REPORT ON PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

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

At Macquarie Room, Parliament House, Sydney on Friday, 9 September 2016

The Committee met at 9:45 am

PRESENT

Mr D. Tudehope (Chair)

Mr R. Hoenig
Mr K. Humphries
The Hon. T. Khan
Mr P. Lynch
Ms T. Mihailuk
Reverend the Hon. F. Nile
Mr C. Patterson
Mr M. Taylor
The Hon. L. Voltz

JOHN DENISON McMILLAN, Acting NSW Ombudsman, affirmed and examined

CHRISTOPHER CHARLES WHEELER, Deputy Ombudsman, affirmed and examined

LINDA MICHELLE WAUGH, Deputy Ombudsman, affirmed and examined

MEGAN LOUISE SMITH, Legal Counsel, affirmed and examined

The CHAIR: I welcome to the second day of hearings of the Committee on the Independent Commission Against Corruption into the Inspector's review of the Independent Commission Against Corruption, Professor John McMillan, Acting NSW Ombudsman, Mr Chris Wheeler, Deputy Ombudsman, Ms Linda Waugh, Deputy Ombudsman, and Ms Megan Smith, Legal Counsel to the NSW Ombudsman. Before we proceed do you have any questions about the process to be followed today or the notice to witnesses that was sent to you?

Professor McMILLAN: No.

The CHAIR: Would any of you like to make an opening statement to supplement the submission you have made to the Committee?

Professor McMILLAN: I will make a brief opening statement. Thank you for the invitation to appear before the Committee in support of our submission. Some of the prominent issues in this Committee's inquiry are ones that arise in the course of the Ombudsman's work in conducting administrative investigations. We thought it might assist the Committee if we shared our experience. Indeed, we have done so particularly on two issues: the choice between conducting inquiries and investigations in public or private; and the level of detail that should be given to witnesses before they give evidence. In my opening statement I will comment only on the choice between conducting investigations in public or in private.

The Ombudsman is required by statute to conduct all inquiries and investigations in private. That work often culminates in a public dimension, for example, in annual reports, in special reports to the Parliament and in public statements—I might say, that is the Ombudsman model. It is eminently sensible that our work is mostly undertaken in private. People, for example, would be deterred from making complaints unless they have the assurance of privacy for their personal details and confidentiality for the investigation of their grievance. Also the resolution of complaints is mostly done by discussions backwards and forwards between parties and agencies, with sharing of information, and that process is most effectively undertaken away from the public gaze.

Investigating people's complaints about government service delivery and administrative decision-making is, of course, different to investigations into allegations of corruption and misconduct by public officials. Not least in the latter type of case, there is more at stake for individuals when career and reputation is threatened and there is likely to be greater resistance to an investigation. The Ombudsman's office occasionally does investigations of that more sensitive or contested kind—Operation Prospect is an example—and we are still required by statute to conduct any such investigation in private. Indeed, to take Operation Prospect as an example, a sensitive investigation of that kind could only effectively be undertaken in private because of the investigation of law enforcement intelligence collection methods and the way that informer allegations have been handled and investigated.

That takes me to the central point in our submission—namely, that the problems and disadvantages that are said to arise in public inquiries do not necessarily disappear when you conduct a private inquiry. Private inquiries, in short, are not a panacea for the problems that are said to exist with public inquiries and our submission points to a range of complex issues and choices that we have faced in conducting Operation Prospect. There can be, to take one example, added administrative steps in ensuring that parties are given procedural fairness. This frequently requires that parties are given an opportunity in private to inspect documents on which a final report may rely or to read excerpts from the evidence given by other parties in private. Preparing those materials for document inspection, and even scheduling and arranging the document inspection, can be a very time-consuming process. It requires a substantial administrative resource burden and can lead to extended dialogue with the parties about the adequacy of the document inspection processes they have undertaken.

There can also be complaints of unfairness arising in private inquiries. One complaint, for example, is that it is difficult to allow parties to cross-examine other witnesses when an inquiry is conducted in private and

parties insisting on a right to cross-examination often misunderstand the difference between inquisitorial proceedings and adversarial or adjudicative proceedings. Complaints about damage to reputation can still arise in private inquiries. A private inquiry does not prevent parallel processes in the media, the Parliament and elsewhere that engage in discussion of the issues that arise in the private inquiry. Parties can occasionally complain that the non-disclosure direction that applies to them in the private inquiry prevents them in the public arena from defending their reputation or contesting allegations that have been placed on the public record.

In conclusion, there is a place, in our view, for public inquiries and there is a place for private inquiries. If the inquiry, whether public or private, is into damning allegations of misconduct or corruption, the inquiry path is likely to be a bumpy ride. The objective at the end of the day is to undertake a thorough inquiry, however it is conducted, to ensure that it is done as efficiently as possible and that there is maximum fairness to all the parties involved. Balancing those objectives can yield different answers and different inquiry methods from one investigation topic to another. That concludes my opening statement. Thank you.

Mr PAUL LYNCH: Professor, my understanding of what you are saying is that there are extra steps you would have to take if an inquiry was held privately rather than publicly. Based on Prospect, what is the scale of the extra steps you have to take?

Professor McMILLAN: The progress report we have made to Parliament has outlined the steps we have taken away from the public gaze. One element of that is the private hearing, which is probably similar in length to a hearing conducted in public. An element of a hearing, whether private or public, of course, is giving parties notice of issues that may be tested and sometimes allowing document inspection prior to it. That can be more demanding in a private inquiry simply because you have to ensure the documents you are showing for inspection are not on the public record. So you have to ensure that they have been properly prepared, redacted and the like.

The two most demanding stages though where you really do get the difference are, first, in document inspection. I think probably by the conclusion of this inquiry we will have devoted over 100 full days to document inspection. Indeed, in my last progress report to the Parliament I said that the document inspection had all been completed. Since then we have had to schedule many additional days of document inspection just because the submissions of parties and documents have thrown up issues that, if it was a public inquiry, quite possibly would have been on the public record and contested in a public way. So to ensure procedural fairness we go through a further stage of allowing document inspection prior to any submission by the parties.

Of course, the submissions are not on the public record; the submissions are private. So, secondly, it is quite an exhausting process then of matching submissions to evidence, to documents, to the submissions of other parties, and deciding what the issues are and ensuring, as I say, that any adverse finding has been the subject of an earlier procedural fairness round. That is where the real time and effort come in. I do not know if my colleague Linda Waugh, who has been with Operation Prospect from the beginning, wants to elaborate on any aspect.

Ms WAUGH: I think the other thing that happens with the public hearing is that it ventilates issues: people hear other people's evidence, the exhibits tend to be tendered and be publicly available. When you do it exclusively in private, in some cases the first time an affected party may actually see—not always—the evidence from another party is in the submission process. So you will get submissions on that and that may throw up topics that you then have to do a further hearing on to ventilate and to deal with. When you are holding hearings in public those additional steps are probably not required because everyone can hear everyone else's evidence and the matters are dealt with through that process.

Professor McMILLAN: If I can just add one other example. I think it is probably a feature of a private inquiry of this kind that you have fairly regular submissions from the parties questioning, contesting, disputing the processes you are adopting. You have to consider those properly and you have to respond to them, and that can be time consuming and delaying. In a public inquiry, of course, there is a schedule. Any submission you want to make has to be made on the public record and it has to be made by this particular date. So matters tend to get resolved much more quickly, I think, through that process.

Mr PAUL LYNCH: My sense of Prospect is that a lot of the parties seem to be arguing they would have preferred it to be done publicly; they seem to feel a bit aggrieved that a lot of it is not out in the open. Is that a fair assessment do you think?

Professor McMILLAN: On every issue there are contrasting and sometimes multiple views. Some parties have said quite publicly it would have been better if this was done as a Royal Commission exercise on the public record. Many of the other submissions we get earnestly request privacy and anonymity. One of the things that is often not well understood about Prospect is that it is based in part on complaints we have received

from a large number of parties and, as I have said, a classic Ombudsman method is that a party has a right to make a complaint in private and have a confidential examination of that. So quite a lot of the threads in the inquiry relate to the investigation of individual complaints where parties, quite rightly, insist on confidentiality for the process.

Transparency is important in every public sector process and the way in which we will achieve transparency ultimately is by a thorough public report that may give rise to further debate. But that is essentially where the interests of transparency are best—

The CHAIR: Can you give me an example of a matter where you have conducted a public inquiry and the rationale that you adopt for deciding to hold the inquiry in public?

Professor McMILLAN: Chris Wheeler has been with the office far longer than I. My recollection is that there has been no public inquiry in terms of a hearing process. There are certainly investigations that have a public element or dimension and we will put out an issues or discussion paper inviting parties to make submissions and often to see submissions of others. There has been no hearing as such.

Mr WHEELER: Over the years there would be several hundred hearings by the Ombudsman using Royal Commission powers and none have been in public because the law has been they must be held in private.

The CHAIR: The question of the rationale you would bring to bear in deciding to hold an inquiry in public does not arise?

Mr WHEELER: It does not arise.

Professor McMILLAN: I was interested in the submission from the Australian Commission for Law Enforcement Integrity that I headed for a brief while. They have a power to conduct a public inquiry but only with the agreement of the Minister. They said no public inquiries have been conducted. The understanding is that their jurisdiction is solely focused on law enforcement activity.

The CHAIR: Similar to the Crime Commission?

Professor McMILLAN: Yes, similar.

The Hon. TREVOR KHAN: We looked at the alternatives of a public inquiry as opposed to private. What interests me about the way the Independent Commission Against Corruption [ICAC] operates is that necessarily one engages in a course of investigation which includes compulsory examinations and then a decision being made to hold a public inquiry, assuming that it is beneficial for the public inquiry to be held. One of the issues is relying upon evidence obtained in the compulsory examination that some or all of the witnesses in the public examinations have not seen or had an opportunity to test. Do you think that is an ideal situation from a natural justice perspective, that a finding can be made on evidence unavailable to a person of interest?

Professor McMILLAN: I am a little reluctant to jump into that area because there may be special considerations or legal constraints of which I am unaware. My response at a general level is that at the end of the day natural justice attaches to two aspects of a process: the way the process is conducted to ensure there is no bias, and it attaches to the final decision that you make. That decision may be in the form of a report, a recommendation, or a referral to some other body. At that stage natural justice imposes a quite demanding obligation that any party who is adversely affected by that final action has been given a proper opportunity to make submissions based upon adequate knowledge of the evidence that has gone into that decision. Whatever decisions or choices that have been made along the way, when it gets to the point of final decision or reporting then natural justice, subject to any statutory constraints, may well require that either the decision-maker not rely on material not disclosed or circulated, or go through a procedural fairness round that can adequately be conducted in private as public to ensure that there is comment at that stage.

The Hon. TREVOR KHAN: What of evidence that has been received in the compulsory examinations that may be exculpatory of the person of interest, which is then not made available to that person of interest during the course of public examination? I understand why you may not make all the evidence available during the collection phase of compulsory examination, but if you have a public hearing what should the witnesses have or not have available to them?

Professor McMILLAN: Subject to statutory restraints the guiding common law principle is that parties are given an opportunity to examine material that is "credible, relevant and significant" seems to be the hallowed phrase. Something can be relevant and significant if it is exculpatory evidence. Another way it is sometimes put is that parties are entitled to know the case to be met and the case to be met can have elements both to their advantage and to their disadvantage. Certainly this is a general answer, but common law principle may require that exculpatory material that is before a decision-maker be released. There again, courts balance

that comment by saying that you do not have to reveal your thought processes as you are reaching the point of final decision.

Mr RON HOENIG: The Inspector reluctantly submitted to us that on balance there should be predominantly private hearings to balance the incidental reputational damage that occurs as a result of the public hearings or a spectacle of some description. Is there a way in which that incidental collateral reputational damage can be avoided in a public hearing?

Professor McMILLAN: There is a statement by the NSW Court of Appeal in *Independent Commission Against Corruption v. Chaffey* that procedural fairness cannot guarantee that parties' reputations are not damaged. If I can give a general response, I would acknowledge that occasionally the complaints and allegations made by people in a public setting damage reputations and even though they have an opportunity to respond they will say that the damage is done. Some of the submissions to this Committee say it is important to widen the frame and to say that complaint applies to the open proceedings of Parliament and courts. The Independent Commission Against Corruption in that sense is in no different position to the others. Essentially, it takes us to that difficult public policy choice: there are some processes that we think for general policy reasons should be conducted in the public arena, such as parliamentary debates and court proceedings and investigations of corruption, and then do the best that we can to ensure that damage to reputation or the opportunity to counter the allegations is raised.

Mr RON HOENIG: In your submission you make reference to Justice Abadee's comments.

Professor McMILLAN: Yes, on page four of the submission.

Mr RON HOENIG: "In an investigative inquiry the investigation travels on an independent road for the truth, and thus the emergence of facts...". If an organisation such as the Commission, that is ultimately, as Mr McClintock told us yesterday, a hybrid of investigation and a determinative function, proceeds on this independent road for the truth should it not permit the actual testing of the evidence and the witness's credibility? Otherwise you are just choosing the version you prefer with the credibility of the witnesses seemingly to be irrelevant. Even in the inquisitive process in the Coroner's Court, for example, the Coroner will permit testing of witnesses' credibility, if you can show the relevance of it to the Coroner's ultimate determination. Why in a hybrid system should the credibility of a witness not be tested, which only aids the fact-finder in determining whether it will accept the evidence?

Professor McMILLAN: The process of testing a witness's evidence is a practice, a notion that sits more comfortably in the adversarial style of dispute resolution. It does not sit comfortably, in the classic sense, in the inquisitorial model of investigation. It is very hard, in an inquisitorial model where proceedings are conducted in private, to allow parties to test each other's credibility.

Mr RON HOENIG: I appreciate that. If you could understand it is a public hearing, because I understand the constraints that you have—so in a public hearing, for example.

Professor McMILLAN: Yes. In a public hearing, the major constraints on allowing any one witness to test the evidence of another witness probably arises more from considerations of efficiency in conducting the process.

The Hon. TREVOR KHAN: Indeed, one of the difficulties is if you have multiple persons of interest, it becomes very hard to determine who is going to go on the attack with a particular witness.

Professor McMILLAN: Yes, and if you do allow multiple testing then what you get is criticism of a different kind: that there is a phalanx of lawyers sitting at the Bar table to investigate what may be a matter that could be conducted more efficiently in another way. At the end of the day, we are always drawn back to the point that there is a very heavy responsibility on those who are conducting the hearing or the inquiry, formulating the report, reaching the decision to ensure that parties have been given a fair opportunity to put their case that can involve testing the evidence of other parties, but not necessarily by methods of cross-examination that would be more appropriate to a different forum.

The Hon. TREVOR KHAN: How do you deal with a witness that ICAC appears to be relying upon as their white knight, who—dealing with an entirely different environment—is, for instance, a prison informer who may be known to ICAC but not to the other witnesses and who is going to obtain, for instance, some sort of benefit from the outcome of the giving of this evidence? This is like the classic case that one sees in court all the time, where you would give multiple warnings to a jury in terms of what they can make of this person. But if those background issues are not known to the person of interest in the inquiry, it could be profoundly unfair to that witness that they do not know those issues affecting the credibility of that witness.

Professor McMILLAN: I think I can only add to that by saying that is correct. It is a genuine problem and, as you say, it is an issue that arises in a disputed way in court proceedings all the time and frequently arises in appeals to the Court of Appeal and the High Court. That probably indicates that there is no simple answer. Issues of that kind give rise to contested proceedings, and the principle applied at the end of the day is whether there has been fairness to the parties involved.

Mr RON HOENIG: Indeed, in those matters that end up in the High Court, or whatever, it is always a question of whether there has been adequate disclosure.

Professor McMILLAN: That is correct.

Mr RON HOENIG: If, indeed, there has been no disclosure then you are really dealing with the most profound of unfairnesses in those cases, surely?

Professor McMILLAN: Yes, and the decision-making body then has to ask itself the question at the point of final reporting whether it is fair and safe to rely on evidence of that kind, or whether it should enable further submissions before it reaches the final decision.

Mr RON HOENIG: Some prison informers, from my experience, are reliable and some are not. But their reliability is tested in adversarial proceedings. I have prosecuted matters with the most terrible people giving evidence for the Crown, but despite lengthy cross-examination, the jury found the evidence was credible as did I. However, unless those issues are ventilated, there is no prospect of your being able to decide one way or another whether that witness is credible, unless the tribunal has a fact-finding mission as a crystal ball with an answer in it.

Professor McMILLAN: Yes, I agree with that description of the dilemma. It is an issue that was dealt with by the NSW Court of Appeal in the case of ICAC and Chaffey, where ICAC had determined to hold a public inquiry into allegations that had been made by a person who had prominent connections to the criminal milieu, Neddy Smith. Proceedings went to the Court of Appeal to contest how evidence of a person with that notoriety should be accepted and whether a public hearing should be held. The counter argument was put there that it would be unfair in a public setting to allow the allegations of a person with that history to be ventilated. But the Court of Appeal said there is no easy answer to that and that procedural fairness will not provide a guarantee to the parties. Ultimately, as the Court of Appeal said, you are drawn back to the choice: Is this an appropriate occasion to do a public hearing or to do a private hearing? The answer will differ from one occasion to the next.

Mr RON HOENIG: I suppose what troubles me is that you proceed under your Act and effectively you make findings of wrong conduct and ultimately the Ombudsman reports to the Parliament. Whenever the Ombudsman has been challenged, we look at those decisions and the legislation is always interpreted to give maximum discretion to the Ombudsman because you are not making a decision that affects individual parties or between a party and the State, and so you are to be given maximum discretion to conduct your inquiries. In relation to the ICAC operating under its Act, apart from whether the inquiries are public or private, ICAC can actually make a determination that effectively operates as a de facto conviction in the eyes of the public. Would you see that under those circumstances different tests need to be applied?

Professor McMILLAN: What that illustrates is a point I noted earlier, that investigations must travel a different path depending upon the nature of the issues being investigated. For the most part, the Ombudsman is investigating allegations or complaints about ineffective service delivery, poor decision-making, poor communication. But if we have to investigate serious allegations of misconduct or corruption, as in Prospect, we encounter exactly the same atmosphere of controversy that surrounds the ICAC investigations. While I am a great supporter of the Ombudsman private investigation model, it is not suitable to the investigation of all problems and complaints. I am a strong supporter of having separate bodies—anti-corruption bodies, Ombudsman bodies—just because of the nature of the issues that arise.

Reverend the Hon. FRED NILE: Your submission is very good and very critical of private hearings. You stress a number of times that they are very time consuming. In other words, they involve a lot of staff, a bigger budget, et cetera, and they delay the decision. You have come out strongly supporting public hearings in your submission.

Professor McMILLAN: No, my view is that the private investigation model is suitable for the work that the Ombudsman undertakes but I acknowledge that public inquiries are necessary, just as I am a great supporter of public hearings and public debates in the Parliament. At the end of the day whether a hearing is conducted privately or publicly will depend on the factors that I think are well outlined in the Independent Commission Against Corruption Act and that include damage to reputation of parties, the efficiency of the process, protection of lines of inquiry and so on. I am a believer that there is a need for both inquiry models. The

thrust of our submission is that it is mistaken to think that all problems disappear if you just move into a private inquiry model. Some of the problems you have in the public hearing setting disappear but other problems of the kind that we just outlined arise.

The CHAIR: As a result of any inquiries that the Ombudsman undertakes do you ever form the view that a matter should be referred for prosecution?

Professor McMILLAN: Yes.

The CHAIR: At that point do you terminate the inquiry and refer the papers to a prosecutor?

Professor McMILLAN: We follow the prosecution guidelines that have been published by the Office of the Director of Public Prosecutions. There is essentially a three-stage process there. The first stage is that the referring body—in this case it would be the Ombudsman's office—decides if there is prima facie evidence of breach of a criminal provision. The next two stages are the prospects of conviction and any other countervailing or mitigating public interest circumstances. Those second and third stages are for the Director of Public Prosecutions. We address only the first stage, but of course on request we would make available all relevant information subject to any statutory constraints.

The CHAIR: That would include statements that you had taken where the person making the statement had sought anonymity?

Professor McMILLAN: Yes. I will check with my colleague Linda Waugh, who has been longer involved in some of these processes than I have been. I will get back to the Committee if I am wrong on that but I think the correct answer is yes.

Ms WAUGH: It does depend on how the original information was collected. Obviously in a case for example in the ICAC if you take an objection during a hearing that evidence then cannot be subsequently used. It does depend on how the original evidence was collected and whether it was collected in admissible form. Often with these sorts of inquiries they are not collected in an admissible form. Once you decide to prepare a brief and seek the advice of the Director you will need to then seek evidence in admissible form. That may involve going to a witness and asking them to give a statement that is in admissible form to which they may say no.

Mr PAUL LYNCH: Do staff of the Ombudsman do that?

Ms WAUGH: If we were preparing a brief? Yes, we would.

Professor McMILLAN: I should have clarified my answer in terms of matters referred to the Director of Public Prosecutions. Putting Operation Prospect aside, generally the only matters that we would be referring are matters to do with a breach of the Ombudsman Act such as a failure to answer a summons or to give truthful evidence. Operation Prospect, the Committee would be aware—

The CHAIR: There may be allegations made in relation to the potential investigation of a sex abuse matter, would there not, which is referred to your office?

Professor McMILLAN: Yes.

The Hon. LYNDA VOLTZ: The Children's Guardian.

Mr WHEELER: That would go back to the agency.

The CHAIR: It would go back to the agency and not be referred from your office to the DPP, even if you were satisfied?

Mr WHEELER: The reference would be generally from the agency. There might be information from our office that would go to law enforcement bodies but the major evidence gathering would need to be by the police and by the agency.

Mr KEVIN HUMPHRIES: To what extent would you assist in that with some issues coming up with ICAC and being their liaison? If something was passed on to the DPP would the Ombudsman's staff be involved in any transition process whether it be information or cross-pollination?

Ms WAUGH: If the DPP requires further information for the purpose of the brief—requisitions—they would come back to the agency who would then compile them.

Mr WHEELER: One of the roles that we perform in the child protection area is that we can bring information together that individual organisations might not have access to. Because we have information from the police, from Family and Community Services and from other sources we can bring that together and pass it

to the relevant body so that they are aware that there is more information out there than what they are aware of themselves. That is one of the key roles we perform.

Mr RON HOENIG: Normally when a State offence has been committed and there are reasonable grounds to investigate and prosecute somebody it is handled by criminal investigators who then collect the evidence in admissible form. You seem to have the same protocol as ICAC. That is, the police are not involved; you have to utilise your own resources to prepare material. Should that not be best done by criminal investigators at that point?

Ms WAUGH: But they normally are done by criminal investigations.

Mr RON HOENIG: Within your office?

Ms WAUGH: You have to put Operation Prospect aside because Prospect is quite abnormal, it is not normal work for the office. Looking at what a Commission would do, yes, they would have criminal investigators working on that along with the lawyers.

The Hon. LYNDA VOLTZ: But the difference would be that you have different powers, as ICAC does, from a Royal Commission and some of that is admissible evidence in court and some of it is not.

Ms WAUGH: Correct, yes.

Professor McMILLAN: I suppose those questions highlight what we encounter all the time in that different functions we are undertaking even on a one-off basis may require a different skill set within the office. Prospect is a good example. We had to build a team with those forensic investigation skills that would not normally reside within an Ombudsman's office because you do not normally require them for other functions you are undertaking. As Ms Waugh said, Prospect is abnormal because it is an investigation into the actions in part of the NSW Police Force and the Crime Commission. That required a degree of separation and independence between our activities and their skills that might otherwise be available to an office such as ours.

Ms WAUGH: I think too in a similar fashion the primary objective of what we do is not criminal prosecution. It is not criminal. That may be a consequence.

The CHAIR: If there are no further questions I thank you for making your time available. It has been very helpful. It is good to be able to hear the perspective of the Ombudsman in respect of the issues that arise. Thank you very much for attending this morning.

Professor McMILLAN: Thank you for the opportunity.

(The witnesses withdrew)

(Short adjournment)

ANDREW ARNOLD TINK, AM, affirmed and examined

The CHAIR: I welcome Mr Andrew Tink, AM. Thank you for agreeing to give evidence in public to the Joint Committee today. The Committee has resolved to hear your evidence in public. Do you have any questions about the procedural information which was sent to you?

Mr TINK: No.

The CHAIR: Please state the capacity in which you are appearing today.

Mr TINK: I believe I am appearing as the person who produced a report proposing what is now to be called the Law Enforcement Conduct Commission [LECC] which is referred to in the preamble to the terms of reference for this particular Committee inquiry.

The CHAIR: We afford everyone an opportunity of making an opening statement. Is there anything you would like to say by way of opening?

Mr TINK: Just a couple of things by way of clarification, Mr Chair. The first is I did not make a submission because I took it from the terms of reference that the report would speak for itself. On reflection though, obviously I am very happy to come and answer questions, which was your wish. The second thing is in relation to requesting a private hearing. The reason for that was that I knew the Law Enforcement Conduct Commission legislation was imminent but I have spent the last month in the United States so my concern was that I might come in here today and find that the bill is in the Parliament and being debated and all the rest of it. I was concerned that things that I might say here could run interference across the debate in the Parliament.

My view is that I have inquired, I have reported and what I have done is done. It is a matter for the Government and then ultimately a matter for the Parliament as to what the precise nature of the LECC is, assuming that it does pass in some form. That was why I was just a little bit reluctant around the public hearing. But reflecting on it since I got home it seems to me that there is no need for that. Indeed my view has always been that things should be done in public wherever possible. Thank you for that last minute indulgence.

The Hon. TREVOR KHAN: By way of update, some Members—I think I can say Members from the Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission—were provided with copies of the latest iteration of the bill last night so I suspect there are extra copies that are freely wandering around the building at the present time.

Mr PAUL LYNCH: There have been a number of copies floating around of various iterations.

The Hon. TREVOR KHAN: So it is quite an open exercise at the present time.

The CHAIR: In any event, you correctly say that it is a report about the LECC and structural changes for police integrity, and the Parliament is at liberty to accept or reject it. In relation to this inquiry, have you seen the submission which has been made by the Department of Premier and Cabinet [DPC]?

Mr TINK: Yes, I have.

The CHAIR: Are there any observations you would want to make about that submission?

Mr TINK: I am comfortable with what they seem to be proposing around the possibility of a new governance structure, if I can put it that way, for the ICAC. On page 11 of that submission there are a couple of details which differ slightly from what is in the report I produced. Again I am very comfortable with that in the sense that I had to do my job in three months. It is a very complex area and the Government has rightly, in my view, taken an extra year to consult and work through what I recommended. In some ways what they have come up with differs slightly, but I am very comfortable with the changes—besides which, it is not really my business to traverse what is now up for deliberation. The DPC submission seems to be suggesting that it is open to this Committee to consider and, if you think it appropriate, recommend a structure which departs a bit from the Commissioner as a single person being the embodiment of the Independent Commission Against Corruption. On page 7 it states:

> Effectively, the Commission is established as a single person—the Commissioner.

It then refers to the NSW Electoral Commission, which I know a little bit about having done an inquiry with John Watkins and Kerry Schott, where there is a three-person panel. The submission also refers at some length to the outcome of what I recommended, where the proposed Law Enforcement Conduct Commission is similarly made up. I did not get there because I thought it was a good idea in theory. I got there because in the

case of police oversight the question confronting me was: Do you combine the Police Division of the Ombudsman's office with the Police Integrity Commission [PIC] in a new body or not and, if you bring it all together in a new body, how do you bring it together?

My view was very strongly that there was a risk that the Ombudsman oversight role might be subsumed into the integrity/Royal Commission type role so I came up with a very strong suggestion about a divisional structure, which had a precedent in that particular area through the Australian Law Reform Commission. The Law Reform Commission looked at this in 1996 in relation to Federal policing matters and it recommended a divisional structure even though it was not taken up. What I ended up with was this idea that there would be an Integrity Division and an Oversight Division. The Integrity Division would be the former PIC and the Oversight Division would be the former Police Division of the Ombudsman's office. My view was strongly that one should not be subsumed into the other. They both have legitimate roles and the structure should reflect that and protect those two roles.

My sense of it was two divisions, integrity and oversight, each headed up by a Deputy Commissioner and then a Chief Commissioner on top. As I understand it, so far as I know what is going on and I have seen an early draft of the LECC bill—I am not sure whether it is current or not—that has been broadly been adopted. Having got that far, I thought, "There are some opportunities to perhaps approach things in a different way to the way the PIC previously approached them and the way the ICAC continues to approach them." And I do not mean any disrespect to either body in saying that, by the way. What I had in mind was a thing I called the "Commissioner's Council" where these three people, the Commissioner and the two deputies—I think they are going to be called differently now—provided the opportunity for a forum where very senior people, and there is a list on page 111 of the report I wrote, could:

- determine which matters are to be investigated
- determine which matters are to proceed to a private hearing
- determine which matters are to proceed to a public hearing
- determine which matters are to be transferred from [one division to the other] (and vice versa)

…

- settle class and kind agreements …
- consider trends in intelligence.

And various other things. But I think for current purposes the key things are:

- determine which matters are to be investigated
- determine which matters are to proceed to a private hearing [and]
- determine which matters are to proceed to a public hearing

It seemed to me that there was an opportunity for more weight to be given to deliberations around whether to take these really significant steps in relation to particular matters and complaints that were being considered by the body. I do not want to traverse particular matters dealt that have been dealt with in public by either the ICAC or the Police Integrity Commission [PIC], but the consequences are very significant for the individuals concerned, let us say, that are the subject of these inquiries. It did not seem to me to be a bad thing to consider a body that would be more objectively and instructively deliberative making those decisions, so that is how I envisaged the Commissioner's Council operating, and thinking that they would meet once a week or pretty regularly. That seems to have been accepted by the Government.

I did, however, have a view that the Commissioner should alone make the final determination if there was dispute amongst the group of three. That proposal has been modified a bit by the Government. They are looking at it in the way that Full Bench panels operate within the judiciary. On reflection, I think that that is probably more likely to have public acceptance than what I was suggesting. Thinking about it, to set up a panel and then have one person say, "Well, I have heard you but I am going this way"—I know certain Premiers have done that with their Cabinet colleagues from time to time.

Mr PAUL LYNCH: Never!

Mr TINK: I will not say who, but one on our side is legendary for that. Nineteen against, one in favour. That is it; motion carried. When we are dealing with exceptionally serious matters—I am not saying that Cabinet does not deal with serious matters—that affect the rights of individuals in a Royal Commission context, if you are going to have a council to consider something, on reflection, it is cutting back a little bit too far to say, "If the Chair does not agree with the Committee, the Chair has the final say." I am sure you would not get away with that in this Committee.

The Hon. TREVOR KHAN: No.

The Hon. LYNDA VOLTZ: He effectively does.

Mr TINK: I am speculating, Chair. I am comfortable with the way all this has landed and the gradation of it in the context that the decision to conduct a private examination or an investigation into serious misconduct has to be decided by two, and then a public examination has got to be decided by three. You do not have to be Einstein to see how that could go wrong, but I think it is better to have a collegiate collaborative discussion about those important steps rather than leave it to one person. A lot will depend on the individuals appointed. A lot will depend on how they get on between themselves. We know occasionally there are problems on the bench with that sort of thing, but I am hoping that they will be able to work together. Indeed, the question about whether a public examination should be held, the end result is in the hands of one person should they decide to hold out, which is not, in a way, that different to what I suggested about one person. It is just that the one person, as it has been reformulated by the Government, is more consistent with the way appeal courts operate, although not entirely, obviously, because they are a majority normally. That is where I got to with all this.

It was pressed on me—I think this may be relevant to what you are considering, too—the role of the Inspector should be increased dramatically. I had problems with that, to be honest, because my view was you either have a Royal Commission or you do not. You either have a standing Royal Commission, whether it is into the public sector integrity or police integrity, or you do not. One submission to me was that there should be a panel of three Inspectors. I was very uneasy about this because it seemed to me that that was getting dangerously close to having a court of appeal on the ICAC or the PIC, or this new body, after the fact and that seems to me to be moving away from the concept of a Royal Commission. I would like to think I could say something else, but having been in the Parliament when the Independent Commission Against Corruption Act was passed, I still think it is important to have a standing Royal Commission in this State into—

The CHAIR: Corruption.

Mr TINK: —corruption. It is entirely necessary and it is entirely appropriate. The idea of this sort of three-person Inspectorate got me thinking that the idea of three heads working on a problem rather than one was not a bad thing. The way I ended up seeing it was that the three heads should be working on it up-front within the organisation so that it is part of the Royal Commission and not an after-the-fact judgement made externally. That is why I have landed on this Commissioner's Council. I am not sure what the Government is going to call it in the bill, but that concept.

The CHAIR: In relation to the role of the Inspector, notwithstanding your view that increasing the Inspectorate to a body of three might not be as desirable, is there room to say that the Inspector's office ought to be well resourced to carry out audits?

Mr TINK: Absolutely. In fact, I ended up being uncomfortable with the idea, and this is no disrespect to the Hon. David Levine, but I became uncomfortable with the idea that this job could be done by one person covering both the ICAC and this new body. I became uncomfortable with that and, in the end, formed a view that there should be a separate Inspector for the new Law Enforcement Conduct Commission [LECC] because the Law Enforcement Conduct Commission, if Parliament sees fit to go along with the concept, will cover this whole new area of police oversight in the Ombudsman's office. It is a major expansion of oversight work, if you see what I am trying to say, because up until now there is no Inspector over the Ombudsman's office. Bringing this into the LECC brings in a major new body of work and responsibility. I had difficulty seeing how an Inspector could do that and also inspect the ICAC, so to speak, and do it all as Parliament and the public would expect. That was my view.

Right in the middle of the time that I was doing this inquiry last year, things got interesting, let us say, around ICAC and the Inspectorate, and it confirmed to me that it was better to have separate Inspectors properly resourced. Going to page 5 of the submission of the DPC, they are talking about an Office of the Inspectorates. I did seek some clarification about that from the Department of Premier and Cabinet and they say it is not meant to be a Full Bench. There will be separate Inspectors for each body, which to me is quite important to maintain that distinction, but they might share resources or they might, from time to time, have informal discussions about things. In principle, I do not have an objection to that, providing the legal responsibilities for each role are clear and they are not muddied and it is seen as one Inspector for ICAC and one Inspector for the police oversight.

Mr MARK TAYLOR: Going back to the Commissioner's Council, do you see opportunities or an advantage in putting in some different skill sets or experiences? There has always been a tradition that integrity bodies appoint retired judges. In your experience, is there some other skill set?

Mr TINK: The way I understand it is proposed is they are going to hive off the management of the new body. The proposal that will come to the Parliament—I better be careful. My understanding of where it is up to—I think it is in this report. They have actually got a diagram of how it will work somewhere. I will turn that up. There is a diagram on page 12 of the DPC submission on how they expect the Law Enforcement Conduct Commission to look like. What they are proposing is that the Executive Manager, the CEO, be separate from the three people who are involved in the Commissioner's Council. I am pretty relaxed about that. I did not have a lot to say about how the executive management would work. I was more concerned with how the work would come over from the Ombudsman's office and be dealt with, and what matters should remain with the Ombudsman once the new body is set up. I am very comfortable with that diagram on page 12, but with the LECC—it might be different with ICAC—there are these two divisions and they do involve significant sort of legal-type hearing work, if I can put it that way. So one is the Integrity Division, which is full-on Royal Commission-type work; the other one is oversight but nevertheless also involves significant legal work, and the Chief Commissioner over the top of it all should be somebody who is capable of doing sort of basically either job—stepping in and doing hearings and so forth.

I still see those three people as having a need to have legal qualifications, and the Government appears to be accepting of that. If you go down the road of having something equivalent to a Council sharing that decision-making power at ICAC, the question is from where are you going to get the bodies? With what I was asked to do, the source of the bodies is obvious—you need somebody for Oversight, you need somebody for Integrity and you need somebody on top. So the question is if you go down that path with the ICAC: Where do you get the bodies from to be that governing council? It seems to me that you have slightly wider options because essentially the ICAC is still doing one thing, which is the integrity side of things, and the Ombudsman, of course, remains separate with Ombudsman-type complaints for the public service generally. That then leads you to—I think it is in the ICAC submission somewhere but I am sorry I cannot find it, they list the people who are the senior office bearers at the ICAC. I guess that is the list of people who you would draw from and to the extent that you draw from the people in that list you have got a chance to choose people with wider skill sets. Does that make sense?

The CHAIR: Yes.

Mr TINK: If you decide to have a panel, one of the key questions is where do you get those people from? Am I allowed to say a couple of things?

The CHAIR: Yes.

Mr TINK: I am probably trespassing in areas that I should not, but I have got some strong views on a couple of things. I do not want to talk in the context of particular inquiries because I do not know enough about them to be commenting forensically in a room like this but I, like everybody else, have read papers about inquiries that have been conducted—some down at the Police Integrity Commission [PIC] too, I have got to say. One of the things that I think needs to take on greater importance in public hearings especially, whether it is the new police body or the ICAC, is that people have got to take the rules of the Bar Council seriously. The Bar Council is the professional body in New South Wales that governs the conduct of barristers, and there are Bar rules. These particular Bar rules came into force on 1 July 2015 and are called the Legal Profession Uniform Conduct (Barristers) Rules—I have set them out on pages 120 and 121 of the report that I did. They apply not only in New South Wales but also in Victoria, which is the other major Bar in the country. They set out the conduct that is expected of people who appear before Royal Commission-type bodies. These are the best advocates in the country deciding upon a set of rules as to how Counsels should conduct themselves at Royal Commissions. In my opinion these should be enforced rigorously at Police Royal Commissions and at ICAC hearings.

The CHAIR: Does it require the Commissioner to take an active role in ensuring those Bar rules?

Mr TINK: Well, in my view—

The CHAIR: Because generally the Bar rules are enforced by the disciplinary bodies of the Bar.

The Hon. LYNDA VOLTZ: I thought Mr Tink was going to outline some of those rules.

Mr TINK: I can read them out, if you would like.

The Hon. LYNDA VOLTZ: Yes.

Mr TINK: It will take a little while but I will read them out.

The Hon. LYNDA VOLTZ: The ones that you thought were fundamentally important.

Mr TINK: Rule 100, which I will also read, relates to the conduct of Counsel in relation to dealing with the media. Another little bugbear of mine is that it is very important for Royal Commission-type bodies to be very careful in their dealings with the media. I had a blazing row with Ian Temby about this 23 years ago or something at this Committee—there were concerns around briefing particular journalists. My view is that these standing Royal Commissions have got an important role in briefing the media—there is no problem with that—they have an education role to brief the media, but the playing of favourites has got to be avoided at all costs because to me that smacks of partial conduct, and partial conduct of a very significant kind if one particular journalist is getting information about an inquiry that is going on.

The Hon. LYNDA VOLTZ: You are assuming that is being done by barristers—and I raised this example yesterday with the NRL match fixing all over the papers, which the media has obviously been briefed about whilst it is still in the investigative stage. Is this just an assumption that it is coming from barristers or—

Mr TINK: Who knows where it comes from—that is one of the difficulties—you tend not to know because journalists do not give their sources. To me it is all the more reason to have a very firm statement of the conduct that is expected. To me it frankly smacks of partial conduct, and that is drawing straight out of the ICAC Act that when you brief a particular person you are engaging in partial conduct. Ideally everybody should be briefed together, whether it comes from Counsel Assisting in any particular tribunal, let us just say, whether it comes from the Commission or separately from Counsel Assisting we are probably never likely to know in the real world, but anybody who is involved in those roles should understand that these rules are really important and such conduct, if it is ever discovered, is very serious.

The Hon. LYNDA VOLTZ: But the briefing of the media in terms of the ICAC—and I was here in previous Labor governments—is not a new thing.

Mr TINK: No, but what I am saying is if the ICAC, LECC, PIC or whoever it is wants to brief the media, they should brief all the media. It should not be—

The Hon. LYNDA VOLTZ: But I am trying to get to where the ICAC has selectively briefed parts of the media and not others.

Mr TINK: There was a case—this is going back 20 years—in the 1990s involving I think it was *Four Corners* and the ICAC. Stuff was revealed on TV before it was actually entered into evidence. Do you recall that?

Mr PAUL LYNCH: That was around Florida, was it not?

Mr TINK: You are quite right, it was Florida. There is one example that really got under my skin.

Mr PAUL LYNCH: There were findings made against a whole range of people the Inspector investigated.

Mr RON HOENIG: Can you just remind us what is in rule 100?

Mr TINK: I will just go through the rules. These are the rules which New South Wales and Victoria have agreed on around Royal Commissions:

97. A barrister who appears as Counsel Assisting an investigative/inquisitorial tribunal must fairly assist the tribunal to arrive at the truth and must seek to assist the tribunal with adequate submissions of law and fact.

98. A barrister who appears as Counsel Assisting an investigative/inquisitorial tribunal must not, by language or other conduct, seek to inflame or bias the tribunal against any person appearing before the tribunal.

99. A barrister who appears as Counsel Assisting an investigative/inquisitorial tribunal must not argue any proposition of fact or law which the barrister does not believe on reasonable grounds to be capable of contributing to a finding on the balance of probabilities.

100. A barrister who appears as Counsel Assisting an investigative tribunal must not publish or take any step towards the publication of any material concerning any current proceeding in which the barrister is appearing or any potential proceeding in which a barrister is likely to appear, other than:

(a) a barrister may supply answers to unsolicited questions concerning a current proceeding provided that the answers are limited to information as to the identity of any witness already called, the nature of the issues in the proceeding, the nature of any orders, findings, recommendations or decisions made including any reasons given by the investigative tribunal; or

(b) a barrister may, where it is not contrary to legislation, in response to unsolicited questions supply for publication:

(i) copies of affidavits or witness statements, which have been read, tendered or verified in proceedings open to the public, clearly marked so as to show any parts which have not been read, tendered or verified or which have been disallowed on objection;

And that really goes to the heart of that Florida thing—

(ii) copies of transcript of evidence given in proceedings open to the public, if permitted by copyright and clearly marked so as to show any corrections agreed by the witness or directed by the investigative tribunal; or

(iii) copies of exhibits admitted in proceedings open to the public and without restriction on access.

The Hon. LYNDA VOLTZ: Does the Bar have an ability to enforce those rules?

Mr TINK: Yes. People in this room will know better than me, but I think they are required to act on a complaint. The Bar Council has bodies of very senior barristers—panels—set up to hear these matters. The barrister against whom the accusation is made has obviously a right of appearance, I think with Counsel, and then they have Counsel Assisting.

The Hon. LYNDA VOLTZ: So there is an ability to discipline already within the Bar Association under those rules?

Mr TINK: Absolutely. Again, somebody here will correct me if I am wrong, but at its most extreme they can be struck off. The ultimate sanction is to lose your professional livelihood and probably—I do not know; I am just guessing—if there is criminal conduct disclosed then I am sure it would be referred to the Attorney General or the Director of Public Prosecutions or somebody like that. So a tribunal appears, it is there, it has always been there—

The Hon. TREVOR KHAN: But these rules only come into force—

Mr RON HOENIG: Similar to the old New South Wales Bar rules.

Mr PAUL LYNCH: Are they not stronger than the old Bar rules though?

The CHAIR: They were specifically directed to Royal Commissions and inquiries.

Mr RON HOENIG: The Bar issued determinations prior to these rules about Counsel's conduct in Royal Commissions—

The CHAIR: Or just unprofessional conduct.

Mr RON HOENIG: Similar to that of a Crown Prosecutor. You were part of the legislature that adopted the ICAC Act originally, were you not, Mr Tink?

Mr TINK: I was.

Mr RON HOENIG: When Parliament gives these powers to a Royal Commission, the protection that it envisages is that the Commissioner is a judge, Counsel Assisting is bound by the Bar rules that you referred to, and with their knowledge and experience it should be intuitive to them to provide that sense of procedural fairness as they embark upon their task. Is that what you envisage would occur by establishing a sort of standing Royal Commission?

Mr TINK: I thought it was implicit. I guess I get a general sense that at times things in some inquiries appear to have gone a little bit further than I would have thought they would if these rules were applied. I do not see any reason why the Commissioner cannot step in and warn somebody who is appearing at the Bar table before them—remind them of what the rules are. Again, you would know better than me, but it is open to people at the Bar table to make a complaint if they think things are going too far.

The Hon. TREVOR KHAN: But, indeed, in a court setting, justices will—I will not say frequently but are known from time to time to direct Counsel appearing before them to their professional obligations. Is that not right?

Mr TINK: I think so, and I do not see any reason why it should not happen at a Royal Commission hearing either. Again, I am probably speculating here, but there has always been much more of a grade separation, if I can put it that way, between the bench and the Bar in traditional court proceedings. Where there is a standing Royal Commission or a Royal Commission of any type and Counsel Assisting, the relationship appears to be a lot closer. I think that is a necessary consequence of a Royal Commission.

Mr RON HOENIG: In fact, for somebody who has been Counsel Assisting, effectively you regard the Counsel—not in an ICAC inquiry, but you regard the presiding officer effectively as your client. So you have taken instructions, you have planned, you have provided advice as to which way you want to go, which witnesses you are going to call, why you call these witnesses, so the grade separation you refer to—I suppose each Commissioner, Coroner, Royal Commissioner makes their own decision, but the ones that I have been involved in you work very closely with the presiding officer.

Mr TINK: And I think you can do that and that difference is accepted—it is a necessary consequence of having a Royal Commission. But I still think there is room, especially when there is a public hearing, if there is conduct which is not in accordance with those Bar rules, it is incumbent upon the person presiding to—

Mr RON HOENIG: But it has usually got to be pretty bad for a barrister to actually complain about another barrister, in practice.

Mr TINK: I understand; it is inherent in cross-examination and all the rest of it that you push pretty hard—that is understood.

The CHAIR: But probably it does go to the conduct of the proceedings generally. We have heard a lot in the last couple of days about how you would ensure procedural fairness is provided to people who are the subjects of inquiries, including, I suppose, the manner in which Counsel acting for accused persons should be able to test the credit of people who are appearing before ICAC. Do you have any view about limitations on Counsel cross-examining witnesses before ICAC?

Mr TINK: At the end of the day I think that has got to be a matter for the Commissioner, bounded by the terms of reference of the inquiry. But what I am hoping is that if this Commissioner's Council—as I call it anyway—idea is adopted, there will be a lot more consideration given to the key steps that are taken in advance of what level the investigation gets to and that that will help to provide balance to the way the proceeding occurs. Beyond that it is hard to get too prescriptive.

The CHAIR: We have heard some evidence in respect of potential issues relating to credit where the credit of a witness appearing before ICAC is potentially open to cross-examination. Should issues of credit be able to be ventilated by Counsel as a matter of procedural fairness?

Mr TINK: To me the answer to that is bound up in the proposition that it is essentially a Royal Commission and it is wide. It is not narrow, it is wide in its scope.

Mr RON HOENIG: When I was Counsel Assisting I used to put the credit issues to the witness when I called them, those that were within my knowledge.

The Hon. LYNDA VOLTZ: You can do that. I am confused. I have been to the Independent Commission Against Corruption [ICAC] hearings and that does happen. I am confused about the dilemma we have before us.

Mr TINK: Can I comment on one other thing?

The Hon. LYNDA VOLTZ: Credit is tested in the ICAC hearings. I am not sure why this is a huge issue. I am not sure you can say the evidence is there.

The CHAIR: The other issue is the manner in which exculpatory evidence is treated.

Mr TINK: That was the one other thing I wanted to mention. I have not seen what the Director of Public Prosecutions put in evidence but I have read the press report. People around this table know better than I, but it is fundamental that a prosecutor has a responsibility to put the facts to the court. If the suggestion is that the body that is briefing the prosecutor, being a public body, is holding material back I have real trouble with that.

The Hon. LYNDA VOLTZ: His explanation at the time, and the lawyers will correct me if I am wrong, is that the ICAC is an investigative inquisitorial body and prosecution is a separate matter. There is a process that goes along with investigation, which is what they are often doing, rather than prosecution.

The Hon. TREVOR KHAN: They laid the prosecution in Kear, they moved beyond their investigation.

The Hon. LYNDA VOLTZ: That was at the end of the process. I am going to what the Department of Public Prosecutions said yesterday, that the ICAC fundamentally has public hearings and is an investigative process rather than a prosecutorial process.

Mr TINK: Once it is referred on.

The Hon. LYNDA VOLTZ: Yes. The ICAC will then refer it for prosecution.

Mr TINK: Yes. It is a question of what goes in the brief.

The Hon. LYNDA VOLTZ: They are talking about the process that pre-empts that.

The CHAIR: No. The discussion yesterday was purely about the material referred to the Department of Public Prosecutions [DPP] upon which it proceeds to a prosecution.

The Hon. LYNDA VOLTZ: No.

The CHAIR: The problem identified by the DPP is that the ICAC may have statements which have been given on the basis of an undertaking to a witness. That undertaking may be on the basis that it will not be disclosed to any other person and they seek not to hand it over to the DPP. Or, some comfort is given to a witness that this statement will not be relied upon in any other process.

The Hon. LYNDA VOLTZ: Point of order: that is exactly the process that the ICAC follows in its hearings.

The Hon. TREVOR KHAN: That is not a point of order.

The Hon. LYNDA VOLTZ: You cannot continually put things to witnesses that are fundamentally not what was said, nor is it the process. When you go to the ICAC witness stand you are asked whether you want your statement to be used in court or not and nearly everybody says "no" and the prosecution has to retake statements. You state these are comforts given to people but it is a process inherent in the ICAC. It is not what he was talking about yesterday.

The Hon. TREVOR KHAN: It is a misunderstanding.

The Hon. LYNDA VOLTZ: It is not a misunderstanding, it is what happens.

Mr TINK: You have the matter well in hand.

The CHAIR: Mr Tink, I do not want to trouble you with the disputes at this table. There is clearly a problem which exists between the DPP and the ICAC in relation to the material which it delivers. I think Kear is a specific example.

The Hon. LYNDA VOLTZ: No.

Mr PAUL LYNCH: They said the opposite yesterday.

Mr TINK: I was not here.

The Hon. LYNDA VOLTZ: Which is a problem with repeating statements.

The CHAIR: We do not have the transcript before us. I understood him to identify a specific category of material where he could potentially understand that there was some difficulty relied upon by the ICAC wanting to refer it, which needs to be resolved, and potentially we might have to come up with a protocol to resolve those issues.

Mr TINK: I can see that difficulty, yes.

The CHAIR: Are there any other issues?

The Hon. LYNDA VOLTZ: I can see why witness statements are so unreliable.

Mr PAUL LYNCH: That is why we have *Hansard.*

The CHAIR: *Hansard* is a wonderful thing.

Reverend the Hon. FRED NILE: We should all appear before the Independent Commission Against Corruption at some stage. I am joking.

The Hon. TREVOR KHAN: I would not wish that on anyone.

The CHAIR: There is potentially no merits review in respect of findings of fact by the ICAC and certainly there is no merits review where it does not proceed to a criminal prosecution. The report is issued and there is a finding. Save for errors of law or other matters which are set out in the Independent Commission Against Corruption Act there is no review of that decision. Part of the issue that is often raised is that because there is no merits review the person of interest does not get an opportunity to respond formally to the allegation made against them. They may have made a submission in reply to the potential finding by the ICAC. Should we be adopting a process where the submission of the person of interest should be included in the Commissioner's report?

Mr TINK: Is this going to recommendation 15?

The CHAIR: Yes. Rather than an exoneration protocol that might be criticised on the basis that it does not afford an opportunity to the person who does not get a criminal prosecution and their findings stand, there be a process where, at the election of the person of interest, their submission is published in response to the allegation as part of the report by the Commission?

Mr TINK: I am with Bruce McClintock on this and what he says in his submission.

The CHAIR: He agreed with that as a proposal yesterday.

Mr TINK: He agreed with the proposition there should be some way of—

Ms TANIA MIHAILUK: I do not think he agreed to it being specifically published in the report.

The CHAIR: He agreed it should be publicly available.

Ms TANIA MIHAILUK: There should be a process that makes it publicly available, but not in the Commissioner's report.

The CHAIR: It is now the subject of a suppression order.

Mr TINK: If you wanted a considered answer from me I would prefer to see what was said yesterday. My provisional view is what was proposed by the Inspector is not something I would agree to. I am against recommendation 15 as it stood. That is as far as I have gone in terms of considering it. I am not sure what Mr McClintock said yesterday. If you want an answer I would like the transcript and I will take it on notice.

The CHAIR: We will arrange that.

Reverend the Hon. FRED NILE: You have seen the submission from the ICAC?

Mr TINK: Yes. I have seen the submissions online.

Reverend the Hon. FRED NILE: The ICAC did one submission and a supplementary one.

The CHAIR: We are grateful for your attendance today and for being publicly available.

(The witness withdrew)

GRAHAM JOHN KELLY, former Inspector of the Independent Commission Against Corruption, affirmed and examined

The CHAIR: Mr Kelly, thank you for appearing before the Committee. Do you have any questions about the procedural information that was sent to you in relation to witnesses appearing before parliamentary committees?

Mr KELLY: No, I understand fully.

The CHAIR: In what capacity do you appear before the Committee?

Mr KELLY: I would like to table a copy of my short current curriculum vitae [CV]. In short, currently I am the chairman of the GDI Property Group, a listed public company, and chairman of Harness Racing New South Wales. I am also a director of various other privately held companies.

The CHAIR: That is interesting. Have we banned harness racing?

Ms TANIA MIHAILUK: We have not banned that yet.

The Hon. LYNDA VOLTZ: No, harness racing is still going. Unless you know something we do not know, Chair.

Ms TANIA MIHAILUK: We will read about it on Facebook.

The CHAIR: Mr Kelly, generally we afford people the opportunity to make an opening statement. Would you like to make an opening statement in relation to your submission?

Mr KELLY: If I may, please, be indulged to read it. It is a pleasure to be back before this Committee, although I think only Reverend the Hon. Fred Nile was here the last time I appeared before this Committee.

Reverend the Hon. FRED NILE: I am a survivor.

Mr KELLY: Relevantly, I was the inaugural appointee as Inspector of the Independent Commission Against Corruption [ICAC], and it is in that capacity that I appear today. I wish to state and make quite clear to the Committee that my comments are made as a matter of policy and not as a matter of any kind of technicality.

The Committee has from me two letters, one dated 17 May 2016 and the other dated 31 May 2016. My salient points are: One, the idea that the ICAC should be stripped of its power to conduct public hearings into possible serious or systemic corruption is, in my judgement, an extremely bad one. Two, the idea that an ICAC finding of corrupt conduct could be expunged by the Supreme Court is also an extremely bad one. Three, the idea that the role of the Inspector of the ICAC should be beefed up by creating an increased staff and making it a full-time job involves an unnecessary expansion based on an unjustifiable extension of power. Four, the related idea that ICAC should be required to tell the Inspector various important steps it proposes to take in undertaking investigations of possible serious or systemic corruption is similarly theoretically and practically flawed. Five, nevertheless there are some changes, as Reverend the Hon. Fred Nile will recall, that I have proposed in the past to this Committee and would continue to advocate—namely, to remove mere breaches of employment conditions from the definition of corrupt conduct and to give the ICAC power to conduct its own prosecutions.

My starting point is simple: Corruption has a long, long history in this State. In fact, the most notorious event in Australian political history—namely, the deposing of Governor Bligh in the so-called Rum Rebellion—was born out of corruption.

ICAC was a brilliant addition to New South Wales' governance. Practically everything Premier Greiner said in his second reading speech for the bill to establish it remains basically true today. The people of this State should be eternally grateful to Premier Greiner and to his adviser Dr Sturgess for its creation.

It has been outstandingly successful in exposing insidious corruption in almost every facet of the New South Wales public sector—the Education Department, the Health Department, the railways, local government, and I could go on and on. I invite the Committee to look at the reports listed on ICAC's website.

The only major thing wrong in Premier Greiner's speech so many years ago was the aspiration that the creation of ICAC would significantly rid New South Wales' public administration of corruption within a decade. The events of the last few years belied that hope.

All this current fuss about ICAC's powers comes, it seems to me, from a simple mistake: ICAC should never have undertaken the Cunneen inquiry. I said that publicly at the time. I said that, had I been the Inspector then and had Ms Cunneen complained to me, I would have found her complaint justified. The simple reason is that her alleged conduct was not alleged to have occurred in the course of execution of her public office and, in any event, did not satisfy the constraint that ICAC must direct its attention towards serious and systemic corruption. The High Court, as it so often does in Australian public administration, fixed the mistake, and there the controversy should rest.

If there is a major problem with ICAC it is that there are so few prosecutions occurring as a result of its endeavours. Let me tell you, I was sitting in the public gallery while there was something of a discussion about the relationships between the Director of Public Prosecutions [DPP] and ICAC. It sounded like 10 years ago, when I used to meet with the Commissioner of ICAC and the DPP of that day. I think the analysis of what goes wrong involves quite complex considerations. It involves resource constraints and the constraint that the DPP is prevented from undertaking the creative preparatory work needed to meet the scrutiny of the criminal courts.

There is, I suspect, some fault on ICAC's part, but the real problem is a hole in the criminal enforcement process. So how should this hole be filled? Not by trying to mess around with the independent processes of the DPP but by giving ICAC its own power to prosecute. I have made that recommendation consistently since I was first appointed as Inspector.

It would then itself have to prepare a brief of evidence in admissible form. This should not require the assembly of a major new enforcement brigade. Really there are not that many cases and anyway they can, and in my view should, be briefed out to the Bar.

My other reform suggestion involves a slight but not damaging reduction to ICAC's jurisdiction. For reasons that may have seemed appropriate to Dr Sturgess at the time, corrupt conduct includes mere breaches of employment conditions. The person in the street may find that surprising when they really want ICAC to go after the big fish. If this artificial extension to the notion of corruption were removed no great harm would be done and it would be one less thing ICAC would have to be worried about. ICAC could then even more easily direct its attention to serious and systemic corruption.

This is in grave contrast to the suggestion in the current Inspector's report that local government be put beyond the province of ICAC. I appreciate the Inspector did not make that as a recommendation but as a suggestion.

Some of the most sinister, most egregious corrupt conduct has been exposed by ICAC to exist in local government. More than perhaps anywhere else in the public sector, this jurisdiction has been ICAC's crowning glory. If anyone thinks that serious and systemic corruption does not continue to pose a major threat to local government in New South Wales they are, in my view, kidding themselves. Time and time again people from every part of this State have said to me that their council is the worst. For once they are all right. I invite you to look at the reports of ICAC in the last 10 years. Thirteen by my count have involved major corruption in local government in New South Wales. This is something we should all be profoundly ashamed of and it is something that, in my view, we all have a duty to assist ICAC or some other equally powerful organisation to help eradicate. To take away the scrutiny of local government from ICAC would be a retrograde step, in my view, of monumental proportions. It would be the green light for rampant corruption, particularly in the development process.

As for the role of the Inspector, I have advocated consistently that this is a job for someone with management experience, not—and with the greatest respect to those who have followed me and their achievements—retired judges. The reason is simple: It is not a judicial review role. It is there to have a practical look at the way ICAC conducts itself. It is a conjunction to the operations of this Committee, which obviously should not be given details of individual cases, whereas the Inspector can be given those details. It conducts itself either in response to complaints or of its own volition. It does not need to intrude nor be an essential step in ICAC's processes. I just do not understand at all the proposal that notification to the Inspector should be a mandatory step in ICAC's investigations.

I do not like saying "in my day", but in my day the then Commissioner, the late Hon. Jerrold Cripps, QC, and I used to meet once a month to tell each other what we were doing, particularly about anything sensitive. This informality worked extremely well. We trusted each other even if sometimes we had diametrically different perspectives. You just do not need to set up a bureaucratic and legalistic system to get efficiency and fairness. I just do not see the need for the office of the Inspector to be ramped up in the way that has been proposed.

Some of you will remember my executive assistant Ms Seema Srivastava. She and I established the office from scratch, a bare office on the top of Redfern police station. Nothing was there—no furniture, no procedures, nothing. She worked hard but, much more importantly, effectively according to work plans. Even though the then Premier who appointed me thought the job would only take about a day a fortnight, in fact it took me a couple of days a week to get the show going.

Bear in mind that the terms of the creation of the office of the Inspector were such that anyone from any time in the past could complain to the Inspector. I must admit I braced myself for a lot of old stuff. I did get some, but not that many. Even with that retrospectivity this job did not take full-time work or a ramped-up office in the way now proposed. I think the explanation for this lies in what the current Inspector said at the end of his evidence yesterday. That is that though he accepts the need for an anti-corruption agency it is one controlled by a powerful oversight agency, so you switch the balance of power around. That, to me, would involve the emasculation of ICAC.

Finally, just to reiterate what I have said in my letter dated 17 May about how unwise it would be to prevent ICAC from conducting public hearings, I believe there is no greater deterrent to surreptitious malevolence than the bright glare of daylight. It is not without symbolic significance that the world's leading anti-corruption body is called Transparency International. On the other side of the coin, if I were wrongly accused of having engaged in serious or systemic conduct I would passionately want the opportunity to clear my name publicly. Only a fool would think that he or she could do so effectively, fending off the innuendo and speculation that always attends Star Chambers, if hearings were in private.

Nevertheless, I believe it is profoundly unwise to require ICAC to notify a target of the nature of allegations in investigative stages of its work. This just gives crooks time to attempt to cover up their tracks.

I simply cannot understand how the Inspector's report can—in my view so naively—have suggested the gutting of ICAC by taking away public hearings, by removing its oversight of local government and by requiring it to notify targets of the nature of allegations against them during the investigative stage. The Government and Parliament of this State should, in my view, stand condemned if such retrograde steps were undertaken.

One mistake corrected, no matter how bad, cannot justify a wholesale onslaught on its powers. It is just not wise to throw the baby out with the bathwater.

I am happy to try to answer your questions as forthrightly and as clearly as I can.

The CHAIR: Does anyone have any questions?

The Hon. LYNDA VOLTZ: No. I think that is all great.

Ms TANIA MIHAILUK: That was pretty clear.

Reverend the Hon. FRED NILE: We obviously have a major conflict now between the ICAC and the Inspector. How do you see that being resolved?

Mr KELLY: Thank you for that question, Reverend the Hon. Fred Nile, because, if I might jump back to ages ago, you have a capacity to pull my heart strings. By that I mean it is heartbreaking for me to see the mess that has ensued. It did not need to ensue. I had had some dealings with Jerry Cripps before I was appointed when he was at the Bar. I did not know him well at all—in fact, barely at all—but he was a man of immense integrity and a man of widely understated and unrecognised ability and fairness, yet he was tenacious. I am not going to try to describe what I am—that is for others to judge—but I think I am a forthright person who can say what needs to be said to others. Jerry had a similar attitude. Our meetings were always productive even if we did not necessarily agree. He clearly respected what I said to him and if he had an explanation or some such thing I took it seriously. And he produced some massively important results during his time, without too much fuss at all.

I will dive off a little bit and perhaps go further than I should, but there was a funny incident when he was about to undertake the inquiry into the Wollongong Council—an inquiry that exposed sleaze and corruption of a kind that had it been written as a script for a movie would have been rejected as incredible. The Friday before, a lawyer for one of the people of interest rang up and asked me to stop the inquiry from going ahead because the evidence would affect his client's marriage—well, hang on a moment! Of course I did not do anything because I could not anyway, but in any event I was absolutely confident that the Commission would proceed forthrightly and fairly. That is my answer to you. You have touched my heart strings again by opening up something that I feel passionate about.

Reverend the Hon. FRED NILE: How do we resolve the conflict?

Mr KELLY: I said from the very beginning that the job of Inspector is not a job for retired judges. I have to make a confession to the Committee. I had a background in constitutional law and policy many years ago. As a matter of constitutional policy—not law but policy—I think it is an extremely bad idea to appoint retired judges to anything because a fundamental attribute of the judiciary should be independence and not the hope for some kind of subsequent government appointment. So, first off, I do not think retired judges should be appointed to anything. Secondly, this job is not a job for a retired judge. Sure, you need an acute understanding of the law, but you need an understanding of how organisations work and you need an understanding of management issues. There are many management issues with an organisation like ICAC. That was a major topic of discussion between the then Commissioner and me.

I would simply not appoint retired judges to this position in the first place because it all becomes too legalistic and it should not be legalistic. I hesitate to say much more than that because I do not want to reflect on any particular appointments as Commissioner, but I have read in the newspaper today that there was some idea of appointing three Commissioners. Well, I reckon that that makes it simply three times harder to get good people, because it is very hard to find very good people. In every role I have ever served in, across a wide range of public companies, across regulatory bodies, as a leader of a major law firm, everything in these instances depends on people.

One of the other things that I have detected that has come up in this inquiry is the need for procedural fairness. When I listened to some of it online yesterday and what have you, I thought, "This sounds like a university law school moot. It is not like real life." Take a very simple example. Assume that ICAC were investigating the Chairman and me because they found that I had given the Chairman a cheque for $10,000. Now assume that the real facts behind that were that I was a builder and I had contracted to build a house for $500,000 for the Chairman and I had included in that a component of $100,000 for roofing material, but the contract had provided that if I did not spend the money on buying the roofing material I would pay the Chairman back the balance. Assume that that was the real explanation. Can anyone in this room seriously think that ICAC would not give me the opportunity to explain?

Sure, I paid the Chairman $10,000, but, hang on a moment, it was part of a contract to build him a house and it was a rebate to which he was entitled. I can assure you that if ICAC refused to give me that opportunity I would be down the street to the Supreme Court in a flash and I am as certain as the sun will rise tomorrow that the court would issue a remedy. Procedural fairness is a difficult and elastic concept, and it should be. We should not be legislating it. We should be allowing the court system to impose it in the appropriate circumstances in the appropriate way. It all works, so I just do not see the big problem here.

Mr CHRIS PATTERSON: Mr Kelly, you made it clear you had a very good relationship with your Commissioner and the results speak for themselves, and I say that with the utmost respect. Yesterday Mr Cooper was here and he said the same thing—he had a very good relationship with two Commissioners over his five-year tenure. In your answer to Reverend the Hon. Fred Nile you made your point about retired judges abundantly clear. That said, that is clearly not the only personality trait. A number of people including the DPC and Mr McClintock yesterday believe that the three-person model might be a way to overcome that clear personality conflict between somebody in your former position and the most important person in the ICAC. You have answered, but there is no guarantee that the people in those roles will have the respect for each other that you and your counterpart had, yet that is the fundamental basis of the Inspector-Commissioner relationship. Do you see the three-person committee as so bad when it could eliminate hard and fast personality conflicts?

Mr KELLY: Could I answer it this way?

Mr CHRIS PATTERSON: Please do.

Mr KELLY: If you put forward a proposal for a three-person Commission, I will not be writing a vituperative letter saying it is a silly idea. I want to make that plain. I do not think it is necessary and, frankly, since you asked me, I do not think it is going to be a solution because you are always going to have a Chairperson with three people and the Chairperson is going to be the focal point. I have had experience of boards and committees where they seem to start off okay and then personality differences emerge and what have you. I think in 10 years time you might well say, "We made it into three people but, really, have we achieved anything?" As I say, if you were to put that proposal I would not express dire opposition to it.

Mr CHRIS PATTERSON: I wish to ask for clarification. Mr Tink was in earlier and he indicated a model in his report of potentially a Chair and two Deputies underneath. I am not a lawyer so I can be corrected, is that three people of equal standing? How is it suggested that that will work, for example, like the Full Bench model?

The CHAIR: If I read the proposal correctly, they are suggesting three lawyers.

Mr CHRIS PATTERSON: Would they be of equal standing or is there a Chair?

The CHAIR: I think there would be a Chair.

Mr CHRIS PATTERSON: Thank you for the clarification.

Mr KELLY: I might add a supplementary answer. I have been the chairman of a whole heap of company boards and have served on boards of different sizes. I would regard myself as something of a corporate governance expert. I think the most important aspect of corporate governance, and fundamentally this is a subset of it, is the cohesiveness of, let us call it, the board. That is sometimes a bit of luck. If you get three people that are of pretty much equal intellectual capability and have similar general orientations, and I do not mean by that political affiliations or any such thing as that, because diversity is very important, but similar goodwill to the outcome I suppose is the way to express it, then things work very well. If you have a dissident, it is a bit like a team of horses. If they all perform in the right direction you have got a superlative machine. If one does not, you have got to get rid of it.

Mr KEVIN HUMPHRIES: Be careful how you do that, I would suggest.

The Hon. TREVOR KHAN: Get over it, Kevin.

Mr CHRIS PATTERSON: That is extremely helpful.

Mr KEVIN HUMPHRIES: It is an interesting metaphor.

The Hon. TREVOR KHAN: You cannot work it into every conversation.

Ms TANIA MIHAILUK: Mr Kelly, you mentioned earlier that in your time as an Inspector you met with the Commissioner and that you had a relationship. I would have thought that by having three Commissioners that would make it quite an unusual power imbalance with one Inspector attempting to meet with three and having a relationship as well. What would your view be on that?

The Hon. TREVOR KHAN: Bigger lunch.

Ms TANIA MIHAILUK: It is a fair point.

Mr KELLY: It is a more expensive lunch.

Ms TANIA MIHAILUK: There is no doubt about that, but I would have thought it makes things very different.

Mr KELLY: I am certain it would.

The CHAIR: You could have a model, could you not, where they delegate a Commissioner?

Ms TANIA MIHAILUK: Extra Inspectors.

The CHAIR: You would have a delegated Commissioner who would meet with the Inspector, probably the chair.

Ms TANIA MIHAILUK: What have you guys already got written down? Let us know.

The CHAIR: Tania, that is not—

Mr KELLY: I do not know what happens now. This idea—

Reverend the Hon. FRED NILE: There have been no meetings.

The CHAIR: There is a Memorandum of Understanding in place between the Commissioner and the Inspector for the purpose of having meetings, which do not occur.

Mr CHRIS PATTERSON: And both have said it publicly.

Mr KELLY: Someone mentioned Mr Cooper yesterday and how they had a good relationship. A common theme was Ms Srivastava, who was a superlative executive officer, and she stayed on with Mr Cooper until almost the end of his time. That was an important common theme. She had her attitudes to a whole bunch of things that ICAC did, no doubt about that, but she was acutely attuned to the bigger picture and she was, with me, the author of that Memorandum of Understanding.

The CHAIR: So that Mr Levine is not done an injustice, he clarified his comment yesterday relating to local government being removed from the auspices of ICAC. To give him his due, he was not suggesting that ICAC be removed from having any surveillance of local government but that it potentially would become a different division of ICAC rather than being removed from ICAC.

Mr KELLY: I must admit, I did not read that in his report.

The CHAIR: It is not in his report, but he certainly clarified it yesterday that he was not suggesting what you have interpreted him as suggesting in your opening today.

Mr KELLY: Well, that is what his report said.

Ms TANIA MIHAILUK: That is right.

Mr KEVIN HUMPHRIES: He was in a better mood.

The Hon. LYNDA VOLTZ: In the fullness of time, in the light of day.

Ms TANIA MIHAILUK: That is right, in the light of day.

The CHAIR: To give him his due, he has moved away from that position.

Ms TANIA MIHAILUK: Yes.

Mr CHRIS PATTERSON: He concurred with your report.

Ms TANIA MIHAILUK: Thankfully.

Mr KELLY: In contradistinction to what I said about what my reaction would be if the Committee recommended three Commissioners, let me say, if anyone proposes to remove local government from ICAC, I will re-emerge from my shell fighting with very strong language.

The CHAIR: You have left us in no doubt about that, Mr Kelly.

Mr KEVIN HUMPHRIES: Thank you for your forthright contribution, Graham, it is much appreciated. What interests me is the third issue that you raised, which is about expanding the remit of ICAC. I suspect the general public would be interested in your views on this as well, expanding through to a prosecution-type transition. It is something we have discussed with the DPP about reaching back in and how far ICAC has been forthcoming in supporting that. What might that look like, in your view?

Mr KELLY: Let me describe the problems to start with. One problem I think is a law school moot problem, in other words, not a real problem, and that is that evidence given under compulsion before ICAC cannot be used in the courts. That is a whole separate issue and it does not need to change.

The practical problem is that to do its job, ICAC assembles the information in the way that it is calculated to produce its own results. It does not assemble that information in the way that a briefing solicitor would assemble it in the DPP in response to the DPP's ordinary prosecutorial functions. The DPP regularly said that they cannot and will not do that work themselves. I see no reason to try to change that position in relation to the DPP. The DPP, overall, in this State, does a very good job and not one that I could cavil with too much.

So what is the solution? The solution really is to allow ICAC or require ICAC to assemble its own material into a form where it can brief it out to the Bar to conduct a prosecution. There is nothing unusual about the Bar being briefed to conduct a prosecution. That has happened from time to time in this State and my understanding is that, at least until relatively recent times, that was very much the norm in the United Kingdom, for example. That has been the norm in other jurisdictions and I do not see why that could not be here.

If it were a question of ICAC's resources, the area of ICAC that is least essential as it is at the moment is the corruption prevention area. It writes papers and what have you, and I do not mean to denigrate its work in any way, but I think that function, frankly, could be performed in the central agencies of the Government, in the Premier's Department or somewhere like that, so you can take that financial resource and put it into the creation of a cell in ICAC that would be responsible for transforming ICAC's general material into, effectively, a prosecution brief.

Mr RON HOENIG: Would ICAC present their own indictments for indictable offences?

Mr KELLY: Yes.

Mr RON HOENIG: That then causes other problems that might hamper them—for example, if they reasonably suspect on inadmissible evidence that somebody has committed a serious, criminal indictable offence, then they have a different responsibility and obligation if they are also a prosecutor, do they not?

Mr KELLY: Not really.

Mr RON HOENIG: For example, not to adversely impact upon the prejudice of a fair trial by holding public hearings that they might ordinarily hold and things of that nature. It adds considerable complexity to their role and function, not that it is necessarily a bad idea.

Mr KELLY: I understand what you are saying but I do not think that that should be the case. I certainly would not mean to suggest that their ordinary function should be—I will use a neutral word—circumscribed by their prosecutorial role. Their prosecutorial role would sit over here to the side. The biggest criticism that I hear of ICAC out in the real world is that people say, "Oh well, they found there was this corrupt conduct, they recommended a prosecution and nothing happened." That is a big problem. I do not mean to be critical of the DPP because I understand exactly where the DPP is coming from. This is simply a hole in criminal law enforcement.

Mr KEVIN HUMPHRIES: The ICAC and the DPP obviously have a fundamental set of principles that they must work by and there is gap in the middle, which the community can see as plain on the nose of your face so why can we not see it? We can see it, but how do you close that gap?

Mr KELLY: It is a fairly simple amendment to the law—you give ICAC the capacity to initiate criminal prosecutions and as part of that they would then develop a cell or section or whatever they want to call it where the briefs would be prepared. I do not think there could be practical justification for employing a plethora of prosecuting Counsel because you can brief it out.

The CHAIR: But you would stop them reporting then, would you not?

Mr KELLY: Why?

The CHAIR: Because if you report you will be potentially reporting in circumstances where you are prejudging an outcome.

Mr KELLY: No, no more than at the moment. At the moment they report that they have found that Graham Kelly is engaged in corrupt conduct and they recommend to the DPP that consideration be given to prosecuting him. I do not see why they could not find that Graham Kelly had engaged in corrupt conduct and make a statement, "And we propose we prosecute him."

The Hon. TREVOR KHAN: Am I not right that in one of the amendments we made—I am perhaps directing this at Mr Lynch more than the witness—last year we gave the power—

The CHAIR: No, we removed it.

The Hon. TREVOR KHAN: That was removed, was it?

The CHAIR: Yes.

The Hon. TREVOR KHAN: It shows you how much I remember from one year to the next.

Mr PAUL LYNCH: It was introduced into the upper House one day and went through the lower House the next day, so if people's recollection of detail is not certain I am not surprised because you blokes rushed it through in 24 hours.

The CHAIR: I was very aware of it.

The Hon. LYNDA VOLTZ: The procedural fairness of it was not great.

The CHAIR: Mr Kelly, your contribution has been very good. Thank you.

Mr KELLY: We shall see.

Mr CHRIS PATTERSON: And we will leave local government alone.

The CHAIR: You can be assured of that.

Mr KELLY: Thank you, it was good to be back.

(The witness withdrew)

(Luncheon adjournment)

MEGAN LATHAM, Commissioner, NSW Independent Commission Against Corruption, sworn and examined

ANDREW KOUREAS, Executive Director, Corporate Services Division, NSW Independent Commission Against Corruption, sworn and examined

ROBERT WALDERSEE, Executive Director, Corruption Prevention Division, NSW Independent Commission Against Corruption, affirmed and examined

ROY ALFRED WALDON, Executive Director, Legal Division, NSW Independent Commission Against Corruption, sworn and examined

SHARON LODER, Executive Director, Investigation Division, NSW Independent Commission Against Corruption, affirmed and examined

The CHAIR: Welcome to witnesses from the Independent Commission Against Corruption. Thank you for coming and being with us today. As is usual practice, do you wish to make an opening statement?

Ms LATHAM: Yes, I have an opening statement. Thank you for the opportunity to make a brief opening statement. I will confine myself to some critically important observations arising out of the submission of the Department of Premier and Cabinet [DPC], which the Commission was unable to address in its principal written submissions, and to attempt to correct some factually wrong assertions that have been made by some of the witnesses before this inquiry.

The structural model outlined in the DPC's submission involves a three-Commissioner panel with unanimous approval required for the exercise of certain powers, an interposed Executive Manager between that panel and operational staff, and bringing that Manager and other staff under the auspices of the Government Sector Employment [GSE] Act. This is not a structure appropriate for the ICAC. Such a structure would fundamentally compromise the independence of the Commission, undermine the Commission's effectiveness as a leading anti-corruption agency and involve unnecessary cost and complexity.

The rationale for bringing the ICAC under the GSE Act, namely, that it would follow the approach taken by other integrity oversight bodies such as the proposed Law Enforcement Conduct Commission [LECC], the NSW Ombudsman and the NSW Electoral Commission, fails to acknowledge the significant difference between those agencies and the ICAC; that is, those agencies do not oversight the Public Service Commissioner or the Department of Premier and Cabinet. The suggested model would compromise the actuality and public perception of the Commission's independence.

The DPC's supplementary submission of 8 September suggests some modifications to the GSE Act to preserve the Commission's independence—in particular, the exclusion of the application of sections 16, 82 and 83 of the GSE Act. However, these are only some of the provisions that impact upon the Commission's independence. Other provisions include section 30 of the GSE Act, which provides that the head of a public service agency, other than a Department, is responsible to the Minister or Ministers to whom the agency is responsible for the general conduct and management of the functions and activities of the agency. That would make the Executive Manager of the ICAC accountable to the Premier of the day. Under section 31 of the GSE Act, the Executive Manager would exercise, on behalf of the Government of New South Wales, the employer functions of the Government in relation to the employees of the agency, and under section 46 the Executive Manager would assign employees of the agency to roles in the agency, thereby removing any role the Commissioner has in the management, direction and control of staff. This is contrary to what was intended when the ICAC was established in 1988.

In the May 1988 second reading speech, the Premier noted that the Commissioner was to have "total direction and control of the Commission" and "the structure of the Commission will, of course, be a matter for the Commissioner". Section 32 allows the head of the public sector agency to delegate any of his or her functions to any employee of any other public sector agency and staff of the Commission could bring proceedings in the Industrial Relations Commission under the Industrial Relations Act, thereby potentially exposing the Commission's processes and procedures to a form of oversight by a tribunal with no legislative mandate for oversight.

A more detailed consideration of the Government Sector Employment Act would no doubt identify other provisions that would impact on the Commission's independence. The suggested resolution of these conflicts by proposing a series of exceptions to the application of those provisions that compromise the Independent Commission Against Corruption's perceived or actual independence practically negates the utility

of the proposal. Even if all relevant provisions were identified and necessary changes made to the Government Sector Employment Act to remove any possibility of actual interference with the Commission's independence that may be insufficient to overcome the perception of a loss of independence.

That perception is critical to the willingness of members of the public and employees of the public sector to report suspected corrupt conduct to the Commission or to cooperate with the Commission in its investigations and corruption prevention work. The potential benefits already exist within the Independent Commission Against Corruption's internal processes and procedures. I regularly consult with the Public Service Commissioner to ensure that the Independent Commission Against Corruption's employment practices are consistent with the broader public sector and there is already a secondment mechanism that allows for workforce mobility. The Commission has robust and tailored merit-based selection and workforce performance processes in place and once this is taken into account the potential benefits are seen to be illusory.

I want to address the suggestion in the Department of Premier and Cabinet submission that the proposed model somehow represents best practice. The suggested model does not conform to the requirements of best practice. That terminology applies in circumstances where a number of similar agencies employ common practices which can be observed and analysed over time for the purpose of determining which of those practices secure the best outcomes. The model proposed by the submission is untested. No other anticorruption agency in Australia requires unanimous or even majority decisions between Commissioners and Assistant or Deputy Commissioners before investigations can be commenced or statutory powers exercised.

Notwithstanding the intention to apply the model to the Law Enforcement Conduct Commission, the legislation for that body has not passed and there is no experience of how the Law Enforcement Conduct Commission model will work in practice. It does not represent current best practice for anticorruption agencies. The operational powers and functions of the Independent Broad-based Anti-corruption Commission in Victoria, the Crime and Corruption Commission in Queensland, the Corruption and Crime Commission in Western Australian and the Independent Commission Against Corruption in South Australia are vested in and exercised by a single Commissioner who may be assisted by a Deputy or Assistant Commissioners whose powers are only exercised by delegation from the Commissioner.

Only the Independent Broad-based Anti-corruption Commission staff are employed under the Public Administration Act of Victoria rather than the Independent Broad-based Anti-corruption Commission Act. As a special body the Independent Broad-based Anti-corruption Commission may be exempted from compliance with certain directions under the Public Administration Act. It is also unjustified in circumstances where the Independent Commission Against Corruption has only recently been reviewed by the independent panel comprising the Hon. Murray Gleeson, AC, and Mr Bruce McClintock, SC, which found no compelling reason to modify the Commission's structure, powers or decision-making processes. The Commission is regarded nationally and internationally as a successful anticorruption agency.

It also involves unnecessary cost and complexity. The current structure of the Independent Commission Against Corruption provides for efficient and flexible program delivery at a time of shrinking public resources. The appointment of a panel of full-time Commissioners and an Executive Manager would result in a top heavy structure and involve significant cost increases at a time when funding restrictions imposed on the Independent Commission Against Corruption have reduced its funding for staff from 119 full-time equivalent positions in 2015-16 to 107 positions in 2016-17, which necessitated a reduction in investigation teams from four to three. It has the real potential to delay and complicate the Independent Commission Against Corruption's decision-making processes.

A full-time Commissioner in combination with part-time Commissioners would necessitate administratively time consuming procedures to inform part-time Commissioners of the progress of an investigation, which can often escalate on a daily or weekly basis. Operational decisions may depend upon the availability of a Commissioner at a given time. Whether the panel is full-time or in part part-time it is critical to the effective and timely exercise of the Commission's powers that a Chief Commissioner be given the final say.

The recognition that a panel of Commissioners has the potential for disagreement is met by the inappropriate reference to judges on appeal courts. Appeal courts are not required to reach unanimous decisions or decisions by consensus. In fact, judicial independence allows judges to perform their role without conferring with their colleagues. The submission refers to the recommendations in the 2015 review of police oversight by Mr Tink without acknowledging recommendation 11, which provides that, "To ensure certainty in decision-making, as well as reflect the status of the new body as one exercising Royal Commission type powers, the Commissioner should have the final say if any matter being deliberated upon by the Commissioner's Council cannot be resolved by consensus".

I have heard what Mr Tink said this morning on the subject of the proposed Law Enforcement Conduct Commission Bill and his acceptance of the requirement for unanimity when the Law Enforcement Conduct Commission is determining whether to hold a public inquiry. It must be understood that if such a requirement is applied to the Independent Commission Against Corruption the default position becomes a wholly private inquiry process resulting in a report to Parliament which may or may not be made public. The consequential loss of confidence by the public in the capacity of the Commission to investigate and expose corrupt practices will have a direct impact upon the willingness to report.

The reference to "agency capture" is curious given that the appointment of a senior former Supreme Court judge for a statutory non-renewable term of five years has always been considered sufficient to ensure integrity in decision-making. The term assumes that a single Commissioner may be influenced by the Independent Commission Against Corruption staff to act in accordance with the interest of the staff rather than in the public interest. There is no suggestion in the Department of Premier and Cabinet submission, or any other submission of which I am aware, that any Independent Commission Against Corruption Commissioner has been the subject of agency capture and no example is provided of where this has occurred or is alleged to have occurred. No-one has identified any interest of the staff that differs from the public interest in exposing, investigating and preventing corruption.

Some factually inaccurate statements have been made thus far to the inquiry, which require correction. As we have made clear in our submission and as provided for in the ICAC Act, every person appearing at a compulsory examination or public inquiry is informed of the nature of the allegations that are being investigated. This is mandated by sections 30 and 31 of the ICAC Act. As a general rule, material is made available to relevant parties prior to the commencement of the public inquiry by way of granting access to a restricted website. More often than not, witnesses are represented by a member of the legal profession, who is afforded the opportunity to ask questions and to bring to the attention of the Commission any information that is in the interests of their client.

If witnesses express a desire to say something of their own volition, they are encouraged to do so. If the credit of any witness who makes serious allegations against another is at issue, it is tested by Counsel Assisting and again by other Counsel at a public inquiry. The Commission's reports are littered with findings of fact that are expressly made only after the Commission is satisfied that the evidence of a doubtful witness is supported by other objective evidence—and there are several examples of that in the Spicer report. The Commission's standard directions encourages persons appearing before it to draw the Commission's attention to any further witness that they request be called or to tender any document they wish to put in evidence through Counsel Assisting. Regrettably, some statements concerning the conduct of the Commission's hearings seem to have been made in ignorance of these facts and without ever having participated in or observed a public inquiry.

The Commission does not deliberately ignore or conceal so-called exculpatory evidence. It is invariably the case that Counsel representing a person of interest in an inquiry will be afforded the opportunity to re-examine his or her client after all other questions have been asked, and that re-examination also allows the person of interest to place on the record his or her response to the allegations. Moreover, a mechanism exists for judicial review of a finding of corrupt conduct. If the Supreme Court reaches a conclusion that a critical finding of fact is unsupported by the evidence or that it could not have been reasonably made it may be overturned. Clearly, the Supreme Court would overturn such a finding if the Commission failed to take into account material evidence that significantly undermined that finding either because it would fall into the latter category or because it would be contrary to the rules of natural justice. The circumstances of the Kear matter have been misrepresented, and I am happy to answer any questions that the Committee may have in respect of that matter or any other matter that is of interest.

Mr PAUL LYNCH: I have one question; literally only one. Commissioner, in your opening comments you talked about the threat to the independence of the ICAC as a result of the Department of Premier and Cabinet [DPC] submission. So I have this clear, that is just in relation to the Government Sector Employment Act point taken?

Ms LATHAM: That was the thrust of the submission that seemed to strike most at the heart of the perceived independence of the Commission. Do not get me wrong; I am not suggesting that there would be brazen actual interference, but in effect that is not the point. The point is that there are people in the public sector who are quite fearful of coming forward and making an allegation of corrupt conduct. I think quite reasonably that that fear would be heightened if they saw no real distinction between their employer and the employer of the ICAC staff.

Mr PAUL LYNCH: That is all I wanted to ask.

Mr RON HOENIG: How has the Commission been misrepresented in respect of the Kear matter?

Ms LATHAM: In respect of the Kear matter—and can I just preface these remarks by saying there have been, as I understand it, throughout the proceedings references to global exculpatory material and, without actually understanding what material has been referred to and being given a concrete example of where that material has been relevantly exculpatory and of the material kind and where it has not been made known to the person of interest, it is difficult for me to answer a global allegation without specifics. But I can say in relation to the Kear matter that in the course of the public inquiry, when Mr Kear, of course, was represented by Counsel, exhibits one and two of that public inquiry—and one can go on to the website and get access to those exhibits—contained a large volume of material that came directly from Mr Kear himself. Part of that material was a set of extensive written diary notes that he had made in relation to all the conversations he had had with various people about the performance of Ms McCarthy. Those diary notes included conversations he had had with people—and I will not necessarily name them here—who were subsequently the subject of comment by the Magistrate as persons who had not been disclosed to Mr Kear for the purposes of the prosecution. I take issue with that, because that material was disclosed in the public inquiry—in fact, Mr Kear's Counsel, in her submissions, made reference to that material and when the brief was served on the DPP for the purposes of the prosecution it was, of course, by dint of the Memorandum of Understanding [MoU] served in admissible form. So it required the drafting of a series of statements in admissible form from what were previously either records of interview or transcripts of the evidence before the public inquiry. Also enclosed in that brief to the DPP were the contents of exhibits one and two, so we did not fail to disclose that material to the DPP. What the DPP did with it, I cannot tell you, because apart from initiating the prosecution by simply taking out the court attendance notice, as soon as that is done the DPP takes over the carriage of the prosecution immediately at the next court appearance and thereafter the prosecution is conducted by the DPP. All I can tell you is, without reservation, all of that material was known to Mr Kear and it was provided to the DPP within the contents of exhibits one and two.

Mr RON HOENIG: The other thing I want to give you the opportunity of contributing to the Committee is in relation to a number of assertions that when the Cunneen matter was first referred to the Commission and you embarked upon your preliminary investigation, the Commission should not have done so as it did not fit within the provisions of the Act—in fact, in some evidence yesterday by Mr McClintock he gave a similar opinion to that which was ultimately determined by the High Court. You have previously given evidence that the Commission proceeded to investigate the Cunneen matter because your view was that it was within the Commission's jurisdiction. That is the case, is it not?

Ms LATHAM: Yes, but further to that I have to say that my recollection of the previous hearings conducted by this Committee is that it was ultimately accepted by the Inspector that we were entitled to commence a preliminary investigation. So my understanding was that at the end of the day it was common ground that we were entitled to commence a preliminary investigation, and the question of whether or not we went to a public inquiry was the point with which Ms Cunneen took issue. It was also accepted, as I understand it, that the interpretation of our jurisdiction at that point in time was consistent with the interpretation that had prevailed for the best part of 25 years. I am not cavilling with the proposition that the High Court was entitled to clarify that, but it remains true to say that we were not operating by way of conducting that preliminary investigation outside our jurisdiction, as it was then understood.

The Hon. TREVOR KHAN: I think that that might have been the position of more than the Inspector of the ICAC by the time we got to a certain point in our last hearing.

Mr MARK TAYLOR: In relation to the Kear matter, yesterday Mr Robin Speed made a submission that set out some information. Was it the case that there was a costs order made in the Local Court against the DPP in relation to that matter?

Ms LATHAM: My understanding was there was a costs order made against the DPP. Can I just say something, I think it is important to add this. There was a no case submission made in the Local Court when the prosecution finished presenting its case. I need to clarify something. The prosecution of an offence under the Public Interest Disclosures Act is quite unusual because a prosecution only needs to establish what is essentially a prima facie case and then the onus shifts and it is a matter for the defendant to establish that it was not substantially for that reason that the employee was dismissed. At the end of the prosecution case a no-case submission was made by the defendant and the Magistrate refused it. One would have thought that at that point in time the Magistrate was satisfied that there was a sufficient basis on which to proceed. I cannot comment on why he made the costs order that he made.

Mr MARK TAYLOR: When the Magistrate made the costs order he said, according to Mr Speed, that the investigation by ICAC was conducted in an unreasonable and inappropriate manner. That was one of his findings.

Ms LATHAM: I do not know where that comes from because, frankly, I think there were parts of the Magistrate's decision which confused the ICAC as the investigator with the DPP as the body responsible for the carriage of the prosecution.

Mr MARK TAYLOR: Further findings were that the proceedings were conducted by the prosecutor in an improper manner and they were initiated without reasonable cause. The ICAC disagrees with those. You do not understand how those findings could have been arrived at. Is that what you are saying?

Ms LATHAM: I think that is something that should probably be directed to Mr Babb as the Director of Public Prosecutions.

Mr MARK TAYLOR: Has the organisation asked the DPP to appeal that costs decision or those findings?

Ms LATHAM: It is a matter for the DPP.

Mr MARK TAYLOR: But it is the case, is it not, that you are of the opinion that those outcomes are not correct?

Ms LATHAM: I am of the opinion that some remarks made by the Magistrate in the course of his judgement are not correct. Whether or not at the end of the day a magistrate is of the view that a prosecution should not have been brought, that is a reflection on the magistrate's view of the conduct of the prosecution and I am not in a position to comment on that. Can I just say that it is important to realise that what the ICAC does by way of putting that material before the DPP is that at the end of an inquiry when it produces a report it only recommends that the DPP give consideration to the laying of charges. I want to stress that.

It does not recommend which charges are laid. It recommends that the DPP give consideration to laying charges. We might suggest one or two that might be suitable for that purpose but ultimately the decision as to what charge is laid and whether or not it is carried forward is one for the DPP. We do not even in fact take out a court attendance notice until we receive advice from the DPP that they do intend to lay a charge and that this is the charge that they intend to prosecute. Only on that advice do we take out a court attendance notice.

The Hon. TREVOR KHAN: That is part of your Memorandum of Understanding.

Ms LATHAM: That is right.

Mr MARK TAYLOR: That is your decision despite the fact that the Magistrate comments that the actual investigation was conducted in an unreasonable and improper manner?

Ms LATHAM: Frankly I do not know on what basis the Magistrate could have expressed that view without reading the entirety of the public inquiry transcript, all of the exhibits and the report.

Mr MARK TAYLOR: Despite that view you have not asked the DPP to pursue it?

Ms LATHAM: No. I do not at any point seek to put pressure on the DPP to appeal any decision.

Mr MARK TAYLOR: It is not a matter of putting pressure on them; you have not asked that they consider it.

Ms LATHAM: It is not my role.

Mr MARK TAYLOR: Is it the case that the media release concerning your finding of corrupt conduct involving Mr Kear still sits on the organisation's website?

Ms LATHAM: It does and it is there for a very good reason. There were two corrupt conduct findings, not just one. One was in relation to a finding on the balance of probabilities that he dismissed Ms McCarthy substantially for the reason that she made the complaint, the public interest disclosure. The other corrupt conduct finding, which was not challenged, was that he had failed to properly investigate the conduct of Mr Pearce after those complaints had been brought to him and after he had acknowledged that there was substance in the complaints. There were two aspects to it, not just the one.

Mr MARK TAYLOR: However, where you refer to legal matters that are standing or ongoing you have amended that section to update the outcome of that inquiry?

Ms LATHAM: Yes, we have and we regularly update that part of our website that refers to the progress of prosecutions.

Reverend the Hon. FRED NILE: In your submission to our Committee you have been very critical of the principal recommendation by the Inspector that the Commission should conduct all examinations in

private. I personally support public hearings. I think it is important for ICAC to be transparent. What are your reasons for strongly rejecting his recommendation?

Ms LATHAM: I find it somewhat curious that yesterday when the Inspector was giving evidence he seemed to equivocate in relation to that recommendation because at one point he said that he personally disliked secrecy and he disliked hearings in private. I think that I can only restate what I said in my submission, which is that not only do we have a statutory function to expose corruption and the public inquiry performs that process quite clearly, but also public hearings are a bulwark against a body like ICAC abusing its powers.

I do not know that Mr Speed has ever sat in the back of one of our hearing rooms during a public inquiry. I know that he has certainly never appeared for anyone in a public inquiry. I heard him say that it is a form of execution. I know he was using colourful language but I heard him say that we do not test witnesses for credit, it is a form of execution, the culture is unhealthy, et cetera. I frankly just do not understand why someone would want to put all of those hearings behind closed doors because no-one then is going to have any idea how much we abuse our powers and how irresponsible we might be if there is no scope for the public to determine whether or not we are conducting the proceedings fairly.

The CHAIR: We heard from Mr Tink, who made some references to the Bar rules in respect of the performance and the obligations of Counsel. Do you agree that Counsel appearing before you should abide by those Bar rules?

Ms LATHAM: I do. Can I just say that I was responsible for the drafting of those uniform rules. I was asked to make a submission to the Uniform Rules Committee and I did and they adopted the rules that I drafted. Can I also say that if one looks at the judgement by Justice McDougall in *McCloy v Latham* where Mr McCloy substantially took all of those points in relation to the conduct of Counsel in the Spicer inquiry, Justice McDougall found that the proceedings were entirely fair and that I had in fact rebuked all Counsel in relation to their conduct. The problem with the Bar rules as they previously existed before July 2015 was that they were modelled on the conduct of a Crown Prosecutor and they were wholly inappropriate to the inquisitorial process.

The CHAIR: There has been some media surrounding the manner in which Counsel Assisting interviewed a particular witness at the ICAC including offering or making observations about black knights and white knights.

The Hon. TREVOR KHAN: Chair, can I just ask where does this go in terms of our terms of reference?

The CHAIR: Well, it goes to the question—

Reverend the Hon. FRED NILE: Let the chairman ask the question.

The CHAIR: It goes to procedural fairness, I suppose, and the performance of Counsel.

The Hon. LYNDA VOLTZ: We are dealing with the Inspector's report, which is looking at some drafts, so I guess the Hon. Trevor Khan's question is more along the lines of the inquiry we have in front of us.

The Hon. TREVOR KHAN: Precisely. We have gone through three sets of hearings so far and we are now onto a precisely set terms of reference. I do not really want us to go back over the previous hearings in the specific matters.

The CHAIR: Okay. I will withdraw that. Does anyone else have any questions?

Mr CHRIS PATTERSON: Commissioner, two former Inspectors have told us about the relationship that needs to be there. If at all possible, take yourself and Inspector Levine out of the process. As you said, you helped draft those points for the Bar. For future ICACs, if that relationship broke down, is there any way, whether through experience or other things—and I am happy for you to even take this question on notice; I do not want to put you on the spot—how do we work to try to address that? I know there is a Memorandum of Understanding [MoU] or whatever it is there, but clearly it is up to the individuals. To get away from the proposed three-person model, which clearly you do not favour, how would we address future breakdowns between the Inspector and the Commissioner if they occurred? From the evidence of the two previous Inspectors it seems vital that there be a respectful working relationship at least.

Ms LATHAM: I agree with you entirely. I have never wanted anything other than a respectful working relationship.

Mr CHRIS PATTERSON: And you said that last time you were here.

Ms LATHAM: I said that last time. Up to a point—and I am echoing the remarks I think of others before the Committee—ultimately it is a human institution with a human face and sometimes you cannot do

anything about personality conflicts. I was somewhat encouraged by something that Mr Kelly said which I thought had some merit. I do not know that it is necessary for an Inspector to be a former Supreme Court judge. There is real scope for looking at a different skill set. There is always the danger that if you have people coming from the same bearpit, as it were, maybe that is a recipe for disaster. I do not know.

I have always enjoyed a very good collegiate relationship with all the judges on the Supreme Court where I have worked. Egos can be strong. People might be very protective of their reputations and they might feel that any criticism is an attack upon them. There is scope for a different kind of relationship between the Inspector and the Commissioner where you do not have someone in the role of the Inspector who potentially thinks that they could be doing a better job and so they come at the role from a more critical angle than perhaps someone else who would be looking at it from the point of view of organisational processes. That is just one thing that occurred to me. Unfortunately it largely depends on the person that is in the job.

Mr CHRIS PATTERSON: Thank you.

Mr MARK TAYLOR: Would it also be beneficial if there were three Commissioners that not all of them came from the same bearpit? Can you see advantages in them having skill sets from different areas rather than all from the same bearpit?

Mr RON HOENIG: You are not saying all judges are the same, are you?

Mr MARK TAYLOR: No, I am saying they may all come from the same bearpit.

Ms LATHAM: The notion of three Commissioners is problematic for a number of reasons but I want to come back to the notion that what any Commissioner does in the ICAC is essentially a quasi judicial hearing role. That is what the Commissioner is there to do. They are there to preside over inquiries and they are there to exercise powers which are akin to powers that are exercised all the time by Supreme Court judges such as applications for search warrants and decisions to use compulsory processes. They are all practices that are familiar to judicial officers and therefore it makes sense that you use some of that skill set.

I must confess I do not see the advantage in having three Commissioners. Frankly, if they were all full-time you would have a couple of people sitting around twiddling their thumbs. There are occasions when we are running a public inquiry. The Commissioner is engaged full-time every day running a public inquiry and we might have another inquiry that is being worked up, and there might be some compulsory examinations [CEs] that are being held in that inquiry. The existing structure which essentially has a standing Assistant Commissioner works quite well because that standing Assistant Commissioner can step in and do those smaller CEs while the Commissioner is engaged in the bigger public inquiry.

As a matter of efficiency that standing Assistant Commissioner also in effect has been the Chief Executive Officer of the organisation in the sense that all the management and employment processes go through that person. That has worked extremely well, I have to say. In addition to that there is always the capacity to engage ad hoc Assistant Commissioners. My difficulty with the three-Commissioner model is that I do not know that different skill sets are going to meaningfully contribute to the decisions and the powers that have to be exercised and I do not know that you need three full-time Commissioners when you have the capacity to augment the exercise of those functions by ad hoc Assistant Commissioners. That is my problem—I just do not see how that is advantageous.

The CHAIR: Have you read the submission of Justice Peter Hall?

Ms LATHAM: Yes, I have.

The CHAIR: He makes a submission about the circumstances in which public hearings would be held and an amendment to section 31(1). What do you say in relation to that?

Ms LATHAM: As I understand it—sorry, you might have to remind me—his recommendation is that somehow you try to augment what is meant by the public interest for the purposes of holding a public inquiry.

The CHAIR: No. It is that he would limit the holding of a public inquiry only to circumstances in which there is serious corruption or serious systemic corruption capable of being founded in a criminal offence.

Ms LATHAM: Perhaps I overlooked that. The difficulty of that is that it would dramatically affect the capacity of the Commission to look at corrupt conduct that did not constitute a criminal offence. There is a wide range of corrupt conduct that does not constitute a criminal offence.

The CHAIR: You could still look at it but not in a public inquiry.

Ms LATHAM: Sorry, but then we come back to this problem that there is this assumption that somehow we have everything within our knowledge and we have some foresight in relation to whether it is

going to be serious and/or systemic at the beginning of a public inquiry process. That assumption is fallacious because the public inquiry is an integral part of the investigation. It is during the public inquiry that we often receive the most interesting and informative lines of inquiry. It has happened dramatically in the past in a number of inquiries I could name. The problem is that if you try to reach some pre-emptive view about whether or not you are going to hold a public inquiry on the basis of whether or not it is serious and/or systemic conduct, you could be entirely wrong because you could be forestalling or shutting off avenues of inquiry that will in fact lead you to the conclusion that it is serious and/or systemic corrupt conduct. That is the problem. The public inquiry process is not just, well, we have gathered all the evidence and now we are going to wrap it up in a nice neat ribbon and show the public what we have got. That is a simplistic view of it. In fact, it is an ongoing investigative process and we often get so many further people coming forward when we have a public inquiry that gives us other avenues that expose other kinds of corrupt conduct. That happened most recently in an inquiry into Botany Council. It also happened during Spicer and Credo, and I am sure there are others before my time when a similar thing occurred.

The CHAIR: He also made the observation, which you did refer to, relating to the holding of a public inquiry and the definition of "public interest". Do you have some observations about that?

Ms LATHAM: The High Court and the Federal Court of Australia and, indeed, other courts, have repeatedly over many, many years in many, many different jurisdictions been asked to interpret the notion of public interest when it appears in a range of statutes, and it appears in defamation statutes, in occupational health and safety statutes, in copyright statutes; it appears all over the place. The difficulty is, as the High Court said many times, you cannot prescribe what the public interest is because it is inherently a discretionary judgement. The only thing that confines the content of the public interest is the scope and purpose of the legislative instrument in which that term appears. If you are looking at what is in the public interest, you can definitely say that something is not in the public interest because it falls outside the scope of the relevant legislation, but it is very difficult to say in advance what you think it is, and that will invariably depend on the particular circumstances of a particular case that you are considering at the time.

The CHAIR: One of the suggestions of the Inspector was the issue of exoneration protocols, and we dealt with some of the suggestions of the Inspector. The nature of merits review, of course, is that generally there are no merits reviews of your decisions unless you have made some significant error of law or other appealable issue under your Act. Should there be some provision for the publication of a submission, if requested by the person of interest, in answer to the allegations made against them?

Ms LATHAM: The publication of submissions does not really address the question of merits review, but I think the suggestion relating to the publication of submissions was that it should be done as some annexure to the report.

The CHAIR: That is potentially one, but it could accompany the report or, alternatively, be published on the website.

Ms LATHAM: Can I say we go through an exhaustive process when we are writing the reports to make the reports accessible to ordinary members of the public and to tell, if you like, the progress and outcome of the inquiry in an intelligible way. I would be very reluctant to weigh down what is largely an efficient report process by volumes of submissions. When I say "volumes" I mean this: It would be wholly unrealistic to publish just one set of submissions without publishing them all. The reason I say that is because publishing any one set of submissions is unintelligible, because the submissions will refer to other submissions, and they will refer to Counsel Assisting submissions, and we go through a process where, at the end of a public inquiry, Counsel Assisting puts their submissions out first and then every other Counsel has the opportunity to respond to those submissions, and then there are further submissions in reply. So you are looking at volumes of material—

The Hon. TREVOR KHAN: Sorry to interrupt, further submissions in reply by Counsel Assisting?

Ms LATHAM: Yes, further submissions in reply by Counsel Assisting. In certain circumstances you would even get, on occasions, submissions in reply to the reply. As I said, that is a very lengthy and voluminous process, so if there is a suggestion that they should be published then they would all have to be published.

The Hon. TREVOR KHAN: Would that include Counsel Assisting's original submissions?

Ms LATHAM: Yes, that is right, it would have to be all of them because you really could not understand where the submissions are going without the full context. On the subject of people feeling aggrieved about their exposure during ICAC inquiries, it is very common for submissions at the end of a public inquiry, by one interested party, to make very damning allegations against someone else who has appeared because there is invariably, when you are looking at corruption in an organisation, a tendency to confess and avoid. This happened dramatically in the inquiry into Botany Council. They all started dobbing on each other, and they all

started effectively saying, "Well, I only did it because they told me to", or, "I only did it because they were already doing it." So you have multiple parties who, in effect, are making cross-allegations against each other. If, ultimately—

The Hon. TREVOR KHAN: Sorry. In submissions that are then essentially untested.

Ms LATHAM: That is right, and this is the other problem. If ultimately what we have done by way of distilling all of that information into a report is not made adverse factual or corrupt conduct findings against some of those people, then publication of those submissions will, for the first time, air those allegations in a public forum without that person having the opportunity to once again defend themselves. It is a bit like opening Pandora's box and that is why we try to keep a lid on that particular process.

The CHAIR: Is that the reason you retain suppression orders on those submissions?

Ms LATHAM: Yes, it is. We have made it very clear to everyone who, from time to time, says, "Will you lift the non-publication order on my submission?" that there is absolutely nothing preventing anybody who has appeared before ICAC from, in substance, repeating their submissions to anyone who asks them, "What did you say in response to this allegation?" They can, effectively, repeat the substance of the allegation without transgressing any non-publication order. It is the publication of the document itself that we do not allow.

The CHAIR: Would you support any proposal where someone could make application to you for the removal of that suppression order and if, on refusal, an appeal to a court or another administrative body?

Ms LATHAM: I do not know what cause of action would lie in relation to that. I suppose—

The CHAIR: As it stands at the moment, your decision to make a suppression order appears to be a final one, and there is no—

Ms LATHAM: Bearing in mind that, on occasions, when people write to the Commission and say, "Would you lift this non-publication order for this reason" and they can identify a public interest criteria that justifies the variation of the non-publication order, I will give them the variation. The difficulty is that the Act itself only allows me to vary a non-publication order if I am persuaded it is in the public interest to do so. It is not sufficient for someone just to say, "I have got a private interest in spreading this document around." If the person is involved in, for example, unrelated litigation and the evidence that they gave before ICAC becomes critically important, well, there is a public interest in that. It is about identifying the criteria.

The CHAIR: There could be a process—

Ms LATHAM: There could be. If such an application was made to me for a compelling reason and I refused it, then I would imagine that that person would have some capacity to argue before the forum in which they wish to produce the document that they were entitled to have my refusal reviewed. In fact, in the Independent Commission Against Corruption Act there is a provision in relation to criminal proceedings that says if there are documents that are covered by a non-publication order and the person wishes to have them brought into evidence in the criminal proceedings, they can make an application to the judge and if the judge is persuaded that it is in the interests of justice, then the judge's order overrides any decision by a Commissioner to refuse to release it. So there is a mechanism in criminal proceedings for that to occur.

The CHAIR: Are you aware that it has been reported in the media there are other matters analogous to Kear where material that the DPP seeks to rely upon has not been provided to the DPP?

Ms LATHAM: Once again, it is very difficult. These kinds of broad allegations are made in the media and I do not know what they are referring to—they do not give me any context, they do not tell me what it is they are talking about, they do not even identify the documents. Can I just say that the Memorandum of Understanding that we have with the DPP works quite well and we go through a very long collaborative process leading up to a prosecution.

Mr KEVIN HUMPHRIES: Can you describe that for me?

Ms LATHAM: Describe what, sorry?

The Hon. TREVOR KHAN: The collaborative process.

Mr KEVIN HUMPHRIES: What does that mean? What does it look like?

Ms LATHAM: What it means is that we provide, according to the MoU, a brief in admissible form of the material that we identify as relevant to the proof of the charge that the DPP has determined to proceed with.

Mr KEVIN HUMPHRIES: The ICAC prepares that?

Ms LATHAM: The brief, yes. We put what evidence we have in an admissible form and provide it. On occasions the DPP solicitor with carriage of the matter, who may have had a conference with Counsel who is briefed, will come back to us and say, "Have you got any information of this nature in this category that might be relevant?" So we will go away and have a look and if we identify it and the DPP says that it is relevant, and if we accept that it is relevant for the purposes of the prosecution and it is covered by a non-publication order I will vary it, I will give it to them, but this is part and parcel of the necessary respect that we have to have for the separate role of the DPP as a prosecuting authority.

Mr KEVIN HUMPHRIES: I have got no problem with that. If you jump to the court of public opinion, who ultimately we are serving, and the issue of findings around corruption and how people are prosecuted, and the number of people who end up being prosecuted is probably minimal I suspect, I am interested in your thoughts as to how we make a smoother transaction above an MoU? For example, the ICAC does good work over here in exposing corruption and the DPP is over here trying to take that case forward for prosecution, but there appear to be some gaps in the middle ground. Have you got any views on that?

Ms LATHAM: Can I just say and I am harking back to—

Mr KEVIN HUMPHRIES: I discount that by saying I suspect that is where the media tends to have a fair bit of commentary on it, which says maybe there are some gaps there and that is why they are in that space.

Ms LATHAM: It really comes back to what was said—I think Mr McClintock raised this point—that the ICAC was never meant to have any expectation that the matters it investigated would ultimately result in criminal charges—that was something that was changed in the course of the legislation. So what you have is a disconnect—a structural and policy disconnect—because the policy underlying the ICAC is that you investigate and expose corruption and the notion of corrupt conduct is defined in such a way that it does not necessarily neatly fit into what might be a prosecutable criminal offence. So we go through that process and a lot of the evidence that we rely upon that founds a finding of corrupt conduct is not admissible because it has been given under a section 38 declaration, which means that it cannot be used against a person in criminal prosecutions—so that immediately leaves that to one side. What the public hears from the public inquiry sounds sensational and it sounds like you are on a hiding to nothing if you want to charge this person before a criminal court, but it ignores the subtleties of the way in which that evidence is received and the limits that apply to how that evidence can be used. There may be other evidence that is not protected by a section 38 declaration or there may be other objective evidence such as documents, bank accounts, phone records and things of that nature that can contribute towards the proof of a charge but that is almost a happenstance; it is not something that we set out to do. Do not get me wrong, I think the DPP is also in an unenviable position.

Mr KEVIN HUMPHRIES: Because the happenstance may contaminate their whole process. How do we push back to the role of ICAC and look at that transition between what is pretty much emerging as a systemic corrupt situation that in all likelihood if we take the inadmissible evidence and park it there for a minute when it should end up over here. I think that is the gap that people are wanting to see plugged—not that you are really going to plug it fully I suspect.

Ms LATHAM: I know there was some suggestion by Mr Kelly who wants us to take a much more active role and I know there was a suggestion from the DPP that we should be given some statutory power to continue investigations after effectively we are functus—we are functus once we issue a report. I know that those suggestions have been made.

Mr KEVIN HUMPHRIES: What is your view on that?

Ms LATHAM: My view on that is actually it is a matter of policy for the Government to determine whether or not they want ICAC to effectively be involved in that sphere.

Mr KEVIN HUMPHRIES: Under the current arrangement are you inadvertently contaminating what should really be in all essence a prosecution case down the track for corruption or criminal investigation?

Ms LATHAM: I do not think that we are contaminating anything. I think the problem is that we have a given remit—that is, our remit—and we are doing what we are supposed to do under our statute, the remit of the DPP is entirely different and somehow or other we are expected to facilitate a remit that is really not within our—

Mr KEVIN HUMPHRIES: But you would concur there is a disconnect there to some extent?

Ms LATHAM: I do, but can I just say in relation to these other proposals by Mr Kelly and the DPP, I am sorry but you are looking at some significant resources that we do not have.

The Hon. TREVOR KHAN: I will park Mr Kelly's proposal to one side because it seems to be somewhat different from the DPP's proposal, and accepting that it is a policy thing and the decision has to be made, at the present time if requisitions are issued by the DPP that are beyond your remit—that is, I assume go and get some more evidence of one sort or another or go and take a statement from somebody—what happens? How is it dealt with?

Ms LATHAM: In theory there is nothing to prevent the DPP from asking the police to do that, even though it is not their investigation. If it is a person who we have never spoken to, we have never interviewed, they were not even on our radar and the DPP says, "We would like to know what that person has to say about it" then there is nothing to stop the police from going and saying to the person, "We would like to interview you about X. Are you okay with that?" Frankly I think Mr Scipione would be horrified to hear me say this, because we often get the reverse. We often get the police referring things to us because they do not have the resources to investigate allegations of fraud in public sector agencies, so I do not know where you go with that.

The Hon. TREVOR KHAN: But is not the more likely circumstance for the DPP going to be—they have provided you with some evidence and you have undertaken an examination of somebody, then the DPP comes back to you and says, "You have ventilated this part but you did not ask them about this area. Will you go and do that?" That is, there is somebody that you do know but the evidence that you have accumulated at least in the mind of the prosecutor or the solicitor having carriage of the matter did not go in the direction that you want. So you have got the relationship but you have not got the evidence that they want.

Ms LATHAM: In those circumstances we would do that, but all I am pointing out is that the more you want to tie the so-called outcomes from a Commission inquiry to the number of successful prosecutions—

The Hon. TREVOR KHAN: I am not seeking to do that.

Ms LATHAM: I know you are not. I am just saying that the more you want to do that then the more you are going to require resources in the Commission itself to deal with that function, which will necessarily detract from its statutory function.

The Hon. LYNDA VOLTZ: It is the old chestnut of criminal charges investigated by police and the exposure of corruption.

Ms LATHAM: It is an intractable problem.

Reverend the Hon. FRED NILE: In the Inspector's report he has recommendation 14 about which you have made no comment. I wonder whether you might make comment here about expanding the office of Inspector, should be a full-time position, and also appointing an Assistant Inspector and so on. You may have heard in his remarks something along the line that we really need a strong oversight body, and we finish up with a strong oversight body almost like a mini-ICAC and ICAC. Do you see some tension already existing or that could arise if that pathway was followed?

Ms LATHAM: I would simply echo what Mr Kelly said. I think the Inspector's recommendation in relation to that grew naturally out of his recommendation that the Inspector should be able to, in effect, review every operational decision that the ICAC is making. If you are going to give the Inspector that kind of function then, yes, he will need more resources and you will need to be full-time. If you are going to do that, why would you have a Commissioner at all? Just put the Inspector in there and then he can review every operation.

Mr KEVIN HUMPHRIES: Mr Kelly might enjoy that, I would have thought.

The Hon. LYNDA VOLTZ: I do not think Mr Kelly would.

Ms LATHAM: But I mean essentially at some point you have to accept that there is a point to the oversight which looks at fundamental processes, not everyday operational decisions.

Mr KEVIN HUMPHRIES: Can I just ask a question of Dr Waldersee? I am interested in your comments on prevention, and congratulations on your work that you have done in the past. Given the distractions and the media attention that ICAC has taken and some of the issues around more recent cases—I think we have heard there has been some reduction—does that affect you, because I see ICAC as largely corruption prevention, and resources in that area? Has there been any change in the way you guys have been able to fulfil that remit over time?

Dr WALDERSEE: Over the time I have been there?

Mr KEVIN HUMPHRIES: Yes.

Dr WALDERSEE: The resourcing priorities of the Commission move around, but the Division itself has shrunk as the priorities shift within the Commission. But the Commission as a whole has also been reduced

in size. My view is that the division is probably pushed to the limit, would be the best way to put it—if not beyond the limit—in terms of its ability to do what it has traditionally done.

Mr KEVIN HUMPHRIES: So where has the push emerged from?

The Hon. LYNDA VOLTZ: Can I just seek clarification? We are moving to annual reports; we are in a different area now.

Mr KEVIN HUMPHRIES: I know, but I am just interested whether some of the Inspector's comments are actually focusing on some pretty narrow areas and is that detracting from other areas which ICAC was starting to set up?

The Hon. LYNDA VOLTZ: Yes, but the areas we are focusing on are the Inspector's report, which is what the Committee is dealing with. I am wondering if we are now moving into the remit of what we will be dealing with in our annual report review.

The CHAIR: I think there is a fair bit of reference to the various Divisions in the Commissioner's second submission in relation to how each of the various divisions operate.

Dr WALDERSEE: Where is the question at at this point?

Mr KEVIN HUMPHRIES: Has the resource and emphasis shifted in your term from prevention into dealing with more current matters that may not have been in the remit of ICAC when it first started?

Dr WALDERSEE: The prevention function—I could be misunderstanding the question here and correct me if I am wrong—in the time I have been there has moved to, more broadly, across-government functions and systems. It has moved from a relatively narrow prescriptive model to a much broader systems analysis model, and that is much more resource-intensive. We are also far more interactive with the public sector. Is that quite where you are going? It is resource-intensive and it has been successful and, to some extent, we have been a victim of our success, but we do not have the resources really to do what we are doing.

The Hon. LYNDA VOLTZ: But if the Government were to make more resources available you would be happy to take them?

Dr WALDERSEE: I must say yes.

Ms LATHAM: Always.

The Hon. LYNDA VOLTZ: I am sure that is the point my colleague was making.

Mr KEVIN HUMPHRIES: That is one issue, I suppose, but it is the emphasis. We know the issue that exists between the Commissioner and the Inspector and that is, again, an issue. All I am saying is that there are other things that ICAC should be interfacing with that we need a bit of feedback on as well. Where does all the time get spent, that is all? I would much rather be listening to what you are doing, to be honest, than the fracas with a few people.

The Hon. LYNDA VOLTZ: Hopefully Dr Waldersee will be back in our annual report review.

Reverend the Hon. FRED NILE: Just one quick question about trying to restore the relationship between you and the Inspector. Are there any plans to do something in that direction? I know you are critical of his reports, saying he never consulted with the ICAC, apparently, when he drafted that report and that that led to some errors and omissions in his report based on lack of knowledge, which he could have got with consultation. I am talking as a citizen as well as a Member of Parliament. How do we get a good spirit of cooperation between ICAC and the Inspector?

Ms LATHAM: I just want to stress that we have always cooperated. I really cannot understand how we could have cooperated less than we have. We have had various requests for information and correspondence with the Inspector since the last inquiry and I have continued to provide anything that he has asked for. In fact, what we now do is we have a series of reports which summarise the progress that we have in each investigation that we are undertaking and those reports go to what is called the Investigation Management Committee, which meets on a monthly basis, and I have been providing those reports to the Inspector on a monthly basis. So he, in effect, is getting everything that we discussed in the Investigation Management meeting—he is getting copies of all of those reports. I have tried to step up every aspect of the information that we provide to him, even when it is not in relation to a specific investigation.

Reverend the Hon. FRED NILE: I was getting more to the one-on-one relationship.

Ms LATHAM: I have not had any requests for any meetings or any phone calls. I have been concentrating on doing my job, and if he did request to have a meeting I would certainly attend.

Mr CHRIS PATTERSON: Long lunches have been suggested in the past.

The Hon. LYNDA VOLTZ: I do not think we should go back to long lunches.

Ms LATHAM: I am not a big fan of long lunches, I have to say.

Mr CHRIS PATTERSON: It was said in jest.

The CHAIR: Commissioner, I am grateful for your time and for your assistance. Thank you very much.

(The witnesses withdrew)

(The Committee adjourned at 2.18 p.m.)