

REPORT OF PROCEEDINGS BEFORE

**COMMITTEE ON THE INDEPENDENT COMMISSION
AGAINST CORRUPTION**

**REVIEW OF THE 2005-06 ANNUAL REPORT OF THE
INSPECTOR OF THE INDEPENDENT COMMISSION AGAINST
CORRUPTION**

At Sydney on Thursday 1 November 2007

The Committee met at 2.00 p.m.

PRESENT

Mr F. Terenzini (Chair)

Legislative Council

The Hon. G. J. Ajaka
The Hon. G. J. Donnelly
Reverend the Hon. F. J. Nile

Legislative Assembly

Mr R. D. Coombs
Mr D. R. Harris
Ms J. L. McKay
Ms L. A. McMahon
Mr J. R. O'Dea
Mr R. G. Stokes
Mr J. H. Turner

CHAIR: It is a function of the Committee on the Independent Commission Against Corruption to examine each annual report of the Inspector and to report to Parliament upon it in accordance with section 64 (1) (c) of the Independent Commission Against Corruption Act. The Committee welcomes the Inspector and Executive Officer of the Inspectorate to the table for the purposes of giving evidence on matters relating to the 2005-06 annual report of the Inspector of the Independent Commission Against Corruption. I would like to convey the thanks of the Committee for your appearance today.

GRAHAM JOHN KELLY, Inspector, Office of the Inspector of the Independent Commission Against Corruption, Level 7, Tower 1, Lawson Square, Redfern, and

SEEMA SRIVASTAVA, Executive Officer, Office of the Inspector of the Independent Commission Against Corruption, Level 7, Tower 1, Lawson Square, Redfern, affirmed and examined:

CHAIR: Firstly, the Committee has received a submission from the Inspector of the Independent Commission Against Corruption in response to a number of questions on notice relating to the 2005-06 annual report. Inspector, do you wish the submission to form part of your evidence here today?

Mr KELLY: Yes.

CHAIR: Do you wish it to be made public?

Mr KELLY: Yes.

CHAIR: I direct that the material to be attached to the evidence of the witness form part of the evidence today. In relation to making the report public, I direct that the statement by the Inspector be made public. Mr Kelly, would you like to make an opening statement to the Committee?

Mr KELLY: I do not have anything in particular to add to the answers we provided in writing or to the general observations I have made to the Committee before, except to indicate that we continue to operate as we have done in the past, there continues to be about just on one complaint per week, and the pattern of complaints continues to be approximately the same. The only other update is that we are discussing with the Independent Commission Against Corruption the nature and terms of our next proposed audit.

CHAIR: I notice that in your 2005-06 report you had a budget of \$382, 051, which you have indicated in your report. We have with us also the 2006-07 report—because of the timing of it you have released that report as well—and it shows a budget of \$636, 730. It is indicated in your reports that there has been no change in the permanent staff you have but that you have employed additional staff on a temporary or short-term basis to perform certain roles. Are you able to give the Committee an indication, given an enhancement in your budget of that size, approximately where that money has gone in relation to staffing or any other issues?

Mr KELLY: Ms Srivastava will give you greater detail on it. But the basic approach is simply that when the office was first set up there really was not much of an idea what resources we would need, and the Premier's Department came up with, to speak colloquially, a back-of-the-envelope kind of guess. But the arrangement was that, within appropriate reason and appropriate controls, we would be funded as we needed to be. Then, at the end of the year, effectively our actuals were taken and a slight supplement granted on top of that.

Where the biggest difference occurred is in respect of the employment of temporary staff, in particular to help us with a couple of the audits where it was simply not practicable to do those audits within the constraints of what we had, particularly bearing in mind that a fair amount of effort had to be devoted simply to setting up the office. There are two important points that I would emphasise. First, we are most definitely not profligate in our expenditure of money; in fact, our approach is quite the contrary, quite mean. Second, we certainly have not felt that we have been deprived of financial resources at all; in fact, I feel completely comfortable about the resourcing that is provided, effectively through the Premier's Department budget.

Ms SRIVASTAVA: In terms of the detail, what was allocated for employee-related expenses was about \$500,000, and we have spent \$450,000 overall in the 2006-07 year, and that includes for both the office manager and me, as well as for hiring additional temporary staff to assist.

CHAIR: Is it the case that it will be necessary to continue to employ additional temporary staff to fulfil roles like auditing, special needs, opinions of counsel, et cetera, and those kinds of services?

Mr KELLY: The answer is yes, from time to time. As I sit here, can I predict particular things? No. But in the very nature of the work we do, there will be a need from time to time; particularly, although we have been very modest in the amount we have spent on legal advice, I foresee that from time to time we will have to get external legal advice. Equally, in relation to any bigger audits that we undertake, quite clearly we would need additional human resources to assist with that. The audits that we have as the possible focus of the next phase of our auditing program will not, in all probability, require us to employ others; the ones we have been talking about are relatively narrow and focused in scope. For example, the one that really took up the greatest degree of input was the one on the section 12A compliance, where we examined a very large number of complaints that had been lodged to ensure compliance, and that required three or four months of secondment by a person from the Ombudsman's Office, for which we paid.

CHAIR: Does that limit you in your predictability as to how much money you will need in any particular year? Does it mean that there is a certain ad hoc nature about the money you will need? Does it vary?

Mr KELLY: It could vary, and it could vary quite dramatically. I suppose if I had a concern on the money side, it is that my arrangement with the Premier's Department is that any special project would have to be separately funded. If, for example, there were an occasion for me formally to seek counsel assisting and all that kind of stuff, then I would have to go to the Premier's Department to seek special funding for that. I should emphasise that I have no reason to believe that that would not be forthcoming, providing that we are appropriately modest. But I guess that is the one area of vulnerability that I see. In terms of anything we might wish to do in the ordinary course of events, I feel quite comfortable about the funding arrangements.

CHAIR: I detect in the reports a certain amount of difficulty with staffing with regard to two issues: first, your location, and, second, factors you have mentioned that make it difficult to get staff, such as other opportunities to do with the office or the location. Would you like to be in a different location? The reason I ask that question is that when you are in a central part of the city it has to be, does it not, easier to access legal services because of the geographic location, given that most legal services are around the central part of the city? Would you like to comment on that? Are they two of the main issues?

Mr KELLY: Yes. Of course, you have the advantage of having visited our offices. Whilst the premises themselves are perfectly fine—one could complain about a little bit here or a little bit there but, overall, inside the walls is perfectly fine—it is not a great geographic location. In particular, simple things, like someone going for a walk at lunchtime just does not happen, and that makes it a pretty trying environment. Although I should emphasise she never complains about this, our office manager, who is, in a sense, the face of the organisation, and people we have had on a couple of occasions working on a temporary basis, frankly have not felt comfortable in the environment and one person who we had engaged on a temporary basis left, and one of the things that I think contributed to his deciding to move on was that he says that he had been physically harassed on a couple of occasions. However, leave that to one side for one moment. I want to emphasise that this is not, despite the location, a racial issue at all; it is absolutely not that; it is just that it is a pretty odd environment for an office like this.

For those of you who do not know, it is right on the top of Redfern police station; so it has some challenges in it. But I think more than that, it is an isolated location so you do not get the ordinary interactions that a lot of the younger people would expect to get in a professional environment. My own view is that that has inhibited us recruiting and retaining people.

CHAIR: That was going to be my next question, but you have answered that. It is an impediment?

Mr KELLY: I think it is. Seema and I are used to it and it does not worry us at all, and, I should say, particularly our office manager, who is a very laconic kind of person and she gets around incredibly; but, frankly, it is not everyone's cup of tea. So that is the physical location. I think your question also ran to other issues. Nowadays we are dealing with, to speak in current language, Gen Y and Gen X kind of people that would be fitting into the hierarchy working for Seema and they are looking at their next job or the job after next, not the current job. When they look at the current job that we would have on offer there is really no career structure and no possibility of a career structure in a small office like this. And I guess they also say to themselves, "How will this look on my CV?" I guess, if you were a bright young lawyer—and we are probably primarily talking about bright young lawyers—it is probably not the most scintillating entry in your CV.

CHAIR: Is that what you meant though when you said you need challenges to the job?

Mr KELLY: Yes.

CHAIR: Overall though, with the establishment and the operation of the office, its internal infrastructure and equipment, having been in the role now for a while, at this stage are you satisfied with all those matters and all those items?

Mr KELLY: By nature I would never want to give the impression of complacency or self-satisfaction, but looking back over the just on 2½ years, I do not really think that I could have expected to have the core infrastructure in much better shape than it is in. The test of that is that although not necessarily as quickly as we might like we manage to deal with the complaints that come in. A lot of complainants I am sure do not like the answers that we give them, but we get not very many who say that we have really done a bad job and have not treated them well—some do, but not very many.

Then, I look at the other side of what we do: I look at the auditing side and I feel reasonably comfortable that we have ploughed through areas that have been useful in terms of the oversight of ICAC and I suspect have contributed to an improved performance by it.

CHAIR: One of the items raised in your earlier meetings with the Committee—it may have been raised on a quarterly examination—was advertising your role, and I note that in the report you have indicated where you have spoken to certain people and you have sent out brochures and you have advertised in newspapers. I also note that the change to the memorandum of understanding is that ICAC also play their part in this. Are you satisfied that your presence out in the community is at a sufficient level or will this be an ongoing role with you? I am talking about the ethnic community. You have mentioned that the main people who come to you are the male Caucasian variety.

Mr KELLY: That is right.

CHAIR: So, will this be an ongoing task of your office to advertise yourself?

Mr KELLY: I think it is one of the things we need to have on the checklist annually. There seems to be a pretty broad-based understanding of the existence of the office by those who want to access its facilities. So, I do not lie awake at night worrying that there are people out there who do not know who need to know. Nevertheless, it is obvious that there is an underrepresentation of complaints from ethnic communities. Interestingly, that is exactly the same at ICAC. So, there is probably some other phenomenon at work there.

Generally speaking—and can I prove this statistically? The answer is no—but my impression is that the composition of complaints that come to us is a pretty fair mirror of the composition of complaints that come to ICAC. So, yes, I think we should keep it on the agenda as a checklist item. Should we spend a lot of money on it? I do not believe that that is required.

CHAIR: In relation to your role, I notice that your functions are contained in section 57B of the Act, and it sets out four sub-paragraphs. In your report you obviously indicate your audit power,

which is in paragraph (a), and then you group paragraphs (b) and (c) for the general complaints, and we will get to those a bit later. Then you come to paragraph (d), which talks about general procedures. What kind of activity would you envisage would fall into that function? Paragraph (d) states:

To assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.

And you have stated there that you have done nothing in that process.

Mr KELLY: That is exactly right. It is a question of how you apply the resources and the way in which you, in a sense, approach the task. We have gathered together pretty much all the policies and processes that are written down by ICAC and we have generally familiarised ourselves with them. We have not come across anything that has rung alarm bells to the point where we thought, "Gee, we had better go in and, in a sense, re-engineer that process", and that is what we mean in saying that we have not done that. What we have concentrated on though, in particular, in the 12A audit is to see how they behave in fact and often when we look at complaints we have a look at the handling of the complaint against what they have said as being the procedures. So, I guess we come at this indirectly in a pragmatic way rather than in a—

CHAIR: Formal way?

Mr KELLY: Yes.

CHAIR: You have indicated in your report that you are also interested in the management side of ICAC. How much of the proportion of your work do you intend to take up looking at the managerial side as opposed to the more legal assessment side?

Mr KELLY: That issue comes up, I guess, primarily in my regular discussions with the Commissioner. I should say at the outset that I think there has been a significant strengthening in management processes in ICAC over the time I have been working at it. I suspect the abolition of the Operations Review Committee has had a positive effect because that process obviously took up a lot of time in terms of putting the documentation together, and Seema and I, particularly in the early days when the committee still existed, spent a fair amount of time looking at reports to it, and they were very voluminous and really one wondered about the productivity of the whole thing.

I think that with the abolition of the committee the management structure that is now in place in relation to the assessment of complaints is much more efficient. The second thing, and of course one is always in a bit of a cleft stick on this—I would not want to give the impression that former staff members were other than extremely good—but I think the recruitment of Theresa Hamilton, with her background in the Queensland commission, has had a positive effect because there has been, I think, this is very impressionistic though, but I think there has been a cross-fertilisation of approaches and management styles, and that always does organisations good, in my experience.

CHAIR: You have indicated the policies that you have put in place for assistance to complainants in regard to complaints about ICAC officers on duty, and inviting complainants to advise whether they wish you to proceed with an assessment. Has there been much change in those policies since the time of your report? Have they been basically the same?

Mr KELLY: It is basically the same, yes. From the beginning we have approached as much of the role as possible in a strategic way. Where it seems that an issue gives rise to a policy matter we have generated a policy, so that over time we will be able to deal with like things consistently. I am a great believer in that kind of strategic approach. I do not mean a bureaucratic approach just churning off rules, in a sense, but trying to approach things strategically and in an organised way. I would be a little troubled if we had to change too many things.

CHAIR: I want to ask you a few questions about the complaint handling processes. The main reason, I suppose, for your role is to assess complaints against the ICAC, which is an accountability venture that we all welcome. I think I am right in saying that the type of complaints you receive or the overwhelming majority of complaints you receive are not perhaps what we all expect; the majority of them are the way ICAC assesses its complaints, the decision to investigate or not investigate, and, of course, you talk in your audit report about there being some issues there as well.

The complaints that you deal with I notice are mainly paper-related, although you receive certain material from the complainant and then you access, I assume, some material from ICAC and you also have your electronic connection in your office. Is that the main material that you look at to assess these complaints? Is that the ambit of it?

Mr KELLY: It is the main focus. We do occasionally interview complainants, and mostly it is Seema that conducts the interview. Generally speaking, I have a policy that we have written down that I do not do interviews myself, because at the end of the day I have to make the call on it. So, we have, in a sense, a separation of functions, and in appropriate circumstances we interview the ICAC officers involved: we have done that quite a deal.

So, we are not limited just to the writing, so to speak, but also to oral information. The one area that we are pretty stringent on, and it comes up quite regularly, is that we ordinarily require a complainant to give some measure of particularisation of their complaint. In other words, if they simply write in and say, "ICAC dealt with me badly and they are corrupt", then we say, "You tell us what you mean and tell us why". Only yesterday—without going into the details of the matter because, as you know, I am not allowed to do that—I had written back to a complainant saying, "Please give us the particulars" and the person wrote back and said, "I'm not going to do so because it's obvious if you look at the ICAC files." Of course, it is never obvious if you just look at the files. That is a fairly tough policy that we adopt. I, personally, am absolutely convinced that it is the right policy. It is a policy that helps preserve the integrity of ICAC's systems and it is a policy that stops us wasting a lot of resources. My budget is nearly to zero on the top of it if we had to do the devilling, so to speak. I think it is a perfectly fair approach because if at the end of the day you want to go down to the Supreme Court of New South Wales you cannot walk up to the counter and say, "I want to commence proceedings against X" without having a piece of paper that says what the basis of the complaint is. That is the one part where we are stringent, but I think rightly so.

CHAIR: I have a few questions about the criteria that you have listed in your report. You refer to the age of the matter. Do you have a particular cut-off point?

Mr KELLY: No. There was one matter that really involved issues going back to 1979. Frankly, had the complainant articulated a reasonably precise complaint I think we would have said, "Nineteen seventy-nine is a little too far away." I had a funny experience in relation to this because we had a visit from the Chinese Deputy Director of Public Prosecutions. He asked a question about age of complaints and I said that our oldest complaint related to 1979 and he burst out laughing. I thought that was probably a pretty fair indication of his view.

CHAIR: So you balance the age with the particularity of the complaint.

Mr KELLY: We have looked at some that go back a reasonable distance.

CHAIR: You also refer to available resources and existing workload. How much does that factor into whether you proceed with an investigation of a complaint?

Mr KELLY: That has not been a central determinant in any of them. I guess in some we have said, "Well, there doesn't seem to be much in this and should we really be spending much more time on it?" And the answer is no. So it is a factor that is present in our minds but it is not a governing factor. I can say to you absolutely confidently that if the complaint otherwise appears to have real substance to it and the only issue was human resources to apply to it then that is a situation where we would look for some other help.

CHAIR: Do you provide reasons to complainants for not proceeding?

Mr KELLY: I suppose there is always a debate about what constitutes reasons but we usually give some explanation for not proceeding.

CHAIR: In general terms.

Mr KELLY: Yes. At the end of the day most of the complaints when we analyse their basis involve maladministration. Quite often we will get to the point where we say, "This is what you are

really complaining about and we don't believe that amounts to maladministration requiring us to take the matter any further." Sometimes the reason is as brief as that and other times we give a bit more. I think if you do not do at least that then, first, people are legitimately disgruntled; and, secondly, you are setting up a system that gives rise to further complaint.

CHAIR: Lastly on complaints, the assessment of evidence seems to be a real issue in your reports. You have a section 12A audit where you made certain recommendations and you assessed some complaints where you questioned an explicit policy on standard of effort required to assess evidence. If you look at both of those courses of action that you have taken—one with an audit and one with assessment of complaints—there seems to be an issue with how ICAC assesses evidence in terms of relevant evidence, allegations of failure to assess relevant evidence and so on. Were those recommendations put in place? Alternatively, did you get explicit policy? In general, what can you tell the Committee about how you feel that ICAC is moving forward to address those issues?

Mr KELLY: To be fair to everyone, I think I should discuss that with the Commissioner at my next meeting. But the general impression is that there has been in recent times a greater understanding of, first, what constitutes evidence; and, secondly, the need to have regard to the evidence. We face the same issue. It is quite tricky in some ways because inherently you do not need, and should not require, anything like the sworn testimony that you would expect in a court. You do not need affidavits, for example. On the other hand, mere assertions do not constitute evidence. A lot of the complaints that come to ICAC—and I have to say I think a fair proportion of the complaints that come to us—are based on mere assertions or, in some cases, mere speculation such as, "The council didn't do this; therefore, it must have been corrupt." Of course, none of that flies.

However, what we have observed in relation to a couple of cases where ICAC has not been as precise as it might have been is that, for example, it may not have rung someone up and said, "Well, what are the facts?" Alternatively, it may have thought that merely because the only evidence was oral evidence that was not enough. Of course, often the only evidence is oral evidence. Even in the most serious of crimes people are convicted on the basis of oral evidence. It is around those grey areas that the difficulties arise.

Reverend the Hon. FRED NILE: I have questions about one or two matters that were referred to earlier in the memorandum of understanding. ICAC is to raise awareness of the Inspector's role and functions. Are they doing anything in that regard to your satisfaction?

Mr KELLY: Yes. They routinely inform people of the opportunity to complain to me. I reiterate generally that there has been a very good level of cooperation from them—it is not absolutely perfect every time obviously—and there is a very good relationship with the Commissioner.

Reverend the Hon. FRED NILE: You say in the briefing paper that ICAC is not making basic inquiries to establish the veracity of complainants' allegations. Can you give an example? What is the reason for that in your opinion?

Mr KELLY: What I really meant harks back to the discussion we were having on evidence. In at least a couple of cases that I can immediately call to mind it would have been relatively easy to ring someone up and ask, "What happened here?" instead of just taking a piece of paper on its face value or taking a complainant's statement as the complete event. I cannot be sure why that has happened. But I think it comes back to a resourcing issue that I have mentioned to the Committee before. I recall in the year immediately gone the Commission dealt with 2,149 complaints or matters—whatever they like to call them—and they have about 10 assessment officers. So there is an enormous volume of complaints that come in and quick decisions have to be made on them.

If you were starting with a clean sheet of paper I think in some ways you would design ICAC differently from the way it has turned out to be. I probably have a slightly different view from the Commissioner and very possibly have a different view from the Parliament. But in many ways there are a large number of complaints that go to ICAC that have no realistic possibility of giving rise to serious and systemic corruption, and they burn up a lot of resources. That even means that people probably, to speak colloquially, give some things the once over lightly instead of giving it that little bit more detailed attention.

Quite coincidentally, I was looking this morning at some newspaper reports—the Committee will no doubt be aware of this—and on 19 October there was a report in the *Daily Telegraph* about the alleged bullying of a security officer at the Premier's department. I do not wish to make any comment whatsoever about the veracity, seriousness or any such thing of that matter, but I feel compelled to say that it is not apparent to me on the face of it that that is something that should go to ICAC. It might be heinous conduct in all sorts of other ways if it were made out, but it does not respond to the notion of being corrupt conduct. Yet ICAC has to devote resources to deal with it. That then leads to the imperfections that we were talking about.

Reverend the Hon. FRED NILE: I have another general question about your responses to questions on notice. You were asked a question about the PIC Inspector and you said, "I am not aware of the details of how the PIC Inspector approaches his role." Do you think there would be some benefit in having a meeting with the PIC Inspector to compare your roles? Perhaps you are doing that through other means. It seems that you are operating in parallel but there is no interaction between the two offices. When they are similar perhaps there should be some comparison.

Mr KELLY: I met with the immediately previous PIC Inspector at the very beginning—in fact, it may have been before I was formally appointed. The new PIC Inspector and I had an arrangement to meet but, one way or another, someone got tied up and we did not. I am aware that the PIC Inspector in one way operates very differently—that is, the PIC Inspector becomes involved to some extent in the current activities of the PIC. For example, as I understand it, he reviews some of their compulsory processes. I came to the conclusion at the very beginning after a discussion with the ICAC Commissioner that I should not approach my task like that because if I were to be involved at that stage during the course of an investigation and then subsequently someone complained to me I could not assess the complaint objectively. So I have deliberately stayed back from current activities.

I think on a previous occasion you and I had a discussion about whether the person in this job should be a lawyer. What I am about to say does not change my view, but it is interesting that the court system adopts much the same view. It is very difficult to get an appeal court to intervene in the middle of judicial proceedings for that same sort of reason. So in that respect the way I approach it, I know it is quite different from the Police Integrity Commission Inspector. Of course, the complainants are very different. Generally speaking, the issues are very different. So I am not sure that there is much greater scope for cross-fertilisation. What I do find useful is the about once a year interaction with people from other jurisdictions who have organisations similar to ICAC and there the issues are very similar.

Mr DAVID HARRIS: When the commission revises or develops new documents or policies, such as the code of conduct, do you see your office as having any formal role in having input into that process, given your knowledge of the types of complaints and potential witnesses?

Mr KELLY: Not in the development as such but the commission provides the outcomes to us and we review them, without doing it in any particular formalistic kind of way. If it struck us that there was an obvious difficulty, then I would raise that in a submission to the commission. I have not had occasion to do that. For example, when they were developing their new procedures following the abolition of the Operations Review Committee the Commissioner and I had informal discussions about the way we should approach it, and we did make one observation which has subsequently been taken up.

Mr JOHN TURNER: In your report you mention that the memorandum of understanding is due to be reviewed in September and signed in October. Has that been executed?

Mr KELLY: Yes it has.

Mr JOHN TURNER: And there was no drama in getting to that position?

Mr KELLY: None at all. In fact, if I recall correctly it was signed last week, last Tuesday.

Mr JOHN TURNER: In your answers on notice, No. 3, you say that the Department of Premier and Cabinet charge an annual fee of approximately \$16,000 per employee for the provision of payroll information technology and other corporate support services. On a rough calculation on your

employee-related expenses solely that is about 17 per cent of that budget. Drawing on your private sector experience is that a realistic fee for employee-related services?

Mr KELLY: It is a while since I have been involved in the outsourcing of those kinds of resources but going back to when I was that would be pretty reasonable. I have not felt the need to put it out to tender, and I am not quite sure what the reaction would be if I proposed that. I see it in this context: the overall budgetary relationship with Premiers has been pretty satisfactory. We have had a bit of a fight here and there but generally speaking we have walked away feeling fairly comfortable about the outcomes. At the moment I do not have a problem.

Mr JOHN TURNER: You have three employees. On that basis that is \$48,000 of your budget going back to the Department of Premier and Cabinet.

Mr KELLY: Yes, that would be about right.

The Hon. JOHN AJAKA: Are you satisfied with the way ICAC advises the public of your existence and the availability of being able to complain to you? Is it something that you believe is well and truly pointed out and not just nice little fine print down the bottom?

Mr KELLY: Yes, I am satisfied. In fact, in early times I almost had to rein them in because they obviously get complaints about themselves and their initial inclination was simply to send the complaint to me. I took the view—I think I discussed this with the previous Committee—that it is good for any organisation itself to deal with complaints against itself in the first instance. So not only do I feel pretty comfortable that they draw attention to the resources available to complainants through my office; in fact, if anything they probably like it a little too much.

The Hon. JOHN AJAKA: That was my next question and you have answered that. I appreciate that. You indicated that when you make a decision or you send correspondence to a complainant you tend to give a brief reason for your decisions. You do not feel that an expanded and detailed reasoning would in a sense give the complainant a little less of an argument that he is still being kept in the dark?

Mr KELLY: I have felt comfortable about going about it the way we have. I guess there are two or three observations I would make. There are resources once you get into anything that is approaching a judicial type judgement. Secondly, to be completely frank, with some complainants it would not matter what you wrote down. There would be a parsing of every sentence and just further correspondence. That happens not uncommonly, no matter what you do.

The Hon. JOHN AJAKA: We experience it here. I was most interested in what you were indicating about levels of advancement for employees, attracting the right candidates, your location, which the Chair had raised. Is there any possibility of your office linking with other government departments, either on secondment, whether it be the Crown Solicitor's office, the Director of Public Prosecutions, where rather than you trying to hire someone from scratch, maybe someone from the Director of Public Prosecutions could be seconded to you for 12 months, as they used to do at the old petty sessions days of the Local Court, where they might be seconded for 12 months, they then go back to where they started, having gained a wider range of experience and of course their career paths have not been hindered in any way.

Mr KELLY: We have done that to a certain extent. In fact, the person who provided the basic input into the 12A report came to us on secondment from the Office of the Ombudsman. We had an administrative assistant on secondment from the Industrial Relations Court, and we have looked at a couple of other possibilities on other occasions as well. So that is something we have done.

The Hon. JOHN AJAKA: And can be looked at in the future. It is not a situation where someone is the deputy and the guy or lady above them will not be leaving for 20 years and there is just no room to move.

Mr KELLY: Philosophically, I am a great believer in secondments.

The Hon. JOHN AJAKA: I am the same. I understand that your existence has been approximately just under three years.

Mr KELLY: Yes. It was 1 July 2005.

The Hon. JOHN AJAKA: Did you find a situation where a lot of old matters were suddenly coming to you, as well as the general new matters? So there was a bit of catching up and now it is starting to level off or is it fairly consistent today as it was three years ago?

Mr KELLY: That is a very interesting question to ask me because when my proposed appointment came before this Committee I think the expectation around the table was that there was this reservoir of old complaints that would inundate us in the first few months. That did not really transpire. There were some and I think we have largely got to the end of them now. But there was not the great build up that people had expected. There has been a remarkable degree of consistency in the number of complaints over the past couple of years and it runs to roughly speaking one a week. If you take the Christmas shutdown out of the picture, it is roughly a complaint a week.

The Hon. JOHN AJAKA: The only thing I wanted to maybe ask about was the matter over the 900 hours, the complaints still active, but I understand you are going to do that Chair?

CHAIR: Yes, we will deal with that.

The Hon. JOHN AJAKA: I will leave that then. Thank you.

Ms LYLEA McMAHON: I have two questions. One relates to how you define on and off duty in terms of your role of investigating conduct.

Mr KELLY: Do you mean for ICAC officers?

Ms LYLEA McMAHON: Yes, for ICAC officers.

Mr KELLY: We have not needed to be terribly definitional. The off duty one that I immediately remember—and there might have been a couple—was obvious. There was not any suggestion it was travelling to or from work or anything like that. It was obvious. ICAC itself has a process for dealing with such complaints so we refer the complaint to ICAC's own process for dealing with it. Will that ever come up? I do not know, and I guess if it does we may have to be a bit more definitional.

Ms LYLEA McMAHON: If you are acting in a professional capacity there are some situations where that continues with you, confidentiality being one, for example. There is an expectation that you are confidential about issues that you come across 24 hours a day, all day every day.

Mr KELLY: We have not come across that kind of case, fortunately. We are not even approaching that. Obviously I cannot go into details but the one that immediately comes to mind was utterly private.

Ms LYLEA McMAHON: I suppose that is a better definition, private versus professional conduct, rather than on and off duty. The other one relates to an answer you gave in terms of the resources of ICAC being expended on investigating inappropriate complaints. How do you see that as being resolved?

Mr KELLY: If the Committee might indulge me to go back a little in history to get to how it might develop in the future, the definition of corrupt conduct from the beginning was very broad and in particular it has the capacity to pick up a situation where there is no more unlawfulness than the potential existence of a disciplinary offence. That gave rise to some difficulty and indeed was litigated. When the judicial review of ICAC was underway, which was initially conducted by Jerrold Cripps before his appointment as Commissioner, he looked in some detail at whether the definition could be circumscribed in some kind of way. I think I recall this correctly: He wrote to a number of organisations, such as the Council for Civil Liberties, the Bar Association and the Law Society, and

asked for suggestions as to how the definition might be modified. Also I think he asked people to show any example where the Independent Commission Against Corruption had to conduct an inquiry where they did not think there was an allegation of corrupt conduct. That exercise turned out not to show to his mind a basis for recommending some kind of modification or tightening of the definition.

Looking to the future, you can approach this in two ways: You can either have a very stringent triage system, which is sort of what ICAC has moved to, so that the fishing net, so to speak, is very big and very broad but you select which fish you want to keep, or you can try to tighten the definition. I personally think there is scope for the definition to be tightened but I think that if that were to be done it would have to be as a result of a very deliberate determination by this Parliament about what resources it wants ICAC to employ doing what. I hark back to the newspaper report I mentioned earlier. To my mind it simply ought not to be within anyone's contemplation that a complaint of that nature should end up at ICAC. There might be other places where it should go, but not to ICAC. I think if I went further in answering your question I probably would be intruding far too far into the realm of public policy than I should go, although I do have views.

Mr JONATHAN O'DEA: One of the questions I have identified is the same as Ms McMahon's in terms of the definition of off duty. I think it needs to be clarified more as a private or personal nature as well, rather than out of hours or away from the premises, given the scope of the review over the potential abuse of power or impropriety, or other forms of misconduct which might relate to work, even though technically off duty. I am just reinforcing that point. I have two other questions. One is, of those two matters raised in answer to question 9A, those two situations where ICAC did not immediately or was not immediately forthcoming in terms of requests for information, were both of those matters ultimately resolved to your total satisfaction or perfectly?

Mr KELLY: In the second case, yes; in the first case, we have not ultimately resolved and reported on the matter. The unfortunate fact is that they could not locate the relevant document.

Mr JONATHAN O'DEA: Do you accept that?

Mr KELLY: One of the observations that we have made to them from time to time, and where I have reason to believe there is a genuine attempt to improve, is that some of their file management practices have not been as great as one might have hoped in terms of record-keeping. I do not want to be particularly condemnatory or anything like that; it is not an unusual phenomenon in public authorities that sometimes the document management system is not quite as good as you would wish.

Mr JONATHAN O'DEA: The other question I have is that I notice that in certain regards you use time measures.

Mr KELLY: Yes.

Mr JONATHAN O'DEA: Do you record the number of hours you spend on each individual complaint? You have about 52 complaints a year. Do you record time or costs against each complaint?

Ms SRIVASTAVA: We do not record costs but we certainly record time-hours spent.

Mr JONATHAN O'DEA: Using a factor of time, you could respond.

Ms SRIVASTAVA: Yes.

Mr JONATHAN O'DEA: What is the average cost per complaint?

Ms SRIVASTAVA: The bulk of complaints?

Mr JONATHAN O'DEA: Yes.

Ms SRIVASTAVA: You would probably be looking at spending roughly, including the Inspector's time, my time, and the office manager's time, \$2,000 to \$2,500.

Mr KELLY: I do not know whether this is a good thing or a bad thing, but a significant charge to the office is for my time because I am remunerated on a per diem basis and that is a relatively expensive way to remunerate people.

Mr JONATHAN O'DEA: And I suppose on a rule of thumb and putting it in a very crude way, there are 52 complaints and a budget of a bit over half a million, so it costs about \$10,000 a complaint. I understand a lot of your other functions also take time. I just think in the interests of transparency it is good for us to understand that, albeit valuable, it is quite a costly process.

Mr KELLY: I think if I may say so, Mr Chairman, you have raised a very legitimate point. Am I comfortable that this office delivers half a million dollars worth of value in a context where there are obviously many, many demands on public sector resources? I think, searching my soul, I have to say I am not confident that it is good value for money. It depends on what value is thought to flow from it. Would I be happier if we had uncovered a whole bunch of egregious behaviour by ICAC? No, of course not.

So in the sense that it is confirmatory that ICAC overall has performed and continues to perform pretty fairly and pretty well, perhaps that is good value for money. Whereas once complaints, as they did in the past, came to this Committee or to individual members and unrealistically it was expected that parliamentarians would be able to solve them, there is now the avenue of being able to refer them to me. Is that good value for money? I am not in a position to judge it professionally. As a citizen, I personally think it probably is good value for money.

Is it good value for money that an omnipotent and otherwise largely unreviewable organisation like ICAC has some degree of fairly transparent accountability? There I would say unqualifiedly yes because I have a general view that extraordinarily powerful and largely unreviewable organisations are to some extent to be feared in democratic society.

Mr ROB STOKES: I have a question related to referred complaints where you have a referral process. Does this relate to where a complaint is received by a legal practitioner acting on behalf of a complainant? Is that considered a referral?

Mr KELLY: It can do so and sometimes it comes from an agency or whatever. What we feel we need to do is make sure that the underlying person whose interests are at issue wants us to deal with the complaint. We did that for three reasons: one, it is only fair to the person concerned; two, if you are going to get to the bottom of the facts, you have to ultimately engage with the person concerned; and, three, it is again a way of ensuring that we do not waste our resources on pointless exercises.

Mr ROB STOKES: The reason I raised that is because, as a general rule in that relationship, there would be an assumption that a solicitor would be acting on behalf of a client, and that would be the end of the matter and you would communicate with the solicitor.

Mr KELLY: We have had one situation where it is absolutely unclear to me that there is much communication between the client and the solicitor—and I do not mean to be critical of the solicitor.

Mr ROB STOKES: But in those situations you would generally hark back—

Mr KELLY: We would be practical about that.

Mr ROB STOKES: My next question is related to that. What proportion of complaints are roughly, say, off the top of your head, made on behalf of a complainant by a legal practitioner?

Mr KELLY: Very few, in reality. Some are made by legal practitioners, but really very few. I take comfort from that. It really is a waste of people's money. I have a pretty stringent view on what lawyers ought to be doing, and formulating these kinds of complaints is probably not the most productive work.

The Hon. GREG DONNELLY: In answers to question number 14B about the provision of assistance to a complainant, you say that advice related to question 13 has occurred on two occasions. Could you inform the Committee about the circumstances of providing assistance? What I am getting at is this: is the assistance provided because clearly the person is struggling to put their position forward clearly to you to enable you to make an assessment of the complaint, or are there other criteria brought to bear about providing assistance?

Mr KELLY: I will make some general comments and then Ms Srivastava will give detail about things she has been directly involved in. When we got going, there was sort of a threshold issue about whether in a sense we would help people formulate their complaint. I came to the conclusion that as a general proposition we should not, and there were a couple of pretty powerful reasons. First off, that has the capacity to take up your time 100 per cent, whether the complaint is justified or not, so there is a real resource allocation issue there. Secondly and in some ways much more fundamentally, if you get involved in the formulation, it is very difficult then for you credibly to assess it and to come to a conclusion that will ultimately be acceptable to anyone, but certainly not to an organisation like ICAC.

It seemed to me that we basically needed to say that you, the complainant, have to tell us what the complaint is, and we are not going to formulate it for you. However, the reality is that there are in our society a material number of people who suffer from some kind of disability or some kind of lack of articulate-ness who can get badly run over by organisations, so to speak, and who need a measure of assistance in identifying what the issue is. So our policy is deliberately developed to enable that case to be dealt with fairly. Ms Srivastava has been involved in that and she might like to speak.

CHAIR: Ms Srivastava, would you like a break before you do that?

Ms SRIVASTAVA: Would that be all right?

CHAIR: Yes, certainly.

[Short adjournment]

CHAIR: Ms Srivastava, you were about to give an answer to Mr Donnelly's question.

Ms SRIVASTAVA: The two occasions when assistance was given were after receiving particulars from both complaints in writing but the particulars were not clear and it was apparent that it would be better, in order to obtain most particulars, to speak to them face to face. That assistance was given because in one instance I think it was an issue of not being able to sufficiently articulate the complaint in writing but orally the complainant found it easier to say a whole lot of information, and from that I was able to ascertain what the particulars were related to the complaint.

In regard to the other complainant, think there were issues around how well the person was and that they felt better when they could meet face to face. It was a very distressing experience for them to be required to put it in writing, and that again was to do with their health and how well they were. In providing that assistance I was mindful that I did not want to be putting words into their mouths so I asked a series of open-ended questions and on both occasions I found I received a large volume of information and then had to be able to identify what related to the complaint, and I was able to clarify from repeating what people said to me that that was the complaint that they wished to lodge.

I then provided them with notes of the meeting and asked them to confirm whether they were happy with what I had written, that that was an accurate record of what they said was their complaint and they said it was. I understand one complainant took it away and had those notes read by a friend, and they were happy with it and they came back and said yes, that is it, you can proceed on that basis.

The Hon. GREG DONNELLY: Inspector, in the same question, question 14, you make some comment about the training of ICAC staff with respect to complaint handling and dealing with complaints. My question is a bit more general, about the issue of training. Obviously the organisation is relatively small and to take someone offline for a period of time creates gaps that can be hard to fill.

Notwithstanding that, is there any training you feel would be valuable to be provided to the staff which, at least to this point in time, you have not been able to provide?

Mr KELLY: I am a passionate believer in training and on previous occasions with the Committee had expressed the view that one of the things that ICAC then needed was a greater training program. I guess if you held that view you had better live up to it yourself perhaps Ms Srivastava should answer part of the question but I have certainly been as encouraging as possible to people to undertake a variety of training, including some, on the face of it, quite remote from Berwick immediate functions and including some reasonably expensive stuff.

One of the difficulties you can have with this kind of function is that people who have to perform become very narrowly focused on whatever the tasks are at hand and do not sufficiently see those tasks in a broader societal context. In my experience across a number of organisations one of the ways you overcome that is through training of one sort or another that takes them into other disciplines or other exposures. You are absolutely right to say that resources are necessarily limited. Our financial resources are not open-ended, and there is no way in the world they could be otherwise. Secondly, people out of the office do have a big impact in the office. I think that is probably enough for me to say. But perhaps Ms Srivastava might like to add something.

Ms SRIVASTAVA: I see the approach the Inspector is taking in terms of training has been one not just related to complaints or task focused work but a broad one. That has generally helped me in running the Inspectorate. It is a small agency. So, I have done training related to management as well as communication training and that has helped overall in making the job more interesting as well as to take a broad strategic approach to this non-complaints handling function.

CHAIR: Mr Kelly, some of the ground we traversed earlier, and I preface the question by this: You referred us to a newspaper article today about bullying a security guard in the Premier's Department and you expressed your opinion in general that those matters should not be before ICAC. Firstly, we are well aware that ICAC receives many complaints, a very small percentage of which it pursues. You have made the comment that ICAC performs well under difficult circumstances. I think we all generally agree—others may have a different opinion, but I think that is generally the situation. I noticed on page 21 of the 2006-07 report there is an instance where there is exchange of correspondence between you and the Commission about a particular matter, and the issue is serious and systemic corruption. There is an interpretation of what that means. I think you, in one of your audit reports, have adopted the interpretation that it means either.

Mr KELLY: Yes.

CHAIR: And so has the Commissioner.

Mr KELLY: Yes.

CHAIR: But he says in there that there are instances where it could be one serious event which highlights inherent corruption issues the Commissioner could pursue or one serious event that does not follow that. Conversely, there could be systemic issues that are not warranted by ICAC but there could be ones that are and they are systemic. So, it is left fairly open, and a horses for courses basis, if I can put it that way, as to what the interpretation could be. You have given an analogy of the fishing net, one option of which is choosing which fish you want to keep, and you have given another course of action, changing the definition of corrupt conduct.

The reason I say all that is that all this relates to the assessment of evidence. In your job as Inspector, since you have been appointed to the role, the main complaint you have had is the assessment of evidence. The majority of complaints you have had are that ICAC has not properly assessed the evidence, and the decision as to whether or not to investigate has been the main source of your complaints. I have asked you this before, and I think the Commissioner has responded to you by saying that these matters of assessment of evidence and the weight to be given to them will be covered in the induction of legal officers. Do you see cause for you to be recommending any training or ongoing training? Do you see a role for yourself to monitor that issue with ICAC? Do you think that could be a cause for ongoing training with ICAC, not just the induction, seeing that is the main focus of the work you get in your role?

Mr KELLY: I think the short answer is yes. The long answer is somewhat more complicated. I think had the commission not been prepared to adopt the interpretation that it can be either serious or systemic, had it said it has to be both, I would have felt compelled to come before this Committee and say either Parliament did not intend that or, if it did intend that, the provision should be amended. As soon as you turn your mind to it, almost instantaneously you will find the most egregious examples of corruption that are not systemic. Of course ICAC should investigate. So, I think ICAC operates on that basis, a basis I feel comfortable with and a basis that Parliament ultimately feels comfortable with as a major advance.

In connection with the assessment of evidence, the major cause of complaint to me is when ICAC has not taken up complaints and a subset of that is that the major component of those complaints is that they have not found the evidence or assessed the evidence properly. So it is sort of a subset of a subset. There were, I can recall to mind, a couple of cases where I thought the assessment officer had not properly understood what was evidence and what was not evidence. My understanding is that there is much better, I guess, ultimate supervision of that issue within the assessment area than might have been the case when those issues arose.

I have not in recent times followed up with the Commissioner precisely what training programs are under way. I think it is a timely reminder that I should check again and my approach will reflect what I said in answer to the question from Mr Donnelly. I like to approach things by imagining that you were the person who was in the hot seat. I think to be an assessment officer in ICAC must be a pretty tough, hard job and it would be a job where it is very easy to make mistakes. For the most part they do not make mistakes but it is certainly easy to make blemishes. I have said to this Committee before, you take the 2000 complaints and take approximately 10 full-time people sitting in that assessment area, you take approximately how many days a year they actually work and you are looking at them having to process one complaint a day, every day they are at their desks and that is hard. I do think there is scope for continually honing their skills in picking issues and dealing with things like what constitutes evidence. Now it is very hard, and I am sure the Commissioner would say this to you if he were sitting here as well, to find precisely applicable training for that kind of approach. It is not just complaint handling stuff because that is not what we are talking about and I think they probably understand all of that fairly well. It is not quite going to a course on what constitutes admissible evidence either—it is somewhat more refined than that. So that is a very long answer, apart from my monosyllabic answer.

CHAIR: Is it a managerial issue?

Mr KELLY: Chairman, I have said before I think embedded in the very structure of ICAC is a tremendous managerial challenge. ICAC's budget is basically at the ICAC level of a global budget of approximately \$16 million; I might be out by \$1 million here or there but near enough to \$16 million. ICAC then has to make decisions about the application of that. A very large part of that budget is simply driven by salaries and salary-related expenses and very little else. But really at the end of the day you are making decisions about resource allocation between two clearly competing functions. One is the corruption prevention function and the other is effectively the complaints function. There is no real guidance given in the legislation, nor—and I do not suggest it should be otherwise—real guidance given from the Parliament or the Government as to how that balance is to be drawn. Interestingly, in a purely conceptual way, you do not necessarily have to have an organisation that has both of those functions together. You could actually separate those functions and make your resource allocation between them much more explicit and much more dependent upon a public policy forum. So, in that sense, it is a big management issue sitting right at the top of the organisation. I think successive Commissioners have dealt with that issue very well but let us not fail to recognise that it is a big issue.

Sitting under that issue is how you view and manage your complaints and investigations function. Quite clearly the investigations function has been tremendously important. The really big, momentous results from ICAC have come from extensive investigations, often involving covert operations or wiretapping or whatever. That is where the big successes have been. Yet they are absolutely resource intensive functions and they are not functions that are repetitive day in and day out. It is not like you know you have to have so many traffic police at any given time. These are functions that have resource demands that go up and down and that is a very big management issue.

Again I would not want to suggest I have any view other than I think successive Commissioners have done a very good job in making those resource allocations. Then, in terms of the stuff that comes in the door, off the street so to speak, in those 2000 complaints a year you have to make very hard decisions about which fish you are going to get.

Ms Srivastava and I were discussing this morning that if you lived in a more idealised world, you would probably try to articulate clearer criteria about what fish you would keep, the species or the size. It is a bit like the fishing regulations, if you continue the analogy. At the moment it is not absolutely clear in our core cases. I suppose, in fairness, I probably should discuss this with the Commissioner first, but it is not always obvious to us why some complaints are taken up and others are not. Perhaps it would be better if there were clearer criteria on that. However, I am sure the Commissioner would say, and I am sure the head of the assessment area would say, to a large extent you have got to be judgmental about it and you have to pick.

CHAIR: On the issue of the relationship between agencies, we obviously have what has been an ongoing discussion over past committees about the relationship between ICAC and the Department of Public Prosecutions. Your analogy of snakes and ladders without the ladders is one I have noticed you have stated to the Committee before and you have been able to clearly recognise the difference in their roles.

Mr KELLY: Yes.

CHAIR: And the attempts that have been made for those two agencies to work together as best as they possibly can, given that there are a lot of issues there. I want to ask, would you be willing to assist in any process of a new memorandum of understanding that is currently, or due to be as I understand it, talked about between those two agencies given your recognition of the issues?

Mr KELLY: Could I answer partly in the public forum and if it is proposed that we go into an in camera session I will give a supplementary answer?

CHAIR: Yes.

Mr KELLY: The short answer to your question is yes. The other answer I would give in the public forum is that it is absolutely clear to my mind that there needs to be a process whereby people who are found to have engaged in corrupt conduct that constitutes a crime, or if after appropriate prosecution is found to constitute a crime, should be dealt with and dealt with expeditiously. There is not a shadow of doubt otherwise; or frankly, we are all wasting our time. In saying that it is necessarily implicit, and therefore I will make it explicit, I do not believe that ICAC achieves the purpose that people expect it to achieve if all the process results in is a finding of corrupt conduct and the person is never prosecuted or, to use American frontier language, is never brought to justice. So there must be, in my mind, some process for the resolution of that issue. The other thing I will say in my public answer to the question is that I can understand the starting point of the Director of Public Prosecutions, as well as the starting point of ICAC. However, I think we as a society also have an entitlement to focus on the end point.

The Hon. JOHN AJAKA: I wish to refer to what was said earlier about section 12A. If it was Parliament's intention that both limbs of serious and systemic were to be satisfied then technically ICAC, by not proceeding on the basis of one or the other, is not really complying with the Act and maybe it is something that your office, as the Inspector, should be seriously looking at or possibly we, as a Committee, might have to look at?

Mr KELLY: When this issue first came up we spoke to the person in the Cabinet office who had been involved in the preparation to the amendments and there was not any element of doubt that it was meant to be disjunctive. Unfortunately, the English language is such that sometimes and/or, or the correct use of them, becomes a little unclear. So we have felt comfortable that at least the relevant people in the Cabinet office intended the two concepts to act disjunctively and that then to my mind solved the problem.

The Hon. JOHN AJAKA: You are not aware of any case in which this has been tested?

Mr KELLY: No.

CHAIR: Mr Kelly and Mr Srivastava, could we excuse you for a few minutes. We need to discuss a matter briefly before we commence an in camera session.

(The Committee deliberated in the absence of the witnesses.)

(Evidence continued in camera)

(The Committee adjourned at 4.19 p.m.)

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