McCLINTOCK: Yes, they are because they've got the whole resources of the agency. They actually have a salary cap. I don't know whether you would know, but one of the commissioners was so

enthusiastic that he hit the salary cap and kept on working, despite the fact that he, in effect, wasn't getting paid for that. That was while I was inspector. There is a differential between the salary cap for inspector of LECC and inspector of the ICAC. I don't know whether you would know, but roughly the Government calculates it is 50 per cent of the salary of the chief commissioner. Bearing in mind the anomalously high salary, some would say, of the chief commissioner of the ICAC—which you know the history of; it goes back to Mr O'Keefe—the chief commissioner of the Law Enforcement Conduct Commission is paid the same rate as a Supreme Court judge. I think there's a 60 per cent uplift from the chief commissioner of ICAC, so the inspector of that agency gets considerably more than inspector of—or the cap is considerably more, although the Government showed some flexibility when they appointed me, I have to say.

The CHAIR: We are veering outside our terms of reference now.

BRUCE McCLINTOCK: Sorry, I know.

The CHAIR: That's okay. That's not your fault. I am just reminding members.

BRUCE McCLINTOCK: I'm just trying to be helpful.

The CHAIR: As you are aware, Mr McClintock, there may be some further questions that we send you in writing. Your replies will form part of the evidence and be made public. Are you happy to provide a written reply to any further questions from Committee members? Yes?

BRUCE McCLINTOCK: Would you like to see the submission I put in to the Federal Parliament?

Mr JAMIE PARKER: That would be great.

The CHAIR: Yes.

BRUCE McCLINTOCK: I will send it sometime later this afternoon.

The CHAIR: That would be much appreciated. As always, your insights are very much appreciated by the Committee. Thank you again for appearing before us today.

BRUCE McCLINTOCK: Thank you for having me.

(The witness withdrew.)

(Luncheon adjournment)

Mr EAMONN MORAN, KC, Victorian Inspectorate, before the Committee via videoconference, sworn and examined

Mr MATTHEW ZILKO, SC, Parliamentary Inspector of the Corruption and Crime Commission (Western Australia), before the Committee via videoconference, affirmed and examined

The CHAIR: We now will commence session seven. Mr Moran and Mr Zilko, thank you very much for taking the time to join us. We really appreciate it. We also thank you for your submissions to our inquiry. I just wanted to confirm with the two of you that you have been issued with the Committee's terms of reference and information about the standing orders relating to the examination of witnesses.

EAMONN MORAN: Yes, I have.

MATTHEW ZILKO: Yes, I have.

The CHAIR: Would either of you like to make a brief opening statement before we commence with questions? We can start with you, Mr Moran.

EAMONN MORAN: No, thank you.

The CHAIR: Mr Zilko?

MATTHEW ZILKO: No, nothing from me, Chair.

Mr LEE EVANS: Mr Moran, your submission notes that, unlike the IBAC Act, the ICAC Act does not require the ICAC to notify the inspector of the use of coercive powers. Could you elaborate on the operation of the statutory notification process in the context of the IBAC?

EAMONN MORAN: Certainly, I can do that. There is a range of provisions in the IBAC legislation, which is the Independent Broad-based Anti-corruption Commission Act of 2011 in Victoria. It requires IBAC to notify the VI—the Victorian Inspectorate—on a number of occasions. Each time they issue a confidentiality notice to a witness, they have to send the VI a copy. If IBAC issues a witness summons, they have to send the VI a written report on the summons. We also get a copy of the summons. When IBAC holds an examination—a private examination or a public examination—of a witness, they are required to send the Victorian Inspectorate a copy of the video recording and, if a transcript has been prepared, a copy of the transcript. If IBAC receives a complaint about the conduct of IBAC or of an IBAC officer, it's a statutory requirement to notify the Victorian Inspectorate about that complaint. And, if IBAC intends to hold a public examination, the IBAC is required, before announcing publicly that intention, to notify the VI of that intention and set out its reasoning as to why it wants to hold a public examination. So quite a range of material comes in. I think in the last financial year it was just under 700 separate items that we would have received from IBAC.

MATTHEW ZILKO: Can I make a comment on that, Chair?

The CHAIR: Yes, please.

MATTHEW ZILKO: I found Eamonn's comments very interesting there, because there is certainly much more obligation or a greater obligation imposed on IBAC than there is on the CCC here in Western Australia. We share one thing in common, and that is that the default position in Western Australia is that hearings will not be undertaken publicly. They will be undertaken privately unless there is shown to be a good reason why a public hearing is required. In that respect, Victoria and Western Australia are probably not aligned with New South Wales, where at least from the news it seems to be the case that public hearings are quite frequently held in respect of misconduct or alleged misconduct.

What I also found interesting, however, was that in Victoria a summons to a witness or the announcement of a proposed hearing has to pass by the Victorian inspector. I don't have that luxury here in Western Australia. The Corruption and Crime Commission can issue summonses off its own bat without clearing it with me first; I generally see the aftermath. On a quarterly basis I audit the commission's applications for surveillance devices, assumed identities, and any summonses issued to witnesses to appear before the commission. But as I say, the commission is not required to seek my comments or consent in advance.

I'm not sure whether the Victorian position is that the Victorian inspector has to give his consent or whether notice is simply given to him so that he can see in advance what is proposed, but certainly neither of those apply in Western Australia. I don't know what the position in New South Wales is, although, having spoken to Mr McClintock at times, I don't imagine that the situation in New South Wales is very much different from

Western Australia. Accordingly, the obligations that are inherent in the Victorian system probably don't apply in New South Wales as they don't in Western Australia. Maybe they're a good thing—

The CHAIR: On that note, Mr Zilko, would it be your preference to have that luxury similar to what the inspector has in Victoria?

MATTHEW ZILKO: Yes, I think it would be a good idea. My principal adviser is furiously taking notes and I think we might make some comments to our own joint standing committee about it; I am appearing before them next week. I think these are things that ought to be taken up. The history, of course, of integrity agencies is that New South Wales led the field, as far as I know. As each State then created its own integrity agency arrangements, it took the New South Wales model and probably tried to improve it where it could. Certainly, having written some submissions to you in July of this year and then having prepared myself to answer these questions this morning, I had a look at where changes have been made in the Western Australian legislation. I would say with some confidence that they have all been derived from the New South Wales legislation but attempts have been made along the way to improve them. But I don't think we've got as far as Victoria clearly has in that regard. I think we could do well to be informed in advance of what the commission was planning to do.

Mr RON HOENIG: Mr Zilko, you have power to annul determinations of the Western Australian commission and/or its officers if you deem it appropriate, if you investigate them?

MATTHEW ZILKO: Yes, I do.

The Hon. ADAM SEARLE: What provision?

Mr RON HOENIG: When you say in your submission—because I haven't read your Act—that you investigate misconduct of its officers or misconduct of the commission, what sort of misconduct? Does that include acting unfairly or acting improperly? Where is the line drawn?

MATTHEW ZILKO: Thank you for that question. It's the Deputy Chair, is it, Mr Hoenig?

Mr RON HOENIG: Yes.

MATTHEW ZILKO: Thank you for that question because it does allow me to make a comment about the ICAC Act compared to our Act. Your Act entitles the parliamentary inspector to consider matters of maladministration. That can be tardiness or it can be a whole range of things. It's not expressly stated, but I imagine it includes criminal conduct. All it says is that it can investigate matters where an officer or the commission has acted beyond the law or in breach of the law, but it doesn't specify that that's the criminal law as well as the civil law, although I assume it's intended to be so.

Our Act specifically provides that I can investigate criminal conduct on the part of a commission officer and/or the commission. That's a power that has been utilised by my predecessors on occasions. I haven't had the opportunity to do it, and I hope I never have the need to do it. Certainly, on occasions, my predecessors have exercised that power and, on one occasion, called an inquiry into misconduct on the part of commission officers and then published a report, which was tabled in the Parliament. The answer to your question, in a nutshell, is that my power is fairly extensive in that regard. It starts at one end of the spectrum, with what might be regarded as misconduct of a minor kind—perhaps laziness, rigidity of thinking or a failure to properly analyse a complaint and act upon it—right through to the other end of the spectrum, where there could be criminal behaviour punishable by not less than two years' imprisonment, which is the specified figure in the Act. There is quite a lot of power there for the parliamentary inspector.

On my reading of the ICAC Act, it is certainly not articulated to that extent in your Act. Maybe that is a good thing because it would not need each new parliamentary inspector to meet and make arrangements with the ICAC commissioner each time a new appointment occurs. As I understand it, from talking to Bruce McClintock, he enters into a memorandum—or he did before he ceased to be the parliamentary inspector. He entered into a memo of understanding at the commencement of his role with ICAC, and that then paved the way for these things to happen. It was not laid down in the Act. I think the better course is to actually legislate it so that there is no misunderstanding and no occasion where ICAC won't cooperate with the parliamentary inspector.

Mr RON HOENIG: The one thing that we've been pursuing this morning is that, under the New South Wales Act, the power of the inspector ultimately is that he can go and look at all of these things and have access to all of these things, but all he can do is report to Parliament and make recommendations or report to Parliament what his determination is, which is no protection for individuals who may have been wronged or had reputational damage. We have been exploring today whether or not the inspector should have either the sort of power that you have or something beyond just the ability of writing a report, which doesn't seem to deal with the checks and balances that you need to have for a commission that has such coercive and strong powers.

MATTHEW ZILKO: Yes, I think there's something in that. I should be clear that, in terms of the commission's power here, if it makes findings against a third party, such as a parliamentarian or member of Parliament, I have no power to overturn that decision. My power to overturn is confined to misconduct on the part of the commission or its officers, including right up to the top—the commissioner himself. If I find that they have misconducted themselves in some way, either criminally or civilly, I have the power to call for the file, annul that decision and I can, of course, undertake an inquiry which clothes me with the powers of a royal commissioner to sort out any matter which pertains to that issue.

I do have that power, and I don't think that power necessarily resides with the ICAC parliamentary inspector. I can't be sure about that, and I might be corrected by someone at your table. As I understand it, that power is vested very clearly in me and not nearly so clearly vested—if it is, in fact, vested at all—in the ICAC parliamentary inspector. The answer to your question is, yes, I can act more quickly. I don't have to wait until something goes to the Parliament. But that's only in respect of commission officers, not in respect of a third party, such as a member of Parliament who the commission may make findings against.

The Hon. ADAM SEARLE: Mr Zilko, you're right. Our inspector doesn't have that power. He can do many of the things that are found in your section 196. There's no appeal against any findings by the ICAC but there is the power, of course, in our Supreme Court for judicial review. But that's an administrative law function. There has to be some admin law remedy or some defect in the report or in the way in which it was reached.

MATTHEW ZILKO: Yes.

The Hon. ADAM SEARLE: One of the things we've been discussing at our end is that obviously going to the Supreme Court can be expensive, but it's also quite intimidating to individuals who may not be sophisticated litigants. So one of the things we've been wrestling with is should our inspector, or someone like our inspector, be given that kind of function—the ability to not just hear a complaint but, if satisfied that the report was made not according to law, whether the inspector should have the power to, to use your language, "annul the report"? Do you have any views about that?

MATTHEW ZILKO: I certainly think that those powers that have been vested in me are—if you're going to have an integrity agency and then have someone such as a parliamentary inspector overlooking it and overseeing its conduct, and making sure that it—that integrity agency—doesn't break the law itself, then I would think that at a very minimum you could do well to have the powers that I have. So I would commend it to the New South Wales joint standing committee that those powers be introduced into your legislation.

The Hon. ADAM SEARLE: Mr Zilko, what's your resourcing like? Are you full time? Are you part time? What sort of staffing support do you get? Lastly, have you ever had to use these extraordinary powers?

MATTHEW ZILKO: I myself have not used these extraordinary powers. I've been in a five-year term for two years now. My staffing is what you might call minimal. I have a principal adviser who is a lawyer—and a very capable lawyer at that—who does most of my research for me. She and I work together on each case. Other than that, administrative, financial and other backup is provided by the Department of Justice. The cut-off is that only I and my principal adviser have access to the files that we receive from the Corruption and Crime Commission. So all the backup that I get administratively and financially, in terms of preparing financial reports and annual reports, that is given to me by the Department of Justice is confined to just that. Only myself and my adviser see the files that I call for and are delivered to me by the Corruption and Crime Commission.

In terms of my own position, I work three days per week. That is thought to be appropriate, although we've had a big jump in complaints, as you will have seen if you have read the letter that I sent with the annexure. When I came to the position I asked the commission to include a reference to my office because I had a sense that the public wasn't aware of the Office of Parliamentary Inspector—or some people weren't—and, therefore, were not aware of rights that they had in respect of reviewing the commission's result or outcome of a complaint. So I asked them to add a paragraph at the end of their closure letters to people who had complained where the commission was advising that person that they did not see serious misconduct or corruption. They did that and the number of people coming to me jumped quite markedly. It's now over 100—how many is it now, Sarah? Something in the order of 120 a year now. That's a good thing because every time I receive a file that I call for from the commission, I'm in effect auditing the commission's behaviour and procedures.

So 120 times a year I'm looking at a file and seeing things. Most of the stuff is fine and on most of it generally I will probably agree with the commission's conclusions. But there have been times when I have strongly disagreed with the commission's conclusions and have explained carefully why. The commission, to its credit, has usually acted in accordance with my wishes, if I've asked it to review something or to reconsider it and find its way to an alternative conclusion. This includes conduct by the police as well as by people in the commission itself

and, of course, departments of government. We're happy at the moment. It may be that I'll go to four days, but at the moment we're working well with three busy days. Sometimes it lapses into four.

I have noticed your number of complaints, and this was in my letter too, even if I take into account the police inspector, who is now Mr McClintock, even if we add the police inspector or if we add the number of complaints about the police to the number of complaints about people other than the police, they still don't add up to the numbers that we're getting in Western Australia, which is counterintuitive, as I said in the letter, because your population's four times our population. I just wonder whether in fact people are aware of the parliamentary inspector's role and powers and, indeed in your case as well, the police inspector's role and powers. It may be that I'm saying more than I should and making work for Mr McClintock in his new role and Ms Furness in her role, but I do commend the greater knowledge by the public of the powers of the parliamentary inspector so that reforms that are intended to be done under the Act can in fact be done.

Mr RON HOENIG: Mr McClintock would say that the reason for the lack of complaints is because of the quality of appointment of the commissioners.

MATTHEW ZILKO: I wouldn't quibble with that.

Mr RON HOENIG: I have a recollection—it's well before your time, many years ago—the late John D'Orazio, the member for Ballajura and former police Minister, was actually exonerated by the parliamentary inspector after some adverse findings by the corruption commission.

MATTHEW ZILKO: Yes, he was.

The CHAIR: I have a question—

MATTHEW ZILKO: Yes, he was.

The CHAIR: Sorry, did you want to continue?

MATTHEW ZILKO: No. I was just saying to Mr Hoenig I am fully aware of that case, and that's a very good case in point where a Minister was basically disgraced or had his name blackened by the commission and the parliamentary inspector reversed the whole situation by effectively calling a mini-royal commission, calling witnesses and making a finding to Parliament that Mr D'Orazio had been wrongly named. So, yes, you're right—that power is important.

Mr RON HOENIG: It didn't rescue his political career, though, did it?

MATTHEW ZILKO: No. He retired after that and I think he was probably still quite bitter about it. But at least his name was restored, having had it, as I say, blackened by the commission's findings.

The Hon. ADAM SEARLE: Mr Zilko, how often has that extraordinary power reposed in your office been used to your knowledge, apart from that occasion?

MATTHEW ZILKO: I'd say less than half a dozen occasions since the Corruption and Crime Commission started in 2004.

The CHAIR: Mr Moran, I just have a question to you. You mentioned before, if I heard you correctly, that there is a statutory requirement for IBAC to advise you if, for example, they're going to have a public hearing. Is that correct?

EAMONN MORAN: That's correct, yes.

The CHAIR: And so they have to advise you, but do you have any power then to intervene in that process?

EAMONN MORAN: No. I felt that there's a few things I have to really clarify. They do have to tell us, "We're intending to hold a public hearing and these are our reasonings." We can review the reasons and decide, for example, whether we think there is an issue as to whether the criteria for a public hearing are met—the issue about exceptional circumstances, or public interest, or no unreasonable damage to a person's reputation, or if the conduct is serious or systemic. So we can raise those issues, but they don't have to get our consent. We have found they will take into account what we say. On occasions that has led to changes, but it is certainly not a consent.

I should also clarify that, with respect to a summons, they notify us of the issue of a summons. They don't need our approval to issue a summons. The advantage of getting the summons early is that you can look at it and there may be some issue on the face of the summons that you can see where it's not complying with one of the statutory requirements, and they might then have an opportunity, before the person has been examined, to reissue the summons, withdraw what's been issued and correct the matter. So you have an opportunity to fix things up in

real time. But if I could just please add, with respect to the powers, we certainly don't have powers to overturn a decision of IBAC.

Like New South Wales, we can make a report. We can make a public report. We can make recommendations, and indeed our legislation says we cannot make a finding that a criminal offence or a disciplinary offence has been committed. We are limited in that regard. And it's not a power that I would seek to overturn a decision. That is quite a big policy decision. The reality is if you raise issues in a public report and through the procedural fairness process IBAC always has the opportunity to reconsider what it's done and review its decision-making without the power in us to annul anything they've done.

The CHAIR: Thank you very much to both of you, both for giving us your time today to answer some of our questions and also for your submissions. We may also send you some further questions in writing. Your replies will form part of your evidence and be made public. Are you happy to provide a written reply to any further questions from the Committee?

EAMONN MORAN: Yes, certainly.

MATTHEW ZILKO: Yes.

(The witnesses withdrew.)

Ms GAIL FURNESS, SC, Inspector, Office of the Inspector of the Independent Commission Against Corruption, affirmed and examined

The CHAIR: Would you like to make an opening statement or some comments before we have questions?

GAIL FURNESS: I would, thank you. It might be useful to the Committee to understand the steps I've taken in the five months or so of being in the position. It may have some bearing. First, I've determined to undertake regular audits—certainly annually, if not more than that. The first, as you know, is into witness welfare—the shorthand term for those who are engaged with the commission's investigations. That's well underway and should be completed this financial year. Secondly, and following on from what my West Australian colleague said, I too am concerned that the awareness and knowledge of the role of the inspector is considerably underdone. Twenty-nine complaints were received last year and, to me, that suggests that there is less knowledge out there of the role of this position than there should be. The first step is there's an article appearing in the next edition of *Bar News*, which is a—

The Hon. ADAM SEARLE: It's a much-read publication.

GAIL FURNESS: —much-read publication by hundreds of people. But, nevertheless, it gets to those who are appearing before the ICAC, and they're the ones who will know if there are any concerns. There's an article appearing next edition. But that's the first step of increasing the profile. I have a new memorandum of understanding with the new chief commissioner and commissioners, and I've expanded the number and range of documents that they are to give me. Of course, it's an agreed memorandum, so I'll be getting more information from them. Fourthly, the *Information For Witnesses* brochure that the commission provides witnesses now includes a screed about the role of the inspector, to give them that information. Finally, I have redrafted the inspector's complaint handling policy to encourage oral complaints and anonymous complaints. Putting all of those together, I should be in a position to have more information to carry out my functions.

Can I just deal with two other matters in addition to that? There was a comment this morning about a conga line of complaints. Unfortunately, that's not the case. Twenty-nine complaints is not, to my thinking, a conga line. Of those 29, 16 were out of jurisdiction. That's not terribly many valid complaints, if I can put it that way. Secondly, following on from Mr Nicholson, like Bruce McClintock—in fact, in an expanded form now—I receive a lot of information about investigations, including preliminary investigations and investigation progress. That information is all available to me.

The Hon. ADAM SEARLE: Ms Furness, I'm just having a look at your brief submission in relation to time frames. I am certainly persuaded—and I think the Committee probably is also—that the imposition of some kind of blanket statutory time frame for the ICAC is not desirable. But the bar indicated this morning that it saw no problem with it and, I think, would even welcome a legislative regime that required the ICAC itself to develop KPIs or time standards and to report against them as, in fact, it already does. But what is missing in its annual reports is the explanation for delays. For example, at page 58 of the current annual report, there are five public reports that are referred to and four of them are outside the 60- or 90-day benchmark that the ICAC set for itself, which is fine, but there is no explanation in the annual report as to what informed those delays. One of the things we are going to consider is perhaps whether they should be required by law to develop their own benchmarks to report against for the inspector to have oversight and for there to be a statutory responsibility to explain why matters have gone beyond. Would that seem to you to be a sensible regime?

GAIL FURNESS: I generally support the Bar Association's submission as to time frames. It certainly shouldn't be legislated but there should be, determined by the ICAC with consultation, KPIs—for want of a better word—and they should report against them in the annual report. It is the case in the last two reports that the commission has set out the reasons for the delays.

The Hon. ADAM SEARLE: In a global sense.

GAIL FURNESS: In each of those reports. It has done that in each report, which is a different matter from the annual report. Whether it needs to be legislated, I'm not sure. But, certainly, they should do it and they should give reasons for the delays. Perhaps my one area of tweaking the Bar Association's approach is that at the end of the hearing a timetable is set for submissions. In my view, consideration should be given to the commission at that stage saying, "This is the timetable. Subject to this being met, this is an indicative period as to when the report will be furnished to Parliament."

The Hon. ADAM SEARLE: The ICAC determines that the public inquiry ends when final submissions are received by it, as opposed to the last day of the hearing, for example.

GAIL FURNESS: It does, but that doesn't necessarily differ from my point, which is that at the end of the hearing they know how complex it is.

The Hon. ADAM SEARLE: They set a timetable that is publicly known.

GAIL FURNESS: They set a timetable for submissions. That is right. If that changes, they generally tell people on the website what the submissions timetable is and when it is extended. At that stage, they should be able to give an indicative time frame for the furnishing of the report to Parliament. Things might change. They can inform people via the website if things change and why that indicative time frame won't be met.

The Hon. ADAM SEARLE: Mr Robertson indicated that, even after a final hearing, sometimes there are further investigations that are undertaken. I guess you wouldn't want to necessarily give that away in a public space. But, if there are changes to timetables, there could be a general explanation, I guess.

GAIL FURNESS: There could be a general explanation.

The Hon. ADAM SEARLE: The second point I would like to explore with you is about the judicial review mechanism and the role of the inspector. Everyone seems to be saying there shouldn't be a merits review from ICAC reports, and I certainly have always thought that is the case. The question is whether the judicial review mechanism reposed in the Supreme Court is, in a practical sense, not readily accessible to non-sophisticated parties—people who are caught up in an ICAC proceeding who do want to make a complaint but are either intimidated by the notion of going to the Supreme Court or it just seems, for one reason or another, inaccessible. We were just hearing from the WA parliamentary inspector, who has a power to essentially annul a decision of their commission over there in certain circumstances, about whether or not the inspector or a body like the inspector should have as one of the tools in its toolkit not merely the writing of a report to Parliament but also, if a report was made contrary to law, the power to make that finding and to set it aside.

GAIL FURNESS: Certainly I have powers to investigate complaints of maladministration contrary to law, oppression et cetera. So that power is already there.

The Hon. ADAM SEARLE: You can do a report.

GAIL FURNESS: And if that's done, then what can happen as a result of my exercising that power. I must say, I'm more inclined to agree with my Victorian colleague. To provide that power to an inspector who's part-time—I have half a staff member—would require a fundamental rethink of the role and resources of the inspector. We have judicial review. We have the Supreme Court eminently qualified and resourced to make decisions, as Mr Campbell said before, quashing a report. In my view, that power should probably be exercised by the Supreme Court. But, from the discussion I've been listening to this morning, I'm not sure that it's appreciated that the power or functions or role that I have are quite significant in terms of receiving complaints. And I appreciate that the end result of writing a report is considered somewhat wanting, by the discussion this morning.

I agree with Mr McClintock. It's a very powerful tool to make a report to Parliament. It's public, it can be reported on and people's conduct changes as a result of that. Scott Robertson said he reads the report. Commissioners read the report. They change their behaviour or adapt their behaviour on the basis of that. So I think that's a very powerful tool. If one is concerned about reputation, which one always should be, it's very difficult to fix someone's reputation after a body with the power to say "You've done the wrong thing" says it. Because, again, as Mr Campbell said, what happens in the court is then it goes to the Court of Appeal and the Court of Appeal says, "No, they didn't do the wrong thing." That's it. Someone says they did; someone else says they didn't. It's about the publicity that's attendant upon those comments rather than finding some other way of doing it.

The Hon. ADAM SEARLE: Inspector, I agree with you about the power of your office at a systems level. But if you're an individual who's on the receiving end, it doesn't really provide an answer in that circumstance, does it? Because if the Parliament receives an ICAC report that says certain people have done certain things wrong, and then there's a report from the inspector saying that actually the ICAC got it wrong or its report wasn't made according to law, the ICAC report still stands. There's no way of reconciling the two reports.

GAIL FURNESS: What happens if it goes to the Court of Appeal and the Court of Appeal says that the ICAC got it wrong?

The Hon. ADAM SEARLE: I guess they set aside the ICAC decision. It gets quashed, doesn't it? It has done in the past.

Mr RON HOENIG: Unless it's legislated out of the court.

GAIL FURNESS: If they do that, then that's the result, and again it comes down to the publicity of the Court of Appeal decision.

The Hon. ADAM SEARLE: Sure, but there's a least a decision. At least in that circumstance the offending report—you're right, the damage may be done to the individual, but at least at a formal level the offending decision has been set aside. In the current legislative regime, it's still there.

GAIL FURNESS: I'm also a bit minded to agree with Scott Robertson when he said you were just creating another layer, and that layer—that is, a decision of mine—would be subject to review. So if the person didn't like my finding, then there would be the Supreme Court available. To me, it adds another layer rather than solving the problem.

The Hon. ADAM SEARLE: What is the solution to the problem, then?

GAIL FURNESS: The solution to the problem is that you have a commission that is constituted by three people. All of you have a role in saying who those people are, and there's a rigorous process. So they are chosen transparently and under rigour. As Bruce McClintock says, at the end of the day, individuals are making decisions. That, I think, is significant. There are checks and balances. There's me; there's you. I understand what you say, Mr Hoenig, but nevertheless this is being publicly broadcast. People can listen and read transcripts. They are all proper mechanisms. There's an annual report that they have to write, the commission. I write an annual report. You can review that. It's publicly available. I am not sure that there is such a want of checks and balances.

Mr RON HOENIG: As even Mr McClintock conceded, though, we introduced some legislative reforms to overcome, as Mr McClintock describes, the behaviour of the commission between 2012 and 2016, and it relates to the quality of the appointments. As you probably heard in the exchange between he and I, there have been some unusual appointments. As you know, judges might be terrific to start with, and then they become different. The checks and balances are needed not for when the appointments are good, where you have an eminent person like Peter Hall as the chief commissioner and there are two senior members of the bar coming in and out, which means that they are maintaining, as you are, your values as a barrister. You are not subject to that agency capture that can happen.

But there is still a range of people during 2012 to 2016 where inspectors have found maladministration and unfairness, who have no remedy. There are people who have suffered who didn't have corruption findings against them but have no remedy. They don't even have access to judicial review. The matters that have been troubling us haven't been since 2017; they have been the legacy matters, and they can happen again unless checks and balances are put in place. We have been grappling now for some years about what that should or should not be. It is fine when you have someone like Bruce McClintock tell you, "I know what's going on and everything is fine." You accept what he says. If he does an audit or you speak to him and he looks at certain behaviour and rectifies that, even if it is informally done, that is fine too. But it is not always going to be like that. There is this powerful organisation that can write its own terms of reference, that can run its own timetable, that can interfere, even rightly, with the democratic fabric of the State, that has in the past gone off the rails.

We just heard from the West Australian parliamentary inspector it did go off the rails with a police Minister. I think, for my part, I am looking at some mechanism for checks and balances to ensure the reputation of the commission is enhanced so we don't get to the stage where its reputation is impacted upon. The other corollary of it is that we are all politicians and we don't want to get to the stage where it takes a major failing of the commission before Parliament intervenes because everybody is hugely worried about tinkering around the edges lest they are seen to be soft on corruption. It requires a major error like the Cunneen matter or something before ultimately Parliament intervenes. We never want to get to that stage again.

GAIL FURNESS: Can I suggest what I think the current checks and balances are that are significant? The first is procedural fairness. Always the commission was subject to procedural fairness, but now it is writ large, if you like, and available for others to see in writing, rather than just having a knowledge of how it applies in law. That is quite significant, that that applies and that by having to publicly afford that provides a safeguard that the work is happening more fairly. I hope that my increased audits will provide an avenue into the ICAC to see what they are doing in specific areas and make recommendations for change, if that is available. I also think more people understanding the role and complaining is a greater source of information, because ultimately what you are saying is we need to know what is happening in order to do something about it. It's about acquiring knowledge, and the matters I set out before are all about acquiring more information. I think my powers are sufficient and the functions are sufficient to do something with that information once it's obtained. That, to my mind, will go some way towards allaying your concerns that no-one knows what's going on. I do know what's going on and I will know more about what's going on and, in my view, I've got the functions and powers to do something about it.

Mr LEE EVANS: I am just adding another layer. Inspector, the submission from Mr Nicholson recommends that the inspectors be given a function to ensure that the public interest has been thoroughly considered, including the power to retain counsel to argue against holding public inquiries. Do you think that this would be a helpful addition to the inspector's existing powers?

GAIL FURNESS: On that topic, we heard from Victoria in that the IBAC are required to tell the inspector and give reasons for proposing to hold a public inquiry. Now there's some attraction to that. It's certainly not a power of veto and nor should it be, but it provides an avenue for intervention if that was thought to be necessary. I'm not sure whether one needs to retain counsel and go through that process; I'm sure there's a simpler way of dealing with it. But there's some attraction in being told beforehand about a public inquiry and why.

Mr JAMIE PARKER: "There's some attraction"—that's very interesting. We will perhaps have to try to determine what that means.

Mr RON HOENIG: It's lawyers' talk.

Mr JAMIE PARKER: It is. One of the challenges that we have is trying to work out how we can present these to the ICAC in a way that has substance and can be operationalised. One of the things that has often come before us from the ICAC when they talk about delays or issues about capacity to take on further matters is the funding arrangements. That's one of the things we've often asked the inspector about. I note that you've only been here for a relatively short period of time and your submission says that, but you're still forming a view around the adequacy of the powers and so on. A lot of the issues that we raise go to the heart of the capacity of ICAC to report in a timely manner, to do the reports and to do the investigations adequately. Do you think that the funding arrangements that have been put in place will be resolving issues, from your perspective? I know that the inspector looks at operational issues, but funding is a critical part of that. Are you confident that those arrangements mean we won't be seeing these explanations of delays and so on based on funding issues?

GAIL FURNESS: The new commissioners are the recipients of the new funding. It's a matter for them to allocate those funds so as to reduce the sorts of delays that we've all seen. Really, it's a matter for them to decide how they are going to allocate the money. They do say in the annual report and elsewhere that this is the largest, I think, influx of money for some time. One would like to think that it will do the job, but I certainly can't guarantee that. I think we all can see what they do with the money and see if there are changes, particularly to delays. Certainly, the commissioners are saying that they were going to have something like five new lawyers and, presumably, that's significant in terms of writing reports because they have a real role to play in writing reports.

Mr JAMIE PARKER: That goes to the question that the Council for Civil Liberties raised, which said that we should give them some time and that, if they do determine to reduce the length of time that reports take, we can have a wait-and-see approach for 12 months or so. Do you think that's reasonable? Do you think that the Committee should be considering the discussion that was put forward by the Bar Association and others this morning in setting these standards?

GAIL FURNESS: No, I don't think you should wait at all. I think the standards should be put in place, and if the new commissioners improve on the time frames, good on them. They're using the money wisely and they're doing presumably what they'll tell you they will do.

Mr JAMIE PARKER: Fantastic. Thank you.

The CHAIR: Any other questions? Ms Lindsay, do you have any questions? No.

GAIL FURNESS: That's quick.

The Hon. ADAM SEARLE: Quicker than anticipated.

Mr JAMIE PARKER: There's nothing controversial yet. Give it a year or two, and we'll see.

The CHAIR: If there are no further questions, you are getting an early mark.

The Hon. ADAM SEARLE: On this occasion.

The CHAIR: On this occasion, yes. We'll see you again. As you know—

Mr RON HOENIG: Your predecessor never got out of here this lightly.

GAIL FURNESS: I think the challenge is going to be to use the terms "she" and "her" for the next five years.

Mr JAMIE PARKER: Well spotted, yes.

The CHAIR: Thank you again for appearing today. We may also send you some further questions in writing. Your replies will form part of your evidence and be made public. Are you happy to provide a written reply to any further questions, should there be any, from the Committee?

GAIL FURNESS: Of course I am.

The CHAIR: Thank you very much, Ms Furness, for joining us again today. We appreciate it.

(The witness withdrew.)

(Short adjournment)

Mr JOHN HATZISTERGOS, Chief Commissioner, NSW Independent Commission Against Corruption, sworn and examined

Ms HELEN MURRELL, SC, Commissioner, NSW Independent Commission Against Corruption, affirmed and examined

Mr PHILIP REED, Chief Executive Officer, NSW Independent Commission Against Corruption, affirmed and examined

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

The CHAIR: We will commence with our final session today. I formally welcome our final group of witnesses. Thank you all for joining us again today. Can you please confirm with us that you have been issued with the Committee's terms of reference and information about the standing orders relating to the examination of witnesses? I'll have to ask you to all respond.

ROY WALDON: Yes.

PHILIP REED: Yes.

JOHN HATZISTERGOS: Yes.

HELEN MURRELL: Yes.

The CHAIR: Thank you very much. I would just like to ask if any of you as witnesses would like to make opening statements before the commencement of questions from members.

JOHN HATZISTERGOS: Thank you, Madam Chair. I might make a brief opening statement, which might be the subject of further questioning by members of the Committee after I've concluded. Firstly, this is the first occasion that Commissioner Murrell and I appear before you. I do pass on the apologies of Commissioner Paul Lakatos, SC, who is overseas at present and is unable to join us. On behalf of all of the commissioners, I wish to assure you of our cooperation and our readiness to assist you in any way we can to advance your important role in overseeing our activities. Thank you to the Committee for providing us with this opportunity to address the commission's submission in relation to the matters which are outlined in your terms of reference. I will be happy—as well as my colleagues—to elaborate on some of the matters that no doubt will be of interest to you in the course of your consideration of those terms of reference.

If I could firstly seek the indulgence of the Committee to summarise what the new commissioners have been addressing since we took up our roles on 7 August 2022, which is when Commissioner Murrell and I commenced in our roles—we were subsequently joined by Commissioner Paul Lakatos as a part-time commissioner on 12 September 2022. To give you some context to what we encountered when we arrived as commissioners, we inherited five unfinished investigation reports that had not been able to be completed by the commission during the tenure of the previous commissioners.

Of these, the first of those reports, Operation Skyline, has been completed and has been presented to the Presiding Officers and publicly released last month. In relation to the remaining four reports, the commission is conscious of its obligation under section 74 (7) of the Independent Commission Against Corruption Act to furnish those reports as soon as possible after it has concluded involvement in the matter. Their finalisation in the shortest possible time frame is of importance not only to the persons concerned and the broader public but also to the commission itself, as the resources are needed to be deployed elsewhere as soon as those investigations have been completed.

To give you some idea by way of update of where we are at the moment, in the whole of last year there were 10 matters which had been advanced for preliminary investigation. So far this year there are six matters that have been so advanced. We have seven matters advanced to a full investigation as we speak. If the current rate of complaints received by the commission continues this financial year, we are likely to eclipse the record of 3,507 matters received in 2021-22, which itself was the highest number received by the commission since 1995-96. I state this to indicate to you that whilst the completion of the reports is a priority, that completion has to be seen in the context of the commission's other workload, which also has to be addressed.

I now want to proceed to say something to you about the outstanding reports to give you some idea of where they are and to provide you with some perspective. I am aware that some of you have complained that ICAC hasn't been as forthcoming as it should be, but a lot of this information that I am providing is available on our website. In relation to Operation Keppel, that report is still in preparation by the Hon. Ruth McColl, AO, SC, who has been engaged for the purposes of now finalising that report, including participating in the review and

editing processes. The Operation Keppel inquiry commenced on 21 September 2020. On 1 October 2021 the commission announced it would conduct a further public inquiry as part of Operation Keppel. That part of the public inquiry commenced on 18 October 2021. The last sitting day was on 1 November 2021.

In total, the public inquiry was conducted over 30 days. The submissions of counsel assisting were provided to the relevant persons or their legal representatives on 15 February 2022. Submissions in response to the submissions of counsel assisting were provided to the commission by 28 March 2022. Some parties requested and were granted additional time to prepare their submissions. The last submissions in response were received on 9 May 2022. Additional submissions had been provided to the commission to select parties on discrete issues on 27 April 2022 and 6 October 2022, and respective responses were received on 4 May 2022 and 18 October 2022. The record of the commission in finalising that report needs to acknowledge that the investigation has thus far involved 2,802 pages of transcript, 516 exhibits comprising 10,877 pages, and submissions comprising a total of 957 pages. Contrary to what you may have been informed earlier, the time line for submissions in that investigation is publicly available.

In relation to Operation Paragon, I'm overseeing the finalisation of that report in conjunction with the commission solicitor who was assigned to the public inquiry on that matter. Operation Paragon commenced on 10 May 2021. The last sitting day was 29 March 2022. In total, the public inquiry was conducted over 35 days. The submissions of counsel assisting were provided to the relevant persons or their legal representatives on 11 May 2022. All submissions in response were received on 22 June 2022. Counsel assisting responded to the submissions of one party on 29 June 2022. The party provided further submissions on 13 July 2022. The record of the commission needs to be considered in the context of an investigation which involves 3,038 pages of transcript, 157 exhibits comprising well over 10,000 pages, and very extensive submissions.

Our submission details the review, proofreading, layout and editing processes involved in the publication of the reports. I can advise in relation to both of those reports, which are time sensitive, that the commission, wherever possible, has sought to advance some stages of the finalisation of those reports, which would normally be done at the conclusion of the report being prepared, to an earlier stage. The capacity to do that is limited in circumstances where the report remains to be finalised.

There are two further reports that are under preparation. They are not time sensitive in the sense that they're not outside of our KPIs. They are Operation Tolosa, which is being looked at by Commissioner Lakatos. That also has involved a large number of hearing days—31 days—2,789 pages of transcript, 93 exhibits comprising multi-volumes of material, and very extensive submissions. That inquiry commenced earlier this year, on 26 April 2022, and the last sitting day was 4 July 2022.

Operation Galley is the last of the public hearings that was conducted under the previous commissioners. Stephen Rushton, SC, was the presiding commissioner, and the Government agreed to provide for him to be reappointed as an assistant commissioner. He is involved in the preparation of that report. The last sitting day for that inquiry was 3 August 2022. The public inquiry took 26 days. Again, there were 2,178 pages of transcript, 250 exhibits comprising well over 10,000 pages, and very extensive submissions. I have outlined what is occurring in relation to those four reports to, hopefully, give you some idea of the arrangements which were put in place shortly after I became the chief commissioner, with a view to enabling the remaining four reports that we inherited to be completed and presented to the presiding officers at the earliest opportunity.

The commission's resources have been deployed to ensure that the reports are completed as a matter of priority, but that has necessitated some delay in other work that the commission would otherwise be undertaking. Moving forward, we will be assisted with an additional 17 full-time equivalent positions, which the commission has received funding for in the 2022-23 budget. Once those staff resources are able to be recruited, I am optimistic that the new resources, once deployed, will assist in ameliorating the kinds of delays outlined in what I have described so far with the four reports mentioned, to the extent that they are delayed, but, more broadly, the other investigative reports that the commission has been preparing.

The commission's submission argues that the timeliness of reporting is a product of the complexity of the matters and the available resources. Whilst I accept that to be the case, I do not discount the opportunity for us to reflect on the past and introduce effective strategies intended to avoid, as far as possible, delays and to reduce delays between the finalisation of public hearings and the production of the commission's reports to the Parliament. It is in no-one's interest that there be a delay any longer than is necessary. In my view, a long delay between the finalisation of the public inquiry and the publication of the report potentially undermines the effectiveness of the public exposure in the public inquiry. I'll be happy to discuss these or any other matters.

The CHAIR: Are there any other introductory comments?

HELEN MURRELL: Not from me, thank you.

Mr LEE EVANS: I have one question from what the chief commissioner has been speaking about. I will forgive you if you don't know the answer, but is there an inquiry budget, so to speak, for how many inquiries you can take on in a year due to your staffing and everything else around that? You've obviously got inquiries on foot, but taking on more and more inquiries through the period of 12 months, is there a point where you've got to say, "We can't do any more this year?"

JOHN HATZISTERGOS: Our resources are not infinite, but we manage the resources. The resources that we have are adequate, as I see it, moving forward, unless we get that tsunami of new matters coming in. I think I can say that. Our priority is serious and systemic corruption.

HELEN MURRELL: I might add that from my observation as an incoming commissioner, the commission is extremely selective about, of the many complaints that are made, what matters are taken forward for further investigation. There's a very early filtering which weeds matters down to those where there appears to be some clear evidence and some very significant allegations that are made. But that depends on how many serious complaints are made, of course.

Mr LEE EVANS: Again, you're new to the position, so we can't hold you responsible for the historic inquiries. My concern and the Committee's concern is the length of time it takes to get through to the report and the findings. If you're taking on more cases and starting inquiries as well as still—

JOHN HATZISTERGOS: Perhaps I can answer that question. In 2015-16, I think it was, the commission's budget was effectively cut to the point that the commission had to let go of 10 per cent of its staff. The commissioners at the time took the view that their functions had not changed. There was nothing in the Act that said they would not investigate matters that are serious corruption or systemic corruption. The way it adjusted to that challenge was, in part, through some of the delays you've been seeing—the blowout in the timetables and the KPIs. That's the situation. As I indicated, I see some redress to that situation as we move forward, particularly with the increase in the budgeting that we've been granted as a result of the last budget. Does that respond to your question?

Mr LEE EVANS: Yes, thank you.

The Hon. ADAM SEARLE: Chief Commissioner, thank you for both the written submission and your oral presentation. I'm particularly happy to see pages 12 to 14 and 15, where you give a pretty clear exposition of the process by which reports are constructed. It might just be my own ignorance but I hadn't seen a clear exposition of the internal processes of the commission laid out like that. That certainly has assisted my understanding of how you work—and, obviously, your KPIs at pages 15 and 16 and, of course, appendix 1. The Bar Association in its submission to us, common with all the other submissions, has recommended that there be no imposition of a statutory time frame on the ICAC. I and, I think, other Committee members certainly agree with that. I think the bar indicated that it might be useful for there to be a legislative requirement that the ICAC itself develop its own time standards that are public, as you have, but that that be formalised in legislation so that you and the inspector could both jointly continuously report progress against your own benchmarks. Do you have a view about that?

JOHN HATZISTERGOS: The benchmark that we have adopted, which is outlined in our submission, takes its roots in the Act itself. The Act requires us to report the number of days between the conclusion of a public inquiry and the presentation of the report to the Presiding Officers. I know some people have suggested it should be at the end of the public hearing component, but the public hearing component includes the finalisation of the submissions because the submissions under the Act are part of the public hearing. That's when we measure our time—when the submissions are closed. But what happens from time to time is that things develop. In one of the inquiries, one of the parties decided that they wanted the commission—or asked the commission—to investigate new matters that hadn't been previously raised, and that led to a process which delayed the finalisation for that matter.

In some cases there are court proceedings that are brought. In some cases the public inquiry itself has brought forward new evidence or new lines of inquiries from other people who have witnessed what's happened through the media and come forward with other information that needs to be investigated, so there has to be some flexibility involved in this. The biggest change, I suppose, over the time of the commission's history has been the complexity of the matters and you can see that in the length of time that they are now taking. Relatively small matters that the commission may have investigated when it was first created are unlikely to be taken up by the commission. That doesn't mean they're not followed through; they are, usually by the agencies. Unless they meet our focus, which is serious corruption or systemic corruption, they're less likely to go to a public hearing.

The Hon. ADAM SEARLE: Yes. Just looking at your own appendix at pages 29 and 30, looking at the public inquiries, six of the nine reports were outside your own benchmark for reporting. I think five of the nine are more than a year. Now, again, that probably reflects what you were saying about the increase in the complexity

and the length. And, might I say, in your opening submission the amount of input into these matters, the sheer volume of material, is staggering. I get that that must impact the writers' and the commissioners' ability to absorb, process and construct a report base that does justice.

JOHN HATZISTERGOS: It requires an enormous amount of work.

The Hon. ADAM SEARLE: It seems to be more than your average court case.

JOHN HATZISTERGOS: Well—

The Hon. ADAM SEARLE: No, I am being—because people are saying, "Well, it's not a court, but it's court-like. You know, the High Court, the Federal Court, other courts dispose of really serious matters in shorter time frames. What is the delay in the ICAC?" I think the answer is when you're looking at the input that you're describing, it's staggering.

JOHN HATZISTERGOS: It's a large amount of information and particularly in the case of ourselves, as new commissioners, taking over some of the previous commissioners' investigations. We have to deal with that and, ultimately, when the reports are finalised through the process, which is outlined in the submission, each of the commissioners has to adopt the report so it's the commission's report. So each has an input into that.

The Hon. ADAM SEARLE: You've got a process to sort of deal with the—I won't say "backlog", but the legacy matters you've inherited as incoming commissioners.

JOHN HATZISTERGOS: Yes.

The Hon. ADAM SEARLE: And you've now got some additional resources going forward.

JOHN HATZISTERGOS: We've got additional resources but we have also changed some of our processes.

The Hon. ADAM SEARLE: Yes, okay. Are you able to talk us through some of those changes?

JOHN HATZISTERGOS: Yes, of course. Our assessments process is of great concern to me at the moment because of the large amounts of complaints that we're getting. Now, don't get me wrong: I don't worry about agencies that report too much. I worry about agencies that don't report. They're the ones I worry about, and we try and do something about that too. But the large volumes that we are getting at the moment are putting pressure on the commission. Now, it was previously the case that all three commissioners would look at all of the assessment reports. They come in twice a week and they could be up to 200 pages each. It's a large volume of information because it doesn't include just the complaint. It also includes any intelligence which the commission has previously, relevant to that matter, that may inform.

Because sometimes we get a lot of—well, not sometimes. We often get complaints which are anonymous. We may not be able to do something about it, but we may have further information which has come from another source and we try and blend all that information together and prepare it into an assessment report with a recommendation. So the volume of information that goes to the commission, that was going to the commissioners, is sometimes up to 200 pages in length and that is twice a week. It was taking a large amount of time of the three of us. So we had to triage those assessment reports and we've assigned, on a roster basis, a commissioner to review those ones which don't need the oversight of the three commissioners, with a capacity for the commissioner who oversights them to elevate them if they feel that there is a need.

Anything that needs to be elevated will still go to the three—that's anything that's serious or is of a more substantive nature. A lot of the matters may be of a relatively simple nature, which could be simply dealt with by the agency itself. It still comes to an assessment panel, it's still reviewed, but there's no necessity for the three commissioners to look at it. To give you a simple example, someone looking up someone's records when they shouldn't have been looking at them, at a hospital, for example. That doesn't need ICAC's involvement. We satisfy ourselves that the agency is looking at that matter properly. That can be dealt with through that triage process. Once the matters are more complicated, they need to go, perhaps, to a preliminary investigation. Those matters will be oversighted by the three commissioners, together with any other matter where there may need to be more assessment and inquiries carried out.

That has freed up some capacity on the other two commissioners—it certainly will when Commissioner Lakatos comes back, in terms of enabling us to do the other matters that we have to do. There are other things that I have reflected on, and I have discussed it with my colleagues. You'd be aware that the other two commissioners are part time and, as I think one of the submissions has indicated to you, their remuneration is structured on a part-time basis. We have to be careful about how we use those precious resources to maximise their effectiveness. The fact that both of them are retired judges gives us some flexibility which wasn't, as I said, present with the previous commissioners. One of the previous commissioners was actually in practice.

The Hon. ADAM SEARLE: Which I think was the intention of the two commissioner—

JOHN HATZISTERGOS: It may have been, but she undertook two inquiries. Two of the longest inquiries in terms of reporting were a product of the fact that she had other commitments that didn't allow her to—I think they were Operation Dasha and Ember, which you'll see in the list. They had the longest time lag between the finalisation of the public inquiry and the presentation to Parliament. We have to be careful about how we use those resources. As I said, we've got some flexibility as far as that is concerned because both of them are retired and they're able to adjust their days. We still have the cap, which is a constraint, but we can work around that. Certainly, anything long, it would be inappropriate to give to another commissioner, because it wouldn't fit within their capacity under the current restraints that we work under.

The Hon. ADAM SEARLE: To other matters in terms of the review of ICAC reports, from time to time there have been proposals that maybe they should be the subject of some kind of merits review. I think most of the submissions we've received are dead against that, and I am too. I'm persuaded that there shouldn't be any kind of merits review. Judicial review is well established. But one of the live issues is whether or not, as a matter of practicality, judicial review reposed in the Supreme Court is difficult to access for non-sophisticated litigants or individuals, and maybe a mechanism of some kind ought to be reposed in the inspector.

For example, as we heard earlier today, section 196 of the Corruption, Crime and Misconduct legislation in WA provides, in some limited respects, for the inspector to look at a report of the commission and annul it or set it aside. Do you have any views on the review of ICAC reports, or is that a matter that it would be invidious to invite you to comment on, given that—

JOHN HATZISTERGOS: I don't really have any views on that. There have been some challenges to ICAC reports that have been taken to the Supreme Court by a number of persons who have been adversely named. I might add, in Operation Witney, we were the subject recently of an application for judicial review. That was the case involving the member for Drummoyne. That's been discontinued, so there is no application before the Supreme Court. In terms of broader merits review, I've listened to the arguments this morning that have been put forward. There's a variety of different views. I'm more inclined to the Bar Association's view that that would just complicate and delay things.

Mr JAMIE PARKER: First of all, thank you very much for coming. It's so pleasing to hear a commissioner say the word "adequate" when it comes to funding—to describe the funding as adequate. As you know, part of the reason why we have this funding arrangement is because of the very assiduous pursuit—

JOHN HATZISTERGOS: Yes, and I thanked you for that in the annual report. I put it in the foreword and acknowledged your efforts.

The Hon. ADAM SEARLE: We are grateful.

Mr JAMIE PARKER: It's a very positive thing to see that because that has occupied the Committee for quite some time. If I may, I go to a few of the issues that have been raised today. There has been a proposal about the inspector having some kind of a role when it comes to the issue of determining whether or not a matter should proceed to a public inquiry. I think Mr Nicholson raised that. Are you satisfied that the provisions around public inquiry are adequate? Does there need to be any further intervention by the inspector or anybody else or any additional powers for the inspector when it comes to that issue around determining whether or not a matter should be subject to a public inquiry?

JOHN HATZISTERGOS: I understand that there were some suggestions raised that the basis upon which public inquiries are decided should be able to be provided to the inspector. I have no issue with that. We have just settled a memorandum of understanding with the inspector. I have, frankly, no issue with making that public. It has been provided to you. I would have to find out whether the inspector is agreeable to it. I know she supplied it to the Committee, but I have no problem in providing that so people know what information the inspector is provided with. If she wants those reports that result in us making decisions on public inquiries, I have no difficulty with providing that information as well. We do have provision in the reports that we do publish stating the reason why the commission decided to go public. That is outlined in a section of the report. Hopefully, that provides some sort of insight.

But we are different to a court. I need to make it clear to you that it's not the case that we have an in and out tray. Every matter has to go through a process and there has to be an outcome at the end. We only go to public inquiry in less than 1 per cent of the complaints that come before the commission. It's a very small number, and those cases are fairly distinguishable. The criteria that's in the Act is what guides us; it's the public interest. You have to weigh the public interest against the private interest. I noticed that Mr Campbell, I think it was, in his submission referred to section 12 and section 13 but there is also 12A, which you have to bear in mind. Whilst

13 is fairly broad about the circumstances you can go to a public inquiry, you have also got to focus on 12A, which is serious corruption or systemic corruption.

Mr JAMIE PARKER: If I may just ask one more question, obviously we have a very narrow set of our terms of reference and the Chair keeps on drawing us back to those terms of reference. The former inspector raised at previous meetings we have had and also today that it might be worthwhile for there to be—I think to use his term—a bit of a "broader look" in every decade or so at the Act. We are looking at some specific areas here—

The Hon. ADAM SEARLE: Three matters only.

Mr JAMIE PARKER: Yes, three only. Would you welcome or do you have a view on whether or not this Committee should perform a wider review of the Act?

JOHN HATZISTERGOS: You may have lost sight of it, but we did actually put in our submission some additional parts of the legislation that, in our view, need your attention.

Mr JAMIE PARKER: The passwords.

JOHN HATZISTERGOS: Yes—the passwords; the section 111 requirements; the ability to be able to give information to people that they can then subsequently pass on; and the ability to require the Government, as opposed to just the agency, to respond to our reports. I must say, I haven't, myself, had the problem of a government not responding. But we have had letters back from the department saying, "This is a matter for the Government, not a matter for the department. We are not going to deal with that aspect of it," and then we have to write off to the Government and the Government says, "Okay, we'll respond." We have had those issues and they need attention. I might just draw your attention to those matters. A 10-year review from time to time is not inappropriate. I don't know if it's 10 years since the last one—

The Hon. ADAM SEARLE: Not quite.

The CHAIR: Not quite—2015.

The Hon. ADAM SEARLE: But a lot has happened in the past four or five years.

Mr JAMIE PARKER: It would be great to be able to address some of the matters that ICAC has raised.

JOHN HATZISTERGOS: From time to time legislation needs to be reviewed and the ICAC legislation shouldn't be any different. That's my view. Perhaps I should have stated that Commissioner Murrell is with us today. Since she has come on board she has been doing a lot of the compulsory examinations, which has assisted in freeing up the others to do the report writing. She has also been working in respect of Operation Keppel.

The CHAIR: Any other questions?

Mr JAMIE PARKER: This has to be the first time that Mr Hoenig has not asked a question.

Mr RON HOENIG: The Commissioner knows how to narrow the target. You must have some experience of parliamentary committees.

The Hon. ADAM SEARLE: This Committee in particular.

Mr JAMIE PARKER: It's early days.

JOHN HATZISTERGOS: It was a long time ago. If there is any other information that you require, please do not hesitate to ask. We would be more than happy to respond. As I said, I'd be grateful for your interest and assistance. I'm not here to impede any of your work, so if there's information we can properly provide to you, we will do so.

The Hon. ADAM SEARLE: Thank you.

JOHN HATZISTERGOS: I should indicate—perhaps I should do so now—some of the things that we've been doing, apart from the matters that you've been looking at, that may be of interest to you. You'd be aware that the commission has done a publication in relation to ethical barriers. That's public. It's available on the website. There has been work done by the corruption prevention team. We have had to streamline processes relating to the handling of vexatious complainants. I've delegated that function now to the chief executive officer so that that doesn't come up to the commissioners per se. That doesn't ban them from communicating with us but it requires them to do it in writing, not by email.

We've streamlined our prevention management group's charter operations to ensure that we're focused on the most important corruption prevention and education activities. Part of that involves putting a lot of effort into potential risk areas of importance. We're using that opportunity to be able to liaise with the ethics committees of this Parliament. We've reached out to the complaints commissioner and we're hopeful of being able to get a

memorandum of understanding with the complaints commissioner so that we can refer matters of lesser significance to that person to be able to carry out. We will hopefully be doing some seminars that may be of interest to members of Parliament in relation to ethical issues which may arise in the course of their duties and to assist them. Included in that is to have some discussion in relation to some of the reports that we have carried out which may be of interest and assistance to members.

We have settled revised memorandums of understanding with the inspector, as I indicated, but also with the Australian Taxation Office. It is my intention to publish on our website memorandums of understanding where possible. It may not be possible in all instances, particularly if it involves the investigative side of our work. But subject to that, we will be hoping to put them on the website. I hope in the near future we'll be able to conclude the memorandum of understanding with the Director of Public Prosecutions and put that on the website so people can see how we interact with that agency. We are in the process of revising our strategic plan and will be in contact with you about that. Transparency and accountability will be a key pillar of that plan.

I've had meetings with just about all of the previous commissioners and assistant commissioners who have been involved with the Independent Commission Against Corruption, the Premier and the Secretary of the Department of Premier and Cabinet. In relation to the latter two, we are at an advanced stage in our review of the commission's baselining moving forward, that is, its budget. I am grateful for the support that this Committee has lent but also to the Government for its work as far as that is concerned. We are hopeful that that will result in a readjustment of our budget in the longer term that can provide us with some certainty moving forward. I don't know whether any questions arise out of any of that.

Mr RON HOENIG: Chief Commissioner, you are to meet with the Legislative Assembly Parliamentary Privilege and Ethics Committee in relation to some outstanding issues about parliamentary privilege.

JOHN HATZISTERGOS: Yes.

Mr RON HOENIG: I think that committee also wants to discuss with you—because you are probably uniquely qualified to do it—the parliamentary declarations for pecuniary interests. There are some recommendations that have come from the commission. They mean well but there is a difference between implementation in practice and what they are designed to achieve. That committee probably needs your assistance in finalising some decisions in that respect.

JOHN HATZISTERGOS: I am meeting with both committees next week and also meeting with the Presiding Officers, so no doubt they will be topical.

The CHAIR: Thank you very much. You have answered our question in relation to further questions that may come in writing. Your replies will form part of your evidence and be made public. Would you be happy to provide a written reply to any further questions from Committee members?

JOHN HATZISTERGOS: Yes.

The CHAIR: You have indicated that. In concluding, I thank you again for your appearance here today, as brief as it was. We do appreciate it, but also for the extensive submission that you provided. On behalf of the Committee I thank you again for hosting us at the ICAC office, which I am sure most members found incredibly interesting.

The Hon. ADAM SEARLE: We did.

JOHN HATZISTERGOS: You are welcome.

(The witnesses withdrew.)

The Committee adjourned at 15:17.