REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

INQUIRY INTO THE PROTECTION OF PUBLIC SECTOR WHISTLEBLOWER EMPLOYEES

REVIEW OF THE 2007-2008 ANNUAL REPORT OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION

INQUIRY INTO PROPOSED AMENDMENTS TO THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT

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At Sydney on Tuesday 11 August 2009

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The Committee met at 10.30 a.m.

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PRESENT

Mr F. Terenzini (Chair)

Legislative Council	**Legislative Assembly**
The Hon. G. J. Donnelly	Ms D. Beamer
The Hon. T. J. Khan	Mr D. R. Harris
Reverend the Hon. F. J. Nile	Mr N. Khoshaba
	Mr J. R. O'Dea
	Mr G. F. Martin
	Mr G. E. Smith
	Mr R. G. Stokes

CHAIR: I declare open the hearing of the Committee on the Independent Commission Against Corruption. This is the Committee's fourth hearing as part of its inquiry into the effectiveness of current laws, practices and procedures protecting whistleblower employees who make allegations against government officials and members of Parliament. Both Houses of Parliament referred the inquiry to the Committee on 26 June 2008. On 12 March 2009 the Committee published a discussion paper as part of the inquiry process and invited submissions in response to the proposals raised in the discussion paper. Today's proceedings will focus on responses made to proposals raised in the discussion paper. I thank everyone for appearing today. Our first witness is Mr Robert Falconer who is Chairman of the STOPLine organisation.

ROBERT FALCONER, Chairman, STOPLine Pty Ltd, 345 Riversdale Road, Hawthorne East, Victoria, sworn and examined:

CHAIR: Mr Falconer, thank you for coming all the way from Victoria; we appreciate you being here. We have received some documents from you, the first of which is dated 1 August 2009, and which I think is your resume.

Mr FALCONER: Yes.

CHAIR: The other document is a letter or a submission dated 3 April 2009. I do not know whether that is part of your original submission.

Mr FALCONER: That original letter was submitted by one of my director colleagues.

CHAIR: Wayne Bruce?

Mr FALCONER: Wayne Bruce.

CHAIR: You have made some additions to that.

Mr FALCONER: I have. I have been bold enough to do it in red to draw attention to the inserts.

CHAIR: Do you wish those documents to form part of your evidence today?

Mr FALCONER: Yes.

CHAIR: Before I ask some questions would you like to make an opening statement?

Mr FALCONER: Yes. First of all, thank you for the opportunity to appear before the Committee. STOPLine commenced business in late 2001 when we became aware of the implementation of the Whistleblowers Protection Act in Victoria. Wayne Bruce, my partner, who has an accounting background, was on the board of Crime Stoppers in Victoria and he sought me out. I have been on the board of Crime Stoppers in Victoria and I introduced Crime Stoppers in Western Australia. Wayne had the notion that we should commence some form of Crime Stoppers first for the private sector and then for the public sector. When the Government decided to introduce the Whistleblowers Protection Act things went ahead on their own.

We set ourselves up, first, to provide a third party whistleblowing service to relevant and interested public sector entities. We have a few of those. It is interesting that at the moment 70 per cent of our clients are from the private sector and 30 per cent are from the public sector. It is fair to say that initially the private sector was not remotely interested in lifting the lid on its corporate dustbins. However, after the corporate collapses in the United States—WorldCom and Enron and the Sarbanes-Oxley Act—that country requires anonymity in its reporting mechanisms, which I think is important. Australia has had its own local snags, for example HRH and so on. As a consequence the Australian Stock Exchange adopted more stern proposals for corporate governance.

Australian Standards brought out a couple of standards that are referred to in our paper in respect to giving whistleblowers safe mechanisms to report malfeasance in the private sector. At the moment it is interesting that the private sector—and this is significant to me—is not driven by legislation. We simply suggest to our private sector clients that if they have a code of conduct—invariably they do and usually it is all encompassing about improper conduct or things for which they do not stand in their organisation—and if their staff members are encountering any issues they should use our hotline to report it to us. We then submit the disclosure at a high level in the organisation.

Some of our clients are fairly touchy about being named publicly but, thankfully, one is not. Telstra, one of our biggest clients, has a small ethics committee to which we report our disclosures. In effect we take reports of misconduct and other inappropriate behaviours of all sorts from a potentially low level in the organisation to a level that is outside the door of corporate headquarters. It seems to work quite well. After comparing a non-legislative driven situation in the private sector to the Whistleblowers Protection Act in the Victorian public sector it is fair to say that, in many instances, incidents that are occurring in the public sector workplace that fall outside the legal definitions are not necessarily being dealt with, whereas in the private

sector there is no way of defining misconduct. You have a code of conduct and that is something that many public sector organisations have as well.

To me the biggest concern and the biggest issue are the bullying and harassment. In our history we have dealt with over 1,300 disclosures in the past eight years and we have conducted over 100 investigations. Most of the investigations that we conduct are not for our hotline clients; they are for other public and private sector entities that come to us. With my policing background I consider internal investigations about forms of misconduct and misbehaviour, humans to humans, within the organisation. The Whistleblowers Protection Act in Victoria does not cover bullying and harassment, which is a huge issue, and it is not in most other Acts. In the main the inappropriate activity has to be analogous in some way with dishonesty, which is an interesting issue.

I discussed this issue at some length with John Taylor, the Deputy Ombudsman in Victoria. That matter has been drawn to the attention of the Victorian Parliament and to the Attorney General and I do not know whether or not some amendment might take place in the future. We have been in the game for a fair while. We are a commercial enterprise but I do not believe that a bit of altruism and high ideals are mutually exclusive to commercial benefit. We are in a business and we say that we play with a straight bat. We know that we have lost a few clients because, using an Australian colloquialism, we are too fair dinkum, but that is the way it is. We have learned a lot in dealing with whistleblowers and the entities. The myth that the private and public sector are so different is just that—it is a myth. The conduct and misconduct of human beings within structured organisations, and at times the lack of corporate courage up the food chain in those organisations, is exactly the same.

CHAIR: Thank you. You are a commercial enterprise?

Mr FALCONER: Yes.

CHAIR: And your association deals mainly with the private sector?

Mr FALCONER: Seventy per cent of our clientele is, yes.

CHAIR: You began a relationship with the private sector to provide your service?

Mr FALCONER: Yes.

CHAIR: You take that protected disclosure, for want of a better word, you deal with it and you investigate it?

Mr FALCONER: No, sorry, we do not, not necessarily. All our clients know that we have a separate arm that conducts investigations. All our personnel are call takers, or interviewers, which is what we like to call them because we are conducting an interview. The average call lasts for about 15 or 20 minutes. I know that anonymity does not apply in this State but with the greatest respect it should. Seventy per cent of the people who phoned us in those eight years want anonymity. I believe, personally, professionally and commercially, that anonymity is not a mask; it is a shield. Without anonymity the capacity to manage in confidence the identity of a whistleblower—in private or in public practice—is gone for all money.

Prior to this I worked in big organisations all my life. We have had people telling us things that were absolutely right. They said, "If my name goes forward on that to our head office it will be out on SMS and email all over the State by lunchtime." Anonymity is important. We sell our service to the entity and the entity buys our honest brokerage, our capabilities and our capacity to deal with it confidentially. Forty per cent of the 70 per cent of people who wished to remain anonymous to the entity that employed them told us their identity, with the proviso that it should not be passed on. Any entity to which we provide our service must agree that it will receive anonymous disclosures if that is the choice of the whistleblower.

CHAIR: Let us say that someone comes along with a disclosure. You said earlier that most disclosures related to bullying and harassment.

Mr FALCONER: A large proportion does, but there are several sins.

CHAIR: You might be aware that New South Wales has the Protected Disclosures Act, which refers to maladministration, corruption and a waste of public money.

Mr FALCONER: It is similar to ours.

CHAIR: A system is in place to give people who raise those matters some protection from detrimental action. That enables them to come forward confidently. You referred earlier to anonymity. I am interested in the fact that you guarantee anonymity. One of the comments made to this inquiry—I think it was by the Ombudsman or by the Deputy Ombudsman—was that if you were to investigate a disclosure sometimes it is impossible to maintain anonymity. The person who made the disclosure has to be involved otherwise you cannot conduct an investigation. How would you get around that if you were guaranteeing someone anonymity?

Mr FALCONER: That is right. We go into an organisation at the behest of those who are running it. The public and private sectors are not totally different. We have conducted investigations in the public sector outside our whistleblowing role, when often there were whistleblowers. Once we get inside an organisation we look for the malfeasance that has been alleged and we start conducting some form of audit. It is about developing a strategy so that we can go into an area where allegations have been made about theft, misconduct, or a misuse of resources. Thereafter we discover something that we are told about by a person who clearly needs his or her identity protected, and we take the next step from there.

At times it requires the development of a strategy. I have spoken at anticorruption conferences in this city and in others. To me one of the other predictable but disturbing things is the ham-fisted approach to these issues by a lot of managers. They go storming in and they ask such obvious questions that they give the game away in the first five minutes and any notion of discovering evidence, emails and other evidentiary material is lost.

CHAIR: Such as a covert investigation?

Mr FALCONER: Not so much covert but discreet—going in after hours and checking someone's computer that has been supplied to him or her by a public or private sector employer when allegations have been made about that organisation. A person who was employed by a tertiary institution to sell training overseas was alleged to be going overseas but he was selling training for himself and a mate—a little sideline that they had going. All the evidence connecting those things was available in that person's computer at his workplace.

CHAIR: On what grounds do people come to you? I take it that these disclosures are limited. In New South Wales we have categories of disclosure. Do you have categories?

Mr FALCONER: Yes. In the public sector protected disclosure comes within the ambit of the Act. There are some limits to it. Once it comes in, an assessment has to be made by the head of the public sector organisation to establish whether or not it is a public interest disclosure and it is then sent to the Ombudsman. The Ombudsman can keep the investigation, give it to the police or return it to the organisation. In Victoria when they do that third step they invariably recommend to the government entity or the local government, which we do a fair few jobs with, that they engage a professional investigative group, and sometimes that is us. So we conduct those investigations; the report goes then to the CEO of, say, the local government entity who then has to return that to the Ombudsman. I have read some of the previous papers of this Committee. There has got to be a policeman's policeman: somebody has got to ride shotgun on your legislation. With the greatest of respect to the CEOs and the public and private sector, if there is nobody auditing what they are doing about these things many of them will slip them under the rug; they will disappear through the cracks.

Mr DAVID HARRIS: I have just been reading through the paper we have just received and you make a very good point in saying that a lot of public sector organisations do not have the people with the necessary skills to deal with disclosures when they happen. When you receive complaints through your organisation do you have a process of testing the veracity of the complaints?

Mr FALCONER: Our process really is, in the main, the interrogation—and that always sounds a scary word but it is not, it is just a means of eliciting information—of the whistleblower and asking them their motivation, why, when, how, who. What is interesting is that even with anonymous whistleblowers, it is not rocket science, we simply do the Crime Stoppers thing: we give them a job number and if we have a security question—some of these people ring back four and five times because the allegation can go to the entity and of course the first step is to make some—and I emphasise this word—discreet inquiries to see if there is some validity to the allegation. They do not stand and fall by the making of the allegation.

Your point to me that you opened up with is very real. I tend to refer, a bit unkindly, to HR handball. Whether they call them the old-fashioned HR or they have got people and culture or some fancy term, a lot of organisations flick it over to the human resources area, who do not understand evidence, do not understand investigations mainly and sometimes muck things up in the first couple of steps.

Mr DAVID HARRIS: So if you get a complaint do you pass all of those complaints on to the relevant organisation?

Mr FALCONER: Absolutely. We say this to all our clients—the private and public sector—whether or not the issue that comes in falls within the ambit of the Whistleblowers Protection Act or your code of conduct over in the private sector, if one of your staff—you have paid for our service and put our number up—is concerned enough to ring in and be questioned at some length about the necessity, the validity, the value of the issue, we will put that forward. Can I say again with the private sector some of the things that come in to us we refer to them as a non-disclosure but we forward them anyway and the good people that receive them deal with them.

Of course, at the end of the day—this is very interesting—out of all the anonymous whistleblowers we have that we give a code number to and their question, we have only had about half a dozen out of 1,300 that do not ring back for feedback. They want something done. It is not always what they wanted; it is not always as perhaps seriously dealt with as they might like, but the general feedback at the end of the day is that the whistleblower has made a report and seen or heard—and remembering they are inside, they work in the organisation so they generally see or hear about what has been done. Conversely, of course, if nothing is done sometimes we get that feedback as well.

Mr DAVID HARRIS: So your recommendation is that the scope of people who can receive disclosures should be widened?

Mr FALCONER: I am not trying to be something I am not here but we have got a commercial interest in this where there are others who provide this service. In the United States where they brought Sarbanes-Oxley into being and have anonymity as an obligatory requirement they have had hotline services like this going for 20 years, and as third-party advisers—here is a bit of bias here—I believe, and our clients, and certainly Telstra, who, as I say, are not shy about being named—some others are—they are quite happy to speak to the benefit that they get of us providing this safe conduit with some level of experience than just ringing into a nominated protected disclosure officer, often who was chosen because they were on leave at the time of the selection—which we have all seen that happen—and the turnover in staff we are finding, particularly in the public sector, is that the PDC, the protected disclosure coordinator, it is a handball job and it is being moved on and there is little or no expertise there, and the handling of these things in the first stages is crucial.

Mr DAVID HARRIS: You are obviously a reputable company.

Mr FALCONER: I think I am. I am biased.

Mr DAVID HARRIS: Can you see any potential areas where if it was broadened there could be issues around people not doing the right thing or making things public?

Mr FALCONER: Of course there would be—with all due respect, the same as the current system where it is going to CEOs and directors of human resources. All the frailties, all the things that humans get wrong—accidentally or deliberately—is always in the mix, there is no doubt about that. There is no infallible system that is for sure.

Mr DAVID HARRIS: But in your view you would see that opening up an opportunity would have more value than negatives?

Mr FALCONER: It is, and as my colleague who put the original submission in had an appendix A to his original letter, he has got a list of various other pieces of regulatory legislation in this State which do provide for the nomination of a third-party provider. That is the little commercial bit of my spiel really. But I do not care. If you do not do that—if I can encourage the people here, the members of Parliament here, to do anything, please look seriously at the need for anonymity, because anybody who comes to me—family, friends, acquaintances—about blowing the whistle I say, "Only if you can do it with anonymity".

There is another very important issue, and I have had this discussion with our Deputy Ombudsman and they agree, and certainly Whistleblowers Australia and Transparency International I have spoken with people there, they are very concerned that very little happens in terms of charging people for recriminations and taking detrimental action against whistleblowers. The reason for that is simple and complex at the same time. A lot of the detrimental action we hear about with whistleblowers is—and it happened in policing in my prior career and it happens now in the private and public sector—a lot of it is very subtle; it would never ever get before a court of competent jurisdiction with sufficient evidence, firstly, to lay a charge and, secondly, to get a conviction.

You do not get invited to the Christmas party; you do not get recommended to do a course in Sydney at the Australian institute; you do not get this, you do not get that; somebody delivers a load of gravel to your house on a Saturday morning; an undertaker rings up to organise your funeral; and a whole range of awful, harmful, psychologically evil things happen but hardly any of them would ever stand up to a prosecution. So it is a bit of a paper tiger, if I can be blunt. The threat of offences for recriminations and reprisals looks good, it is nice to say, but the reality is if you cast around this country and elsewhere not many people have ever been prosecuted for it.

Reverend the Hon. FRED NILE: Thank you very much for coming in and sharing your information. You mainly operate in Victoria?

Mr FALCONER: Yes.

Reverend the Hon. FRED NILE: Are you overlapping with any government agencies? Do you see any overlapping occurring?

Mr FALCONER: No, we do not, and I think it is fair to say again—and I am blowing my own trumpet fairly heavily here today—we are well regarded by the Ombudsman's office, and that is the main entity. Of course, the Whistleblowers Protection Act in Victoria is overseen and managed by the Ombudsman's office. Other than that there is the Auditor-General, of course, as you are aware, and there are other entities like that, they go about their business. We have never had any criticism or complaints that we have done anything that has impeded the progress of other proper bodies

Reverend the Hon. FRED NILE: Can those government bodies—say, the Ombudsman—investigate you or follow-up any of your activities?

Mr FALCONER: They could not investigate us—

Reverend the Hon. FRED NILE: I meant the matters you are handling.

Mr FALCONER The ones that fall under his Act certainly. If we have done an investigation and we have presented it back to our client—let us say a local government body—and then they submit the investigation report that we have conducted on their behalf back to the Ombudsman and it is inadequate, it would certainly come back very rapidly. It would go back to the body that hired us saying these investigators should have done this, this or this. Thus far we have never had that happen to us.

Reverend the Hon. FRED NILE: Would most of the public service inquiries you have have some involvement back with the Ombudsman?

Mr FALCONER: Most of them do. Some of them that fall outside—and this is back to my issue about legislation and definitions and actually cutting things out of the process, certainly in Victoria for example—and the Ombudsman is aware of this and it has been raised with the Attorney General—bullying and harassment, and sexual harassment in particular, is not covered by the Act, and it is a huge issue in the public and the private sector. But we are working within a legal definition there, whereas, as I said earlier, in the private sector it is broader and all encompassing. But—and this is the nub of it again—good CEOs, the ones that are fair dinkum and they want to know about the health of their organisation and protect their assets, people and their reputation they want to know about what is going on and they want to try and deal with the issue. Then there are the others.

Reverend the Hon. FRED NILE: Do you feel fairly strongly that that bullying and harassment should be included in the whistleblower—

Mr FALCONER: When you look at the sort of estimates they put on the cost of bullying and harassment—although I hasten to say that in some instances it has become the modern-day whiplash injury; there are a lot of specious complaints about bullying and harassment and that is another danger, they have to be dealt with very carefully. But the genuine numbers of bullying and harassment and some of the investigations we have conducted, there have been serial bullies that have destroyed the lives of many, many people—some of them their superiors—and nobody has taken any action. It is a huge issue.

Reverend the Hon. FRED NILE: You mentioned the hypothetical cases about various things happening—gravel being delivered to the person's home. How would you establish that that actually had any involvement with the employee's employment? It could be a neighbour; it could be someone in the organisation.

Mr FALCONER: It could be a benefactor wanting to help you build your driveway, I agree, but it is highly unlikely. I was going back to my previous life in policing and I presented my bio to simply demonstrate that I have been around the block a few times and I know what is happening out there, and in internal investigations some of the dreadful things that were done to police officers who stood up to be counted I could write a book on those. I do not know and could never prove who actually did it but I do not think it was accidental.

The Hon. TREVOR KHAN: I am interested in your proposal for third-party disclosures, if we could call it that. I take it you are aware of the works that have been published by Dr A. J. Brown on behalf of what you could describe as his group?

Mr FALCONER: I am.

The Hon. TREVOR KHAN: It is the case, is it not, that one of the things that he proposes is that where we talk about protected disclosures his recommendation is that we should talk about them in terms of public interest disclosures, because at the nub of it, from the public sector point of view, what we are talking about is disclosures that are made for the public interest as opposed to being harmful to an individual?

Mr FALCONER: Yes.

The Hon. TREVOR KHAN: If we go to that concept of a public interest disclosure and going to a third party, particularly in the context of the twentieth year since Fitzgerald, in the lead-up to Fitzgerald what we saw were disclosures that were made to the media that led to the Moonlight State appearing on the ABC *Four Corners* program. Those were disclosures made, as I understand, by a public servant who kicked that off—in fact, a police officer—and they, in a sense, you could say brought down a government, and certainly brought down a police commissioner. Do you see in those circumstances that there is merit in extending protection to a public servant who makes a disclosure to the media?

Mr FALCONER: Yes, there is. But again for the same reasons as I have said about a ham-fisted approach and a loss of evidence and cooking up of alibis and whatnot, we have had whistleblowers who said to us they are contemplating going to the media. They have rung us because we provide a service to their organisation. I always say to them, "You need to make that your last resort", because the reality is the media certainly love it—the media do not like this third-party stuff. I know some people in the media; they would sooner that they ring in—I just heard Steve Price warbling away there in the taxi—Steve Price or someone like that. They would very much sooner have that out and get the ratings for the shock horror for one day than say, "No, no, this is not the way to go. You really should be going in through the proper authority so that some discreet inquiries can be made to acquire evidence before it is all gone."

But it is interesting in the proposed Federal legislation there is discussion about whether or not there should be some capacity to protect people or to not discriminate adversely against people who go to the media. I reckon it is a last resort. Generally, if we go back to my investigative background about going in and seeing what evidence is available in the workplace in support of it such as emails, telephone records and all sorts of things, often they are gone very quickly. Additionally, people get their heads together about what did or did not happen at the time. I am a fan of AJ's, and I was involved in the early part of his work. The one thing I disagree with him about in his most recent paper is that element of saying that it really should be about issues to the entity and not to the individual. I think that they are inexorably linked.

Undoubtedly people are your most expensive and valuable resource, and you have to be able to protect them in the workplace. It is not good enough to just say that they are not misusing their card or they are not in

any way stealing public moneys, they are just monstering their workmates and some of them are ending up getting psychological care. I do not think you can just do that.

The Hon. TREVOR KHAN: I accept what you are saying. In the context of the example of the police force in Queensland 20 years ago, how would a disclosure even to a body such as yours be handled? I am not being critical because I understand the nature of the disclosure that was initially made to Masters was to the effect that a police officer was being, in a sense, harassed by senior officers because he refused to take a bribe.

Mr FALCONER: Yes, because he was straight.

The Hon. TREVOR KHAN: Yes. That, of course, led to a whole series of circumstances.

Mr FALCONER: Sure.

The Hon. TREVOR KHAN: If you have a normal system of disclosure, including straight third-party recipients, how do you deal with an effective investigation of a fair dinkum complaint when the corruption and misconduct goes all the way to the top of the organisation, as it did with the Queensland police?

Mr FALCONER: My answer to that is fairly straightforward. I have worked in two States with Ombudsmen. The Ombudsman's role ought to be as it certainly was in the early days in Victoria when we had a Deputy Ombudsman (Police Complaints) who sat alongside the Ombudsman whose only role was police complaints. When I was running Internal Investigations Victoria, anything that came into my office through a mechanism such as ours, or an internal police hotline, which we put in place when I was in Western Australia, at the end of the day the Ombudsman had an overview role of anything that came in from there. Sure, if you are totally corrupt and just do not accept the disclosure or the report, or you water it down to make it a nothing and then submit that corrupted report to the Ombudsman, sure that will not work.

Really, we have to rely on the fact that in the main we have honest people in these jobs; and if we have not, we ought to deal with them. But, you have to have someone overseeing. If the Ombudsman oversaw the mechanism in this discussion we are having, the flaw of pushing it back under the waterline or trying to minimise something serious should be detected by the Ombudsman, or in Victoria now the Office of Police Integrity, or here the PIC, and may I say I declare my colours here, and I have said it publicly in Victoria and got into trouble with the police union in Western Australia supporting the establishment of an anti-corruption commission, which backfired and did not work as well as it should have. But then the Kennedy royal commission recommended a rebirth and rebadging and better legislation, as with the CCC over there, and we do not have one of those in Victoria, and we should. Dare I say in this company that that is mainly because members of Parliament do not have to answer to the OPI if there is anything involving Parliamentarians and police?

The Hon. TREVOR KHAN: I could ask much more, but the conference was great.

CHAIR: I am glad to hear that.

Mr GERARD MARTIN: On the question of anonymity and given that in New South Wales in the almost 20 years that the ICAC has been around there have been many vexatious complaints, I take it that if there is not anonymity a lot of people will not come forward. Should there be something in the mechanism, in the structures, that there should be some responsibility on a vexatious litigant, and even some penalty, if it is purely that. In the four-year cycle of local government at certain times there is a lot of tit-for-tat complaints, which take up a lot of time of the ICAC. Can you think of any workable process that would fit in with that?

Mr FALCONER: Let me approach that in two ways. First, and I will sound contrary here, but as I said earlier we have had more than 1,300 disclosures, and that was the big thing. We still get this in the public or private sector, it does not matter; chief executive officers have an absolute fear that they put our mechanism, this conduit, in place, because we are independent but we report back to them, which the whistleblowers are generally enamoured with, when they work out that they are not ringing in to the company they are generally quite pleased, because they see the independence as something meaningful. In all those 1,300, honest to goodness, we would not have had five that I would declare as vexatious in the proper and true meaning of the word. That does not mean that some people do not say that two and two are five, but if they believe that on their observations and what they have heard and seen something is corrupt or definitely is improper conduct, you have to accept that in good faith, and we do.

So there are very little numbers of disclosures or reports that we get that could truly be described as "vexatious". Having said that, there are some, because we always press them for their motivation when we take them to course. We ask, "Why are you ringing?" or " Why is this driving you?" Sometimes there are admissions of clashes, but because the motivation is not pure that does not negate the validity of that report. Dare I say with ladies in the room that the term "hell hath no fury" comes to mind? Does that answer your question?

Mr GERARD MARTIN: Yes. From that I guess it is not worth the pain to try to get some sort of system of having a penalty?

Mr FALCONER: I go back to my policing days. When I took over Internal Investigations Victoria one of the beefs with the police union was that it wanted a situation that when a person made a complaint against police and the evidence did not support that, that those people ought to be charged with making a false report, for goodness sake. So if you start holding up a stick towards the whistleblowers you might frighten too many away. Chairman, can I say this about anonymity: Crime Stoppers started in 1987 in Victoria. A Victorian policeman and our media director went overseas and saw it in America and brought it back, and it is now national. Each year 150,000 people ring Crime Stoppers. I do not have all of the figures here but I can get them, they are fantastic.

When we originally said you could get rewards, that was the other thing: that there would be mercenaries and the crooks would be in it for the money. But only 2 percent of the people in all those years who made reports under Crime Stoppers even looked for the rewards. And the benefits are huge. Again, if they make a vexatious or a deliberately harmful allegation of someone, the real answer is in how that is addressed by the entity; it is about the discretion and a bit of brains and a bit of quietly looking at the background issues, not charging in and seizing everything and destroying a career based on the call. The call itself is not the real story, it is the start of an investigation, or it ought to be.

Mr GREG SMITH: I worked in a government agency before I came to Parliament. I had a fair bit to do in the whistleblowing area, because I was in a senior position. My experience is that there are people who are bitter because of career disappointments and who are prepared to allege corruption against people who have not picked them for positions, and they will continue to complain to whatever agency will listen to them. Really, when you look at all of that, it is a waste of time. There might be a psychological problem there of trying to help the person and heal them if you can, but a lot of time is wasted by those sorts of whistleblowers, if you can call them that. Do you agree with that?

Mr FALCONER: Yes, I do agree with that.

Mr GREG SMITH: If you give anonymity to people in that position with this grievance because of their career, or their pride, you really do not know whom you are dealing with. Should you not really know the credibility of the person before you investigate?

Mr FALCONER: Not necessarily. I go back to what I took to be your main point, those vexatious people, those troublesome individuals who go on and on with complaining. I suggest that some of those individuals have become very well known. If they came in under cover of anonymity they would still become well-known because the focus of their grievances, or the terms of their grievances, or the nub of their allegations, become so obvious that it can be seen, whether anonymous or not. You could say, "That is that Billy Blogs from Collingwood", he writes every three weeks. As a consequence of them becoming identifiable by the nature and the style of their complaints, you can put that to one side.

Mr GREG SMITH: That is right. However, if they complain only once and it sounds very serious, you will spend time on it.

Mr FALCONER: Yes, you do. It goes with the territory.

Mr GREG SMITH: Do you think that for your own investigation you are better off to deal with the person face to face so that you can make a judgement from their demeanour at least?

Mr FALCONER: Earlier I indicated that our average call-taking report runs at about 20 minutes. Some of those people ring us back a number of times. We diarise it and we say, "Ring us back in a fortnight", because we cannot ring them. Invariably, in the main, they do, they are quite keen to pursue it. And those sorts

of individuals would be very keen to pursue it. Again, in dealing with them on the telephone you can get a lot of information and a lot of feel for somebody and what drives them. If we take anonymity away, how will that stop those people? They will still march up to the doors and knock and do all sorts of things and they will still be pests. Barry Perry who was the Victorian Deputy Ombudsman (Police Complaints) years ago taught me a valuable lesson at one of my earlier meetings. He said, "Don't ever fall for labelling a human being a vexatious complainant and decide you can ignore him. Even the ratbags every now and again will come forward with something fair dinkum".

Mr GREG SMITH: That is right, it is like the person who cries wolf too often. It is hard to take them seriously. You made a point in response to Mr Khan, which I will ask you about. In Victoria you do not have a commission with compulsive powers like the ICAC or the Criminal Misconduct Commission?

Mr FALCONER: Yes, what a shame.

Mr GREG SMITH: Yes, it is a shame. But, speaking hypothetically, if the Ombudsman received a really serious complaint about the Premier, that he was corrupt and was sending money off to a Swiss bank account, or a matter of that sort, money that he was receiving for some favour, does the Ombudsman have the power and the clout and the support to pursue that?

Mr FALCONER: No, I do not … But you would have to ask George Brouwer. He might answer differently.

Mr GREG SMITH: Would a crime commission have the power and the support and the clout to do much about it?

Mr FALCONER: I am a bit of a fan of the Crime and Corruption Commission in Western Australia. Watching from afar, it seems to be kicking a few goals. It seems to be fairly fearless, which is an obligatory requirement.

Mr GREG SMITH: If a Premier of Western Australia were corrupt?

Mr FALCONER: They have locked up two over there.

Mr GREG SMITH: Former Premiers?

Mr FALCONER: Yes, they were Premiers at the time. They sent two Premiers to gaol, historically, in Western Australia, which I thought was a good result. It showed certainly a fearlessness that was evident.

Mr GREG SMITH: Certainly Mr Burke was not Premier at the time he was convicted. He had been the Ambassador to Ireland and the Holy See, had he not, before they got him?

Mr FALCONER: I am not sure.

Mr GREG SMITH: He had left politics?

Mr FALCONER: I am not sure. I am not taking any credit; it was before me.

Mr GREG SMITH: He did not get those jobs after he was charged, or allegedly charged. You would agree that it is a very difficult job for a whistleblower who was putting in someone, for example a Prime Minister?

Mr FALCONER: We have already seen that in Queensland with commissioners. Of course it is difficult. If you are heading for someone with a high profile and in a very powerful position, that is all the more reason that you have to have bodies that are as independent as possible of the political process to tackle it. Some would argue that that is impossible, I suppose.

Mr GREG SMITH: If someone did dob-in to the police, for example, and lost their job as a result, should there be massive compensation to that person?

Mr FALCONER: I think there should be some compensation, or a model that they can take action in respect to. I am not sure if that equates with the day-to-day activities that I am alluding to in our business unit. I am not sure how bowling over a Premier and suing someone is directly connected to my expertise.

Mr GREG SMITH: It might be the CEO of the company.

Mr FALCONER: That is an interesting one. That is a good point. Of course, with the private sector we will always have someone say, "Well, what if it's the CEO?" We say, "We'll go to the board."

Mr GREG SMITH: It might be the board?

Mr FALCONER: Well, then we have got a problem, have we not? We will have to think about ASIC or somebody else.

Mr GREG SMITH: But do you agree that the whistleblower should be compensated for helping authorities convict someone in that situation?

Mr FALCONER: No, I am sorry. That is a different question. The Americans have gone with that where you are getting bounty for being a whistleblower. Again, based on my experience and maybe my background—it probably is my background—I am not in favour of paying people for being honest and blowing the whistle. But if they get harmed, they should be able to be compensated.

Mr ROB STOKES: Existing legislation recognises the importance to secure anonymity wherever possible, but at some point a person is entitled to know who is their accuser?

Mr FALCONER: Yes.

Mr ROB STOKES: How do you deal with that?

Mr FALCONER: If the only evidence that one had in an investigation was direct evidence of a person who happened to be a whistleblower, then that definitely would be the case. You could end up with a showdown. You would have to tell the whistleblower that. But can I say, that is very rare because once you get inside the organisation with the blessing and support of those in charge, you start looking for the other corroborative evidence. Most of the investigations that we have conducted we have been able to do it and the whistleblower would be in the mix, of course, because they are part of the immediate workplace. They were present when this happened or when these goods went out of the storeroom, or whatever. If you are half clever, you can build them into the scenario as a witness but not directly as the trigger witness.

Mr JONATHAN O'DEA: A number of the elements of your model and your recommendations are quite attractive. If you accept anonymity as a basic principle, which is obviously what you propose, how do you enforce that in smaller organisations? Basically, that principle should apply not just for large organisations?

Mr FALCONER: Yes, the availability of it.

Mr JONATHAN O'DEA: How do you protect the anonymity in a small organisation or a small office where it is not so easy?

Certain evidence omitted from the published transcript, on the Committee's resolution, following the request of the witness.

Mr JONATHAN O'DEA: As a third-party recipient of protected disclosures obviously you have a degree of expertise personally and within your own organisation?

Mr FALCONER: Yes.

Mr JONATHAN O'DEA: Not every entity that puts up its hand to perform that sort of function necessarily would be appropriate. What sort of accreditation process, filters or checks do you have to go through?

Mr FALCONER: In actual fact, in terms of investigation, we are a licensed investigations firm. All our investigators are licensed. That is the requirement. Earlier I was asked about complaints. One thing I forgot to mention was that there is a mechanism. The authority that registers licensed investigators and companies is under the police commissioner's office. They have a body where anybody could complain about our conduct or misconduct in that respect. But as far as receiving disclosures, reports or whistleblowing reports, there is no mechanism. The other companies that do this are mainly big accounting firms and a couple of other smaller groups. There are not a lot of people doing this. But as I said earlier, in America they have had a history of 20 years of this. Interestingly enough, in the US they get a lot more fraud reported through these fraud hotlines, which is what they set them up for originally, than we or any of our competitors do here. My view on that is that we have a bit of a cultural hang-up about whistleblowers. The word "dob" has been mentioned once around this table today. It is a pejorative term. We tend to still have our schoolboy and schoolgirl hang-ups about that, but that is definitely changing.

Mr JONATHAN O'DEA: Do you think the controls need to be tighter—they sound as though they are fairly reasonably loose in many organisations?

Mr FALCONER: We mentioned Fitzgerald. As far as I know, Tony Fitzgerald just went up and gave them both barrels at some presentation up there on the twentieth anniversary. I heard from police colleagues that in the middle of the Wood royal commission there were people being busted here, detectives, for committing corrupt acts. I am not being disparaging; I am simply saying that no matter what you do and what checks and balances you have, it will not always be done correctly or the way you would want it. As long as there is some entity you can complain to or, in our case in the private sector where there is no legislation, no black letter law and these are arrangements by entities that in their view want to have good corporate governance, if we are not getting that right, they will terminate our contract. There is no doubt about it. If we are over in the public sector, I am confident that because we have so much involvement with the material we deal with going to their office that we would come unstuck with the Ombudsman and we would be criticised there. I am sure the Ombudsman would not hesitate to write to the police commissioner about our licence.

Mr JONATHAN O'DEA: Obviously, you are speaking in part on behalf of whistleblowers, as indeed will a number of people who are to give evidence?

Mr FALCONER: Yes, I am.

Mr JONATHAN O'DEA: Without going into undue detail, do you think it would be inappropriate for us not to listen directly to whistleblower employees in the course of considering what we should be doing to protect whistleblowing employees? In other words, we are hearing third-party evidence. Do you think we should be listening to whistleblower employees?

Mr FALCONER: I think it would be a great idea, but I am not sure how you would gauge a sample. I mentioned A. J. Brown's report before. That was a three-year effort of a huge number of people and organisations. I think they have got the running on this, the feeling of whistleblowers. I think there is enough research there in that, and there is a fair bit overseas. I have alluded to some of it. I do not want to make this too

esoteric, but some of the stuff I have put in that paper, there is plenty of research about but, with all due respect, how would you find them and who would you call? If you put out an ad for whistleblowers to come here, you would get some of the people Mr Smith was referring to, I suspect.

The Hon. GREG DONNELLY: In an earlier response you said that from your experience there is not much difference between issues in the public and private sectors?

Mr FALCONER: Yes, human conduct. There is very little difference with how human behaviour, managerial behaviour and the way problems in a workplace are addressed.

The Hon. GREG DONNELLY: To the extent that there are differences, given that 30 per cent of your clients are in the public sector, from your experience what are those differences? Can they be categorised or explained in any particular way?

Mr FALCONER: No. I am really saying there are not many differences, whether it is the whistleblower, whether it is HR or whatever your organisation calls HR these days or whether it is the way some managers react to these things. When we ask "whistleblowers" it is a case of "Have you reported this already?" "I am saying yeah I have." "Who to?" "Oh, my line manager, Bob Falconer." "Well, what's he done about it?" "Nothing." This is the truth, they will say "Nothing." The truth will be, "Nothing I know, nothing I have seen or nothing anybody has told me about." Often Bob Falconer has done something, but did not give the feedback or, conversely, Bob Falconer put it in the too-hard drawer because he did not want to be the bearer of bad tidings up the food chain. He did not want to go up to the divisional manager and say, "Listen, we've got a problem out in our workshops there. One of my blokes reckons that the fellas are all moonlighting out on our trucks and not doing our jobs," whatever.

The Hon. GREG DONNELLY: In addressing some of the underlying issues, do you have any comment about the effectiveness or otherwise of education and training programs in private or public organisations?

Mr FALCONER: Yes. You need to give some basic guidelines. In Victoria the Whistleblower Protection Act came in, would you believe, New Year's Day 2002. Information about it went out in the lead-up to the New Year and Christmas break. All of a sudden people had to follow some guidelines. The then Ombudsman, Barry Perry, put out guidelines and templates. That was okay, but what a lot of them did was they just lifted them off his website, put them in their website, filled in a couple of names, ticked the box and moved on. The ownership of these things and whistleblowing systems and good governance has to be demonstrated from inside the organisation. These are evident facts, are they not? It has to be from the top down. You have to be fair dinkum. Tokenism is no good.

If the Ombudsman—I think this is the Ombudsman's role—provides guidance and statistics and some of the template-type information you might use, it is important for the individual organisations in the public sector to have ownership. We talk to all our clients about it all the time; this is not a oncer. You do not induct somebody who comes into the company or entity and say, "Well, we've got this whistleblower hotline and this is it" and move on. It is like most things about human behaviour and misconduct, you have to keep reiterating and upgrading it. You have to give some examples of how it has worked to demonstrate that you are genuine about it and it is worthwhile. I think that ownership of that—I know that is covered in the paper—has to be with the entity. We saw a little of this in Victoria where some of the smaller departments said, "No, no, we don't do all that stuff. AGs looks after that for us."

The Hon. GREG DONNELLY: In respect to overseas jurisdictions and your study or awareness of them, are there any in particular from which we have lessons to learn when dealing with these issues? Would you direct us to any to look at particularly?

Mr FALCONER: No. This is an unpaid promotion: A. J. Brown's people and the report and research they have done, nobody has done anything like that. I do not think they have done that overseas either. Having had the opportunity years ago in my previous role to go overseas, the first time I went over I did not take anything and I brought stuff back. The next time I took a lot of stuff and gave it away because I realised that we have a lot of good ideas in this country. There is enough of it spread around the country. If you look down over the Murray River and see what they are doing and vice versa, I think between us there are enough things to cherry pick to get the best model. If you come along later, your opportunity to get the best model is much higher.

Mr NINOS KHOSHABA: Mr Falconer, earlier you mentioned that there may be times when you go in and check someone's computer after hours.

Mr FALCONER: Yes.

Mr NINOS KHOSHABA: Obviously, without their knowledge.

Mr FALCONER: Yes.

Mr NINOS KHOSHABA: Let us say that the allegations are found to be true and even worse than originally expected.

Mr FALCONER: Yes.

Mr NINOS KHOSHABA: If the company wanted to take further action against this individual, would there be a problem in how they obtain information under privacy laws, for example?

Mr FALCONER: No, not when it is your computer, your premises—and I am making "you" the entity here. When we do that, naturally we do that with somebody from management of the company. We go in after hours. What a lot of people do not realise is that, with the proper technology—and we buy this service from people—they can recover all sorts of things out of hard drives and computers, which is where a lot of the damning evidence is to be found, notwithstanding that it has been deleted.

But in relation to privacy, we are not talking about people's homes. We cannot go to people's homes without police and warrants, but in your workplace, public or private sector, it is your equipment and your premises. If you want to engage in investigations of your own staff or if you want to audit or review the activities of people in the workplace, then that is your prerogative.

CHAIR: Are you recommending that there be an outsourcing of this service in these sorts of circumstances?

Mr FALCONER: This is our commercial hat. Wayne, my partner, has an accounting background and he wrote this. He is quite right. They do this in America. These Acts that he has listed are allowing for appointed third parties to provide the service. Whether it is us or somebody else, the benefits are the expertise, the knowledge and the understanding from doing this all the time and the background. That is beneficial, particularly for small organisations—although some of the big ones blow it as well because it is an extraneous appointment. It is not part of their real position description.

We think the capacity should be there. Some will say, "No, we can do that and we have all these great people", but others need to be able to engage somebody. Those same bodies can be held accountable by the Ombudsman. If the Ombudsman oversees your Act and your piece of legislation, then part of that oversight would be any public entity that engaged, if it was available, a third party provider because you would then be coming under the scope of the Ombudsman's purview.

CHAIR: Thank you very much for your evidence, Mr Falconer, and thank you for taking the time to come up here and give us your views, which are very interesting.

Mr FALCONER: I appreciate the opportunity. Thank you.

(The witness withdrew)

(Short adjournment)

CHRISTOPHER CHARLES WHEELER, Deputy Ombudsman, New South Wales Ombudsman, 580 George Street, Sydney, affirmed and examined:

CHAIR: We received a further submission from you, possibly in response to a discussion paper we put out. Also you have given us a copy of a speech you made at a recent conference. Would you like those to be published and made part of your evidence?

Mr WHEELER: Yes, thank you, Mr Chairman.

CHAIR: Before we ask you some questions, would you like to make an opening statement to the Committee?

Mr WHEELER: I will make a short statement Mr Chairman. The review of whistleblowing in New South Wales comes at a time when there is unprecedented national interest in whistleblower protection legislation. Not only are various jurisdictions around Australia reviewing their legislation or actively bringing it in, but also the Commonwealth is considering introducing public interest type disclosure legislation to fill what is generally agreed to be a serious deficiency in its legislation.

It is also fortuitous that it is coming at a time when the results of the Whistling While They Work research are being published. Of course, the first report was published at the end of last year, and the draft of the second report was just released at the Australasian and Pacific Anti Corruption Conference [APSACC] last week. As you will be aware, that research is one of the largest social studies research projects undertaken in Australia, and certainly the largest into whistleblowing. And it was not just an academic exercise. While it involved academics from five universities, ably led by Professor A. J. Brown, it also involves practitioners from the five ombudsman and four corruption fighting bodies and various public sector employment commissions or integrity commissions. The results of that research are quite practical and give some very good guidance as to where legislation and practice should go.

As you mentioned, the Ombudsman made an initial submission to your inquiry. I appeared at the previous hearing and we made another submission in relation to your discussion paper. But, if I may, I would like to revisit just one of the issues that was included in the Ombudsman's submission to the inquiry on 28 August 2008: this might be an appropriate time to reconsider the whole approach to the drafting of protected disclosure legislation. As you know, Mr Chairman, the Act is very short; it has only 35 sections, 12 of which are formalities. Of the 23 "operational" provisions, 10 focus on who a disclosure can actually be made to, going into specific details. I will get back to that in a moment. I want to also refer to the fact that there are several provisions in the Act which, as far as I can see, do not serve any good purpose.

The first one would be section 9, which relates to disclosures being required to be made voluntarily. I have had no idea why that is there, or what it is intended to achieve. As far as I am aware, the only disclosures that would not be made voluntarily would be disclosures by a CEO of corrupt conduct to the ICAC or of a workplace child protection allegation to the Ombudsman, mandatory reporting in the child protection area, and I think that certain health professionals are now required to make reports about their colleagues. Apart from that, everything else defined in this Act is voluntary. Why that would be there is, as I say, quite beyond me. It is unnecessary.

The second provision that I have problems with is section 16 which refers to disclosures are that "made" frivolously or vexatiously. The provision refers to the motivation of the person making the disclosure, not the content. To be a protected disclosure, it must be serious and substantial waste, corrupt conduct or maladministration. It is referring to the content; it is referring to the motive of the person at the time the disclosure was made. I personally, as well as the Ombudsman, cannot think of any circumstances in which a complaint about a serious matter may have been made frivolously. If it was, would it matter?

In terms of vexatiously, we have said in the submissions that have come to you that a very significant distinction needs to be drawn between a matter made vexatiously and a matter made maliciously. Both involve an improper motive, but a malicious one can have substance. If there is substance, it does not particularly matter what the motivation was of a person who made the disclosure. If you are aware of that motivation, it means that you have to be far more careful about proving the substance. But many matters come to attention because of malice. It is a fact of life that very often people, particularly if it is very serious and particularly if they may even be involved, are not going to raise the disclosure unless they have some motivation to do so.

That motivation is very often a payback complaint, or it might be that certain management action has been taken against them for underperforming. That might be the trigger that leads them to raise matters of significant public interest that you would not hear about otherwise. It is important to separate the content from the possible motivation, if you know what that motivation might be.

A further problem there is that it generally is impossible to know if a complaint was made frivolously or vexatiously until after it has been investigated. It is not something that you can use to decline a complaint because you just will not know. Unless you have looked into it, you do not know if there is substance, and you do not really know what the motivation of that person may have been. But if we get back to the original point I was getting at, the Ombudsman noted in his submission to the inquiry that almost exactly the same protections that can be found in the Protected Disclosures Act, should a person meet all the various technical requirements of that Act, are provided without question to any member of the public or any public official who makes a complaint to the Ombudsman, the ICAC, or the Police Integrity Commission.

Pretty much exactly the same protections are available under all of those bits of legislation. The only requirement to make a complaint to the Ombudsman or the ICAC is that the complaint to the Ombudsman has to be in writing, and, to the ICAC, it can be in writing or oral, and then the protections apply. For example, if you have a public official who makes a complaint to the Ombudsman, for it to be a protected disclosure the Act requires it be made in accordance with the Ombudsman Act. Then you have to meet the requirements of the Protected Disclosures Act. But the sheer fact that it was made in accordance with the Ombudsman Act means that has the same protections. There is no difference.

There are three provisions of the Act—for example, the ones that relate to disclosures to the ICAC, the Ombudsman and the Police Integrity Commission—which in practice serve no purpose other than to make this situation more confusing. What the Ombudsman argued in the earlier submission is that maybe it is time to start looking at the fact that in a democracy, people have a right to complain and that the default position should be, if you have complained to an appropriate person, you are protected. That protection is then removed for certain conduct or certain reasons, and that might be for making wilfully false statements, attempting to mislead, wilfully failing to assist, and for failing to keep matters confidential which should have been kept confidential.

Maybe a way of simplifying this legislation is to remove a lot of those hurdles that have been built into the Act, and are built into a lot of whistleblower legislation. Take the starting point as being that if you make a disclosure or a complaint to an appropriate person, it is protected. That is the default position. It can be removed for good cause. I think that would meet the policy behind such legislation and would be far more practical and far easier to explain.

One of my roles is to go out and talk to senior public servants—public servants whose job it is to receive disclosures—and to try to explain the Act to them. It takes a full morning. I talk for approximately three and a half hours trying to explain this Act in a way that they will understand because it is just so complex. Often what I am saying is, "This bit you can ignore because it does not actually serve any purpose, but this other bit is important. You need to focus on that. I don't know why, but you need to focus on it because it is a requirement." It would be far easier to have a much more simple Act that people can get clear in their minds and that they understand. It would save certainly me and others a lot of time trying to explain and guide agencies in dealing with protected disclosures. Thank you.

CHAIR: As I understand it, and I know that you are the expert, when this Act was put in place in 1994, it was designed with the intention of gathering all the protections that were available in those Acts and recognising them in the Protected Disclosures Act. As you have said, in order to become a protected disclosure, you have to jump all these hurdles. Firstly, you have to make it in accordance with the requirements of those Acts. It then has to show or tend to show that these things are happening. As I understood it, the Acts all came down to protecting people against detrimental action. That is why that provision, section 20, is in there—the criminal offence of protecting people—so that it would give people confidence to come forward.

If I am at work and I see people using too much photocopy paper, or I see someone take a bribe or something like that, and I report it and I get sacked or demoted, then that is a criminal offence. That is how I understood it. "Whistleblower" is not defined anywhere, but we use whistleblowing as the term, and that is how I understood the whole rationale—to give people protection. We call it whistleblower legislation because we want to take away corruption, maladministration and waste of public money from the public service. The best

people in the public service to see that are the person sitting alongside the guy who is using the photocopier, or whatever, and giving them some protection. That is how I understand it all came about.

The other section to which you refer, section 16, was there to weed out complaints simply made by people alluded to by Mr Falconer, as I understand it—people who had not gained a promotion and tried to allege corruption, and to weed out those sorts of things. All those operational provisions were put in there for that reason. One can understand why they are doing that. As I understand it, what you are saying is that the legislation should be drafted in such a way that anybody can make a complaint and it is treated as protected disclosure unless it is found that it is frivolous or vexatious, or it does not have any substance. How would that look different? I know you want to abolish section 16 and you want to remove that because, as I understand it, as you go along in your investigation, the wheels would come off it as you find those things. How would you then redraft the legislation? In essence, what would it be? What would it say, in essence?

Mr WHEELER: I will go back to the matters you were raising at the start when we were discussing this. The legislation was put together indeed to protect whistleblowers. I do not know that much thought was given to the provisions relating to disclosures to the Ombudsman, the ICAC and the Audit Office, as they then were the only three. Certainly the provision about it being made in accordance with the Ombudsman Act and being made in accordance with the ICAC Act meant that we had to get legal advice about what that meant. The advice was that "made in accordance with the Ombudsman Act" means it was in writing; being made in accordance with the ICAC act means that it was just made to the ICAC.

They actually serve no purpose. I think that nobody really thought about how those Acts were going to fit together, or the fact that the same protections were in those other Acts. But the protections do work if the disclosure is made internally to an agency. That is where the focus should be. Looking at section 16, to my mind if a person has made a disclosure to an appropriate body there should not be 10 sections saying you can make it here or there. I think it should be something that says a person or body with the jurisdiction to deal with that complaint and the protections of that Act will then apply. You would then have some provisions, however, that if it were found that a complaint was made vexatiously—I would not use frivolous—then the protections do not apply.

CHAIR: Stopping you there. You refer to an appropriate body. One of the issues the Committee is looking at in the discussion paper is that people should go to who they think is an appropriate body. Are you saying that if somebody goes to the wrong body but thinks that it is the right body—

Mr WHEELER: No, I think they should be fine if they have an honest belief. If they can show it was a reasonable belief to have—"I thought they were the right body"—and that makes sense, then they should be protected. We just do not want them wandering off to a totally inappropriate organisation knowingly to create problems. An Act of this nature should be about setting the rules of the road for all the players in the whistleblowing area—for agencies, for watchdog bodies and for whistleblowers—to say: If you do it this way this is what we expect, this is what we want, and you will be protected. It should not need to go into massive detail about: You can go there but you cannot go here, and you can only go there in those circumstances. It should be that if you have gone to a person or body that it is reasonable to believe they are the appropriate body to deal with it, then you will be protected just like if you went to the Ombudsman, you are protected. However, if you have done any of the following, or if you do any of the following, that protection will be removed.

I think that is a far stronger way of drafting legislation than the way it is at the moment, which basically says: There are a series of hoops that you have to jump over before a decision is made by an agency that they think you are protected. Bear in mind, only a court or tribunal under the Act decides if it is protected disclosure. In Victoria, Tasmania, and I think the Northern Territory, there is a central body that says yes it is or no it is not. In our jurisdiction we have to make our best guess. We will go back to someone and say we think it is a protected disclosure—cannot be certain, but we think. It would be far easier if we were able to say: You have made a disclosure about something of importance therefore the default position is that it is protected unless certain things occur.

CHAIR: There are two more things I wish to ask you about. Firstly, I wish to ask you about anonymity. I take it you heard the evidence of Mr Falconer where he stressed the guaranteeing of anonymity. I know you have commented about this before but from your experience what are your comments on Mr Falconer's evidence on the question of anonymity and how possible it is to keep that under wraps while investigating something?

Mr WHEELER: From our experience, if you admit you have a disclosure human nature being what it is, people will speculate about who made it. I would speculate - if somebody made a disclosure about me, or that concerned me, then I would wonder who made it. I may have no intention of taking detrimental action but I would speculate or wonder who had made it. Either I will get it right or—what is worse—I will get it wrong. Because if I get it wrong and I take detrimental action against somebody who did not make the disclosure, that is not a criminal offence under our Act. It is only an offence if you take action against the person who did make the disclosure. The agency cannot turn around and say: No, it was not this person; they did not make the disclosure, because they have just narrowed the field as to who would have—that is if they are believed.

The other thing we have found through long and painful experience is that people have generally raised the issue already in the workplace. As Mr Falconer said, it is so common that people have already raised it with a supervisor, or they have told their colleagues, or mentioned it down at the pub in one case, or they were seen going into the disclosure coordinator to make the disclosure in another case. I am not aware of a case where when people knew a disclosure had been made they did not try and work out who made it. Sometimes it is possible to disguise the identity of the person who made it.

One of the things we advocate is when a person comes forward with a disclosure that management should sit down with them and say: Who have you told? If we investigate this will it be obvious it was you? Are you so inextricably entwined in this thing that it has got to be you? If the answer is yes, then you do not put your head in the sand but you actually talk to the person and say: "Look, it is going to be obvious that it was you so why do we not make this a positive and get out there and make sure that people understand that you have the support of management, the matter will be investigated appropriately and appropriate action will be taken at the end of that process."

While confidentiality is a great thing if it is possible, generally it is not. Mr Falconer gave an example about sending in an internal audit and saying: Why not start over there? That can work really well in circumstances where you are trying not to admit you have any disclosure. Internal audit knows where to look. What they are saying they are looking for is this big but they just happen to find that little bit there, and you have not actually admitted to anybody that a disclosure was made. In summary, from a practical perspective anonymity is a great concept but it really does not work in most cases.

CHAIR: From your experience you cannot rely on it to work in every case?

Mr WHEELER: You are also relying on the fact that the investigation is conducted in such a way that it does not pinpoint - we have seen cases where the investigator will go in and call all the people in the workplace in except for the whistleblower—they have already talked to them. Everyone else knows that it had to be him or her because they were not interviewed. With this sort of thing you just never know when somebody is going to say something or do something. It may even be the whistleblower because you do not know when they are going to blow their own cover, or the investigator is going to say or do something which will also blow that person's cover. You cannot investigate or interview somebody without telling him or her things. They will learn from you certain things by the sheer questions you ask.

CHAIR: Are you basically saying, having been doing this for a fair while now, that at the end of the day on the ground in the workplace there is a limit to which this system of protecting people can apply? Mr Falconer mentioned subtleties. I do not know whether arranging a funeral is a subtlety, but you can talk about a subtlety where you might miss out on a cup of coffee or whatever. There is obviously a limit on the ground as to what we can do. Would you agree that any protected disclosure has to be aimed at those serious incidents at the workplace where you are overlooked for a promotion or whatever? Would you generally agree at the end of the day that is really the best system we can hope for?

Mr WHEELER: That is the best system we can hope for from legislation. Legislation by itself is not going to protect whistleblowers. With a supportive management, depending on the fine detail of who was actually defamed for example, you do not need legislation. If you have management that is approaching it in the right way, they are making it plain in their workplace that the person has done the right thing, they are going to deal with it appropriately, and they will not countenance any detrimental action taken against the person, you do not need an Act. It is only if there is some external third-party that might be affected that you might need the protection of the Act. But for it to work best you need both. You need management that is committed to the idea that whistleblowing is a good thing—as a theory at least—and that they will deal with disclosures appropriately and they will protect their staff that have made disclosures, and the people that disclosures are made about.

CHAIR: Would you say that enforced regulation that managers and chief executive officers would have to abide by and make part of their operations, such as reporting in their yearly reports and those sorts of things, has a chance of changing the culture in management to make it the way you have said? Is that the best way to go?

Mr WHEELER: I think it helps a lot if management can see that the Act says the Government and the Parliament have said this is the approach that we expect you to take. I think that helps to set the scene as to just what they should be doing. It is beyond question and there is no doubt about it. It is a statutory obligation on them, not a discretionary issue—that helps. With a lot of these things the tone is set from the top. The legislation sets out that this is the objective we want to achieve. This is what we think your role is. At the moment the legislation does not say what their role is. This Act only imposes two and, by implication, three obligations on management. The first is, theoretically, to keep it confidential if they can. The second is to notify a whistleblower six months after they have made their disclosure. The third, by implication, is that they have to read the disclosure—that is it. There is no message coming through this legislation to management saying: You have obligations and we expect you to deal with these people—whistleblowers—in the following way.

CHAIR: One of the proposals in the discussion paper is the unit—

Mr WHEELER: Yes.

CHAIR: The Independent Commission Against Corruption raised some doubts about that. You have commented on this in your reply but do you have any further comments to allay any fears that the Committee may have as to this issue of conflict that the commission has raised?

Mr WHEELER: In our submission on the discussion paper we did go through each of those dot points and pointed out that we do not think any of those things are a problem. For these functions to be performed, as I have mentioned before, it requires a statutory power to do so and that is for a range of reasons. Getting compliance in the absence of statutory power is very problematic. When the Act first came in I decided to audit the internal reporting policies of most government agencies. I asked them all to send in their policies. I went over those policies. I went back to those agencies and asked them to come back with a revised version. I went over them again. It was very time consuming.

The number of agencies that failed to comply was quite significant. We were not prepared to use our formal powers and make it a formal investigation and require to them to come in because our thinking was that we want agencies to want to be involved in this and to want to do these things. It is not a mandatory requirement in the Act for them to have a policy. So we just kept going back. Then, using the Parliamentary Ombudsman's committee we started naming some agencies in hearings that were not complying and compliance improved considerably. However, if there were a statutory provision that said you must notify the Ombudsman of X or take advice at least to consider Y, that would assist considerably.

It also addresses issues of privacy, for example, and confidentiality. Any exchange of information would not be a breach of the confidentiality provision of the Protected Disclosures Act and there would be no issue about breaching the Privacy Act, which is an issue with have in our relations with various other watchdog bodies. What you can actually say to coordinate your activities, for example, to prevent forum shopping or how much you can put to the other agencies such as: "Can you identify your complainants?" Is that a breach of the Privacy Act? In some of our relationships it is a breach of that Act, but in others it is not. The statute puts it beyond question. Some other issues have been raised about going against government policy in relation to greater responsibility for corruption prevention activities, I think this approach would actually enhance the ability of agencies to take responsibility for their corruption prevention activities.

Another point I would make is that the Ombudsman is the only general jurisdiction watchdog body with jurisdiction over the whole public sector. In that regard most of the identified formal whistleblowers are in the police area. Approximately 1,200 police each year make an internal disclosure about their colleagues—that is a uniform number each year. Often the results of those disclosures lead to prosecutions. We are not just talking about people with payback complaints or whining about their colleagues, but we are talking about serious disclosures that have a far greater chance of being sustained than an ordinary complaint. I think at least 40 per cent or 50 per cent of prosecutions come from internal disclosures. We have a serious involvement in that area as well in terms of helping with the development of their guidelines and how they deal with these matters. We are the only body that really has the breadth of coverage that could perform this role. If the Act does not have an owner, and a statutory power to be able to do that, it is going to keep wandering along where everybody

is looking around and hoping somebody else will do it, particularly in a time of diminishing resources. It needs to be set up formally and it needs to be funded.

Mr DAVID HARRIS: Mr Wheeler, one of the amendments the Committee is considering is the requirement for agencies to report on protected disclosures in their annual reports, similar to the way they report on freedom of information [FOI]. I want to drill down a bit. What are your thoughts on that and what should that information look like because a series of figures on a page do not tell a lot. What is your view and do you think it would be useful?

Mr WHEELER: At the moment we really have no idea how many protected disclosures are made in New South Wales. We do not know really how they are being dealt with, what their outcomes are. We hear a bit and we are asked for advice regularly. I think that is a serious problem that we do not have that information. On the other side of the coin, for agencies often it is inappropriate to release or disclose too much information in their annual reports, particularly if they are trying to guarantee confidentiality of a whistleblower. So you have those two problems there. But what we do need to know is how many disclosures are claimed by people—"I have made a protected disclosure", how many are accepted as being a disclosure, how many allegations are being made. It might be one disclosure but 20 different serious allegations or it might just be one.

What are the conduct categories? Are they mainly about corrupt conduct, serious and substantial waste or maladministration? What are the outcomes? Were they investigated, declined, referred to another body? Were they sustained? Were they false? I would like to see figures where agencies have found that something is actually false. It is a very rare thing. It is normally due to somebody making an error. They have looked at certain facts and they have interpreted them in a certain way or they do not have all the facts. I would not class that as false; it is just not sustained. It is wrong but it was not intentionally made for the purpose of deceiving. Was any action taken arising out of the disclosure—disciplinary, criminal, change of policy or procedure?

There are two ways of doing this. The first would be reporting in an annual report. The FOI example is interesting. When we had the FOI role I used to go through and audit the annual reports of about 135 agencies each year looking at the FOI reporting because that is the only way we can find out what is happening with FOI applications. The standard of reporting ranged from abysmal to generally not very good, with certain agencies quite good. So if the only way we can collect data is from agencies putting it in their annual report at their discretion, if it is anything like FOI—and they have been doing that since 1989—I would not rely on that data. Not only is it often wrong and the figures do not add up, but they just ignore the bits that they are supposed to put in there. Every other Australian jurisdiction, in the FOI context, has a centralised collection of statistics by an agency, often an ombudsman or the Attorney General, and they produce an annual report every year going through all those statistics. That does not happen in New South Wales. I would recommend against going down that path as a way of getting statistics together for protected disclosures. They really need to be collected centrally.

If you have a body that had a type of oversight role where they would actually see what is coming in, watch how agencies are dealing with it, they can put those statistics together because they would see all the ones that come in. If you look at Victoria, Tasmania, Northern Territory and Western Australia, from memory, there is a central notification of disclosures and there is somebody who is looking at them and saying, "Right, you have dealt with that appropriately". It is a bit like the Ombudsman's child protection in the workplace function where any allegation of child protection-related matters has to be reported to the Ombudsman and we oversight how they are dealt with to make sure that they are dealt with properly and we give advice and guidance. That would work; but in annual reports, if it is anything like FOI, it would be next to useless.

Reverend the Hon. FRED NILE: Thank you for coming today, Mr Wheeler. You are critical of the current protected disclosures Act in that it includes material that is not important and leaves out important material. Do you have a draft Act or a view as to how the Act should be redrafted?

Mr WHEELER: I do not have a draft of it. We have been raising the issues with each of the parliamentary inquiries. The guidance I would point to is primarily the Whistling While They Work reports about legislation, with the proviso that my thinking has moved on from that towards the idea of the default position being that the disclosure is protected. But the provisions that are recommended in those reports about the requirements that should be on agencies, the data collection and that sort of thing are very good. In terms of what hurdles you have to jump before you are protected, I think a far simpler thing is, "You are protected"—just as if you went to the Ombudsman. Any person in this State who writes any letter to the Ombudsman has exactly the same protections.

Reverend the Hon. FRED NILE: That is a good idea. The basic aim is to encourage people to make complaints. That is the purpose of the Act and what we want to encourage. Would it be better to have a central point where all the complaints go initially, such as the Victorian STOPLine or the Ombudsman's office, and then they can be followed back through the various agencies?

Mr WHEELER: The Whistling While They Work research found quite conclusively that most people prefer to go to their supervisor. In the vast majority of cases they want to go internally. It also found there is a correlation between organisational loyalty and the fact that people blow the whistle. It is not just ratbags running around. People who care about their organisation want to raise problems within that organisation and they want to do it internally. If you said they could only go externally, I think you would lose a lot of information and you would have an impact on the morale of organisations. People should be encouraged primarily to go internal. That is why we focus a lot of our work not on the substantive disclosure but on how an agency dealt with it.

Sometimes we look at the substantive matter but generally speaking our preference is to say, "The agency should deal with the substantive matter; we will look at how that agency dealt with the whistleblower." That is the sort of allegation that we would be interested in. I think it is far better if we have a system that encourages internal disclosures and that places like the Ombudsman, the ICAC, the Police Integrity Commission [PIC], and the Audit Office are a fallback position if all else fails or if it is the sort of matter that an agency could not deal with—such as corruption by the CEO or corruption that needs the special investigating techniques or the powers of the ICAC or even the royal commission powers of the Ombudsman—those sorts of things where it serves a purpose to go externally.

Reverend the Hon. FRED NILE: You mentioned the more than 1,000 complaints to New South Wales police. Have you dealt with those?

Mr WHEELER: We oversight the police handling of complaints, including internal disclosures. We have a significant involvement in policy development about how they should be dealt with. We are currently working on various projects with police about detrimental action matters and how they can be dealt with appropriately. We have a longstanding involvement in this area. There used to be an internal witness committee in police and we used to be on that. A lot of work goes into that area.

Reverend the Hon. FRED NILE: Those whistleblowers do not go to the PIC?

Mr WHEELER: Well, 1,200 go internally. I do not think that many go to external bodies full stop.

Reverend the Hon. FRED NILE: They do not go to you either?

Mr WHEELER: Most complaints, we get notified of them. Most police would go internally before they would come to us. I do not know the PIC figures, but I would imagine that most would go to police and not to them either. There would be some—absolutely some—but you have 1,200 to police.

Reverend the Hon. FRED NILE: Do the police provide a detailed report on how those whistleblower complaints are dealt with and is the reporting satisfactory?

Mr WHEELER: The New South Wales Police Force has one of the best systems around for dealing with internal witnesses. They set up their internal witness support unit, which at the time was unique, I think, almost in the world. They take it very seriously. They take appropriate steps to protect whistleblowers, which is why there are 1,200. Before the royal commission if there were any it would be surprising. The number demonstrates that the police trust the organisation to deal with it appropriately. They are not going to make a disclosure if they think they are going to get into a significant amount of trouble or if they think it will not be dealt with. The research showed that one of the key factors that leads to a person making a disclosure is if they think it is going to be dealt with. They are not going to bother if they think it will not be. So it is the culture of the police and how it has changed that has led to those disclosures being made.

The Hon. TREVOR KHAN: Could I compare very briefly the object of the Queensland Act in section 3, which identifies the promotion of the public interest by protecting persons who disclose unlawful, negligent or improper conduct affecting the public sector, danger to public health and safety, and danger to the environment, with the object in our Act, which I suggest to you is a higher hurdle when it talks in terms of "in

the public interest of corrupt conduct, maladministration and serious and substantial waste in the public sector"? Is my interpretation correct that ours is a higher hurdle to jump to get under the protection of the Act?

Mr WHEELER: I do not know that it is a higher one; it is a narrower one. It does not extend to those issues about protecting the environment, serious damage to public health and safety, that sort of thing. If you look at the definition of "maladministration", that is, sort of, your lowest common denominator of all three. All of them are maladministration but corrupt conduct theoretically is a somewhat higher degree of maladministration. But the definition of "maladministration"—serious conduct that is unreasonable, unjust, et cetera—is a reasonable level, I think, to pitch it at. I do not think it is any higher or lower than the Queensland one, if my memory serves me. Where Queensland and a number of other jurisdictions go, they broaden it beyond just those things in the public sector to include things that might be in the private sector, which is damage to health and safety, the environment, et cetera. I think we have already put in a submission suggesting that our Act should be broadened to bring it into line with the other legislation around Australia.

The Hon. TREVOR KHAN: Section 8 of our Act deals with disclosures made by public officials. I cannot remember if you spoke about that part of the Queensland provisions. For example, if there is a StateRail circumstance where there is interaction between public and private sector entities and a disclosure is made by an employee of a subcontractor to StateRail, that plainly is not covered by the Act at present, is it?

Mr WHEELER: I would not think so. The key part of the definition is somebody performing a public official function and acting in a public official capacity who is within the jurisdiction of one of the watchdog bodies. I do not think that would cover an employee of a subcontractor. It probably would not cover a contractor, but it depends. If that contractor is acting as an agent of that organisation, they could well come within the jurisdiction. If it was somebody, for example, who was a temporary employee who was hired through a service to fill a job position while somebody was on maternity leave, for example, I think they would be under the Act, even though they are not an employee of the public sector. But if it was somebody who was doing track work on a contract with StateRail, I doubt if they would be.

The Hon. TREVOR KHAN: Yet plainly if the object of the Act is, in a sense, to facilitate the disclosure in the public interest of corrupt conduct, et cetera, it would seem appropriate that the definition extend to cover those private sector employees who interact with the public sector?

Mr WHEELER: I agree entirely.

The Hon. TREVOR KHAN: I move on to the next part, that is, the appropriate body or, to use the Queensland interpretation or definition, the appropriate entity. There are two individuals or entities that I would invite you to consider as being appropriate to the circumstances of disclosure. In the Queensland legislation One of the appropriate entities is a member of Parliament. I invite you to discuss whether you think it is appropriate that a member of Parliament should be the recipient of a disclosure that is then protected? The second is the media, and I also ask you to consider whether that may be an appropriate body or entity to receive a disclosure.

Mr WHEELER: My views on this would be that the—

The Hon. TREVOR KHAN: I interrupt you to say that I do not necessarily put parliamentarians and journalists in the same category. If you like, you can answer those questions together or separately.

Mr WHEELER: I would think about this in terms of a hierarchy. To my mind the most appropriate place, if possible, for a disclosure to be made is to the employer - within the agency. When that does not work the next fallback position should be an external watchdog body of some sort. If that does not work there might be circumstances where I think it would be appropriate to go to an MP or to a journalist. But I think it would have to be in that sort of hierarchy, and only if all else has failed. I think that a number of the rules in section 19 of our Act are appropriate. Substantially the same disclosure should have been made either internally or to a watchdog body, and if it does nothing with it or it has taken action with which you do not agree, et cetera, I would then accept the subjective test, which is that you would have to demonstrate you have a reasonable belief it was true.

I have some difficulty with the objective test in section 19, which states that it must be true. Absent the “smoking gun” memo—and I have not seen too many of them—it is beyond me how a whistleblower in a prosecution situation could prove that his or her disclosure was true when watchdog bodies, employers, et cetera have not. However, that is something for the Parliament to decide. It is appropriate that there should be a clause

so that if all else goes wrong you can take the issue to an MP or a journalist. Over the years there have been cases that have shown that that was the appropriate way for people to go.

The Hon. TREVOR KHAN: Reference was made earlier to what was called the Fitzgerald circumstance, or the Queensland police circumstance. Would you agree that because of what was presented there the only avenue available to certain police officers was to go to the media first up?

Mr WHEELER: Yes, I do. There are two issues here. I agree with you; the only place they could have gone in the Queensland situation was to the media. However, how you build that into legislation and what test you would use would be extremely difficult.

The Hon. TREVOR KHAN: But in my view it is extremely important.

Mr WHEELER: It is extremely important. But the point is that there was no protection and they did. Protection is not the only thing that will lead to people making an appropriate disclosure to the media when it needs to be done. There was no protection there whatsoever. As a matter of fact, it was exactly the opposite. The legislation is not the be-all and end-all of everything. On occasions there will be people who will be firmly of that view and they will take the consequences that come from that and be prepared to do so. We would have to try to draft an Act that stated, "In these circumstances you can go immediately, but in other circumstances you have to go through these steps." I would not want to be the one drafting that Act.

Mr GERARD MARTIN: I refer to third party organisations such as STOPLine. Are you comfortable with such a third party organisation investigating protected disclosures?

Mr WHEELER: I have not looked at that body because we do not have that in New South Wales. The disclosure must be made to an officer of the agency itself. We have a partial equivalent. Many agencies will use the services of the internal audit branch, a government entity, to do investigations for them. Often we will recommend to agencies that are small and that do not have an investigative capacity that that might be the place to which they might go. I have no problem with the idea of a third party organisation investigating.

As to whether they should be the people to whom you can make a disclosure, I guess my starting point is that I think we should be doing everything to try to get people to make the disclosure internally to their own management, and to feel comfortable about doing so. If not, management can say, "We will pass that off to an external provider." In some ways you could argue that that is an abrogation of responsibilities. I think it depends on the jurisdiction and the culture of that public sector. In the New South Wales context my preference would be to sheet home responsibility to the agency to deal properly with disclosures, unless they are so small that they do not have any capacity to handle these things.

Mr GERARD MARTIN: Do you believe that any changes to the legislation should be silent on third party organisations?

Mr WHEELER: You might look at agencies that are so small they cannot build up any expertise either in the Act or in carrying out investigations. They might have some other avenue through which they can do this. There are slightly similar provisions, for example, under the Privacy Act where you can decide that a very small organisation is part of some other agency for the purposes of the Privacy Act, or part of some other agency for the purposes of the Freedom of Information Act. Maybe you could say that a certain agency is part of another agency for the purposes of the Protected Disclosures Act. That might address the problem. They certainly need help. It is totally unrealistic to expect them to be able to receive, assess and deal with a disclosure, and then deal with what will happen in their workplace.

Mr GREG SMITH: Mr Wheeler, you said that complaints are often made out of malice but that they might still be in the public interest. How would you deal with a complaint that had a mixture of fact and a mixture of fiction that was malicious in trying to damage somebody by exaggeration? Is that person protected for everything he or she says?

Mr WHEELER: I think it comes down to categorising whether there was sufficient content - that it was not vexatious, as in they knew that there was nothing in it. If they have manufactured a case it is not good enough that they have just taken certain facts that were correct and built in other facts to make a new picture, if you like. There would have to be some substance to the conduct that they allege. It is corrupt conduct, maladministration, or serious and substantial waste. Maybe it is not to the extent that they have talked about and

maybe it does not cover all the people to whom they are referring, but there has to be some substance to it that fits the requirements of the Act.

Mr GREG SMITH: Are they protected for the malice and the fiction?

Mr WHEELER: From memory, we got legal advice about this at the start. What happens is that it is partly protected and it is partly not protected. I am trying to recall what the advice was—whether it is partly protected or it is partly not protected. If somebody was defamed and there was no substance to it and that person went off to court and took an action that could be an interesting judgement. Normally the courts would read this sort of legislation broadly to protect the whistleblower. But if they believed that whistleblowers were motivated by something inappropriate, and they were wrong, I do not think they would protect them.

Mr GREG SMITH: Earlier the Hon. Trevor Khan asked questions about disclosures to members of Parliament or journalists. Section 19 of the Protected Disclosures Act anticipates such a thing, but it provides protection only if a whole lot of other things do not apply.

Mr WHEELER: That is right.

Mr GREG SMITH: Do you think a member of Parliament is a public official?

Mr WHEELER: Under this Act a member of Parliament is a public official.

Mr GREG SMITH: A member of Parliament could then make the protected disclosure, keeping his or her informer anonymous, and still have the protection?

Mr WHEELER: It is possible if it is made in accordance with the relevant agency's protected disclosures policy. The context of one of the amendments that was made over the years was to allow correctional officers working in police cells to be able to make disclosures about police, and vice versa. I would think that means that, as an MP, theoretically—and do not hold me to this—you should be able to make a disclosure under, say, the Ombudsman's internal reporting policy about something to do with an anonymous member of staff. You would not necessarily have to admit where you got the information unless that was essential to be able to investigate it.

Mr GREG SMITH: Let us say that a member of the public tells you about apparent corrupt conduct by a school principal and wants to protect himself from defamation proceedings and you pass on that information. Do you think that would be protected?

Mr WHEELER: Someone passed it on to the department, to the Ombudsman, or to the ICAC?

Mr GREG SMITH: The department in the first place.

Mr WHEELER: If you went to the Ombudsman or the ICAC it is protected automatically because it is a complaint.

Mr GREG SMITH: Under what section of the Independent Commission Against Corruption Act do you get protection? I just had a look at it.

Mr WHEELER: I am trying to remember the provisions.

Mr GREG SMITH: I could not see one that protected whistleblowers.

Mr WHEELER: It is not about whistleblowers; it is about anybody. The Defamation Act contains protections that state that any communication to or from the Ombudsman, the ICAC and the Police Integrity Commission has absolute privilege. There are provisions in the Independent Commission Against Corruption Act and the Ombudsman Act that talk about detrimental action against a person who made a complaint or appeared as a witness.

Mr GREG SMITH: I think it is witnesses.

Mr WHEELER: I will not stand on this one but I think there is something about complainants in that one. There certainly is in the Ombudsman Act. Both Acts have the reverse onus of proof. If you are a witness or a complainant and there is detrimental action against you, you only have to prove that you made a complaint and that there was detrimental action. The onus is reversed.

Mr GREG SMITH: Would the protection include privilege, such as public interest immunity privilege if the politician was called before one of those bodies and was asked who informed him or her?

Mr WHEELER: No. The only privilege that can be relied on, if the Ombudsman is using royal commission powers—and we do that many times a year—is legal professional privilege. All other privileges are waived by the Act, including public interest immunity. Whether we would want to know the name or insist on it would depend totally on whether it served a forensic purpose and if the information, on its face, demonstrated a case. But if there were some essential piece of information that we needed and only the person who first came out with it would know, maybe we would need to find out who that was.

Mr GREG SMITH: If lawyers are politicians they need to create some sort of a legal professional privilege situation.

Ms DIANE BEAMER: Following the question that was just asked, who has protected disclosure? If somebody comes to a member of Parliament and that member anonymously takes the issue to a government agency and says, "This has occurred to me" does the person who came to that member who was not named have the member's protected disclosure?

Mr WHEELER: Unless he or she complied with all the requirements under section 19 of the Act the person who went to you would not have the protection but you would. It is similar to the workplace. If somebody goes to his or her supervisor and makes a disclosure and the supervisor then takes that to a person nominated in internal policy, the supervisor is protected and not the member of staff. If they both go they are both protected. This is where it becomes a bit of a nonsense. You have to go precisely to that person and it cannot be passed on. You cannot act as a mailbox and walk it there; they must go to that person.

Ms DIANE BEAMER: As you said, in a number of protected disclosure cases it is obvious who did it.

Mr WHEELER: Absolutely.

Ms DIANE BEAMER: So going to a member of Parliament seems like a stupid thing to do.

The Hon. TREVOR KHAN: We do not think so.

Ms DIANE BEAMER: If you want a protected disclosure.

Mr GREG SMITH: Do you agree that there is a hole in the legislation, as ordinary members of the public who make a disclosure about public administration are not protected?

Mr WHEELER: It comes down to whether they need to be protected. If they go to a body like the Ombudsman or the ICAC they are protected. They have just the same protection as the public official. If they go to the employing organisation they do not need workplace protection; the only protection they might need is defamation. If an agency or its staff took defamation action against a complainant we would be particularly interested in what basis they had for doing that and who was funding it and whether they had good grounds for believing that that complaint was malicious and that defamation was the right answer. It comes up sometimes in councils but not that often. We have tried to keep an eye on whenever defamation action results from complaints and it is normally developers. Somebody makes a complaint to the council about a developer and they will sometimes—if they are from the eastern suburbs or some bay in the northern suburbs they have taken defamation action in the past, but it is quite limited—very rare.

Mr GREG SMITH: It could still destroy someone's house or their savings.

Mr WHEELER: Defamation action is reasonably rare, and to take it against a complainant, as I say, absent it being taken by a private individual who is upset about a complaint made against them to a council, I am not aware immediately of a case where that has been an issue.

Mr GREG SMITH: Have a look at Beecroft Primary School.

CHAIR: In your electorate, Mr Smith?

Mr GREG SMITH: In my electorate. There are two defamation actions against parents. It is reserved at the moment.

Mr WHEELER: I am aware of that case.

Mr JONATHAN O'DEA: I find it very valuable to listen to your perspective and obviously the perspective of the Office of the Ombudsman as a third-party oversight body. How important do you think it is in conducting this review that the Committee attempts to understand properly the perspective of the employer organisations within which legitimate protected disclosures are made?

Mr WHEELER: You have already had submissions, I think, from certain employer organisations. It would depend on the organisation. You might get a very different perspective depending on which ones you are talking to. If you are talking to the New South Wales police, for example, you might get a radically different perspective to certain other agencies I will not name.

Mr JONATHAN O'DEA: I suppose what I am asking is how important do you think it is that this Committee attempts to understand the perspective of employer organisations as a whole?

Mr WHEELER: The issue of this Act is about providing sufficient protection to enhance the chances that people will actually make a disclosure. So the people who are making a disclosure have a bit of a different perspective on this than the agencies they might be making the disclosures about. I think it is very important to have the broadest possible information when you are looking at this sort of legislation. But when you look at what the focus of the Act is, which is to place obligations on agencies to do things they would not necessarily otherwise do, it would be—I am trying to think how to put this diplomatically.

Mr JONATHAN O'DEA: I am asking for your honest response, and obviously there is a next question as well, which you probably are anticipating. I am asking for not a political response, I am just asking for a frank response. I would have thought it was a fairly simple question. How important do you think it is to understand the perspective in the same way that we need to understand the perspective of third-party oversight bodies like the Ombudsman? How important is it to understand the perspective of an employer in conducting such a review?

Mr WHEELER: If I were going down that path I would distinguish between employers who get significant numbers of protected disclosures and see value and benefit in receiving them and the ones that get a significant number of disclosures that have caused them a lot of grief over the years. I distinguish between large employers who get many and smaller ones who get very few. I would also distinguish people who have not got any yet but are just worried they might get them. So if you want to go down that path there are a whole range of different types of employer organisations that you would need to get in to talk.

The ones who see value in this area and are doing important things - the sorts of things we are recommending that should go into the Act will not impact on them because they are doing it already pretty much. The organisations that see whistleblowing, whether they admit to it or not, as something that is detrimentally impacting on their ability to do their job will have a very different perspective on it. How you will tell the difference between the two would be interesting because no-one is going to sit here and say that they see whistleblowing as causing a huge problem and it is not worth the problems that it creates.

Mr JONATHAN O'DEA: Recognising again that there will be different categories of employees, different types of employees, and that some would be more appropriate to speak with, potentially, than others, how important do you think it is for us to understand the perspective of legitimate whistleblowers?

Mr WHEELER: One of the significant problems we had in the Whistling While They Work research is to talk to and get responses from whistleblowers and trying to do it in such a way that we had a reasonable sample. One way, of course, was to advertise within agencies saying, "If you are a whistleblower we have got a form here", and we did it in such a way that there was a double-blind situation and there would be no identification. But that is a self-selected list of people who have a particular issue. So we also then went through our databases of the watchdog bodies and those agencies to identify all the other whistleblowers, and then, again

using ways that were ethically sound, we indirectly approached those people to see if they would be prepared to be involved to fill out questionnaires, to be interviewed.

In that way we managed to get a broader sample than we would have otherwise, because if you just go out and say you are willing to talk to whistleblowers you will have a self-selected group and it will be primarily people who have not had a good experience, not the ones who have had. The research, for example, has shown that most people who identify as having made an internal disclosure were actually reasonably satisfied by the process, whereas if you were to talk to Whistleblowers Australia their view is that whistleblowers, almost by definition, are not. So getting a balanced sample would be extremely difficult. We had enough trouble and we were using, as I say, five universities with 16 case study agencies that were cooperating with us fully. I would not like the job.

Mr ROB STOKES: I listened to what you had to say about some of the deficiencies in the existing legislation and some of the duplication and the problems with section 16 and all the rest. Given that the discussion paper talks about setting up an investigation unit inside the Ombudsman's office, what about the legislation itself? Do you see problems with, for example, subsuming parts or all of the Act within the Ombudsman Act? Would that be a direction in which you would go?

Mr WHEELER: I would prefer to see a totally separate Act, an Act that is called the Public Interest Disclosures Act to focus on its purpose, not on one of the mechanisms of achieving it, which is to protect whistleblowers. I would see that the Ombudsman's role would be in that Act and that it would primarily be an oversight role not a direct investigation role. I mean there would always be the power to do that but most of these matters should be dealt with by the agency concerned. The public interest is in making sure those agencies do it properly, not in the Ombudsman taking responsibility and going and doing it for them—that is not going to lead to any lessons being learned by those agencies.

CHAIR: We have heard evidence from you about this Whistling While They Work report and also from Mr Falconer and both of you speak extraordinarily well about it in most esteemed terms. I take it this resulted from extensive investigation, extensive research that took some time and a report is out and there is another one coming?

Mr WHEELER: The draft is out of the second one.

CHAIR: And that has looked at a whole range of issues for what we call whistleblowers. I take it a committee like this could glean pretty well from that the experiences of whistleblowers?

Mr WHEELER: Indeed. A lot of work went into interviewing whistleblowers, surveying whistleblowers and also the results of a major survey. About a third survey down the path was one that went across four jurisdictions and it was sent out to 23,000 bureaucrats. I think about 7,300 responded, which was a good response given it was the size of a small novel, and that was filled in by a number of whistleblowers as well. There is a third report. There was an earlier report which looked at legislation—it primarily focused on legislation across Australia. But the second one about enhancing the theory and practice of internal witness management has a lot of information there from people who have made disclosures, internal disclosures, in the past.

CHAIR: You talked about the difficulty of getting a sample, and it sounds to me as though the Whistling While They Work project has carried out extensive work in getting a relevant, reliable sample of people who have whistleblown and that a committee like this could use that report quite accurately, from what you are saying and what Mr Falconer was saying, in getting a very accurate impression and indication of the experience of whistleblowers, is that right?

Mr WHEELER: I think that would be entirely correct. Also, I need to point out that the research, apart from about 170-something agencies that were involved in a lot of it, it focused on four agencies in each jurisdiction—16 in all case study bodies—and did a lot of very detailed research within those bodies. So it built in the perspective of a range of some police services, some large government agencies, health areas, small councils, big councils—there was a range of sizes, a range of types of agencies and they were intimately involved in the research and in the development of the reports that have come out of it, particularly if I may refer to the draft of the second report, which is being called the "Whistling While They Work: Towards Best Practice Whistleblowing Programs". I can leave that for the Committee. That was based a lot on the work with those case study agencies to make sure it was practicable.

CHAIR: This research has done a vast amount of legwork, if I can use that term, for committees such as these who want an insight into the experiences of whistleblowers?

Mr WHEELER: Yes.

CHAIR: Thank you very much for coming again to give your evidence. It was very useful.

(The witness withdrew)

(Luncheon adjournment)

JERROLD SYDNEY CRIPPS, Commissioner, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney,

THERESA JUNE HAMILTON, Deputy Commissioner, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney,

ROY ALFRED WALDON, Solicitor to the Commission, Executive Director, Legal Division, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney,

MICHAEL DOUGLAS SYMONS, Executive Director, Investigation Division, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney,

ROBERT WILLIAM WALDERSEE, Executive Director, Corruption Prevention, Education and Research, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, and

ANDREW KYRIACOU KOUREAS, Executive Director, Corporate Services, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, sworn and examined:

CHAIR: It is a function of the Committee on the Independent Commission Against Corruption to examine each annual and other report of the commission and report to both houses of Parliament in accordance with section 64 (1) (c) of the Independent Commission Against Corruption Act. The Committee welcomes the commissioner of the Independent Commission Against Corruption and other members of the ICAC executive for the purpose of giving evidence on matters relating to the ICAC's annual report for 2007-2008.

In addition to examining the ICAC on its annual report, the Committee will continue to take evidence in relation to the effectiveness of current laws, practices and procedures in protecting whistleblower employees who make allegations against government officials and members of Parliament. The Committee will also take this opportunity to ask further questions of the ICAC as part of its inquiry into proposed amendments to the Independent Commission Against Corruption Act. The proposed amendments to the Act will amend section 37 to remove the current restrictions on the use in disciplinary proceedings and in civil proceedings, either generally or solely in relation to the recovery of assets, of evidence that was obtained compulsorily by the commission. A further proposal is to amend the Independent Commission Against Corruption Act that will make the assembling of admissible evidence a principal function of the commission.

I thank the witnesses for appearing today. Commissioner, the Committee has received a submission from the Independent Commission Against Corruption in response to a number of questions on notice relating to its annual report for 2007-2008 and also a submission in response to the discussion paper on whistleblower protection. Do you wish those to form part of the evidence today?

Mr CRIPPS: Yes, please.

CHAIR: As the witnesses are here to cover three separate areas, I propose that the Committee members ask questions firstly on the inquiry into the protection of public sector whistleblower employees, and then move on to the amendments to the Independent Commission Against Corruption Act, and then to the review of the 2007-2008 annual report. Therefore the evidence, when read and transcribed, will be together but in separate lots for the purpose of convenience. Commissioner, before questions commence, would you like to make an opening statement?

Mr CRIPPS: Yes, I would. If it is acceptable to the Committee my opening statements will touch upon all three of the items. Today is the last time, as you all probably know, that I will have the honour of addressing this Committee, because my term of office expires on 13 November 2009. I do not imagine that there will be another joint parliamentary committee meeting before that date. I will bring a couple of matters to the attention of the Committee before I deal with the questions on notice and indeed the protected disclosures and amendments to the legislation.

Subject to what the Committee might say, I see very little point in travelling over the grounds that I have already, on a number of occasions, travelled when I have dealt with questions on, for example, what should happen to section 37. As the Committee knows, it is my view that section 37 should be amended so as to remove the immunity from use in disciplinary and also civil proceedings, although other people have different views

about that. A number of organisations have made submissions about this matter, some of which, particularly the one from the Bar, appeared to think that I was advocating the removal of the privilege against self-incrimination in criminal trials. However, I was not.

So far as I am aware the Committee has received a large range of submissions on other matters and unquestionably will decide the matters in accordance with its view of those submissions. Nothing I can say would add to or detract from anything the Committee would otherwise want to do. Previously I have addressed this Committee about the problem that faces the commission when people have been found to have told lies to the commission, which in theory, or in legislative mandate, carries a penalty of five years jail. But almost never is anybody seriously punished for telling lies to the commission. That has an effect on the work of the commission, because it is a central part of the work of the commission that we rely on people being truthful in order to discover corruption. If people are not truthful, at least they should face the prospect that they will be punished for not being truthful. However, I have dealt with that before.

I have also made submissions concerning what should happen if people are found to have behaved with corrupt conduct and what punishment should follow from that. It has been my increasing concern since I have been a member of this commission that on the one hand there is an arm of government that is very concerned with maintaining integrity and ethical conduct in the public sector and another aspect of government that seems to spend its time letting off people who have done the very things that it thinks are very serious. But that is a matter for the Parliament, presumably, to come to grips with in due course.

In previous discussions I have advocated consideration of the position that I now hold, and which I will vacate on 13 November, should be for a non-renewable period like the Auditor-General position; that is, a seven-year period, non-renewable. I have spoken to other commissioners about this. It takes a while to get into the swing of being a commissioner, particularly when commissioners are almost always taken from well outside the public sector and the like. It seems to me that that proposal ought to be given serious consideration.

I have a stronger view about the role, or the term of office, of the assistant commissioner, who is the deputy commissioner, and her appointment lasts for only five years. Currently we run the risk of two people retiring in very close proximity to each other and the corporate memory of the institution will be lost. I ask the Committee to consider, or whether you do or not, to think about the role of the commissioner and probably more importantly for the commission's functioning, about the role of the deputy commissioner to be a renewable role. I have already raised a couple of matters with Mr Lee in Cabinet, which I would like to place before the Committee, having told Mr Lee that I would do so.

First, the Government recently established 13 new super departments to replace a number of existing departments. That is a matter for the Government to make up its mind about, but the concern that the commission has is this: under the system as it was before the amalgamation of departments, there were at least 110 people who were under a statutory obligation to report incidents of suspected corruption to this commission. Unless the legislation is changed, there will now be only 13 people and the prospect of that is twofold: first, a lot of what should have come to the commission may never even get to the top members. I am not criticising them; in the nature of things they will not hear a lot of what goes on in their departments. Secondly, even if it does, it will take a long time to get through the system to get to this commission. I would like some consideration to be given to ensuring that we are, in effect, in the same position as we were before that legislation was passed.

The second matter that I wish to raise relates to the independence of the commission. I have always found that the independence of this commission has been respected by government and certainly by this Committee. However, there is a bureaucratic tendency amongst people in government, not in Parliament, to think that we are just another agency of government and, therefore, directions from Cabinet should apply to us in the same way as they apply to everyone else. I am, of course, aware that on matters such as the budget our independence is not absolute. We can function only if we are given the budgetary allowance to do so. My position in the past has not been a position of complaints against the Government in this regard, although later on, with the Committee's permission, I will table a short report as to why in the future we will have to make provision for a little extra.

The commission received a direction from Cabinet that I could not employ anyone without Cabinet's approval, because it is to do with a freeze on all government departments. I immediately contacted Mr Lee and told him that was inimical to what I understood to be the independence of the commission. He wrote a letter to me saying that that direction does not apply to the commission. Shortly after that I received another direction from Cabinet that said that a senior counsel could not be employed by the commission without the approval of a

Minister—I think the Attorney General but I cannot remember. I have not received a reply from the Government on that, but I have written to Mr Lee and told him that it is even worse than the first one; that we should have to get permission from a Minister of the Crown to see whether we have to brief someone and therefore make available to that person a whole lot of information that should never be made available in any event. I had assumed in my letter that that direction does not apply to us. I have asked Mr Lee to ensure that in future, if he would not mind, that some attention was paid to these directions.

The last matter I want to raise with the Committee is about some of the questions in the questions on notice. You may recall that a number of matters in the questions on notice relate to the Breen inquiry. As you now know because you have got the answers, I have decided that it is appropriate for me to answer all those questions. A question did arise originally, which caused some concern, and it was this: That section 64 of the legislation forbids this Committee from in fact investigating any matter, I think are the terms, relating to an investigation. Obviously, these questions about Mr Breen certainly related to this investigation. But I adopted a different view about it for this reason.

Before the inspector had been appointed I think it would be clear that a lot of these questions could not have been asked. The question I had to apply my mind to was whether that section should be read down more charitably to this Committee now that there has been an inspector appointed to do the very thing that this inspector did do, and to report these things publicly to the Committee. I took the view—I hope I am right—that that being so, one had to take a more, from your point of view, generous view of the prohibition in section 64 because I do not see how the system can work otherwise if I do not. I have assumed that this Committee has thought it can properly ask the questions, or it would not have done so.

The other matter I would like to address your attention to is the question of parliamentary privilege arising out of these matters. It has been said by some that it is in contempt of Parliament for a decision of the House to be impeached anywhere. Now actually, as you will probably know, section 9 of the Bill of Rights, which applies to New South Wales, provides that the freedom of speech in debates and proceedings in Parliament should not be impeached or questioned in any court or place out of Parliament. However, these questions that were put to the commission invite a comment about those matters.

It does seem to me, unless people have a view to the contrary that I would like to hear, that being in this room at the present time we are not in a place out of Parliament. This is a place in Parliament before a Committee selected by the Parliament to undertake the Parliament's business. So, in that regard I have also answered the questions. It also seemed to me that this principle has not been applied very often because, after all, when Mr Greiner, the ex-premier, was found to have engaged in corrupt conduct, the decision and the report was presented to the Parliament. The decision was set aside by the Supreme Court and, as far as I know, nobody took the view that that was outside the jurisdiction of the Supreme Court by operation of article 9 of the Bill of Rights.

Anyway, I just thought I would mention these two matters because in fact I have answered all of the questions or at least had my staff answer those questions that should have been answered. Essentially, that is what I want to say. A further matter I want to address is this. I have mentioned to you that in the past I have had no trouble—everyone has trouble meeting their budget and making their budget stretch—in submissions I have put as the Parliament or the Government has always been charitable. However, because we had a very busy year last year—you may recall that that arose out of the Wollongong inquiry and the RailCorp inquiry—it has had the effect of pushing back a lot of work that we otherwise think is important and should have been done like a lot of briefs to prepare to go to the DPP and also a number of preliminary investigations. I am asking your permission to put before you for your consideration, and I hope your support, a submission that I propose later to make to Treasury for the purpose of this submission. I do not claim the right to be here to be tabling documents, but I do claim that entitlement to ask you whether I can and if I can, I will table that document. I do not expect people to talk about it at the present time, but I just ask you to think about it and then if you agree with it, we would like your support.

CHAIR: That is suitable.

Mr CRIPPS: Finally, could I say this? As I say, this is my last time before you people here. I would like to express my appreciation of the way you have assisted the commission to discharge its statutory functions and the courtesy with which, to date at least, you have treated my submissions.

CHAIR: I ask you to keep in mind that some time down the track I anticipate that this Committee may consider inquiring into a 20-year review of the commission and look at many different issues. During the course of this afternoon or at the conclusion of your evidence feel free to list some issues that you think the Committee may examine. We would be pleased if we could have your input again at that time, or anyone else from the ICAC, into any area you think we should look at or not look at or whether things are working well or not working well, and to look at how the commission should operate in this day and age. That may happen after your appointment is finished.

Mr CRIPPS: Yes.

CHAIR: We always welcome your input. We will commence with questions about the whistleblower inquiry. One piece of evidence given by Ms Hamilton before the Committee on the last occasion related to the Protected Disclosures Unit proposed in the discussion paper to oversee the Act and its administration. The Deputy Ombudsman today has given evidence that he feels quite comfortable with performing that role in toto without any perceived conflict that Ms Hamilton raised on the last occasion. He has given evidence to that effect. Do you have any further comments about your evidence on the last occasion on the issue of a conflict? Do you still have reservations about the Ombudsman performing that role?

Ms HAMILTON: I do have reservations. A lot would depend on the detail of the role. The reservation I raised was about possible conflicts if the Ombudsman's office was to become too intricately involved in decisions that were being made within departments that might later be the subject of a complaint to the Ombudsman. For example, if the Ombudsman was telling a department, "You should deal with this this way" or, "You should take this protected disclosure" or "You should not" a high level policy review-type unit might not be an issue. I simply say that I would need to know more detail about what was proposed. I just thought to assist by raising what might become an issue if the Ombudsman was given too intricate and too direct a role in relation to how departments deal with protected disclosures.

CHAIR: We have heard evidence today about the media's role in protected disclosures. You know from the Act that you make a disclosure to the relevant authority and if nothing happens there, you can move on and then you can disclose it to a member of Parliament or the media. A submission has been made that you should be able to go straight to the media or a member of Parliament about that protected disclosure. What are your thoughts on that?

Mr CRIPPS: I do not share that view. I think that arrangements are there. They do make arrangements for the appropriate alternative conduct if the proper response is not made, but generally speaking I do not think the first response should be to the media. That assumes that everything that comes out of the media is crystal clear and always right, and that is not always the case.

CHAIR: Just to clarify, I think you made some comments about keeping the disclosure updated at certain intervals along the process. I take it from your evidence that you do not think it is a good idea to have that timetable set in place where you go back to the person who has made the protected disclosure to update them?

Ms HAMILTON: Yes. The concern was that in some cases it may not be a problem at all to have to go back to the discloser. But there might be some cases where the investigation is at a delicate covert operational level and it is not appropriate to disclose what is happening even to the person who originally made the complaint. The concern raised was that to have an invariable direction that you must always go back at a set period to the complainant might prejudice investigations in some cases.

CHAIR: Some comment has been made today about section 16 of the Protected Disclosures Act. The Deputy Ombudsman recommends that we delete that section on the basis that the system he would want in place is that when you make a disclosure it is presumed confidential and it is presumed to be a protected disclosure unless along the way something appears not to make it a disclosure. The discussion paper puts forward a definition for those terms "vexatious" and "frivolous." From your evidence I take it that you do not agree with that or you see problems in defining them. Would you elaborate on that?

Ms HAMILTON: Sorry, you will have to remind me which one is section 16?

CHAIR: Section 16 talks about vexatious or frivolous complaints and defining those terms. In the discussion paper we put forward a proposal to define those terms so that matters that come forward that are

considered frivolous or vexatious can be dispensed with instead of investigating them. The Deputy Ombudsman says that they all should be investigated or presumed to be confidential and proper disclosures unless along the way matters come up that make them not so.

Ms HAMILTON: No. I disagree with that because I think it is helpful to have a provision that allows you to categorise disclosures as vexatious or frivolous in some cases. Also, as we previously submitted, I think further trying to define those terms, which are used quite often in many Acts and I think have a well-known meaning as being vexatious or frivolous, might only make the issue worse. I do not know that there has ever been any particular problem in categorising certain disclosures as vexatious or frivolous or that that has been successfully challenged later. So, we would support maintaining that provision and do not see the necessity to define vexatious or frivolous any further.

CHAIR: We should apply the normal dictionary meaning?

Ms HAMILTON: Yes, exactly.

Mr DAVID HARRIS: This morning we heard evidence that Victoria has a system where disclosures can be made to a third party. In the particular case it was a private company that had been contacted by other private companies or by the public sector to carry out that function. Do you see any role in New South Wales for that sort of system and do you see any obvious problems with it?

Mr CRIPPS: I am not sure but I believe at all events that the status of protected disclosures should extend to people who are reporting corruption or maladministration of public officials. I have never understood the reason why that status can only be given to someone who is a public servant. It seems to me to be more particularly appropriate in this day and age when so much of government business is outsourced and dealt with by people who are not part of the public system. Perhaps Theresa has other comments.

Ms HAMILTON: I think, as the commissioner said, we certainly favour the protection extending to private contractors who are doing business with the Government and want to make a disclosure. I am not sure that was exactly the issue you raised?

Mr DAVID HARRIS: No. We have this company called STOPLine. Some public sector companies will have available to their employees a phone number they can ring to make a disclosure. That company then would be involved in letting the public sector companies know and also use their investigation.

CHAIR: It is a private commercial enterprise.

Ms HAMILTON: So they have privatised the declaration?

Mr GREG SMITH: As well as government departments.

Mr SYMONS: There are a number of companies and one is run by a former Commissioner of Police. Is that the one you are talking about?

Mr GREG SMITH: Yes.

Mr SYMONS: There are other companies. Deloittes do it as well and other companies do it. In my view it is an excellent avenue. It takes away the fear factor within the agency, especially the smaller the agency, "I am going up to tell about a person who works with me." It provides some degree of anonymity and it is an excellent vehicle. I am not advocating that we go to that company, but as a concept, it is an excellent concept in the sense that it takes it outside the system but it is still within the system.

Having said that, Victoria and South Australia have a system—in particular South Australia and I believe Queensland—whereby anyone can be, to use that dreaded term, "a whistleblower". It is covered by the legislation. Yes, it is a company. As I said, it is also done by Deloittes and done by some of the other major companies, and it is a growth industry. He has been pushing for some time and has a number of people on his books across various States, as I understand it.

Reverend the Hon. FRED NILE: Commissioner, do you have any views on the protected disclosure steering committee during this reform process? Does it perform a good and important role? How can you improve its role?

Mr CRIPPS: I think it does, but I will leave that to Theresa because she is the one who is immediately concerned with this matter.

Ms HAMILTON: That is probably why he asked you. Yes, I do think so. I must say that it has not met frequently. In fact, I think I have only been to one meeting since I have been at the ICAC, but it was a detailed meeting about some of the same legislative amendments that we have been discussing here today when they were first mooted. That was how I was able to identify, for example, that there were differences of opinion among the agencies about which agency you could go to with protected disclosures, and whether you were protected if you went to the wrong agency. I think it has been useful from the point of view of highlighting, even among the agencies that administer the legislation and are involved in it, that there are differences of opinion that have led to some of the submissions that we have made here today.

Reverend the Hon. FRED NILE: The fact that it does not meet, or meets very infrequently, seems to put a question mark over its effectiveness or its value. When bodies do not meet, that seems to send a message.

Ms HAMILTON: I can only agree with that. I think I saw it mainly as an avenue to discuss how the legislation is working. It does not need to meet frequently to do that, but there probably would be more room to discuss other administrative arrangements and how the whole Act is being administered by the various agencies as well as consistency. Yes, I can only agree; it probably would have been more useful if it met more frequently.

Reverend the Hon. FRED NILE: Should there be some more direct role for convening it? Who convenes it now?

Ms HAMILTON: The Ombudsman's office convenes it, I think.

Reverend the Hon. FRED NILE: Should that continue, or should it be convened by the ICAC's office?

Ms HAMILTON: The Ombudsman's office has always taken a great interest in this legislation and has played a lead role. I certainly would have no objection to its continuing to be their responsibility.

Reverend the Hon. FRED NILE: There have also been questions raised about the involvement of contractors in the whole process of protected disclosures. Do you have any views on that, or have they changed?

Ms HAMILTON: No. I think we are still strongly of the view that private contractors who are in some sort of relationship with government work should be allowed to make protected disclosures as long as it comes within the purview of the Act as being about the conduct of a public officer or a public department. Yes, the commission continues to support that amendment.

Reverend the Hon. FRED NILE: However, New South Wales Health has made submissions to us that there should be some limitation and that it should apply only to contractors who are in a current contractual relationship with some public authorities. What is your view on that issue?

Ms HAMILTON: I do not really see why that limitation would be necessary. Just because the contractor is no longer in a relationship does not mean they might not have information from the previous term when they were working with the government. Sometimes people take a long time to make up their mind to come forward for various reasons. I would see no reason to limit it to current contractors as long as a previous contractor had information about corrupt conduct or maladministration.

Reverend the Hon. FRED NILE: The Ministry of Transport also had some concerns that complaints made by contractors to avoid legitimate action, pursuant to the relevant contract, should be excluded from protection under the Protected Disclosures Act. Do you have any views on that?

Ms HAMILTON: Such complaints could already, I believe, be categorised as frivolous or vexatious—certainly vexatious, I would say, if they are being made for an ulterior motive. But if it is considered that they

were not covered by that general provision, I would certainly have no objection to a provision being inserted that precluded complaints that were made on those sorts of specious grounds.

The Hon. TREVOR KHAN: I am interested in that last limitation, in a sense, and also in your discussion with regard to section 16. To my uneducated mind, what section 16 seems to suggest is that an investigating officer, at the commencement of an investigation, can decline to undertake the investigation because it is frivolous and vexatious. The point I raise is this: How reasonably does an investigating officer come to a view that the complaint is frivolous and vexatious, if indeed they have not commenced investigation?

Ms HAMILTON: I must say that it is sometimes quite apparent on the face of complaints. It is not a decision that would be made lightly, I would suggest, and it is not every complaint that you think does not have substance or perhaps does not have force that you would categorise as frivolous or vexatious. It normally is a complaint that on the face of it is nonsensical or perhaps could not possibly be true on any level. It sometimes involves aliens or conspiracy theories about these types of things. I am just saying that it is sometimes quite apparent that complaints are frivolous or vexatious, just on the face of it. I think it is helpful to be able to categorise them as such up front and not have to spend a lot of time disclosing why they are being investigated.

The Hon. TREVOR KHAN: While I accept—obviously, in cases such as aliens—that there is a bit of a problem, could I suggest that section 16 potentially provides an opportunity for investigating officers to decline to investigate complaints which in fact may turn out, whilst on their face appearing to be frivolous or vexatious, to in fact have some substance.

Ms HAMILTON: I can only say in respect of the commission that decisions not to investigate are not made by individual officers. We have a very high-level assessment panel. I am on it and the executive directors of investigation and legal are on it. The decisions are made at a high-enough level that I am quite confident that matters are not being unfairly categorised as frivolous or vexatious when they are not. Obviously there are other departments which may not have such a high-level assessment panel. But, as I said to the Chairman previously, I have been in this area for a long time and I think under the concept of a frivolous and vexatious complaint, it is quite well known what it has to be to reach that level, and it really has to be something that anybody reading it would think, "This is frivolous or vexatious."

The Hon. TREVOR KHAN: Would you differentiate vexatious from malicious in terms of a definition of a complaint?

Ms HAMILTON: Yes, because malicious complaints can often be quite valid in that they are being made for bad motives by disgruntled former employees or ex-wives, but they are often excellent sources of information. It is a malicious complaint, but it may be true and worth investigating. Vexatious is really that it is just being made for some personal animus against the person complained about, or to cause trouble, or to cause an investigation of this person. Often it is quite apparent that that is the reason it is being made.

The Hon. TREVOR KHAN: I will not take up much more time of the Committee, but could you accept that in the mind of some investigating officers—and I am not taking into account your organisation—that the distinction between a malicious complaint and a vexatious complaint is not as clear, and that the danger exists that malicious complaints will, in a sense, be interpreted as vexatious?

Ms HAMILTON: I could not say what happens in other organisations. It is obviously a training issue. I think any organisation that accepts protected disclosures should train the officers who will be assessing them to make sure they understand what is a frivolous or vexatious complaint.

Mr CRIPPS: We have complaints and in the commission we deal with it in the same way. I found this problem when I first started—how they were divvied up—because on one view of the matter, as soon as you open the envelope you start investigating. But in point of fact, if you view it as an assessment before you then move to another more formalised step; that is what we do in the commission. We have a committee that decides this. If they do not decide unanimously, to either accept or reject it, it has to come to me. That is the way we deal with it, anyway.

Mr GREG SMITH: What is the level of the officers on the committee?

Mr CRIPPS: Of the assessment?

Mr GREG SMITH: Yes.

Mr CRIPPS: They are the deputy, the legal executive, the investigation executive and the corruption prevention and control officer.

Mr GREG SMITH: Is there a lower level of scrutiny of these documents before it goes to the committee?

Mr CRIPPS: Yes. There is an assessment committee. There is a woman who heads that who first of all sends it to the committee.

Mr GREG SMITH: Does anyone scrutinise the matters that they recommend rejection of?

Mr CRIPPS: Yes, the panel.

Mr GREG SMITH: The panel does?

Mr CRIPPS: The panel I have referred to. If the panel cannot agree on it—and I do not treat this as meaning three to two—unless the panel is unanimous, I have directed that they be referred to me and I will have to have a look at it.

Mr GREG SMITH: Do you have, say, a practice of not getting too involved in an investigation using compulsive powers if the police are already investigating aspects of the allegation?

Mr CRIPPS: We certainly do not want to inhibit the success of police investigations, so we certainly take that into account if we know the police are investigating. Perhaps you could ask Mick Symons. He might know more about that than me. I have never come across this problem. They contact us, too.

Mr GREG SMITH: Are there cases in which they ask for your support to use your compulsive powers to assist their investigation?

Mr CRIPPS: No.

Mr SYMONS: Our powers are restricted strictly to the ICAC Act. We do not engage in fact-finding for any other agencies.

Mr GREG SMITH: But do you not form task forces?

Mr SYMONS: Not outside of the ICAC.

Mr CRIPPS: And you have to remember too that this is an organisation that is given extraordinarily wide powers, particularly to investigate. It does seem to lead to the view by some members of the media that someone has just got to throw up a bit of scuttlebutt and we can drag people off the street and put them into the witness box and make them answer questions. That is certainly not the way that I would run this commission. I think you have to have a reasonable ground for investigation before you start using those powers.

Mr GREG SMITH: But on occasions you would need assistance from the police, would you not?

Mr CRIPPS: Oh, yes.

Mr GREG SMITH: For surveillance?

Mr CRIPPS: For surveillance, no.

Ms HAMILTON: We have our own surveillance.

Mr GREG SMITH: What if you do not have enough?

Mr CRIPPS: Has it happened? I do not know.

Mr SYMONS: The only time that we have actually assisted the police on a serious matter, which I will not go into, was some years ago. There has been no incidents in my experience and on my readings when we have gone outside that. However, having said that, if it was a position where we would look at assistance, we obviously have another commission that we could look at, the Police Integrity Commission. But we have always managed to cover within our resources. It would have to be a massive job for us to go outside for that.

Mr GREG SMITH: Just getting onto public whistleblowers who are not public servants, do you see that there is a case for incorporating protection of them in the Protected Disclosures Act?

Mr CRIPPS: I do, but I do not know whether Theresa does.

Ms HAMILTON: Our primary submission to this Committee was that anybody should be able to make a protected disclosure, not just public officers. That remains our position. As we said, in particular we feel that private contractors who are working in government work should be able to make protected disclosures.

Mr GREG SMITH: Recently we have seen the use of defamation actions against parents at schools who were complaining about what they thought were corrupt practices, among other things, in the schools. Do you think that there is a case for giving those parents protection?

Mr CRIPPS: I do not know.

Ms HAMILTON: They would have been protected if they had complained to us. They may have complained to the wrong body.

Mr GREG SMITH: That is not often what they think of first.

Ms HAMILTON: No. I know.

Mr CRIPPS: I do not know.

Mr SYMONS: The legislation in South Australia does provide that protection on the understanding and stipulation that the complaint is made in good faith. There is one case I know of in which a person was successfully sued for defamation, but that particular person ran a double-barrel; they slipped in one complaint in a legitimate way and then put one in through the back door, and they got caught through the back door. But in South Australia there is a defence to defamation on the understanding that the complaint is made legitimately. It may be something to look at in that we do have that here in this State. I do know the case that you are talking about in which people were sued, but I am also a bit concerned about the content of what was said in that particular case as well.

Mr CRIPPS: Also the defamation laws would cover parents making most complaints to schools, unless they were made not only maliciously but quite untrue and unfounded. Under the defamation laws I would imagine there would be a defence of qualified privilege and the like to cover that sort of thing.

Mr SYMONS: Are you aware of the contents of that case?

Mr GREG SMITH: Very much.

Mr SYMONS: You know with the actual format it would have been very difficult to drag it under any umbrella of protected disclosure or method of disclosure.

Mr GREG SMITH: The method of disclosure exposed the complainants, very much so.

Mr ROB STOKES: I direct my question mainly to the deputy commissioner, and it relates to section 16. I want to get my head around this because the Ombudsman had very clear views on the unsuitability of this section. Once you have determined through your assessment process that a complaint is frivolous or vexatious, you then have discretion as to whether or not to continue with the investigation. The reason for my semantics is that you can decide that it is frivolous but it might be the tip of an iceberg so you still proceed to look at it. Does that happen from time to time or is that it once you have decided the matter is frivolous or vexatious?

Ms HAMILTON: I must say in my experience I cannot think of any occasion where we did actually decide that a matter was frivolous or vexatious, because it has to be fairly clear-cut. That is why I think it is important to have it there for those clear-cut cases so you can say we are not even going to look at this. But, on the other hand, we try to assess carefully whether something, even if it is expressed badly or does not seem to have much evidence, has something behind it. It is an art more than a science is all I can say. You try to assess as best you can whether it is worth looking at further, bearing in mind you have to concentrate on serious and systemic matters.

Mr ROB STOKES: You mentioned then that it is something that is very rarely used?

Ms HAMILTON: Yes.

Mr CRIPPS: I have just had a look at section 16 because Theresa was one up on me that she had not heard about it for a while and I had not heard about it till she heard about it. But when I read the section it really requires them to have a look at the claim before they come to the conclusion that it is vexatious. Also there does seem to me—if you do not mind me saying so—a real problem in getting sections like that to look for the most remote possibility that it will never happen and say that the section cannot work. I would like to know just what it is when it has not happened.

When I was doing an inquiry into this organisation, before I was appointed, it was always said to me that the definition of "corruption" was bad because it could lead in theory to corrupt conduct that ordinary people would not think was corrupt. Now people crossed their heart and spat their death and said they were concerned for the public safety and the like, so I said to the Bar Council, "You give me an illustration of it." I said to the Council of Civil Liberties, "You tell me when it has happened?" I said to the Law Society, "Tell when it has happened?" I said this to about five of them and not a reply. So I decided why change the definition?

Mr JONATHAN O'DEA: Commissioner, obviously we recognise that there are some frivolous or vexatious whistleblowers and my following question does not relate to that class of whistleblower. My question relates to legitimate whistleblowers, some of who suffer detrimental action or treatment. I think everyone would say that there are people that would fall into that category. Why do you think it is, from my understanding, there has not been one single successful prosecution for detrimental action in New South Wales?

Mr CRIPPS: I do not know. Do you want to say anything about that?

Ms HAMILTON: Apart from the obvious that it is a very hard thing to prove. Employers can always come up with other reasons. These days most employers are too sophisticated to write something saying they decided to move a person because they complained about them—they ascribe other reasons. It is a very difficult thing to prove.

Mr JONATHAN O'DEA: It may be that the experience of the employee is filtered somewhat or a different reason is put by the employer. In light of that, do you think it is inappropriate for this Committee to hear directly from legitimate whistleblowers that have been the subject of detrimental action, given that employers can provide a filtered version? Would you say it is inappropriate for us to hear directly from people in that category?

Mr CRIPPS: You are the Parliament of New South Wales. You can do what you want to do as far as I am concerned.

Mr JONATHAN O'DEA: Of course we can.

The Hon. TREVOR KHAN: Unless we do not have the numbers.

Mr JONATHAN O'DEA: When we have the numbers.

Mr CRIPPS: Personally I do not see a problem if the Parliament—the only problem I would see is a Parliamentary problem and that is whether you have so many things to do that you cannot add that to it. But that is your issue.

Mr JONATHAN O'DEA: What I glean from your responses is that there is, perhaps, a unique perspective of whistleblower employees that is not necessarily gleaned from the perspective of an employer?

Mr CRIPPS: That may be so. I do not know.

Ms HAMILTON: Well, yes. The trouble is people might come to us and say, "I was moved because I made this complaint" or " I was demoted because I made this complaint" but when we get the evidence and the files and the human resources reports there is nothing there at all about that; it is all about long-term problems or this person has been a troublemaker. I am not saying therefore that that whistleblower is lying. Their perception that the reprisal was taken may well be true, but it is another thing to prove it beyond reasonable doubt in a court of law for a criminal offence. I would ascribe the lack of prosecutions to no more than that: it is a very difficult offence to prove. But I still think it is a deterrent to know that it is there and hopefully it would deter some employers from taking reprisal action if they know it is a criminal offence.

Mr GERARD MARTIN: Surely the reason that we have organisations such as yours is that it is very difficult for a partisan organisation such as a parliamentary committee to call people, to take evidence and to try to make some sort of a judgement on whether someone has been harshly treated. That is why we have the Independent Commission Against Corruption and the Ombudsman. Would that be right?

Ms HAMILTON: Yes. I am not saying that the Independent Commission Against Corruption necessarily just goes on the papers and does not necessarily want to investigate any matter that is hard. In appropriate cases we would be happy to call in people and to take evidence and to test what an employer was saying about the reason, but it would need to be an appropriate case.

Mr NINOS KHOSHABA: Commissioner, we heard earlier from Mr Chris Wheeler, who expressed concern with the current Act and believes that the Protected Disclosure Act should be simplified. I do not expect an answer from you now but I am hoping at a later time you will read his evidence and draw to the Committee's attention anything you would like to comment on?

Mr CRIPPS: Yes, I will.

CHAIR: I now wish to move on to the inquiry into the proposed amendments to the Independent Commission Against Corruption Act. That evidence has now concluded. I take it you have had an opportunity to read the submissions?

Mr CRIPPS: Yes.

CHAIR: I think you touched on it before but I am not quite clear on it. You commented that without the evidence obtained through compulsion the employer has a difficult time in bringing forward earlier than normal disciplinary proceedings. That is because the employer is unable to use that evidence of admission. When you have a situation where you are recommending to an employer a disciplinary hearing, and you have conducted your inquiry, what material—leaving aside that you cannot send the admission material—do you send to the employer? What other material would an employer receive from you that would allow that employer to continue to instigate disciplinary proceedings if the employer was not able to use the evidence of admission?

Mr CRIPPS: We would send the material over to them, including what was said at these hearings but it cannot be used. What you have to remember it is that the work that the commission does cannot be held up by us continually getting evidence either from the Director of Public Prosecutions or from the employer when we have other primary functions to fulfil. Once we know a public servant has behaved disgracefully, and we hear that at a public inquiry after he or she has taken an objection, we know it and we can move on to something else. We really do not have the resources to start saying: Right, now we will behave as though we were the employer of that person and knowing what that person has done let us look around for admissible evidence to prove that which we cannot use but we know as fact. That is the problem.

CHAIR: Is it your evidence and experience that without the employer being able to use the evidence of admission that the disciplinary proceedings either would not take place or they would be prolonged? How much would the evidence of admission assist an employer?

Mr CRIPPS: Mostly in disciplinary proceedings that evidence would do it.

CHAIR: There have been a number of cases where without that evidence there has been a failure of disciplinary proceedings or the disciplinary proceedings have not been able to be instigated. I know if the

evidence of admission were used it would do it but without that are you saying that the incidents of success in disciplinary proceedings are very low with the information you already send them?

Mr CRIPPS: As I say if you had that admission, and it could be used, you would not have to look for anything else. It is there—the person has made an admission. I suppose it is possible that that person might go to the disciplinary hearing and say, "I did not really mean it" or something. That is about it, but let me make this point. My essential argument for getting rid of it is as a matter of doctrinaire legal principle I see no reason why the privilege of self-incrimination should extend to public servants who admit they have cheated the public.

CHAIR: I understand what you are saying but if someone asks the question: What about the other evidence that the Independent Commission Against Corruption could give the employer? There must be other evidence that we could use. If someone stands on their dig on principle and says they do not like the idea of a person being compelled to give evidence knowing that that evidence is going to be used against them. It would grate with us that are lawyers and it would grate with other people. Is it your evidence that without that we have a very low rate of disciplinary proceedings? The proceedings may take too long and people can resign and get their entitlements, for example? If the Committee were to make a recommendation would that be your evidence?

Mr CRIPPS: Yes, it is. Also, which I touched upon in my opening, the Government or the Parliament has to make up its mind as to where integrity lies in the public system and how it is enforced. My own personal view, for what it is worth, is that people who are in the public sector have the highest expectation of integrity and ethical behaviour, because that is the nature of the people who take on the position of serving the public.

CHAIR: I did not interrupt the evidence the Committee received from the Bar Association as a very strong objection to this proposition—it did not come across that way to me. Mr Odgers even suggested that we include in the Act parts of section 128 of Evidence Act. I do not know if you have read that piece of his evidence?

Mr CRIPPS: I do not remember that.

CHAIR: He said we should include in the Act as an amendment section 128 of the Evidence Act, which is that a certificate be given that the evidence cannot be used against that person. His fear was that if that evidence can be used in the disciplinary proceeding then the evidence in the disciplinary proceeding could be used in another court, such as a criminal court. He was concerned with that derivative use. He suggested that section 128—I cannot remember the wording of it—could not be used in that way. He did not want to see a situation where an accused in a criminal court was being cross-examined on evidence he gave in a disciplinary proceeding, for example. I do not know if you have had a chance to look at that?

Mr CRIPPS: No, but I have thought about that. You just simply assume that that evidence cannot be used in criminal proceedings.

CHAIR: Would you have any objection to that amendment?

Mr CRIPPS: Yes.

CHAIR: No objection.

Mr CRIPPS: There did seem to be a view, if I might say so with respect to the Bar Association—of which I was once a happy member—that they seem to think that I was opposed to the privilege of self-incrimination and I have never suggested that.

CHAIR: That was a misunderstanding—there is no doubt about that.

Mr CRIPPS: It seems to me that it is reasonable to be used in a disciplinary proceeding, because they do not get that protection, but you could just build into the legislation that it can be used in disciplinary proceedings only or whatever. If you add the word "only" it would be good enough.

Reverend the Hon. FRED NILE: To make it clear, you had no intention of it being used in criminal proceedings at all?

Mr CRIPPS: No.

Reverend the Hon. FRED NILE: A question has been raised whether all the information you collect can be or has been supplied to the various departments to conduct an inquiry or investigation? Is there any restriction on what you can supply?

Mr CRIPPS: No, I do not think so.

Reverend the Hon. FRED NILE: Can you supply tapes of telephone intercepts?

Mr WALDON: There might be in relation to telephone interception if we have not had a public inquiry. But we are talking about cases where we have had a public inquiry. The view is if a telephone intercept has been played in a public inquiry then we can provide it. It is a public document and we can provide it anywhere.

Reverend the Hon. FRED NILE: Should there be an amendment to provide for that information to be used where there has not been a public inquiry?

Mr CRIPPS: I would like to think about that. In criminal proceedings it can be used.

Ms HAMILTON: That would require an amendment to the Commonwealth Act, which I do not think would be forthcoming, in any case.

Reverend the Hon. FRED NILE: It can be used in disciplinary hearings?

Ms HAMILTON: It can be used in some kinds. The Federal Act provides all of the prescribed proceedings where you can use TI [telephone intercept] product. It does include some disciplinary proceedings, but not all. In cases where there is TI product, they are probably not the sorts of cases we are talking about where the problems arise. The problems arise more in cases where there are a lot of financial records but without the admissions those records are probably not enough to show the wrongdoing. You need the admissions, otherwise it is an enormously difficult task to build a case against somebody. So that is the real beauty of hearing admissions. They pull all that evidence together. We are, of course, quite happy to provide whatever evidence we have to departments. But that evidence, without the admissions, may not be sufficient.

Reverend the Hon. FRED NILE: The admission should be sufficient, should it not?

Ms HAMILTON: The admission is the best evidence you can get, if it is a reliable admission. Obviously it simplifies the process considerably if the person has admitted, "Yes, they are my bank records. Yes, I received that money. Yes, it was a corrupt arrangement." We often have those admissions as clearly as that, but they cannot be used in disciplinary proceedings.

Reverend the Hon. FRED NILE: It seems that in some cases, such as RailCorp, they do not make much progress in successful process or convictions.

Mr CRIPPS: If you run an organisation that has over a period of 20 years been exposed about 20 times for corruption, it is probably a reasonable assumption to think that lessons are not very adequately learnt. But we really do not know. The problem with RailCorp was a repetition of almost identical corrupt conduct going on and on and on because, to use that tedious expression, there appeared to be a culture within the organisation of tolerating it. That did not mean everyone was corrupt, but it meant there was a toleration of corruptness.

The Hon. TREVOR KHAN: I am interested in the use of the material. We have talked about disciplinary proceedings. Before another witness I raised a circumstance where there is an admission of corrupt conduct that involves a subcontractor. A public service organisation may have some use for that material in, for example, proceedings in relation to termination of contract, particularly where a corrupt official is called to give evidence by the subcontractor or contactor who is seeking to defend the termination of contract. In those circumstances, simply limiting the use of the information to disciplinary proceedings may catch only one of the fish involved in the corrupt enterprise.

Mr CRIPPS: I do not know that it would, but one is better than none.

The Hon. TREVOR KHAN: I agree.

Ms HAMILTON: Certainly that is a good example of a civil proceeding where you would hope that you could use the evidence because it does seem to be against public policy and the public interest for someone who has been in a corrupt arrangement to be able to sue for termination of contract when the admissions made cannot be used, even if that person himself made the admissions.

Mr WALDON: I think it is precisely for that reason that we were submitting that evidence given under compulsion of ICAC should be available in civil proceedings as well, so public sector organisations can, if they need to, take action to avoid contracts or claims for damages.

The Hon. TREVOR KHAN: I am mindful of the time. One of the suggestions that has been made to us, and I am sure your answer will be reasonably quick, is if evidence that has been given under compulsion were allowed to be used that it would limit the commission's capacity to elicit the admission in the first place.

Mr CRIPPS: I have heard that argument put, but I do not subscribe to it. What we aim to do in the public inquiries is to get the best evidence we have of corruption. The best evidence we have of corruption is someone who has committed a criminal offence. So we are not going to steer away from exposing conduct that could amount to a criminal offence just because we have to. Our function is to expose corruption. The secondary function is to ensure, if possible, that people get convicted when they should and be disciplined when they should. So, in my view, it would not have any effect on the way we would conduct public inquiries.

The Hon. TREVOR KHAN: Perhaps I have phrased it poorly. I am looking at it from the perception of that poor egg or not so poor egg who is in the witness box and the implication that it may impact upon their employment and discourage them from making admissions they otherwise might make.

Mr CRIPPS: What got me to the stage of making these recommendations was it did not take me long to realise that the assumption behind section 37 was that if people knew the evidence could not be used against them they were going to tell the truth. I have presided over almost all the compulsory examinations and all the public inquiries and that has never been my experience at all. The people tell me what they think the commission knows. They do not go any further unless they think the commission knows. You see it repeatedly when they start off by denying it and the telephone intercepts are played. If the theory were right, you would not have to play the telephone intercepts and these people would be disclosing it. They do not at all. That also brings me, if I can nag on the final point, to why people who tell lies to the commission should be punished. The choice here is that you admit to corruption or you get jailed for telling lies. You do not have the choice that if you do not admit to corruption you will be given a good behaviour bond by a magistrate.

The Hon. TREVOR KHAN: If it is before a magistrate, this may be difficult for you to answer. Would a way of dealing with the good behaviour bond issue be to set a standard non-parole period?

Mr CRIPPS: I think so. What they have to remember is in the middle 1990s a case went to the Court of Criminal Appeal in which it was said that for someone to tell a lie to the commission would always involve a jail term. Since then we have moved into areas of home detention and other aspects of punishment. But all I ask is that these magistrates observe the direction of the Court of Criminal Appeal. Unless people fear that they will go to jail if they tell lies, they are not in a position where it is very conducive to them telling the truth. Most of them have in fact engaged in corrupt conduct. They do not find it easy to admit that. But the choice should be you either admit it or you go to jail for telling lies.

Mr GREG SMITH: Commissioner, do you propose in cases where people who are already charged with false swearing but beat the charge and are acquitted that the evidence given before the commission can be used in a disciplinary proceeding?

Mr CRIPPS: Do you mean if it was given before a public hearing?

Mr GREG SMITH: Yes.

Mr CRIPPS: Yes, I think it should be used. The fact that it has not resulted in a criminal conviction, it would not be used in a criminal court.

Mr GREG SMITH: If somebody is before, say, the GREAT tribunal and gives false evidence that they were coerced or tricked into admitting matters before the ICAC, should they be subject to criminal sanction if it could be proved they were lying when they said that?

Mr CRIPPS: Do you mean if they defended in criminal proceedings—

Mr GREG SMITH: In GREAT proceedings they said they had been coerced at ICAC.

Mr CRIPPS: I am not sure what happens in GREAT, but I would like to think that if someone takes an oath in GREAT and tells a lie they get punished.

Mr GREG SMITH: That is what the Bar Association might be getting at in its push that people are exposed to further prosecution by using evidence that has been given originally at the commission. If they put up a defence as to why they gave that evidence, they might be then exposed to further criminal offences.

Mr CRIPPS: I suppose that is theoretically possible. It is also an illustration of what I said earlier about vexatious illustrations. I would like to see that having happened.

Mr GREG SMITH: Have you experienced people coming before you taking the rap for others and later considering it to be a false admission?

Mr CRIPPS: No. I have had people who have told lies—wives to protect their husbands but not necessarily to inculpate themselves.

Mr GREG SMITH: Would you recommend prosecution of those people?

Mr CRIPPS: Yes.

Mr GREG SMITH: There has been experience in the criminal courts. I particularly think of one gentleman, now deceased, who was a major witness against various people, including Al Grassby, who pleaded guilty to perjury because in a trial he took the box and said the drugs were his. Ultimately that was the basis upon which a police officer was released, following conviction, because the indemnity for perjury had not been disclosed to the defence. You do not have that experience at the commission?

Mr CRIPPS: No, I do not.

Mr ROB STOKES: In relation to disciplinary proceedings and civil proceedings, is the commission still of the view that civil proceedings should be excluded from privilege?

Mr CRIPPS: Yes.

Mr ROB STOKES: Is the commission of the view that it is more important in disciplinary proceedings than in civil proceedings or do they go together?

Mr CRIPPS: I suppose it depends upon the issue. If you get a person—and we have had this—who will freely admit to having robbed the people of New South Wales of $1 million, that is probably more important than a lesser disciplinary offence for something else. I think it probably depends on the circumstances of each case.

Mr ROB STOKES: My next question relates to disciplinary proceedings. Does the commission have a view as to whether the term "disciplinary proceedings" should be separately defined in the Act, say in the same terms as in the Public Sector Employment and Management Act.

Mr CRIPPS: I had not applied my mind to that. What do you mean?

Mr ROB STOKES: As I understand, disciplinary proceedings are not separately defined in the Act.

Mr CRIPPS: No. It just depends upon what proceedings you talk about whether they fall into the definition of disciplinary proceedings, which I think would be almost any disciplinary proceedings. In other words, you do not have to go before GREAT for it to be disciplinary proceedings.

Mr ROB STOKES: My final question relates to earlier questions about the appropriate penalty for lying to the commission. How does that fit in with, for example, the sentencing procedure Act in terms of a hierarchy of sentencing options? Perhaps, arguably, magistrates might be following what they see as the intent of the sentencing procedure Act?

Mr CRIPPS: I would ask the magistrates who thought that to have a look at what the Parliament has said is the maximum penalty for this offence. It is five years. I do not think they have to be deflected by anything else.

Mr GREG SMITH: Do you feel that the finding of corrupt conduct should be sufficient as a ground to sack someone in any department?

Mr CRIPPS: No. There is no doubt the finding that someone has engaged in corrupt conduct does not have any legal consequences, but it certainly has reputational effects. I do not see why anybody should be bound by what the commission has found if they want to dispute it in a proper tribunal later on.

Mr GREG SMITH: I am not suggesting that they do not have an appeal.

Mr CRIPPS: No, not an appeal.

Mr GREG SMITH: Would that not solve your worry that they make these admissions, yet they could walk back into their department because there is nothing that can be used against them in the current regime? If a finding of corrupt conduct was given the status of a conviction, would that not solve the problem?

Mr CRIPPS: I had not thought of that but I would be reluctant to agree to it. I do not think a declaration by the commission that someone has engaged in corrupt conduct should be an irrebuttable presumption in disciplinary proceedings against a person who wants to say that the commission got it wrong.

Mr GREG SMITH: Prima facie should it be enough to discipline the person?

Mr CRIPPS: I do not know. You would not have to. All you would have to do is tender the evidence. You would then make up your own mind whether or not it is good enough.

Mr GREG SMITH: If they do not understand that they are gone?

Mr CRIPPS: I had not applied my mind to this. I do not think you would need to do that. You would just need to tender the evidence and leave it at that. It will be responded to or it will not.

Mr JONATHAN O'DEA: Commissioner, earlier in response to a question you raised the issue of RailCorp. As this might be your last appearance before this Committee I wanted to observe that there have been further admissions of corrupt conduct since we last focused on that organisation—an issue that largely has been reported in the media. In the case of those individuals the question of disciplinary proceedings is somewhat hampered by the current regime. In light of those and other examples I am sympathetic to the changes that you have proposed. Clearly, I do not think it is in the public interest to have to go through those same proceedings again.

As a matter of public record, I asked the new Minister, who is now directly responsible for RailCorp, following certain changes that have passed through Parliament, why more is not being done within that organisation. The response was that things were happening and that a quarterly report was now going to ICAC. This is an important area at which this Committee has looked before, so I do not want to go into details of in-camera discussions. Are you now satisfied in relation to RailCorp that proper treatment and attention are being given to systemic and cultural problems in that organisation?

Mr CRIPPS: I do not know and that is all I can say. I suppose that this really relates to the recommendations we made, whether those recommendations will be carried out and, if they are carried out, whether that will alter what I have loosely called the culture of the organisation. I am sure that there are people in RailCorp who are trying to do that. I have never said that everyone engaged in RailCorp potentially will be corrupt. But I have said that you have a culture of corruption that is hard for people to avoid. At present there

are people in RailCorp who are trying to do that. Perhaps you should ask Dr Waldersee. He might have a view about this because he has been dealing with the RailCorp people.

You also have to remember that when we deal with an agency and make recommendations as to how that agency should respond, essentially we make no secret of the fact that we are passing over to that agency the solution to that problem. We cannot get involved in the management of that problem for two reasons. Firstly, we do not have the staff and, secondly, if something goes wrong we are part of the problem.

Mr JONATHAN O'DEA: Are you satisfied with the response as best you can be, not being part of the organisation?

Dr WALDERSEE: Without going into the details of the procurement transformation project and various other responses, I think it would be fair to say that, barring something we do not know about, we are getting a far more cooperative response than we have had in the past and a reported willingness to undertake some serious change. As the commissioner said, we do not know what is going on inside, as we do not go in and look. This is based simply on our interaction. Secondly, as the commissioner noted, it is a huge job to turn this around. It is a year since our recommendations. Nobody would expect you to change in a year an organisation of 15,000 people with this long-term history of problems. That is not a realistic time frame. If large amounts were devoted to the change you would still be looking at a 5-year to 10-year turnaround. It is a big issue. On the face of it, the short answer to your question is that they appear to be far more cooperative than they have been in the past.

CHAIR: We will now move on to your annual report. Inspector Harvey Cooper referred to his audit function and to his ability to check on telecommunications interception [TI] records. He suggested an amendment to the Commonwealth Telecommunications Act.

Mr CRIPPS: Could you tell me which question this is?

CHAIR: In his audit function Inspector Harvey Cooper referred to his ability to audit telecommunications records and he suggested an amendment. As I understand it, you made an order to allow him to do that in the public interest. Have there been any developments in that area?

Mr WALDON: Are you talking about TI or about surveillance devices?

Mr CRIPPS: About TI.

CHAIR: Does it relate to both those issues or to just one?

Mr WALDON: There are issues relating to both. In the most recent issue, the Inspector indicated that he wanted to audit our surveillance devices records under the new Surveillance Devices Act. We took the view that, in order for him to do that, the commission had to certify that it was in the public interest to provide him with that material which, of course, the commissioner did. Because of the way in which the Surveillance Devices Act is structured, there are only limited bases on which you can provide surveillance device material to anyone. I think there were a couple of bases on which that information could be provided to the Inspector. However, for the purposes of the audit we took the view that in order to ensure it complied with the requirements of the Act our commissioner had to certify that it was in the public interest for it to be provided. That was done.

CHAIR: That is the way in which it is proceeding at the moment?

Mr WALDON: Yes.

CHAIR: Is there a case for amendments to both Acts?

Mr CRIPPS: There should be in order to make it clear. I take the view that the really important function of the Inspector is not to wonder whether we have been as diligent as we should have been in attending to complaints, although it is not irrelevant. The important function of the Inspector is to ensure that people in the organisation do not abuse the power they have to tap phones and to put surveillance devices on people so that members of the public have confidence we are not doing it. People in the commission are warned that if they do

it they might be caught. So far as I am concerned, any possible inhibition in this legislation to the Inspector would get my support if it were removed.

Mr WALDON: I add that there are other restrictions under the Telecommunications (Interception and Access) (New South Wales) Act that also create a problem for us in giving the Inspector access to our TI material. In that jurisdiction it is not a case of our commissioner certifying that it is in the public interest to provide; we have to comply with the Commonwealth legislation. That would be an issue for amendment to the Commonwealth legislation.

Mr CRIPPS: I think they would need amendments to the Commonwealth legislation. It is a bit leery about letting anybody—

CHAIR: We would always welcome submissions from you about that if it assists your role. We could deal with that in our own way and then pass it on. It appears as though you have formulated an escalation protocol when government departments do not follow or implement your recommendations. Are you suggesting that this Committee should have a role in that process as final measure? What role do you see this Committee playing in that process? If you are recommending changes and they are not being implemented you already have referral powers in your Act to take it to the Minister, et cetera. What role can this Committee play in that process?

Mr CRIPPS: I suppose that this Committee would represent the Parliament in the last analysis. In the scheme of things the first complaint or submission is made to the head of the department, then to the Minister, and then to the Parliament if we do not get the proper response. I have never turned my mind to whether it should come to this Committee as opposed to the Parliament. We have never sent one to the Parliament anyway.

CHAIR: It is available to you.

Mr CRIPPS: It is available. We have threatened it.

CHAIR: Has it worked?

Mr CRIPPS: Yes.

CHAIR: It is a bit like the injunction threat. If you threaten injunction things start to happen. Can you give me an update as to what stage you have reached with the memorandum of understanding [MOU] with the Director of Public Prosecutions [DPP]?

Ms HAMILTON: Yes. Recently we signed a new memorandum of understanding. As we said in response to your questions on notice, the only real change to it is that it now specifies we will try to get briefs to the DPP within three months at the end of submissions on a public inquiry, which is our internal target. We have now formally put that into the MOU. Otherwise both parties considered that it had been working well and did not require amendment. In particular, I say from my point of view that the regular liaison meetings I have with the DPP officer have been very useful. Apart from anything else, both of us now realise the other competing priorities we have with our work, but we are trying our best to work around them.

There has also been more interaction between DPP lawyers and lawyers at the ICAC to try to resolve issues about briefs without letting them drag on unnecessarily. Generally, the MOU has been a lot more successful with newer matters rather than with older matters. However, I think that is to be expected because the older matters started before it was being enforced. You will see from the prosecution timescale chart that with newer matters generally, if you average out the times, the times are down to a year or less, which compares favourably with the four or five years that things were taking in the past. I think the MOU is having an effect. We never expected it to work overnight, but it certainly has had a beneficial effect on newer matters that are going to the DPP's office.

CHAIR: I have seen the tables that show numbers for later matters have come down markedly. I interpret that as being successful. Lastly, I note that there has been an increase in the work you have had in the past financial year. Has the reporting from local councils increased as a share of your total reporting?

Mr CRIPPS: Do you mean public inquiries?

CHAIR: Referrals or complaints of corruption.

Reverend the Hon. FRED NILE: Workload.

Mr CRIPPS: The workload from local councils has increased. I do not know whether overall they have gone beyond the complaints.

CHAIR: Your pie graph shows local councils contributing 38 per cent of your workload, or whatever it is. I think that figure has gone up.

Mr CRIPPS: Yes.

CHAIR: Is there a problem?

Mr CRIPPS: There might be; we do not know. We know that if you have something—and I use the word advisedly—as sexy as Wollongong you would find there would be a huge number of complaints coming from councils because they get a lot of publicity. Everyone thinks that if Wollongong is doing it everyone must be doing it. Most of the statisticians who do these reports and surveys will point to the fact that the prominence of ICAC's work in a given area tends to generate complaints in that area.

Mr DAVID HARRIS: My question, which I direct to Dr Waldersee, refers to question on notice No. 10 relating to proactive corruption prevention approaches. Can you update us on the progress of the internal audit for local councils? If that has been completed have local councils been taking up that tool and providing any feedback?

Dr WALDERSEE: No, it has not been completed; it is underway. Initially it was a self-diagnostic tool for councils. We found that planners and planning managers did not have the time, the knowledge or the inclination to do it. But there is a recommendation that they have internal audit account functions and we thought this was the place. We have talked to internal audit and essentially it does not know enough about planning to be able to audit what goes on and to work out whether or not this or that should have happened. Those guidelines for internal auditors are well underway but they are not finished. There is a keenness amongst internal auditors to get it and we think it will be taken up.

Reverend the Hon. FRED NILE: Have you supplied the Committee with a copy of the new memorandum of understanding?

Ms HAMILTON: No, but I am happy to do so. We got it only last week but I will provide a copy to the research director.

Reverend the Hon. FRED NILE: The other matter you raised, Commissioner, about the reduction down to 13 officers, there has been no legislation passed, as far as I am aware, establishing 13 separate departments. Are you in a position to lobby the Government—

Mr CRIPPS: Yes, I have actually spoken to the Cabinet office about it and Mr Lees said they would give consideration to any submission we made. What I am anxious to do is to have the same outcome as we have got at the present time, namely, a sufficiently large number of people who are motivated to report instances of reasonably suspected corruption, and I am fearful that if you leave it to 13 people it is not going to work as well.

Reverend the Hon. FRED NILE: So the Government could designate those officers—

Mr CRIPPS: Yes. I did not get the impression that the Government thought this was an insoluble problem. Nobody said, " I am going to do it for you", but I can say it had a favourable audience with Mr Lees.

Reverend the Hon. FRED NILE: ICAC has set up the new complaints handling and case management system. Is that working to your satisfaction? I think you were going to go live by the end of August 2009.

Mr CRIPPS: This is MOCCA. This is something that my grandson would have understood, and he is aged three but I do not because I am aged 76. So I will have to ask Andrew, who understands MOCCA, to explain this. This is an electronic imposition that has been imposed on us.

Mr KOUREAS: We have not got it loaded yet because of unforeseen technical issues but we are anticipating going live by the end of the month. We are doing some more testing tomorrow afternoon and then a final test next week if all goes well. So we are anticipating going live by the end of the month and we expect the system to be a considerable improvement on the previous system.

Reverend the Hon. FRED NILE: So it is more technical problems with computers?

Mr KOUREAS: Yes, it is integrated to all Microsoft-suitable applications. It offers more functionality; it sends various tasks to people automatically in the system. I anticipate some improvement in the way the process is being handled.

The Hon. TREVOR KHAN: Commissioner, if I could go back to the questions Reverend the Hon. Fred Nile asked you with regards to the 110 down to 13? I take it from the answer that you gave that you have been invited to make some sort of submission. Putting yourself in the position that you are talking to Mr Lees at the present time, what would be the nature of the submission that you will be making to him to give him some guidance as to how you would define the group?

Mr CRIPPS: He now knows who it is in the public sector that has an obligation to report suspected corruption. He knows where they sit in the public sector and he knows the areas that they come from. What I would like is someone to apply their minds to that to make sure there are people in those comparable positions—and they will be still there even though you have stopped having 100 people and you have reduced it to 13—to make sure that those people have the obligation and understand the obligation. It is really important to do this because one of the problems that ICAC has even under the present system is there is a tendency for some agencies to start investigating before ICAC does and their investigations can muck up ICAC's investigations. So we like to get these complaints very quickly so we can deal with them, and there will be a tendency, I think, to slow it up. How the Government or the Parliament does this I do not know.

The Hon. TREVOR KHAN: Could I move on to another matter, again involving the Director General of Premier and Cabinet? It relates to directions that you have received with regard to the employment of people within your organisation. Were those directions made in writing?

Mr CRIPPS: Yes.

The Hon. TREVOR KHAN: Approximately when were those directions made?

Mr CRIPPS: The first ones were about two or three months ago.

Mr KOUREAS: In early July.

Mr CRIPPS: That is the one about the staff freeze—early July.

The Hon. TREVOR KHAN: Were the directions both from Premier's and Cabinet or were they from another department?

Mr CRIPPS: No, Premier's and Cabinet.

The Hon. TREVOR KHAN: Were the letters at least signed by the same individual?

Mr CRIPPS: I cannot remember that now. I took the view that what had happened was that there was some Cabinet direction as to how all government agencies would behave and it was just sent out to ICAC as being one of the government agencies. I thought it was important to direct Cabinet's mind to the fact that ICAC should not be viewed as another government agency. I suppose I could have run up Mr Lees and he would have said, "Oh no, it does not apply to you". I could have rung up about the Senior Counsel and someone would have said, "It did not apply to you", but I thought it was probably appropriate to make a stand to ask the Government to continually think about ICAC's independence.

The Hon. TREVOR KHAN: Obviously there has not been the opportunity to read the document that you have tabled, but are you looking for, in a sense, a one-off injection of funds to overcome the backlog that has been created or is it an issue of increased recurrent funding?

Mr CRIPPS: It is recurrent, I think. That is what we are asking for. When you read it you will see that we have slipped down the scale of employees, and I have to say one of the reasons why it took a while to become noticeable is because I think the way the division was being run was very effective and very efficient, but even with all that we have got back to where we were two or three years ago. But it became a real issue because of the huge amount of work we had last year, and we have had almost as much work this year. I do not see that New South Wales is going to be freed from the burden of corruption just because I leave on 13 November.

Mr GREG SMITH: Has the commission put forward a case for some sort of review as to the staffing levels that are needed and the resources that are needed because of increasing work?

Mr CRIPPS: Yes. I think this document tries to do this. The document that I have been permitted to table is really a forerunner of an approach we are making to Treasury. It was to give this parliamentary committee an indication of what we were doing—because we are answerable to this parliamentary committee and not the Government—and in the hope that this parliamentary committee will see that what we are saying has merit and support it. But it has just been dropped on you today. If any of you have any queries about it please let me know and I will do my best to respond to them.

Mr GREG SMITH: I must say it is not novel that you are having to fork out 1 per cent efficiency savings, that the Government only gives 2.5 per cent for the extra salaries and then negotiates 4 or 4.5 per cent. If that continues year after year it means that your staff falls each year; you cannot replace people when they leave. I suggest that that same thing is happening in the DPP and other agencies. Are you aware of that?

Mr CRIPPS: I have not gone into that. It is enough dealing with my own agency.

Mr GREG SMITH: You probably do not have the amount of work you did at one stage because you do not do police corruption.

Mr CRIPPS: Except that that is 10 years ago.

Mr GREG SMITH: At the time when the Police Integrity Commission was established was there a loss of staff and budgetary amounts from the ICAC?

Mr CRIPPS: You would have to ask Mr Waldon this because he was the only person here who was there.

Mr GREG SMITH: It is good to have the corporate memory. When I was seconded there Mr Waldon would have been there then.

Mr WALDON: I was not in a senior position then so I was not party to the negotiations or discussions.

Mr GREG SMITH: But showing great potential.

Mr WALDON: But I am aware that there were discussions and as a result of that it was identified that an amount of the commission's recurrent budget would be subtracted from future years because of the setting up of the PIC.

Mr GREG SMITH: But nevertheless, the workload has progressively increased, particularly in areas like local government, RailCorp, those sorts of things—major investigations—and you have a need for more staff, as it were, to combat the workload?

Mr WALDON: Yes. If I could just add to that? I think it became very significant both late last year and this year that I think for the first time that I have been at the commission we actually had to take a number of preliminary investigations—not full investigations but preliminary investigations—and place them on hold because we just did not have the people to resource them. So that effectively meant that some matters just were

not being looked at for quite a period of time until we were able to draw back the resources from some of the major investigations.

Mr GREG SMITH: And that would be an impediment to successful investigation sometimes, would it not, because the trail gets cold?

Mr WALDON: Absolutely.

Mr GREG SMITH: How many actual investigators do you have working for the ICAC? You have got 39 in the division but how many are actually investigators?

Mr SYMONS: We have a surveillance pool attached to that. We have maybe 25 investigators, but bear in mind you have got annual leave and maternity leave and things like that. So even though the strength is 39 you take out your surveillance team and that takes one team to one side and drops it down. So we work on an average of about 20 to 25 investigators on the floor without impediments.

Mr GREG SMITH: That is about 30 per cent of the total staff?

Mr SYMONS: Of ICAC?

Mr GREG SMITH: Yes.

Mr SYMONS: Yes, it would be.

Mr GREG SMITH: To conduct the inquiries that you get do you think that it is sufficient to have that proportion of investigators with 60 or 70 other staff?

Mr SYMONS: I guess, for want of a term, the investigation division—without being hit by Roy—is actually the engine room and that generates the flow-on to corruption prevention and it occupies the flow-on through the legal, et cetera, as well as other matters that come through. But the investigation is the engine room, which happens. But you need corruption prevention. The concept with RailCorp—

Mr GREG SMITH: I am not denying that, I am just asking you whether it affects your ability—

Mr SYMONS: I think the balance is good.

Mr GREG SMITH: The balance is good but the numbers are not enough?

Mr SYMONS: Correct.

Mr GREG SMITH: And to be a more effective agency you could do with an input of a lot more staff—qualified staff and qualified investigators?

Mr SYMONS: Yes.

Mr JONATHAN O'DEA: Commissioner, you may be aware that on a number of times in Parliament I have raised the finances of the Independent Commission Against Corruption. I was pleased with one of the Premier's responses in that it indicated a willingness to seriously consider an increase in budget, which was promising. Obviously, we do not want to make these things political unless they have to become political. One would like to think that there is bipartisan support for increased resources when a responsible entity like the ICAC asks for them.

Having said that, I was a little surprised at your comment differentiating the ICAC from the rest of the public service regarding staff directives, but not normal budget constraints; that is, the 1 per cent efficiency saving. Last year, despite the fact that there was a demonstrably increased call on your resources, there was in fact a real budget cut in the budget process, which was of concern to me. I do not understand why you differentiate between the staff directives, which should be seen as independent, and the normal budget process, where perhaps you could be seen as part of the public service. Would you comment on that?

Mr CRIPPS: We are not happy, but it is necessary. We do not get money from any source other than the Government. So, to that extent, we cannot be said to be wholly independent of government. But, so far as staff is concerned, I can make this point: It is true that last year we got into trouble that has flowed over to this year, but we thought we had solved it by increasing efficiencies, doing a whole lot of things to try to accommodate the extra work that we were getting. But we have now come to the conclusion that we cannot keep on doing that. We cannot keep on being more efficient.

Mr JONATHAN O'DEA: So?

Mr CRIPPS: So, there is no inconsistency really, I do not think there is. Also, on the problem associated with staffing and the independence, we just cannot have the Government telling us whom we employ. I would always, and I do not know whether my successor would, pay attention to reasonable requests of the Government that we do A, B and C. But that is what they have to be viewed as, requests not directions. And it is understood that we can say no if we want to.

CHAIR: Commissioner, this may well be the last time you give evidence. I congratulate you, and indirectly your executive staff and all the staff at the Independent Commission Against Corruption, on the excellent professional job that you have done in the service of the people of New South Wales in your role as commissioner. I am bold enough to speak on behalf of the Committee members to say that the ICAC operates in a very professional and excellent manner. A previous inspector commented a few times that the commission operates extremely well under very difficult circumstances, and that encapsulates how it works with the number of inquires and complaints that you receive, and in assessing them. It is an enormously difficult task. Since I have been a member of this Committee, and as its Chair, I have enjoyed my relationship with you and your helpful and professional staff. I take this opportunity to wish you the very best for your future after your appointment ceases. Whatever you choose to do in the future, I wish you the very best. I thank you, once again, for doing an excellent job.

Mr CRIPPS: Thank you for those generous words. I am sure that my successor will probably carry this organisation through in the way it should be carried through. Once again, I thank this Committee for the constructive work and suggestions it has made, and also for the civilised and courteous way that we are able to deal with issues such as we dealt with today and have dealt with in the past.

CHAIR: Is the submission you provided for the information of members only?

Mr CRIPPS: No, I table it with your permission. Obviously you will use it as you want to use it. My purpose in giving it to you was in the hope that you would see that a reasonable argument was put forward that lends Treasury support.

(The witnesses withdrew)

(The Committee adjourned at 3.17 p.m.)