REPORT OF PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

INQUIRY INTO PROPOSED AMENDMENTS TO THE INDEPENDENT COMMISSION AGAINST CORRUPTION ACT 1988

———

At Sydney on Monday 4 May 2009

———

The Committee met at 10.00 a.m.

———

PRESENT

Mr F. Terenzini (Chair)

Legislative Council	**Legislative Assembly**
The Hon. G. J. Donnelly	Ms D. Beamer
Reverend the Hon. F. J. Nile	Mr N. Khoshaba
	Mr J. R. O'Dea
	Mr G. E. Smith

CHAIR: I will open the proceedings by making a short statement. The Committee is holding this hearing as part of its inquiry into proposed amendments to the Independent Commission Against Corruption Act. The proposed amendments would amend section 37 of the Act to remove the current restriction on the use in disciplinary proceedings, and in civil proceedings generally or solely on recovery of assets, of evidence that was obtained compulsorily by the Commission. A further proposal to amend the Independent Commission Against Corruption Act to make the assembling of admissible evidence a principal function of the Commission is also referred to in correspondence by the Premier referring this inquiry to the Committee. I thank the witnesses for attending to give evidence today.

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

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

ROY ALFRED WALDON, Solicitor to the Commission, Independent Commission Against Corruption, 133 Castlereagh Street, Sydney, sworn and examined:

CHAIR: We have received your submission. Do you wish that to be part of your evidence today?

Mr CRIPPS: Yes, please.

CHAIR: Commissioner, would you like to make an opening statement?

Mr CRIPPS: Yes, it is probably appropriate that I make a very short opening statement, but assuming that the members of this Committee have read the submissions that have been put in and also are aware of the three matters proposed to be discussed. I would like to make a couple of things clear. First of all—and I think I have made this clear to the Chair independently—I do not see ground 3 as having any connection with grounds 1 and 2. You may recall that grounds 1 and 2 refer to the removal of the immunity given under section 37 in civil and disciplinary proceedings of admissions made in the course of compulsory examinations or public inquiries. I have addressed that in some detail. The third one expressed the view, if grounds 1 or 2 were adopted, would something have to happen to the requirement that the Commission were given power to in effect collect more evidence and the like. I want to make it clear that I took the view that the third had no connection at all with grounds 1 and 2, and I think, if you do not mind me saying so, you agreed with me when we spoke about the matter. As long as people understand that.

As to the third matter, you may recall that my original proposal was simply that there be added to section 14 a requirement that what the Commission was authorised to do was to collect evidence as, in effect, directed by the Director of Public Prosecutions [DPP]. I had a concern, you may recall, when I spoke to this Committee earlier that it must be doubted whether we had the power to go out and collect evidence after we had finished an investigation and were finished with a matter. I took the view that if the Parliament wanted us to do that—and it appeared that the Parliament did want us to do that because the questions from this Committee have frequently related to what is the result of our finding of corruption—could they make it clear that we had the power to do it. I put that to Cabinet. Cabinet in effect—I will not say modified it—made a great change and said: Could it be a third function? Well, I do not care really; obviously it is a matter for the Committee or the Parliament what it wants to do, so long as we are in the position where, when we act, nobody can say we are acting outside the law.

So far as the first two are concerned, as I said, I would like our submission to be on the record. There is one other document that I would like to be on the record and I may not be here when that is given. There was a letter written by a legal officer of the Commission and I responded to that letter because he gave it to me and asked me if I wanted to respond. I said I did, so if that letter goes before the Committee I would like my reply to go before it. Other than that, I have on frequent occasions before this Committee explained why I think it is important that people in the general public are confident that not only will corruption be exposed but the people who have engaged in it will suffer detriment. I am not suggesting for one minute that the privilege against self-incrimination should be removed. It is one of the criticisms I had when people said my suggestions had an effect on it. They would have no effect on the privilege against self-incrimination.

But I think, as representatives of the community, people here must have a view as to whether or not people in the community think it is appropriate for what I can describe as rampant corruption to be exposed only to find that the people who have engaged in it are allowed to remain in their positions and then resign with all their entitlements because the evidence available comes from their own admission and there is probably not enough evidence. If we have to get more and more evidence to do that, outside what has been admitted, we probably need a bigger staff. But essentially I think people should recognise that when we approach a public inquiry or a compulsory examination we concentrate on what is needed, if it is, to prove there has been corrupt conduct in the public sector. Once we do that we have to move on. That is the reason why, and I will not go over the reasons again because they are in the letter that I wrote to this Committee in any event.

CHAIR: When you refer to privilege against self-incrimination, section 37 removes that privilege but it places restriction on use.

Mr CRIPPS: Yes.

CHAIR: You have said in your submission that, without being able to use evidence of an admission in disciplinary proceedings, disciplinary proceedings may fail.

Mr CRIPPS: Yes.

CHAIR: How many cases are you aware of where disciplinary proceedings may have succeeded if that evidence was available? How many matters have you referred to departments where there has not been any other evidence that could have been used? Can you point to disciplinary proceedings recommended by you that have failed through not being able to use that evidence?

Mr CRIPPS: I will get Mr Waldon to answer this to the best of his knowledge because it is more in his department than mine. But could I say, first of all, we certainly know when criminal proceedings are going on or not going on because we have an obligation to refer for consideration. We know these things go to the heads of departments, but there is no structure whereby they tell us whether they have done anything or not. But I can think of one case where we did lose and it involved a woman called Susanne Ryan, who was part of the National Parks and Wildlife Service. She gave quite damning evidence in her own admission, and inadvertently that was used at whatever the tribunal it is that was determining whether she should be dismissed, but then it was set aside on appeal because they said there was an improper use of the confession she had made. But as to the rest, I just do not know. The main problem I get from my perception is that people realise that they can, if necessary, resign with all their entitlements before anything else happens to them. I think that has to be stopped and one way it could be stopped is for them to know that, even if they do resign, these admissions can be used against them.

CHAIR: You refer many matters to departments. Does the average matter that you refer have other evidence available for the department to use? You mentioned the matter of Susanne Ryan, which I think is to do with Mr Kite?

Mr CRIPPS: Yes, that is it.

CHAIR: Is it an ongoing problem that when you refer matters you feel as though there is no other evidence available? Is it a common occurrence?

Mr CRIPPS: I do not know about common, but it certainly happens a lot.

Mr WALDON: I think one problem is that on occasions these people resign before the disciplinary proceedings can even commence. Some departments have difficulty progressing the disciplinary aspect because very often the only evidence might be evidence that has been given in our public inquiries. Sometimes there might be some additional evidence, but the departments still have to go out and find the requisite evidence in order to commence the disciplinary proceedings and then bring them to fruition, so it is not just a case of looking at what has happened in our public inquiries. The department is having to go out and actively conduct a disciplinary process, which sometimes might take quite a while and quite a lot of resources, and sometimes where the people have not resigned beforehand they are stood down on full pay and the process can take months before reaching fruition. So it is a question of the resources that the public sector is putting into this.

CHAIR: The essence of your submission is that if this evidence was available it may alleviate the allocation of resources?

Mr CRIPPS: Yes, I think it would.

CHAIR: And bring matters to a head earlier?

Mr CRIPPS: Yes.

CHAIR: As a question of public policy, you are saying that that evidence should be able to be used?

Mr CRIPPS: Yes.

CHAIR: Section 37, if I have interpreted it correctly, is not a derivative use—

Mr CRIPPS: No, it is not.

CHAIR: It is use immunity.

Mr CRIPPS: Yes.

CHAIR: The fact of the admission and the admission itself cannot be used, but it can form the basis of further investigation.

Mr CRIPPS: Yes.

CHAIR: You do not think that that is—

Mr CRIPPS: This is sometimes what the Director of Public Prosecutions wants us to do—to go out and get these extra statements—but we do not do that for the departments. We simply do not have the resources to do that for the departments. So although departments—I am talking generally—might know from the admission that someone has behaved badly, it is still up to them to go out and collect the evidence outside the admission that can be used.

CHAIR: Do you provide that evidence of the admission to the department?

Mr CRIPPS: If it comes to us, yes. People should remember the way this Commission must necessarily operate. Our prime function is the exposure of corruption. Once we do that we like to move on to the next case. Dare I say it, there is still plenty of corruption in New South Wales. We are kept pretty busy.

CHAIR: Your argument is that if that evidence were admissible the departments could get on with their job and you could get on with your job and move on to another matter.

Mr CRIPPS: Yes.

CHAIR: Your view is that the public interest outweighs the private interest.

Mr CRIPPS: Yes. That is why I draw a sharp distinction with the privilege against self-incrimination, which has been part of the common law of Australia and England since the middle of the seventeenth century. That will be unaffected by this submission. I am not going to get into that.

CHAIR: You are making it quite clear that you have no interest in self-incrimination with regard to criminal matters. You are simply talking about disciplinary matters in the workplace and removing that restriction. You are saying that the public interest in bringing those matters to a head by using that evidence outweighs—

Mr CRIPPS: Yes. The Parliament has accepted this in other areas. The evidence can be used in disciplinary proceedings in the Police Integrity Commission and in the Health Care Complaints Commission. A few years ago the Act was amended as far as the Police Integrity Commission was concerned. Originally it was said there were aspects of the Police Commissioner's powers, such as no confidence in an officer and things like

that, where this evidence could be used. The legislation was then amended and it was said that it also applied to anyone who gave evidence at the Police Integrity Commission who was a public servant and not a police officer. The irony at present is that if that person is disciplined for what is said in a Police Integrity Commission inquiry that can be used against them. However, if the same thing happened in respect of the Independent Commission Against Corruption it could not.

CHAIR: You are citing that inconsistency in respect of disciplinary matters.

Mr CRIPPS: Yes.

CHAIR: In respect of civil matters you narrow it down to recovery of money derived from corrupt conduct.

Mr CRIPPS: I did not originally. The Cabinet office suggested that they wanted to limit it to the recovery of money consequent upon corrupt conduct. I do not see why it cannot be used in any civil instance.

CHAIR: There is the Confiscation of Proceeds of Crime Act and the Criminal Assets Recovery Act. Apart from using that Act, are there any other processes or related authorities that you can resort to for recovery?

Mr CRIPPS: I cannot think of any.

CHAIR: As you are aware, the Criminal Assets Recovery Act is used by the Crime Commission. I know you refer matters to the Crime Commission. How would you feel about amendments allowing you to instigate matters or refer matters under the Criminal Assets Recovery Act? Would that suffice for recovery of those assets?

Mr CRIPPS: If the admissions can be used?

CHAIR: Yes.

Mr CRIPPS: I expect it would. However, I do not quite know what work comes under the Criminal Assets Recovery Act.

CHAIR: It involves civil proceedings. There does not need to be a conviction. It is a civil proceeding—

Mr CRIPPS: Sorry, you are using it as a synonym. I thought you were talking about a separate piece of legislation. If that can be used for the recovery of these assets that have been, as they think, prime facie fraudulently obtained, it could be used.

CHAIR: I imagine that there would be questions for the committee about civil issues and how this might spark off varying courses of action. Do you think that people who give evidence may be seeking all sorts of legal advice? Do you think there may be more compulsory private hearings instead of public hearings? What are the implications of allowing this evidence to be used in civil matters? Would it cause witnesses to get more legal advice and would it drag things out? That is a very general question. Do you think the established legislation would be sufficient?

Mr CRIPPS: Frankly, I had not thought of it in terms of people commencing their own legal proceedings so much as people defending legal proceedings knowing that what they were putting forward was a lie.

Ms HAMILTON: I understand that under that legislation the hearing product cannot be used. So giving the Independent Commission Against Corruption the power to act for itself under that legislation would not necessarily help unless at the same time we were also given the power to use compelled statements. That would address one aspect of what we have been talking about. There are other aspects of civil recovery that would not necessarily come within the ambit of the asset recovery legislation. For example, the department might have a clear admission that somebody has been stealing and they want to take civil action to recover something other than assets. The assets might have been dissipated and they might simply want to sue and get the judgement and perhaps take somebody's wages. The Commission was putting forward a general right where

there have been admissions that public funds have been stolen or corruptly obtained that those admissions are admissible in an appropriate civil proceeding, which might be an asset recovery proceeding, but might also be just an ordinary civil proceeding to recover the money.

CHAIR: You are talking about a situation where somebody has got away with $1 million as a result of corrupt conduct and the money has gone, but the department would then initiate civil proceedings against that person for damages for compensation.

Ms HAMILTON: Whatever they can get. There would be a civil judgment and then they might get assets in the future or they might be able to garnishee their wages. We would have to think about whether it is too narrow to limit it to confiscation of assets. There may be other ways that money could be recovered from a wrongdoer through a civil suit. The Commission's view is that that should not necessarily be closed off.

Mr WALDON: There are occasions when a public sector organisation will have a contract with a service provider. There may be evidence during the course of that public inquiry that that service provider has engaged in corrupt conduct. It should be open to that public sector agency to take action to have the contract voided and that may necessarily result in some sort of civil action. If they cannot use the evidence that has been derived as a result of the admissions made in that inquiry it may be difficult for them to find the evidence otherwise in order to take successful action to void the contract.

CHAIR: Do you think this will have an impact on people's willingness to come forward to make admissions and to be full and frank?

Mr CRIPPS: I have expressed my view fairly forcefully on this subject. There was an assumption when this legislation was introduced that it would have the effect of making people at least more willing to disclose their sources of corrupt conduct and how badly they behaved if they knew they were totally immune from any form of civil, criminal or disciplinary proceedings. It is an example of theorising about the way people behave only to find that they do not, and that seems to make people theorise even more powerfully about the way people will behave. They do not behave like that at all.

I have been at the Commission for four and a half years and I have been involved in most of the inquiries. I find that people will tell me what they think the Commission knows—no more, no less. It has nothing to do with these sections. Independently of this inquiry I think there should be tougher application of laws when people tell lies at this Commission thinking the Commission does not know something. It has been my experience that we know that these admissions are coming up because we have had telephone taps that tell us exactly what has happened. These people will get in the box and tell one lie after another until they find out that the Commission knows something. Even then they are reluctant. Macbeth would say that they have stepped in blood so far that they keep going. In my opinion it is a myth to say that people are more likely to come forward because of this.

CHAIR: You are saying that we have a system where someone is compelled to give answers and your experience is that they will tell you what they think you know already or something that is not true.

Mr CRIPPS: Yes.

CHAIR: As they find out what you know, they will come to the party and make the admissions.

Mr CRIPPS: Yes. The upshot is that we do not get information that we did not know about but it turned out it would have been good had we known about it. The theory is a myth rather than reality.

Reverend the Hon. FRED NILE: You mentioned earlier the Police Integrity Commission having the ability to do what you would like to do. Is that because of the legislation or practice?

Mr CRIPPS: It is not so much what I would like to do; it is what I think is in the public interest to be done. It comes from the legislation. One of the provisions in the Police Act refers to the Commissioner losing confidence in a police officer. That can have all sorts of serious implications. In that case the legislation allows him to use the information that comes from a public inquiry by way of admission in disciplinary proceedings.

The legislation also goes forward—and I may have glossed over this a bit, unfortunately, for people who probably are not doing this all the time. The legislation also includes that protection for a public servant

who is not a police officer. Perhaps I can explain it a little more carefully. Once you get to organisations like, on the one hand, the Police Integrity Commission, and, on the other hand, the Independent Commission Against Corruption, and they have both been given exclusive jurisdiction in the areas they are proclaimed to have jurisdiction in, invariably you will get demarcation areas where people cross over.

Consequently, in the discharge of its function the Police Integrity Commission will frequently call into evidence public servants who are not police officers and against whom serious allegations are made. The same as we can get in the Independent Commission Against Corruption police officers who form part of our investigation. I think all of this got sorted out, largely, in the Court of Appeal in a case recently involving a judge. My argument is that it is ironic that the same public servant can get an immunity from us if he comes and gives evidence but it can be used against him if he gives evidence in the Police Integrity Commission. Some people may say to me perhaps they should abolish the use in the Police Integrity Commission deriving from that, but I do not think so.

The other thing, as you probably know, is I was the one who probably started this about a year ago to try to do something about it. It was because every time I came to this Committee people who are representatives of the community would always think an important aspect of our work is what happens after we have disclosed corruption. Some people would think: why are there not more criminal convictions; why are there not more disciplinary ones? It made me think, really, do we have to go any further now than maintaining the privilege against self-incrimination, and I do not think we do.

Reverend the Hon. FRED NILE: So removing that power, or changing section 37, would lead to more convictions?

Mr CRIPPS: I do not know. There is this complicated feature. As the Chair pointed out, the prohibition is on using the admissions; it does not prohibitusing the intelligence that comes from the admissions. So, you can go around getting evidence that will support what you know to be true but cannot lead in a criminal proceedings. Of course, that involves us in a lot of extra work because, as I have told this Committee before, the Director of Public Prosecutions will not do it, nor will the police. If the Independent Commission Against Corruption does not do it, it is not done. There is a problem about this which is a bit ancillary to what we have been talking about—whether we have the power to do this and, if we do not, it should be cleared up.

Reverend the Hon. FRED NILE: If you have the additional power would you need further staff to be investigating other than those you have now?

Mr CRIPPS: I do not think I would get involved in investigating crime any more than I am directed to do so by the Director of Public Prosecutions. That is what we do now to the extent we can do it, and that is what bothers me—that we may not be authorised to be doing that. But that is as far as I would want to go. Not just anybody, not just the Commission deciding something, but directed by the Director of Public Prosecutions that we need this extra evidence, we cannot use the admission, and would you go and get these statements? That is what I wanted to make clear.

Reverend the Hon. FRED NILE: Despite that protection for witnesses, you cannot think of a case where a witness has appeared and willingly disclosed corruption—

Mr CRIPPS: That we did not know about? No, I have not.

Reverend the Hon. FRED NILE: —that has been free and open?

Mr CRIPPS: It sounds good to say it and, as I say, people often think that once their theories do not meet the reality of what happens later on it makes them not abandon their theories so much but it reinforces them, I think.

Reverend the Hon. FRED NILE: There are people who are opposing your request. The thought I had would be that some of the fears they have will not occur. Is it better that we have a trial period and proceed with a change of powers and we observe that for a year or two years and then review it if there is any evidence that it is leading to some abuse?

Mr CRIPPS: My view about that would be that it is really a matter for Parliament. I think, if I say so with respect, that that is not a bad idea; at least you can work it out. I know there was quoted a piece of the

speech I gave on the twentieth anniversary of this, about people saying it is like the KGB and everything like that. What was not quoted in that was that the next paragraph said it never happened. Although people were saying it was like the KGB and you are going to be worse than the South African police force—and that was all quoted in this letter—what was not quoted was that I raised that for the purpose of telling people that that had never happened in 20 years.

Mr GREG SMITH: You say in your submission, at page 3:

> Generally, most witnesses deny any involvement in wrongdoing despite being reminded of the criminal consequence of giving false or misleading evidence and only make admissions when presented with clear and compelling evidence of misconduct.

Mr CRIPPS: Yes.

Mr GREG SMITH: If that is most witnesses, would that not mean that you have other evidence that the department can use in any disciplinary proceedings?

Mr CRIPPS: Yes, it is possible they do. You might get a telephone intercept, for example. That can be used. But the simplest way of getting a finding of disciplinary misconduct is the frank admission of the person who has done it. That is what I am saying.

Mr GREG SMITH: Mr Waldon might remember this. Before the Police Integrity Commission was established, the Independent Commission Against Corruption was used also to do police investigations. There was a well-known one called Operation Milloo, involving Neddy Smith as a principal witness. Was it not the case that in those times an adverse finding of corrupt conduct was used by the police force or service, whatever it was called then, against particular officers?

Mr CRIPPS: I do not know.

Mr WALDON: I do not know either.

Mr CRIPPS: You would think it probably has happened because when they brought the legislation in separating police officers from other public servants, this just went in as if it was not a new thing. So you are probably right; it probably was there, but I do not know.

Mr GREG SMITH: There is a section in the Police Integrity Commission Act, I think it is 40, 42 or 40(3). I thought that was identical to your section 37.

Mr CRIPPS: I have a copy of section 40 here. I got this from Mr Waldon before coming here. Subsection (3) is:

> An answer made or document or thing produced, by a witness … before the Commission—

That is the Police Integrity Commission—

> is not … admissible in evidence against the person in any civil or criminal proceedings, but may be used in deciding whether—

And then it goes on at the bottom that not only is it everything the Police Commissioner can do to discipline but it goes on to say people taking proceedings for the purpose of disciplinary action under the Public Sector Employment and Management Act.

Mr GREG SMITH: I apologise. My focus had been on incriminating and civil material. Does the Commission operate taskforces with departmental investigators to pursue further evidence?

Mr CRIPPS: I will get Mr Waldon to answer that more. You must recall that when we start an inquiry into a thing we do not want them to do that because so often their starting their own independent inquiries wrecks our investigation. But the time comes when it is all public and nothing is there to say we mostly do get the cooperation of people within government departments for collecting evidence. Perhaps Mr Waldon can answer better.

Mr WALDON: We do not operate joint taskforces with government agencies. What we do is provide them with all the evidence we have managed to accumulate which is relevant to the particular disciplinary issue. As the Commissioner says, sometimes that can work against us. In the Susanne Ryan matter, for example, the

relevant department made use of that evidence in a way that the relevant tribunal later said was not appropriate. That process went on for about two years and at the end of that she was reinstated and no further action was taken.

Mr GREG SMITH: She had stood trial, had she not?

Mr CRIPPS: No, I do not think so. He had.

Mr GREG SMITH: He was her accomplice, and he was acquitted?

Mr CRIPPS: Yes.

Mr GREG SMITH: Not everyone is happy sometimes about an acquittal after it appears that a good case was run or a good case was available.

Mr CRIPPS: Let me say there was a good case available. As I have said earlier to this Committee, I do not want to point bones at everybody but when you get a lay down misère that fails, everyone who was involved in the criminal law knows better than most that it can derive from a number of circumstances. You can get an incompetent presentation, you can get a mad jury, you can get a stupid judge—these are all options.

Mr GREG SMITH: Or a defence counsel that the judge likes and he does not like the prosecutor.

Mr CRIPPS: You do not like saying this too much publicly but it is a fact. I think anyone who was in the prosecution of criminal law would know that. It does not happen often fortunately, but it does happen.

Mr GREG SMITH: Do your inquiries terminate once you deliver the report or do you have residual powers?

Mr CRIPPS: No. This is the point I was directing this Committee's attention to. We can have all these powers of doing all sorts of things while we are investigating. Once we have stopped investigating, we do not have those powers—unless we are investigating. We prepare a report and we send the report and recommendations to the Director of Public Prosecutions. It is after that that the Director of Public Prosecutions will say to us that we want you to get this additional information. I do not mean that my view about this is entirely free from doubt, because I think a lot of people might take the view that we can go on collecting evidence after we have published a report of an investigation. I just want Parliament, if it thought that it is appropriate for us to do this, to make it clear and stop being ambiguous.

Mr GREG SMITH: When you say you continue to collect evidence, do you use your compulsive powers?

Mr CRIPPS: No, I hope not. Certainly we would never use our compulsive power. That would be an egregious breach. If we are not investigating, we cannot use these powers.

Mr GREG SMITH: But it would be a practical way, such as using—

Mr CRIPPS: The problem I have is that if someone, after the Independent Commission Against Corruption has investigated, goes out to get a witness statement from someone else, they think it is the same as if the police are asking. They do not think that, by the way, the president of the local surf club would like to know this. They feel an element of compulsion that they have to, and I just want that cleared up.

Mr GREG SMITH: Your primary function is to expose corruption?

Mr CRIPPS: That is right.

Mr GREG SMITH: That is why you generally do things in public. You can do things in secret hearings but generally you finish with a public hearing, and that exposure is effective in deterring. Whereas, say, the State Crime Commission and the Australian Crime Commission tend to have their hearings in secret with a view to gathering evidence for prosecution. That was the difference in style that the Government fixed upon when it enacted the legislation and set up these Commissions. Is it not the case that the media and the public

expect you will all come up with convictions and, in a sense, you get the feeling that, unless you do, sometimes people might say you are not doing your jobs properly?

Mr CRIPPS: I think they do, and therefore we get that sort of feedback or backlash when you get people, as we did have in the famous Monto series—people who had admitted to engaging in it were allowed to resign and take all their entitlements. People think what is the point of exposing corruption if the people who are going to be corrupt—which, fortunately, are not the majority of public servants—know that nothing is going to happen to them.

Reverend the Hon. FRED NILE: There is no penalty.

Mr CRIPPS: Yes.

Mr GREG SMITH: And you feel that unless you push these issues, Parliament—the Government—will not do so on its own initiative because it is distracted by other things that are going on at the time.

Mr CRIPPS: They are my masters; I am not going to criticise Parliament. But that is right. I put it on the basis that our essential function—however we talk about education, exposure—is to diminish corruption in New South Wales, and this is a way of pushing that agenda forward.

Mr GREG SMITH: But can you see a case for being able to continue to serve notices on people forcing them to produce information after you have finished your special investigation and had your hearings and put in your report, when you are in the brief preparation phase?

Mr CRIPPS: I do not know. I really have not thought about this. Do you mean to treat them as though they are under compulsion of criminal penalty if they do not give us the information?

Mr GREG SMITH: There may be witnesses who are not targets—

Mr CRIPPS: Yes, I know.

Mr GREG SMITH:—who will not assist because they are scared or they feel that they do not want to dob their mate in—

Mr CRIPPS: I do not think we should punish them though.

Mr GREG SMITH: —but who might respond to a notice?

Mr CRIPPS: Well they might respond to the notice but are you suggesting that that notice carries with it disobedience; that notice carries with it a criminal penalty? The police do not have that, do they?

Mr GREG SMITH: No, but you have that when you are conducting your special investigations.

Mr CRIPPS: Yes, we do.

Mr GREG SMITH: So there is a penalty for people who are just witnesses, not targets or not people who are corrupt if they do not cooperate. Is that correct?

Mr CRIPPS: Yes.

Mr GREG SMITH: Sometimes witnesses do not want to cooperate because either they do not want to dob in their mate or they are scared. That is why you have this power of compulsion to get them to cooperate because otherwise your organisation would be frustrated in its investigation. Can you not see an argument for perhaps having a power to continue with the investigation if necessary to finalise the brief?

Mr CRIPPS: I can see an argument. I might ask Theresa to speak about this because, after all, she came from Queensland, where they did have that power.

Ms HAMILTON: They have a clear power to continue to gather evidence at the request of the DPP but I do not think they did actually use compulsory powers as part of that. But I can say there does often reach

the stage where we are gathering information for the brief where there is a lack of cooperation in providing information. It is certainly not provided as readily as when one can serve a notice with a return date, so I guess it is something the Commission would have to think about. It can sometimes be a practical problem that we do not have the same power to compel information when we are gathering the evidence for the brief after the investigation as before.

Mr GREG SMITH: You may want to chase the paper trail into the banks and the banks may not produce unless they are compelled to. They could be forced to by a search warrant, which is just using ordinary powers that are available to police—and you have police attached to your organisation who could use search warrants. Do you know whether that is done on occasions?

Mr CRIPPS: You mean after we have finished?

Mr GREG SMITH: After the investigation.

Mr CRIPPS: We actually have independent power. I can authorise the issue of search warrants if I want to.

Mr GREG SMITH: But what about after your investigation is completed in the sense of a report?

Mr CRIPPS: No.

Mr WALDON: No, usually in those situations we would rely on the DPP, if they decide to proceed with the prosecution, to subpoena the relevant reports. But there are difficulties with that because you do not know what the records are until you have commenced the action and you have actually issued the subpoena.

The Hon. GREG DONNELLY: In light of your earlier comments about corruption, and specifically your reflections about the nature of the evidence you have received over 4½ years, could you reflect on the educative role of the Independent Commission Against Corruption and how you see that as functioning and having some effect in capping the issues of corruption in New South Wales?

Mr CRIPPS: I have to say my view is that everything the Independent Commission Against Corruption does is directed to the diminution of corruption in New South Wales. It is probably a mistake to think in terms of: Is it better to expose it publicly like we do or is it better to send people out to educate them so they do not do it? You must bear in mind that although we have different divisions of the organisation to effect this sort of work, my view is that it is all directed to corruption diminution. Having said that, I do think exposure of corruption is a very salutary lesson to people in the community who are disposed to be corrupt, particularly if at the end of the day something attaches to their conduct. I think education is very important provided that education is well structured. It appears to be well structured so far as other people tell us. For example, the Canadian air force adopted a document we put out addressing the question of how you deal with conflicts of interest. We do get quite a reputation throughout the world really as to how good our corruption prevention is. I am always getting letters from organisations overseas.

One of the problems, as you probably would know more than anyone, it is almost impossible to know how much corruption is there and how much would be there but for the Independent Commission Against Corruption. People have to assume, "If you do this, this will probably diminish corruption", and I think you have to assume that most people in the public service—I know we tend to deal with people who are not honest—are honest and you cannot be starting to tell them they have got to do things which make them think that every time they come to work everyone mistrusts them. These are problems we have to deal with, but I do think our education system works fairly well because we are continually getting requests to update it.

I think it has appeared to work well in the case of the Wollongong one, but the Wollongong one is a good example because that is a combination of the investigation and the education that followed from it. My general view is that we are better at educating when that education derives from something we have really uncovered in an organisation rather than thinking what could go wrong and then starting to deal with something, which we do not know. But our most effective education does come, I think, from the lessons we learned in exposing corruption. But at the end of the day I have to say what we are aiming at is a reduction in corruption, which is the best way of doing it and in what circumstances.

Mr JONATHAN O'DEA: Commissioner, you have outlined your views well and put up a fairly good case for amendments to be enacted. Assuming those amendments are passed, when would you say that they should be operative in terms of investigations that might be underway currently but not yet completed or investigations that have not commenced?

Mr CRIPPS: That is a good question. I would be opposed to having any retrospectivity of this. I would be opposed to anybody having their answers given against them when they have been told by me that would never happen. I think that would diminish, I suppose, the integrity of this Commission—thinking the Commissioner has given a solemn understanding that such had happened and now—so I would not allow that to happen to anyone who had already been told that they were not going to be used.

Mr JONATHAN O'DEA: So that is the crucial point—not if the investigation has commenced?

Mr CRIPPS: After that, the quicker the better.

Mr JONATHAN O'DEA: There may be investigations that have commenced where they have not been told that. That would be the crucial time.

Mr CRIPPS: Yes.

Reverend the Hon. FRED NILE: Can you clarify whether it will involve extra costs and staff? You did not finish your comment earlier.

Mr CRIPPS: No.

Reverend the Hon. FRED NILE: I am only thinking that people may be critical of it and be against it.

Mr CRIPPS: Certainly if it were kept the way it is and people wanted us to be more proactive in making sure that by collecting evidence we could get people disciplined, whereas we previously could not or, for that matter, convicted, we would probably need more staff to do that. You only have to look at the Hong Kong ICAC. The Hong Kong ICAC, with a population of seven million people, actually has all these protections that people have got, so they have to get their evidence from derivative sources. They have to employ 1,500 people to do what we do with 110. So you would need a lot more if you had to do all this extra work. I think anyone who has been associated with the Director of Public Prosecutions would understand that.

Reverend the Hon. FRED NILE: It is a question of whether the Director of Public Prosecutions has more resources or—

Mr CRIPPS: Well, the DPP has a problem, which I think you would have to take up with the DPP whether it is a problem. The DPP takes the view that as an organisation it really is there to present the case; it is not there to investigate, as I understand it, and they are very strong on that. I also understand that the police say that almost everything that the Independent Commission Against Corruption sends over is incredibly complicated and most of it is very complicated in financial terms and you have to make an analysis of complicated transactions. I think the police think they have enough to do and anyway the Independent Commission Against Corruption is doing it, so—

Mr GREG SMITH: They can fix it.

Mr NINOS KHOSHABA: If there is an allegation against a person or an organisation, at what stage does it become public?

Mr CRIPPS: As I think was pointed out by Mr Smith, unlike a lot of other institutions that are investigating, we have this facility for public inquiries. The legislation in turn sets out what we have to take into account when we want to start a public inquiry as opposed to a compulsory examination, which is a private inquiry. But I think it can be generally summed up this way: it can be generally summed up by saying we are fairly confident in our own minds that there is something that needs to be exposed. We are conscious of the fact that we might be wrong and therefore the people against whom these allegations might be made should be given the opportunity to know precisely in public what it is we know and are acting on, so they can put to us what it is they say should result in a finding of no corrupt conduct.

There is one exception to this that I have never had to deal with at the present time and it is one that I am always reluctant to deal with whenever it is raised. There used to be a suggestion by some people that the higher the public profile of the person involved in the allegation, the more one should think of having a public inquiry. I tend not to take that view, I have to say, but I know other people do because they say this strengthens public perception. If they are equal under the law, generally they should be equal under the law for ICAC, I think, our decision on whether we investigate should be based on whether we think it is appropriate to expose this and to give people the opportunity and for people to know who have heard both sides whether we have behaved. It is a big thing that ICAC has got going for it, I think, as opposed to a lot of crime commissions and the like. It is like courts; people know what we have done and why we have done it. That is the thing that makes me go public.

Mr GREG SMITH: In relation to using evidence taken in the Independent Commission Against Corruption in civil proceedings, do you feel that should be limited against defamation proceedings?

Mr CRIPPS: It was said to me by someone in Cabinet, "Well, what about defamation?" I said, "What about defamation?" I do not know what they are talking about. What is defamation?

Mr GREG SMITH: If you are a witness in a proceeding where you are compelled to answer and you are asked certain things and you defame the target.

Mr CRIPPS: I would have thought if not absolute, certainly you would have a privilege that the law would recognise that could not be the subject of defamation.

Mr GREG SMITH: Except would it not be the case that people could be scared off by the threat of defamation proceedings if the evidence was not protected?

Mr CRIPPS: Defamation proceedings not in our Act but in the Defamation Act protect them.

Mr GREG SMITH: I know there are certain offences.

Mr CRIPPS: There are, but if there were a problem about it you would just make sure that you extend the defamation privilege. The Act says there is absolute privilege, the same as in Parliament. The matter is published by a person or body, and that is the Independent Commission Against Corruption. So I think that would cover them myself, although I would have to say—

Mr GREG SMITH: You are not seeking to change that?

Mr CRIPPS: No, when it was put to me I said to whoever it was from Cabinet, "I don't really see what the problem is, but if there is a problem just change the Defamation Act."

CHAIR: We have covered some ground on your principal functions, coercive powers on investigation and what your activities would be after investigation is completed. As it stands at the moment, once your investigation is completed and you submit that report and give evidence to the Director of Public Prosecutions, your investigation is completed. It is reasonably clear that you cannot use your coercive powers but you do chase up some things for the Director of Public Prosecutions, a statement from someone or something like that, relying on them doing it voluntarily. It has been put to you by Mr Smith in a general way about continuing to use your coercive powers after that. I would like to know what you think about that because that would necessarily involve, would it not, not only those extra resources but a continuing—

Mr CRIPPS: Could be called back five years later.

CHAIR: Whilst ever the DPP had it, you would run alongside their operations. Firstly, would that not be in stark contrast to the original purpose of the Independent Commission Against Corruption and would it not also have profound implications for your office?

Mr CRIPPS: I think it might, and that is one of the reasons that I really wondered about whether we should make it a third function, as opposed to just tacking a bit on to the end of section 14. Could I take that on notice and we will talk about this? I have not talked about it to date so I do not want to give an opinion off the top of my head.

CHAIR: As I understand it, what you are seeking is the clarification that after an investigation is completed and the Office of the Director of Public Prosecutions get their brief—and I understand that the Memorandum of Understanding is working better than it was before—

Mr CRIPPS: Yes.

CHAIR: You are preparing those briefs along the way as an investigation proceeds.

Mr CRIPPS: Yes.

CHAIR: So that at the end of the investigation you have the brief to hand over and the Director of Public Prosecutions might write to you saying, "We need this, this and this", and if it does not involve any coercive powers you are able to assist them. As I understand it, you are seeking clarification that you can do that?

Mr CRIPPS: Yes.

CHAIR: You can then revisit the matter and approach a person to get a statement, provided they are willing to give it to you, and not use those coercive powers. My understanding is to do that is unclear in the Act and you want that clarified?

Mr CRIPPS: If that is what Parliament wants us to do. I would like it to be cleared up and unambiguous.

CHAIR: These are very complex matters and it is no good handing them over to the police because, from what you tell us, they have to then reorientate themselves from scratch.

Mr CRIPPS: Yes.

CHAIR: That is why you are seeking clarification. It is not my understanding that you are seeking to have an ongoing ability to have investigative powers.

Mr CRIPPS: No, not at all.

CHAIR: The proposal is that we have a hearing today and next Monday and once all the evidence has become public the Committee would then ask you to return at a later date.

Mr CRIPPS: Yes.

CHAIR: That would give the Commission the opportunity to respond to any issues that have arisen. That may mean on a sitting day of Parliament for perhaps an hour or so?

Mr CRIPPS: Yes, I would be quite happy to do that.

CHAIR: It is a matter where the Committee may feel the Commission needs to establish its case for the changes. Consistent with that—once the evidence is out there—the Committee would be happy to give the Commission the opportunity to address any issues that have arisen.

Mr CRIPPS: Thank you.

(The witnesses withdrew)

(Short adjournment)

HARVEY LESLIE COOPER, Inspector of the Independent Commission Against Corruption, Lawson Square, Redfern, sworn and examined:

CHAIR: The Committee has received a submission from you in relation to this matter. Do you wish that submission to be part of your evidence today?

Mr COOPER: Yes.

CHAIR: Before the Committee asks any questions would you like to make an opening statement?

Mr COOPER: Yes. The problem with my submission is that there is a preliminary question of the philosophy that you wish to adopt towards the powers of the Commission. Do you want it to remain as it is—an investigative body—or do you wish to add to that and give it if not full enforcement powers then at least powers that facilitate specific classes of orders such as disciplinary action and recovery of moneys? That is the preliminary question. I have answered those questions in favour of an extension of the powers. The extension of the powers I have set out in my submission. I do not think it would add anything if I were to talk further on those.

CHAIR: You have gone further than perhaps what would normally be expected in a question such as this. We have a Commission with powers to compel a witness to incriminate himself or herself.

Mr COOPER: Yes.

CHAIR: The restriction, of course, is how that evidence is used. The original idea of the Independent Commission Against Corruption was to expose corruption in a public way to act as a deterrent and once that was done it may deter others of a like mind to conduct himself or herself in that manner—therefore a balance was achieved. You go further than that in your submission. You say a finding of fact and the admissions made would be prima facie evidence when used in other proceedings and the onus then shifts to the defendant on the balance of probabilities to address those matters. If that were adopted for those proceedings what would you see as the implications? For example, would you expect a witness to be able to have the resources to properly defend or rebut that kind of evidence in the scheme of things? What proceedings were you envisaging?

Mr COOPER: For argument's sake, let us take first of all disciplinary proceedings. I would expect that if the Commissioner made findings in a manner that would be defined in the legislation then that would be available to the employer in the first place or to the appropriate tribunal in the second place as prima facie evidence. The onus would then shift to the employee to rebut that. Would he have the resources to do so? Well, they have the resources now when they appear before the various tribunals for reinstatement or continuation of their employment. I have noticed in quite a few cases the employee resigns so that is not an issue. What I am considering here is that it saves the employer, in appropriate cases, the cost of in effect re-litigating what has already been litigated before the Independent Commission Against Corruption.

CHAIR: Obviously this kind of inquiry has to look at policy matters and the balance between achieving the aims of the Commission—which is an investigative Commission and not a law enforcement agency like others around the country—of getting the information and then the use to be made of the information received. The public interest is being balanced with the rights of the individual who is compelled to give evidence. They are very strong powers. You are no doubt then of the view that the public interest in being able to use this evidence outweighs the private interest of that individual?

Mr COOPER: Yes, because if there is a finding that that individual has so abused the trust put in him as an employee that he has been guilty of corruption as defined in the Act then the public interest requires that such a person should cease to be employed in a government agency.

CHAIR: You are talking about a finding of fact—a finding of fact having been made by the Commission on certain evidence: transcript, telephone-intercept evidence, oral or documentary evidence. That occurs now and that evidence can be used but what we are talking about here is compelling an admission—which already happens—but also being able to use that admission. We have a situation where not only would you be compelled to give evidence but you know that that evidence is going to be used against you. I take it you are firmly of the view, firstly, that the public interest outweighs the interests of the private individual in that regard. Secondly, you have mentioned public trust. Are you of the view that a public servant in the New South

Wales public service has that level of trust bestowed upon him or her by the New South Wales community that they should be subject to having their own admission evidence used against them?

Mr COOPER: That is my personal opinion, but I do concede there are arguments to the contrary, and that is where one gets to the question of policy—which of course is for you to decide. But that is my personal opinion, that if you look at what I consider to be the public view they get pretty hot under the collar when they see people, in effect, betraying the trust that is put in them as employees of a government agency and they would regard that as an appropriate balance. But that is just my personal view.

CHAIR: The reason I ask is because police officers in the Police Integrity Commission are in a very special position because they have that discretionary power and they have a very high position of trust in the community and their admissions can be used against them in disciplinary proceedings. The argument or the discussion topic then is: Are public servants regarded properly as police officers in that same level of trust?

Mr COOPER: By the time the matter gets before the Commission it usually involves public servants or employees of a government agency who are fairly high up in the hierarchy of that particular agency and who have powers to, for example, award contracts for work or supplies to that agency, and in that respect they are in a position of trust.

CHAIR: With regard to civil matters—this is perhaps one that is less clearly defined or set out—you take the same view that the evidence of admissions should be prima facie evidence in civil matters?

Mr COOPER: As stated in the questions, limited to the recovery of moneys wrongfully taken from the agency.

CHAIR: Do you see any implications of that where employers are able to start their own actions against an employee or a former employee in a civil action? Civil actions can encompass a whole variety of remedies. Do you see any implications insofar as witnesses being willing to come forward and make admissions or give information that would deter that?

Mr COOPER: When you say witnesses willing to come forward do you mean—

CHAIR: In the Commission to admit to things.

Mr COOPER: From what I am told, as things stand, witnesses do not disclose everything because the evidence they give cannot be used against them. According to what I am told, the fact is that they give evidence only on what they think the Commission already knows and that further inducement has to be applied to them to make full admissions. The original idea that people would be prepared to make admissions because it could not be used against them has, in fact, not materialised. That is the view I have accepted as told to me by the Commissioner.

Ms DIANE BEAMER: That is certainly the view he put to us.

CHAIR: That is the view that the Commissioner has put to the Committee; that is what he has stated on a number of occasions.

Mr COOPER: I looked up, as I said in the submission, a number of the past minutes of this Committee and I derived it from that. I also derived it from personal discussions with the Commissioner.

CHAIR: You are aware that places like the New South Wales Crime Commission use the Criminal Assets Recovery Act. I note there have been instances where, for example, in a recent case with the New South Wales Fire Brigades there were orders made for around $1 million for recovery, et cetera, and they are the orders that they make—there is either an order for the repayment of money or an order for the recovery of assets to make up for the money. So there are quite a few variations of powers that that brings. You do not think that that can be used for that purpose by ICAC instead of releasing or removing that restriction on civil proceedings?

Mr COOPER: As I understand the Criminal Assets Recovery Act, the application has to be made by the Crime Commission to the Supreme Court—number one. It cannot be made by the employing agency. Number two, it requires the payment of an amount which could be described as the value of the proceeds derived by the person from illegal activities. So there does not have to be a conviction under that Act. I do not

know whether the Crime Commission would be willing to take that action but it may be that if the Act were amended to give the ICAC the power to make an application under section 27 of the Criminal Assets Recovery Act it might not be a bad idea. I would be quite happy with that.

CHAIR: You make some comments about the third part of the terms of reference. I take it you do not see a connection between the third term of reference and the other two proposals, in that one is not contingent on the other?

Mr COOPER: That is probably a fault in my reasoning.

CHAIR: I do not think it is because I think that comment has been made before and it probably will be made again by the time this inquiry is completed. But you make some interesting comments about the assembling of evidence in your submission. Do you think moving this practice of the ICAC from another function in section 14 to a principal function in section 13 will have implications for the nature of ICAC itself and what it was originally intended for? Do you see any implications about that? The argument is that it is starting to create a law enforcement body itself.

Mr COOPER: I would not call it a law enforcement body; I would call it an evidence-collection body. As I understand the current situation, because the assembling of evidence is not a primary function, if something comes in which occupies the Commission in its primary function of investigating corruption then the assembling of evidence gets put in the background. Whether that would affect the operations of the ICAC would depend, in my view, on the way the ICAC organises itself internally. If it were made a primary function, I would imagine—the Commissioner would have more accurate views than I have—that he would set up within his offices a particular section dealing with the assembling of evidence, as directed or recommended by the DPP.

CHAIR: My question is, given the nature of the first two terms of reference that you have addressed very sharply and very directly, do you think there is a need to change that function of the ICAC? You say they do not have any relationship to the first two terms of reference. Would you be in favour of ICAC changing its role like that? Do you think there is any need to, given its non-relationship with both the other two terms?

Mr COOPER: I see the third term of reference as an attempt to overcome the problem of the collection of evidence for prosecution falling between the two stools. Maybe I have misinterpreted that particular term of reference, but that is the way I see it. You have got a situation where for one reason or another the assembling of evidence is not done by the DPP but they ask ICAC to do it and ICAC does it and if it is not enough it would go backwards and forwards. I see that as something that has really got to be determined by organisation rather than perhaps by legislation. It may mean, as I mentioned, that the Commission should have extra resources to enable it to do that part of the work more efficiently.

CHAIR: There is a memorandum of understanding between the two agencies now and I understand that is working better than it has been. Is that the sort of thing that you are happy to continue to have?

Mr COOPER: Yes. That is the way I see that particular point.

Reverend the Hon. FRED NILE: As the Chairman said, you are very strong in your submission in supporting the two amendments and you have given the arguments for that, which I think are adequate. As the Chairman said, you do not see that the third amendment should be necessarily linked with the first two: if the first two were not proceeded with the third one could be proceeded with as a separate amendment.

Mr COOPER: Or considered.

Reverend the Hon. FRED NILE: But there does seem to be some tension between the DPP and ICAC in getting successful prosecutions. From what we gather, the DPP often says that the material they get from the Commission is not sufficient and that is why they come back and say, "We want more information". I believe it is important that we resolve that situation and not let it just linger on as it has been now for some time. I think that has created a criticism of the ICAC that you do not see much fruit for their efforts in terms of prosecution. Would you agree with that?

Mr COOPER: I do not want to put blame on one side or the other. What I think needs to be done is to set up some sort of single organisation. It may be that the appropriate course to take is to give the DPP further resources so that it can manage the whole thing in house. That might be a more efficient way. I do not know the

views of the Commission on that. I know from past experience that when the DPP wants some information to base a criminal prosecution it contacts the police and sometimes it gets the information it wants or the evidence it wants promptly, sometimes it does not. But at least there is a set procedure: there is personal contact between the officers of the DPP and the police officers; they can get on the phone—it is a much closer system of organisation. But when you have got another department coming in you have got a problem, and, as I see it, it is a matter really of organisation whether you give it all to the DPP.

I personally am not in favour of making the Independent Commission a prosecuting body; I would rather leave the prosecution to the DPP. That, as I see it, is not the problem here. The problem here is in working out a good system of organisation so that the evidence is delivered to those crown prosecutors in time for them to stand up in front of the court and present their case.

Reverend the Hon. FRED NILE: You also state in your submission that you are concerned as to whether the power to assemble evidence would extend to a power in the Commission to obtain further evidence at the request of the Director of Public Prosecutions after it has completed its investigation into corruption?

Mr COOPER: Yes.

Reverend the Hon. FRED NILE: Why are you concerned?

Mr COOPER: I am probably being a little bit picky or pedantic here, but, knowing the way lawyers think, they could argue that the word "assemble" means getting together things you already have and it does not include getting new things in. That may or may not be a valid point; I just suggest that if you are going to amend it to cover this particular power at least get the parliamentary draftsman to have a look at whether the word "assemble" is an adequate description of what might be required.

Reverend the Hon. FRED NILE: Do you have another word in mind—"finalise" or "collate"?

Mr COOPER: Assemble or collate such information as the Director of Public Prosecutions may require, or provide the Director of Public Prosecutions with what evidence—

Mr GREG SMITH: A brief of evidence.

Mr COOPER: A brief of evidence.

Ms DIANE BEAMER: But is the problem the second part, that is, after completing its investigation? That is where being pedantic comes in. It finishes its investigation and has no further power to investigate, but the Director of Public Prosecutions says, "There is a bit of a hole here"—in the collation, assembly or whatever—and it has to have the ability to go back at some stage and gather more information. So it is being pedantic about after it has finished as opposed to getting all the stuff together.

Mr COOPER: That is what I am saying. I do not want to start giving drafting evidence—I think the parliamentary draftsman can do a better job than I can—but what I was doing was sort of flagging a matter that might well need attention. That is all I am saying.

Reverend the Hon. FRED NILE: Perhaps it should refer to new evidence.

Mr COOPER: Yes, or additional evidence.

Ms DIANE BEAMER: In relation to the first term of reference regarding disclosures, we are going to have one group of people saying we need to be able to do this and then we are going to have another thought, which is probably going to come from groups like the Bar Association, that this is a fundamental right that every person has in terms of their civil liberties. You come down on the side of saying that we need this because people do not fully disclose until, "Here's a video of you doing corrupt activity" and "Oh, yes, I was there on that day". We are protected in some regard. Why do you think that this power fundamentally needs to be changed?

Mr COOPER: Basically—this is my view—for the protection of the community so that in dealing with disciplinary proceedings those who have betrayed the trust put in them as senior officers in a government agency are no longer there to betray that trust again. I have great sympathy for what, as you say, the Bar

Association is going to say and civil libertarians are going to say—they have historical arguments in their favour—and the question is weighing that up against what I regard as protection of the community from illegal conduct.

Reverend the Hon. FRED NILE: There was a suggestion earlier that we should envisage a two-year trial period to bring in these changes to ascertain whether the fears of the Bar Association and others were justified, and probably they would not be. Do you see some advantage in that?

Mr COOPER: By all means; I am not against that by any means.

Mr GREG SMITH: This is the situation, I suggest, that happens with the Independent Commission Against Corruption briefs or the material that is sent: they mainly collect transcript. A hearing brings up a transcript. The Criminal Procedure Act requires the Director of Public Prosecutions to produce a brief to hand up to the court and a timetable is fixed once someone is charged and you have to serve all your statements and matters of that sort. They operate by signed statement. Even financial documents have to have a bank affidavit or something of that sort. My experience—and I suggest that it is a common experience, and I have worked for the Director of Public Prosecutions as a Crown—is that you often get a bundle of transcript with a covering report. This is what happened in the past and I assume it is still happening to an extent because the Independent Commission Against Corruption did not feel it had sufficient resources to prepare a brief. It probably had to use its police investigators to do that and it had them working on other things. Is that your understanding of the problem?

Mr COOPER: It is certainly not inconsistent with my understanding of the problem. I must confess I was not aware of the practice of just giving transcripts. I can well appreciate the difficulties that the Director of Public Prosecutions would have in that circumstance.

Mr GREG SMITH: Would you see it as necessary that someone from those two agencies has to put the brief in admissible form for the Director of Public Prosecutions because that is what the police do?

Mr COOPER: In that particular case, as I mentioned in my submission, it may well be a question of resources and the person who prepares the brief understands what is required. I could well understand that those in the Independent Commission Against Corruption may not understand it because it is not their way of working. It may well be that either the Independent Commission Against Corruption has to have the people with that understanding and skill or the Director of Public Prosecutions does it. It is a question of resources, as I see it.

Mr GREG SMITH: Do you agree that it would be advantageous to have someone who has worked on the investigation and knows what it is all about be in charge of at least assembling the evidence?

Mr COOPER: As long as he or she understood what was required for the purposes of admissible evidence in the proceedings, yes, I agree entirely.

Ms DIANE BEAMER: What you are suggesting is someone who is skilled in two areas—understanding what the Commission wants and also what the Director of Public Prosecutions wants—so that the brief that goes across is in the language that the Director of Public Prosecutions requires it, not as required for a document that is being printed for the Parliament or to prove that corruption took place.

Reverend the Hon. FRED NILE: And that should be happening after the memoranda of understanding. That problem was identified earlier.

Mr GREG SMITH: You have said that one of your reasons for being cautious—I do not know if you used the word "pedantic"—about the assembling is that the investigation is over. Under the Independent Commission Against Corruption Act do you think there is a point where an investigation is over or, once the Commission commences an inquiry, why can it not after its report continue to use its powers to, for example, obtain documents towards the assembly of the brief, such as notices to require production?

Mr COOPER: They certainly have power to assemble evidence for the purposes of assisting the Director of Public Prosecutions. There is no argument about that. It is just that I am having some misgivings about the limits upon the word "assemble". That is all. I may be over-cautious here and all I am doing is

flagging my own fear, which may be unfounded, so that it can be brought to the attention of the parliamentary draftsman so that he or she can do something about it.

Mr GREG SMITH: Do you say that, after it has delivered its report, the Commission cannot continue to use its powers for the purpose of advancing the brief?

Mr COOPER: No, I think it has those powers.

Mr GREG SMITH: I direct your attention to, for example, section 19 of the Act, which relates to incidental powers. Section 19(2) allows the Commissioner or officer of the Commission to seek the issue of a warrant under the Surveillance Devices Act. There does not seem to be any limit to periods or even reference to conducting special investigations or using compulsive powers to use the listening devices authority. Is that right? Do you agree with that?

Mr COOPER: Yes, probably.

Mr GREG SMITH: From your experience, where there is publication of criminal or corrupt activity by people often they will talk to their colleagues or family and that is often a very good opportunity to gather further evidence that can incriminate them. Do you agree?

Mr COOPER: It can be, yes.

Mr GREG SMITH: Do you understand it as shaking the tree?

Mr COOPER: Yes.

Mr GREG SMITH: It is a very common investigative method used by police and others.

Mr COOPER: Yes.

Mr GREG SMITH: There is no reason why the Independent Commission Against Corruption could not practise that method of gathering further evidence. Is that right?

Mr COOPER: As far as I can see, they do. When I was preparing the report or the audit on search warrants, they were using that at least on two or three occasions.

The Hon. GREG DONNELLY: In relation to how the new memorandum of agreement is working between the Independent Commission Against Corruption and the Director of Public Prosecutions, we are led to believe that it has improved or gone some of the way to improving the way in which matters are dealt with between the two organisations to facilitate a smoother working through of issues. Is that your understanding or is that the feedback you have received or observed firsthand?

Mr COOPER: What goes on between the Commission and the Director of Public Prosecutions is really outside my sphere of investigation and I cannot comment on that from personal knowledge.

The Hon. GREG DONNELLY: In terms of the agreement itself, are you familiar with the terms?

Mr COOPER: I have read it; I do not claim to know them all. From what I have read, I thought it was a very comprehensive document.

Mr JONATHAN O'DEA: If you saw the amendments go through, or as broadly proposed, what sort of extra resourcing would you see perhaps as necessary within the Independent Commission Against Corruption and also within your own office in terms of overseeing the additional responsibilities?

Mr COOPER: Within my own office at this stage I do not see any need for extra resources. Within the ICAC I would see perhaps extra people who would devote themselves to the preparation of the criminal brief. How many that would involve I am not really in a position to say. That would be really a matter for the Commissioner to assess.

CHAIR: Thank you very much for your attendance.

Mr COOPER: Would I be out of order in raising before the Committee a totally separate matter? If I am, please say so.

CHAIR: I do not think so, as long as it is within the statutory functions of the Commission.

Mr COOPER: It is within the statutory functions.

CHAIR: Good.

Mr COOPER: One of the things I wanted to do was to conduct an audit into the use by the Commission of telephone intercepts under the Federal telecommunications interception legislation. The problem is that when I asked for information relating to the warrants it was pointed out by the Commissioner and supported by advice from the Federal Solicitor-General that the Commissioner is precluded from giving information relating to telephone intercepts to the inspector in terms of an overall audit but not in terms of a specific targeted allegation involving misuse of telephone intercepts. This means in effect that I am unable to conduct an audit into the use of telephone intercepts.

The Ombudsman does look at those intercepts, but only for the purpose of checking whether the appropriate records are kept and the documentation is in order. He does not look at what I consider to be the real question; that is, whether the intercepts are used legitimately for the purposes or objectives of the Commission as set out in the Act and not for some other private purpose. Obviously, I must apply to the Federal Attorney-General for an amendment to be made to the legislation. If I were to make such a submission the Commissioner has indicated that he would support me. I wonder whether the Committee has any particular views on the matter. I understand it is a matter that you may wish to consider separately.

CHAIR: I am sure that it would concern the Committee if you felt that you were not able to perform an audit in the way you wanted to and you had some obstruction—as I understand it, federally related.

Mr COOPER: I emphasise that it is not the fault of the Commissioner.

CHAIR: I gathered that, and that the Commission is hamstrung by the legislation. The Committee will certainly look at that and take on board your views and the Commissioner's views to ensure as best we can that you are happy with the way you are able to do your job. I understand your concern that you are unable to do that because of the Federal legislative inhibition or obstruction. We could perhaps seek your formal views when we examine you for the yearly report. We also have the Commissioner's annual report hearing coming up and we may raise that issue. We may well support you in having that amendment made.

Mr COOPER: Would I be out of order in putting this in writing to the Committee?

CHAIR: Not at all.

Reverend the Hon. FRED NILE: That would be the way to go.

Mr GREG SMITH: Is there any reason you are limiting it to telephone interception? Why not listening devices? I know that would be a lot of work.

Mr COOPER: I am doing it one step at a time. I did search warrants. The next step I thought was important was telephone intercepts. I have been stymied on that. Yes, I am going to do the other forms of interception, but they are covered by State legislation. They have similar provisions to the Federal Act, but they are not quite as proscriptive.

Mr GREG SMITH: Has anything prompted you to be suspicious that there a might be misuse of these powers?

Mr COOPER: No. It is just part of my duty to audit.

CHAIR: We appreciate that. Thank you for telling us that. Thank you again for attending. We will certainly take that on board.

Mr COOPER: I appreciate that.

Reverend the Hon. FRED NILE: And you will put it in writing?

Mr COOPER: Yes, I will.

(The witness withdrew)

JOHN WILLIAM PRITCHARD, Commissioner, Police Integrity Commission, Level 3, 111 Elizabeth Street, Sydney, and

MICHELLE MARGARET O'BRIEN, Commission Solicitor, Police Integrity Commission, Level 3, 111 Elizabeth Street, Sydney, affirmed and examined:

CHAIR: Thank you for attending this hearing. We received a submission from you. Do you wish that submission to be part of your evidence today?

Mr PRITCHARD: Yes, if that is suitable.

CHAIR: Do you wish to make an opening statement?

Mr PRITCHARD: No. I am happy to answer questions.

CHAIR: In your sphere of operation evidence of admissions made by police officers and other people can be used in disciplinary proceedings. Can you give the Committee an idea of how that operates? What are the mechanics of that? Do you warn witnesses? What is your experience?

Mr PRITCHARD: Together with the normal warnings that are given to witnesses in relation to the use of evidence, sworn police officers have extra directions that relate to those matters provided for in section 40 (3) about the further use that can be made of the evidence they give under compulsion before the hearing from the point of view of matters under sections 173, 181D or 181 (3) (a) of the Act. That is in addition to the normal advice that may be given to a witness who is not a police officer. The provision was amended last year to provide for a similar use with regard to administrative officers, being non-sworn officers of the New South Wales Police Force. Depending on their employment, it may well also extend to officers of the Crime Commission given the Police Integrity Commission's jurisdiction over that agency as well. The mechanics are that not all transcripts are given to the police. An assessment is made on behalf of the Commission as to whether the material may be of relevance to the Police Force in relation to the management or welfare of the officer in question. Specific sections, such as section 40(3), relate to the management of the officer and could include actions in those relevant sections.

CHAIR: So a variety of actions can be taken by the Police Force and that information can be used in any of those situations?

Mr PRITCHARD: That is right.

CHAIR: What is your experience in applying this with regard to the evidence that you obtain? Have you drawn any conclusion or impression that it has implications for evidence? Is it a deterrent in terms of getting admissions or does it work? Do you get that evidence in the hearings you conduct?

Mr PRITCHARD: I do not think it makes a difference to the attitude a particular witness may take to the hearing. Bringing home to witnesses the fact that the evidence they give can be used by their employer might tend to focus their mind a little more on how they answer questions. I do not think you could say with any certainty—and I do not think there is any research; it would be more anecdotal—that it is a positive or a negative with regard to the attitude a police officer may take to responding to questions.

Ms O'BRIEN: I would agree. So much depends on the individual in the witness box as to how they react to the position they are placed in once the warnings have been read out.

CHAIR: You have given us a short history of the changes and outlined how we have come to the situation we are in now. We appreciate that. Of course, we have also had the Police Royal Commission where most of these things emerged. Police officers hold a very special position of trust in the community and it has been determined that that evidence can be used. What consultation occurred with stakeholders in the drafting of the legislation? What kind of feedback or input did you get? Was there any resistance or information obtained through that process that dictated or determined the final outcome?

Mr PRITCHARD: I was not around at the time and do not know the full history of the legislation. You can gauge from the submission that it was the result of an argy-bargy process. Various positions were put at

the time about how the police could use the Royal Commission evidence. I think it was as a result of the use to which it was being put that the need for some formality emerged. That resulted in section 40 (3). The submission contains arguments about police occupying a different position within the public sector—that is, the level of trust, high integrity and so on.

Ms O'Brien probably has a longer corporate memory than I do given her involvement in the Royal Commission and the Police Integrity Commission. I think there was a recognition on the part of the most relevant and directly affected persons—the police themselves—that there might have to be a requirement of that kind. Certainly, the section 181D process, which is the only avenue open to the Police Commissioner to sack police officers, is different from the provisions that apply to the rest of the public sector with regard to any rights or available avenues. I suppose like all pieces of legislation where a number of people have an interest it is a compromise.

Ms O'BRIEN: I was not involved in the process of the introduction of that legislation. I am aware that at the end of the Royal Commission certain actions were taken against police officers. That resulted in some consideration by higher courts about whether or not action to dismiss a police officer was a civil proceeding. As a result of the decisions in a couple of those cases this legislation was introduced to make it plain that the evidence given at the Royal Commission and subsequently in the Police Integrity Commission could be used when the Commissioner was deliberating about the exercise of his powers under section 173 and what became section 181D.

It is fair to say that the simplistic notion enshrined in some of the parliamentary speeches about giving the Police Commissioner an efficient and speedy way of ridding his service of people in whom he no longer had confidence did not really pan out. If you were to ask the Police Commissioner now about how successful that method of dismissing people under those provisions is in terms of defending challenges taken in the Industrial Relations Commission, he would tell you it is not quite the easy path it was probably meant to be. That is an area that the Police Integrity Commission does not get involved in—the exercise of those powers under sections 173 and 181D of the Police Act.

CHAIR: Generally as to the evidence you get from a hearing of the Police Integrity Commission, do admissions form a major part of the evidence against an officer? Would there be a satisfactory disciplinary action—whether it be all those variations of actions that can be taken—without being able to use that evidence? What I am getting at is how important is the component of the admissions in the police force being able to deal with its officers in a variety of ways? How important is that?

Mr PRITCHARD: I tend to think it is very important, although I would couch that by saying, as we said in our submission, the efficacy of the use of the admissions is probably an inquiry best directed to the police themselves. What we simply do is initiate a process that may have as its ultimate goal down the track the removal of an officer under section 181D, which can then lead to proceedings being taken in another forum, in the Industrial Relations Commission, where a whole different range of considerations apply. There is no doubt again, it depends on the attitude of the particular officer. If they make admissions as to their involvement in misconduct, clearly from the point of view of the Commissioner of Police one would have thought it would follow that that would be valuable evidence or information available to them.

CHAIR: If we were not able to use those admissions as evidence in police disciplinary proceedings, would there be many more officers not brought to justice in the police service? How important is that admission?

Mr PRITCHARD: Again, I am not sure I can give you the answer you want.

CHAIR: You forward evidence to the police, I take it?

Mr PRITCHARD: Sorry, can I clarify it? When you say evidence you mean in the context of disciplinary, criminal or are you talking both?

CHAIR: Your hearings at the Police Integrity Commission. That evidence is used by the police force to manage their police officers, including the evidence of admissions. If that evidence of admissions were not able to be used, how satisfactorily do you think the police force would be able to manage issues within its force of officers who were guilty or were found to be operating inappropriately?

Mr PRITCHARD: To the extent that we are able to comment, I do not think you could say that it would have a serious detrimental effect. I think you will see—and I am going on rough memory—that the number of officers each year in which the Commissioner exercises loss of confidence provisions under section 181D is not very large in any event, and the number of those who challenge that process, say in the Industrial Relations Commission, is even smaller. As a subset of that, the number of officers where that action has been taken as a result of inquiries conducted by the Police Integrity Commission and where evidence is given in private hearings or in the other hearings has been used is probably small. I suppose the fact is that we know the police like to get hold of it when they know we have conducted a private hearing with an officer.

When that officer has made some admissions in relation to misconduct, there is certainly an eagerness to be able to have access to the evidence pursuant to the provision that allows that to be done. To the extent that I can comment on it—and I do not wish to be seen to be avoiding the question, I am simply saying the police are best placed to give you a comment as to the efficacy in any sort of substantial way—we know that whenever the police are aware that a hearing has been conducted with an officer, if we think there are issues that relate to the management of the officer, meaning from a disciplinary issue or another way, there is certainly a keenness and interest in getting access to the transcript.

CHAIR: Are you able to provide a view on this idea that with public servants generally, not just police officers, there is a level of trust put in them by the community that warrants the using of that evidence from admissions in disciplinary proceedings? Police officers have powers and discretionary powers and obviously they are in a position starkly different from the average public servant in RailCorp or other departments. Do you want to offer a view as to whether this proposed reform to remove that provision from the Independent Commission Against Corruption Act is warranted, given the trust people put in the public service?

Mr PRITCHARD: If you approach it on that ground alone—and going back to our submission, we set out what appeared to be the rationale or policy reason behind some of the debates in Parliament explaining why this provision was there, which suggested that police officers do occupy a certain higher position of trust. I suppose it is not just that aspect but they have certain extra powers that no other members of the public sector in many respects have, and that casts a greater obligation to behave more appropriately and perhaps at a higher level. But we would have to concede there may be a small chink in that armour with the extension of section 40(3), with the amendment last year to include disciplinary action under the Public Sector Employment and Management Act.

There is a slight erosion in that policy factor that may have been behind the provision in the first place. It would now appear with administrative officers of the police force, now that the Police Integrity Commission has jurisdiction over those officers, that evidence they give in hearings, coerced evidence, can be used in taking action under that Act. If you accept that, as I said, that seems to chip away a little at the rationale behind treating police differently. The public sector is not an homogenous body. It is made up of varying sorts of officers with different powers.

CHAIR: You could see why someone could mount an argument that it is a logical corollary that as a result of the administrative officers in the police force now facing the prospect of having that evidence used against them, the wider public service, under the Independent Commission Against Corruption regime anyway, would be a logical follow-up?

Mr PRITCHARD: Indeed. I think you have to acknowledge that and given, as I said, the Police Integrity Commission's jurisdiction now in relation to the Crime Commission, and depending on the status of employment of particular officers of the Crime Commission, whether they are subject to the Public Sector Employment and Management Act, there is also an argument that another class of persons has been added against whom evidence can now be used in disciplinary-type matters. Either you have to acknowledge that, yes, to the extent that police were treated or seen as different, there has been some sort of erosion of the principle upon which that is based.

Ms DIANE BEAMER: So if some civil libertarians started talking about administrative officers being at the thin edge of the wedge they would be quite right?

Mr PRITCHARD: I can see there might be a counterargument in that, for the very same reason that administrative officers were given over to the Police Integrity Commission in terms of jurisdiction, it is hard to distinguish the conduct of police officers from the conduct of administrative officers. Very often the two would be involved in the one matter, so there might be an argument—

Ms DIANE BEAMER: Has that gone as far as it should?

Mr PRITCHARD: I was going to say there might be an argument of administrative neatness, if I could put it that way, that complements the fact that one agency now has responsibility for everybody in the police force. There might be an argument that you should not treat one group in that wider group differently from another. Once you have opened the floodgates in one respect, there could be an argument there is no reason why the floodgates should not be opened in all respects.

CHAIR: With regard to civil matters, I note you have actions under the Criminal Assets Recovery Act. What is your experience with that? The proposal put forward in the terms of reference is that these admissions in the Independent Commission Against Corruption hearings are able to be used in civil proceedings even though it may be restricted civil proceedings to recovery of those assets. What is your experience with the Criminal Assets Recovery Act and is it something that the Independent Commission Against Corruption could also be involved in?

Mr PRITCHARD: I think they are the differences between our submissions. At the moment, the Police Integrity Commission can take proceeds of crime action, confiscation proceedings, and the experience of the Commission to the extent that it has commenced those proceedings, and there are not many, has not been that it has been hampered in undertaking those proceedings because it has been unable to use evidence from its own hearings. As we indicated in our submission, those pieces of legislation provide quite an extensive armoury of powers in order to examine witnesses in any event, which can be used as part of those proceedings. To the extent that the Police Integrity Commission has taken that action, I do not think it could be said that it has been hampered or stymied or they failed because we have been unable to use evidence obtained in private hearings or other hearings that the Commission has conducted.

CHAIR: So you are happy with how that operates? You are happy with that.

Mr PRITCHARD: Yes. It has never occurred to us to seek, I suppose, the same amendment to the Act that the Independent Commission Against Corruption may now be seeking because we felt frustrated or some proceedings were stymied because we were unable to use evidence.

CHAIR: You are fully aware of what the Independent Commission Against Corruption does or its purpose, to expose corruption and to conduct hearings? Would you offer a view as to whether an amendment could be made for it to be able to do what you are doing? Would that resolve the issue? Would that assist the Independent Commission Against Corruption?

Mr PRITCHARD: I think it would, because at the moment the Independent Commission Against Corruption, as I said, has to really seek the auspices of the Crime Commission to take proceeds of crime action. That takes away the control of the proceedings from it to a large extent, whereas the Police Integrity Commission does not have to. I would have thought the issue now having been raised it still would not occur to us to seek any amendment to the Police Integrity Act to seek what the Independent Commission Against Corruption now seeks. As far as we are concerned, if you were to put the Independent Commission Against Corruption in the position in which the Police Integrity Commission is now we would be saying to them, if they were seeking some assistance on how to conduct them, that they have an armoury of powers under the confiscation legislation as it is, where you can call people in and have them examined for that purpose. Our experience has been you do not really need anything done to your own Act in order to ensure powers; it is already there.

CHAIR: In this case, what has been proposed is that evidence of admissions can be used by an employer or anyone else for civil actions—for a whole variety of reasons that civil actions entail—for the recovery of assets or money gained from corrupt conduct.

Mr PRITCHARD: Yes.

CHAIR: That is general and then proceeds outside the Independent Commission Against Corruption operation for employers—for example, even if the money has gone, to garnishee their wages or do all sorts of things, and injunctions. Can you offer a view as to the efficacy of the Criminal Assets Recovery Act to properly deal with these issues of recovering assets and money other than going through all that other process?

Mr PRITCHARD: I can only see from the Police Integrity Commission's experience, where it has been used to seek what is regarded as proceeds of criminal activity, it has been more than appropriate. As we said in the submission, at least that is a category of proceeding that is easy to classify and define, whereas with civil proceedings, contract, tort or whatever you want to call it, it is not difficult to see how one could be difficult to define and move more slowly and slowly. The proceeds of crime actions are quite—

CHAIR: Manageable?

Mr PRITCHARD: Yes, manageable; indeed. They are very neat, very tidy and very compartmentalised.

Reverend the Hon. FRED NILE: Just to clarify that point, do you think that the Independent Commission Against Corruption wants these increased powers only because of this area of the recovery of assets and so on? I understood that was one part of it but not the main reason?

Mr PRITCHARD: I can only go from what I have seen and that was the background to the request. It does appear to draw on Operation Monto, the RailCorp investigations, in large part, given the large amounts of money that were involved in that respect. I can only take it, therefore, it is in response to seeing people make admissions about money that they may have obtained as a result of their wrongdoing but it being considered when some further action is sought to be taken to recoup those proceeds that those admissions cannot be used.

Reverend the Hon. FRED NILE: But they can be used for convictions, for prosecution?

Mr PRITCHARD: The admissions?

Reverend the Hon. FRED NILE: Yes, in addition to the recovery.

Mr PRITCHARD: No, only for prosecutions under the Act for false swearing and the Police Integrity Commission is like the Independent Commission Against Corruption in that respect. The only way it can be used in criminal proceedings is for offences under the respective Acts themselves. They cannot be used in actual criminal proceedings for substantive offences outside those provided for under the Act. As I understand it, there is no amendment sought to extend it to criminal proceedings per se. There would still be that balance in the distinction between civil and criminal.

Reverend the Hon. FRED NILE: In your submission you made the point that the Chairman raised earlier that because police occupy a special position of public trust, et cetera, you stated that the broad protection from the use of self-incriminating evidence obtained under compulsion was limited. Obviously in a number of these cases we are not talking about low-level public servants but people in managerial positions in control of tenders, contracts and so on. Would that not equal the quality of trust for a police officer? I am not underestimating the trust for police but people in those very important positions also have a position of trust.

Mr PRITCHARD: Yes, and within the scheme of the Police Force there is obviously a different range of trust and integrity that you might expect from a junior constable compared with an Assistant Commissioner. There is a whole range of different ranks there too. Are you coming from the angle of suggesting that the class of persons within the group otherwise known as the public sector could be defined?

Reverend the Hon. FRED NILE: Yes.

Mr PRITCHARD: Again, I think lawyers being what they are, there would be perennial arguments about who fits into what category and who fits into what position. I am not sure sometimes whether again for administrative neatness it is just easier to take the whole group and put them under—

Reverend the Hon. FRED NILE: I take the whole group. I am not suggesting that it be spelt out in law but from the point of view of the Independent Commission Against Corruption when dealing with these people in those positions of trust they should be able to get the full hand of the law.

Mr PRITCHARD: I can only say in relation to our section that section 40(3) does not draw any distinction between a lower level police officer and an Assistant Commissioner. It is a member of the Police Force per se, or the Commissioner; it is one and everybody. So I would have thought if you are going to extend

it to the public sector those distinctions, while having some intuitive sort of appeal, would just create more trouble than they would be worth.

Ms DIANE BEAMER: Relating to the first amendment proposed, one of the points made about the way in which evidence is gathered is that often witnesses are reluctant to tell the truth until confronted with it. Do you find with the Police Integrity Commission that until you actually play the tape recording back—

Mr PRITCHARD: I draw on my previous experience at the Independent Commission Against Corruption and I would have to say that I find police officers are a lot more resistant to acknowledging the obvious compared with public officials—very much so.

Ms DIANE BEAMER: Given that they are warned that actually not telling the truth could be used against them, and given that people are unwilling to tell the truth.

Mr PRITCHARD: Unwilling?

Ms DIANE BEAMER: Unwilling to incriminate themselves until it is pointed out to them that this has occurred. Is there any need to do this kind of change to the Independent Commission Against Corruption Act?

Mr PRITCHARD: It depends on what you are ultimately trying to do. There is no doubt in relation to the provision in the Police Integrity Commission Act that it is clearly directed on a lot of occasions to treat what may be a problem by getting rid of the police officer, if I could put it as crudely as that. Prosecution for some offences is important but very often, from the point of view of the Commissioner, his objective is to get rid of that officer. I would have thought that the same rationale, to a large extent, would apply to public officials—that very often, given the balance that is struck between the use of the evidence that cannot be used in criminal proceedings, and so prosecution is a different matter, the object might be to have that person removed from the public sector. That in itself is often a desirable goal, so being able to use evidence for that purpose, I think, would enhance at least some sort of remedy or some sort of outcome from the particular investigation.

Ms DIANE BEAMER: But given that perjury is an offence that has ramifications, I note you have said assembling of evidence is unnecessary?

Mr PRITCHARD: I should clarify that by saying I understand now what may be the driving force behind that proposed amendment, which at the time we did our submission I was not completely sure about. I understand there is a wider concern that if one and two were granted the Commission might start to focus more on disciplinary proceedings and neglect pursuing criminal proceedings.

CHAIR: I think that was the rationale and thinking behind Cabinet's decision.

Ms DIANE BEAMER: So you are changing—

Mr PRITCHARD: No, I would not change that. I would not regard that as a particular concern. My experience has been that as much as the prosecution or the assembling of briefs for prosecutions, both in the Independent Commission Against Corruption Act and the Police Integrity Commission Act, is regarded as a secondary function, I do not think anybody in the Commissions treats it as anything other than a primary function. If you conduct an investigation and collect evidence, you do not treat that as some sort of a subsidiary thing. You treat it as a very serious matter and something that should be pursued as a desirable outcome of your investigation.

I do not really have a concern that some sort of de facto, default position would come into play that "Oh well, it was easy to get the evidence for disciplinary proceedings. Let's not worry about prosecution." My experience in both agencies has been that prosecutions are very important and they are pursued with full vigour to the extent they can be. If that is the rationale behind it, I would not really see that as a major problem. No, I am not changing my position in that respect. The other issue we raised there—and it is a wider issue that may be outside the scope of these terms of reference—is that if you were to turn these agencies into being primarily concentrating on collecting admissible evidence for prosecutions, we say to a large extent that is what a crime commission does already.

Ms DIANE BEAMER: So you would be duplicating something?

Mr PRITCHARD: Yes.

Ms DIANE BEAMER: You make the point that the solution that needs to be found about corruption particularly is that often agencies just want to cut it out?

Mr PRITCHARD: Yes.

Ms DIANE BEAMER: They just want to excise that bit?

Mr PRITCHARD: That is right. A person may be more willing to acknowledge that "If I admit that I have been doing wrong, the worse that can happen to me is that I might lose my job but that evidence can't be used against me to lock me up". That is a weighing-up exercise that witnesses often very much go through: "If I don't tell the truth, I run the risk of being prosecuted anyway and going to jail whereas if I do tell the truth I might lose my job but at the same time it cannot be used in criminal proceedings and I can be locked up."

Ms DIANE BEAMER: I am just scratching my head given the first thing you said—the reluctance to tell the truth until it hits you fair and square in the jaw, so to speak—leads you then to say there are those criminal avenues open to both the Police Integrity Commission and the Independent Commission Against Corruption to use as a criminal offence.

Mr PRITCHARD: Yes. Both Acts have the false swearing provision and you can use the evidence that a person gives, even coerced, as evidence in that limited set of proceedings. But again you are in a criminal court, you have a criminal standard of proof, you have got all the vagaries associated with prosecuting and you may end up with nothing in the end; there may be an acquittal. There is a higher standard of proof.

Ms DIANE BEAMER: And what the agency really wanted was to get rid of person X.

Mr PRITCHARD: That is right, and if any agency has a conviction for a criminal offence against a person it puts them in an easy position to then move to a dismissal situation.

Ms DIANE BEAMER: But the admissions make it very easy.

Mr PRITCHARD: Definitely.

Ms DIANE BEAMER: But often they are given with the fact that you have presented them with the evidence.

Mr PRITCHARD: That is right. But as I said before about the attitude of witnesses as to whether they are going to tell you the truth or not, I do not think that putting a provision in the Independent Commission Against Corruption Act is going to, in many respects, change. People will either tell you the truth for whatever reasons or they will not.

Mr JONATHAN O'DEA: The Police Integrity Commission was established after the Independent Commission Against Corruption but I cannot remember in what year.

Mr PRITCHARD: It was 1997.

Mr JONATHAN O'DEA: So in a sense you were born after the Independent Commission Against Corruption. Before that I understand that functions were essentially encompassed within the Independent Commission Against Corruption. It is slightly outside the scope of the direct current considerations, but are there any other areas where you have seen the Police Integrity Commission evolve or develop in an area like the disciplinary area that you perhaps think the Independent Commission Against Corruption ought take note of or have consideration of in its ongoing evolution?

Mr PRITCHARD: No. I say that—and most members would be aware I was formerly with the Independent Commission Against Corruption—having been in both, no. There is no doubt that investigating police misconduct is a totally different ballgame to investigating public sector misconduct. Even taking into account the subtle differences in the definition of the relevant terms in the Independent Commission Against Corruption Act to the Police Integrity Commission Act, police misconduct is a fundamentally different kettle of fish.

I say that because—and I mean no disrespect—they are harder investigations because police are trained investigators so they generally know the tactics that you will be employing to a large extent anyway. Police misconduct tends to be very much wrapped around or intertwined with criminal conduct—with what people would understand as traditional involvement in drugs, selling drugs or things of that nature—whereas public sector corrupt conduct is, to me, a much broader concept. It does not necessarily often involve what we might traditionally regard as criminal conduct.

To the extent that there are lessons to be learned from one to the other, no, I do not think so. But as I said—and as I indicated in one of the answers to Ms Beamer's questions—I certainly noticed, even if only anecdotally from where I sit in terms of hearings, that police officers are much more difficult officers to examine than a public official generally is. As I said, that to a large extent reflects the fact that police work in the same environment that you do whereas a humble grade 4, 5 or 6 clerk from the Roads and Traffic Authority, who probably never had any exposure to an investigative criminal process before, finds it quite foreboding, quite intimidating and quite an exercise. To a large extent police give evidence every day and know how things work. That makes the job a lot harder.

Reverend the Hon. FRED NILE: I suppose that is why the Police Integrity Commission in some ways inherited the powers of a royal commission. You came out of the Royal Commission as distinct from the Independent Commission Against Corruption?

Mr PRITCHARD: Yes, and its Act. You only need to read the Acts to see that the provisions are not identical but they are very much the same. There is no doubt that the Police Integrity Commission Act is modelled on the Independent Commission Against Corruption Act, but with some subtle differences to recognise that police officers hold a different status, powers of arrest and those sorts of things that the normal public official does not have.

Reverend the Hon. FRED NILE: So there may be a need to elevate the Independent Commission Against Corruption to the same level? Maybe that is where we are moving with these requests from the Independent Commission Against Corruption.

Mr PRITCHARD: I agree. Once you accept that the policy rationale behind why police officers were treated differently with regard to the use to which coerced evidence could be put has been chipped away, then there probably is an argument to a large extent: "Well, why would you stop there?" Whether that is within the confines of this inquiry I do not know. There are some wider issues there.

Reverend the Hon. FRED NILE: We do not want to restrict the Independent Commission Against Corruption from being successful in its role.

Mr PRITCHARD: No, I agree.

Ms DIANE BEAMER: Conversely, we, the public, place those working in the Police Force and in the public service working in the Police Force in a position of trust. We regard them very differently than we do somebody processing our licence in the Roads and Traffic Authority. We know the kinds of powers police officers have and it might be that the distinction the Police Integrity Commission has and the way that it deals with those sorts of things is well worth preserving.

CHAIR: Is that a question to Mr Pritchard?

Ms DIANE BEAMER: No, it is not a question: it was just a comment.

CHAIR: Mr Pritchard did you want to comment on that?

Mr PRITCHARD: No, I was just going to be a bit cheeky by saying if the public think that anybody within the public sector has a higher degree of trust and integrity it is politicians. To that extent obviously a provision of this kind, given the Independent Commission Against Corruption's jurisdiction, would include members of Parliament as well.

Ms DIANE BEAMER: It does.

Mr PRITCHARD: To the extent that there are disciplinary proceedings, which is another issue. I agree the argument has to be acknowledged that your normal grade one or grade two clerk sitting down there in the Department of Disability and Ageing is not the same as even a constable out on the street, with the powers of arrest and carrying a gun and things of that nature. That does raise some issues.

CHAIR: There are degrees of trust?

Mr PRITCHARD: There are indeed.

CHAIR: But in general, broad, conceptual terms the public service as a whole, or sections of the public service, serve the public and there is an element of trust in each and every one of them. No-one would argue with that, I would suggest.

Mr PRITCHARD: No, and unlike the Hong Kong Independent Commission Against Corruption that has jurisdiction over both private and public conduct, public servants accept now that there is an agency that does watch over their conduct that other citizens in the workforce do not have. I think most people accept that.

(The witnesses withdrew)

(Luncheon adjournment)

MARIANNE TERESE CAREY, Solicitor, Managing Lawyer, Group 6, Office of the Director of Public Prosecutions, 265 Castlereagh Street, Sydney, sworn and examined:

CHAIR: We have received a submission from the Director of Public Prosecutions in this matter; do you wish that submission to be part of your evidence today?

Ms CAREY: Yes.

CHAIR: Before questions commence would you like to make an opening statement to the Committee?

Ms CAREY: It might assist the Committee if I explain what Group 6 does and that would explain why I am here on behalf of the director. I would also like to outline the Director's position.

CHAIR: Certainly.

Ms CAREY: I am the managing lawyer of Group 6. That group provides the Independent Commission Against Corruption [ICAC], the Police Integrity Commission [PIC] and advisings from the police as to sufficiency of evidence to commence criminal proceedings and we also do Coroner's Court work. That means we do all prosecutions arising from ICAC, PIC and advisings from the police. We will prosecute ICAC matters if they go to court; we prosecute all New South Wales police officers charged with any kind of criminal or traffic offence, as well as corrective service officers and other public officials; and we prosecute matters deemed of special interest, either because of their size, complexity or some other aspect such as being of high public interest. We appear in the District Court in short matters and appeals in rotation. That is what Group 6 does and that is why I am here because I have direct responsibility for advisings from ICAC.

The position of the Office of the Director of Public Prosecutions [ODPP] is that we support the amendment referred to in No. 3 of the terms of reference; we support the assembling of admissible evidence for criminal prosecutions as being a primary function of ICAC and we support that irrespective of whether the amendments referred to in Nos 1 and 2 are made. There is a memorandum of understanding between the ODPP and the ICAC, most recently reviewed in December 2007 and is presently being reviewed again, and that governs the way we deal with ICAC advisings. It provides for the furnishing by ICAC to the ODPP of admissible evidence obtained as a result of an ICAC investigation. It also sets out liaison arrangements between the ICAC and the ODPP and that mostly concerns Ms Hamilton of the ICAC and I having bimonthly meetings to discuss the process of the advisings from ICAC or ICAC prosecutions. It has also led to an improvement in the past year or so in the provision of requests from ICAC and the nature or the state of the briefs of evidence that come to the ODPP and the time it takes for the ODPP to provide advice has also improved but problems though do remain.

The two biggest issues for the ODPP—while not directly concerned with ICAC—is a lack of resources within the ODPP generally and within Group 6. Amongst all that other work that I have outlined we are responsible for, we must do all the requests from ICAC for advice and prepare the advice for the Director's decision. As I have said, we have the carriage of any prosecution. The lack of staff obviously impacts on the time it takes us to provide advice. The state of the briefs compiled and submitted by ICAC when requesting advice is the other issue. As I have noted, both agencies have cooperated closely and the state of the briefs has greatly improved over the past year or so and so has the general turnaround in the provision of advice but there are issues that remain.

The biggest one is that the focus of ICAC it is not on assembling evidence, including admissible evidence, for a prosecution until after the investigation and the hearing have been completed and their report submitted. This means that briefs of evidence, admissible or otherwise, are not put together at the time of investigation or hearing because that is not their focus. This delay can lead to problems, and does lead to problems, down the track. That means that the provision of advice by the ODPP is delayed, mostly because we have to issue what we call requisitions or requests for further evidence. We do this on a regular basis and this delays the provision of advice until those requisitions are answered by the ICAC and they cannot always be answered and we cannot provide advice to them.

The kind of requisitions I am talking about include where appropriate people who produced relevant documents are no longer employed, for example, at a bank. Witnesses have to be located and approached to either provide a statement in an admissible form or provide what we call an "adopting statement", where they adopt their ICAC evidence so that it conforms to the Criminal Procedure Act and can be used in a prosecution.

Evidence is often no longer available and corruption matters essentially lead to fraud or benefit by deception charges, which are paper heavy and very intricate in detail. So if things are lost it can mean there are problems in the prosecution.

An issue also is the scope of the ICAC investigation and what inquiries can be made and what evidence can be obtained after the conclusion of an investigation. This is really a matter for the Commissioner and the Committee but I just note it. For example, a requisition raised by the ODPP may require a search warrant to be executed and the issue is if the investigation is over does ICAC have the power to ask for a search warrant, conduct a search and obtain that material? That general issue can mean that requisitions are not actually answered. I just put that before the Committee.

There are also other issues that may delay matters such as we require the entirety of an admissible brief of evidence before any advice can generally be given. We need to know the scope of the corruption. We need to know where all the parties referred to fit within that corruption. We need to know the level of their individual criminality. We can usually only know that when you have an entire brief of admissible evidence before you. We require a significant amount of an admissible brief of evidence before we can hold plea discussions—they are separately addressed in our memorandum of understanding. We need a significant amount before we can consider inducements or indemnities, again because we need to know where that person fits into the whole criminality at hand.

The Independent Commission Against Corruption itself often has a lack of resources. For example, when we request expert analysis or evidence about business records or forensic accounting, all these things are required because, as I said, they are generally fraud briefs that will lead to, most commonly, benefit by deception charges. They are paper heavy, they are bank heavy and we need to trace the paperwork. We consider that the amendment would sit easily with the principal objectives of the ICAC Act and the functions. We think it is a logical step because it is the ICAC officers who gather, assemble and present the evidence to the ODPP specifically seeking the advice of the ODPP as to whether criminal proceedings should be commenced, and criminal proceedings can only be commenced if there is admissible evidence on which to proceed.

The amendment would, the ODPP believes, assist in the provision of more timely advice from us, and we also believe that it would allow the ICAC to more quickly request that advice if from the word go they are thinking about what the ODPP would need to consider criminal proceedings if the matter is referred to us. It will also allow prosecutions if they are to occur to occur in a more timely fashion, and delay has a significant impact on someone's sentence when they are sentenced, if they are sentenced. That is the ODPP's position and it might assist the Committee in knowing how we function.

CHAIR: Do you have a view on the first two terms of reference? You have given some fairly comprehensive information on the third one. As you know, the first two of those is to use evidence obtained compulsorily for disciplinary and/or civil proceedings. Do you have any view on that?

Ms CAREY: They are not matters of direct concern to the ODPP because we deal with admissible evidence for criminal proceedings, not disciplinary or civil proceedings. So we see them as matters for the Commissioner or the committee. As I said, we support the amendment irrespective of whether those first two amendments are made because the amendment referred to in number 3 of the terms of reference would assist ICAC and the DPP generally in what it does now.

CHAIR: You have mentioned the memorandum of understanding and you have told us that that has improved over recent time.

Ms CAREY: The liaison and the cooperation between the ICAC and the DPP—we have made great efforts to get advice to us in a more timely fashion in a more admissible state and for us to answer that advice. We readily review the memorandum of understanding and at one of our bimonthly meetings—which, coincidentally, was last week—we have agreed to review it now. It was last reviewed or signed off on in December 2007.

CHAIR: When you say it has improved, what are you talking about? The liaison between the two agencies or are you talking about any difference in the type of briefs that you are getting and the time in which you are getting that from ICAC? Are you talking about that as well?

Ms CAREY: Both have improved. As a result of the improved liaison the briefs have improved. I think ICAC has also made some internal measures and they, I believe, assist in the improvement in the type of briefs we get.

CHAIR: So, going on the improvements that you have seen, if I were to say to you that ICAC are now preparing briefs along the way, and whilst they are doing their investigations they are also preparing along the way some admissible evidence, would you accept that, given the improvements that you have seen?

Ms CAREY: I accept that in some matters they do do that and some briefs are improved as a result. There are underlying problems still, but as a general concept they definitely have improved.

CHAIR: On your post-investigation requisitions that you issue, have you seen any difference in a lessening of requisitions that you have issued over recent time as a result of that improvement?

Ms CAREY: I do not personally issue the requisitions but I understand from my staff that they are taking less time to answer. So it may be because there are less or it may be because ICAC is finding it easier to answer them because everything is so much closer to the hearing investigation date.

CHAIR: So generally, as a result of this memorandum, all those different components of that general area are improving, because we have two organisations that do very different things: we have one that was put in place to expose corruption and get evidence that it needed to do that, and that originally, if so, if they thought that it came to enough to prosecute they would hand it over to a prosecution body. You do not do any investigation and the DPP just prosecutes. Over time, as you can imagine, people have been asking what happens after someone has been found to be corrupt under the Act—what happens to them. So the emphasis is more on convictions and prosecutions, hence the memorandum and, as we are all glad to hear, the general improvement there.

The Office of the Director of Public Prosecutions has supported the proposition that the ICAC, as one of its principal functions, gathers admissible evidence. You can see that this would change the very nature of the Commission and what it does. You can see that that would happen and, understanding of course that it may help the Office of the Director of Public Prosecutions, you can see that this would alter the very nature of ICAC itself, do you not?

Ms CAREY: It would alter the nature, although I note that a secondary function, if you like, is that it may get admissible evidence to the ODPP, and one of their primary functions can include referring matters to the ODPP. So I think the change would sit within their existing primary function and what I call the secondary function anyway. We do not consider that it would, in reality, be much different; we think it sits there with their primary functions, one of which is to seek the advice of the ODPP. The reason they seek the advice of the ODPP is to see if there is material on which we can commence criminal proceedings. So we need admissible evidence for that. That is what ICAC, in reality, does now—after the fact, though.

CHAIR: Given the improvements between the two agencies through this memorandum and given the practices of ICAC, do you think that placing this provision in section 13 instead of section 14—it being a principal function—is going to really improve the way that you are getting your briefs of evidence? What material improvement do you expect to see if this were to be made a legislative change?

Ms CAREY: I expect that admissible evidence will come as a matter of course, not necessarily as a result of a requisition. I think the requisitions we are still asking for are directed towards admissible evidence such as, "Could you please obtain a statement in admissible form from X? Could you please obtain a statement from Y in admissible form producing these documents?" The majority of the requisitions we still issue are requests for evidence in admissible form. So I think that as a matter of course if it is a primary function that may be the difference.

CHAIR: You are saying in admissible form or the admissible evidence itself? There are certain pieces of evidence that take the form of things like statements, for example, that are not admissible or do you find that you have to get them to go out and get admissible evidence for you to be able to prosecute?

Ms CAREY: It is both, but, for example, admissible evidence—you could ask a person for a statement adopting their ICAC evidence. If they adopt their ICAC evidence that makes that ICAC evidence admissible as long as the adopting statement complies with the Criminal Procedure Act. An adopting statement can be as short

as four paragraphs. So that can turn what was inadmissible into admissible evidence. Or you can ask that person and they can make a statement in admissible form that does not adopt their ICAC evidence although it would reflect their ICAC evidence. That is evidence in admissible form as well. It is sort of two sides of the one coin in some respects.

CHAIR: The other issue that has arisen is that the Commissioner will tell us that when an investigation is completed he does not have the power to apply his coercive powers because in the Act it has got "for the purposes of an investigation". So when an investigation is completed then he feels that he cannot execute search warrants or tap phones and suchlike, although there may be disagreement about that. If the Office of the Director of Public Prosecutions wants this to be a principal function of gathering admissible evidence and if we then address the issue of post investigation coercive powers we are really starting to get to a stage where the ICAC is like the police. Do you concede that?

Ms CAREY: I did raise that matter and it is for consideration. I think it probably goes hand in hand with this: what is an investigation? I know the Commissioner has an opinion on that. You raise the question of what is an investigation, because that can sometimes mean that requisitions are not answered at all and it can cause problems when you are trying to provide an advice which looks at the sufficiency of evidence to commence criminal proceedings. There have been no requests to submit on that point but I did just raise it as a point that may impact on this, and I know the Commissioner's opinion on that aspect and what an investigation is.

CHAIR: There is a difference though between going and getting a statement from someone and exercising coercive powers. The Commissioner tells us that he receives your request for requisitions and he will go out and get further evidence where he can to plug any holes in a brief, et cetera, but he cannot use his coercive powers. You concede that once this becomes a principal function of the ICAC, gathering admissible evidence, then it does change the very nature of how it was put together and why it was put together?

Ms CAREY: It may. Another way to look at it is when they are executing a search warrant, for example, during the course of an investigation or a reference. If the ICAC's mind is turned to gathering admissible evidence on that point there may be no need, once the reference is concluded, for the DPP, for example, to requisition material in the search. So it may not change it if ICAC's mind as a collective is directed towards a collecting of admissible evidence at the same time that they are carrying out an investigation. They may not be required once an investigation has concluded to, for example, seek to execute another search. Therefore, it may not change their function per se.

Reverend the Hon. FRED NILE: You mentioned a moment ago that sometimes you ask for a requisition and you are sent a requisition and you do not get the material back. What would happen then?

Ms CAREY: Then the brief has to be appraised.

Reverend the Hon. FRED NILE: It would just stop: it would not proceed?

Ms CAREY: It would not stop. The brief would have to be appraised and the advice given with the material that the ODPP has may change the nature of the advice, for example, if you had X evidence than if you do not have that evidence. If ICAC after a period says that this material cannot be supplied then my solicitor will resume looking at that matter and will provide advice on what they have before them.

Reverend the Hon. FRED NILE: And the advice would say, "Yes, we will proceed with the prosecution"?

Ms CAREY: The advice may. It depends on what the material is before us. It depends on what admissible material we have or we know ICAC can provide. On occasion if the admissible material or material in admissible form is not on the advising brief but on an assurance from ICAC that it can be provided we will provide advice. Whether the absence of an answer to a requisition means that a matter does or does not proceed to a recommendation to lay charges will depend on the individual material, the individual matter, the nature of the material that cannot be obtained, how important it is if that evidence can be obtained some other way, for example. I cannot give you a blanket answer on what effect the lack of that answer to that requisition would have on an advising brief.

Reverend the Hon. FRED NILE: So you advise ICAC in the case where everything is straightforward, you have all the material, you say, "Yes, we are proceeding with a prosecution". Do they have any role at that point then? Do they just sit back and you take over the whole case?

Ms CAREY: Not all requests for advice will result in a direction or an advice that a matter should proceed. It depends again on what we are being asked by ICAC. In matters where the director recommends criminal proceedings commence the ODPP solicitor suggests the form of a CAN, which is a court attendance notice—a charge sheet, in effect. The ODPP solicitor, in effect, writes the CANs for the ICAC officer and they have to issue those court attendance notices on the person. They therefore become, in effect, the officer in charge of the matter, but the DPP prosecutes from there. The ICAC investigator stands in stead of the police officer in charge. On normal police matters you have an officer in charge. The ICAC investigator or the person who is nominated to be in charge of that brief from ICAC stands in the stead.

We write the court attendance notices and they would outline the averment that on X day in this State of New South Wales in this location X person did X, and then it would have the form of the charge. They file those with the court; they serve them on the person; and they liaise with us so that when the matter is first returnable in the local court the DPP appears and takes over the prosecution.

Reverend the Hon. FRED NILE: In the past, I think before the memorandum of understanding, the briefs or material provided by the Independent Commission Against Corruption often were not suitable or not of sufficient quality for you to proceed. Does ICAC have a set of instructions on what you require in a brief?

Ms CAREY: The Independent Commission Against Corruption has lawyers who prepare the briefs of evidence and, as I understand, they also have former police officers, because in a normal prosecution the police compile the brief of evidence. As I understand it, they also have former police officers who give advice on how to compile a brief of evidence. When an advising comes to the Office of the Director of Public Prosecutions we have as part of the memorandum of understanding a protocol where my solicitor would meet with the investigator or the lawyer, whoever is in charge of the ICAC brief of evidence, and discuss the brief. My solicitor issues requisitions to that person and both parties work on it for an advice. If it becomes a prosecution both parties work on it to ensure a successful prosecution.

Reverend the Hon. FRED NILE: Are you happy now with the procedure in preparing briefs?

Ms CAREY: There are still problems.

Reverend the Hon. FRED NILE: But it has improved?

Ms CAREY: It has improved, but there are still problems, and essentially based around admissible evidence or evidence in admissible form.

Reverend the Hon. FRED NILE: So it would help if the Independent Commission Against Corruption were clear about that role?

Ms CAREY: From our point of view we think it would assist if it was a principal function and ICAC turned its mind to that from the beginning of an investigation and ran a parallel sort of approach.

Ms DIANE BEAMER: You are saying that if it was a principal function they would turn their mind to having some admissible evidence all the way through and when it came to you it would be a neat and tidy package for the Office of the Director of Public Prosecutions to get its teeth around and proceed with. The evidence of the Police Integrity Commission was that the amendment would have the effect of changing it from being primarily an investigative fact-finding body, an inquisitorial model, to a specialised criminal investigation type body, such as various crime commissions which operate in a number of Australian jurisdictions, and that proposed further amendment No. 3 would be unnecessary. You have worked out that if you had a mindset at ICAC that says at the very beginning, "we are getting all this evidence together", it can actually be achieved under the Act as it is now?

Ms CAREY: It can be achieved under the Act as it is now. The problem, though, is that it causes immense delay. It causes delay on the part of ICAC in asking the Director of Public Prosecutions for advice. It causes delay when the Office of the Director of Public Prosecutions receives a request for advice because

requisitions must be raised and the requisitions always go to admissible evidence or evidence in admissible form.

Ms DIANE BEAMER: Given that the memorandum of understanding has improved that, it is really a mindset that the ICAC has when it goes about doing this investigation that it will collect it in a form that is admissible but also tagged in some way that it has to be admissible, and if it did that concurrently that would help you, but it can do that now?

Ms CAREY: Well, that is a matter for ICAC.

Ms DIANE BEAMER: It is just that it does not.

Ms CAREY: Their briefs have improved, so in some respects they must be dealing with these issues a lot earlier than they used to. I cannot tell you at what stage they start dealing with these issues, whether it is during investigations or they turn their mind to it the instant an investigation is over. I do not know what occurs in ICAC in relation to when they turn their mind to it, but there are still delays and they are all about the state of the briefs when they come to us.

Ms DIANE BEAMER: Given that in some instances they can now give you a brief which is vastly improved, is it just a matter of them getting their heads around the fact that it is something that they have to do as opposed to legislative amendments to say it is a primary function?

Ms CAREY: As I said, I do not know what they are doing at ICAC, but even when they give us a brief that is vastly improved there is still a significant delay, for example, when the investigation concludes until we get the material. For example, I have only now received requests for advice in relation to Wollongong City Council. So while those briefs may be in a better state, there is still delay at the ICAC end, and it may be because they are not turning their mind to it when they start the investigation, but that is a matter for ICAC. I do not know the answer to that.

CHAIR: When you say there is a delay, are you suggesting there is a delay before ICAC gets the requisitions out, or is there a delay in ICAC receiving their responses to pass on to you?

Ms CAREY: That is a matter for ICAC. There is a delay from my point of view from when they are issued until when the answers come back. Whether that is because people do not cooperate with ICAC I do not know. That is a matter for ICAC.

CHAIR: But it is not unknown as a prosecutor to be frustrated through requisitions sent to the police as well, is it? The police can sometimes take a long time to get back with requisitions depending on information coming to them.

Ms CAREY: They can.

CHAIR: So it does not necessarily follow that, if you make it a primary function, the requisitions will come through any quicker, does it?

Ms CAREY: They may not, but I do not know what the problem is at the ICAC end.

CHAIR: I understand that, but there are delays in getting that information.

Mr GREG SMITH: Ms Carey, have you personally had the carriage of ICAC briefs in the past?

Ms CAREY: I have in the past. It would be some years ago now because as a managing lawyer I am not supposed to carry a brief. I do. I would read all matters that come in so I can allocate them to the appropriate lawyer. I do not read the entirety of it. I usually read the investigator's statement and I certainly read the advice my solicitors write before I forward it on.

Mr GREG SMITH: In the past, when you had carriage of them, did they often come in as bundles of transcript with a bit of a covering report and a few statements, but nothing compared to a police brief, which is full of statements?

Ms CAREY: They do not resemble even now a police brief of evidence.

Mr GREG SMITH: Would a police brief of evidence usually have a summary at the start, an index and a series of statements, and a statement that says what the witnesses prove?

Ms CAREY: That is correct. They will have a statement of facts, which would be in effect a summary; they will have an index; and they will have statements from various witnesses in a chronological order. We receive advisings from the police. Police advisings always have an initial investigator's report for our information and the statements they have obtained in admissible form that are available if we recommend criminal proceedings.

Mr GREG SMITH: How does that contrast with the ICAC briefs that you have seen?

Ms CAREY: To be fair to ICAC, their briefs can be as big as 20 volumes. Between 10 and 20 is not unusual. They do have smaller volumes, but they often have large volumes. They are not compiled in the same way, although it is improving and, as I said, I understand they have a former police officer to assist with the compilation of briefs. They do not resemble police briefs.

Mr GREG SMITH: Is the bulk of their brief unindexed transcript?

Ms CAREY: It can be unindexed. It can be transcript. Material can be filed in a different place. For example, things that you would think would come after a statement—for example, a statement may say "I produce X, Y and Z"—will not be after that statement, but you may find them in another volume.

Mr GREG SMITH: So you might have to read the 20 volumes or however many there are to get the sense of what the brief is about?

Ms CAREY: You do, although they do provide an investigator's statement and, if you have a meeting, we encourage them to have a meeting with the ICAC investigators before they read it or before they read it all so that they can have some direction on what they should look at and what is most important.

Mr GREG SMITH: The bulk of the briefs you receive are in relation to proposed charges of false swearing?

Ms CAREY: That is a large component, but also benefit by deception.

Mr GREG SMITH: With false swearing, in your experience, when you get a brief does the ICAC tell you on what pages the false answers are given and where the evidence is to prove they are false?

Ms CAREY: Yes, they usually point that out in their report.

Mr GREG SMITH: Is one of the problems in the quality of their briefs associated with the non-suspect witnesses, the ones that actually prove corrupt conduct, in the sense that they are often not willing, as far as you are aware, to make further statements?

Ms CAREY: That is correct, or we have their evidence and it is put forward by ICAC, but it is not in admissible form and there is no guarantee that the witness will be willing to give evidence, and that witness may be crucial to prove a case against people nominated as the persons of interest.

Mr GREG SMITH: Have you conducted ICAC cases where witnesses have refused to cooperate in court?

Ms CAREY: We have one at the moment where it is unclear. They have indicated that they will not cooperate and we will have to look at our options as far as prosecuting that person goes, such as subpoenaing them, declaring them unfavourable, for example.

Mr GREG SMITH: Do you also receive briefs from the Police Integrity Commission?

Ms CAREY: We do.

Mr GREG SMITH: What do you say is the quality of those briefs compared with the ones you have seen from the ICAC?

Ms CAREY: Briefs from the Police Integrity Commission are usually put together better and in more admissible form, and I think that is probably because they are put together by police officers and they more closely resemble admissible briefs of evidence as you would normally receive in a prosecution matter.

Mr GREG SMITH: Do you understand that Police Integrity Commission investigators are interstate or Federal police officers generally whereas ICAC has a lot of lay investigators?

Ms CAREY: That is correct. The Australian Federal Police or persons who have been police officers in other jurisdictions work for the Police Integrity Commission—not New South Wales police officers.

Mr GREG SMITH: Do you get briefs from the New South Wales Crime Commission from time to time?

Ms CAREY: We do not get briefs of evidence from the New South Wales Crime Commission. In my group the Crime Commission has a role in relation mostly to informers, people seeking indemnities.

Mr GREG SMITH: They generally work jointly with other bodies, is that right?

Ms CAREY: They generally work with the New South Wales police on a normal prosecution, that is, a non-ICAC and non-PIC prosecution. They can also work with the Police Integrity Commission, but in my experience and in my group they are related to a small area of informers' indemnities, requests for immunity.

Mr GREG SMITH: Do you get briefs from the Australian Crime Commission?

Ms CAREY: I think we have one brief now from the Australian Crime Commission, but not generally.

Mr GREG SMITH: Are you able to comment on the quality of that brief?

Ms CAREY: The matter was referred to us by the Commonwealth Director of Public Prosecutions and it was referred to us in trial stage. I understand that there are issues with the brief, but I cannot comment any further than that.

Mr GREG SMITH: Do you know whether the Independent Commission Against Corruption has officers designated to assemble briefs on an ongoing basis?

Ms CAREY: I believe they have at least one person who we liaise with and who brings briefs to us. I believe he is a former New South Wales police officer and I believe his role is to assemble the briefs and assist investigators and lawyers in the assembling of the briefs so that they are in a better state, they are better organised and they better comply.

Mr GREG SMITH: Has that officer come on board in recent times, when you have seen an improvement?

Ms CAREY: Perhaps last year or maybe a bit longer, yes.

The Hon. GREG DONNELLY: On the question of your foreshadowed discussion of the next generation of a Memorandum of Understanding between the office and the Independent Commission Against Corruption, is the issue of further refinement of the nature of brief material to be provided to yourselves quite central to your discussion or are you just collecting your thoughts at the moment about what is going to be in the overall discussion?

Ms CAREY: The bimonthly meetings are mostly concentrating on running through the matters that we presently have carriage of and matters that the Independent Commission Against Corruption intends to refer to us. If there is a delay we discuss what is causing the delay. Within our group prosecutions must take precedence, so is it because I have no staff to devote to the advising and it has not moved? Is it because requisitions are outstanding? Is there something that can be done to speed it along? The Independent Commission Against Corruption also advises me of what matters it anticipates it will send to me so I can start, if possible—and it is

not usually possible, but if possible—to consider the availability of someone to do the advisings. We do not generally discuss the memorandum of understanding at those bimonthly meetings, but it is time for it to be reviewed and we did discuss it in passing at the last meeting with a view to reviewing it within the next couple of months. I believe the Independent Commission Against Corruption has a view that perhaps it should spell out its role more clearly.

The Hon. GREG DONNELLY: In regard to what?

Ms CAREY: What they should do. It says a lot about what the Office of the Director of Public Prosecutions should do. It might assist if it were to spell out a little more clearly what is expected of the Independent Commission Against Corruption in terms of the relationship.

The Hon. GREG DONNELLY: I am struggling a little bit in the sense that there appear to be some matters that come across to you that are in pretty good shape in terms of being able to proceed with a prosecution. However, there are other examples that are obviously a source of frustration for one reason or another. Can you put a percentage on it or give more precise guidance—not with absolute precision—about the level of deficiency in what is coming across?

Ms CAREY: Older matters—that is, those that came across before the improvement was noticed—are a source of frustration. They are the ones that can cause the most trouble. Improvement has been noticed in the more recent briefs we have received.

The Hon. GREG DONNELLY: Are you saying that the more recent briefs are consistently better?

Ms CAREY: They are generally better. That is not to say that there are not individual issues and that we do not need to issue requisitions. However, as a general theme they are better than the briefs we used to get from the Independent Commission Against Corruption. Most problems are attached to the older briefs we still have. Generally both my group in the Office of the Director of Public Prosecutions and the Independent Commission Against Corruption have made efforts to get them moving and in a better state.

The Hon. GREG DONNELLY: We are not arguing that. Are they much better, a little better or what?

Ms CAREY: They are generally a fair bit better. I do not know whether that is much. There are matters that are really, really bad.

The Hon. GREG DONNELLY: Can you give it a rating out of 10?

Ms CAREY: Compared with a really, really bad one, there would be a whole lot better. Generally not all of the briefs were really, really bad.

The Hon. GREG DONNELLY: Have you had discussions with the Independent Commission Against Corruption about a really bad brief to try to establish what was the cause?

Ms CAREY: I touched on an older matter that is outstanding with Mr Smith. There is no admissible evidence from the prime witness. Because of a delay in the matter coming to us—and there was some delay on our part as well—it had to be reallocated as a result of staff changes. That is always a problem because a new solicitor has to start from scratch and read it again. That matter was very old and it took a long time. We are looking at charging people with offences committed in the late 1990s. There were no admissible statements from banks, which was crucial. The appropriate people at the bank had left and the bank initially said it had lost the documents. There are now statements from the bank. Things like that can occur. There are two problems with that matter that we have discussed. There are other matters where we have discussed particular issues that are holding things up.

Mr JONATHAN O'DEA: Obviously, an ongoing theme of late has been the previous dysfunction. We are hearing about the improvement in the dynamic between the Office of the Director of Public Prosecutions and the Independent Commission Against Corruption. Are there other areas where the Office of the Director of Public Prosecutions has recognised that it has lifted its performance?

Ms CAREY: We have lifted our performance in the provision of advice time wise. The only way we have been able to do that is for my group to work extremely hard. They work unpaid overtime, they work on

weekends and they work out of hours. That is the way we cope. The Police Integrity Commission might have a different view. Perhaps other areas suffer. We have more closely liaised so that the Independent Commission Against Corruption knows exactly what we need and what we expect a brief to contain. We do a fair bit of guiding through the requisition process and we have attempted to provide advice in a more timely fashion. We have tried various things such as allocating solicitors to provide advice only. However, there are so many prosecution matters in our group that that is not feasible in the long term. We do not have any dedicated advising solicitors. We would like some because part of the problem is that if you have a 20-volume fraud brief that is very technical and paper heavy you read it and you often run a three-week committal. However, when you come back you are starting from scratch again. We have made huge efforts in assisting them to improve on their end and thus assist us in giving more timely advice. We do not always achieve that.

CHAIR: Thank you very much for attending.

(The witness withdrew)

BRUCE ROLAND McCLINTOCK, Senior Counsel, 6/174 Phillip Street, Sydney, affirmed and examined:

CHAIR: In what capacity are you appearing before the committee?

Mr McCLINTOCK: I am a barrister and senior counsel. I carried out an inquiry into the Independent Commission Against Corruption Act in 2004-05 and presented my report to the Governor in January 2005. I was concluding a report that had been begun by Mr Cripps, the present Independent Commission Against Corruption Commissioner. I have other experience in relation to the Independent Commission Against Corruption. I was counsel assisting in the mid-1990s in the inquiry into Randwick Council and I have appeared before the Independent Commission Against Corruption on numerous occasions. For example, I appeared for a member of the Legislative Council in the Oasis inquiry some years ago. I assume the reason I was asked for a submission was the report I carried out in 2005.

CHAIR: That is right. We have received your submission. Do you wish that to be part of your evidence?

Mr McCLINTOCK: Yes.

CHAIR: Do you wish to make an opening statement?

Mr McCLINTOCK: The changes to section 37 to make evidence gathered by the Commission admissible in civil and disciplinary proceedings are very sensible. I have noticed that on many occasions, not merely in relation to the Independent Commission Against Corruption but also bodies such as the Australian Securities and Investments Commission, which also have compulsory powers and protections similar to those in section 37, there have been occasions in civil cases I have conducted when there is a perfect piece of evidence that you would wish to use and which has invariably been gathered at very considerable public expense but which because of the protections and prohibitions you cannot use. Sometimes you cannot use it even to contradict the evidence of the person who has given it if that person says something precisely to the contrary; that is, you know they are lying. That has disturbed me for a very long time, largely because a huge amount of public money was expended to gather that evidence. For that not to be able to be used except in prosecuting the person for false swearing seems to be an unnecessary and damaging limitation on the use of the evidence.

I put to one side its use in criminal proceedings, which I would not support because there are obviously other strong factors. In relation to civil and disciplinary proceedings where we are not talking about people going to jail or the liberty of the subject but whether they are fairly dealt with for the things they have done it seems a different matter. I understand that there have been occasions when state public servants who have had findings of corruption made against them on their own admission have been able to leave the public service with their benefits simply because the admissions they made to the Independent Commission Against Corruption could not be used in disciplinary proceedings against them. That is a matter of concern.

The amendments to section 37 increase the status of the ICAC's functions of assembling evidence for criminal proceedings. As I said in my submission, I do not see the link between the changes to section 37. However, that also seems to me to be important and it is clear that that was the focus of the previous witness's contribution. I have heard different stories—depending on whom one talks to—about where the problems lie. I suspect that, as always, there is a degree of finger pointing. The ICAC's complaint has been that its matters always get put to the bottom of the pile at the Office of the Director of Public Prosecutions. Whether that is correct I do not know.

There have also been complaints that the Director of Public Prosecutions applies perhaps an overly high standard to determine whether prosecutions should be brought. Again, I am not in a position to comment about that. However, in the 1990s inquiry where I was counsel assisting there was one matter where I thought we had unassailable evidence of a very substantial bribe being paid but no prosecution was brought. Again, that could simply be my naivety about what you need to do to succeed in a criminal case bearing in mind that apart from one or two not very successful exceptions I have done only civil work.

That said, it seems to me that the change to the status of the evidence assembling function is desirable and necessary if only because it will get a message across to the Independent Commission Against Corruption about what it should be doing. It is all very well having inquiries and exposing corruption publicly, but it seems

to me that the ultimate result should be the punishment of those who engaged in corrupt conduct. That is my opening statement. I cannot imagine that my comments would be regarded as terribly controversial.

CHAIR: I take it that you are very comfortable with the idea that the public interest of using that evidence in disciplinary and civil proceedings outweighs the private interests we hear so much about from other sources about protecting people.

Mr McCLINTOCK: I have absolutely no doubt that public interest outweighs those private interests. As I said, it would be a different matter if it were a crime. If it were for civil disciplinary matters I have no doubt that it outweighs it. Bear in mind that all that is happening is that evidence that has been gathered can be used. It does not even mean it is conclusive.

CHAIR: In civil proceedings, for example, there may be a question of its admissibility. You are saying that prime facie it is admissible unless there is some other reason.

Mr McCLINTOCK: Yes. As I said, that is how it should be. It is a matter of frustration when you can see the item of evidence and you cannot use it in civil proceedings. You have to reinvent the whole thing. I have no doubt that in that area the public interest dictates the change.

CHAIR: With civil proceedings, you know the Criminal Assets Recovery Act is in place?

Mr McCLINTOCK: Yes.

CHAIR: We have the Confiscation of Proceeds of Crime Act in place. We have heard evidence from the Police Integrity Commission today that it has no real issue in using that avenue for the recovery of assets or money. Do you think that if the Independent Commission Against Corruption were unable to have a connection with that Act, as the Police Integrity Commission does, that that would go a long way to assisting without the removal of that restriction on civil proceedings of admissions? Do you think that can work and address that issue or do you firmly believe that enabling an employer to take civil action against a former employee or an employee, whether it be an injunction or compensation, is the right way to go?

Mr McCLINTOCK: I think the latter is the right way to go. I do not see necessarily there is a conflict between the two. Although, I have to say I think the concept of the Independent Commission Against Corruption does not fit well in a sense with taking direct steps itself to use the confiscation of assets provision of legislation like that. The Independent Commission Against Corruption was established and has always seen itself as an investigating body that, while it ultimately makes findings of corruption—it sees itself as having an education function as well, which is important but put that aside for present purposes—it sees itself as an investigating body that does not finally make the decision itself to bring criminal proceedings and while, technically, it is the person who is prosecuting, it is run by the Director of Public Prosecutions, so I do not quite see how it fits. Again, I do not see a conflict between the two notions.

If you think about how it works in relation to disciplinary proceedings, if you have, for example, a local council and there has been a finding by the Independent Commission Against Corruption that a council employee has been taking bribes—not an uncommon thing, one has to say, as one knows recently—and the particular employee has admitted it on oath before an Independent Commission Against Corruption inquiry, it would seem strange in those circumstances that the council could not take immediate steps to terminate the person's employment, but as things now stand it cannot, unless there is something independent it can use to discipline the person.

I do not think it is merely a matter of clawing back ill-gotten gains obtained by corruption. It is a matter of dealing with people. For example, civil proceedings come out of Independent Commission Against Corruption investigations. There was litigation after the Oasis inquiry. There is quite often civil litigation following things like Independent Commission Against Corruption investigations although, I suppose, disciplinary proceedings are far more common. That is a long-winded answer, which I apologise for, but I hope it answers your question.

CHAIR: The other area that troubles me a little is the third term of reference, about the principal functions of the Independent Commission Against Corruption. My understanding is that in your recent report you agreed with the Commission submission that there was no justification or reason why the principal

functions of the Commission were to be interested in convictions. Is that a position you have changed now or is that distinguishable from what we are talking about?

Mr McCLINTOCK: No. I have to say, I have not seen the Commission's submission on this.

CHAIR: No, your submission to the inquiry?

Mr McCLINTOCK: My view was that there was no need to change it at that stage. I have taken a different position in here, partly because of my own concern about the lack of convictions that are coming through and whether that was not a way of addressing the issue. I am not being facetious when I say this, but the false swearing ones before the Commission do not impress me—they never have. That is not corruption: it is a criminal offence and obviously they should be punished for it, but that is because it damages the process. But the significant thing is obtaining evidence of crimes that involve corruption, taking bribes, and so on. Obviously, there have been some convictions but not as many as I would have thought or that some of the findings and evidence before the Independent Commission Against Corruption warrant.

If that change to the Independent Commission Against Corruption legislation improves that and improves its ability or adeptness for getting material together to enable prosecutions that would be a very good thing. I did not mean to downplay the significance of false swearing, but this is the Independent Commission Against Corruption we are talking about not the independent Commission against giving perjured evidence. I do not say that facetiously; it is significant.

Reverend the Hon. FRED NILE: You have no objection then to these amendments that are proposed?

Mr McCLINTOCK: No, I do not. I think they are a good idea.

Reverend the Hon. FRED NILE: But you are very firm though in the extracts you have attached from your previous report that you do not want it extended in any way to give the Commission any power in relation to criminal proceedings?

Mr McCLINTOCK: Yes, that is right, and I would not change that. The change to make its function assembling evidence is something different from that. I see it as assisting the Commission to develop the process of putting the Director of Public Prosecutions in a position where the Director of Public Prosecutions can do it rather than the Independent Commission Against Corruption itself doing it. Bodies like the Independent Commission Against Corruption obviously take notice of what is said in the legislation about what is significant for them to do. It does not appear to me to be merely cosmetic to emphasise the importance of that function but it does not mean that the Commission itself would be bringing the actual prosecution, which is the thing I had in mind in part 3.4 of the report I provided them. That would not change, but I do not see this amendment as infringing upon what I said in that part of my report that I attached to my submission.

Reverend the Hon. FRED NILE: Do you think some criticism of the proposed amendments from the bar is because it has a fear it will be extended to the other category or is there a misunderstanding of what is being proposed?

Mr McCLINTOCK: I think it is a misunderstanding, basically. May I ask, has there been a formal response from the Bar Association about it? I would be surprised if the Bar Association—one always has to judge criticisms depending on their source. If it is confidential I will not pursue it.

CHAIR: It will be public by the end of the day, because they are the next witness.

Reverend the Hon. FRED NILE: I was referring more to what is in newspapers, and so on.

Mr McCLINTOCK: I have not picked up anything in the newspapers.

Mr JONATHAN O'DEA: What is your prevailing view of the bar's opinion?

Mr McCLINTOCK: It depends on the area. There are some things I agree with very strongly; some things I totally disagree with. I have found myself at odds with my professional brethren on a number of occasions going back many years to the Greiner and then the Carr governments' changes to the personal injuries legislation that I supported to the fury of some of my professional brethren. A lot of these things depend, of

course, on the nature of the work that people do. You will get, obviously, completely different views from barristers who do criminal defence work, for example. I suppose I am influenced by the fact that I have had quite a close role with the Independent Commission Against Corruption and have a considerable degree of sympathy for the task it has.

I have to say, I was surprised when I heard from the earlier witness that it does not have professional police as investigators. The two investigators I had back in the 1990s were very able policemen, one from the New South Wales Police Force and one from the Australian Federal Police. The State policeman was then a sergeant and has gone on to be a very senior officer since then, and I was impressed by the calibre of the work they did on the Randwick inquiry. But that is straying away from the question I was asked.

Mr GREG SMITH: You mentioned how you felt in an inquiry, there was some red hot—I do not know whether you use that expression which is so popular at the moment—but there were some very strong evidence of bribery that ultimately the Director of Public Prosecutions did not go on with or something?

Mr McCLINTOCK: Yes.

Mr GREG SMITH: You agree that things can be red hot when the inquiry is moving along but when it comes to translating that into a prosecution it might be difficult because all the elements that were in existence at the time were no longer available?

Mr McCLINTOCK: I could not agree with you more, and the case in question was a very good example. While I thought it was red hot, and in some ways it was, there was a finding made by the assistant Commissioner I was appearing before of corruption, of a bribe being taken. But—and this would have been obvious to any experienced prosecutor—there was one arguably critical part of it that depended on a piece of hearsay. An experienced prosecutor assessing the evidence in question may have thought that was enough to bring it undone. My view at the time was that it was not, but reasonable minds can differ about these things.

Mr GREG SMITH: You agree that the rules of evidence before the Independent Commission Against Corruption do not apply, and you can use hearsay, and often in civil proceedings there is an informality about evidence that does not exist in criminal proceedings?

Mr McCLINTOCK: Absolutely. As you are very well aware, criminal proceedings are the last refuge of the strict rules of evidence.

Mr GREG SMITH: Attacks on credit: are you one who takes the view that if someone gives a version in the Independent Commission Against Corruption of events, that they cannot be cross-examined on that later on when they give a different version so that counts as a prior inconsistent statement?

Mr McCLINTOCK: Provided they have claimed privilege, which is the precondition, I have always taken the view that they cannot be, that is, it cannot be used as a prior inconsistent statement.

Mr GREG SMITH: What if they raise good character? Could it be used to rebut good character?

Mr McCLINTOCK: As section 37 stands now, I think the answer to that—although I would like to look at the section again—is probably not. There is a strong prohibition across the board on the use of that evidence.

Mr GREG SMITH: Against the person who makes it?

Mr McCLINTOCK: Against the person who makes it.

Mr GREG SMITH: Is evidence rebutting good character evidence against the person who makes it?

Mr McCLINTOCK: It could be raised by counsel cross-examining, which is the very frequent way of it coming on, especially with inexperienced barristers. I think it probably would still be prohibited.

Mr GREG SMITH: It is just an extension of an ongoing debate. It has been suggested that it would not be appropriate after the report is given and the active investigation is finished and it has moved on to a new

one or something like that, that it cannot use its compulsive powers to gather further evidence to assist in assembling a brief. Do you agree with that view?

Mr McCLINTOCK: I understand the problem and I understand the way it comes up is very often when they send the materials off—whether they be good or bad in form—to the Director of Public Prosecutions. The Director of Public Prosecutions will come back and say there is this hole here, go and fill it. The Independent Commission Against Corruption then says that is not our job; our job finishes when we give the report. The Director of Public Prosecutions says we are extremely busy and the New South Wales Police are busy too. It is going to be you or it will not be done at all. I understand the Commission has done that but I understand there is a degree of discomfort with the task in those circumstances and a degree of discomfort whether its powers formally extend to obtaining further information once it has made the report.

If that is the case, it seems to me to be not to derogate from any legitimate interest to extend the power to the Commission so that they can plug the gap and to give the investigators the necessary compulsory powers in those circumstances. I understand there to be some concern where they do not have the compulsory power and that while it has not come up as an issue yet, there is a possibility that it might come up as an issue; in effect, they are asking for people's voluntary cooperation at that point.

Mr GREG SMITH: They might wish to use a notice to require production of original documents, for example, that they did not get in their investigation and the original documents are the things that are needed for the prosecution, maybe because of document examiners' evidence or matters of that sort.

Mr McCLINTOCK: Yes.

Mr GREG SMITH: There does not seem to be anything in the Act that says that an investigation finishes at a certain time.

Mr McCLINTOCK: No, although you would probably interpret the investigation as actually finishing once a report has been produced because when you look at the structure of the legislation, its inquiries end up with a report. Implicit in that is the powers would be limited by that fact. I have to say, I have not looked at it specifically for the purpose of giving evidence here, although I am aware of the issue. I have to say that I think the Commission will take the view—I stand to be corrected by anything that Mr Cripps himself says—that their powers did not extend to issuing a notice at that point and what they will simply be doing is using the investigator to go around and ask for the documents. That usually produces them but whether that is sufficient—

Mr GREG SMITH: There is nothing to stop the investigator, if it is a policeman, using search warrants under the Law Enforcement (Powers and Responsibilities) Act?

Mr McCLINTOCK: No, there is not, but again I understand there is a resourcing issue. Let us face it; there is an ownership problem with these issues. The Independent Commission Against Corruption owns the investigation and takes responsibility for it. In a sense the Director of Public Prosecutions and police do not own it in the same way and that comes from the kind of division of functions that is going to be there. People who are actually involved in the investigations are very attached to them or can get very attached to them and feel very strongly about them whereas people who come from the outside can be less attached but, on the other hand, more dispassionate.

Mr GREG SMITH: That is a good reason to keep the running of prosecutions with the Director of Public Prosecutions rather than the Independent Commission Against Corruption.

Mr McCLINTOCK: Absolutely. You know as well as I do how involved people can get—overly involved sometimes.

CHAIR: The public have a certain perception of how ICAC operates. It is an investigative body to expose corruption and all those things. There is no doubt that the public has confidence in the way that ICAC operates. If the section 37 amendments were to be made, do you envisage anything to affect that confidence when the public knows that evidence of admissions can be used against you at work? Do you see any deterioration of that public confidence in the processes of ICAC if forced admissions can be used in disciplinary proceedings?

Mr McCLINTOCK: No, I do not. I can understand why you express the concern. I think overall, though, most people would think that if someone has made an admission, that admission should be able to be used in the civil and disciplinary proceedings against them. I think they would simply see it as a consequence of the Commission's existing powers. I do not believe it would have any effect on public confidence in ICAC, which does seem to be high, I have to say, and one would not wish even to lower it. But I do not think that would.

CHAIR: There is an argument to say that it might improve the confidence in certain ways because there would be results at the end?

Mr McCLINTOCK: Exactly.

CHAIR: The same with a prosecution and a conviction along the lines of that?

Mr McCLINTOCK: Exactly.

CHAIR: We value your comments. You have an intricate knowledge of the Act and you have done the review, so I thought I would ask that. Thank you for attending and giving us the value of your experience. We will take all that on board.

Mr McCLINTOCK: Thank you. I hope I have been of use to the Committee.

CHAIR: You have.

(The witness withdrew)

(Short adjournment)

STEPHEN JAMES ODGERS, Senior Counsel, Chair, Criminal Law Committee, New South Wales Bar Association, Forbes Chambers, Elizabeth Street, Sydney, affirmed and examined:

CHAIR: We have received a submission from the New South Wales Bar Association. Do you wish that to be part of your evidence today?

Mr ODGERS: Yes, please.

CHAIR: Before we ask questions, do you wish to make an opening statement?

Mr ODGERS: I do. Thank you for the opportunity, Chair and members. I am going to speak to the letter that was written by Ms Katzmann, President of the Bar Association, on 17 April 2009. I was not involved in the preparation of that letter but I will seek to explain and expand on some aspects of it. The first point: I appreciate that there has been some possible confusion about what exactly is proposed in respect of the Independent Commission Against Corruption Act in relation to criminal proceedings.

Looking carefully at the terms of reference I note that it is not proposed, explicitly at least, that answers given compulsorily or evidence obtained compulsorily in the Independent Commission Against Corruption be admissible in criminal proceedings. The proposal relates to civil and disciplinary proceedings, although I think members of the Bar Association had been under the belief that it was still, nonetheless, something that was being proposed, considered or a possibility and it was appropriate that the Bar Association respond and make it very clear that our position is strongly against any such possible use of answers compelled or evidence obtained compulsorily in the Independent Commission Against Corruption, and I just want to make that clear. It is important that I specifically advert to it because I need to go on to a separate point even in respect of civil and disciplinary proceedings, which relates to this issue. I will come back to that in one moment, if I might.

CHAIR: Yes, certainly.

Mr ODGERS: In terms of explaining very briefly why the Bar is opposed to any use of compulsorily obtained evidence in criminal proceedings, I remind the Committee—I am sure the Committee is aware—that under the Fifth Amendment to the United States Constitution there is a privilege against self-incrimination, which is forcefully protected by courts in the United States under the International Covenant on Civil and Political Rights, Article 14 (3) (g), which states that all people in criminal proceedings are entitled not to be compelled to testify against himself or to confess guilt. So you have got a right under the international covenant not to be compelled to testify against yourself, which is another way of expressing this basic concept of the privilege against self-incrimination.

The High Court has repeatedly emphasised the importance of the right and I think it is universally regarded as an important right, which should be protected. The only other point I would make about it is that it provides a way of ensuring a fair balance between the State and individual. It requires the State to prove guilt of a criminal offence and not be able to use the individual suspect to effectively compel that suspect to prove the case against them out of their own mouth. While it is not currently proposed, as I understand it, that compulsorily obtained evidence in the Independent Commission Against Corruption be admissible in criminal proceedings, there is an issue that I ask the Committee to consider in the context of what is proposed, that is, the use of such evidence in civil and disciplinary proceedings and that is the potential indirect use of compulsorily obtained evidence. When I say "indirect use", I mean indirectly used in respect of criminal proceedings.

What I have in mind is that there is the possibility that evidence that is compulsorily obtained in the Independent Commission Against Corruption might then be used in civil and/or disciplinary proceedings and then indirectly be utilised in criminal proceedings. Quite how this might work depends on the circumstances. It would partly depend on whether or not the person who is being made a defendant in civil or disciplinary proceedings is able to claim privilege against self-incrimination in those proceedings. For example, hypothetically, if they were being cross-examined in those proceedings about what they have said in the Independent Commission Against Corruption, there would be a question as to whether or not they could then claim privilege against self-incrimination and what they said in the civil and disciplinary proceedings to protect them against use of what they said there in subsequent criminal proceedings.

In some circumstances people—for example, as I understand it the Medical Tribunal—cannot claim privilege against self-incrimination, which raises the possibility of being compelled to give evidence at the

Independent Commission Against Corruption, make admissions that are then the subject of cross-examination in a tribunal setting and then what they say in the tribunal setting, perhaps to qualify or explain what they said at the Independent Commission Against Corruption. All of that becomes admissible in criminal proceedings.

If this Committee—and indeed the Government—proceeds to make the amendments that are proposed or may be adopted in respect of civil and disciplinary proceedings, I would invite this Committee to raise the possibility of a further amendment to the Independent Commission Against Corruption Act to confer an indirect use protection on answers given compulsorily or evidence obtained compulsorily before the Independent Commission Against Corruption. The current position under the Act is that an answer made or a document produced at a compulsory examination or public inquiry before the Commission—and I am reading from section 37(3) of the Independent Commission Against Corruption Act—is not admissible in evidence against the person in any civil or criminal proceedings or any disciplinary proceedings.

As I apprehend it, it is proposed to effectively delete the words "in any civil" and also the words "or any disciplinary proceedings". If that is to occur, I suggest—indeed, I think I can say that the Bar suggests—that consideration be given to adding in a provision similar or identical to that contained in the current Evidence Act, privilege against self-incrimination, section 128(7). I have provided copies of that to members of the Committee. It states:

> In any proceeding in a NSW court or before any person or body authorised by a law of this State, or by consent of parties, to hear, receive and examine evidence:
>
> (a) evidence given by a person in respect of which a certificate under this section has been given, and—

I stop there. It is talking about evidence, which is comparable to section 37 (3). Section 128 (7) (b) is what I am focussing on—

> (b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence, cannot be used against the person …

subject to the proposition that if you lie, that can be the subject of a prosecution. To cut to the chase, this provides what is conventionally called a direct and indirect use immunity—that is, not only what you say cannot be used in evidence against you but anything that is obtained indirectly in consequence of you having given evidence cannot be used against you. If there is a decision made to amend the Independent Commission Against Corruption Act so that what you say can be used against you in civil and disciplinary proceedings, because of potential indirect consequences in criminal proceedings for such an outcome we propose, to safeguard against that kind of indirect use, the Independent Commission Against Corruption Act itself should be amended in a way which confers the indirect use immunity as presently found in section 128.

Moving on, and I will be very brief in what else I have to say—I am sorry for going longer than I intended—the current privilege against self-incrimination extends not only to incrimination for prosecution for criminal offences but also to civil penalties. That is recognised in section 128, where you will see that the current privilege in subsection (1) covers both committing an offence or liability to a civil penalty. That is the traditional scope of the privilege. It is not limited to incrimination but also to the imposition of a civil penalty. The High Court has recognised under the common law that privilege extends that far. We would contend that any modification allowing compulsorily obtained evidence to be used in civil proceedings should not extend to a situation where there is the potential imposition of a civil penalty. That point is made in the letter by Ms Katzmann in the second paragraph on page 2.

Turning lastly to disciplinary and civil proceedings, I have to be quite frank with you. There are differing views within the Bar Association about this. We recognise that there are arguments both ways. The ultimate conclusion that was come to by the Bar Association was, on balance, that it did not support the proposed changes but it recognises there are arguments both ways. The primary argument, which is contained in the letter of Ms Katzmann opposing the proposed change, is found in the last sentences of the major paragraph on the second page, which essentially comes down to the following.

The primary goal of ICAC is to find the truth, find the facts. Anything which might discourage a witness from telling the truth would tend to conflict with that primary goal. If a witness knows that what he or she says can be used against them in civil or disciplinary proceedings, that provides a disincentive to telling the truth if they have something to hide. I appreciate that they are compulsorily required to answer questions, and I am not suggesting that they will necessarily refuse to answer questions, but there is of course the greater danger that they will attempt to obfuscate the truth or ameliorate their position to protect themselves. It is just simply a

basic proposition that if they are facing a significant harm to themselves, they are not fully protected as currently is the position, then there is the danger that they will not give truthful evidence.

That is the argument primarily which found favour with the Bar Association on balance as being a reason for not making the changes that have been suggested. As for civil proceedings, the view of the Bar Association is that ICAC should not be used as a mechanism for assisting people in private civil actions. I think that is a secondary point to the primary point which I have just made. That is all I seek at this stage to say in response to the two primary proposals in the terms of reference. As for the third—that is, modifying the functions of ICAC to make its current function relating to assembling evidence for criminal proceedings a primary function—nothing is contained in the letter from the Bar about that topic. I do not propose to make any submission about that topic, other than to make the observation that I do not really understand the terms of reference because the proposed change seems to be contingent on the changes relating to disciplinary and civil proceedings in that it is stated, "if either of the amendments referred to in paragraphs (1) or (2) above are made", whether et cetera.

This has led to maybe the explanation of part of the confusion that has existed about what exactly is being proposed, because it is hard to see what the linkage is between using evidence obtained in ICAC for criminal proceedings, which is this issue, and how that relates to the potential use of evidence in disciplinary and civil proceedings. But, anyway, that is just an observation I make that it is not entirely clear how these proposals interrelate. Because the Bar has not made a submission about it, I do not propose to make a submission on that issue.

CHAIR: What I want to ask you is this. If I have it clear, if proposals one and two are adopted, then you want to place the same subparagraph (b) in subsection (7) in the ICAC Act to make it clear that derived use is not available in criminal proceedings.

Mr ODGERS: Correct.

CHAIR: You said in the beginning of your evidence that you had a concern that the cross-examination of evidence obtained for ICAC would be used in criminal proceedings.

Mr ODGERS: Would be used in civil and disciplinary proceedings and then indirectly—

CHAIR: And as a consequence, indirectly flow on to criminal proceedings.

Mr ODGERS: Yes.

CHAIR: Is that because that section that you want in ICAC is not in there or is that because of any other case law or legislation or rule of evidence—and you are the expert on evidence—that allows counsel to do that? If a lawyer wanted to do that, what legal path would they follow to do that?

Mr ODGERS: Normally the way one approaches this is to ask: Is there something that prohibits it? The rules of evidence are generally things that stop you doing things. The basic rule of evidence is if it is relevant it is admissible. Plainly enough, if somebody has made an admission at ICAC that they have committed a crime, that will be very relevant in criminal proceedings. So the question is: is there some rule that prevents that being led by the prosecution in criminal proceedings?

CHAIR: That is cross-examining the defendant on evidence they gave at another hearing.

Mr ODGERS: Or just simply leading. Let me take it through step by step rather than answering your question directly. Assume a person is questioned at ICAC and compelled to give an answer that essentially implicates them in a crime; it is an admission. That cannot be used currently in criminal proceedings. But if, as proposed, it can be used in civil and disciplinary proceedings, one could imagine a situation in which that evidence of what is said at ICAC is tendered by the plaintiff in civil proceedings as an admission or tendered by the relevant body that is involved in the disciplinary proceedings and will be evidence against the defendant. The defendant almost certainly will have to go in the witness box, if they are resisting the civil claim or resisting the disciplinary proceedings, to meet that apparent overwhelming case—whatever it is.

They may well try to qualify or explain what was said at ICAC. Even if they do not, it is inevitable that they will be cross-examined in the civil or disciplinary proceeding about what they said at ICAC. The question I

raise is: will the evidence that they give in the witness box in the civil or disciplinary proceeding be admissible in a subsequent criminal proceeding, which would be effectively an indirect use of what they said at ICAC because they are being cross-examined in a civil or disciplinary proceeding about what they said at ICAC? The answer to that is not simple because the first question you have to ask is: at the civil or disciplinary proceedings could they claim privilege against self-incrimination in respect of their testimony in those proceedings, so that what they said in evidence in a civil or disciplinary proceeding could not be used in a subsequent criminal prosecution?

I think the short answer is probably they could in many cases. In some cases they cannot; I know that because I know that section 128, for example, only applies to a court. So that would not extend to tribunals, and as I understand it there is some authority suggesting that in, for example, the medical tribunal you simply cannot claim privilege against self-incrimination in that tribunal. So that would mean then that effectively they could not resist being cross-examined about what they said at ICAC in those proceedings and then it would appear that any admissions they made in the disciplinary proceeding could be then used against them in subsequent criminal proceedings.

CHAIR: So if you are counsel acting for a defendant in criminal proceedings and you saw that your client was being cross-examined or attempted to be cross-examined on evidence they gave at a disciplinary hearing, what would you put up as a bar for that on the Evidence Act or any other that is available?

Mr ODGERS: If they had not claimed privilege or could not claim privilege in the disciplinary proceeding, the only argument you would have would be that it would be unfair to admit what they said in the disciplinary proceeding against them in the criminal proceedings. There is a provision of the Evidence Act which says that a court may exclude evidence of an admission if it was made in circumstances that it would be unfair to admit it against that person. That is a very ambiguous concept. The High Court has limited it, given it a fairly restrictive interpretation in recent years. You would not be confident, and indeed I think it is likely a court would have to say that it would not be unfair to admit what was said in those proceedings.

CHAIR: You are saying that it is not a definite bar to that; it is an issue to be argued—

Mr ODGERS: Correct.

CHAIR: —and I think it is section 138.

Mr ODGERS: No, it would not be 138 because there has been nothing illegal or improper about what was done. You simply would not get to the first step under 138. No, there is a provision, section 90, which is the one I was referring to.

CHAIR: That is the old 'Lee' discretion.

Mr ODGERS: Yes, that is exactly right, the old 'Lee' discretion. I have grave doubts that that would apply. I do not think 138 works because there has just simply been nothing improper that has been done.

CHAIR: That is your very point, I suppose, that enables that to facilitate—

Mr ODGERS: I am concerned that this is not something that you can confidently say would not happen. Therefore, because it is a legitimate concern, if we are going to go down the path of making this kind of evidence admissible in these kinds of proceedings, we really need to make certain that it does not have a flow-on effect to criminal proceedings.

CHAIR: Hence the proposal that you are putting forward—

Mr ODGERS: Correct.

CHAIR: —would then enable you as defence counsel to clearly point to that and say—

Mr ODGERS: I would think so. You would say that this would be an indirect use of what was said at ICAC.

CHAIR: Showing a clear intention that the Parliament does not wish that evidence to be used in criminal proceedings.

Mr ODGERS: Correct.

CHAIR: The other evidence you have given is that the Bar Association's central argument is that it would be a hindrance to getting that evidence from people; they would not make those admissions because they know that that could be used against them in disciplinary proceedings.

Mr ODGERS: That would be a concern, yes.

CHAIR: The Commissioner would say in his experience at ICAC that when people give evidence, when they are asked about it, his experience is quite clear: the witnesses will only tell the Commissioner what they think the Commission already knows and will ultimately make admissions when the tape gets played, for example. When an intercept tape gets played they will play ball then. That is one of the first questions we asked the Commissioner, as you can imagine. His experience is that people will only tell the Commission what it already knows, and his view is that it would not make any difference in that respect. The Police Integrity Commission says that it is very difficult to determine. These things are very difficult to determine whether or not it would make a difference. What do you think of the Commissioner's argument?

Mr ODGERS: I have to be honest; I am reluctant to either agree or disagree with the Commissioner because he has far more experience of these kinds of inquiries than I do. I would prefer, if it is possible, to simply remain at the position I have adopted, which is that based on human nature the argument is that if you have this additional deterrent that would tend to be a disincentive to being open and frank. But I appreciate that the Commissioner has the benefit of the practical experience that he has.

CHAIR: We have had evidence today from the Inspector of ICAC, Mr Harvey Cooper, who in his submission and his evidence has suggested that evidence of an admission in ICAC become prima facie evidence in disciplinary or civil proceedings to be rebuttable by a defendant, for a finding of fact by the Commission or evidence of an admission to become prima facie evidence in disciplinary or civil proceedings. What is your view on that?

Mr ODGERS: I am a little resistant to this kind of language. There is no doubt whatsoever that if a person has made an admission at ICAC about something which is relevant to a civil or disciplinary proceeding that will be a key part of the case against them in that civil or disciplinary proceeding. It is inevitable. I have in fact relied on that point to say they will effectively have no choice but to go into the witness box and attempt to deal with it, which raises the potential concerns about indirect use that I have just highlighted. But plainly it will be a key part of that civil action or that disciplinary proceeding. There is no question about it. As for this proposition of prima facie, I do not know that it adds anything to the discussion.

Reverend the Hon. FRED NILE: Following up one point that the Chair made, you say in this submission from the president, "on the other hand diluting the immunity would potentially defeat the central purpose of ICAC investigations because it would inhibit witnesses from being honest or cooperative". As the Chair said, all the evidence we have indicates that that has not happened, that the witnesses lie until the other evidence is then produced and then they confirm it or make admissions. You used the term "compelled to tell the truth". They are not compelled to tell the truth; they only volunteer the truth when the evidence is overwhelming.

Mr ODGERS: Yes.

Reverend the Hon. FRED NILE: And then they make the admission. So it is not an abuse of that immunity.

Mr ODGERS: Well, it is in the sense that they are being compelled to answer and if they do lie they face prosecution. They do not have the option of remaining silent. The quid pro quo for that has traditionally been the current 37 (3), that what they say cannot be used against them. If it can be used against them then they know that telling the truth if they have done something bad now carries with it consequences, which did not previously exist. It is a deterrent one would say as a matter of human nature to admitting they have engaged in criminal or corrupt behaviour. But I cannot take it any further than that because I cannot knowingly comment

with any great knowledge on the point that has been made about the practical reality of what happens at ICAC. I would just be repeating myself on that topic. I am afraid I am not much help in response to that issue.

Reverend the Hon. FRED NILE: Page 1 of your submission makes a strong argument against being used in criminal proceedings, and as you have admitted that was not the intention.

Mr ODGERS: As I understand it, yes. Although I had been led to believe that nonetheless there had been some suggestion that it might be used in criminal proceedings. But I appreciate that is not currently proposed.

Reverend the Hon. FRED NILE: Because you use fairly strong language saying obtaining evidence for criminal trials by compulsion and then other investigative authorities would follow suit. That is almost the thin edge of the wedge argument that I often use with other issues.

Mr ODGERS: Yes, and if it is not going to happen then that thin edge of the wedge argument can be put to one side. But, if I might be so bold, if this change does occur then it is not implausible that other commissions of inquiry will also seek to be able to use what is obtained in civil and disciplinary proceedings, which in turn raises the concerns I have expressed about potential indirect use.

CHAIR: We are not the pioneers in this; there are already others such as the Police Integrity Commission—

Mr ODGERS: Yes, I appreciate that as well.

Mr GREG SMITH: As to the Bar Association's view about deterring people from giving truthful evidence, if that was the case, is that not against the common law principle where people are directed to answer questions, such as police officers or army officers? If justification at common law is given for using that evidence later in a criminal proceeding is it not more likely to be truthful if they were subject to that direction?

Mr ODGERS: Perhaps I am not entirely sure what you are referring to. Of course, we all know if you are questioned by the police, who suspect you have committed a crime, you have a right to remain silent—

Mr GREG SMITH: I am talking about police officers being directed to answer questions.

Mr ODGERS: I am sorry, yes. You mean at the Police Integrity Commission, for example. It is the case that because of the public interest in removing police officers who have engaged in corrupt or illegal conduct they will be required to answer questions and that can be used against them in those proceedings—I appreciate that. Ultimately the Parliament must make a decision as to whether the interests that support compelled disclosure outweigh the fundamental principle. The fundamental principle is the one I have articulated; it is upheld in the Constitution of the United States, it is upheld in international covenant, it is generally applied under the common law and sometimes the statutory provisions override that privilege. The usual quid pro quo is that the answers cannot be used against you—that is the current position.

Section 128 overrides it where a judge thinks a person should still answer but the evidence cannot be used against them. The Police Integrity Commission is an example of where the Parliament has decided that in those particular narrow circumstances it is appropriate that police have to answer and that it can be used against them in the disciplinary proceedings. The Bar Association's position is that there has to be the clearest justification for statutory modification of this fundamental right. This would appear to go considerably further than the Police Integrity Commission—plainly it does. It is permitting the use of this material. Firstly, it is not limited to the police force and it is not limited to disciplinary proceedings as proposed—it is going to go to civil proceedings as well. As I have already explained, there are dangers of indirect use, which raises an interesting question that I do not have the answer to: does the Police Integrity Commission Act cover indirect use? I do not know whether it does.

Mr JONATHAN O'DEA: That was going to be my question. I was going to ask whether the Bar Association had taken a position on the Police Integrity Commission Act where disciplinary proceedings potentially might lead to the same risk and whether or not it had ever come up?

Mr ODGERS: To be quite honest with you, until I was asked to come along and speak to this Committee on Friday I had not looked at that issue and I have not checked to see. More precisely, your question is: Has the Bar Association taken a position? I do not know the answer to that. I suspect not.

Mr JONATHAN O'DEA: Or, indeed, has the issue ever arisen to anyone's knowledge?

Mr ODGERS: Not that I am aware. There are two issues here. The first is what is the Bar Association's position about the Police Integrity Commission, and the other is what is the situation under the Police Integrity Commission in relation to indirect use? As for the former, I do not know what the Bar Association's position is and, as for the latter, I do not know what the Act does.

Mr GREG SMITH: In the section you have used in aid of watering down a change by having section 128(7) of the Evidence Act incorporated, did the Bar Association take into account the provisions of section 128(9)? Section 128(7) deals with witnesses before the court; section 128(9) deals with accused witnesses who are given certificates. Whilst they might be protected in the first trial, in a retrial their evidence can be used against them.

Mr ODGERS: Yes.

Mr GREG SMITH: Do you see that as weakening your argument that the principles in section 128(7) should be incorporated into any amendment that the Committee might recommend?

Mr ODGERS: No. Section 128(9) is a very narrow provision dealing with a situation where an accused person chooses to go into the witness box in a criminal trial and they do not have to, chooses to give evidence and claims privilege in respect of potential use of what they say in other criminal proceedings, and then for whatever reason the first trial does not conclude or alternatively there is a successful appeal and the question is can what he or she said in their evidence in the first trial be used against them in a retrial not can it be used in other criminal proceedings. So it is a very narrow provision dealing with a very narrow question and the High Court in Cornwell took the view that you should not be able to effectively—it is really the same trial—

Mr GREG SMITH: It is a retrial?

Mr ODGERS: It is starting again. You should not be able to prevent the use of what you have chosen to do or the evidence you have chosen to give in the first trial should be available in the retrial.

Mr GREG SMITH: Would the expression "cannot be used against" apply to evidence in cross-examination to damage someone's credit?

Mr ODGERS: "Used against" is section 128. Is that what we are referring to?

Mr GREG SMITH: Is it section 128(7)?

Mr ODGERS: Section 128(7), yes.

Mr GREG SMITH: Does that apply to credit evidence?

Mr ODGERS: Yes.

Mr GREG SMITH: Are you aware that in the Domican trial for the attempted murder of Christopher Flannery he gave a certain version of events and he was cross-examined on the same issue that had been used in the Nugan Hand Royal Commission where he gave a different version, and it was allowed in by Justice Roden to damage his credit?

Mr ODGERS: I must confess I am not completely familiar with that situation. I proceed on the assumption that at the Royal Commission he claimed privilege against self-incrimination so that his evidence would not on the face of it be admissible in subsequent proceedings. My understanding of the privilege is that it extends to any use including use to cross-examine about inconsistent statements. I must say I am a little surprised by what you have told me but I do not know enough about that particular case.

Mr GREG SMITH: Is not the expression "used against" normally pointing towards proving the elements of the offence rather than damaging the credibility of someone?

Mr ODGERS: I am almost certain—you will note my hesitation—in saying no, I do believe it is so limited. As I understand section 128—and I did not bring my book with me—I am almost certain the position is that that means it cannot be used in any way either as evidence of guilt or to discredit the accused by saying, "You said X in the witness box today but you said the opposite at a Royal Commission".

Mr GREG SMITH: But what if it is not an accused but just a witness that has given evidence before the Independent Commission Against Corruption who then gives a different version of evidence in a trial but is still a witness?

Mr ODGERS: Then, of course, the critical point is that it is not being used to incriminate. It is not being used in contradistinction of the fundamental protection that is conferred by the right. The right is to not incriminate, to not use it against you to prove a criminal offence.

Mr GREG SMITH: But it might prove you have perjured yourself when you gave the original version 10 years ago.

Mr ODGERS: That may be so but it is not being used in criminal proceedings against that person, it is being used to show that as a witness he or she has said something inconsistent with it. Now you have explained it to me I understand it and I can see why there would be no difficulty in such an outcome. It is not being used against—that is the critical point. If I am modifying what I said before, I misunderstood the scenario.

Mr GREG SMITH: No, I put a different scenario. I put a scenario of someone actually on the second occasion being on trial but on the first occasion was a witness.

Mr ODGERS: If it were an accused being cross-examined it would be being used against if it were being used to discredit the accused in the witness box. However, if all you are talking about is a witness in a proceeding it would not be being used against that person to show they had given an inconsistent account under privilege.

CHAIR: Thank you for your attendance today. You have made a very good contribution. The Committee appreciates your evidence.

Mr ODGERS: I am pleased to have been of some help, I hope. Thank you for the opportunity.

(The witness withdrew)

(The Committee adjourned at 4.00 p.m.)