



PARLIAMENT OF NEW SOUTH WALES

Committee on the Independent Commission Against Corruption

REPORT 1/56 – MARCH 2016

REVIEW OF THE 2013-2014 ANNUAL REPORTS OF THE INDEPENDENT COMMISSION
AGAINST CORRUPTION AND THE INSPECTOR OF THE INDEPENDENT COMMISSION
AGAINST CORRUPTION





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The motto of the coat of arms for the state of New South Wales is "Orta recens quam pura nites". It is written in Latin and means "newly risen, how brightly you shine".

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Membership

| | |
|-----------------|---|
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Committee's functions

Under section 64 of the *Independent Commission Against Corruption Act 1988*, the functions of the Committee are to:

- monitor and review the exercise by the ICAC and the Inspector of the ICAC of their functions
- report to Parliament, with such comments as it thinks fit, on any matter appertaining to the ICAC or the Inspector or connected with the exercise of its functions to which, in the Committee's opinion, the attention of Parliament should be directed
- examine each annual and other report of the ICAC and the Inspector and report to Parliament on any matter appearing in, or arising out of, any such report
- examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to Parliament any change which the Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector
- inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

Nothing in the ICAC Act authorises the Committee to:

- investigate a matter relating to particular conduct
- reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint
- reconsider the findings, recommendations, determinations or other decisions of the ICAC in relation to a particular investigation or complaint.

Chair's foreword

The 2013-14 Annual Reports of the Independent Commission Against Corruption (ICAC) and the Inspector of the ICAC were reviewed by the Joint Committee on the ICAC on 7th August 2015.

The hearing by the oversight committee was conducted against the noise created by the manner in which the ICAC investigated certain allegations concerning Senior Crown Prosecutor, Margaret Cunneen and styled 'Operation Hale'.

A good deal of time was spent in the committee proceedings seeking to elicit responses as to the manner in which the ICAC went about the conduct of its investigation of the Senior Crown Prosecutor. The ICAC Commissioner sought to deflect a significant number of those questions by relying on Section 64(2) of the *Independent Commission Against Corruption Act 1988*.

At the conclusion of the committee hearing, the Committee sought advice from the Crown Solicitor as to the interpretation of Section 64(2). The Crown Solicitor's advice was provided to the Clerk of the Legislative Assembly. That advice remains the property of the Clerk and is not generally available for publication.

It is fair to say however, that the advice canvassed the extent to which the Committee can question the ICAC in respect of operational activities. In summary, the advice of the Crown Solicitor indicated that the Committee is entitled to ask questions relating to particular conduct or investigations where the questions are for the purpose of reviewing the way in which the ICAC conducts its functions, and its investigation and decision-making procedures. This does not mean that the Committee can reconsider the substance of individual matters investigated by the ICAC, with a view to substituting its own decision.

Oversight of bodies such as the ICAC is an essential component of the manner in which the community entrusts significant power to those bodies. The *Independent Commission Against Corruption Act 1988* invests the ICAC with power to conduct compulsory examinations, issue search warrants, conduct surveillance, and intercept telephone calls. Such power is given to the ICAC because of the community's demand that corruption, wherever it exists, be stamped out.

The granting of powers to bodies like the ICAC however, can only be justified in the eyes of the community if there is proper oversight. I anticipate that in further reports of the ICAC Committee, the full extent of the Committee's power to oversee the ICAC is investigated further. It is essential in my view, that the Parliamentary oversight committee and the Office of the Inspector of the ICAC be respected for the protections which they afford the community. They should not be seen as bodies which seek to limit the power of the ICAC, but rather to protect the community's interests in ensuring that the ICAC does not abuse the powers which have been invested in it.

Because of the significant noise surrounding Operation Hale, a significant amount of the excellent work by the ICAC may well have been lost. It is important that ICAC continues that work because of the endemic nature of corruption wherever public officials have the opportunity of delivering contracts and opportunities.

At the commencement of the 2013-14 Annual Report the Commissioner outlined some of the major achievements of the ICAC for the previous year. These should be acknowledged and repeated:

MAJOR ACHIEVEMENTS

- *receiving 3,386 matters and taking on average 28 days to deal with a matter, which is a 28% improvement on the average 39 days it took to deal with the 2,930 received in 2012–13*
- *presenting a “straightforward” matter to the Assessment Panel within 13 days on average, compared with the target of 21 days*
- *commencing 43 new preliminary investigations and 10 new full investigations (operations)*
- *completing a total of 49 preliminary investigations and 14 operations*
- *conducting nine public inquiries over 84 days*
- *making corrupt conduct findings against 41 people, and recommending that the advice of the Director of Public Prosecutions (DPP) be sought with respect to the prosecution of 39 people for various offences, compared to 18 people referred to the DPP in 2012–13*
- *completing 96% of preliminary investigations within the target 120 days.*

The educational component of the work carried out by the ICAC is important. However, the desire to educate the community about the existence of corruption and the opportunities to engage in corruption, should not ever be used as a justification for either abuses of power, or pursuing individuals in circumstances where the ICAC acts beyond its jurisdiction.

At the time of writing the foreword to this report, the ICAC Committee is reviewing the report of the ICAC Inspector into Operation Hale and will have more to say about the job of the Inspector and the oversight committee when that report is completed.

Finally I would like to express my thanks to other members of the Committee for the work that they have done and continue to do at a time when there is considerable public attention on the work of the Committee. Also I am exceedingly grateful for the professionalism of the secretariat who work so hard behind the scenes to assist the work of the Committee.



Damien Tudehope MP
Chair

List of recommendations

RECOMMENDATION 1 _____ 15

That the NSW Government ensure that Inspectors and Assistant Inspectors of the ICAC are recruited in a timely fashion to avoid any periods of vacancy in these positions.

RECOMMENDATION 2 _____ 20

That the NSW Attorney General write to the Commonwealth Attorney General seeking an amendment to the *Telecommunications (Interception and Access) Act 1979* (Cth) to enable the Inspectors of law enforcement and integrity agencies to access telecommunications interception material for audit purposes.

Commentary

INTRODUCTION

1. This report fulfils one of the Committee's statutory obligations under its establishing legislation, the *Independent Commission Against Corruption Act 1988* (the ICAC Act). The Committee's functions include examining each annual report and other report of the Independent Commission Against Corruption (the ICAC) and the Inspector of the Independent Commission Against Corruption (the Inspector) and reporting to Parliament on any matter appearing in or arising out of these reports.
2. The ICAC investigates, exposes and prevents public sector corruption and educates the community and the public sector about corruption. The ICAC's functions include investigating complaints of corrupt conduct; examining laws, practices and procedures to detect corrupt conduct and to secure changes in work methods or procedures that may be conducive to corrupt conduct; advising and instructing public authorities and officials about changes in practices and procedures to reduce the likelihood of corrupt conduct; and educating the public and providing information about the detrimental effects of corrupt conduct and the importance of maintaining integrity in public administration.¹
3. The Inspector oversees the ICAC's work by undertaking functions including auditing the ICAC's operations to monitor compliance with the law of the State; dealing with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct by the ICAC or its officers; dealing with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the ICAC or its officers; and assessing the effectiveness and appropriateness of the ICAC's procedures relating to the legality or propriety of its activities.²
4. As part of its review of the 2013-14 annual reports of the ICAC and Inspector of the ICAC, the Committee called the ICAC and the Inspector to a public hearing on 7 August 2015. Following the hearing the Committee provided the ICAC and the Inspector with further written questions. The transcript from the public hearing and answers to further questions are reproduced as appendices to this report.
5. The Committee's review has focused on the following areas:
 - Recent amendments to the ICAC Act
 - ICAC
 - (a) Assessment and investigation processes
 - (b) Corruption prevention and education functions

¹ *Independent Commission Against Corruption Act 1988* s 13.

² *Independent Commission Against Corruption Act 1988* s 57B.

- (c) Relationship with the Office of the Director of Public Prosecutions
- Inspector of the ICAC
 - (a) Resources and staffing
 - (b) The Inspector's audit function
 - (c) Liaison between the Inspector and the ICAC
- The Committee's oversight powers.

RECENT AMENDMENTS TO THE ICAC ACT

6. Following a challenge to the ICAC's investigation of Ms Margaret Cunneen SC (Operation Hale) the High Court found, in April 2015, that the ICAC did not have jurisdiction to investigate private individuals who misled public officials, where the probity of the exercise of an official function by public officials was not adversely affected.³ The High Court decision meant the jurisdiction of the ICAC was narrower than the ICAC had previously interpreted.
7. In response to the High Court decision, the Parliament enacted retrospective legislation to ensure that no past findings of corrupt conduct made by the ICAC were invalid.⁴ The Government also established an Independent Panel, comprising the Hon Murray Gleeson AC QC and Mr Bruce McClintock SC, to review the ICAC's jurisdiction.
8. The Panel reported on 31 July 2015. It did not recommend amendments to reinstate the broad interpretation of the ICAC's jurisdiction as exercised by the ICAC before the High Court decision. The Panel made four recommendations to amend other aspects of the ICAC's jurisdiction to:
 - 1) allow the ICAC to investigate conduct that impairs, or could impair, confidence in public administration, including certain kinds of fraudulent practice
 - 2) emphasise that the definition of corrupt conduct under the ICAC Act 1988 does not apply to constrain the ICAC's delivery of its advisory, educational and prevention functions (in the way that it applies to constrain ICAC's conduct of its investigative functions)
 - 3) give the ICAC jurisdiction to investigate breaches of certain NSW electoral and lobbying laws
 - 4) limit the ICAC's jurisdiction to allow it to make findings of corruption only in instances of serious corrupt conduct.
9. The Government accepted all recommendations, which were given legislative effect in the Independent Commission Against Corruption Amendment Bill that passed Parliament and came into effect in September 2015.

³ *ICAC v Cunneen* [2015] HCA 14.

⁴ *Independent Commission Against Corruption Amendment (Validation) Act 2015*.

10. While not expressed as a formal recommendation, the Panel further suggested that Parliament consider an amendment to clarify that ICAC officers have the power to commence court proceedings for both statutory and common law offences. ICAC officers have the power to commence criminal proceedings where the offence committed is a statutory offence, following receipt of advice from the Director of Public Prosecutions. However, in May 2015, the NSW Local Court held that the ICAC did not have the power to commence proceedings for common law offences.⁵
11. The Government implemented the Panel's suggestion through amendments to the *Criminal Procedure Act 1986* in the Courts and Other Justice Portfolio Legislation Amendment Bill, which passed Parliament and came into effect in November 2015.

Committee comment

12. The High Court's decision in the Cunneen matter in April 2015 and amendments resulting from recommendations made by the Independent Panel mean the ICAC's jurisdiction to investigate corrupt conduct has changed to include conduct that impairs, or could impair, confidence in public administration and breaches of electoral and lobbying laws. The ICAC is now limited to making findings of corruption only in instances of serious corrupt conduct.
13. The amendments to the ICAC Act may require a significant review of existing processes for the conduct of investigations and making findings of corruption. Arrangements between the ICAC and the Electoral Commission are also necessary to implement the changes. The Committee will examine the ICAC's implementation of the amendments as part of its review of the ICAC's 2014-2015 annual report.
14. The recent amendment of the *Criminal Procedure Act 1986* ensures that ICAC officers have the power to commence legal proceedings for statutory and common law offences on the advice of the DPP. The Committee considers that the amendment provides certainty for ICAC officers by enabling them to continue their existing practice of commencing proceedings by issuing Court Attendance Notices for both statutory and common law offences.

⁵ Gleeson, M and McClintock, B, *Independent Panel – Review of the jurisdiction of the ICAC*, July 2015, p 53, NSW Department of Premier and Cabinet website, http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0003/173235/Independent_Panel_Review_of_the_Jurisdiction_of_the_Independent_Commission_Against_Corruption_Report.pdf, viewed 5 February 2016; see also Whitbourne, M 'Court rules ICAC invalidly commenced prosecutions against Ian Macdonald and John Maitland over coal exploration licences to Doyles Creek Mining', *Sydney Morning Herald*, 22 May 2015, Sydney Morning Herald website, <http://www.smh.com.au/nsw/court-rules-icac-invalidly-commenced-prosecutions-against-ian-macdonald-and-john-maitland-over-coal-exploration-licence-to-doyles-creek-mining-20150522-gh7czv.html>, viewed 4 February 2016.

THE ICAC

Assessment and investigation processes

General Procedures

15. All complaints and reports of corrupt conduct received by the ICAC are evaluated by the Assessments Section to determine if the complaint is within the ICAC's jurisdiction and whether further investigation is warranted. In the 2013-2014 reporting period the Assessments Section received 3,386 complaints and reports of corrupt conduct.⁶
16. Matters within the jurisdiction of the Commission are reported by the Assessments Section to the Assessment Panel. The Assessment Panel comprises the Commissioner, Deputy Commissioner and executive directors of the Investigation, Legal and Corruption Prevention divisions, and meets twice a week.⁷ A report to the Assessment Panel provides complaint details, relevant background information, analysis and a recommendation for action to be taken.
17. Assessment Panel members have ultimate responsibility for determining the action to be taken for each complaint, including: referring the complaint to another agency; requesting an investigation be conducted by another agency and the outcome reported back in writing; requesting further information; providing corruption prevention analysis or advice; or undertaking a preliminary investigation. In 2013-2014, of the 3,386 complaints received, 43 matters were retained for preliminary investigation and ten new investigations commenced.⁸
18. The ICAC's decision making processes and procedures for the conduct of assessments and investigations have recently been the subject of widespread interest, with questions raised regarding the ICAC's decision to investigate allegations concerning Crown Prosecutor Margaret Cunneen SC's conduct following a car accident (Operation Hale).
19. At the public hearing held as part of the review of the 2013-2014 annual reports of the ICAC and the Inspector, Committee members questioned the Commissioner on the ICAC's procedures for determining when to escalate a complaint of corrupt conduct to a full investigation, and the ICAC's decision making processes in choosing to commence Operation Hale.
20. However the Commissioner, while providing a summary of the ICAC's processes and procedures undertaken for complaints received by the Commission, responded to a number of the Committee's questions by stating that the questions were precluded under section 64(2) of the ICAC Act. Section 64(2) places limits on the powers and functions of the Committee.

Committee comment

21. The Committee is concerned that the Commissioner did not fully respond to questions put by members at the public hearing held on 7 August 2015. To

⁶ ICAC, *Annual Report 2013-2014*, p 15, ICAC website, <http://icac.nsw.gov.au/documents/about-the-icac/corporate-reporting/4519-annual-report-2013-2014/file>, viewed 5 February 2016.

⁷ The Hon Megan Latham, ICAC Commissioner, *Transcript of evidence*, 7 August 2015, p 11.

⁸ ICAC, *Annual Report 2013-2014*, p 6.

provide effective oversight of the ICAC and to conduct its statutory role of monitoring and reviewing all aspects of the exercise by the ICAC of its functions, the Committee must have access to sufficient information to come to considered conclusions and make meaningful recommendations.

22. The Committee addresses its concerns in a later section of this report that considers the Committee's oversight powers. The Committee will continue to work with the Inspector to ensure that the ICAC's assessment and investigation procedures are appropriate, that proper checks and balances are in place when progressing a complaint to an operation, and that investigations focus on serious and systemic corrupt conduct.

Disclosure of confidential information

23. One area of concern for the Committee regarding the ICAC's investigation process is the disclosure of confidential information obtained in the course of an investigation.
24. By way of background, where the Assessments Panel decides to investigate a complaint, all investigations are commenced as preliminary investigations. A preliminary investigation may, for example, be conducted to assist the ICAC to discover or identify conduct that might be made the subject of a more complete investigation. If appropriate, a matter may then be escalated to a full investigation (known as an operation). Importantly, investigations are not necessarily public but if it is judged in the public interest to do so, the ICAC can decide to hold a public inquiry into the matter being investigated.⁹
25. At the public hearing held as part of the review of the 2013-2014 annual reports of the ICAC and Inspector, Committee members questioned the Commissioner and the Inspector concerning allegations of illegal disclosure of information to the media by people who have obtained that information in the course of an ICAC investigation. In particular, members questioned the witnesses on allegations that officers of ICAC have "leaked" information to the media about matters that were not public. For example, Mr Adam Marshall MP raised Operations Credo and Spicer with the Commissioner:

Given the article on page 27 of today's *Australian* under the headline "Watson rejects claims of leaking", I must ask this question. The article claims that as part of what ended up being Operation Credo and Operation Spicer a search warrant was executed on 4 December 2013 at Mr Chris Hartcher's office. An article in the *Sydney Morning Herald* of 6 December announced that Mr Hartcher would be the subject of two ICAC inquiries. However, it was not until 18 February 2014 that the Commission publicly announced the two inquiries – Operation Credo and Operation Spicer. Again you may need to take this question on notice. How does a media outlet find out and publish that the Commission is undertaking two inquiries months before they are announced by the Commission?¹⁰

⁹ ICAC, *Annual Report 2013-2014*, p 27.

¹⁰ Mr Adam Marshall MP, *Transcript of evidence*, 7 August 2015, p 20.

26. In response to questions about allegations of illegal disclosures, the Commissioner stressed the difficulty in investigating such allegations and clarified her limited role in dealing with them. The Commissioner stated:

[The allegations] are not for me to investigate. The thing is that is for the Inspector to investigate because a leak from an officer of the Commission constitutes misconduct under the Act and that is within the Inspector's jurisdiction, not my jurisdiction. If I receive any information or any complaint from anyone that a named ICAC officer has been responsible for that kind of conduct then I forward that information to the Inspector. I make him aware of the fact that the allegation has been made, and then it is a matter for him.¹¹

27. The Commissioner further emphasised the need for information to be concrete before she could refer it to the Inspector for investigation:

I do not have any concrete information from anyone that could point to a named Commission officer who is said to have spoken to anybody and passed on information that they have acquired in the course of their duties. If someone wants to bring information of that nature forward to me then, as I said, I am happy to make it available to the Inspector...it is very difficult for me to say to the Inspector, "People out there are complaining that the ICAC leaked information". That is not information that he can realistically investigate.¹²

28. In addition, the Commissioner stressed the difficulty in determining the source of illegal disclosures where they occur. While officers of the ICAC have access to confidential information, witnesses in ICAC investigations also possess such information:

We have people who come into compulsory examinations and provide us with a lot of information. We can, of course, make those people aware – and we do make those people aware – that they are not permitted to discuss any aspect of their evidence with anyone else. But at the end of a long inquiry when you have potentially interviewed or spoken to as many as 300, 400 or 500 people there is simply no way of knowing which of those people may be responsible for discussing the fact that they were interviewed by the ICAC, what they were interviewed about, and where they think the interview was heading.¹³

29. Applied to allegations of illegal disclosures relating to Operations Spicer and Credo, as raised by Mr Marshall, the Commissioner stated:

I cannot rule out the possibility that there are a number of people to whom the Commission spoke who had already worked out for themselves that there was going to be an inquiry.¹⁴

30. For his part, in evidence to the Committee, the Inspector also emphasised the difficulty of investigating allegations concerning illegal disclosure of information:

Realistically...the issue of leaks is intractable and at times risible, and is evidence in my mind – for me – of a blood feud between News Limited and Fairfax Media

¹¹ The Hon Megan Latham, *Transcript of evidence*, 7 August 2015, p 19

¹² The Hon Megan Latham, *Transcript of evidence*, 7 August 2015, p 19

¹³ The Hon Megan Latham, *Transcript of evidence*, 7 August 2015, p 18

¹⁴ The Hon Megan Latham, *Transcript of evidence*, 7 August 2015, p 20

Limited. It is a futile task for me to embark upon trying to deal with any allegation by one side or another which has been publicly made or by any one individual to determine whether there has been a leak and, if so, by whom and to whom of what...it is capable of being investigated. I am not prepared to undertake it. It would be a waste of time for me to constitute myself as a quasi royal commission and invite journalists to come along and ask them, "Where did you get it?" – I know what the response would be – or to invite members of Commission staff or officers of commissions to say "Did you give X to Y?" But I think allegations of leaks is a fact of bureaucratic and political life in this state – allegations of leaks. The reality of it or the extent of it is something I do not know.¹⁵

Committee comment

31. The Committee acknowledges the respective roles of the Commissioner and the Inspector in dealing with allegations of the illegal disclosure of information obtained in the course of an ICAC investigation. It also acknowledges the difficulties in investigating such allegations.
32. Nonetheless, the Committee is not satisfied that this issue can be characterised merely as evidence of a 'blood feud' between News Limited and Fairfax Media Limited. The underlying issue of the illegal disclosure of information obtained in the course of an ICAC investigation is a serious one. This is reflected in the serious penalties that exist under section 111 of the *Independent Commission Against Corruption Act 1988* for such conduct, including imprisonment.
33. The disclosure of confidential information that someone is the subject of an ICAC investigation has the capacity to cause reputational damage with far-reaching consequences for individuals. The Committee notes the Commissioner's evidence that ICAC officers and witnesses are made aware of the confidentiality provisions.¹⁶ The Committee can only add, in light of recent allegations, that the ICAC should take additional steps to reinforce these confidentiality provisions to its officers and witnesses. The Committee will continue to monitor this issue.

Corruption prevention and education functions

34. While the wider community most often focuses on ICAC's role of investigating and exposing public sector corruption, the ICAC has important statutory functions to prevent corruption and provide education and advice on addressing corruption risks and protecting against corrupt conduct. The Committee examines the ICAC's performance of these functions in the following section.
35. The Corruption Prevention Division comprises three units: Investigations, Sector-wide Projects and Education. The Division was restructured in the 2013-2014 reporting period due to a long term decline in requests for corruption prevention advice.¹⁷ While the provision of phone and email corruption prevention advice remains an important function, the restructure has allowed the Division to focus its resources on other areas of corruption prevention and education.

¹⁵ The Hon David Levine OA RFD QC, Inspector of the ICAC, *Transcript of Evidence*, 7 August 2015, p 4.

¹⁶ The Hon Megan Latham, *Transcript of evidence*, 7 August 2015, pp 18-19.

¹⁷ ICAC, *Annual Report 2013-2014*, p 34.

Investigations

36. Officers of the Corruption Prevention Division are attached to most ICAC investigations to identify processes, structures, human factors, external influences and possible legislative issues that are conducive to corrupt behaviour. Investigation reports made by the ICAC may include corruption prevention recommendations, where agencies which are the subject of corruption prevention recommendations are required to inform the ICAC of any plan to respond to the recommendations. In the 2013-2014 reporting period, 72 per cent of corruption prevention recommendations made to agencies were fully implemented.¹⁸
37. The Committee asked whether the ICAC considered it had sufficient powers to ensure implementation, given only 72 per cent of corruption prevention recommendations were fully implemented. The ICAC considers its current powers are adequate:

...The ICAC has significant soft power around the implementation of recommendations. The failure to implement is transparently displayed on the ICAC website and in the annual report, leaving non-compliant agencies facing public pressure to explain.

Should there be intransigence, an escalation protocol is in place in which ultimately the Minister is advised, again creating pressure on the agency to act. The escalation protocol has not been invoked within recent times. This soft power is generally considered appropriate and adequate, the 2013-2014 figures aside, and preferable to the use of legislated powers.¹⁹

Sector-wide projects

38. The Corruption Prevention Division identifies and analyses corruption risks of sector-wide significance, to make corruption prevention recommendations to Government. In the 2013-2014 reporting period the Division published sector-wide reports on IT contractors and the coal allocation and approval system. The Division also conducted a community attitude survey and commenced work on sector-wide projects examining invoice payments, facilities maintenance and employment screening.
39. The Committee notes that the ICAC selects subjects for sector-wide corruption prevention projects on the basis of the degree of public concern and the extent of corruption risk. The Committee asked how the Division measured public concern and whether the results of the community attitude survey played a part in selecting subjects. The ICAC responded that the continuous contact between staff of the Division and the public, suppliers and public officials informed its understanding of issues of importance:

The staff of the Division, including the ED, have extensive and continuous contact with the public, suppliers to government and public officials through training, speaking, outreach, investigations, advice, and through the assessment of matters reported to the Commission. These many points of contact that occur annually allow

¹⁸ ICAC, *Annual Report 2013-2014*, p 39 and appendix 5.

¹⁹ ICAC, *Review of the ICAC 2013-2014 Annual Report, Response to further questions*, p 9.

the Division to develop an understanding of issues of importance in a way that would not be possible through a survey or similar instrument.²⁰

40. The Committee was interested to know whether the ICAC had evidence of recommended reforms being implemented or corrupt activity being curtailed as a result of its corruption prevention projects. The ICAC responded that it was not possible to measure the direct impact of its work on the extent of potential corruption. However, in terms of reform implementation, the findings of the reports were included in training provided by the Division and there was anecdotal evidence that the reports were used by management within organisations:

Following the release of these reports there is generally a period of interaction with senior management of the relevant areas across the sector, peak committees and public presentations. The reports also become integrated into training as appropriate. Many managers indicate the reports are used to map their issues and to benchmark their operations.²¹

Education

41. The education unit conducts speaking engagements, provides training workshops and delivers advice to public sector agencies and members of the public. These education functions provide information and assistance on preventing, detecting and reducing corruption.
42. 90 training workshops were delivered in the reporting period.²² This represents a fall in the number of training sessions delivered in the previous two reporting periods (107 in 2012/13 and 116 in 2011/12). The ICAC informed the Committee that it had commenced development of new workshops and refreshing the website presentation of workshop materials to improve demand.²³
43. In November 2013, the ICAC also hosted the biennial Australian Public Sector Anti-Corruption Conference (APSACC) in Sydney. APSACC is organised jointly with the Queensland Crime and Conduct Commission and the Western Australian Corruption and Crime Commission. The conference aims to assist the public sector to control corruption by heightening the knowledge and skill levels of public sector leaders and managers.
44. The ICAC informed the Committee that the program of speakers for its 2013 conference comprised executives and practitioners from governments and non-public sectors across Australia, New Zealand, Southeast Asia, Germany and the United States. The ICAC further informed the Committee that the conference was attended by 609 people and that 92 per cent of attendees indicated that conference content was applicable to their workplace.²⁴

²⁰ ICAC, *Review of the ICAC 2013-2014 Annual Report, Response to further questions*, p 7.

²¹ ICAC, *Review of the ICAC 2013-2014 Annual Report, Response to further questions*, p 8.

²² ICAC, *Annual Report 2013-2014*, p 10.

²³ ICAC, *Review of the ICAC 2013-2014 Annual Report, Response to further questions*, pp 10-11.

²⁴ ICAC, *Annual Report 2013-2014*, p 41.

Committee comment

45. By working concurrently with the Investigation Division throughout an investigation, the Corruption Prevention Division can examine deficiencies in an agency's practices that have led to an environment conducive to corrupt conduct. The making of corruption prevention recommendations is important to bring about changes to policies and procedures of affected agencies and to reduce the chance of corrupt behaviour recurring.
46. Public sector agencies and the wider community, in both rural and metropolitan areas, are assisted by the Corruption Prevention Division's provision of workshops, speaking engagements and advice.
47. The Committee notes in particular the ICAC's role in organising biennial anti-corruption conferences (APSACCs) with its counterparts in Queensland and Western Australia. In November 2013, the Committee Chair at the time, Mr Dominic Perrottet MP, had the advantage of attending the APSACC held in Sydney. The Committee commends the ICAC for this important part of its work in corruption prevention.
48. The Committee is satisfied that the ICAC comprehensively fulfilled its corruption prevention and educative functions in the 2013-2014 reporting period.

Relationship with the Office of the Director of Public Prosecutions

49. Liaison between the ICAC and Office of Director of Public Prosecutions (ODPP) is conducted in accordance with a Memorandum of Understanding, last updated in 2011. In cases where the ICAC considers that there may be grounds to prosecute a person for a criminal offence, a brief of evidence is prepared for consideration by the ODPP. In the 2013-2014 reporting period, the ICAC recommended the advice of the ODPP be obtained about the possible prosecution of 39 people for various criminal offences.²⁵
50. There have been issues in the past regarding the time taken for the ICAC to furnish briefs of evidence to the ODPP and the time taken by the ODPP to provide decisions on briefs of evidence referred by the ICAC. The Committee asked about the current state of the working relationship between the ICAC and the ODPP, and whether the timeframes for the provision of briefs and decisions on briefs were acceptable.
51. The ICAC informed the Committee that in the 2013-2014 reporting period, 72 per cent of briefs of evidence were provided to the ODPP within 90 days from the confirmation of the charges to be considered, and performance in this area had 'improved substantially' in the last five years.
52. The ICAC further commented it is satisfied with the timeliness of the ODPP advice on briefs of evidence referred to it by the ICAC. The Committee heard that the ICAC Deputy Commissioner meets regularly with the head of ODPP's Group 6 (the group that deals with ICAC briefs of evidence) and that the regular meetings had

²⁵ ICAC, *Annual Report 2013-2014*, p 30.

led to a 'substantial reduction' in the time taken by ODPP to provide advice to ICAC.²⁶

53. The Committee notes the evidence of the ICAC Commissioner at the public hearing. The Commissioner indicated that ICAC investigators are conscious throughout investigations that referral to the ODPP can only occur on the basis of admissible evidence but that the question of whether there is sufficient evidence to prosecute is ultimately a matter for the ODPP:

Mr Ron Hoenig: As the commission conducts its investigations of serious conduct that could involve serious criminal offences, are the commission investigators conscious of the need to collect admissible evidence along the way?

Ms Latham: They collect as much evidence as they can, admissible or otherwise, but they are conscious of the fact that referral to the DPP can only be done on the basis of admissible evidence. We refer the material – ultimately, the question is for the DPP to determine whether there is sufficient admissible evidence to warrant the proceedings, but we are conscious of the fact that they can only act on admissible evidence.²⁷

54. The Independent Panel, in its review of the jurisdiction of the ICAC, considered the issues of delays, and noted that delays appeared to have been reduced in recent times. The Panel concluded that reducing delays was a question of resources and 'institutional willingness on the part of both the ICAC and the DPP to take steps to deal with the issues.'²⁸ The Panel made no suggestions for legislative change in relation to the time taken by both the ICAC and the ODPP to conduct their respective functions.
55. Also on the subject of referrals to the ODPP, the Committee has made particular note of figures for the matters of Operations Acacia, Jasper and Jarilo, being matters involving former Members of the NSW Parliament.
56. With regard to Operation Acacia, the ICAC made recommendations in a report handed down in August 2013 that consideration be given to obtaining the advice of the ODPP with respect to the prosecution of Mr Ian Macdonald, a former Member of the NSW Parliament, for the common law offence of misconduct in public office. Partial briefs of evidence were sent to the ODPP in March 2014, with further statements being obtained at that time.²⁹
57. Advice on the ICAC's website dated 2 February 2016 stated that on 5 November 2014, the ODPP advised the ICAC that there is sufficient evidence to prosecute Mr Macdonald for two offences of misconduct in public office. The ODPP

²⁶ ICAC, *Review of the ICAC 2013-2014 Annual Report, Response to further questions*, p 21.

²⁷ *Transcript of evidence*, 7 August 2015, pp 28-29.

²⁸ Gleeson, M and McClintock, B, *Independent Panel – Review of the jurisdiction of the ICAC*, July 2015, p 79, NSW Department of Premier and Cabinet website, http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0003/173235/Independent_Panel_Review_of_the_Jurisdiction_of_the_Independent_Commission_Against_Corruption_Report.pdf, viewed 5 February 2016.

²⁹ ICAC, *Annual Report 2013-2014*, p 102; see also ICAC, *Investigation into the Conduct of Ian Macdonald, John Maitland and Others (Operation Acacia)*, August 2013, p 9, ICAC website, <https://www.icac.nsw.gov.au/docman/investigations/reports/4193-investigation-into-the-conduct-of-ian-macdonald-john-maitland-and-others-operation-acacia-august-2013/file>, viewed 5 February 2016.

commenced proceedings in the Supreme Court and the matter was listed for trial on 14 March 2016 at the Sydney Supreme Court.³⁰

58. With regard to Operation Jasper, the ICAC made recommendations in a report handed down in July 2013 that consideration be given to obtaining the advice of the ODPP with respect to the prosecution of two former Members of the NSW Parliament, Mr Macdonald and Mr Edward Obeid Senior. The offences for consideration were conspiracy to defraud or misconduct in public office in respect of Mr Macdonald, and conspiracy to defraud in respect of Mr Obeid. Partial briefs of evidence were sent to the ODPP in March 2014, with further statements being obtained at that time.³¹
59. In relation to Operation Jarilo, the ICAC made recommendations in a report handed down in July 2013 that consideration be given to obtaining the advice of the ODPP with respect to the prosecution of Mr Macdonald for the offences of corruptly receiving and soliciting a benefit contrary to section 249B of the *Crimes Act 1900*. Briefs of evidence were sent to the ODPP on 6 August 2013 but the 2013-2014 ICAC Annual Report advised that the ODPP was awaiting the outcome of criminal proceedings involving another person involved in Operation Jarilo, Mr Ronald Medich, before finalising advice in relation to this matter.³²
60. The ICAC informed the Committee that in complex matters such as Acacia and Jasper, it is not unusual for timelines to be more protracted given the bulk of material to be considered and the complex legal and factual issues involved.³³

Committee comment

61. The issue of delays in the provision of briefs of evidence by the ICAC to the ODPP and in the time taken by the ODPP to provide decisions on ICAC briefs has been a matter of concern to previous Committees. However, the Committee has examined figures for a number of reporting periods and notes that there has been significant improvement in the timeframes for both the provision of briefs and decisions on briefs over the last five years. The recent report of the Independent Panel considered the issue of delays and concluded that no legislative change was required.
62. The Committee commends the ICAC for its continuing efforts to meet its target of having 90 per cent of briefs of evidence with the ODPP within 90 days from the confirmation of charges to be considered and for its ongoing efforts to work with the ODPP to reduce delays in commencing prosecutions.

³⁰ ICAC, *ICAC Prosecution Outcomes*, 2 February 2016, pp 6-7, ICAC website, <https://www.icac.nsw.gov.au/documents/investigations/general-information-1/4729-icac-prosecution-outcomes-web-table-2-february-2016-fin/file>, viewed 4 February 2016.

³¹ ICAC, *Annual Report 2013-2014*, p 102; see also ICAC, *Investigation into the Conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and Others (Operation Jasper)*, July 2013, pp 10-11, ICAC website, <https://www.icac.nsw.gov.au/investigations/current-investigations/investigationdetail/192>, viewed 5 February 2016.

³² ICAC, *Annual Report 2013-2014*, p 101.

³³ ICAC, *Review of the ICAC 2013-2014 Annual Report, Response to further questions*, p 21.

63. Further, the Committee notes that timelines can be affected where matters are particularly complex or for extraneous reasons, for example, where ODPP advice cannot be finalised until other matters are dealt with by the Courts.

INSPECTOR OF THE ICAC

Resources and staffing

64. The Hon David Levine AO RFD QC was appointed Inspector of the ICAC on 10 February 2014. The Inspector also holds the position of Inspector of the Police Integrity Commission (PIC), a role he took up in February 2012. The Committee was interested to know whether holding the two positions simultaneously was working satisfactorily.
65. The Inspector advised that holding the two positions was working 'comfortably'.³⁴ The Inspector further advised that it had increased the effectiveness of the Inspector position and that the establishment of a single inspectorate had led to financial savings. The Inspector also noted that uniformity of administrative procedures had been achieved through the creation of a single inspectorate.³⁵
66. The Inspector informed the Committee that he was currently resourced sufficiently and had been assured that further resources were available to him if required.³⁶ To that end, the Inspector had requested the appointment of an Assistant Inspector to assist with his work in overseeing the ICAC.³⁷
67. The Committee notes that former District Court judge, Mr John Nicholson SC, was appointed to the position of Assistant Inspector at the time of printing.³⁸ The Committee looks forward to hearing how the appointment of an Assistant Inspector helps the Inspector to manage his workload.

Vacancy period

68. Following the retirement of His Honour Harvey Cooper AM as Inspector of the ICAC, there was a vacancy in the Office of the Inspector for a four month period from October 2013 to February 2014.
69. During the vacancy period, Inspectorate staff received and assessed 16 complaints. The Inspector's annual report noted that the assessment process undertaken by Inspectorate staff in the vacancy period, while conducted in good faith, was a process that should have been the exclusive domain of the Inspector:

... complaints were received and on their face apparently assessed by persons whose functions did not include taking such a step which is exclusively that of the Inspector. Complainants were interviewed and statements were made to the complainants relating to whether or not the subject of their complaints fell within or without the jurisdiction of the Inspector. This is extremely unfortunate as it gave rise to expectations in the complainants whose complaints were also, as a matter of course,

³⁴ The Hon David Levine OA RFD QC, *Transcript of Evidence*, 7 August 2015, p 5

³⁵ Inspector of the ICAC, *Review of the ICAC Inspector's 2013-2014 Annual Report, Response to further questions*, p 1

³⁶ The Hon David Levine OA RFD QC, *Transcript of Evidence*, 7 August 2015, p 5

³⁷ Inspector of the ICAC, *Review of the ICAC Inspector's 2013-2014 Annual Report, Response to further questions*, p 1

³⁸ 17 February 2016.

articulated by the former Inspector's staff indicating that they, (the complainants), would receive some form of attention and satisfaction.³⁹

70. Of the 16 complaints received in the vacancy period, one was outside the jurisdiction of the Inspector, one was withdrawn, six were not sustained and eight were carried over to the 2014-2015 reporting period.⁴⁰ The Inspector noted in his report that a great deal of time and resources had been occupied in resolving complaints received during the vacancy period, which were of 'arguable validity'.⁴¹

Committee comment

71. The Inspector conducts a vital oversight role to ensure that the ICAC's extensive covert and coercive powers are properly exercised and adequately scrutinised. While the Inspector has been assured that there are further resources available should he require them, the Committee is concerned that the Inspector requested the appointment of an Assistant Inspector prior to meeting with the Committee on 7 August 2015 yet the appointment was only finalised in February 2016.
72. The Committee considers that for the Inspector to perform his oversight role effectively, adequate resources, including staff, are essential. Recruitment should take place in a timely fashion. The Committee considers it is unacceptable that, in a period when the Inspector received an unprecedented volume of complaints, there were delays in the appointment of an Assistant Inspector.
73. The Committee was pleased to hear that the simultaneous discharge of duties of both Inspector of the ICAC and Inspector of the PIC is working well.
74. The Committee also considers it unacceptable that there was a period of vacancy in the position of the Inspector from October 2013 to February 2014. Further, the Committee considers that it was unfortunate that Inspectorate staff conducted the Inspector's complaint handling function in this period. The Committee agrees with the Inspector that, given the fixed terms of appointment for Inspectors, there was ample opportunity for the timely appointment of the new Inspector, avoiding any vacancy period and the potential for persons other than the Inspector to take on this statutory role.
75. The ICAC Act makes provision for a person to be appointed as an Acting Inspector, who would have all the functions of the Inspector.⁴² The appointment of an Acting Inspector should take place if an unavoidable vacancy in the Office of the Inspector arises in future. The Committee makes the following recommendation.

³⁹ Inspector of the ICAC, *Annual Report 2013-2014*, p 3, ICAC Inspector's website, <http://www.oicac.nsw.gov.au/assets/oicac/reports/annual-reports/Annual-Report-2013-2014.pdf>, viewed 5 February 2016.

⁴⁰ Inspector of the ICAC, *Annual Report 2013-2014*, p 11.

⁴¹ Inspector of the ICAC, *Annual Report 2013-2014*, p 12.

⁴² *Independent Commission Against Corruption Act 1988*, Sch 1A(2).

RECOMMENDATION 1

That the NSW Government ensure that Inspectors and Assistant Inspectors of the ICAC are recruited in a timely fashion to avoid any periods of vacancy in these positions.

The Inspector's audit function

76. An important aspect of the Inspector's oversight role is his or her ability to assess whether ICAC is exercising its extensive covert and coercive powers in a way that complies with the law. The ICAC's powers include conducting telecommunication interception and controlled operations and carrying out the terms of search warrants and surveillance device warrants.
77. The Inspector may examine the ICAC's use of these powers through the conduct of audits. This is an important safeguard because ICAC's broad coercive and covert powers could impinge upon the civil rights of persons under investigation, sometimes without their knowledge. The annual report of the Inspector noted that when individuals do not know that they are under scrutiny from a surveillance device there is no opportunity to complain if they feel the use of the device is unjustified:
- A person can be the object of scrutiny by a surveillance device without his or her knowledge. This means that he or she lacks the opportunity to complain of any unjustified use of such a device.⁴³
78. To effectively carry out this audit function, the Inspector is empowered to investigate any aspect of the Commission's operations or any of the Commission's officers. To that end, the Inspector may access any of the ICAC's records and may require ICAC officers to supply information or produce documents about any matter relating to the ICAC's operations or the conduct of ICAC officers.⁴⁴
79. No audits were conducted by the Inspector in the 2013-2014 reporting period. The Inspector explained that in light of the vacancy period and the fact that the Inspectorate was not fully staffed until the end of March 2014, he saw little reason to conduct 'either intrusive piecemeal or major oversight audits'.⁴⁵ However, the Inspector confirmed that since publication of the 2013-2014 annual report he had commenced an audit into the ICAC's conduct of Operation Hale which has now been completed.⁴⁶ The Committee's review of the Inspector's report regarding Operation Hale is being conducted as a separate inquiry and will be reported on at a later date.

⁴³ Inspector of the ICAC, *Annual Report 2013-2014*, p 9.

⁴⁴ *Independent Commission Against Corruption Act 1988*, ss57C, 57F.

⁴⁵ Inspector of the ICAC, *Annual Report 2013-2014*, p 9.

⁴⁶ The Hon David Levine OA RFD QC, *Transcript of Evidence*, 7 August 2015, p 3; see also Inspector of the ICAC, *Report Pursuant to Section 77A Independent Commission Against Corruption Act 1988 Operation "Hale" ICAC re Margaret Cunneen SC & Ors*, 4 December 2015, ICAC Inspector's website, <http://www.oicac.nsw.gov.au/assets/oicac/reports/special-reports/S.77A-REPORT-in-Operation-Hale-.pdf>, viewed 5 February 2016.

The Telecommunications (Interception and Access) Act 1979 (Cth)

80. The ability of the Inspector to fully perform this audit function is hampered by the provisions governing access to telecommunication interception material held by the ICAC, set out in the *Telecommunications (Interception and Access) Act 1979 (Cth)* (the TIA Act). The TIA Act empowers law enforcement and integrity agencies such as the ICAC to apply for telecommunications interception warrants where they believe a warrant would assist in the investigation of a serious offence.⁴⁷ Warranted access may apply to communications passing across telecommunication services and stored telecommunication content.
81. The TIA Act provides for monitoring of law enforcement and integrity agencies' application for, and use of, interception material through the Commonwealth Ombudsman and the Ombudsman of each state. The Ombudsman is required to check whether the agency has complied with the record keeping requirements of the TIA Act, including the accurate documentation of the issue of warrants, and how the information gathered was used. Records must be inspected at least twice a year, and a report of the inspections made annually.⁴⁸
82. The Ombudsman's role in examining compliance with record keeping requirements does not extend to assessing whether the law enforcement or integrity agency is exercising its coercive and covert powers appropriately. This is the Inspector's role.⁴⁹ Despite this, the Inspector has only very limited authority under the TIA Act to inspect telecommunications interception material possessed by the ICAC for the purpose of assessing whether the ICAC is exercising its powers appropriately.
83. The issue of access to interception material has been a matter of concern since the establishment of the Inspectorate. In 2000, the ICAC Committee, when recommending the establishment of the Inspector of the ICAC, recognised that unimpeded access to telecommunications interception material was necessary to ensure that the Inspector was able to assess the legality and propriety of the ICAC's procedures and monitor its compliance with the law:
- The Committee is aware that the Commonwealth legislation governing the transmission of legally acquired telecommunications intercept product currently would prevent the proposed Inspector from accessing any ICAC records that contain TI product. The Committee consequently notes that amendments will need to be made to the Commonwealth *Telecommunications (Interception) Act 1979* if the Inspector's access to ICAC records is to be uninhibited. Advice to this effect will be provided to the New South Wales Attorney General.⁵⁰
84. The then Committee recommended that the Inspector of the ICAC be included as an authorised recipient of telecommunications product; this recommendation

⁴⁷ S5D of the TIA Act defines a serious offence as an offence that may be punishable by imprisonment for life or for a period of at least seven years.

⁴⁸ *Telecommunications (Interception and Access) Act 1979 (Cth)*, ss83-86.

⁴⁹ *Independent Commission Against Corruption Act 1988*, s57B.

⁵⁰ Committee on the ICAC, *The ICAC: Accounting for extraordinary Powers*, 2000, p 64, NSW Parliament website, [http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/0a54048715a7d42aca256cf50012c8d2/\\$FILE/Committee%20Report%2001%20May%202000%20-%20Inquiry%20into%20General%20Matters.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/0a54048715a7d42aca256cf50012c8d2/$FILE/Committee%20Report%2001%20May%202000%20-%20Inquiry%20into%20General%20Matters.pdf), viewed 5 February 2016.

was echoed in the 2005 Independent Review of the ICAC Act, conducted by Mr Bruce McClintock SC, who recommended that as part of the establishment of a new Office of the Inspector of the ICAC, the Commonwealth Government include the Inspector of the ICAC as an authorised recipient of telecommunications product.⁵¹

85. In 2005, the TI Act (which later became the TIA Act) was amended to provide for the newly created Inspector of the ICAC to be an authorised recipient of interception material. In introducing the amendments, the then Commonwealth Attorney-General, the Hon Phillip Ruddock MP, commented on the accountability and transparency that the role of Inspector of the ICAC would bring, and the importance of having access to interception material in order to fulfil its statutory role:

Accountability and transparency are key elements of public authorities.

To this end, the New South Wales government has created the Inspector of the Independent Commission Against Corruption to audit the commission's operations and to deal with complaints about the commission (including complaints about abuse of power, impropriety and other forms of misconduct by the commission or its officers).

As with other bodies that are established to deal with complaints about misconduct by public officials, having access to intercepted material will greatly assist the new inspector to fulfil its statutory role.

The bill will therefore make the inspector an eligible authority so that it may use intercepted material for the purpose of its function of dealing with complaints.⁵²

86. However the TIA Act, as currently constructed, only allows the Inspector to access interception material held by the ICAC to a limited extent, that is, for a targeted inspection but not for general audits.
87. In his 2008-2009 Annual Report the then Inspector, His Honour Harvey Cooper AM, commented that in seeking to conduct an audit of the ICAC's applications for and use of warrants and intercepts made under the TIA Act, he was unable to access telecommunications interception material. The then ICAC Commissioner, the Hon Jerrold Cripps QC, considered that providing telecommunications interception material to the Inspector for the purpose of a general audit was outside the scope of the TIA Act.
88. The Inspector noted that advice obtained by the ICAC from the Commonwealth Attorney-General indicated that the TIA Act would allow the Inspector to examine telecommunications interception material for a targeted inspection, but not general audits:

⁵¹ McClintock, B, *Independent review of the Independent Commission Against Corruption Act 1988*, January 2005, p 134, NSW Department of Premier and Cabinet website, http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0020/11369/icac.pdf, viewed 5 February 2016.

⁵² The Hon Philip Ruddock MP, Attorney General, *Commonwealth House of Representatives Debates*, 14 September 2005, p 11, Commonwealth Parliament website, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2005-09-14/0025/hansard_frag.pdf;fileType=application%2Fpdf, viewed 5 February 2016.

This advice concluded that the TIA Act would enable the Commission to provide the Inspector with applications for telecommunications interception warrants where there is a targeted inspection into an allegation of misconduct or corruption but not for undertaking a general audit to ascertain if misconduct had occurred.⁵³

89. The then ICAC Committee supported the then Inspector in seeking amendments to the TIA Act to enable access to telecommunications interception material for audit purposes.⁵⁴ The then Commissioner also expressed support for the Inspector's proposed amendments:

The important function of the Inspector is to ensure that people in the organisation do not abuse the power they have to tap phones and to put surveillance devices on people so that members of the public have confidence we are not doing it. ... So far as I am concerned, any possible inhibition in this legislation to the Inspector would get my support if it were removed.⁵⁵

90. The Committee understands that access to telecommunications interception material for oversight purposes is also an issue for the Inspector in his role as Inspector of the Police Integrity Commission and an issue for inspectors of law enforcement and integrity bodies in other States:

I recently met with some inspectors or occupants of cognate offices from Western Australia, Queensland and Victoria, who all have the same problem, and we discussed it.⁵⁶

91. The Inspector made a submission to the recent Commonwealth Legal and Constitutional Affairs References Committee inquiry into comprehensive revision of the TIA Act in relation to this issue, submitting that the inability to access all records held by the ICAC means that the Inspector is not fully able to perform his or her statutory functions:

The current position is therefore that the Inspector (of the ICAC) is unable to fully perform his or her statutory functions. In particular, in performance of the Inspector's audit function, he or she may wish to assess the legality and propriety of the ICAC's reliance on telephone intercepts in furtherance of its investigations and in order to do so, may need to access the intercepted information obtained under warrant. A warrant and interception under the TIA Act could proceed for purposes not appropriate to the objectives of the ICAC but rather, for improper purposes. It is for this reason that the Inspector has been given the powers of audit. However, the current form of the TIA Act is said to prevent the Inspector from accessing such

⁵³ Inspector of the ICAC, 2008-2009 Annual Report, pp 5-6, ICAC Inspector's website, <http://www.oicac.nsw.gov.au/assets/oicac/reports/annual-reports/Annual-Report-2008-2009.pdf>, viewed 5 February 2016.

⁵⁴ Committee on the ICAC, *Review of the 2008-2009 Annual Report of the Inspector of the Independent Commission Against Corruption*, Report 11/54, November 2010, pp 13-17, NSW Parliament website, [http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/66aa4c9cdc1823f6ca2577e600187e6a/\\$FILE/ICAC%20Inspector%20AR%202008-2009%2011-54.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/66aa4c9cdc1823f6ca2577e600187e6a/$FILE/ICAC%20Inspector%20AR%202008-2009%2011-54.pdf), viewed 5 February 2016.

⁵⁵ Committee on the ICAC, *Review of the 2008-2009 Annual Report of the Inspector of the Independent Commission Against Corruption*, Report 11/54, November 2010, p 14.

⁵⁶ The Hon David Levine OA RFD QC, *Transcript of Evidence*, 7 August 2015, p 3.

lawfully obtained information and thus is precluded from fulfilling this important function.⁵⁷

92. The Legal and Constitutional Affairs References Committee tabled the report of its inquiry into the TIA Act in March 2015. The report made no recommendations for change to the current arrangements for monitoring the use of telecommunications interception material.
93. The Committee notes that in the 2013-2014 reporting period the ICAC completed 49 preliminary investigations and 14 operations, and applied for 21 telephone interception warrants and one stored communications warrant.⁵⁸

A new oversight model for Police

94. In early 2015 the NSW Government commissioned Mr Andrew Tink AM to examine ways that oversight of the NSW Police Force and the NSW Crime Commission could be streamlined and strengthened. The report of his review, *Review of Police Oversight*, was released by the Government in November 2015.
95. The review recommended combining the existing functions of the PIC, the Police Division of the Ombudsman's Office and the Inspector of the Crime Commission in a single commission, with two key functions and two divisions to reflect those functions, namely: detection and investigation of serious misconduct (the integrity division); and oversight of complaints investigation by the NSW Police Force (the oversight division).
96. The review recommended that, to ensure the new Commission remains subject to external scrutiny, it should be accountable in relation to all its functions to an Inspector. Further, to ensure the proposed Inspector could properly conduct essential statutory audit functions, the review recommended the NSW Government write to the Commonwealth Government seeking an amendment to the TIA Act to allow the Inspector to access telephone intercept material for the purpose of auditing the new Commission.⁵⁹
97. In November 2015 the Government announced that it would accept all of Mr Tink's recommendations.

Committee comment

98. The ICAC has strong covert and coercive powers, the use of which may affect the privacy and civil liberties of members of the community. It is critical that there is accountability for the use of these powers, and the Inspector performs an important role in ensuring that the strong powers of the ICAC are applied appropriately and lawfully. While it is vital that law enforcement and integrity agencies such as the ICAC have warranted access to telecommunications interception material to assist in uncovering corrupt conduct, it is equally critical that the Inspector, as the cornerstone of ICAC's accountability regime, be able to

⁵⁷ Inspector of the ICAC, *Annual Report 2013-2014*, p 10.

⁵⁸ ICAC, *Annual Report 2013-2014*, pp 3 & 29.

⁵⁹ Tink, A, *Review of Police Oversight*, August 2015, Recommendation 31, NSW Department of Justice website, <http://www.justice.nsw.gov.au/justicepolicy/Documents/review-police-oversight/review-police-oversight-final-report.pdf>, viewed 5 February 2016.

fully oversight every aspect of the ICAC's activities, including its use of telecommunications interception material.

99. The ICAC Act enables the Inspector to scrutinise the ICAC's use of all its coercive and covert powers and the Inspector is not subject to the ICAC in any respect. However, the Commonwealth TIA Act prevents the Inspector from performing his or her statutory functions to the fullest extent as he or she is unable to examine whether the ICAC's use of telecommunications interception material is lawful. The Committee considers that it is vitally important that the Inspector is not hindered in any way from fully performing his or her audit function.
100. Access to telecommunications interception material has been an issue since the establishment of the Office of the Inspector of the ICAC, and continues to be an issue for other inspectorates in NSW and inspectorates in other jurisdictions. The Committee notes that a recent review of police oversight conducted by Mr Andrew Tink AM recommended the establishment of a new police oversight commission and a new Inspector of that commission. The review recognised that the new Inspector would require access to telecommunications interception material to properly conduct his or her oversight function, and recommended that the NSW Government write to its federal counterpart seeking an amendment to the TIA Act to ensure access to telephone intercept material for audit purposes. The Government has accepted all of the review recommendations.
101. Given that the Government has committed to the establishment of a new police oversight commission and a new Inspector of that commission in 2016, and that access to telecommunications interception material by Inspectors for audit purposes is a long standing problem, the Committee considers that a resolution of this issue is a matter of priority. The Committee therefore recommends that an amendment be sought to the TIA Act.

RECOMMENDATION 2

That the NSW Attorney General write to the Commonwealth Attorney General seeking an amendment to the *Telecommunications (Interception and Access) Act 1979 (Cth)* to enable the Inspectors of law enforcement and integrity agencies to access telecommunications interception material for audit purposes.

Liaison between the Inspector and the ICAC

102. Liaison between the ICAC and the Inspector is conducted in accordance with a Memorandum of Understanding (MOU). In previous annual report reviews the Committee was concerned that the Inspector and the Commission were not able to meet at the intervals prescribed by the MOU, due the increasing investigative workload of the ICAC.⁶⁰

⁶⁰ ICAC Committee, *Review of the 2012-2013 Annual Reports of the ICAC and Inspector of the ICAC*, pp 3-4, NSW Parliament website, [http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/e29b89ba9a520a1eca257d5b001f79dd/\\$FILE/Review%20of%20the%202012-](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/e29b89ba9a520a1eca257d5b001f79dd/$FILE/Review%20of%20the%202012-)

103. A new MOU was struck between the ICAC and the Inspector in May 2015, which is reproduced at appendix 3 to this report. Where the previous MOU required that the Inspector and Commissioner agree to meet every 30 days the new MOU requires that the Inspector and Commissioner (or their nominated delegates) meet 'periodically' to discuss relevant issues and raise any matters touching on the Inspector's functions and the conduct of the Commission.⁶¹
104. The Committee notes that while there is no longer a requirement for the Inspector and Commissioner to meet every 30 days, the Inspector stated in his response to further questions asked after the hearing that he is satisfied with current levels of liaison and considers that the working relationship has been effective.⁶² The Committee further notes that the ICAC considers that the MOU 'provides an efficient basis for communications between the Commission and the Office of the Inspector.'⁶³

Committee comment

105. It is important that the Inspector has a productive relationship with the Commissioner enabling the Inspector to perform his or her functions effectively and efficiently. It is also important that there is co-operation from the ICAC in response to the Inspector's requests for information.
106. The Committee will continue to monitor liaison between the Inspector and the ICAC and whether the level of communication prescribed by the current MOU is taking place.

THE COMMITTEE'S OVERSIGHT POWERS

The role of the Committee

Legislative provisions

107. When the ICAC was established in 1988, Parliament recognised that the extensive covert and coercive powers conferred on the Commission made accountability and review essential. The Committee on the ICAC was established concurrently and forms part of the accountability framework for ensuring that the ICAC's powers are properly exercised and adequately scrutinised.
108. The Committee's functions are set out in section 64(1) of the ICAC Act as follows:
- (a) to monitor and to review the exercise by the Commission and the Inspector of the Commission's and Inspector's functions,
 - (b) to report to both Houses of Parliament, with such comments as it thinks fit, on any matter appertaining to the Commission or the Inspector or connected with the exercise of its functions to which, in the opinion of the Joint Committee, the attention of Parliament should be directed,

2013%20Annual%20Reports%20of%20the%20ICAC%20and%20Inspector%20of%20the%20ICAC%20-%20report%205%2055.pdf, viewed 5 February 2016.

⁶¹ *Memorandum of Understanding between ICAC and Inspector of the ICAC*, dated 29 May 2015, p 3.

⁶² Inspector of the ICAC, *Review of the ICAC Inspector's 2013-14 Annual Report, Response to further Questions*, p 3.

⁶³ ICAC, *Review of the ICAC 2013-2014 Annual Report, Response to further questions*, p 20.

(c) to examine each annual and other report of the Commission and of the Inspector and report to both Houses of Parliament on any matter appearing in, or arising out of, any such report,

(d) to examine trends and changes in corrupt conduct, and practices and methods relating to corrupt conduct, and report to both Houses of Parliament any change which the Joint Committee thinks desirable to the functions, structures and procedures of the Commission and the Inspector,

(e) to inquire into any question in connection with its functions which is referred to it by both Houses of Parliament, and report to both Houses on that question.

109. Section 64(2) of the ICAC Act prevents the Committee from investigating particular conduct, or reconsidering the ICAC's decisions, findings or recommendations about particular complaints or investigations:

(2) Nothing in this Part authorises the Joint Committee:

(a) to investigate a matter relating to particular conduct, or

(b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or

(c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

110. In order to effectively conduct its monitoring and review role, the Committee is empowered to send for persons, papers and things (section 69 of the ICAC Act).

National Crime Authority (NCA) model

111. The legislative provisions for the ICAC Committee are closely modelled on the provisions of the Commonwealth *National Crime Authority Act 1984*, which provided for a joint oversight committee to monitor the NCA.⁶⁴ The NCA was a federal law enforcement agency established to investigate serious and organised crime. The NCA had extensive covert and coercive powers and secrecy provisions to conduct investigations; however it had no prosecutorial function. Information gathered by the NCA was handed to bodies such as the Australian Federal Police, Australian Tax Office or Customs. The NCA was superseded by the Australian Crime Commission in 2003.

112. The NCA Committee was established to 'monitor and review the performance by the NCA of its functions and to report to both Houses of Parliament upon any matter appertaining to the Authority or any change which the Committee thinks desirable to the functions, structure, powers and procedures of the Authority.'⁶⁵

113. In the early years of its operation, the NCA Committee found it was unable to adequately fulfil its monitoring and review functions because it could not obtain sufficient information from the NCA. The NCA Committee went as far as

⁶⁴ The NCA Committee was the predecessor of the current Parliamentary Joint Committee on Law Enforcement, which monitors the performance of the Australian Crime Commission and the Australian Federal Police.

⁶⁵ Parliamentary Joint Committee on the National Crime Authority, *The National Crime Authority – an initial evaluation*, 1988, p 1, Commonwealth Parliament website, http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/acc/completed_inquiries/pre1996/initial_evaluation/report/index, viewed 5 February 2016.

recommending its own disbandment to avoid becoming a 'charade'.⁶⁶ Following this recommendation, a meeting of the NCA and the NCA Committee was convened at which the NCA agreed to prepare a comprehensive brief for the Committee without reference to sensitive operational material.

114. The provision of briefing material allowed the NCA Committee to better understand the NCA's work, while protecting the confidentiality of sensitive material. The ability to provide effective oversight of an agency with strong coercive powers, while protecting the confidentiality of sensitive operations, was a recurrent issue for the NCA Committee.⁶⁷

Accountability framework

115. The ICAC Committee was not set up to review decisions or findings made in individual cases or to receive complaints from individuals about specific matters. As the then Premier, the Hon Nick Greiner, noted in his second reading speech on the establishment of the ICAC:

... the commission's activities will be monitored by a parliamentary committee. This committee will not be involved with specific operational matters, but will be concerned with looking at the overall effectiveness of the commission's strategies.⁶⁸

116. The limitation on the Committee's ability to review decisions or findings made in individual cases was recognised in the Committee's 2000 review of the ICAC Act. The report noted that:

The Committee does not have the ability to review the Commission's decisions and findings, to investigate conduct, or to examine the legality and propriety of the Commission's actions with respect to particular complaints. It is the Committee's opinion that these statutory restrictions imposed upon the Committee under section 64(2) are appropriate. Committee Members have neither the qualifications nor the expertise to conduct investigations, nor does the Committee have the resources to serve as an appeal mechanism for individuals dissatisfied with the decisions and findings of the Commission.⁶⁹

117. The report further commented on the inappropriateness of Committee members investigating complaints against the ICAC:

Moreover, it is the Committee's opinion that, since Committee Members (in common with all Members of Parliament) fall within the investigative jurisdiction of the ICAC, it would be inappropriate for Members to be involved in investigating complaints against the ICAC. The Committee is concerned that such a circular

⁶⁶ Parliamentary Joint Committee on the National Crime Authority, *Second Report*, 1986, p 2, Commonwealth Parliament website, http://www.apf.gov.au/Parliamentary_Business/Committees/House_of_Representatives_committees?url=report_register/bycomlist.asp?id=176, viewed 5 February 2016.

⁶⁷ Parliamentary Joint Committee on Law Enforcement, *History of the Committee*, Commonwealth Parliament website, http://www.apf.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/History_of_the_Committee, viewed 16 September 2015.

⁶⁸ The Hon Nick Greiner, Premier, Treasurer and Minister for Ethnic Affairs, *Legislative Assembly Debates*, 26 May 1988, p 675, NSW Parliament website, [http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LA19880526/\\$File/491LA009.PDF](http://www.parliament.nsw.gov.au/prod/parlment/hanstrans.nsf/V3ByKey/LA19880526/$File/491LA009.PDF), viewed 5 February 2016.

⁶⁹ Committee on the ICAC, *The ICAC: Accounting for extraordinary powers*, 2000, pp 18-19.

oversight system could give rise to allegations of either conflicts of interest or 'paybacks' for previous investigations.⁷⁰

118. Originally, operational matters were subject to oversight by the then Operations Review Committee (ORC). The ORC comprised eight members: the ICAC Commissioner, who acted as ORC Chair; an Assistant Commissioner; the Commissioner of Police; an independent person appointed by the Governor on the Attorney General's recommendation; and four persons appointed by the Governor, to represent community views.
119. The ORC was responsible for ensuring the ICAC was accountable for decisions about whether to investigate allegations of corrupt conduct, to advise the ICAC on whether it should commence or discontinue an investigation into complaints of corrupt conduct, and other matters referred by the Commissioner. The ORC acted in an advisory capacity only, and the Commissioner was not compelled to follow its advice.
120. The 2000 review found a number of features that limited the effectiveness of the ORC as an accountability mechanism, including: a lack of independence from the ICAC; no power to compel ICAC to provide information; and no power to report on its proceedings. The review further highlighted a significant gap in the oversight framework governing the ICAC. No agency or body was able to monitor the use of, or investigate complaints of the misuse of, ICAC's powers. To that end, the Committee recommended establishing an Inspector of the ICAC, with a specific audit role and complaint handling function.⁷¹
121. A similar recommendation in the 2005 Independent Review of the ICAC Act⁷² to appoint an Inspector of the ICAC was taken up by the Government, with the first Inspector appointed in 2005. With the Inspector's appointment, the ORC was discontinued. In practice, this meant that the ICAC was subject to oversight from both the Committee and Inspector, with the Inspector in turn being subject to Committee monitoring.
122. The Committee has previously conducted substantive reviews of the ICAC Act and associated issues including an inquiry into whistleblowers. Most recently, it conducted an inquiry into prosecutions arising from ICAC investigations which was not completed as the NSW State Election intervened. One of the ways in which the Committee regularly exercises its monitoring and review role is to hold public hearings with the Commissioner and other senior officers of the ICAC. Questioning has focused on the annual report, budgetary and resource concerns, and any other issues that members have raised in relation to the ICAC's discharge of its functions, general operations and structure.

⁷⁰ Committee on the ICAC, *The ICAC: Accounting for extraordinary powers*, 2000, p 55.

⁷¹ Committee on the ICAC, *The ICAC: Accounting for extraordinary powers*, 2000, p 65.

⁷² McClintock, B, *Independent review of the Independent Commission Against Corruption Act 1988*, January 2005, p 134.

The Inspector's role

123. As noted above, the Inspector forms part of the accountability framework for the ICAC. First appointed in 2005, the Inspector's functions are set out in section 57B of the ICAC Act, and include:

- auditing the ICAC's operations to monitor compliance with the law of the State
- dealing with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct by the ICAC or its officers
- dealing with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the ICAC or its officers
- assessing the effectiveness and appropriateness of the ICAC's procedures relating to the legality or propriety of its activities.

124. The Inspector is completely independent of the ICAC and has the power to audit any aspect of the ICAC's operations and to investigate complaints about the improper use by the ICAC of its powers. In carrying out his or her functions, the Inspector has full access to ICAC's records and can require ICAC officers to answer questions or produce documents. The Inspector can report to Parliament at any time on any matter he or she considers warrants the making of a special report.

The 2013-2014 Annual report Review

The public hearing

125. As noted earlier, a public hearing, held as part of the Committee's review of the 2013-2014 annual reports of the ICAC and the Inspector, was conducted on 7 August 2015 at Parliament House. At the hearing, members questioned the Commissioner on the ICAC's procedures for determining when to escalate a complaint of corrupt conduct to a full investigation.

126. The Committee questioned the Commissioner about the ICAC's decision making processes in choosing to commence Operation Hale. This operation investigated allegations concerning Crown Prosecutor Margaret Cunneen SC's conduct following a car accident. The Commissioner stated, however, that the questioning was not 'within the confines of the Committee's function.'⁷³

127. The Committee further questioned the Commissioner about ICAC's policies for determining the content and issuing of press releases. The Commissioner responded to the Committee's questions by stating that section 64(2) of the ICAC Act did not allow the Committee to ask such questions.⁷⁴

128. Following the public hearing, the Commissioner wrote to the Committee Chair on 21 August 2015, objecting to certain aspects of the conduct of proceedings.

⁷³ The Hon Megan Latham, *Transcript of evidence*, 7 August 2015, p 21.

⁷⁴ The Hon Megan Latham, *Transcript of evidence*, 7 August 2015, p 23.

These objections included the Commissioner's view that certain questions were prohibited by section 64(2) of the ICAC Act, specifically section 64(2)(c), which sets out that the Committee is not authorised to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

129. The Commissioner considered that there were two bases for the prohibition in section 64, namely:
- that Parliament should not be involved in operational matters
 - that the ICAC cannot respond to questions about specific decisions taken in relation to investigations without breaching the confidentiality provisions of the ICAC Act, because disclosure of such information is not for the purposes of, or in accordance with, the ICAC Act.
130. The Chair replied to the Commissioner by letter dated 26 August indicating that the Committee was seeking legal advice on relevant matters.

Committee comment

131. The Committee strongly affirms the important role of the ICAC in investigating, exposing and preventing corruption in the NSW public sector and educating the community and public sector about corruption and its effects. However, the ICAC has been granted formidable powers to achieve this, and there must be comprehensive oversight of bodies with such powers to prevent their abuse and to encourage full public confidence.
132. The ICAC Act establishes a number of mechanisms to guard against abuse of the ICAC's powers. The Committee forms part of this accountability framework with the role of monitoring, reviewing and reporting on the exercise by ICAC of its functions. For the Committee to properly hold the ICAC to account, it is necessary and appropriate for the Committee to be fully informed about all relevant aspects of its operations.
133. The Committee does not accept a narrow interpretation of section 64(2) of the ICAC Act. Advice received from the NSW Crown Solicitor confirms that questions which examine the ICAC's processes to better inform the Committee about the decisions or procedures followed in a particular example are a legitimate exercise of the Committee's powers. Section 64(2) does not permit the ICAC to decline to answer a question in which the Committee seeks an account of decisions made during the course of an investigation to monitor the ICAC's investigation procedures, provided the Committee is not seeking to reconsider decisions in relation to a particular investigation, as precluded by section 64(2)(c).
134. Similarly, the ICAC cannot invoke secrecy provisions to avoid answering legitimate questions. Section 111 of the ICAC Act provides that officers of the ICAC may produce or divulge information for the purposes of and in accordance with, the ICAC Act. Committee proceedings are one of the many lawful purposes of the ICAC Act. Confidentiality and secrecy provisions should not be used by a statutory body to obstruct a Parliamentary Oversight Committee from properly exercising its statutory functions.

135. In short, in accepting that the Committee's oversight role does not extend to reconsidering decisions of the ICAC, investigating a matter itself, or acting as an appeal mechanism and a complaints body, the Committee is specifically charged under section 64(1)(e) with the authority to examine the functions, structures and procedures of the ICAC and it can sometimes be helpful, and it is entirely proper, to refer to a specific matter to do so. A narrow interpretation of section 64(2) of the ICAC Act would hamper the work of the Committee just as the activities of the NCA Committee were curtailed.
136. Applied to recent events, the Committee is concerned that at the public hearing on 7 August 2015, the Commissioner did not fully respond to certain questions put by members. The Committee notes that the Commissioner's opening remarks did provide the Committee with a description of the assessments process undertaken for complaints received by the ICAC. However, to perform its statutory review function, it is necessary for the Committee to obtain sufficient information to determine whether the ICAC's current functions, structures and procedures are adequate. There can be value in seeking to understand, by aid of reference to a particular matter, whether the ICAC's decision making procedures and policies are in need of refinement or review.
137. In saying this, the Committee did not, and does not, seek to reconsider or further examine the events investigated by the ICAC in Operation Hale. In exercising its review functions, the Committee acknowledges that it is not entitled to weigh up the evidence before the Commissioner in a particular matter or to consider the Commissioner's state of belief as to the significance of the evidence, or his or her motives in deciding whether or not to investigate a matter. The focus is seeking information to elucidate the Commission's operational processes and methodologies.
138. Recent changes to the ICAC Act following the report of the Independent Panel, and discussed earlier in this report, provide that, going forward, the ICAC is limited to making corruption findings in cases of serious corrupt conduct. These legislative changes provide a further compelling argument for the Committee to be provided with sufficient information to understand the ICAC's decision making processes. This includes how the ICAC arrives at a decision to progress a complaint to investigation and the grounds for determining whether to hold a hearing in public or private. This will allow the Committee to ensure that the ICAC is operating within the limits of the legislation.
139. In conducting its oversight role, the Committee has no wish to compromise the work of the ICAC or the security of its staff. While the Committee's recent questions to the ICAC were on the public record, it is open to officers of the ICAC to request that proceedings be conducted in private if they consider that responses to Committee questions are of a confidential nature. In short, the current confidentiality and secrecy provisions of the ICAC Act are appropriate to ensure the Committee is able to receive information to effectively oversight the ICAC without compromising the safety of individuals or organisations, or the integrity of investigations.

Committee conclusions

140. The Committee has broad and expansive powers to oversight the ICAC and will use them robustly to monitor and review the exercise by the ICAC of its functions.
141. While the Committee acknowledges the constraints imposed by section 64(2) of the ICAC Act on its monitoring and review role, it is concerned that, narrowly interpreted and applied, section 64(2) of the ICAC Act may constrain the Committee from properly exercising its statutory functions.
142. The ICAC Act allows the Committee to ask questions relating to particular conduct or investigations in undertaking its oversight role, where such questions are for the purpose of monitoring and reviewing the way in which the ICAC conducts its functions. The Committee does not consider it appropriate to question the ICAC on matters that are currently under investigation or in cases where findings have not yet been made. However, the Committee is not similarly limited with regard to matters that have concluded.
143. In reviewing the operational processes underpinning concluded ICAC findings and determinations, the Committee's work complements that of the Inspector, who can examine current matters and investigate individual complaints. The Committee fully endorses the role of the Inspector in examining matters that are currently the subject of investigation by the ICAC, responding to individual complaints and undertaking audits and investigations to ensure that the ICAC complies with the law.
144. The Committee acknowledges that questioning the ICAC on historic cases as part of its monitoring and review role may lead to a degree of tension between the Committee and the ICAC. However, the Committee considers that this is a legitimate outcome when acting to ensure the accountability of the ICAC.

Appendix One – Transcript of evidence

This appendix contains a transcript of evidence taken at a public hearing held by the Committee on 7 August 2015. Page references cited in the commentary relate to the numbering of the original transcript, as found on the Committee's webpage.

CHAIR: Good morning and thank you for attending this public hearing of the Joint Committee on the Independent Commission Against Corruption for review of the 2013-14 annual reports of the Independent Commission Against Corruption and the Inspector of the Independent Commission Against Corruption. My name is Damien Tudehope. I am the Chair of this Joint Committee and member for Epping. On my right is the Deputy Chair of the Committee, Mr Adam Marshall, the member for Northern Tablelands. Our colleagues from the Legislative Assembly are Mr Chris Patterson, the member for Camden; Mark Taylor, the member for Seven Hills; Tania Mihailuk, the member for Bankstown; Ms Kathy Smith, the member for Gosford; and Mr Ron Hoenig, the member for Heffron, who has arrived from London only this morning. Also joining the Joint Committee are members of the Legislative Council, the Hon. Trevor Khan, the Reverend the Hon. Fred Nile and the Hon. Lynda Voltz.

Today the Committee will hear first from witnesses from the Office of the Inspector of the Independent Commission Against Corruption. They are the Inspector himself, the Hon. David Levine, and Ms Susan Raice, Principal Legal Adviser. Following their evidence, we will hear from witnesses from the Independent Commission Against Corruption. They are the Hon. Megan Latham, Commissioner of the Independent Commission Against Corruption; Ms Theresa Hamilton, Deputy Commissioner; Mr Roy Waldon, Solicitor to the Commission and Executive Director, Legal Division; Mr Andrew Koureas, Executive Director, Corporate Services Division; Ms Sharon Loder, Executive Director, Investigation Division; and Dr Robert Waldersee, Executive Director, Corruption Prevention Division.

For the benefit of members of the public who are present, I note that prior to the commencement of these proceedings the Committee resolved to authorise the media to broadcast sound and video excerpts of the public proceedings. Copies of the guidelines governing the broadcasting of proceedings are available. I now declare the hearing open and welcome the first witness representing the Office of the Inspector of the Independent Commission Against Corruption, the Hon. David Levine and Ms Susan Raice.

DAVID DANIEL LEVINE, Inspector of the Independent Commission Against Corruption, Office of the Inspector of the Independent Commission Against Corruption, affirmed and examined:

SUSAN AUDREY RAICE, Principal Legal Adviser, Office of the Inspector of the Independent Commission Against Corruption, sworn and examined:

CHAIR: Thank you for appearing before the Joint Committee today to give evidence. Before we proceed, do you have any questions concerning the procedural information that we sent to you in relation to witnesses and the hearing process?

Mr LEVINE: No.

Ms RAICE: No.

CHAIR: Would you like to make an opening statement before the commencement of questions?

Mr LEVINE: No, Mr Chairman.

CHAIR: Inspector, in the report you made notes in relation to the Telecommunications (Interception and Access) Act 1979 on pages 9 and 10. What was the outcome of the Senate's inquiry into that Act on the issue you raised in your report? I also note that recently you made reference to that Act in your June 2015 report, furnished on 18 June, and arising out of the Independent Panel Review of the Jurisdiction of the Independent Commission Against Corruption [ICAC]. You stated that litigation may be needed to resolve the issues around that Act. Would you care to elaborate on what your concerns are and how that litigation perhaps ought to be pursued?

Mr LEVINE: Yes. As to the first part of your question, I do not think that there has been any outcome.

[Interruption]

The Hon. LYNDIA VOLTZ: Point of order: Mr Chair, I ask that you remind members of the public that they are not to interrupt speakers and they will be removed if they do so.

CHAIR: That is fair. The important thing is that members of the Committee can hear the Inspector and I am very relaxed that I can hear him clearly.

Mr LEVINE: As far as I know there has been no outcome from the Commonwealth select committee. The issue is this: The view is held by commissioners of ICAC, the Police Integrity Commission and indeed interstate that the product of telephone intercepts and indeed in some cases the application material that leads to the warrant that leads to the product is not available to a person in the position of the inspector except to the extent that I understand it in the excruciating terms of the Commonwealth legislation in some very obscure circumstances. The litigation to which reference has been made would arise on the occasion of a request for the product, a request for the material delivered to the issuing authority, a refusal and then seeking some order from some appropriate court that either the negative position is wrong or it is right. If the position presently taken is correct then the work of inspectors is profoundly compromised and there will be a necessity to amend the Commonwealth legislation.

Mr RON HOENIG: That effectively means you cannot discharge the investigation of maladministration under section 57B (4) of the ICAC Act because you cannot access the materials to enable you to make a judgement.

Mr LEVINE: It does not necessarily mean that I can never discharge the function. It compromises the extent to which I can discharge the function.

Mr RON HOENIG: If you cannot see the product, you cannot discharge the function, can you?

Mr LEVINE: Not necessarily. I would discharge the function to the extent that I can, with the rider in a report—if I make a report—that I have not had access to the product. And that might affect any conclusion to which I would come, having otherwise discharged my function.

Mr RON HOENIG: Because judgements in restricted products, as you would know—is it Commissioner Levine or Justice Levine?

CHAIR: Inspector.

Mr LEVINE: The safest way is to call me Inspector.

Mr RON HOENIG: You would know better than I would, Inspector. Judgements relating to product are invariably inferential judgements as to the ultimate use that is made of it. So if you do not see it how do you make an inferential assessment as to whether or not what you may be examining under the Act is correct?

Mr LEVINE: It depends where the product falls within the ambit of my inquiry. If the product of a telephone intercept initiates an action by the ICAC or some cognate body, it is difficult to determine the propriety or otherwise of the inquiry made by the ICAC if I do not know what kicked it off, as it were.

Reverend the Hon. FRED NILE: Inspector, has there been any action to change those procedures to give you the powers to have access to that material?

Mr LEVINE: Save for the submissions I made some years ago and save for this, I recently met with some inspectors or occupants of cognate offices from Western Australia, Queensland and Victoria, who all have the same problem, and we discussed it. Secondly, I shall be seeking counsel's advice in relation to the construction of the Commonwealth legislation. That will be my next action. What flows from that I cannot say. It depends what the advice is. It might have to be a Council of Australian Governments [COAG] matter; I do not know.

The Hon. TREVOR KHAN: Inspector, I take it that this is not an academic matter for you—this is a matter that is impacting on a present investigation you are undertaking.

Mr LEVINE: Yes.

The Hon. TREVOR KHAN: And that would be the matter of Cunneen, would it?

Mr LEVINE: Yes.

CHAIR: Thank you. Your report says that since 2013-14 no audits have been conducted of the commission's exercise of statutory authority. This contrasts with your predecessor, who published 11 audit reports during his time as inspector. Have you, since the issuing of your report, initiated any audits?

Mr LEVINE: Yes.

CHAIR: Can you tell me the matter in respect of which you have issued an audit?

Mr LEVINE: Operation Hale—the Cunneen matter.

CHAIR: Thank you. And what methodology are you using in respect of that audit?

Mr LEVINE: Asking for everything that I can have from the ICAC.

CHAIR: And that has been provided to you?

Mr LEVINE: And I add that it has been provided, save for the telephone intercepts—if they exist.

CHAIR: I take it in the course of that audit you have formed some preliminary views in respect of the manner in which that matter was conducted?

Mr LEVINE: Yes.

CHAIR: Are you able to share those with us?

Mr LEVINE: No, I would prefer not to.

CHAIR: Is it true to say that in your report in June 2015 you identified a series of issues that had been raised with you in relation to the manner in which the commission conducts its investigations? I think there are 14 specific areas where complaints have been raised.

Mr LEVINE: Yes.

CHAIR: Is one of those areas of complaint the manner in which the commission is seen to leak—to use the colloquial word—its information?

Mr LEVINE: Forgive me—I do not remember one of the 14 being expressly in those terms.

CHAIR: Well, let me ask you this: Does it give rise to concern to you that that is an issue that appears to trouble some members of the public in relation to the manner in which the commission conducts its affairs?

Mr LEVINE: Realistically, Mr Chairman and members of the Committee, the issue of leaks is intractable and at times risible, and is evidence in my mind—for me—of a blood feud between News Limited and Fairfax Media Limited. It is a futile task for me to embark upon trying to deal with any allegation by one side or another which has been publicly made or by any one individual to determine whether there has been a leak and, if so, by whom and to whom and of what. It is futile.

CHAIR: Well, except for the fact that there are serious criminal penalties, potentially, for someone who is leaking information, whether they are employees or witnesses who appear before the commission. That is a serious matter and it should be investigated, should it not, if there is an allegation that material is leaked?

Mr LEVINE: Well, it is capable of being investigated. I am not prepared to undertake it. It would be a waste of time for me to constitute myself as a quasi royal commission and invite journalists to come along and ask them, "Where did you get it?"—I know what the response would be—or to invite members of commission staff or officers of commissions to say, "Did you give X to Y?" But I think allegations of leaks is a fact of bureaucratic and political life in this State—allegations of leaks. The reality of it or the extent of it is something I do not know. From my own professional experience over the past 40-odd years, I have some acquaintance with what I have been calling the futility of trying to chase that hare.

CHAIR: Thank you.

The Hon. LYNDIA VOLTZ: Inspector, I note in your report there was the period between 1 October 2013 and 9 February 2014 when the office of Inspector General was vacant and that there were 16 complaints received during that time, some of which could not be assessed. Have you received any complaints with regards to interactions between the previous Premier, his staff or any other Ministers and the Independent Commission Against Corruption [ICAC] Commissioner acting in his independent role?

Mr LEVINE: The answer to that question is I have received communications which raised that issue. I have not assessed them as complaints yet falling within my jurisdiction, but certainly I have received communications.

The Hon. LYNDIA VOLTZ: How did it arise that there was a vacuum period from October 2013 to February 2014 when there was no inspector?

Mr LEVINE: My predecessor's term ended and there was no appointment made until I was appointed four months later.

The Hon. LYNDIA VOLTZ: As to the 16 complaints received during that period, in your submission you state that people were given impressions, because statements were taken, about what action would happen.

Mr LEVINE: Could you tell me from which report? My last annual report?

The Hon. LYNDIA VOLTZ: I have the 2013-14 report. During the vacuum period, "complaints were received and they were assessed by persons whose functions did not include taking such a step".

Mr LEVINE: Yes.

The Hon. LYNDIA VOLTZ: What happened to those complaints?

Mr LEVINE: They have been dealt with.

The Hon. LYNDIA VOLTZ: They have been dealt with?

Mr LEVINE: Yes.

The Hon. LYNDIA VOLTZ: And they have all been assessed?

Mr LEVINE: Yes.

The Hon. LYNDIA VOLTZ: And the impressions that people were given?

CHAIR: I do not know if he can answer that.

The Hon. LYNDIA VOLTZ: The report states, "Complainants were interviewed and statements were made to the complainants relating to whether or not the subject of their complaints fell within or without the jurisdiction of the Inspector"?

Mr LEVINE: If you are asking me the outcome of those complaints I cannot tell you because I do not have—

The Hon. LYNDIA VOLTZ: That is okay.

Mr LEVINE: Each complainant that was contactable, and I say that advisedly, received a communication from me and I think in each case the outcome was that my jurisdiction had not been activated by the complaint.

The Hon. LYNDIA VOLTZ: I think we ask you this question every year, but I will ask it again. Do you have sufficient resources to run an inquiry in line with your powers as defined by the Act?

Mr LEVINE: If you could remind me of every answer I have given each year—

The Hon. LYNDIA VOLTZ: I think you always say you would like more money.

Mr LEVINE: The answer is, presently, yes. That is the first part of the answer. Second, I have an assurance that further resources will be made available to me, if required. Third, the circumstances of "if required" is often very difficult to determine. The reporting year that ended on 30 June was extraordinary compared to every other year that preceded it. I have had some increases in resources that will accommodate my needs. There are outstanding matters beyond my control and indeed beyond the control of the commission that may or may not affect my need for resources.

The Hon. LYNDIA VOLTZ: You also now have two roles. You are combined Inspector for the Police Integrity Commission [PIC] as well?

Mr LEVINE: Yes.

The Hon. LYNDIA VOLTZ: How is that functioning in respect of your roles?

Mr LEVINE: Comfortably.

CHAIR: You made an observation that you would benefit from having an assistant inspector.

Mr LEVINE: Yes.

CHAIR: Is that a position you would still advocate to?

Mr LEVINE: Strongly, yes.

The Hon. TREVOR KHAN: And you have a person in mind?

Mr LEVINE: Yes.

The Hon. LYNDIA VOLTZ: It is not you, Trevor.

CHAIR: In April this year, after the decision of the High Court in *Cunneen v the Independent Commission Against Corruption*, you were reported as describing the Commissioner as a sore loser.

Mr LEVINE: Yes.

CHAIR: Is that correct?

Mr LEVINE: The report was correct and that is what I thought at the time.

CHAIR: Elaborating on that, what did you mean by that? Did you think that she should not have issued the release that she did?

Mr LEVINE: Yes. I thought the whole approach by the commission to that piece of litigation was disdainful—another word I used—of the courts in this State and the highest court of the land. That is the view I held and still hold.

The Hon. TREVOR KHAN: What occurred was that a media release was issued after the High Court had delivered its decision and the commission's media release, in essence, said the High Court was wrong. That, in essence, is what this 622 word media release does, does it not?

Mr LEVINE: Which one?

The Hon. TREVOR KHAN: It was a media release, which is still on their website, of 20 April 2015. I think you were quoted in the paper on the following day and perhaps a week later where the concept of poor loser and disdainful are reported.

Mr LEVINE: Yes.

The Hon. Lyndia Voltz: Point of order: The member would need to provide a copy of the press release to the Inspector.

The Hon. TREVOR KHAN: I am happy to do that. I have taken it off their website.

The Hon. LYNDIA VOLTZ: He just said to you he does not know which one you are talking about.

CHAIR: The question puts the context in which he made the comment. Inspector, do you need to see a copy of the press release?

Mr LEVINE: If it can be made available.

The Hon. TREVOR KHAN: It can.

Mr LEVINE: Yes.

The Hon. TREVOR KHAN: It is an extraordinary position, is it not, for what is a quasi-judicial body to reject, in effect, the decision of the High Court?

Mr LEVINE: Well, they are entitled to disagree with the decision of the High Court.

The Hon. TREVOR KHAN: But they go further than that, do they not?

Mr LEVINE: Yes, I agree, and they did so with remarkable promptitude.

Mr RON HOENIG: Inspector, you were a very eminent and highly regarded jurist. Using the word "disdainful", which means showing contempt or lack of respect, is a very significant expression by you?

Mr LEVINE: I used it quite advisedly. That was the impact that the media releases of ICAC made upon me, having been a former member of the judiciary. I do not resile from them.

Reverend the Hon. FRED NILE: As Inspector, did you follow it up with the commission or with the Commissioner?

Mr LEVINE: I think there have been communications between myself and the commission about press releases, yes.

The Hon. TREVOR KHAN: Do I take it also the press release has been referred to you—I withdraw that question. I will not put that question at this stage.

CHAIR: You were also reported in that same article as giving advice to the Government to avoid a kneejerk reaction that would turn the commission into a second Police Force or Crime Commission. Do you care to elaborate on that?

Mr LEVINE: I remember saying that as part and parcel of my reaction to ICAC's apparent reaction to the proceedings up the ladder of the courts. That remark was particularly affected by the nature of the Cunneen incident: a motor vehicle accident, an issue about breathalysing, and, indeed, an issue said to be an attempt to pervert the course of justice, all of which, to my mind, would normally and quite capably be dealt with by a law enforcement agency, which ICAC is not. The only factor to date, apparently, that has informed ICAC about all of this business is that one of the drivers involved in the collision was the girlfriend of the son of a senior Deputy Crown Prosecutor.

CHAIR: And you thought that was inappropriate material for ICAC to be investigating?

Mr LEVINE: And I was not alone in so thinking. The former commissioner himself was of that view.

Mr RON HOENIG: When you have an Act like the Independent Commission Against Corruption Act, which has such broad definitions of what constitutes corrupt conduct, the

commission can go in any direction it wants, whether or not the conduct is criminal or a civil wrong or something of that nature. How does one criticise an organisation if the Parliament gives it that breadth of power or discretion?

Mr LEVINE: How can one criticise it?

Mr RON HOENIG: Yes.

Mr LEVINE: I can criticise it as Inspector in terms of how it administers its powers. I can criticise it from a perspective of a sense of proportion that I and I think the public would expect to be exercised by ICAC in relation to the matters with which it concerns itself. It must be remembered that until the motor vehicle accident on 31 May 2014—I think that was the date—ICAC had been concerned with major inquiries involving operations Jasper, Spicer and Credo involving politicians from the Premier down, the very areas in which, to my mind, the public has a legitimate interest in seeing ICAC exercise its jurisdiction. I cannot recall at the moment the number of politicians—I remember the Premier resigned his office and I think nine others.

The Hon. LYNDIA VOLTZ: It was 11, was it not?

The Hon. TREVOR KHAN: Too many to remember.

Mr LEVINE: It was a sufficient number to constitute what I perceived to be a disruption of the structure of parliamentary government, when nine or 11 members had to move from one side to the crossbenches or whatever. That was big-time stuff. Then out of left field comes the motor vehicle accident. That is the context of bearing a sense of proportion that I am talking about.

Mr RON HOENIG: If you look at the nature of the corruption complaints that the commission gets, a significant proportion, if not most of them, are allegations of criminal conduct, some of which involve serious criminal offences. At which point of serious criminal offences should those matters be investigated by criminal investigators who are skilled in obtaining admissible evidence? At which point should the commission continue its investigation of its statutory functions? Do they overlap? And, if I can add to that—and if I am on the right track—why then cannot a criminal investigation proceed, if there be insufficient evidence to actually bring charges and the commission then proceed to perform its statutory function? Quite similar, for example, to the use of inquests by a coroner when, after the inability of, say, police or the Crime Commission to get evidence to charge somebody, the coroner completes his or investigation and ultimately people are charged as a result of that investigation?

Mr LEVINE: That is the type of question that in America is called a "compound" question. Mr Hoenig, had you asked that question in my court say 20 years ago I would have disallowed it because by the time you have reached the end of it I have forgotten the beginning.

Mr RON HOENIG: I am trying to do it the quick way here, by consent.

Mr LEVINE: I think the nub of the issue is one that could well be dealt with by what I will call the panel—that is the Gleeson-McClintock panel—and it is whether there should be,

by statute or some other means, a clear statement of the criteria by which ICAC determines it will investigate A, B, C but not D and E.

CHAIR: I appreciate that. We have not seen that report, nor have you.

Mr LEVINE: No.

CHAIR: I take the point that that is certainly an issue which the High Court has invited the Government to review.

Mr LEVINE: It is a fact of my life as Inspector that people communicate with my inspectorate saying, "How come ICAC did not investigate my complaint, which is this big, yet they have embarked upon Operation Hale?", which they say is the same size as theirs. That is an everyday event almost in my office.

Reverend the Hon. FRED NILE: Have you sought an explanation from ICAC as to why they pursued Operation Hale, the Cunneen matter, so vigorously and what resources and expenditure were involved in that particular matter?

Mr LEVINE: I would prefer not to answer that because I am still in the process of, firstly, examining the material that ICAC has been good enough to provide to me. Secondly, I propose to get counsel's advice on certain aspects, including the telecommunications one; and, thirdly, once I have put my material together I will be in a better position to approach ICAC and say, "What do you say about A, B, C and D?" But I have not worked out yet what precisely A, B, C and D are.

The Hon. TREVOR KHAN: Inspector, do you have a view about the time this would take? It has really been a matter of some hot interest.

Reverend the Hon. FRED NILE: Would that be an audit?

Mr LEVINE: That is another decision, as to whether it remains an audit or I go into full investigation mode. That would depend on the advice of counsel amongst other things. As to a time limit, I said a couple of weeks ago, in another context, that if I decide to deliver a special report it might take three months. If I need further resources simply for the mechanical process of generating the document, I will ask for them—and I am sure that I will get them.

The Hon. TREVOR KHAN: Does your current assessment include the propriety and legality of the media release that was issued by ICAC at the time that it referred material to the DPP?

Mr LEVINE: It will. I have received communications from various sources.

The Hon. TREVOR KHAN: Including the Director of Public Prosecutions—is that correct? Just so I am not seen to be asking you a surprise question, I think that is referred to in your report of June. I do not wish to mislead you but I believe in that report you referred to the referral by the DPP of that media release.

Mr LEVINE: I do.

The Hon. TREVOR KHAN: It is at page 11, point 14. You will be pleased to know people do read your reports.

Mr LEVINE: That is because I do not put any illustrations or photographs in it. All I am saying there is that I acknowledge that it had been an issue referred to in the media and that I have received communications saying, "Are you going to do anything about that?"

The Hon. TREVOR KHAN: Sure.

Mr LEVINE: I cannot answer that yet.

The Hon. TREVOR KHAN: One of the sources of referral was, in fact, the Director of Public Prosecutions.

Mr LEVINE: It is definitely part of the program. Yes.

Mr RON HOENIG: Going back to the difficulty you had in accessing prior to the Telecommunications (Interception and Access) Act, I think you will continue to have problems once you receive counsel's advice until there is an amendment to the Act. But you should not have any difficulties, for example, getting any product when it comes to listening devices.

Mr LEVINE: That is right.

Mr RON HOENIG: You can access without any difficulty.

Mr LEVINE: I have experienced no difficulty in relation to surveillance material, except in relation to telephone intercepts.

Mr RON HOENIG: Subject to the advice you get, in fairness to the commission, they are acting in accordance with the law in respect of their not handing material over to you.

Mr LEVINE: I am not critical of them for having a view of what the law is and acting in accordance with that view. All that is done in good faith, as far as I am concerned.

Mr RON HOENIG: The other question relates to your staffing structure. You have two part-time employees?

Mr LEVINE: Yes.

Mr RON HOENIG: That is it.

Mr LEVINE: Yes.

Mr RON HOENIG: That is an executive support officer and a senior legal project officer.

Mr LEVINE: She is now my principal legal advisor.

CHAIR: She is sitting at the table.

Mr RON HOENIG: When you say that they are part time, they are full-time employees and they are dividing their attention between the Independent Commission Against Corruption and the Police Integrity Commission, or are they part-time in both functions?

Mr LEVINE: I will just briefly explain how we work. The three of us are in the office three days a week. Two of us—myself and Ms Raice—are in the office four days a week doing work for both commissions. I can be in the office five days a week or I can work seven days a week.

Mr RON HOENIG: Bearing in mind the size of your responsibility for both organisations—I am only asking you about this one—do you have a view about the type of staffing structure ideally you would need to properly discharge your functions in a comprehensive and thorough fashion under the Act?

Mr LEVINE: "Comprehensive and thorough" is capable of meaning something I would try to avoid. If I was to exercise my functions and powers I would really almost have to be a mirror image of ICAC itself or piggy-back or be there every day, looking over their shoulders at everything. That is totally unrealistic and it is a course I would reject. At present, the answer is that I have sufficient flexibility vis-a-vis DPC and getting in further staff. One reality is that the volume of work spikes. For example, until Operation Hale it was at a fairly consistent level. I only came in as the Inspector of ICAC in February 2014. Operation Hale brought about this inundation of work that does require further staff, and may require for the resolution of the over 30 communications we have received since the High Court decision.

Reverend the Hon. FRED NILE: In view of your comments, strictly do we still have two inspectors for these two organisations—ICAC and the Police Integrity Commission.

Mr LEVINE: You are asking about two inspectors?

Reverend the Hon. FRED NILE: I am asking: Should we go back to the original proposition of having two inspectors?

Mr LEVINE: At present, my answer to that would be no. I thought you were asking me whether something should be done about PIC.

CHAIR: I think you said earlier that you were managing both functions well.

The Hon. LYNDIA VOLTZ: Comfortably.

CHAIR: Thank you, Inspector. You have been most helpful this morning. I thank you for making yourself available and for giving us the information that you have, which has been very comprehensive.

(The witnesses withdrew)

(Short adjournment)

MEGAN FAY LATHAM, Commissioner, Independent Commission Against Corruption,

SHARON LEE LODER, Executive Director, Investigation Division, Independent Commission Against Corruption, and

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

THERESA JUNE HAMILTON, Deputy Commissioner, Independent Commission Against Corruption,

ROY ALFRED WALDON, Solicitor to the Commission and Executive Director, Legal Division, Independent Commission Against Corruption, and

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

CHAIR: I now welcome the Hon. Megan Lathan, Commissioner, Independent Commission Against Corruption, Ms Theresa Hamilton, Mr Andrew Koureas, Ms Sharon Loder, Dr Robert Waldersee and Mr Roy Waldon. Thank you for coming this morning. I note again that the Committee has resolved to authorise the media to broadcast sound and video excerpts of the public proceedings. Copies of the guidelines are available, if anyone requires them.

Commissioner, in the event that you or your staff require any of these proceedings to be held in camera it is open to you to make that application. I advise members of the public that if such an application is made they will be asked to step outside while the Committee determines whether the hearing should proceed in camera. The Commissioner has indicated that she would like to make an opening statement which may touch on matters that have already been raised this morning.

Ms LATHAM: Thank you, Mr Tudehope and the Committee members, for the opportunity to make an opening statement. The commission understands that these proceedings relate to part 7 of the Independent Commission Against Corruption Act, more specifically section 64, which sets out the functions of this Committee. The commission welcomes the opportunity to speak to the Committee about the commission's functions, the annual report, any trends in corrupt conduct and any policies that might contribute to its detection and prevention. However, as Committee members are no doubt aware, section 64 (2) does not allow the Committee to investigate any particular matter or reconsider any decision by the commission in relation to a particular complaint or investigation.

Since the commission's last appearance before the Committee, a number of new members have been appointed. In the interests of assisting the Committee to appreciate the wider context within which the commission carries out its work, the commission would like to summarise the processes and procedures by which complaints of allegedly corrupt conduct are received and assessed and, if appropriate, escalated to an investigation by the commission. It appears to the commission that these procedures are poorly understood and often misrepresented, although they are explained on the commission's website and in its annual reports. I would like to take this opportunity to summarise them.

The exercise of the commission's jurisdiction generally commences with the reception and registration of a complaint from any person or a notification from a public authority that corrupt conduct may have occurred or may be occurring. A very large number of complaints are received by the commission each year. In 2013 and 2014, which is the subject of these proceedings, 3,386 matters were received by the assessments section, of which 1,717 were section 10 and section 11 complaints. The remainder consisted of inquiries, requests for information and public interest disclosures. There were 410 matters which were outside the commission's jurisdiction.

The commission has developed very stringent procedures to ensure that only those complaints that warrant further investigation are progressed. Complaints and reports within the commission's jurisdiction are made the subject of reports to the assessment panel. The assessment panel comprises the Commissioner, Deputy Commissioner and the executive directors of the Investigation, Legal and Corruption Prevention divisions. The assessments section manager is the convenor of the assessment panel. The assessment panel considers reports twice a week.

Reports to the assessment panel are prepared by the relevant assessment officer in an approved form. They set out the allegations and relevant background information, provide an analysis of the information and recommend what action should be taken. In some circumstances, the officer preparing the report may make some additional inquiries to clarify issues before finalising the report. Each report is reviewed by a senior assessments section officer prior to submission to the assessment panel. The reviewing officer is required to ensure that the report is accurate, logical and complete and that it acknowledges any deficiencies or information gaps. The officer recommends what action the assessment panel might take.

The assessment panel is ultimately responsible for determining what action to take with respect to each matter. In relation to each report, the assessment panel considers the classification of each matter and whether it falls within the commission's jurisdiction, the adequacy of the report, including the summary and analysis of the matter and relevant background information, the adequacy of or need for inquiries in relation to each matter, including by way of referral under section 53 of the Independent Commission Against Corruption Act, assessment inquiries or preliminary investigation, the appropriateness of the recommendations made, whether a matter should be referred to another organisation or relevant authority for information or action, whether technical advice is required that may assist in the assessment of the matter, for example, legal advice or strategies to manage certain inquiries.

Assessment panel members can endorse the recommendation made in an assessment report or can recommend an alternative course of action. The assessment panel can decide to refer the matter to another agency or take no further action, or it can exercise the commission's power under sections 53 and 54 of the Independent Commission Against Corruption Act to refer a matter to another agency for investigation or other action and require that agency to submit a report on what action it takes. It also can require the assessment section to conduct assessment inquiries to ascertain additional information on which to base a further assessment of the matter. It can ask for the provision of corruption prevention advice and it can ask that further investigations be undertaken.

Only a small portion of matters are made the subject of a commission investigation. In 2013-14, 43 matters were retained by the commission for preliminary investigation. This

represents 2.14 per cent of the 2012 section 10 and section 11 complaints and report and public interest disclosures received by the commission in that period. Most investigations commence as preliminary investigations. A preliminary investigation may be conducted for the purpose of discovering or identifying conduct that might be made the subject of a more complete investigation or deciding whether to make particular conduct the subject of a more complete investigation. If appropriate, a matter may then be escalated by the commission's strategic investigation group to a full investigation, which is then known as an operation.

Preliminary investigations are usually assigned to the preliminary investigation team. A lawyer is assigned to this team to provide legal services and ensure that powers are exercised appropriately. Once a matter becomes an operation it is assigned to an investigation team. One or more lawyers are assigned to each operation. If the matter involves potential system issues, a corruption prevention officer will also be assigned. A primary case manager is appointed for each commission investigation. This person is responsible for regularly reviewing the conduct of the investigation to ensure compliance with relevant procedures and investigation plans. The strategic investigation group is responsible for making and/or approving key decisions made in the course of a commission investigation.

The strategic investigation group consists of the commissioner, the deputy commissioner and all executive directors, except the executive director of corporate services. It oversees commission investigations, preparation of investigation reports, preparation of briefs of evidence for submission to the DPP and the progress of criminal prosecutions arising from commission investigations. The strategic investigation group usually meets monthly. The functions of the strategic investigation group include determining the appropriate level of reporting for and overseeing the progress of investigations, investigation reports, briefs of evidence and criminal prosecutions; providing direction and advice on proposed investigation strategies, deciding whether a preliminary investigation should be escalated to a full investigation, making and/or approving key decisions for an investigation, and endorsing and/or determining investigation priorities.

Investigations may focus on both historic and current activities. Methods of investigation will vary, depending on the nature of the conduct under investigation. Investigation plans are prepared for all matters and each investigation is regularly assessed to determine the most appropriate investigation strategy. Operational orders and tactical plans are required for any significant operational activity, such as the execution of a search warrant or the conduct of a controlled operation, to ensure compliance with the commission's investigation and risk management precepts. A debrief is required following the execution of an operational order or tactical plan, with a view to assessing performance against objectives and identifying possible improvements to systems, procedure and methodology.

The primary purpose of a commission investigation is to determine whether any corrupt conduct or conduct connected with corrupt conduct, or conduct liable to allow, encourage or cause the occurrence of corrupt conduct has occurred, is occurring or is about to occur. It also determines whether the laws governing any public authority or public official need to be changed for the purpose of reducing the likelihood of the occurrence of corrupt conduct. It is also able to determine whether methods of work, practices or procedures of any public authority or public official did or could allow, encourage or cause the occurrence of corrupt conduct. Compulsory examinations or a public inquiry may be conducted as part of the investigation. However, not all investigations require compulsory examinations or involve a public inquiry.

The commission must be satisfied whether or not it is in the public interest to conduct a public inquiry, and in doing so section 31 (2) of the Act requires consideration of the benefit of exposing to the public and making it aware of corrupt conduct; the seriousness of the allegation or complaint being investigated; any risk of undue prejudice to a person's reputation, including prejudice that might arise from not holding an inquiry; and whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned. The considerations taken into account by the commission in applying the above criteria include whether public exposure would be likely to educate the public about serious corruption or systemic failures and issues, encourage others to come forward with information relevant to the investigation, and encourage public agencies to engage in reform and/or establish public understanding of why change is necessary.

The commission also considers the seriousness and nature of the conduct, for example, whether the conduct involves a criminal offence, the seniority or standing of the public official involved, the level of sophistication, organisation and planning, and the number of persons involved and whether the alleged conduct is systemic. The commission also considers whether the allegations are already in the public domain and whether the public inquiry would provide a transparent mechanism for public officials and others to be publicly accountable for their actions, or provide persons the subject of the allegations, including false accusations or innuendo, with an opportunity to provide an account. The commission also considers the desirability of enhancing public confidence in the operations of the commission by demonstrating openness and public accountability in the commission's conduct of investigations. The commission weighs these criteria carefully when deciding to hold a public inquiry.

The commission is acutely aware that a public inquiry exposes the details of the commission's investigation and that persons who are named as part of that investigation may be the subject of media attention. However, what is frequently misunderstood is that a public inquiry is but one part of the investigative process. It is the only part of the investigative process that is likely to encourage the reporting of other relevant information that was previously unknown to the commission. It also performs a vital educative and deterrent function, and it provides the public with a window into the operations of the commission. Even during a public inquiry an investigation can take an unanticipated turn. It is quite wrong to assume that the commission is able to determine what findings it will make before an investigation has been completed.

It is a dynamic process that has proven most effective in exposing corrupt practices that are otherwise unlikely to be detected because they are, on the whole, immune to the investigative tools available to law enforcement agencies. The public inquiry is an inquisitorial process, not an adversarial one. It is consistent with the process undertaken by ad hoc royal commissions such as the Wood royal commission into police corruption and the Royal Commission into Trade Union Governance and Corruption. The effectiveness of the inquisitorial process lies in its ability to confront a witness with information that has been acquired during an investigation of which the witness is unaware, thereby increasing the likelihood that the truth will be exposed.

By way of contrast, the adversarial process traditionally utilised in courts of law is governed by the rules of evidence and is defined by the issues in dispute of which the witnesses have notice. It is a feature of adversarial proceedings that a witness is therefore able

to prepare a response to an anticipated question. Much of the uninformed debate about the commission's public inquiry process suggests that the commission should provide witnesses with advance notice of the material upon which they will be questioned. That would significantly undermine the effectiveness of the commission's investigative process principally because it would provide an incentive to persons who may be adversely affected by the inquiry to destroy or alter evidence of relevance to the inquiry or to conspire with others to give false evidence to the inquiry.

It is for these reasons that the commission refuses to discuss or respond to public speculation about the nature of the material that underlies an announcement to hold a public inquiry. The consequence is that the commission's silence in the face of that speculation is sometimes interpreted as tacit confirmation of what has been said or written. The commission would be undermining its own investigations were it to confirm or deny such reports. The commission's experience is that the public understands and supports the commission's public inquiry process. The detection and exposure of corrupt conduct is vital to the maintenance of public confidence in the integrity of public administration. The suggestion that the whole of the investigation should take place behind closed doors runs directly counter to its statutory purpose, namely, to investigate, expose and prevent corruption.

The conclusion of an investigation may result in no further action or a number of different actions. These may include referral to a public authority of information that is relevant to the exercise of its functions, such as information for consideration of disciplinary action or system changes to reduce the likelihood of corrupt conduct. It can also result in the dissemination of intelligence and other information or a brief of evidence for referral to the New South Wales Director of Public Prosecutions, or the furnishing of a report on the investigation for presiding officers of the Parliament.

This represents an overview of the commission's internal procedures and accountability mechanisms. They apply to every matter regardless of the origins of the complaint and the identity of the person or persons about whom the complaint is made. Any misconduct on the part of a commission officer, any abuse of the commission's powers or any breach of the ICAC Act may be the subject of a complaint to the Office of the Inspector. The Office of the Inspector and this Committee are the two main external accountability bodies for the commission. The commission is also externally accountable for its work through accounting to the NSW Treasury and the Auditor-General for the proper expenditure of funds; inspection by the NSW Ombudsman of records of telecommunications interceptions, controlled operations and the use of surveillance devices; reporting to the New South Wales Attorney General and the judge who issue the warrant for each surveillance device warrant; compliance with access to information and privacy laws, with exemptions for certain operational matters; and through the commission's annual reports.

There have been no adverse reports from any of the relevant agencies with respect to the exercise of the commission's powers. The commission's actions are also reviewable by the NSW Supreme Court in the exercise of its administrative law jurisdiction. If the commission has made a finding that cannot be supported on the evidence, if it has taken something into account that it was not entitled to take into account or failed to take into account something that it was obliged to take into account, or if it has denied procedural fairness to a person against whom an adverse finding has been made the findings may be overturned.

In its 25-year history the commission has made more than 1,200 findings of corrupt conduct in relation to more than 800 people. Not since the decisions in Greiner and Moore in 1992 and Woodham in 1993 has there been an occasion when a finding of corrupt conduct has been overturned. The setting aside of a finding of corrupt conduct against Mr Kinghorn is presently under appeal. Significantly, there has never been an occasion when a finding of corrupt conduct has been overturned on the basis that the commission denied procedural fairness.

The key achievements of the 2013-14 year are set out in the annual report at pages 6 and 7. The corruption prevention activities of the commission do not, in my opinion, receive the attention they deserve. Corruption prevention relies in no small part upon the information that emerges from the commission's investigations. That information assists in identifying organisational characteristics that are conducive to corruption and in formulating measures that are capable of reducing corrupt practices. This aspect of the commission's work results in long-term financial benefits to the State by reducing procurement fraud and fostering competitive tendering processes.

The commission is available to work cooperatively with any public agency that wishes to address the potential for corruption in its practices and procedures. The Committee will see from the annual report that the commission has accomplished a great deal in 2013-14. The investigations carried out in 2013-14 were complex and lengthy. One of them, namely, Operation Nickel, exposed systemic false certification of heavy vehicle licences and qualifications—a form of corruption that has the potential to significantly compromise public safety. The commission continues to be served by highly qualified and experienced staff whose professionalism I have had the privilege to observe firsthand. I commend the annual report to the Committee and I and other members of the commission will be pleased to clarify any part of the report for the Committee's benefit. Thank you.

CHAIR: Commissioner, you appreciate that your opening statement has taken the best part of 40 minutes. Can I ask you this: If any members of the Committee still have questions outstanding after 1 o'clock are you available this afternoon?

Ms LATHAM: Yes, I am.

CHAIR: And are other members of the commission available?

Mr WALDON: I am.

CHAIR: Can I also put on record, Commissioner, that a lot of the material you have addressed is contained in your report and you can assume that the members of this Committee have read your report. To the extent that you felt it necessary to re-read parts of your report to us, you probably underestimate the ability of the Committee members to have read that report, and they appreciate, I have to say, the work that your organisation does.

I can also say this to you: The Premier is on record as supporting the manner in which your organisation goes about its work and the results that it achieves. You would be aware of the legislation that the New South Wales Parliament passed to seek to preserve the findings of the commission so as to ensure that the integrity of the commission is not undermined by having to spend the resources that might be more appropriately spent investigating corruption on undue legal process seeking to overturn previous decisions. You will also appreciate that Mr

Duncan is currently challenging that legislation and that may put some further significant strain on the resources of the commission.

But in any event I want to assure you that to the extent that you felt it necessary to elaborate on the performance of the commission, there is no-one around this table, to the best of my knowledge, who would deprecate the work that you carry out. There may be issues that have been in the media that need exploring but you can rest assured that no-one will challenge the fact that your commission should exist.

Ms LATHAM: I did not by any means assume that anyone on this Committee had not read the report. However, this Committee is properly open to the public, these are public proceedings, and there are very few forums that the commission has to explain its work, and that was one of the functions that I thought was appropriate in the circumstances.

CHAIR: Thank you very much for taking the time to put that together. I want you to be absolutely confident that the commission has the support of this Committee.

The Hon. TREVOR KHAN: Commissioner, do you agree with the following proposition: The ICAC will ultimately be effective only if its performance justifies its extraordinary powers? If the commission is to justify those powers it must be scrupulously fair, value the rights of individuals and accept that persons should be convicted only after due process in the relevant court.

Ms LATHAM: Do I accept that proposition?

The Hon. TREVOR KHAN: Yes.

Ms LATHAM: Of course I accept that proposition against this background: that, as I indicated a short time ago, there are frequently misunderstandings that the commission operates in some way as a court, which it is not. Notions of fairness, of course, really have to be assessed against the background of the forum in which the rules of that forum operate. As I indicated in the opening statement, the inquisitorial process is deemed by many people to be inherently unfair, but Parliament saw fit to invest a body like ICAC with inquisitorial powers for the reason that there are some types of conduct—corruption being amongst them—that are so difficult to detect and expose that only the use of inquisitorial powers has proven effective to do so. But I do not cavil with any part of that statement as a general proposition.

The Hon. TREVOR KHAN: That statement was made by Peter McClelland, QC, in March 1991.

Ms LATHAM: Yes.

The Hon. TREVOR KHAN: It is contained in the inspector's report tabled on 18 June this year. Have you read his report?

Ms LATHAM: I am familiar with the statement made by Justice McClelland, yes.

The Hon. TREVOR KHAN: Have you read the inspector's report?

Ms LATHAM: Yes, I have read the inspector's report.

The Hon. TREVOR KHAN: You have referred to the inquisitorial nature of the process you undertake. Did you say the following in 2014 as a concluding note? "If any of you get tired of adversarial litigation, inquisitorial litigation is fantastic. You are not confined by the rules of evidence; you have a free kick. You can go anywhere you want to go and it is a lot of fun." Who do you get to have a free kick at?

Ms LATHAM: The first thing that I need to say in relation to that is that, like all those things—and I am sure people around this table and politicians would have had a great deal of experience of this phenomenon—there are remarks that are often taken out of context and they do not convey what people might think they convey taken out of that context.

The Hon. TREVOR KHAN: We are giving you the opportunity to explain it now. Who do you have the opportunity of a free kick at?

Ms LATHAM: The workshop on cross-examination, which took place in February 2014, was one I was invited to attend as a justice of the Supreme Court. I had that invitation extended to me before I had any inkling that I was to become the next ICAC Commissioner. Having been appointed some two or three weeks prior to that cross-examination workshop, I asked the Bar Association if they still wanted me to attend, and they said that they did.

The Hon. TREVOR KHAN: With respect—

Ms LATHAM: I am explaining—

Mr RON HOENIG: Let the Commissioner finish.

The Hon. TREVOR KHAN: —the question is clearly directed—

Mr RON HOENIG: Point of order—

Ms LATHAM: I am explaining the context.

Mr RON HOENIG: —can the Commissioner conclude her answer?

Ms LATHAM: If I cannot explain the context then I am afraid I cannot answer the question.

The Hon. TREVOR KHAN: You have taken a long time for your opening address.

The Hon. LYNDIA VOLTZ: Maybe the member should stop interrupting the Commissioner.

Mr RON HOENIG: Can the Commissioner answer the question without being interrupted? She is giving some context.

CHAIR: I accept what you are saying. Commissioner, you can answer the question? Mr Khan, you might let the Commissioner finish her explanation.

Ms LATHAM: At the end of an hour's discussion primarily to do with the operation of the rules of evidence in an adversarial setting, I said, as a concluding note to a roomful of reasonably young advocates, that if they wished to experience something other than adversarial litigation, where they were confined by the rules of evidence and they could only ask questions that were dictated by the issues in dispute, then inquisitorial processes offered an alternative experience. That was the context of the remarks. The free kick is simply a reference to the fact that you are not constrained by rules of evidence and you are not constrained by the issues in dispute. The inquisitorial process allows an advocate to follow any line of inquiry and to question a witness in any way that might elicit information that is relevant for the purposes of the inquiry. That was the reference. In conclusion, the inspector publicly stated, when the series of remarks was repeated to him, that there was nothing wrong or inaccurate in what I said. It was simply a reflection of the extensive powers that are available for somebody who is operating within the context of an ICAC inquiry.

The Hon. TREVOR KHAN: Do you not think that even members of the public might think that reference to a "free kick" is an indication of not even the extent of rules of fairness applying to witnesses being questioned?

Ms LATHAM: It has nothing to do with rules of fairness. I was not talking to members of the public; I was talking to members of the Bar and I was talking to members of the Bar in the context where I was told that the recording of that workshop could only be accessed by log-in by a member of the Bar Association and that it was not available for public download.

The Hon. TREVOR KHAN: So a degree of hubris was allowed in the context of a private chat with members of the profession? Is that what you are saying?

Ms LATHAM: I do not know what you mean by that, Mr Khan. I was simply talking to a group of advocates who were interested in expanding their professional experience. Indeed, immediately after I made that comment and sat down, a member of the audience asked me a specific question about how the experience of counsel assisting in an ICAC inquiry differs from the experience of counsel instructed by a client in a civil or criminal matter. The whole of the discussion was really about contrasting those two areas of legal practice.

The Hon. TREVOR KHAN: Sure. You know where I am going, because you answered the question—

Ms LATHAM: No, I do not think I know where you are going.

The Hon. TREVOR KHAN: —with regard to counsel assisting. You said the following, did you not? "Well, you don't. You actually know where you are heading. The thing about the role of counsel assisting in ICAC is that you are actually part of a team and there's been a long inquiry"—and you have spoken about that—"and you've actually worked out um what you want to get out of the witness and so it is basically, by the time you get to it, it's just um, you know, like pulling the wings off butterflies." I take it this was a considered response that you gave to these young members of the profession. Would you like to tell me how counsel assisting's role is like "pulling the wings off butterflies"?

Ms LATHAM: I am not in a position to tell you that, because it was a reflection of what had been said to me about the role of counsel assisting. I do not act as counsel assisting; I appear as the Commissioner and I do not—

The Hon. TREVOR KHAN: Sure, with counsel assisting in front of you and controlled by you.

Ms LATHAM: Yes, but you see, Mr Khan—no, I preside over the inquiry and if counsel assisting asks a series of questions, which are entirely proper within the confines of the scope and purpose of the inquiry, then counsel assisting is permitted to run. Might I say, there are other counsel who appear regularly in the jurisdiction for various witnesses, who also get to have that free kick, as you indicated previously. They get to have that free kick as well; that is a feature of advocacy in the jurisdiction that anybody at the Bar will confirm.

The Hon. TREVOR KHAN: Commissioner, tell me again how you perceive the role of counsel assisting as being akin to a person pulling the wings off butterflies.

Ms LATHAM: I am sorry; I just do not regard it as a relevant question. I have already explained—

The Hon. TREVOR KHAN: The rules do not apply here either. I have asked the question; tell me how it is like pulling the wings off butterflies.

Ms LATHAM: I have explained the context. I do not think you have a complete transcript of what was said because—

The Hon. TREVOR KHAN: If you are suggesting I am being inaccurate, we can get the *YouTube* recording. You used the words "like pulling the wings off butterflies", Commissioner. I am asking for an explanation of what that means.

Ms LATHAM: I am not suggesting I did not use those words. As I said a short time ago, I was reflecting what other counsel assisting and other counsel appearing in the jurisdiction had said from time to time about the difference of the experience. The difference lies in the fact that what you have in front of you are the results of sometimes a very broad-ranging and very detailed inquiry.

Sometimes an investigation has gone on for six to nine months and you have a wealth of information in front of you. You have a wealth of material, including evidence from other witnesses which might be directly counter to the evidence that the witness in front of you has just given. So you, in fact, know exactly where the witness who has just responded to a series of questions has tried to mislead the commission, has lied to the commission or has said something which can be proved to the contrary by objective evidence. In that context where you are in possession of all the material it allows you to, in effect, draw that witness into a trap. That was the context within which the remark was made. That is the only way I can answer your question.

Mr ADAM MARSHALL: Commissioner, I take you to the issues in relation to secrecy of the commission. You are aware of secrecy provisions contained in section 111 of the Independent Commission Against Corruption Act?

Ms LATHAM: Yes.

Mr ADAM MARSHALL: Are you aware of the potential punishment under section 111 for officers of the Independent Commission Against Corruption?

Ms LATHAM: For anyone who discloses information that they have obtained in the course of an investigation, yes.

Mr ADAM MARSHALL: Do you think they are sufficient punishments?

Ms LATHAM: I think the punishment is sufficient in the sense that it is modelled on similar provisions where there is a penalty for disclosing information that is otherwise meant to be confidential. The difficulty, of course, is being able to prove that someone has deliberately disclosed information that they only acquired in the course of carrying out functions under the Act. I say that because the general impression that seems to be abroad that ICAC is responsible for certain information finding its way into the public domain is one that even the Inspector does not necessarily support. His view is that it is the product of some kind of media feud, and I am not going to comment on that one way or the other.

The difficulties from the commission's perspective is that when we commence an investigation—and as I said investigations might take quite some period of time, six to nine months or something in that order—we will speak to a lot of witnesses who will speak to us voluntarily. We have a lot of witnesses who will provide information to us without having to bring them into a compulsory examination. We have people who come into compulsory examinations and provide us with a lot of information. We can, of course, make those people aware—and we do make those people aware—that they are not permitted to discuss any aspect of their evidence with anyone else. But at the end of a long inquiry when you have potentially interviewed or spoken to as many as 300, 400 or 500 people there is simply no way of knowing which of those people may be responsible for discussing the fact that they were interviewed by the ICAC, what they were interviewed about and where they think the interview was heading. It is really a problem to do with trying to contain that information and trying to ensure that everybody abides by those obligations.

Mr ADAM MARSHALL: I take it from your answer that you are aware of the many allegations that have been ventilated publicly that ICAC, or officers of ICAC, do leak information to the media?

Ms LATHAM: I am aware of the allegations.

Mr ADAM MARSHALL: What actions have you taken to investigate those allegations?

Ms LATHAM: They are not for me to investigate. The thing is that is for the Inspector to investigate because a leak from an officer of the commission constitutes misconduct under the Act and that is within the Inspector's jurisdiction, not my jurisdiction. If I receive any information or any complaint from anyone that a named ICAC officer has been responsible for that kind of conduct then I forward that information to the Inspector. I make him aware of the fact that the allegation has been made and then it is a matter for him.

Mr RON HOENIG: As the Commissioner would know better than anyone else in the room, sometimes in an investigation by the police they might release some information publicly that generates some product as part of the investigations.

Ms LATHAM: We do not do that.

Mr ADAM MARSHALL: The Committee heard the Inspector comment earlier on his views about issues that come forward to him, complaints of that nature about leaking and the possible investigation of those being futile. He said he did not like the idea of bringing in journalists and asking them where they got their sources from. To paraphrase him, essentially he thought it was not an efficient use of his office or his time. What actions do you take as Commissioner to ensure that no information is leaked from your officers to members of the media prior to raids on premises or inquiries being announced publicly by the ICAC?

Ms LATHAM: As I said a moment ago, I have complete confidence in the professionalism of my staff. I know that when we start these investigations with teams of investigators all of them understand the importance of maintaining confidentiality. I do not have any concrete information from anyone that could point to a named commission officer who is said to have spoken to anybody and passed on information that they have acquired in the course of their duties. If someone wants to bring information of that nature forward to me then, as I said, I am happy to make it available to the Inspector.

The only instance where, as I understand it, the Inspector did directly ask a journalist where the information came from—because the accusation was that it had come from an ICAC officer—the journalist confirmed that it had not come from an ICAC officer; that she had obtained it elsewhere. So all I can say is it is very difficult for me to say to the Inspector, "People out there are complaining that ICAC leaked information". That is not information that he can realistically investigate. There has to be a reference to what was said, by whom and on what occasion. I would think that would provide the basis for a proper investigation.

The Hon. TREVOR KHAN: Do you think you could be discomforted at the very least if reports are in the paper—indeed, in the *Australian* today—that Mr Geoffrey Watson is attending social functions with journalists?

Ms LATHAM: I do not speak to Mr Watson. He is a private member of the bar. I am sorry, but in my time as Commissioner I have not engaged Geoffrey Watson as counsel assisting an inquiry. You need to address that question to him.

The Hon. TREVOR KHAN: Does it cause you any discomfort?

The Hon. LYNDIA VOLTZ: She has already answered the question.

Mr ADAM MARSHALL: Following the same line, are you concerned when you read media reports that ICAC officials are raiding premises and the media just happen to be there at the same time? Are you concerned about how the media gets that information? Who retains that information in the first place? How does the media amazingly turn up at the very time ICAC officers are raiding a premises?

Ms LATHAM: You will appreciate that during my time as Commissioner that has not occurred so I cannot speak to what happened necessarily during the reign of the previous Commissioner. But I can say that there is only one occasion of which my staff is aware where the media did attend on the execution of a search warrant. We ascertained that the person's neighbour had rung the media as soon as the commission officers turned up to execute the warrant, and the media were there almost within minutes.

The Hon. TREVOR KHAN: Was that Torbay?

Ms LATHAM: That is the only occasion upon which we were able to ascertain why it was that the media attended on the execution of the search warrant.

Mr ADAM MARSHALL: Will you tell the Committee about that?

The Hon. TREVOR KHAN: If it was Torbay, you have got a problem with that explanation—

Ms LATHAM: Excuse me—

The Hon. LYNDIA VOLTZ: Point of order: The constant badgering of the witness when giving answers—

The Hon. TREVOR KHAN: Come on—

The Hon. LYNDIA VOLTZ: Not "come on". You guys are pretty much having a free shot. We have not asked any questions on this side yet. Let the Commissioner answer the questions and maybe other members might have questions to ask. She has answered the same question three or four times; just let her answer.

Ms LATHAM: I am going on instructions from the directors who were working in the commission at that particular time. As I understand it, that was on the occasion of the execution of a search warrant on Mr Torbay's home, and that was the explanation we were given.

Mr ADAM MARSHALL: You may not be able to answer this question; you may need to take advice. How do you explain the presence of television news crews that had to drive for at least an hour and a half to get to Mr Torbay's residence to film the execution of the raid?

Ms LATHAM: I do not know how long the search took. You are talking about matters that occurred before my time. If you want me to provide an answer, I am happy to do so on notice.

Mr ADAM MARSHALL: If you wish take the question on notice that is fine.

Ms LATHAM: I will take it on notice and provide an account in relation to that raid.

Mr ADAM MARSHALL: Given the article on page 27 of today's *Australian* under the headline "Watson rejects claims of leaking", I must ask this question. The article claims that as part of what ended up being Operation Credo and Operation Spicer a search warrant was executed on 4 December 2013 at Mr Chris Hartcher's office. An article in the *Sydney Morning Herald* of 6 December announced that Mr Hartcher would be the subject of two ICAC inquiries. However, it was not until 18 February 2014 that the commission publicly announced the two inquiries—Operation Credo and Operation Spicer. Again you may need to take this question on notice. How does a media outlet find out and publish that the commission is undertaking two inquiries months before they are announced by the commission?

Ms LATHAM: I cannot give you an answer.

Mr ADAM MARSHALL: You can take the question on notice.

Ms LATHAM: It would be pure speculation on my part. Frankly, many things published in the media are not accurate. As I said in my opening statement—

Mr ADAM MARSHALL: On this occasion the report in the *Sydney Morning Herald* was accurate.

Ms LATHAM: All I can say is that they obviously have their own sources. I am not in a position to tell you any more about it. All I can say is that I am confident to the extent that that information was generally abroad because the investigation had been going for some considerable time. I cannot rule out the possibility that there are a number of people to whom the commission spoke who had already worked out for themselves that there was going to be an inquiry.

Mr ADAM MARSHALL: As you have stated, you believe it is not your role to investigate or to be discomforted by any potential leaks anyway.

Ms LATHAM: It is my role to pass onto the Inspector any information I receive that suggests that any officer of the commission is guilty of misconduct.

Reverend the Hon. FRED NILE: In your introduction you outline the very careful procedures you follow in moving through the various stages to determine if something is so serious that it will become an operation. How was the Cunneen matter established as being so serious that it should become an operation rather than be referred to the police as a perversion of justice or something else?

Ms LATHAM: I appreciate that a certain amount of time was spent with the Inspector discussing that matter. However, as I have indicated, questions relating to the reasons the commission did anything in particular in regard to any investigation or complaint are not within the remit of this Committee. Section 64 of our Act makes that perfectly clear. We do not appear before this Committee in effect to go through individual decisions we have made and justify them in each and every case. I do not mean to be disrespectful, but I do not regard those questions as being within the confines of the Committee's function.

Reverend the Hon. FRED NILE: I want you to clarify the criteria for determining that a matter will become an operation.

Ms LATHAM: I went through the criteria in my opening statement. There is a series of criteria and they are applied to each and every matter we examine. That is all I can tell you.

The Hon. LYNDIA VOLTZ: I refer back to the term "free kick". That is not a legal term, is it? It is a sporting term.

Ms LATHAM: Yes, it is.

The Hon. LYNDIA VOLTZ: It is a sporting term that means the unobstructed kick of a stationary ball.

Ms LATHAM: Yes.

The Hon. LYNDIA VOLTZ: Would you agree that most police agencies around the world would see the ability to use hearsay evidence from people compelled to give answers as an unobstructed shot at a stationary target?

Ms LATHAM: Yes, I would have thought so.

The Hon. LYNDIA VOLTZ: I was surprised that my lawyer friends opposite were using it as a legal term. I come from a sporting background and I was surprised that it was being used in that context. I will ask some questions about the High Court decision in *Jason Lee v The Queen*. The High Court ordered the retrial of offences where transcripts of evidence given by a defendant during a compulsory examination in a hearing before the commission were given to the prosecution to aid in its preparation for trial. The decision was based on the principle that proof offered by the prosecution unaided by the accused is fundamental to the criminal justice system. Does this ruling have any impact on ICAC's role if it is prosecuting a matter itself?

Ms LATHAM: It does not have any impact on us. It impacts much more directly on the Director of Public Prosecutions. A recent decision in the Court of Criminal Appeal considered the effect of Lee in circumstances where the compulsory examination occurred at a time long before criminal charges were laid. The circumstance in Lee was that the compulsory examination was of itself on the same topic, which was already the subject of criminal charges at the time that the compulsory examination took place. It was in a somewhat different category. However, the Court of Criminal Appeal has recently said that even where someone is compulsorily examined before criminal charges are laid and the question arises whether or not that person can have a fair trial, the responsibility lies on the Director of Public Prosecutions to appropriately quarantine anyone who has had any access to material that would otherwise be inadmissible. It is something that affects the practice of the Director of Public Prosecutions, not the commission.

The Hon. LYNDIA VOLTZ: I note your answer to Reverend the Hon. Fred Nile in regard to individual cases and how they are decided. I am not sure you can answer this question. Are you aware whether any charges have been laid as a result of Operation Jasper? If so, which department or agency approved them?

Ms LATHAM: The only information we have in relation to that is that the Director of Public Prosecutions sent that matter for consideration to senior counsel. I think that question should be asked of the Director of Public Prosecutions. Whilst we accept that there is a genuine public interest in whether or not prosecutions emerge from our investigations, I think I should indicate that, as I said, the commission's activities are focused on exposing corruption and doing something by way of addressing policies and procedures that prevent its furtherance in the public sector. We generally do not consider the number of successful prosecutions that arise from inquiries as any relevant indicator of our success. However, we accept that there is a public interest in it.

Mr MARK TAYLOR: One of the commission's activities is issuing press releases from time to time. I refer you to the press release concerning Ms Cunneen dated 27 May 2015. I assume you are aware of that press release.

Ms LATHAM: I am aware of a number of press releases. However, this again seems to be traversing operational decisions that we made in respect of a particular matter.

CHAIR: With respect, I disagree.

Ms LATHAM: All I can say is that I will not comment on decisions taken in relation to individual matters. What I can tell the Committee is that from time to time the commission takes the step of making public statements to inform the public about the outcome of an investigation, the reasons an investigation might not be pursued, or why it might be delayed. It depends on the level of public interest in the investigation. It depends on whether or not there has been speculation about what the commission is doing. Sometimes those public statements are necessary in order to fulfil our accountability function to inform the public of what it is that we are doing, and that is the function that we undertake from time to time by undertaking those public statements.

Mr MARK TAYLOR: In regard to your initial statement concerning operational matters, it is certainly not the case that the press release of 27 May 2015 had anything to do with an investigation at that time. It was post investigation or certainly post decision of the High Court, was it not? So you can talk about the mechanisms inside the commission that come about for the release. Do you understand the question?

Ms LATHAM: Yes.

Mr MARK TAYLOR: Perhaps I will ask it again. Did you authorise the press release dated 27 May 2015 headed "Decision to provide evidence in Operation Hale to the DPP"?

Ms LATHAM: I am the commissioner and the buck stops with me, but I really do not understand entirely what the controversy is about.

Mr MARK TAYLOR: Is there a process within the commission that you authorise a press release prior to it being released?

Ms LATHAM: Yes, there is a process whereby in every matter if we take the view that the public needs to be informed or that there needs to be a response to something that grossly misrepresents the position of the commission or that is in the public interest to publish, I will consult with the members of the executive and we will make a decision as to whether or not such a statement is necessary and then we will probably make a decision about the form of that statement.

Mr MARK TAYLOR: Specifically in relation to the press release of 27 May 2015, did you read that press release and authorise that prior to it going out?

Ms LATHAM: I am sorry, you just need to explain it to me. The press release of 27 May was the release that informed the public that we were referring the matter to the Director of Public Prosecutions [DPP].

Mr MARK TAYLOR: Yes.

The Hon. TREVOR KHAN: It did a good deal more than that.

CHAIR: Mr Taylor will show the press release to the commissioner.

Ms LATHAM: Yes. Well, again, it is a decision that we took in relation to a particular matter. It is a decision that we took in relation to a particular matter.

Mr MARK TAYLOR: I understand that but my question is: Did you read the press release and is it a function of yours to authorise a press release? I am trying to establish whether you had personal knowledge of the content of that press release.

Ms LATHAM: Of course I read the press release.

Mr MARK TAYLOR: Is there a process where you say yes or no and you okay or authorise that press release to go out from the commission? Is that how the function of the commission works?

Ms LATHAM: As I said before, the buck stops with me. I am the commissioner. Nothing would be released into the public domain unless as the commissioner I approved it.

Mr MARK TAYLOR: With all respect, I still have not had an answer. Specifically do you recall authorising that particular press release? That is the question.

Ms LATHAM: Again, this is a question you are asking me about a decision in relation to a particular matter.

The Hon. TREVOR KHAN: Is that a refusal to answer it? Is that what it is?

Ms LATHAM: Section 64 (2) of the Act states:

Nothing in this Part authorises the Joint Committee:

- (a) to investigate a matter relating to particular conduct, or
- (b) to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint, or
- (c) to reconsider the findings, recommendations, determinations or other decisions of the Commission in relation to a particular investigation or complaint.

All of these questions—

The Hon. TREVOR KHAN: So that is, "Yes, I am refusing to answer that question"?

Ms LATHAM: Mr Khan, what that is is an explanation of what section 64 says that limits the type of questions that this Committee can ask of the commission.

The Hon. TREVOR KHAN: That is, "Yes, I am refusing to answer." Is that right, Commissioner?

The Hon. LYNDIA VOLTZ: Point of order: Mr Chair, I ask you to bring the Hon. Trevor Khan to order.

CHAIR: Order! I am not sure a question which asks you whether you issued a press release is within section 64 (2).

Ms LATHAM: I have already said we issued the press release.

CHAIR: And do you recall doing it?

Ms LATHAM: Of course I recall doing it.

Mr MARK TAYLOR: You would have been aware at the time that Ms Cunneen obviously appeared on behalf of the Crown in certain murder indictments at the time?

Ms LATHAM: I am sorry, I am not trying to be rude; I am simply trying to point out that section 64 does not allow this Committee to ask those questions.

CHAIR: With respect, I disagree. I think it is an entirely relevant question.

Ms LATHAM: We will have to agree to disagree, I am sorry.

CHAIR: Perhaps you can put the question again, Mr Taylor.

Mr MARK TAYLOR: My question was at the time that you authorised that press release was it the case that you were aware that Ms Cunneen appeared on behalf of the Crown in certain murder trials in this State?

The Hon. LYNDIA VOLTZ: Point of order: The rules under which this Committee operates have been read out a number of times to members opposite. The commissioner has already said that she will not deal with operational matters in a specific area. The member is now asking a very specific question in regard to an investigation and the actions of the commissioner. It is out of order, as the commissioner has already pointed out a number of times.

CHAIR: Order! In my respectful submission the commissioner's knowledge of the occupation of Ms Cunneen is not an operational matter.

Ms LATHAM: I have been aware for many years that Ms Cunneen operates as a Senior Crown Prosecutor.

Mr MARK TAYLOR: Is it the case that at the time you would have been aware that the press release would have an effect on the appearance or otherwise of Ms Cunneen in upcoming trials?

Ms LATHAM: No, I simply do not have any remit to determine one way or the other what Ms Cunneen's duties might have been at that time. It was simply not a question that came within my jurisdiction.

CHAIR: That is a bit unresponsive, quite frankly. You have been a Senior Crown Prosecutor yourself. You would know that if in the event while you were acting in that position you were charged in the manner that you were advocating or the DPP was suggesting should occur in relation to Ms Cunneen you would have to stand aside. Is that not the case?

Ms LATHAM: I am sorry, no, I do not know that that is the case. All that information did was convey to the public that the matter was being referred elsewhere. The decision whether or not to stand Ms Cunneen down from any of her then duties was not one for me; it was one for the Director of Public Prosecutions.

CHAIR: But you will recall that it was issued at a time when she was conducting a murder trial.

Ms LATHAM: I frankly did not have any information on whether or not she was conducting a murder trial.

CHAIR: Did it occur to you that that might be important?

Ms LATHAM: I simply do not understand where these questions are going.

CHAIR: It goes to the role of issuing a media release in relation to the delivery of or request to the DPP to charge Ms Cunneen. It was not an insubstantial press release.

The Hon. TREVOR KHAN: It was 622 words.

CHAIR: The press release could have said, "Matter referred to the DPP" full stop.

Ms LATHAM: Again, I just do not understand where these questions are going and why it is that they come within the remit of the Committee. But can I just say this: When the commission makes a decision that something is in the public interest to convey publicly we make that decision regardless of the effect that it might have on that individual. If it is in the public interest it is in the public interest. Unfortunately from time to time we make public announcements, including announcements that we are about to hold a public inquiry, that name individual persons as the subject of allegations of corrupt conduct and those press releases have effects on people. They have effects in the sense that members of Parliament might have to stand down or people occupying offices might have to step aside.

CHAIR: That is right.

Ms LATHAM: All I can say is there is nothing inconsistent about the commission deciding to make a public announcement that is in the public interest. Whether or not it has an effect on somebody's position, from our perspective, is secondary to our functions. Our function is to make sure that information that is in the public interest is released, that our activities and our investigations are transparent, that they are open to scrutiny and that we inform everybody of what it is we are doing and why. That is the general practice that we adopt. We could be just as rightly criticised if we withhold information and do not release it until some later time when it has even more of an impact, so we cannot really pick and choose about the timing of our public announcements.

Mr MARK TAYLOR: Perhaps I could ask one last question on that, Commissioner. From your answers can I infer that you did not at any stage communicate with the Director of Public Prosecutions [DPP] prior to the issuing of that press release? Sorry—I will rephrase that so I can tie that down for you: You did not communicate with the DPP about the shortly to be released press release?

Ms LATHAM: I do not think you can infer any such thing. But once again that is really within the confines of the decisions that the commission makes about who it communicates with, when, where and why.

Mr MARK TAYLOR: Sorry, I am confused by the answer.

The Hon. LYNDA VOLTZ: Point of order: The member cannot keep asking the same question three or four times because he thinks he should get an answer that is different to the answer he has just been given.

Mr MARK TAYLOR: No-one has asked the same question three or four times.

The Hon. LYNDA VOLTZ: Well, you have just asked her if you can infer something. She has told you that you cannot infer it and that it is part of their operation on how they deal with people.

CHAIR: I understand. Thanks. Let us move onto the next question.

Mr CHRIS PATTERSON: For the year ending 30 June 2014, ICAC's total revenue was \$26.85 million. Is that correct, to your knowledge?

Ms LATHAM: The \$26 million includes, as I understand it, some capital expenditure. I think our actual income from the Treasury was \$21 million.

Mr CHRIS PATTERSON: That is correct—\$21.15 million with a government grant of just over \$2.5 million supplementing it.

Ms LATHAM: Yes.

Mr CHRIS PATTERSON: So it is safe to say that the bulk of the resources are from the government—taxpayer resources?

Ms LATHAM: I would hope so.

Mr CHRIS PATTERSON: We know so. Thank you.

CHAIR: You do raise some income by educational programs and things that you run.

Ms LATHAM: We do not raise a lot of income that way. Our view is that we should not be charging public sector agencies because of the statutory purpose for which we were set up.

CHAIR: I think there is a reference in the accounts to \$350,000-odd of income that you receive from that. I might be wrong. It is of little consequence.

Ms LATHAM: That income arises out of a shared service that we provide to the Health Care Complaints Commission.

CHAIR: Thank you.

Mr CHRIS PATTERSON: Obviously not pertaining to the operational part but, as we have just established, clearly ICAC is government funded. Would you say that the pursuit of the Margaret Cunneen by ICAC was a good use of government resources or ICAC's resources?

Ms LATHAM: Once again, I do not regard that as a question that is within the Committee's remit.

Mr CHRIS PATTERSON: Without putting words in the Inspector's mouth, he certainly did not seem to. If that is not within the—

The Hon. LYNDA VOLTZ: That is not putting words in the Inspector's mouth?

Mr CHRIS PATTERSON: Well, go back to *Hansard*.

CHAIR: That is what he said.

The Hon. TREVOR KHAN: Straight out verbal.

Mr CHRIS PATTERSON: Okay, so in relation to Cunneen—but not for you to comment, because you have made it abundantly clear you won't—

The Hon. LYNDA VOLTZ: Point of order—

CHAIR: Well, she may comment. Just put the—

The Hon. LYNDA VOLTZ: He cannot say, "Not for you to comment, because you've already said you won't." The member should not ask a question and—

Mr CHRIS PATTERSON: It will then go to my question, if I may.

The Hon. LYNDA VOLTZ: Are you going to ask her a question she can comment on or not?

CHAIR: Put the proposition to her.

Mr CHRIS PATTERSON: The ICAC was ordered to pay the costs of Cunneen in three hearings—one in the Supreme Court, one in the Court of Appeal and one in the High Court—and obviously your own legal costs. Has this happened with any other operation that you are aware of?

Ms LATHAM: I can take that question on notice, but that just follows the usual rules that apply in any litigation: the loser pays the costs. That is the rule that applies in any litigation.

Mr CHRIS PATTERSON: Absolutely. I am not questioning that. So you will take on notice the question: Has that occurred with any other operation?

Ms LATHAM: Yes, I can take that on notice. I do not know.

Mr CHRIS PATTERSON: Thank you. I appreciate that. Again on notice, do we know the estimate of those costs or is that something you cannot answer?

Ms LATHAM: Well, we do not know, because that is something that is usually referred elsewhere.

Mr CHRIS PATTERSON: Thank you.

Reverend the Hon. FRED NILE: Where is the elsewhere?

Ms LATHAM: My legal director tells me that there has been no estimate of legal costs. It has been forwarded to the Crown Solicitor's Office, so we do not know what they are.

The Hon. TREVOR KHAN: Will those costs come out of your budget when they are eventually taxed or assessed?

Ms LATHAM: There is a Treasury Management Fund that we are able to access if they agree to cover us in litigation that arises out of the performance of our functions.

The Hon. TREVOR KHAN: Has that discussion occurred to date?

Ms LATHAM: It occurs on many occasions. We have got a number of litigations—

The Hon. TREVOR KHAN: With respect, we are talking about the Cunneen matter. Has the discussion about who is going to bear the costs been had?

Ms LATHAM: As I said, the Treasury management fund has accepted liability for any of those matters, including the Cunneen matter.

The Hon. TREVOR KHAN: Well, you had not said, so thank you.

Mr CHRIS PATTERSON: This week the Duncan case was heard in the High Court. ICAC was represented by two silks, Bret Walker SC and Geoffrey Watson, another two junior barristers appearing for it, the Solicitor General, who is a silk, and another junior appearing for the Attorney General making similar arguments for ICAC. Mr Duncan was only represented by one silk and one junior barrister. Commissioner, do you consider it excessive of ICAC to brief two silks and two juniors?

Ms LATHAM: That matter raised a constitutional point which required the intervention of every State with the exception of Tasmania. So that had nothing to do with us. That was simply a desire on the part of other States to contribute to the argument. No, I do not regard it as excessive.

Mr CHRIS PATTERSON: Thank you. I am just trying to get to the use of the resources by ICAC.

Mr RON HOENIG: The inquisitorial process seems not to be widely understood by a number of commentators, particularly in the media. You made reference to the fact that at times the inquisitorial process can be seen to be unfair. The Act requires you to perform something different as part of the inquisitorial process because you are not simply conducting

public inquiries in relation to corrupt conduct or making recommendations like a royal commission. The Act requires you to make determinations against individuals.

Ms LATHAM: Yes.

Mr RON HOENIG: And that sets ICAC apart from, say, the inquisitorial process in an inquest or a royal commission that makes recommendations or an ombudsman that makes recommendations. That is the case, is it not?

Ms LATHAM: Well, royal commissions make findings. Our findings of corrupt conduct are equivalent to findings made by royal commissions. But, yes, that is true.

Mr RON HOENIG: Royal commissions do not make findings against individual people—

The Hon. TREVOR KHAN: Wood did.

The Hon. LYNDIA VOLTZ: Yes, they do. There is one at the moment in Melbourne.

Mr RON HOENIG: I want to put to you a question that I put to the Inspector probably in a convoluted way. A significant proportion of matters relating to corrupt conduct involve allegations of criminal offences, some quite serious criminal offences. Do you make a determination during your investigative process as to when another agency should perhaps collect admissible evidence for the purposes of seeing whether somebody should be charged as distinct from just continuing your statutory function in the way you do?

Ms LATHAM: As I said in the opening statement, there are occasions when we commence an investigation and at some point we determine that it may not be appropriate to continue to a full public inquiry, and we would refer the information that we had then acquired to another agency for their purposes. That might be a number of different agencies, not just the Director of Public Prosecutions [DPP] or the police. It could be a number of different agencies. As I said, there might be a public agency that was able to take disciplinary proceedings based on the information that we have acquired. But those decisions are made on an operational basis, on a case-by-case basis, and it is very difficult to apply some overarching rule. It really just depends on the progress of the investigation and whether or not we think that we have acquired sufficient information to make that referral a constructive one.

Mr RON HOENIG: I am particularly interested in what is the greatest public interest, and that is bringing people to justice who have committed criminal offences. As you know—others probably do not—the DPP is at the end of the process. They just get handed the material following an investigative process. There is conduct of people that constitutes very serious criminal offences. I do not want to single anyone out hypothetically because it might relate to people who are currently before the court, but they are very significant criminal offences. At some point is a determination made as to whether or not the commission should proceed to investigate whether or not those persons are guilty of corrupt conduct or whether or not the police or the Crime Commission ought to take over the investigation for the purposes of having charges against the people if they can obtain admissible evidence to bring those charges?

CHAIR: That is a loaded question.

Ms LATHAM: That is something that can occur but, as I said, it depends on the individual case.

Mr RON HOENIG: I understand that.

Ms LATHAM: All I can say is that the focus of the commission's investigations is on corrupt conduct. As you would be aware, corrupt conduct has a definition under the Act. In order to ground jurisdiction, we have to be satisfied that there is an indication that corrupt conduct has occurred or is about to occur. That is what we are permitted to investigate. When we get to the end of an investigation, after a full public inquiry, sometimes it is only then that we have all of the information that we need to determine whether any of that information might justify referral for the consideration of prosecution.

It is sometimes very difficult to make that assessment when you are only halfway through an investigation. As I have attempted to stress on a number of occasions, it is the public inquiry that most often produces the most unexpected and the most startling information. Sometimes a public inquiry process really gives us a lot more material which might found a referral to the DPP. We have to make a judgement call in each case as to whether or not we need to go further than a preliminary investigation, whether we have enough at that stage that we could refer or whether we need to go further.

Mr RON HOENIG: You only have limited resources.

Ms LATHAM: That is right.

Mr RON HOENIG: There is only a certain amount of thorough investigations that you can undertake. That would be right, would it not?

Ms LATHAM: Yes, but the powers of the commission go far beyond the powers that are normally available to conventional law enforcement agencies such as the police. The distinguishing feature, I suppose, is that we can uncover material and we can investigate conduct in a way that conventional law enforcement agencies cannot. At the end of the process, we potentially will have more information than that law enforcement agency could ever have acquired, even if we had referred it at an earlier time.

Mr RON HOENIG: As the commission conducts its investigations of serious conduct that could involve serious criminal offences, are the commission investigators conscious of the need to collect admissible evidence along the way?

Ms LATHAM: They collect as much evidence as they can, admissible or otherwise, but they are conscious of the fact—we are all conscious of the fact that referral to the DPP can only be done on the basis of admissible evidence. We refer the material—ultimately, the question is for the DPP to determine whether there is sufficient admissible evidence to warrant the proceedings, but we are conscious of the fact that they can only act on admissible evidence.

Mr RON HOENIG: I note your report states that 41 per cent of the complaints that the commission receives are from local government.

Ms LATHAM: Yes.

Mr RON HOENIG: You make various suggestions as to why that is the case. It is usual in local governments and communities across the State that when someone is dissatisfied with a complaint that the first port of call is to say they are referring the matter to ICAC. Then stories appear in local papers to say that they have and, of course, the commission quite properly does not comment. You must be inundated by those sorts of complaints?

Ms LATHAM: They represent a significant proportion of complaints because, as we indicated in the report, it is that level of government with which most people have direct contact. I do not think it is an indication of that level of government being more or less corrupt than any other. I think that is just the level of government with which people are most affected in their daily lives.

CHAIR: In fact, I think the greatest increase in corruption appears to be in the education sector.

Ms LATHAM: Interestingly, it depends on whichever sector we are looking at. It tends to promote disclosure of other corrupt conduct within a sector. As soon as we start investigating a given sector, we find that that tends to produce further complaints, so it has a snowballing effect.

CHAIR: I have to congratulate you. I read one of the reports you issued in relation to corruption in the IT industry and the delivery of IT services to an education institution. I must say the recommendations are excellent.

Reverend the Hon. FRED NILE: I am following up a question regarding the work of the assessment panel.

Ms LATHAM: Yes.

Reverend the Hon. FRED NILE: I note in the reports there has been an increase in the number of decisions made by the assessment panel to close matters without referral. In the 2013-14 reporting period, in fact, 84 per cent of matters closed without referral. There seems to be a significant drop in the number of matters retained for preliminary investigation—only 43 in 2013-14. What factors led to the increase in matters closed without referral and the decrease in matters retained for preliminary investigations? Has there been a change of policy with regard to methodology used by the assessment panel in determining what action should be taken on matters received by ICAC?

CHAIR: That is a long question.

Ms LATHAM: There has not been any change in methodology. From time to time the volume of complaints goes up and goes down. It fluctuates from time to time and also from time to time the nature of the complaints vary as well. There has been no change in policy. That is just a reflection of the assessment process working in order to weed out matters that on their face and even after some preliminary inquiries do not actually raise any allegation of corrupt conduct that warrants further investigation.

A lot of people make complaints to ICAC—this will not come as any surprise—because we are a complaints body. Any complaints body will tell you—the Ombudsman and other

bodies will tell you—that when people are dissatisfied with a decision that has been made that affects them, they will complain to everybody, even if it does not involve corrupt conduct. It is a general, "I am going to make a complaint", and it goes out to all of those organisations and they often do not come within jurisdiction.

Reverend the Hon. FRED NILE: I understand that, but the figures do not seem to add up. It is as if there has been a change in policy.

Ms LATHAM: I can look at that more closely. I will supply some further information to you at a later time.

The Hon. TREVOR KHAN: Is it common practice for counsel assisting to provide letters of comfort to witnesses with regards to the use of their evidence?

Ms LATHAM: I would not say it was common, but I can only speak for the period of time during which I have been commissioner.

The Hon. TREVOR KHAN: Sure.

Ms LATHAM: I would not say it was common, no.

CHAIR: Would you accept it as good practice? Is it something you condone?

Ms LATHAM: I think there is a great deal of misunderstanding about what so-called letters of comfort are. The only occasion of which I am aware during my tenure was a very specific written undertaking, which was expressed in very specific terms and was premised upon—and this is something that every undertaking in the legal setting also is premised upon—the person who receives the benefit of the undertaking giving the commission a full, complete and truthful account. So that if the person who receives the benefit of the undertaking does not give a full, complete and truthful account the undertaking is worth nothing.

The Hon. TREVOR KHAN: Let us assume that that is not where I am going. Let us assume that on at least one occasion counsel assisting has provided one. It is the case, is it not, that the one you are aware of is one where you, in a sense, provided a mirroring letter of comfort some week or thereabouts later.

Ms LATHAM: It was not a mirroring letter of comfort. I provided what was a strictly worded undertaking.

The Hon. TREVOR KHAN: What is the legislative basis upon which you provided and on which counsel provided such a letter of comfort?

Ms LATHAM: There is no need for a legislative basis in circumstances where such undertakings—as Mr Hoenig would know—are routinely given in a range of law enforcement contexts. They do not have a legislative basis at all. It has been a policy that is applied, and has applied for many years, where people are conducting investigations and someone suggests that they will cooperate with the investigation in return for being treated—

The Hon. TREVOR KHAN: Not pursued.

Ms LATHAM: —with some discretion in terms of the ultimate findings that would be made against them, but always subject to the requirement that they tell the complete truth.

The Hon. TREVOR KHAN: As you have raised Mr Hoenig, you would be aware, would you not, that where those letters of comfort have been given, the Director of Public Prosecutions will disclose the existence of such a letter of comfort to a person impacted by the evidence that may be given. Is that not right? That is, you let the other side in on the news.

Ms LATHAM: Yes. That is the current practice as I understand it.

The Hon. TREVOR KHAN: In the context of ICAC, what is your procedure for advising persons who may be impacted by the evidence given by a witness holding a letter of comfort? How does the other side know that this bloke is on a promise?

Ms LATHAM: All I can say is that we are not obliged to disclose any decision that we take in the course of an operation. The point about an inquisitorial process is that you do not in fact tell the subject of the investigation what information you hold and how you obtained it.

The Hon. TREVOR KHAN: In the context of hearings before the commission, a witness may be in receipt of a letter of comfort and none of the persons who may be impacted by that evidence will be told that the witness is in receipt of a letter of comfort.

Ms LATHAM: That is quite possible.

The Hon. TREVOR KHAN: That is the fact, is not?

Ms LATHAM: As said, it is quite possible that that is what occurs. There may be circumstances where we do disclose it but we are not obliged to.

The Hon. TREVOR KHAN: Would you like to check back and see in your time as commissioner when you have disclosed to the other side during a hearing—

Ms LATHAM: I am happy to take that on notice but, as I said, your question was premised on there being some obligation to disclose it or on some legislative basis for the undertaking.

The Hon. TREVOR KHAN: No, I was asking whether you had a procedure with regards to disclosure.

Ms LATHAM: And I told you that there is no recognised procedure that we have to comply with by way of making decisions to provide such an undertaking or by way of informing other people that we have done so.

The Hon. TREVOR KHAN: Do you think as a matter of general fairness, ignoring the rules of evidence, that a person potentially impacted by a witness who may be, in a sense, subject to a letter of comfort and may be only telling part of the story, that it might be appropriate for the other side to have some knowledge of that?

Ms LATHAM: I do not think that is a relevant notion of fairness that operates within the way in which the inquisitorial process works, and there is a very simple reason for that. The fact is that nobody appearing in an inquiry knows all of the information that the commission has at its disposal—nobody does. And nobody does know until we either provide a report—and even in those circumstances where we provide a report there will still be information in possession of the commission that we have not released and that we will not release because it is not in the public interest to do so.

The Hon. TREVOR KHAN: Would it not be in the public interest for people to know that you are doing deals with witnesses?

Ms LATHAM: I do not think that is the case, frankly, that it is necessarily in the public interest for them to know that.

Mr RON HOENIG: Well, there is no other side in an inquisitorial process. And I do find it amazing that members of Parliament give a statutory organisation powers and then they complain that the organisation uses them.

The Hon. TREVOR KHAN: Is that a speech?

Mr RON HOENIG: Over the last decade or so the response to advice to various statutory organisations for corruption prevention has been that codes of conduct have been adopted. Those codes of conduct are sometimes given legislative force by some regulation which says that they shall apply. The codes have now become so convoluted and complex that even experienced members of the bar have trouble reading them, let alone some punter who is working for a public authority. I have had my trouble getting my head around even the Parliament's one, and I might be a struggling member of the bar. There must be a better way to simplify a process that communicates to average people what is expected of them in an organisation rather than these complex codes.

Ms LATHAM: It is always difficult to be prescriptive about something like what constitutes a conflict of interest because they are notions or concepts that shift according to the circumstances in which an individual finds themselves, but I think the best person to answer that question is probably Dr Waldersee. He has done a lot of work in this area and he is regarded within the Asia-Pacific as a leader in this field. Robert, would you like to reply?

Dr WALDERSEE: I fully agree with your issue, which is that they are extraordinarily complex. In Operation Jarek, about the people who worked in warehouses and were taking gift vouchers and so on, in a couple of cases they argued that the gift policy was so complex that they did not understand that they were not allowed to take gifts. And when we looked at it they actually were that complex. Now, the trouble with codes of conduct as a single control is that they can be aspirational and say, "This is what we expect of you," but—

Mr RON HOENIG: Like "Thou shalt not kill, thou shalt not steal."

Dr WALDERSEE: Yes, that sort of thing. But if people want to use them as a disciplinary tool they stop being codes of conduct and become specific sets of rules. It has become quite problematic. The other problem is that in the cluster arrangements there are multiple layers that are each setting up codes of conduct. So there is one at the cluster level and then the

individual department will have one. People are now facing two document sets. It is something we find unsatisfactory and we communicate that, where possible, they should be simplified.

Mr RON HOENIG: What is the solution, because every public authority, including various parliaments and Ministers, have all these detailed codes in response to a variety of advice, recommendations or previous findings. What is the solution? Do they all need to be rewritten? Do we all have to go back to basic standards? As I said in my question to the commissioner, these complex codes—I do not know whether it was by design or inadvertently—are now given statutory force. So there is a regulation that says that you shall comply with a code. Normally a law that binds somebody is enacted by the parliament or by regulation. Now, at some administrative level these detailed documents are produced by some middle-ranking bureaucrat and those documents become the law. They are just written by an HR department or they are incredibly complex. Then those documents are used, not as a tool for corruption prevention but generally used as a sword. You are the world expert, so having gone down this track for the last decade, what do the public sector organisations now do about it?

Dr WALDERSEE: The thrust of what the commission is doing now is to say that the control that is likely to be obtained from the code, and further tightening of the code, has probably reached a point of diminishing returns. The risk control in a broader sense should be looking at the whole operational arrangements and the waste in the system. But to continue to add more and more rules when people do not even know the existing rules is unlikely to achieve enormous gains. That said, you would not go to no code of conduct. There is an optimum point where people understand that you do not take gifts, you do not own your own business and contract back to government. There are basic things that people need to understand.

Mr RON HOENIG: So the conflict of interest provisions the commissioner says are difficult and then you apply the code. With respect to the local government code, if a councillor is a very religious person and goes to church on Sunday, the minister of religion may say to him, "We have a big traffic problem out the front. Our parishioners risk being killed. Something needs to happen with the pedestrian crossing or some lights." If you look at the wording of the model code of conduct you see that that religious person who goes to church all the time has a conflict of interest because of his relationship with the church and the minister and therefore should not raise the traffic problem out the front and should leave it to somebody else to do. But the very reason that that person is in local government is that he has come from that sector of that local community and has that knowledge and relationship to cause something to occur. If you use that as an immediate example—

The Hon. TREVOR KHAN: This is even longer than my questions.

CHAIR: I think we understand the point.

Dr WALDERSEE: The point is that a conflict of interest should not necessarily exclude someone from the decision but it needs to be known that the person has an interest. There needs to be a decision on how it is going to be managed. The short of it is that if the policies and procedures are extraordinarily complex, people do not know or understand them, or they greatly restrict people's ability to carry out their functions. While the rest of the operations are loose and there is waste and opportunity throughout, there is no point focusing any more on those policies and procedures. The policies and procedures need to be brought back so that

they have an effect on people's behaviour and the focus is then put more broadly across how the organisation controls itself.

Mr RON HOENIG: There is one other thing I want to ask the commissioner or whoever is appropriate. Sometimes, to minimise or avoid as much as corruption as possible, it costs an organisation more to do that than the loss which may well be either through corruption or inefficiency or simple error. Is that a legitimate thing for an organisation to take into consideration when determining what level of corruption prevention, error prevention or audit prevention it should put in place?

Dr WALDERSEE: There has been considerable research that has shown the fact about the cost, but it relates to what has been termed the "law and order model". You write complex regulations or codes of conduct—as you have described—and then put a lot of money into enforcing them. That does not deal with the opportunity and incentives that come from money just lying around the organisation or poorly controlled procurement.

Many years ago we looked at fire brigades. There was a \$4 million facilities job and they had \$6 million budgeted. If you can get that \$2 million off the table then you prevent corruption and, at the same time, you make the operation more effective and efficient. So our focus is increasingly on how you tighten up the functioning of government to take out opportunities and incentives for corruption. And that does not have the negative cost that a law enforcement approach has.

Mr RON HOENIG: A private sector organisation would make that cost-benefit decision every time. You would decide how much corruption or inefficiency you are prepared to tolerate depending on the cost of closing it up.

Dr WALDERSEE: Yes.

Mr RON HOENIG: Is the public sector in a different position, in your view?

Dr WALDERSEE: It is. We talk about this in our workshops. In the private sector, as you said, you reach an equilibrium where you are not going to spend any more preventing corruption because it is going to cost you more to prevent than you save. But in government the other issue is that it is not just a purely financial consideration. There is the reputation of government and confidence in the system. So while there is no natural equilibrium, the factors are different too. So it is a slightly different issue. When people see government money being wasted or going to the wrong person, that matters more than just a dollar value.

CHAIR: It is like shoplifting in a sense, isn't it? You are prepared to spend so much to try and prevent shoplifting but there is a point in private practice where you say, "I'll tolerate it."

Dr WALDERSEE: There is.

Ms TANIA MIHAILUK: I am very interested in prevention of corruption policies in general. It does not matter who is in government, there is a general view that we now provide a lot of public money to private organisations and to the not-for-profit sector as well by way of grants. And that is at a local government level and at State and Federal levels. I have a real interest in how we can prevent corruption in that kind of space and I am interested in your

view on who should be monitoring this type of corruption. Should it be the government that is providing the grant to a particular organisation or should it be that organisation itself? And what takes place, in reality?

Dr WALDERSEE: A couple of years ago we put out a report on the funding of non-government organisations [NGOs] to deliver human services for Government because we had concerns that the central control of small grants to thousands of NGOs was very difficult and it was not clear what benefits were being achieved. We made a series of recommendations. They included having multiple departments funding consortia so that there was an outcome you could hold the consortia to. At the moment, with small grants you cannot hold anyone to an outcome because they are only partial contributors. So you do not know if they have delivered and you do not know if it is value for money. They are seeking funds from multiple departments and the departments do not know who is funding what.

Our view was that if you can have an outcome that you can hold a person accountable to—that is, a performance-based outcome for a person or consortium—and you know which department is funding it, ultimately you will have a system where the departments oversight each other. You can then hold the group accountable for the delivery of the outcome. That would remove a lot of the opportunities.

Ms TANIA MIHAILUK: Was that a recommendation in that paper?

Dr WALDERSEE: Yes.

Ms TANIA MIHAILUK: I do not think that has happened.

Dr WALDERSEE: It is a major undertaking to make it happen. They have started looking at the data on who is funding what. Just working that out has been a big challenge. Work is going ahead on that.

Ms TANIA MIHAILUK: You raise a very good point. I have noticed the overlap of grants that organisations apply for. They are the same types of grant. Nobody is monitoring that. I will read your paper, Dr Waldersee. This Committee and Parliament in general should look at how to assist that type of monitoring.

CHAIR: I agree with that.

Mr CHRIS PATTERSON: Commissioner, from memory, in your opening address you said that only 43 cases out of nearly 4,000 go from the complaints stage to the determination of an operation. What are the steps and the checks and balances involved in going from receipt of one of those 4,000 complaints to the 43 that the team decides to investigate?

Ms LATHAM: The checks and balances are all the processes that I described: the Assessment Panel evaluation, the report going to the Assessment Panel with recommendations, the Assessment Panel's decision, and then the decision by the strategic investigation group whether to conduct a preliminary investigation. Then there is a further decision whether to escalate from preliminary to full investigation. All those decisions are regularly reviewed by the strategic investigation group. That was the procedure that I described in the opening statement.

Mr CHRIS PATTERSON: That was thorough.

Ms LATHAM: That is the process they all go through.

Mr CHRIS PATTERSON: You are obviously very confident that there are a number of checks and balances in place to ensure that those that should be investigated are and become operations.

Ms LATHAM: Yes.

Mr CHRIS PATTERSON: You are clearly very confident in the team you have doing that job.

Ms LATHAM: Yes.

Mr CHRIS PATTERSON: You have said today that, as Commissioner, as the boss, the buck stops with you. Do you have any concern that, with all those checks and balances in place, the decision to proceed with the Cunneen case occurred, taking into account the High Court ruling?

The Hon. LYNDIA VOLTZ: You are going straight back there again.

Mr CHRIS PATTERSON: I am going back because I am interested. I was ignorant of all those checks and balances. I am interested to hear how they could get it so wrong.

Ms LATHAM: I will take that as a comment, not a question. I am not answering any questions that seek to in any way canvass the decisions that we made on any individual matter.

Mr CHRIS PATTERSON: You have said you are extremely confident of all the checks and balances in place before going from a complaint to an operation.

Ms LATHAM: Yes. As I said in my opening statement, I have absolute faith in the professionalism of my staff, all of whom have worked for the commission for a lot longer than I have and all of whom, from my observation, display complete professionalism and dedication to the task at hand.

CHAIR: Commissioner, a discussion paper issued by this Committee in November 2014 recommended codification of some additional offences. Are you aware of that paper and do you agree with the recommendations on codification of those additional offences?

Ms LATHAM: Yes. That paper, which was not advanced, arose from a submission that we made to the Committee. We still have copies of that submission, which I can make available. We made certain recommendations to the Committee about the codification of offences such as misconduct in public office that would allow greater certainty in the criminal law in relation to that offence. It would also allow for the prescription of maximum penalties, which would serve the function of marking the gravity of those offences.

CHAIR: The Committee may progress that discussion paper.

Ms LATHAM: That would be constructive, from our point of view.

CHAIR: The discussion paper also makes some observations about the seconding of people from the Director of Public Prosecutions [DPP] to your commission during the public hearing process. Is that occurring and has it been fruitful?

Ms LATHAM: It is not occurring, for the reasons that were given by the High Court in *Lee v The Queen*. It is not occurring because the current Director of Public Prosecutions sees that kind of relationship as potentially damaging to the prospects of any future prosecution because it would raise a complaint from the prospective accused that there had been some contamination—

CHAIR: Contamination of the material that the DPP had become aware of.

Ms LATHAM: Yes.

CHAIR: When you were acting as a justice, if someone appeared before you whom you knew, would you disqualify yourself?

Ms LATHAM: Absolutely. It is a cardinal rule of apprehended bias that if you have an association or a relationship with a person over whom you exercise some power you disqualify yourself. But that would arise only in circumstances where it was more than just a passing acquaintance. In many circumstances you might know of the person but you do not have any existing relationship with them.

CHAIR: That would have occurred to you in relation to the investigation of Margaret Cunneen?

Ms LATHAM: I do not know what you mean by "that would have occurred". I was not presiding over the investigation, if that is what you mean.

CHAIR: That is where my question was going.

Ms LATHAM: An acting commissioner was appointed from Queensland, a very senior practitioner at the Queensland Bar.

CHAIR: For the purposes of the public inquiry that is correct, is it not?

Ms LATHAM: It was for the purposes of the investigation.

CHAIR: In its totality?

Ms LATHAM: That person was appointed as soon as it became an investigation. That person is presently Commissioner of the Queensland Crime and Corruption Commission.

CHAIR: So when you elected to issue a press release after the High Court decision, and when you elected to refer the matter to the DPP, that was your decision, was it not?

Ms LATHAM: It was the decision of the commission, bearing in mind that the commission no longer had jurisdiction to investigate the matter. The public knew that we had

previously announced that we were in possession of material that warranted a public inquiry. Therefore, there were legitimate public concerns about what was occurring in relation to that information. The Government had passed legislation which preserved the lawfulness of the possession of that information and only allowed us to refer it. Short of asking for the information to disappear into the ether, the only thing that we could do was refer it elsewhere under the legislation.

The Hon. TREVOR KHAN: And issue a 622-word media release.

CHAIR: In hindsight, would it have been better if someone else had issued that, rather than you being perceived to have?

Ms LATHAM: It was a press release of the commission. It was not a personal press release. It was a release of the commission, and it appears on the website as a press release of the commission, as do all our press releases.

CHAIR: But it was not shown to the investigator, who was the independent investigator. It was shown to you.

Ms LATHAM: I am sorry but there is a fundamental misunderstanding here. At the stage at which that press release was issued there was no longer an investigation because the High Court had determined that we did not have jurisdiction.

CHAIR: But there was still potentially a perception of conflict.

Ms LATHAM: I am sorry, I do not accept that.

CHAIR: Thank you for coming today. I know some of the material has traversed a lot of areas and potentially been difficult. You have been very frank with us, and I thank you for that and I am grateful for you making yourself available today. I simply indicate this to you. There is potential for us to reconvene after the Government has received and released the report of the expert panel. We may like to have a further discussion with you after we have seen this report so that we can get your views in relation to some of the material for the purposes of any report we would issue following that release. If you would be so good—

Ms LATHAM: We anticipated that that would be in the Committee's interest and we would like to have a further discussion in relation to the proposals that are going forward into legislation. We are keen to have a further discussion about that.

CHAIR: Thank you.

Appendix Two – ICAC's answers to questions taken on notice and further questions

This appendix contains answers provided by the ICAC in response to questions taken on notice at the public hearing held on 7 August 2015 and answers to further questions which were sent to the ICAC following the public hearing.

Answers to questions taken on notice

1 Question from Mr Adam Marshall MP, Transcript of Evidence, p 20:

Mr ADAM MARSHALL: You may not be able to answer this question; you may need to take advice. How do you explain the presence of television news crews that had to drive for at least an hour and a half to get to Mr Torbay's residence to film the execution of the raid?

Ms LATHAM: I do not know how long the search took. You are talking about matters that occurred before my time. If you want me to provide an answer, I am happy to do so on notice.

Mr ADAM MARSHALL: If you wish take the question on notice that is fine.

Ms LATHAM: I will take it on notice and provide an account in relation to that raid.

Response:

The Commission has responded to the Inspector on a similar issue raised with him by a complainant about the attendance of the media at a search of Mr Torbay's residence. In the Commission's view, the Inspector is the appropriate entity to inquire into specific complaints of this nature.

However, as information about this search is in the public domain, including through media reports, the Commission makes the following observations:

1. Several ICAC officers attended Mr Torbay's property to execute a search warrant at 9.38am on 27 March 2013. They were all wearing vests marked "ICAC".
2. Sometime after the officers arrived, but before the warrant was executed, a car pulled up and a male person got out and began taking photographs. It is not known whether this person lived in the street, was a journalist or just happened to be passing by.
3. The search warrant was executed at 10.08am and officers remained in and around the house conducting a search until 2.30pm.
4. News items about the search appeared online in the Armidale Express at 10.24am and in the Sydney Morning Herald at 12.49pm.
5. At some stage in the afternoon, ICAC officers were filmed near the house by television cameras.

It is clear from this timeline that several persons, including neighbours and the male person who took photographs, would have been able to alert the media to the presence of ICAC officers. The Commission has no information about who specifically may have alerted the media.

2 Question from Mr Adam Marshall MP, Transcript of Evidence, p 20:

Mr ADAM MARSHALL: Given the article on page 27 of today's Australian under the headline "Watson rejects claims of leaking", I must ask this question. The article claims that as part of what ended up being Operation Credo and Operation Spicer a search warrant was executed on 4 December 2013 at Mr Chris Hartcher's office. An article in the Sydney Morning Herald of 6 December announced that Mr Hartcher would be the subject of two ICAC inquiries.

However, it was not until 18 February 2014 that the commission publicly announced the two inquiries—Operation Credo and Operation Spicer. Again you may need to take this question on notice. How does a media outlet find out and publish that the commission is undertaking two inquiries months before they are announced by the commission?

Ms LATHAM: I cannot give you an answer.

Mr ADAM MARSHALL: You can take the question on notice.

Response:

In general terms, prior to the Commission announcing that it is going to hold a public inquiry, a number of investigative steps will have been taken over an extended period. This can include executing search warrants, interviewing witnesses, holding compulsory examinations with witnesses and serving summonses on witnesses to appear at a public inquiry. During these processes, many persons necessarily become aware of the subject matter of ICAC investigations and the likely course of those investigations. It is sometimes necessary to canvas with witnesses whether they will be available at a particular time to give evidence at an inquiry.

In the circumstances, it is impossible for the Commission to speculate about how media outlets might know the general information that an inquiry is going to be held about particular issues. There could be any number of sources. The Commission can say that it does not provide any information to media outlets about public inquiries except through authorised media releases that go to all media outlets at the same time when an inquiry is announced.

If any member of the Committee has specific information which suggests otherwise, it would be appropriate to refer it to the Inspector.

3 Questions from Mr Chris Patterson MP, Transcript of Evidence, p 26:

Mr CHRIS PATTERSON: The ICAC was ordered to pay the costs of Cunneen in three hearings— one in the Supreme Court, one in the Court of Appeal and one in the High Court—and obviously your own legal costs. Has this happened with any other operation that you are aware of?

Ms LATHAM: I can take that question on notice, but that just follows the usual rules that apply in any litigation: the loser pays the costs. That is the rule that applies in any litigation.

Mr CHRIS PATTERSON: Absolutely. I am not questioning that. So you will take on notice the question: Has that occurred with any other operation?

Ms LATHAM: Yes, I can take that on notice. I do not know.

Mr CHRIS PATTERSON: Thank you. I appreciate that. Again on notice, do we know the estimate of those costs or is that something you cannot answer?

Response:

The only matters, apart from the Cunneen matter, in which the Commission has been ordered to pay costs are Balog in 1990, Greiner in 1992, Woodham in 1993 and Kinghorn in 2014 (although this last matter is presently under appeal). The Commission has no estimate of the costs in the Cunneen matter at this time.

4 Question from the Hon Trevor Khan MLC, Transcript of Evidence, pp 30-31

The Hon. TREVOR KHAN: In the context of ICAC, what is your procedure for advising persons who may be impacted by the evidence given by a witness holding a letter of comfort? How does the other side know that this bloke is on a promise?

Ms LATHAM: All I can say is that we are not obliged to disclose any decision that we take in the course of an operation. The 1point about an inquisitorial process is that you do not in fact tell the subject of the investigation what information you hold and how you obtained it.

The Hon. TREVOR KHAN: In the context of hearings before the commission, a witness may be in receipt of a letter of comfort and none of the persons who may be impacted by that evidence will be told that the witness is in receipt of a letter of comfort.

Ms LATHAM: That is quite possible.

The Hon. TREVOR KHAN: That is the fact, is not?

Ms LATHAM: As said, it is quite possible that that is what occurs. There may be circumstances where we do disclose it but we are not obliged to.

The Hon. TREVOR KHAN: Would you like to check back and see in your time as commissioner when you have disclosed to the other side during a hearing—

Ms LATHAM: I am happy to take that on notice but, as I said, your question was premised on there being some obligation to disclose it or on some legislative basis for the undertaking.

Response:

As outlined in other correspondence to the Committee, there is a commonly recognized and used procedure for obtaining evidence from a proposed witness by way of an induced statement. Such a statement is made on the basis that the contents, if repeated in evidence during an inquiry, will not be used to found an adverse finding against the witness, provided that the witness does not mislead or lie to the Commission. In the event that such a witness

is found to have lied to, or misled the Commission, the witness may nevertheless be prosecuted under s 87 of the ICAC Act.

This procedure does not guarantee that evidence from another source will not be used to make adverse findings against the witness. The terminology "letter of comfort" does not apply in these circumstances.

During the term of the current Commissioner, in the course of opening the Spicer inquiry on 6 August 2014, counsel assisting said:

"Mr Thomson was offered an inducement by ICAC that in exchange for providing a statement, the statement would not be used against him in criminal proceedings in NSW except if he gives false or misleading evidence."

Mr Thomson's statement was provided to all legal representatives on 11 August 2014.

To the best of the Commissioner's recollection, there has been no other occasion in the course of inquiries over which she has presided that such a disclosure has been made. In view of the fact that almost all witnesses before the Commission give evidence on the basis that what they say will not be used against them in other proceedings, the Commission is of the view that there is no relevant distinction between the protection afforded by an induced statement and the protection afforded by an order under s. 38 of the ICAC Act.

Response to further questions

Assessing matters (pages 14-25 of report)

1. **The Committee notes that compared to the previous year, in 2013-14, there was reduced section 11 reporting from most government sectors with the exception of 'education (excluding universities)' which increased by 72% (page 21).**
 - a) **Do you have any comment on the reasons for reduced reporting in most sectors and for the 72% rise in the education sector?**
 - b) **Can you please provide a table which includes section 11 reporting figures for each sector, and percentage differences from the previous reporting year (2012-13)?**

The Commission could only speculate about the reason/s for the reduction in the number of section 11 reports as there are often fluctuations in the reporting from year to year. However, the sharp rise in the number of section 11 reports from Education (except universities) may be attributed to the NSW Government restructuring that occurred around 2012-13 whereby some agencies became larger. It may also be the case that some agencies were over/under reporting and hence the fluctuations in subsequent reporting periods.

The table below provides a comparison between 2012-13 and 2013-14 of the reporting for the various government sectors:

REVIEW OF THE 2013-2014 ANNUAL REPORTS OF THE ICAC AND THE INSPECTOR OF THE ICAC
ICAC'S ANSWERS TO QUESTIONS TAKEN ON NOTICE AND FURTHER QUESTIONS

| Sector | 2012-13 | 2013-14 | % change |
|---------------------------------------|---------|---------|----------|
| Custodial services | 98 | 22 | -78% |
| Tourism, sport, recreation and gaming | 3 | 1 | -67% |
| Law and justice | 14 | 8 | -43% |
| Energy | 38 | 26 | -32% |
| Local government | 166 | 136 | -18% |
| Arts and heritage | 6 | 5 | -17% |
| Policing | 7 | 6 | -14% |
| Health | 62 | 57 | -8% |
| Transport, ports and waterways | 160 | 148 | -8% |
| Universities | 28 | 26 | -7% |
| Natural resources and environment | 30 | 29 | -3% |
| Consumer and trade | 4 | 4 | 0% |
| Other- unspecified | 3 | 3 | 0% |
| Community and human services | 41 | 43 | 5% |
| Education (except universities) | 60 | 103 | 72% |
| Government and financial services | 13 | 29 | 123% |
| Aboriginal affairs and services | 4 | 10 | 150% |
| Emergency services | 8 | 22 | 175% |
| Land, property and planning | 0 | 3 | N/A |
| Employment and industrial relations | 0 | 0 | N/A |
| Parliament | 0 | 1 | N/A |

- 2. The Committee notes the Assessment Panel, which meets electronically twice a week, is governed by a Charter (page 23). What does meeting electronically mean? Can you provide the Committee with a copy of the Charter?**

Members of the Commission's Assessment Panel are each provided with copies of the assessment reports for consideration on a twice weekly basis. The Panel members then consider the reports and the various recommendations and make comment via electronic means (email) to the Manager Assessments, who then records the comments in the case management system. The majority of matters that are reported to the Commission are assessed by the Assessment Panel in this way, however, a face-to-face meeting is convened for any matter requiring further discussion by Panel members.

The Assessment Panel Charter is attached for your information (Appendix 1) and is currently being updated.

- 3. The Committee notes that many matters the ICAC receives do not meet the definition of corrupt conduct in the ICAC Act, and therefore do not warrant further action (page 23). The Committee further notes that the majority of matters (84%) that the ICAC receives fall into this category. Could you please provide the Committee with some typical examples of such matters?**

The percentage of decisions closed without referral (84%) in the Table 17 on page 25 of the 2013-2014 Annual Report does not refer to matters received by the Commission that did not meet the definition of corrupt conduct. The percentage refers only to matters that were considered by the Assessment Panel and were closed without further action being recommended or taken.

The majority of matters the Commission receives do meet the definition of corrupt conduct in the ICAC Act, however the Commission may decide not to take or recommend further action for a number of reasons. Some allegations are too vague, are trivial or baseless. An allegation may involve no more than a complaint about service delivery or disagreement with a decision made by a public official. The conduct alleged may have occurred so long ago that no productive action can now be taken in relation to the matter.

The Commission does receive some allegations that are outside its jurisdiction, for example, matters relating to corruption within the NSW Police Force. The Commission may decide to close those matters but refer them to either the NSW Ombudsman or the Police Integrity Commission under section 128 of the *Police Integrity Commission Act 1996*. Also, other matters reported to the Commission may involve no more than a complaint of maladministration or waste of public funds. This type of allegation may be referred to the NSW Ombudsman or the Audit Office for information.

Investigating corruption (pages 26-33 of report)

- 4. In 2013-14, 71% of full investigations were completed within 12 months (p.9). The target is >90% and the 2013-14 figure compares with completion rates of 86% in 2012-13 and 90% in 2011-12. The Committee notes that page 27 of the report states that this is 'symptomatic of ICAC undertaking more complex and protracted investigations'. Could you please elaborate and provide examples?**

There are a number of factors that support the assessment that lower timeliness for

completion of investigations in 2013-14 is symptomatic of the ICAC undertaking more complex and protracted investigations. For example, for the year ending 30 June 2013, on average the percentage of preliminary investigations on hand compared to full investigations was 55% to 45%. In 2010 that proportion was 90% to 10% but in 2015 the proportion was 40% to 60%. Also, over the same period, from 2010 to 2015, the number of full investigations the Commission had on hand at any particular time has doubled. Put another way, the Commission's investigation capacity is now more invested in full investigations than it was five years ago. There is also an increase in the number of days, on average, to complete a public inquiry for any particular investigation. In 2010 the average public inquiry took five days. In 2015 the average is ten days.

5. The Committee notes that the review of the Operations Manual has been extended to June 2015 (page 26). Could you update the Committee on the status of this review?

Following on from the update provided to the Committee in April 2014 the Commission's new property management procedures (IP12) were implemented on 1 July 2014. The purpose and impact of those procedures is dealt with in more detail in the answer to question 6 below.

In July 2014, minor amendments were made to the work instructions under the Commission's Telecommunications Interception and Access procedures (IP15) to accommodate technical requirements. Also in July, following the acquisition of video badge technology, primarily for use in the execution of search warrants, a new work instruction was approved setting out the requirements for the use of that equipment.

There was disruption to the progress of the review project in August and September 2014 due to resourcing and the relocation of the Commission. At the end of September 2014 work commenced on the substantial review of the Commission's policies and procedures for the conduct of compulsory examinations and public inquiries (IP03).

Also in September 2014 the Executive Management Group (EMG) decided to incorporate the Commission's Assessment's manual into the Operation review project, thus significantly increasing the content to be covered by the project. The structure of the Operations Manual was revised so that the Assessments policies and procedures are now Part 1 of the manual with the former Part 1 (Investigation Management) and Part 2 (Investigation Management), now Parts 2 and 3 respectively.

On 24 September 2014 the first of several work instructions for the new Assessments section (Part 1) was approved. This work instruction relates to the use of voice recording equipment by assessment officers.

In December 2014 a work instruction relating to security and risk management for the conduct of Commission hearings was approved. This subject area was given some priority due to the Commission's relocation and consequent changes in the security environment. Also, in December 2014 the EMG approved two policies and procedures resulting from the revision of assessment records and information management (AP02) and procedures for

the implementation of assessment panel decisions (AP04).

In recognising the additional work involved in incorporating the Assessment Manual procedures into the Operations Manual and disruptions due to resourcing and the relocation of the Commission, in February 2015, the EMG recognised that the project would extend until at least 30 June 2016. Also in February 2015 the EMG approved amendments to the Manual's overarching policy framework document (General Investigation Standards and Procedures), to reflect the incorporation of Assessments procedures into the Manual and also ongoing work underpinning improvements to the Commission's investigation planning framework.

On 30 April 2015 the EMG approved a new policy and procedure for the conduct of compulsory examinations and public inquiries (IP03). This policy and procedure replaced and incorporated a number of existing procedures. There are four work instructions under the policy. One work instruction relating to the preparation of hearing briefs was approved on 29 July 2015. A further three work instructions are in draft form nearing completion or approval:

- A work instruction on the use of the Commission's public and restricted web-site for hearing material has been delayed pending the implementation of a new software platform for the Commission's restricted web-site but is expected to be finalised shortly.
- A work instruction on the management of hearing transcripts, exhibits and recordings is delayed pending the digital upgrade of the Commission's hearing recording system this month. The upgrade will not only improve internal efficiencies but the new recording platform will give the Inspector more timely access to copies of the recordings should they be required.
- A work instruction replacing the current Associates Manual will be completed once the above work instructions are finalised.

On 11 June 2015 the EMG approved a policy and procedure (IP13) for the engagement of the Commission's physical surveillance capacity.

In July 2015 the Commission commenced a substantial review of the policy and procedure dealing with telecommunications interception and access (IP15) to ensure readiness and compliance with the new Commonwealth data retention legislation which effectively commences on 13 October 2015. The Commission, with other law enforcement agencies, is undertaking this review in consultation with staff from the Commonwealth Attorney-General's Department and Commonwealth Ombudsman's Office. The extent of this review and implementation requirements is expected to delay progress on finalising other subject areas of the Manual.

- 6. Your annual report notes that there are now substantially revised evidence management procedures in place (p26). Could you tell us how revised evidence management procedures have impacted on the investigative work of the ICAC?**

The review of evidence management procedures referred to on page 26 of the annual report was a substantive review of the Commission's existing procedures to ensure evidence is recorded, preserved and dealt with by the Commission:

- consistently with any relevant legal requirement or responsibility that applies
- as evidence until it is no longer required for an investigation, prosecution or other proceeding
- so as to negate any actual or perceived impropriety in the manner of its handling or integrity
- so as to avoid any detriment to the health and safety of a Commission officer or the public
- so that, subject to any order of a court or appropriate authority, it may be returned to the owner or person who produced it or is entitled to it, in the condition in which it was obtained by the Commission and as soon as practicable after it is no longer required for a lawful purpose.

The revised procedures have resulted in improved efficiencies in the management, capture and analysis of evidence, particularly digital evidence and digital capture of physical evidence and improved the consistency and the usefulness of the Commission's evidence collection standards.

7. The Committee understands that the ICAC applied for 3 stored communications warrants in 2012-13 (page 29). This type of warrant hadn't been applied for in previous years.

- a) What sort of material does a stored communication warrant allow you to access?**
- b) Is the ICAC likely to apply for more stored access warrants in the future?**

A stored communications warrant authorises the Commission to access a "stored communication" as that term is defined in s 5 of the *Telecommunications (Interception and Access) Act 1979* ("TIA Act") namely, a communication that:

- is not passing over a telecommunications system
- is held on equipment that is operated by, and is in the possession of, a carrier
- cannot be accessed on that equipment, by a person who is not a party to the communication, without the assistance of an employee of a carrier.

A stored communication may also be accessed by the Commission under an interception warrant. The most common example of a stored communication is a text message or image but only if the communication is still accessible on the carrier's systems and access to the communication is obtained covertly, that is, without the knowledge of a party to the communication. For a party to have knowledge of the access, it is not necessary that they consent to it, just that they know the access will occur.

In future, if access to a stored communication under a TIA Act warrant is considered necessary for the purpose of a Commission investigation and the Commission is able to satisfy the criteria for obtaining an interception warrant or a stored communications warrant, it is likely the Commission would apply to an issuing authority for such a warrant to access the stored communication.

- 8. The Committee notes that in 2013-14 all warrants were issued by an external authority and none were issued by the Commissioner (page 29). How does this compare with the previous two reporting years, 2012-13 and 2011-12? What considerations are taken into account in deciding whether to apply to an external authority on the one hand, or for the Commissioner to issue the warrant on the other? Could the ICAC please supply the Committee with the ICAC's protocols in this regard?**

In the two years prior to 2013-2014, all search warrants obtained by the Commission were issued by an external authority and none was issued by the Commissioner.

The ICAC's protocols in this regard are set out in s 1.1 of the Commission procedure for obtaining and executing search warrants:

1.1 Search warrants issued in NSW

Division 4, Part 5 of the ICAC Act and Division 4, Part 5 of the Law Enforcement (Powers and Responsibilities) Act 2002 (Except ss.69-73) apply to Commission search warrants.

Section 40 (4) of the ICAC Act provides for an officer of the Commission to make application to an authorised officer (as defined in the Law Enforcement (Powers and Responsibilities) Act 2002) or the Commissioner for a search warrant.

It is Commission policy that warrants be sought from authorised officers, and not the Commissioner.

Preventing corruption (pages 34-41 of report)

- 9. The Committee notes that there has been a long-term decline in the demand for corruption advice provided by the Corruption Prevention Division (page 34). Has the restructure discussed on page 34 adjusted for this decline, or are further adjustments necessary? Has thought been given to deploying resources across divisions? Is this possible given different staff skill sets? For example, the Legal Division identifies challenges involving a substantial workload on page 43 of the report.**

While there has been a long term decline in advice requests, there remain significant fluctuations and this year has seen the numbers rise again. It should be noted that the unsolicited advice requests have always been a relatively small part

of the work of the Division in terms of hours. Furthermore, the decline in advice sought in this way has been more than offset by the growth in the training and speaking advice that is provided by the Division.

The skill sets within CP allow staff to work flexibly across all aspects of the Division's activities. The high levels of training and speaking along with major projects and investigations are produced by the same staff of the Division – there are no staff dedicated to advice only. The workload of the Division is high and the staff's skill-sets are not particularly relevant to work in other Divisions.

10. The Committee notes that the 'percentage of corruption prevention recommendations in investigation reports addressed as at 30 June 2014' was 94% (p 9). Since then, have further recommendations been addressed? If so, can you provide further elaboration?

It is not the Commission's usual practice to follow-up an agency's implementation of corruption prevention recommendations beyond the final progress report provided by the agency. Consequently, the Commission is not aware of what further progress has been made in relation to the implementation of the recommendations reported in its 2013–14 Annual Report.

The Commission can, however, advise that in 2014–15 it received final progress reports from 16 agencies concerning the implementation of recommendations. Ninety-seven per cent of these recommendations had been addressed.

11. The Committee notes that sector-wide corruption prevention projects undertaken by ICAC's Corruption Prevention Division are selected on the basis of the degree of public concern and the extent of the corruption risks (page 34). How is public concern measured? Is it by using Community Attitude Surveys as mentioned on page 36, or some other means?

The Staff of the Division, including the ED, have extensive and continuous contact with the public, suppliers to government and public officials through training, speaking, outreach, investigations, advice, and through the assessment of matters reported to the Commission. These many points of contact that occur annually allow the Division to develop an understanding of issues of importance in a way that would not be possible through a survey or similar instrument.

12. Do you have any concerns with the results of your community attitudes survey (p36) which shows that the proportion of individuals who see corruption as a major problem has fallen over the past twenty years? As there appears to be no shortage of investigation work for the ICAC to conduct, do you consider that there that there is value in public awareness measures that could aid the community in recognising corrupt behaviour?

The decline in individuals who see corruption as a major problem need not be indicative of a

lack of public awareness of corrupt conduct. Individuals may still be aware of what constitutes corrupt conduct, but perceive that action is being undertaken to successfully expose corrupt conduct and prevent it from reoccurring.

The activity level of the Commission may be perceived as evidence that corruption is being uncovered and addressed. Thus, individuals may acknowledge the existence of corrupt conduct, but not perceive it as a major problem because they perceive it as being appropriately acted upon.

Notwithstanding the above, there may be scope to conduct further activities to raise public awareness. However, public awareness measures that have broad reach are costly. The current public awareness measures employed by the Commission are those based on "bang for the buck". Further measures are likely to produce a reduced impact for the amount invested.

13. The annual report notes that the Corruption Prevention Division undertook a number of major projects examining corruption of sector wide significance in 2013/14 in: IT Contractors; coal allocation and approval system; invoice payment; and facilities maintenance (pages 34-37). Has the ICAC found any evidence of reforms being implemented or corrupt activity curtailed by agencies as a result of this work?

With the exception of the Coal report, these projects do not contain specific recommendations and do not require agencies to report back on implementation of changes. The absence of specific recommendations is a deliberate choice that recognises that the situations within different agencies are often quite varied and that a single "one size fits all" recommendation may not be effective in preventing corruption and could damage the core business of the agency. Rather, the reports rely on encouraging managers to diagnose their own environment by providing insights and options for managers that are seen as useful for agency core business and for preventing corruption.

Following the release of these reports there is generally a period of interaction with senior management of the relevant areas across the sector, peak committees and public presentations. The reports also become integrated into training as appropriate. Many managers indicate the reports are used to map their issues and to benchmark their operations. The exception is the Coal report that contained specific recommendations, which have been implemented.

It is not possible to know what changes are made as a result of the report, what corruption is currently occurring, and what corruption would have occurred had the changes not been made. Therefore it is not possible to assess the effectiveness of the reports in this way. However the reports are based on analysis of weaknesses that have repeatedly been associated with corruption, and the solutions are typically derived from public and private sector best practice for dealing with these weaknesses. In other words, the effectiveness in preventing corruption is based on the best practice experience of well run organisations rather than on an attempt to measure the

difference between corruption levels and estimated corruption levels that would have occurred without such practices in place.

14. The Committee notes that the 'percentage of corruption prevention recommendations in investigation reports addressed as at 30 June 2014' was 94% (page 10, table 2). However, page 39 and appendix 5 of the report state that 'Final reports received by the Commission in 2013-14 indicated that 72% of corruption prevention recommendations made to agencies were fully implemented'.

a) Could you please explain how these measures differ from each other, thereby accounting for the different percentage amounts?

A recommendation is considered fully implemented if either the recommendation has been implemented as described in the report or alternate actions have been undertaken that fully implement the intention of the recommendation.

A recommendation is considered addressed if it is fully implemented (as described above), or if some but not all elements of the recommendation have been implemented as described in the report or alternate actions have been undertaken that partially implement the intention of the recommendation.

As per Table 38 in Appendix 5, final reports were received with respect to 47 recommendations. Thirty-four recommendations were fully implemented (either as described or in an alternate way), resulting in the reported figure of 72%. An additional 10 recommendations were partially implemented (either as described or in an alternate way), resulting in a total of 44 recommendations that were addressed and the reported figure of 94%.

15. The Committee notes that if an agency supplies a plan of action around corruption prevention recommendations to ICAC, the agency must provide a written report to the ICAC of its progress in implementing the plan 12 months after informing the ICAC of the plan. If the plan has not been fully implemented by then, a further written report must be provided 12 months after the progress report (page 39).

a) What happens after these two steps?

b) Noting that final reports received by ICAC in 2013-14 indicated that only 72% of corruption prevention recommendations made to agencies were fully implemented (page 39 and appendix 5) are ICAC's powers sufficient around these issues?

In almost all matters, actions plans are either fully implemented at the 12- month or 24-month stage. In the rare circumstance where an action plan is not fully implemented at the 24- month stage, a further report is requested, in the same way as the 12- month and 24- month report is requested. There may be occasions where a public authority wishes to furnish additional supporting information after submission of the final report. In these instances the ICAC officer monitoring the matter will liaise with the agency

regarding its receipt.

There are many unforeseen reasons why action plans in response to recommendations may not be implemented or may be considerably delayed. Not all failure to implement is the result of agency intransigence. The ICAC has significant soft power around the implementation of recommendations. The failure to implement is transparently displayed on the ICAC website and in the annual report, leaving non-complying agencies facing public pressure to explain.

Should there be intransigence, an escalation protocol is in place in which ultimately the Minister is advised, again creating pressure on the agency to act. The escalation protocol has not been invoked within recent times. This soft power is generally considered appropriate and adequate, the 2013-14 figures aside, and preferable to the use of legislated powers.

16. The Committee notes the target for 'percentage of corruption prevention recommendations in investigation reports addressed as at 30 June 2014' is 80% (page 10, table 2). How was this target set, and what is the rationale for the 20% tolerance?

The target of 80% is set by the executive, as a group, based on analysis of historical factors. The incentive created by the target is for the Division to produce recommendations that are likely to be taken up by the agency – effective and workable recommendations. As noted, however, in the response to question 15, a number of unforeseeable circumstances can arise that make implementation inappropriate or impossible. This is the 20% tolerance. In 2013-2014 the number of unforeseen circumstances were unusually high but this does not detract from the incentive value of the target.

17. The Committee notes that demand for corruption prevention workshops decreased over the 2013-14 financial year, and that there was a decrease in 2012-13 from the previous financial year also (page 40). Does ICAC expect this increase to continue? Are there any comparable figures for 2014-15?

Since 2012-13, ICAC workshop evaluations have consistently had over 90% of participants rating them as “useful” or “very useful” and participants “agreeing” or “strongly agreeing” that these workshops met their training needs. The participant satisfaction with the Commission’s workshops has been consistently high.

However, despite this high level of satisfaction, the decline continued in 2014-15. The decline may be due to those agencies which had identified a training need increasingly having had that need met, the misconception that the workshops have not been changed since 2011 or a mistaken belief that the Commission charges a fee for delivering workshops.

The ICAC is developing new workshops (Corruption prevention for council operational staff, and Corruption prevention for planning professionals) that will be offered in 2015-16 and will be refreshing the website presentation of workshop materials so that their benefits are better explained. It is hoped that this will improve demand.

- 18. The Committee notes that in 2013-14, the percentage of public inquiries that resulted in the making of corruption prevention recommendations was 33% and that the target is 90% (page 10). The Committee notes that brief reasons for these figures are provided at page 39 of the report. Could you please provide more information about each of the eight investigation reports for which there were no corruption prevention recommendations and the reasons for this in each case?**

There were Corruption Prevention recommendations in the following investigations:

1. Operation Nickel (Heavy vehicles)
2. Operation Tilga (Security systems)
3. Operation Jasper (MP Obeid and mining issues)
4. Operation Acacia (Maitland and mining).

There were no corruption prevention recommendations in the following investigations:

1. Operation Cavill (Ryde Council)
2. Operation Cyrus (Circular Quay leases)
3. Operation Cabot (Water licenses)
4. Operation Meeka (Direct Health Solutions)
5. Operation Dewar (SES Commissioner)
6. Operation Torino (Corrective Services)
7. Operation Indus (MP Roozendaal's car)
8. Operation Jarilo (Minister McDonald).

As a result, 33% (4 out of 12) of investigations contained corruption prevention recommendations. In operation Cavill, the Commission noted that "The Commission usually makes recommendations for corruption prevention when systemic or operational failure contributes to or enables corrupt conduct to occur. In this matter, no systemic or operational failure is evident. What the investigation exposed was the willingness of individuals to intentionally ignore any systemic and operational controls that stood in the way of the pursuit of personal interest or political advantage.

"When senior public officials intentionally flout controls, a dysfunctional environment is created. Recent significant changes to the LG Act have now increased the options available to both the minister for local government and the Office of Local Government to deal with individual councillor conduct and dysfunction of a council as a whole."

In operation Cyrus the system that had allowed the corrupt behaviour to occur around the

Quay leases was defunct, and therefore there was no point making recommendations. The new strategy was not fully developed at the time of the investigation and therefore was not amenable to analysis by the Commission.

The Commission did note that previous recommendation made to amend the Code of Conduct for Members to deal comprehensively with improper influence by MPs in the 2013 report, Reducing the opportunities and incentives for corruption in the state's management of coal resources, is a subject of a joint Legislative Council Privileges Committee and Legislative Assembly Privileges and Ethics Committee enquiry into this and other recommendations made in that report.

In operations Cabot and Meeka the Commission notes on its website that it has not made any corruption prevention recommendations. For Operation Meeka, recommendations to prevent MPs misusing their positions have already been made in Operations Jasper and Acacia (see report titled "Reducing the opportunities and incentives for corruption in the state's management of coal resources"). These recommendations have been accepted by Parliament. The systemic problems in the granting of water licences raised in Operation Cabot were already being addressed by the NSW Office of Water at the time the Commission's report was published.

In operation Torino the behaviour was the same as exposed in prior investigations. However, the recommendations arising from those investigations had not been fully implemented. Therefore, the recommendations were not repeated.

In operation Dewar, one of the major issues identified during the investigation was Commissioner Kear's failure to properly identify and manage the conflict of interest arising out of his friendship with Mr Pearce. The identification and management of conflicts of interest are key anti-corruption issues and have been discussed in a number of previous ICAC reports. Similarly the issue of management of PIDs is widely communicated by the Ombudsman and the Commission.

In operation Indus, the Commission investigated the circumstances in which Moses Obeid provided the Hon member Eric Roozendaal (MLC) with a motor vehicle in 2007. The Commission made findings of corrupt conduct against Obeid, but not Roozendaal. Although no corruption prevention recommendations were made in this report, it did raise the issue of inappropriate use of influence by a minister. This issue was dealt with in Chapter 6 of the 2013 report "Reducing the opportunities and incentives for corruption in the state's management of coal resources".

In operation Jarilo, the Commission investigated the offerings of rewards or inducements to former NSW Energy Minister Ian Macdonald. No issues of a systemic nature were concerned, however, corruption prevention issues in relation to the inappropriate use of influence by a Minister were dealt with in Chapter 6 of the 2013 report "Reducing the opportunities and incentives for corruption in the state's management of coal resources".

- 19. The Committee notes that 90% is the target for the percentage of public inquiries that resulted in the making of corruption prevention recommendations (page 9). Given only 33% of public inquiries resulted in the making of corruption prevention recommendations in 2013-14, and given only 67% of public inquiries resulted in the making of corruption prevention recommendations in 2011-12, is this target realistic?**

Over the longer term a target of 90% appears reasonable. It provides an internal incentive to the Commission to thoroughly analyse the systems within which the corrupt conduct occurred. When taken together with the target of 80% implementation which creates an incentive to produce realistic and practicable recommendations (question 16), the targets encourage thorough analysis but balance in the recommendations made.

As described in the response to question 18, from time to time investigations arise for which recommendations are not appropriate. The year 2013-2014 was unusual in the number of such investigations, and from year to year there are significant fluctuations. Nevertheless, the value of the target in terms of the incentive to thoroughly analyse the systems remains, even if at the end of that analysis no issues are identified that are best addressed through recommendations.

Compliance and accountability (pages 42-51 of report)

- 20. In 2013-14, the ICAC completed 42% of its investigation reports within target (p.9). The Committee notes that, since 2009-10, the target has been 60 days when the public inquiry ran for five days or less, and 90 days otherwise, and that the ICAC aims to meet these timeframes 80% of the time.**

The Committee further notes that in 2012-13, 50% of ICAC's investigation reports were completed within the target, and in 2011-12 only 17% were completed within the target (p.9). Limited explanation for the 2013-14 figures is provided on pages 49 and 50 of the report. Does the ICAC have any further comment on the repeated failure to meet the targets in this area, and on whether the current target is realistic or useful?

The Commission considers that the present targets of completing 80% of its investigation reports within 60 days where the public inquiry ran for five days or less and within 90 days otherwise, remains relevant and is achievable in normal circumstances. The ability to meet these targets depends on a number of matters, including the extent to which other operational matters impact on the drafting and review of reports and the complexity of the matters being reported.

In 2014-15 the Commission furnished four investigation reports. Only one of these was not furnished within the target time.

In 2013-14, there were significant departures from the target times for reports in operations Tilga, Indus, Jarilo, the report on addressing outstanding questions in operations Jasper and

Acacia and the combined report for operations Cabot and Meeka. In the case of Tilga, the delay was caused by the complexity of the matters being reported and other operational matters which affected the time available to draft the report. Completion of the Indus and Jarilo reports was postponed so that they could be furnished at the same time as the Operation Jasper report. Completion of the report on addressing outstanding questions in operations Jasper and Acacia was dependent on receiving counsels' advice. Although senior counsel was briefed in September 2013, final advice was not received until early December 2013. Completion of the combined report for operations Cabot and Meeka was delayed by the Christmas/New Year break and the decision to furnish it at the same time as the report for Operation Cyrus.

21. The Committee notes the ICAC's statement that 'Applications for telecommunication interception warrants are usually made to members of the Administrative Appeals Tribunal (Commonwealth)' (page 43). Where these applications are not made to members of the Tribunal, how are they dealt with?

Applications for telecommunication interception warrants are governed by the *Telecommunications (Interception and Access) Act 1979* (the TIA Act).

Section 39 of the TIA Act provides that an application for a warrant may be made to an "eligible Judge" or "nominated AAT member". An "eligible Judge" is a person who is a Judge of a court created by the Commonwealth Parliament who the Minister has declared to be an eligible judge for the purpose of the TIA Act. A "nominated AAT member" is a person so nominated by the Minister.

As a matter of administrative convenience it is Commission practice to make applications to nominated AAT members. This is because the AAT has put in place arrangements for dealing with urgent and non-urgent applications and has developed a roster system to ensure that a nominated member is available to consider applications. In the past difficulty was experienced in finding an available eligible judge.

22. With regard to the unresolved litigation matters that the ICAC was involved in during the 2013-14 reporting period, concerning Martin Waterhouse [matter 2] (page 46); NuCoal Resources Ltd [matter 3] (pages 46 and 47); Cascade Coal Pty Ltd, Mt Penny Coal Pty Ltd and Glendon Brook Coal Pty Ltd [matter 4] (page 47); and Travers Duncan, John Kinghorn, John McGuigan, John Atkinson and Richard Poole [matter 5] (page 47); could you please supply details as to the final results, if available?

In the Waterhouse matter, on 2 April 2014, Garling J dismissed the proceedings and ordered the plaintiff to pay the Commission's costs. On 30 June 2015 Mr Waterhouse filed a summons seeking leave to appeal this decision. The application for leave to appeal is set down for hearing on 10 September 2015.

The NuCoal Resources Ltd case was heard in the Supreme Court on 27 October 2014. Judgment is reserved.

In the Cascade Coal Pty Ltd, Mt Penny Coal Pty Ltd and Glendon Brook Coal Pty Ltd matters, judgment was delivered on 29 July 2014. The plaintiffs' summons was dismissed and the plaintiffs were ordered to pay the Commission's costs. The plaintiffs filed a summons seeking leave to appeal. A hearing date is to be set.

On 29 July 2014 McDougall J dismissed the summonses filed by Messrs Duncan, McGuigan, Atkinson and Poole and ordered them to pay the Commission's costs. A declaration was made that the finding that Mr Kinghorn had engaged in corrupt conduct was not made according to law and was a nullity. This was because, for the purposes of s 9 of the ICAC Act, the corrupt conduct finding against Mr Kinghorn was made on the basis that his conduct could constitute or involve a criminal offence under s 184(1) of the *Corporations Act 2001*. That section provides that a director of a corporation commits an offence if they are reckless or are intentionally dishonest and fail to exercise their powers and discharge their duties in good faith in the best interests of the corporation or for a proper purpose. The Court held that a director's duty under s 184(1) did not require a proactive disclosure of information on their part. The Commission was ordered to pay Mr Kinghorn's costs.

The Commission filed a summons seeking leave to appeal the decision concerning Mr Kinghorn. Each of Messrs Duncan McGuigan, Atkinson and Poole also filed a summons seeking leave to appeal.

These matters were set down for a three day hearing commencing on 31 March 2015.

As a result of the 5 December 2014 Court of Appeal decision in *Cunneen v ICAC* [2014] NSWCA 421, Messrs Duncan McGuigan, Atkinson and Poole amended their grounds of appeal to take that decision into account on the basis that the corrupt conduct findings made against them did not involve any finding that their conduct led or could have led any public official or public authority into dishonest, partial or otherwise corrupt conduct.

The March hearing dates were vacated and the matters were set down for a three day joint hearing commencing on 15 June 2015.

On 15 April 2015 the High Court delivered its judgment in *ICAC v Cunneen* [2015] HCA 14. This judgment affected the findings in relation to Messrs Duncan, McGuigan, Atkinson, Poole and Kinghorn because those findings were made on the basis that their conduct could affect the "efficacy" rather than the "probity" of the exercise of official functions.

As the Commission then had no arguable basis to sustain its appeal in the Kinghorn proceedings or to resist the making of orders allowing the appeals by Messrs Duncan, McGuigan, Atkinson and Poole, the Commission, on the basis of its legal advice, consented to the dismissal of its summons seeking leave to appeal the decision in Kinghorn and consented to the appeals in the matters of Messrs Duncan, McGuigan, Atkinson and Poole. On 4 May 2015 the proceedings involving Messrs Duncan, McGuigan, Atkinson and Poole were adjourned for the purpose of constituting a bench of three judges of the Court of Appeal to make orders to finalise the matters.

On 6 May the *Independent Commission Against Corruption Amendment (Validation) Act 2015* (the Validation Act) came into effect. As a result the orders made on 4 May concerning

the proceedings involving Messrs Duncan McGuigan, Atkinson and Poole were vacated and a new three day hearing was set to commence on 15 June 2015. The Commission filed a notice of motion on 7 May 2015 seeking to have set aside the consent order dismissing its appeal in the Kinghorn matter.

Mr Duncan then amended his notice of appeal to include a challenge to the validity of the Validation Act and made application to have that challenge removed to the High Court. The challenge was heard by the High Court on 5 August 2015. Judgment was reserved.

The matters involving Messrs McGuigan, Atkinson, Poole and Kinghorn are effectively in abeyance until the High Court hands down judgment on Mr Duncan's challenge to the validity of the Validation Act. The June 2015 Court of Appeal hearing dates have been vacated.

Our organisation (pages 52-57 of report)

23. The Committee notes that the ICAC moved premises in 2014. Do you have any observations in relation to the new premises and their suitability for ICAC's purposes?

The new premises at 255 Elizabeth St were specifically fitted out for ICAC. Staff occupy one and a half floors of the building.

The two hearing rooms are both on the same floor which is far more convenient than the old building where they were spread over different floors.

The new building is more practical in terms of security which now operates from Level 7 of the building. Staff, media and training facilities are greatly improved.

ICAC moved into its former premises in 2001 and over the years outgrew the fit-out they inherited from the previous tenant. This led to some wasted space and mismatched office design. By contrast the new building has modern office design including a dedicated staff meals and break room. In the new building the media have a dedicated space with audio visual links to the hearing room.

24. The Committee notes that a number of the ICAC's policies were reviewed in 2013-14 (page 53). Could you please supply details of how each of these policies was updated?

ICAC policies are reviewed in accordance with the Commission's Compliance Monitoring Register which has a minimum review period of four years for each policy, or they are reviewed more frequently in response to legislative changes or to meet Commission needs. The Audit and Risk Committee periodically monitors this register.

The Commission has a systematic and comprehensive review process. Research is initially undertaken to ensure compliance with legislative requirements, NSW Public Sector

guidelines, the ICAC Award and best benchmarking practice.

All reviewed policies are submitted to the Commission's Executive Management Group for endorsement. The Commission's Consultative Group then reviews the policies and may make suggested changes. This Committee is prescribed by the ICAC Award and consists of Management and Staff Representatives. Once the group has endorsed the reviewed policy formal approval is then given by the Commissioner.

25. The Committee notes that ICAC has a screening process in place for those who work on its premises (page 55). What sorts of checks are done and do these checks differ according to the position or risk level?

The security vetting process is undertaken for all persons either directly employed or engaged to provide services such as contractors. All staff undergo an extensive screening process that includes: confirmation of identity, statement of financial interests, assessment for conflicts of interests, screening of close associates for criminality or previous investigation by ICAC, personal referees, verification of qualifications, police check, previous employment check, RBT check, tax check and electoral role check among others.

A number of consents and releases are sought in order to obtain the above information for vetting purposes as well as undertakings as to secrecy of information gained while in the employment of the Commission.

There is also a level of security screening that applies to contractors. This includes standard checks such as criminal records checks, but is not as comprehensive as the staff screening process. Some facilities and trades personnel who provide services are also required to provide basic undertakings.

26. The Committee notes that during the reporting period the Audit and Risk Committee made a minor finding 'to ensure user access to SUN was periodically reviewed by management' (page 56). What does this mean? Please provide further details in relation to this finding.

SUN is the Commission's financial application where financial reports are generated and, amongst others, invoices are paid. The auditors checked user access to SUN and noted that some user identities related to former employees. Although these users could not have accessed the system, the auditors recommended that user access to SUN be reviewed every year to ensure user access was up to date and that no unauthorized access was permitted. A system generated report is run to verify user access and is checked by the Audit Office as part of its annual audit of the Commission's financial statements and annual report.

Financials (pages 58-83 of report)

27. The Committee notes that for 2013, printing costs were \$62,000 and for 2014 they were \$79,000 (page 72). What sort of documents are covered by these figures and is

there any opportunity to reduce printing costs with greater use of electronic publishing?

These figures refer to all externally-printed documents including investigation reports, corruption prevention reports, brochures, and all types of stationery (including overprinted envelopes and folders, letterhead and business cards).

During the 2013-2014 financial year, the Commission produced double the number of investigation reports that it produced in 2012-2013, from six to 12. Some of these reports were substantial in size, for example, Operations Jasper and Acacia which numbered 172 and 169 pages respectively.

The Commission is reducing printing costs where it can, and has been doing so steadily over the past 10 years. It is noted that printing costs in 2005-2006 were \$166,000. While the Commission must furnish hard copy reports to Parliament, a new policy was recently applied, with the agreement of the Legislative Council, for the Members to now receive notification once a report has been made public that it can be accessed electronically from the ICAC website rather than being provided with individual hard copies. This is in line with the practice that has been in place for many years with the Legislative Assembly, and has meant that we can now substantially reduce our print runs. Last year, the Commission relaunched its biannual stakeholder newsletter, *Corruption Matters*, as an HTML electronic newsletter, which has meant that there are no print costs for that publication now.

Appendix 3 – Outcome of Matters (page 90 of report)

- 28. Appendix 3, Table 34 (page 90) outlines certain outcomes for matters closed during 2013-14. One outcome is 'Disciplinary action – resignation'. What sort of scenarios does this cover e.g. where an organisation asks for a person's resignation, or where a person the agency intended to dismiss resigns before this happens?**

The outcome "Disciplinary action taken by the agency – Resignation" covers the situation where the agency has commenced disciplinary proceedings but the subject of those proceedings resigns before the proceedings are completed.

Appendix 4 – Prosecution and Disciplinary Action in 2013-14 Arising from ICAC Investigations (pages 91-102 of report)

- 29. The Committee notes that briefs of evidence in 'Operation Segomo' were forwarded by the Director of Public Prosecutions (DPP) to the Crown Solicitor's Office for consideration.**
- a) Why was this done in this case?**
 - b) If a decision is made to refer a matter to the Crown Solicitor, does the DPP always make this decision or does the ICAC sometimes refer matters direct to the Crown Solicitor?**
 - c) Could the Committee please have a copy of any ICAC protocols that exist in relation to this matter?**

One of the allegations examined in Operation Segomo was that John Hart, a barrister, had

made representations to a client that he could pay a DPP officer to ensure no prosecution would be commenced against his client and others in relation to an allegation of sexual assault. There was evidence that Mr Hart had discussed the sexual assault matter with a DPP lawyer. Although the Commission was satisfied that no officer of the DPP was involved in any impropriety, the DPP decided that it was appropriate in this case to refer the briefs of evidence against Mr Hart and others involved in the scheme to the Crown Solicitor in order to avoid any perceived conflict of interest.

The Commission does not refer matters to the Crown Solicitor for consideration of prosecution. Section 14(1) of the ICAC Act requires the Commission to furnish to the DPP evidence for the prosecution of NSW criminal offences.

The Commission does not have any protocols in relation to the DPP's decision to refer the Segomo matters to the Crown Solicitor.

30. Could you please provide updates to the reports for matters on pages 101-102 of the Report relating to: Operation Petrie, Operation Jarilo, Operation Indus, Operation Jasper, Operation Acacia, Operation Tilga, Operation Nickel, and Operation Cavill?

There has been no change in operations **Petrie, Jarilo** or **Indus**

In Operation **Jasper** the Commission has received advice from the DPP with respect to three persons and is awaiting advice from the DPP with respect to six persons. Action taken by the Commission with respect to the three persons for whom advice has been received is subject to a suppression order made under the *Court Suppression and Non-publication Orders Act 2010*.

In Operation **Acacia**, following advice received from the DPP, court attendance notices were served on:

1. Mr Macdonald in November 2014 for two offences of misconduct in public office;
2. Mr Maitland in September 2014 for an offence under s 87 of the ICAC Act (false or misleading evidence);
3. Mr Maitland in November 2014 for two offences of accessory before the fact to misconduct in public office; and
4. Mr Maitland in July 2015 for five offences under s 178BB of the *Crimes Act 1900* (obtaining valuable thing by false or misleading statements).

Matter 1 is for hearing on 7 December 2015. Matters 2 and 3 are set down for hearing in the Supreme Court on 14 March 2016. A hearing date is yet to be set for matter 4.

The DPP has also advised that there is sufficient evidence to prosecute Mr Ransley for two offences under s 178BB of the *Crimes Act 1900* and insufficient admissible evidence to prosecute Mr Poole.

In Operation **Tilga**, following advice received from the DPP, court attendance notices were

served in May 2015 on Mr Diekman for five offences under s 249B of the *Crimes Act 1900* (corrupt commissions or rewards) and on Mr Huskic for five offences under s 249B of the *Crimes Act 1900* and two offences under s 254b(iii) of the *Crimes Act 1900* (using a false document). Hearing dates for these matters are yet to be set.

The DPP has also advised that there is insufficient admissible evidence to prosecute Mr Paul.

In Operation **Nickel**, following advice received from the DPP, court attendance notices were served on Mr Binos for four offences under s 249B of the *Crimes Act 1900*. He is due to be sentenced in October 2015.

In Operation **Cavill**, following advice received from the DPP, court attendance notices were served on:

1. Mr Petch for two offences under s 249K of the *Crimes Act 1900* (blackmail), an offence of misconduct in public office and two offences under s 87 of the ICAC Act;
2. Mr Goubran for one offence under s 249K of the *Crimes Act 1900*;
3. Mr Stavrinou for an offence under s 87 of the ICAC Act;
4. Mr Booth for an offence under s 87 of the ICAC Act; and
5. Mr Henricus for an offence under s 249B of the *Crimes Act 1900*. Hearing dates have not yet been set for these matters.

The DPP also advised there was sufficient evidence to prosecute Messrs Petch, Li, Salvestro-Martin, Perram and Tagg for offences under the *Election Funding, Expenditure and Disclosures Act 1981*. The NSW Electoral Commission will deal with these matters.

Inspector of the ICAC

- 31. The Committee understands that liaison between the ICAC and the Inspector of the ICAC is conducted in accordance with an MOU. Do you have any comment on the effectiveness of the liaison and working relationship between the ICAC and the Inspectorate? In your view, are there any areas for improvement?**

The MOU provides an efficient basis for communications between the Commission and the Office of the Inspector. Information requested by the Inspector is always provided in as timely a manner as possible. On occasions, the Inspector requests hard copy transcripts of inquiries and exhibits that may be voluminous. Those requests often require staff of the Commission to spend a considerable time collating that material. Electronic access to material held by the Commission is available to the Inspector and represents a more efficient way of meeting the Inspector's needs. In recent times, the Inspector has usually requested material be provided in electronic form, which is more efficient and convenient for all parties concerned.

- 32. In his 2013-14 Annual Report (pages 9 and 10), and at the public hearing, the**

Inspector of the ICAC raised the issue of the ICAC's interpretation of the Commonwealth *Telecommunications (Interception and Access) Act 1979* (the 'TIA Act') which prevents information relating to applications for telephone intercepts and the product of any such intercepts being available to the Inspectorate. The Inspector has argued for amendments to the TIA Act to allow the Inspector to receive lawfully obtained information to conduct an audit of the ICAC's application for and use of information from warrants and intercepts made under the provisions of the TIA Act. Do you have any comments on this issue?

The TIA Act prohibits the communication of interception warrant information (which includes the existence or non-existence of an interception warrant) and intercepted information, except in limited circumstances for a "permitted purpose". The Commission can only communicate such information for the purposes of an investigation it is conducting or for the purposes of a report on an investigation, or for the purposes of an inspection of the Commission's records of telecommunications interceptions or a report on such an inspection. The NSW Ombudsman inspects the Commission's records to ensure compliance with its statutory obligations. The Commission abides by the constraints imposed by the TIA Act, which are clear on the face of the Act – it is not a question of interpretation. The amendment of the TIA Act to allow the Inspector to have access to intercepted information and interception warrant information is a matter of policy for the Commonwealth's determination.

Director of Public Prosecutions

33. The Committee understands that a memorandum of understanding exists between the ICAC and the Director of Public Prosecutions.

- **Have there been any recent changes to the memorandum of understanding?**
 - **Could you comment on the current working relationship between the ICAC and the DPP?**
 - **Are you satisfied with the current timeframes for the preparation of and provision of briefs of evidence to the DPP?**
 - **Are you satisfied with the timeliness of the DPP in providing decisions on briefs of evidence referred by the ICAC?**
-
- **Have there been any recent changes to the memorandum of understanding?**

No, the memorandum of understanding was last revised in 2011 and signed on 17 May 2011.

- **Could you comment on the current working relationship between the ICAC and the DPP?**

The ICAC has a positive working relationship with the DPP's office. The Deputy Commissioner continues to meet regularly with the head of the DPP's Group 6, which generally deals with ICAC briefs of evidence, and this interaction had led to a substantial reduction in the average time taken for advice to be provided by the DPP on ICAC matters.

- **Are you satisfied with the current timeframes for the preparation of and provision of briefs of evidence to the DPP?**

The ICAC currently aims to have 90% of its briefs of evidence provided to the legal division by investigators within 90 days from the confirmation of the charges to be brought. The performance against this target has improved substantially over the past five years, e.g. 72% was achieved in year ending 30 June 2014 and 81% in the year ending 30 June 2015. Given the complexity of the ICAC's briefs the time frames we aim to achieve are ambitious, and we are generally meeting them.

- **Are you satisfied with the timeliness of the DPP in providing decisions on briefs of evidence referred by the ICAC?**

The ICAC is satisfied with the timeliness of DPP advice on matters that are referred generally to Group 6. Certain large and complex matters, e.g. matters arising from Operations Jasper, Acacia, Cyrus and Cabot, were referred to another area of the DPP and private counsel, and the timelines for those matters have been more protracted, which is not unusual in view of the bulk of the material provided and the complexity of the legal and factual issues involved. There are also two matters that are on hold as they cannot be considered until after a murder trial involving one of the witnesses has been completed.

Leaving aside these matters, as at 30 June 2014, the three matters with the DPP for advice had only been outstanding since February 2014 (2 matters) and May 2014 (1 matter).

APPENDIX 1

INDEPENDENT COMMISSION AGAINST CORRUPTION

ASSESSMENT PANEL CHARTER

1. Role

The **ASSESSMENT PANEL (AP)** is a small group of senior officers whose role is to provide initial direction and advice to the Assessments Section on the handling of all complaints, reports from NSW public authorities pursuant to section 11 and other information, including advising if the matter should be referred to another division of the Commission. The Assessments Section is responsible for the registration and initial assessment of **all** such matters received by the Commission.

The AP also provides ongoing advice in relation to matters retained by the Assessments Section.

2. Objectives

The primary objectives of the AP are to:

- advance the strategic directions of the Commission
- effectively prioritise and select complaints that should be the subject of further enquiry, including investigation and corruption prevention advice, according to the goals and statutory functions of the Commission
- ensure an appropriate course of action is followed in relation to individual matters
- ensure ICAC resources are deployed efficiently
- promote an organisation-wide approach to the management of complaints, section 11 reports and other information received by the Commission which could involve corrupt conduct.

3. Membership

The AP consists of the following positions:

- Commissioner
- Deputy Commissioner
- Executive Director, Corruption Prevention, Education and Research Division
- Executive Director, Legal / Solicitor to the Commission
- Executive Director, Investigation Division
- Manager Assessments (member & convenor – or his/her nominee as convenor)

In circumstances where a member is unable to attend due to their absence or unavoidable work commitments, the officer acting in the position, or an officer at the next most appropriate level as nominated by the member, may attend as their delegate. The officer responsible for the matter reported is expected to be available to provide additional information, where the Assessment Panel requests it.

Note: neither the Commissioner nor the Deputy Commissioner has a delegate in the event s/he is unable to consider the panel papers due to absence on leave or work commitments.

4. Functions

All AP members are to consider each matter reported, and to advise on issues including (but not limited to):

- the classification of each matter, including whether it falls within the ICAC's jurisdiction (see ICAC Classification of Matters - Appendix A)
- the adequacy of the report, including the summary and analysis of the matter
- the adequacy/need for enquiries in relation to each matter, including section 53/54 referral, assessment enquiries, preliminary investigation
- the appropriateness of the recommendation(s) made
- whether the matter should be the subject of corruption prevention analysis and advice
- whether the matter should be referred to another organisation for information
- technical advice that may assist in the assessment of the matter (such as legal advice, or strategies on managing certain enquiries)

- information/advice that should be provided to the complainant/agency
- whether the matter should be noted for consideration as a case study in the Annual Report
- the appropriate level of resourcing that should be provided for dealing with the matter
- other relevant background information (such as information about previous dealings with a particular organisation)

In the case of mere enquiries or matters outside the Commission's jurisdiction,⁷⁵ the Manager Assessments will bring these to the AP's attention only if they are relevant to an investigation being undertaken by the Commission, or in other circumstances where this is considered appropriate.

In discharging its functions, the AP will have regard to such factors as, but not limited to:

- the ICAC's jurisdiction under the ICAC Act 1988
- the potential seriousness of the matter
- competing and/or operational priorities
- ICAC resource allocation and skills required in pursuing the matter (e.g. – in conducting preliminary enquiries)
- the apparent veracity and age of the claims made
- the likely existence of evidence or lines of enquiry to pursue the claims
- the potential for the ICAC to provide prevention advice on systemic issues
- whether the matter can be more appropriately dealt with by another organisation
- whether the matter has been considered and/or dealt with by a suitable organisation and, if so, the conclusions made by that organisation

5. Ethical practices

Members of the AP shall be subject to the Commission's Code of Conduct and Conflicts of Interest policy. Members are to act independently in making assessments or drawing conclusions. In particular, equal consideration shall be given to all functions and responsibilities of the Commission subject to the demands and priorities of the organisation at a particular point in time.

6. Conduct of meetings

The Assessments Section's Support Officer distributes all AP meeting papers on Monday and Tuesday afternoons. Each AP member is to advise the convenor by email whether s/he wishes to meet to discuss any of the reported matters. Meetings will take place on Tuesday and Thursday mornings, subject to operational requirements. If no matters are nominated as requiring discussion, the meeting will not take place. If consensus cannot be achieved at a meeting with respect to a particular matter, it is sufficient if three or more AP members agree on a particular course of action for that decision to prevail.

After the AP have considered the papers and provided advice on the papers, the

⁷⁵, which are not reported to the AP (as opposed to all other matters)

convenor will inform the Assessment Section of the Assessment Panel's advice. The Support Officer will record the AP's decisions and comments in the ICAC's complaints database (see Decision Codes at *Appendix B*). The Support Officer will print off and distribute code sheets for each file. Any clarification required from the issues raised in the meeting, or notification of any data entry errors, should be notified as soon as possible. The Officer responsible for each matter is required to check the AP decision after the meeting.

7. Frequency of reporting

All complaint-related matters received by the ICAC must be reported to the AP at least once. A matter shall be reported to the AP on further occasions where:

- the AP requests a further report on the matter
- significant enquiries are required prior to the AP being able to make a decision on a matter
- significant enquiries have been made by the Assessments Section and the matter requires a final endorsement of the proposed action following those enquiries (including where a section 53/54 referral has been issued)
- there is uncertainty as to the appropriateness of a particular assessment or course of action
- the matter is serious, sensitive or likely to create public interest.

8. Relationship with other groups

The AP shall liaise with other groups and/or areas of the ICAC as required, ensuring that the functions of the AP are met. Groups/areas shall include but not be limited to:

- Strategic Investigation Group
- Prevention Management Group
- Executive Management Group

9. Evaluation of Performance

The Manager Assessments will arrange for the performance of the AP to be evaluated annually. The AP will meet annually once the evaluation process is finalised.

Appendix Three – The Inspector's answers to further questions

This appendix contains answers to further questions which were sent to the Inspector of the ICAC following the public hearing held on 7 August 2015.

5 Question:

The Committee notes that the *Police Integrity Commission and Independent Commission Against Corruption (Inspectors) Act 2013* allowed the two positions of the Inspector of the Police Integrity Commission and the Inspector of the ICAC to be held by the same person. In your view has this increased the effectiveness of the Inspector positions? What other consequences have resulted from this amalgamation?

Answer:

The permitting of the two positions of the Inspector of the Police Integrity Commission and the Inspector of the ICAC to be held by the same person has increased effectiveness of the Inspector position. It has obvious consequences in terms of financial savings in that instead of there being two separate staffed units being made up of the Inspector plus two, one unit of the Inspector plus Principal Legal Advisor and Executive Support Officer has proved sufficient. Uniformity of procedures in terms of the creation and disposition of files, for example, has been achieved.

6 Question:

The Committee notes your comments, made at the public hearing, regarding the possible appointment of an Assistant Inspector of the ICAC. Could you update the Committee on this matter?

Answer:

This matter is still in the hands of the Department of Premier and Cabinet, my last communication with the Premier was on 13 August 2015. It is highly desirable that it be finalised as soon as possible.

7 Question:

The Committee notes your comments on pages 2 and 3 of the report regarding the office of ICAC Inspector being vacant from 1 October 2013 to 9 February 2014. Do you consider that the problems that arose through the lack of an Inspector could have been alleviated by the appointment of an Assistant Inspector?

Answer:

Yes. The functions and powers are personal to the Office of the Inspector and would be personal to an Assistant Inspector. An Assistant Inspector could have embarked upon any necessary inquiries of ICAC or elsewhere, with authority. Another way of looking at it is this: If the Office of this Inspectorate becomes vacant, the business of the Inspectorate can be continued by the Assistant Inspector until a replacement is appointed.

8 Question:

The Committee notes the total expenditure for 2013-14 of \$316,480, within a budget of \$301,000 (page 7).

- What was the reason/were the reasons for the budgetary overrun?
- Could you please provide a breakdown of costs for 2013-14?
- The Committee notes the total expenditure for the previous year was \$425,373. What are the reasons for the significant variation in costs for 2012-13 compared with costs for 2013-14?

Answer:

The following information has been provided by the office of the Chief Financial Officer of the Department of Premier and Cabinet:

a) Comparison of 2013-14 Actual Expenditure to Budget

Expenditure in 2013-14 was \$316,480 compared to a budget of \$446,000. The 2013-14 Annual Report noted a 2013-14 budget amount of \$301,000. This budget amount related to 2014-15 and was incorrectly attributed in the 2013-14 Annual Report.

The Office's savings against budget reflect the efficiencies achieved in the appointment of Mr Levine to both the Inspector of ICAC and PIC roles and the application of a shared services model across the two offices. The budget had not allowed for these changes.

b) Breakdown of 2013-14 Costs

The table below provides a breakdown of costs for 2013-14:

| | |
|---|------------------|
| Salary & Wages (Including Inspector's retainer) | \$189,101 |
| Inspector's Fees .. | \$115,920 |
| Fees for Services Rendered | \$6,838 |
| Office Supplies | \$3,274 |
| Other Operating Expenses | \$1,347 |
| TOTAL EXPENSES | \$316,480 |

9 Question:

The Committee notes that liaison between the ICAC and the Inspector is conducted in accordance with an MOU and that 'the purpose of the MOU is to ensure that communications between the Inspector's office and the ICAC are conducted at an appropriate level' (page 7).

- Could you please expand on what 'conducted at an appropriate level' means?
- It is noted the MOU was in the process of minor revision at the time the 2013-14 report was written. Could you please provide the MOU and the details of the minor revisions?
- Do you have any comment on the effectiveness of the liaison and working relationship between the ICAC and the Inspectorate? In your view, are there areas for improvement?

Answer:

Communication "at an appropriate level" means the Inspector communicates with the Commissioner initially on a matter and vice versa, the Principal Legal Advisor of the Inspectorate might communicate with the Deputy Commissioner or an Assistant Commissioner or indeed with the lawyer to ICAC. Whilst a matter might be initiated as between the Inspector and the Commissioner or vice versa its further conduct can

satisfactorily be dealt with for example as between Principal Legal Advisor of the Inspectorate and the legal personnel of the ICAC.

A copy of the MOU is provided on a **confidential** basis. The minor revisions were matters of grammar, office addresses, there no longer being a requirement for meetings as between the Inspector and Commission at fixed periods but rather when required. As at the time of answering these questions no such meetings have been found to be necessary. Save for the matter dealt with in 6 below liaison and the working relationship has been effective. This may be exemplified further in the Annual Report for the reporting year concluded 30 June 2015.

10 Question:

The Committee notes your comments in relation to the *Telecommunications (Interception and Access) Act 1979* (TIA Act) on pages 9 and 10 of the report and made at the recent public hearing. In your recent special report furnished to the NSW Parliament on 18 June 2015, and arising out of the Independent Panel Review of the Jurisdiction of ICAC, you stated (page 13) that litigation may be needed to resolve the issues around the TIA Act. Could you please expand on this point?

Answer:

In relation to the *Telecommunications (Interception and Access) Act 1979* (TIA Act) Counsel's advice is being sought. It is difficult to expand upon that fact: if Counsel advises that the position of ICAC is correct, there is no present point in challenging it. If their advice is to the contrary, then a decision will have to be made as to whether any litigation in relation to a particular inquiry that may have been conducted by ICAC should be initiated and probably concluded in the High Court with the intervention of at least Western Australia, South Victoria and Queensland, their Inspectors or cognate office holders having the same problem to which I have averted in the reports etc referred to in the question.

COPY

**MEMORANDUM OF UNDERSTANDING
BETWEEN
THE INDEPENDENT COMMISSION AGAINST CORRUPTION
AND
THE INSPECTOR OF THE
INDEPENDENT COMMISSION AGAINST CORRUPTION**

This Memorandum of Understanding ("MOU") is made on this day the 29th of MAY 2015 between the Independent Commission Against Corruption ("the Commission") and the Inspector of the Independent Commission Against Corruption ("the Inspector").

1. BACKGROUND

- 1.1 The Inspector's role was created by the provision of the *Independent Commission Against Corruption (Amendment) Act 2005* which inserted Part 5A into the *Independent Commission Against Corruption Act 1988* ("the ICAC Act"). The relevant provisions commenced operation on 1 July 2005.
- 1.2 The principal functions of the Inspector are set out in section 57B of the ICAC Act provide as follows;
 1. *The principal functions of the Inspector are:*
 - a) *To audit the operations of the Commission for the purpose of monitoring Compliance with the law of the State, and*
 - b) *To deal with (by reports and recommendations) complaints of abuse of power, impropriety and other forms of misconduct on the part of the Commission or officers of the Commission, and*
 - c) *To deal with (by reports and recommendations) conduct amounting to maladministration (including, without limitation, delay in the conduct of investigations and unreasonable invasions of privacy) by the Commission or officers of the Commission, and*
 - d) *To assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*
 2. *The functions of the Inspector may be exercised on the Inspector's own initiative, at the request of the Minister, in response to a complaint made to the Inspector or in response to a reference by the Joint Committee or any public authority or public official.*
 3. *The Inspector is not subject to the Commission in any respect.*
 4. *For the purposes of this section, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is:*

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION
THE INSPECTOR'S ANSWERS TO FURTHER QUESTIONS

- a) *contrary to law, or*
- b) *unreasonable, unjust, oppressive or improperly discriminatory, or*
- c) *based wholly or partly on improper motives.*

1.3 Section 57C of the ICAC Act sets out the powers of the Inspector and provides as follows;

The Inspector:

- a) *may investigate any aspect of the Commission's operations or any conduct of officers of the Commission, and*
- b) *is entitled to full access to the records of the Commission and to take or have copies made of any of them, and*
- c) *may require officers of the Commission to supply information or produce documents or other things about any matter, or any class or kind of matters, relating to the Commission's operations or any conduct of officers of the Commission, and*
- d) *may require officers of the Commission to attend before the Inspector to answer questions or produce documents or other things relating to the Commission's operations or any conduct of officers of the Commission, and*
- e) *may investigate and assess complaints about the Commission or officers of the Commission, and*
- f) *may refer matters relating to the Commission or officers of the Commission to other public authorities or public officials for consideration or action, and*
- g) *may recommend disciplinary action or criminal prosecution against officers of the Commission.*

2. PURPOSE

- 2.1 To set out arrangements for liaison between the Commission and the Inspector concerning referral of matters, exchange of information and points of contact between both agencies.

3. INTENT

- 3.1 The Commission undertakes to co-operate fully and frankly with the Inspector and his staff in order to assist the discharge of the Inspector's functions under the ICAC Act.

4. LIAISON

- 4.1 The primary point of liaison will be between the Inspector and the Commissioner or their respective nominated delegates.

- 4.2 The Inspector and the Commissioner agree to meet periodically, to discuss relevant issues and raise any matters touching on the Inspector's functions and the conduct of the Commission. Both the Inspector and the Commissioner will keep their own short notes of these meetings.
- 4.3 If the Inspector or his staff need information or material or to inquire of the Commission regarding a complaint or other matter touching on the conduct of the Commissioner, this will be referred to the Deputy Commissioner in the first instance. In the absence of the Deputy Commissioner, such inquiry will be directed to the Solicitor for the Commission.
- 4.4 For any other matters arising from the Inspector's functions, general inquiries, or requests for information and material etc, liaison shall occur between the Inspector's staff and the Deputy Commissioner in the absence of the Deputy Commissioner, such inquiry will be directed by the Inspector's staff to the Solicitor for the Commission.
- 4.5 Where the Inspector and/or his staff wish to interview any of the Executive Directors of the Commission in connection with a complaint, the Commissioner will be notified wherever possible.
- 4.6 Where the Inspector and/or his staff wish to interview any staff of the Commission in connection with a complaint, the Deputy Commissioner will be advised wherever possible.
- 4.7 The Commission acknowledges however, there may be occasions where the Inspector and his duly authorized staff may need to act unilaterally without prior notification as outlined in paragraphs 4.5 and 4.6.
- 4.8 Written correspondence from the Commission to the Inspector will be addressed to the Inspector and marked "Private and Confidential" c/-;

Office of the Inspector of the Independent Commission Against
Corruption
GPO Box 5341
SYDNEY NSW 2001

Or by email to oiicac_executive@oiicac.nsw.gov.au
Or such other address as the Inspector may advise.

5. NOTIFICATION OF COMPLAINTS OF MISCONDUCT BY THE COMMISSION TO THE INSPECTOR


- 5.1 The Commission will notify the Inspector of matters which come to its attention which involves conduct of an officer of the Commission that comes within the principal functions of the Inspector.

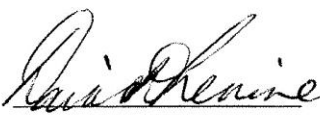
COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION
THE INSPECTOR'S ANSWERS TO FURTHER QUESTIONS

- 5.2 Unless urgent and requiring immediate attention, in which case oral communication will be provided to the Inspector as soon as possible to be subsequently confirmed in writing, all such matters will be communicated to the Inspector by way of written notification.
- 5.3 Notification of matters referred to in paragraph 5.1 will also be reported by way of schedule to be provided at the meeting between the Inspector and the Commissioner as referred to in paragraph 4.2. The schedule will briefly set out the relevant information as available and known to the Commission including any action of the Commission itself has taken to deal with the complaint.
- 5.4 The Commission will make information concerning the Inspector's role and function publicly available to complainants. This includes:
- a) having appropriate information about the Inspector and links to the Inspector's website on the ICAC webpage;
 - b) where determination is made not to investigate a complaint, further advise the complainants of the basis upon which they may be able to pursue a complaint with the Inspector and provide the Inspector's contact details.
- 5.5 Furthermore, where requested, Commission officers will provide any persons with the contact details for the Inspector as per the address details in paragraph 4.8 and/or the Office of the Inspector's general telephone number of (02) 9228 5260.

6. REVIEW

- 6.1 This MOU may be reviewed at any stage the request of either party but in any event shall be reviewed no later than 24 months from the date of the MOU.


The Hon. Megan Latham
Commissioner of the ICAC
29/5/15


The Hon. David Levine AO RFD QC
Inspector of the ICAC
29/5/15

Appendix Four – Extracts from Minutes

MINUTES OF MEETING No 2

Wednesday 24 June 2015
Room 1043, Parliament House

Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

Officers in Attendance

Catherine Watson, Bjarne Nordin, Elspeth Dyer, Jacqueline Isles.

The Chair opened the meeting at 1:15 PM.

1. Apologies

Mr Humphries.

2. Confirmation of Minutes

Resolved, on the motion of Revd Nile: That the draft minutes of the meeting of 3 June 2015 be confirmed.

3. ***

4. ***

5. ***

6. Annual Reports

The Chair raised the Committee's review of the 2013-14 and 2014-15 Annual Reports of the ICAC and the 2013-14 and 2014-15 Annual Reports of the Inspector of the ICAC.

Discussion ensued.

Resolved, on the motion of Mr Khan that the Chair writes to the Commissioner of the ICAC and the Inspector of the ICAC requesting their appearance before the Committee in relation to the 2013-14 Annual Reports at dates to be determined.

7. Meeting with the ICAC and Inspector of the ICAC

The Chair raised the possibility of a meeting with the officers of the ICAC and officers of the Inspector of the ICAC to discuss their functions.

Discussion ensued.

The Committee agreed that the meeting could take place as part of the review by the Committee of the 2013-14 Annual Reports of the ICAC and the ICAC Inspector.

8. ***

9. Next Meeting

The Committee adjourned at 1:46 PM until a date and time to be determined.

MINUTES OF MEETING No 3

9:50am, Friday 7 August 2015

Jubilee Room, Parliament House

Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

Officers in Attendance

Catherine Watson, Bjarne Nordin, Elspeth Dyer, Jenny Whight, Jacqueline Isles

1. Apologies

Mr Humphries

2. Deliberative meeting

2.1 Confirmation of minutes

Resolved, on the motion of Mr Marshall:

That the draft minutes of the meeting of 24 June 2015 be confirmed.

2.2 ***

2.3 Review of the 2013-14 Annual Reports of the ICAC and Inspector of the ICAC

i. Public hearing

Resolved, on the motion of Mr Marshall:

That the Committee take evidence from the Inspector of the ICAC; the Commissioner of the ICAC; representative/s of the Office of the Inspector of the ICAC; and representatives of the ICAC at a public hearing on 7 August 2015.

Resolved, on the motion of Mr Marshall:

That the Committee permit the audio-visual recording, photography and broadcasting of the public hearing on 7 August 2015.

Resolved, on the motion of Mr Marshall:

That the Chair send questions on notice to witnesses following the public hearing on 7 August 2015, as required.

Resolved, on the motion of Ms Voltz:

That the Committee secretariat publish the transcript of evidence taken at the hearing on 7 August 2015, after making corrections for recording inaccuracy, together with any questions taken on notice, on the Committee's webpage.

ii. Inquiry timeline

Resolved, on the motion of Mr Khan:

That the Committee reserve judgment on timelines for the completion of its Review of the 2013-14 Annual Reports of the ICAC and Inspector of the ICAC until it has the opportunity to review the Independent Panel (Gleeson/McClintock) Report on the Jurisdiction of the ICAC.

2.4 ***

2.5 ***

3. Public hearing – Review of the 2013-14 Annual Reports of the ICAC and Inspector of the ICAC

At 10:15am, the Chair declared the public hearing open and witnesses and the public were admitted.

Office of the Inspector of the Independent Commission Against Corruption

The Honourable David Levine AO RFD QC, Inspector of the ICAC, was affirmed and examined.
Ms Susan Raice, Principal Legal Advisor, was sworn and examined.

Evidence concluded, the witnesses withdrew.

Independent Commission Against Corruption

The Honourable Megan Latham, Commissioner, was affirmed and examined.
Ms Sharon Loder, Executive Director, Investigation Division, was affirmed and examined.
Dr Robert Waldersee, Executive Director, Corruption Prevention Division, was affirmed and examined.
Ms Theresa Hamilton, Deputy Commissioner, was sworn and examined.
Mr Roy Waldon, Solicitor to the Commission and Executive Director, Legal Division, was sworn and examined.
Mr Andrew Koureas, Executive Director, Corporate Services Division, was sworn and examined.

The Commissioner made an opening statement.

Evidence concluded, the witnesses and the public withdrew.

4. Next meeting

The Committee adjourned at 1:22PM until a date and time to be determined.

MINUTES OF MEETING No 4

9:01am, Wednesday 26 August 2015
Room 1136, Parliament House

Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Humphries, Mr Khan, Revd Nile, Ms Smith, Mr Taylor, Ms Voltz.

Officers in Attendance

Helen Minnican, Bjarne Nordin, Dora Oravec, Elspeth Dyer, Jenny Whight, Christopher Herbert

1. Apologies

Ms Mihailuk, Mr Patterson

2. Confirmation of minutes

Resolved, on the motion of Mr Khan, seconded Mr Humphries:
That the draft minutes of the meeting of 7 August 2015 be confirmed.

3. ***

4. ***

5. Review of the 2013-14 Annual Reports of the ICAC and Inspector of the ICAC

5.1 Correspondence

The Committee noted the following item of correspondence received:

- 21 August 2015 – letter from ICAC Commissioner regarding the public hearing held on 7 August 2015.

Discussion ensued.

Resolved, on the motion of Mr Khan, seconded Ms Voltz:

- (a) That the Chair write to the Commissioner in response to her letter of 21 August 2015, regarding the public hearing on 7 August:
 - i) That the limitations on the Committee's jurisdiction have been a contested area at certain times in the long-standing relationship between the Committee and the Commission;
 - ii) That the Committee will be seeking advice from the Crown Solicitor on the scope and ambit of the jurisdictional limitations specified in s.64(2) of the ICAC Act;
 - iii) That the Committee proposes further consideration be given to strengthening the checks and balances that currently exist under the accountability framework provided for the Commission in the ICAC Act, e.g. by expanding the functions of the ICAC Inspector and increasing the resources available to the Inspectorate;
 - iv) Meetings be organised with the Commissioner and Inspector to discuss in private the further development of the accountability mechanisms under the ICAC Act with the Commissioner and Inspector, initially in private.
- (b) That the Chair write to the Inspector of the ICAC in similar terms;
- (c) That the Chair write to the Premier indicating the Committee is seeking advice from the Crown Solicitor on the ambit and scope of s.64(2) of the ICAC Act, and providing a copy of the correspondence with the Commissioner and Inspector, for information;
- (d) That advice be sought from the Crown Solicitor on the ambit and scope of s.64(2) of the ICAC Act (being a request for legal advice made by the Clerk in accordance with Assembly practice).

5.2 Timeline

The Committee noted the suggested timeline for completion of the Committee's review of the 2013-14 annual reports of the ICAC and Inspector of the ICAC. Committee staff agreed to notify the Chair if they considered the timeline required further amendment.

6. ***

7. Next Meeting

The Committee adjourned at 9.59am until a date and time to be determined.

MINUTES OF MEETING No 5

12:03pm, Tuesday 8 September 2015
Room 1254, Parliament House

Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Humphries, Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

Officers in Attendance

Helen Minnican, Bjarne Nordin, Dora Oravec, Elspeth Dyer, Jenny Whight, Jacqueline Isles

1. Confirmation of minutes

Resolved, on the motion of Revd Nile, seconded Mr Patterson:

That the draft minutes of the meeting of 26 August 2015 be confirmed.

2. Correspondence

The Committee noted the following item of correspondence received:

- ICAC Commissioner, dated 28 August 2015, in response to the Committee's letter of 26 August, regarding the Committee's jurisdiction under the ICAC Act

The Committee noted the following items of correspondence sent:

- ICAC Commissioner, dated 26 August 2015, regarding the Committee's jurisdiction under the ICAC Act and the Committee's decision to seek advice from the Crown Solicitor
- ICAC Inspector, dated 26 August 2015, advising that the Committee has resolved to seek advice from the Crown Solicitor on its jurisdiction under the ICAC Act
- The Premier, dated 26 August 2015, advising that the Committee has resolved to seek advice from the Crown Solicitor on its jurisdiction under the ICAC Act

Discussion ensued.

Ms Voltz objected to the terms of the Chair's letter to the ICAC Commissioner, dated 26 August 2015, as she considered it did not reflect the motion adopted by the Committee at its meeting held on 26 August 2015.

3. Advice from Crown Solicitor

Committee staff distributed copies of the advice from the Crown Solicitor. The Acting Deputy Clerk spoke on the summary of the Crown Solicitor's advice, previously circulated. Discussion ensued.

Resolved, on the motion of Revd Nile, seconded Mr Patterson:

That the Committee seek the permission of the Clerk for Members to retain a copy of the Crown Solicitor's advice on a confidential basis, on the condition that it not be published, and for the advice to be returned to the Clerk after the Committee's next deliberative meeting. The Committee further noted that any Member could view the advice in the Deputy Clerk's office.

4. Follow-up to correspondence from ICAC Commissioner

The Committee agreed to discuss options for follow-up at the next meeting, after Members have had an opportunity to consider the Crown Solicitor's advice.

5. Next Meeting

The Committee adjourned at 12.37pm until a date and time to be determined.

MINUTES OF MEETING No 6

12.03pm, Tuesday 15 September 2015

Room 1254, Parliament House

Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Humphries, Mr Khan, Revd Nile, Mr Patterson, Mr Taylor, Ms Voltz.

Apologies

Mr Hoenig, Ms Mihailuk, Ms Smith

Officers in Attendance

Ronda Miller, Catherine Watson, Bjarne Nordin, Dora Oravecz, Jenny Whight

1. Confirmation of minutes

Resolved, on the motion of Mr Khan, seconded Mr Patterson: That the draft minutes of the meeting of 8 September 2015 be confirmed.

2. Advice from Crown Solicitor

The Clerk spoke to the arrangements for members to read the Crown Solicitor's advice. Discussion ensued.

3. Interim report on Committee's oversight powers

The Chair spoke to the proposed resolution, previously circulated, that the Committee recommends that s64 of the ICAC Act be amended to add a provision to the following effect: "That the provisions of s64(2) do not apply to the Committee in circumstances where the Commission has reported to the Parliament or elected not to proceed with an investigation".

The Chair proposed that the Committee issues an interim report to the Parliament addressing the extent of the Committee's oversight powers.

Discussion ensued.

Resolved, on the motion of Revd Nile, seconded Mr Patterson:

That the Committee defers consideration of the proposed resolution until the Committee's next meeting.

Discussion ensued.

Resolved, on the motion of Mr Khan, seconded Mr Humphries:

That an interim report be drafted addressing the extent of the Committee's oversight powers, incorporating the proposed resolution as a recommendation.

The Committee agreed to meet in October to consider the Chair's draft of the interim report.

4. Next Meeting

The Committee adjourned at 12.27pm until a date and time to be determined.

MINUTES OF MEETING No 7

1.04pm, Wednesday 21 October 2015

Room 1254, Parliament House

Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Humphries, Mr Khan, Ms Mihailuk, Revd Nile, Ms Smith, Mr Taylor, Ms Voltz.

Apologies

Mr Patterson

Officers in Attendance

Bjarne Nordin, Dora Oravec, Elspeth Dyer, Jenny Whight

1. Confirmation of minutes

Resolved, on the motion of Mr Marshall, seconded Mr Taylor:

That the draft minutes of the meeting of 15 September 2015 be confirmed.

2. ***

3. ***

4. ***

5. Next meeting

The Committee adjourned at 1.44pm until a date and time to be determined.

MINUTES OF MEETING No 8

9:30am, Thursday 11 February 2016

Macquarie Room, Parliament House

Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Khan, Ms Mihailuk, Revd Nile, Ms Smith, Mr Patterson, Mr Taylor, Ms Voltz.

Officers in Attendance

Catherine Watson, Bjarne Nordin, Elspeth Dyer, Jenny Whight, Tanja Zech

1. Apologies

The Committee noted an apology from Mr Humphries.

2. Confirmation of minutes

Resolved, on the motion of Mr Khan, seconded by Mr Patterson:

That the draft minutes of meeting no 7, held on 21 October 2015, be confirmed.

3. ***

4. ***

5. Review of the annual reports of the ICAC and Inspector of the ICAC

5.1 2013/14 annual reports of the ICAC and ICAC Inspector

The Chair confirmed that the deliberative meeting to consider the Chair's draft report for the review of the 2013-14 annual reports of the ICAC and Inspector will be held on 15 February 2016.

5.2 ***

6. ***

7. ***

8. ***

9. ***

10. ***

11. Next meeting

The Committee adjourned at 12:08pm until 15 February 2016.

MINUTES OF MEETING No 9

2:07 pm, 15 February 2016

Room 1254, Parliament House

Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

Officers in Attendance

Helen Minnican, Catherine Watson, Bjarne Nordin, Elspeth Dyer, Jenny Whight.

1. Apologies

The Committee noted an apology from Mr Humphries.

2. Confirmation of Minutes

Resolved, on the motion of Revd Nile, seconded by Mr Marshall:

That the draft minutes of meeting no 8, held on 11 February 2016, be confirmed.

3. ***

4. Consideration of Chair's draft report on the review of the 2013-14 Annual Reports of the ICAC and Inspector of the ICAC

The Committee considered the Chair's draft report distributed to members by email on 8 February 2016. The Committee also considered proposed amendments to the Chair's draft report, distributed in writing at the meeting by Ms Voltz.

Discussion ensued.

The Committee agreed to meet again on 25 February 2016 to consider the Chair's draft report.

5. ***

6. Next Meeting

The Committee adjourned at 3:07pm until 25 February 2016.

MINUTES OF MEETING No 10

1:02 pm, 23 February 2016
Room 1254, Parliament House

Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Hoenig, Mr Humphries, Mr Khan, Ms Mihailuk, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

Officers in Attendance

Helen Minnican, Bjarne Nordin, Elspeth Dyer, Jenny Whight, Tanja Zech.

1. Confirmation of Minutes

Resolved, on the motion of Mr Khan, seconded by Mr Patterson:
That the draft minutes of meeting no 9, held on 15 February 2016, be confirmed.

2. ***

3. ***

4. ***

5. Next Meeting

The Committee adjourned at 1:48pm until 25 February 2016.

MINUTES OF MEETING No 11

1:09 pm, 25 February 2016
Room 1254, Parliament House

Members Present

Mr Tudehope (Chair), Mr Marshall (Deputy Chair), Mr Humphries, Mr Khan, Revd Nile, Mr Patterson, Ms Smith, Mr Taylor, Ms Voltz.

Officers in Attendance

Bjarne Nordin, Elspeth Dyer, Jenny Whight, Tanja Zech.

1. Apologies

The Committee noted apologies from Mr Hoenig and Ms Mihailuk.

2. Confirmation of Minutes

Resolved, on the motion of Mr Patterson, seconded by Mr Taylor:
That the draft minutes of meeting no 10, held on 23 February 2016, be confirmed.

3. ***

4. ***

5. Consideration of Chair's draft report on the review of the 2013-2014 Annual Reports of the ICAC and the Inspector of the ICAC

The Committee agreed to consider the Chair's draft report distributed to members by email on 24 February 2016 paragraph by paragraph.

Paragraphs 1 to 31 put and agreed to.

Paragraph 32 put.

Ms Voltz moved that the first sentence of paragraph 32 be deleted.

Amendment put and negatived.

Paragraph 32 agreed to.

Paragraphs 33 to 52 put and agreed to.

Paragraph 53 put.

Ms Voltz moved that the first two sentences of paragraphs 53 "The Committee notes that where evidence that cannot be used to prosecute a person in a court of law is provided to the ODPP, this has the potential to delay ODPP advice regarding ICAC briefs of evidence. Time spent reviewing inadmissible evidence could be spent more productively" be deleted; and that the words "In this regard" be deleted from the third sentence of paragraph 53.

Amendment put and agreed to.

Paragraph 53, as amended, agreed to.

Paragraphs 54 to 58 put and agreed to.

Paragraph 59 put.

Ms Voltz moved that paragraph 59 "Advice on the ICAC's website, dated 2 February 2016, stated that the ICAC is awaiting the ODPP's decision on whether proceedings will be taken" be deleted.

Amendment put and agreed to.

Paragraph 59 (circulated as paragraph 60 in the Chair's draft report) put and agreed to.

Paragraph 60 (circulated as paragraph 61 in the Chair's draft report) put.

Ms Voltz moved that paragraph 60 (circulated as paragraph 61 in the Chair's draft report) "Advice on the ICAC's website dated 2 February 2016 stated that the ICAC is still awaiting the ODPP's decision on whether proceedings will be taken" be deleted.

Amendment put and agreed to.

Paragraphs 60 to 63 (circulated as paragraphs 62 to 65 in the Chair's draft report) put and agreed to.

Paragraphs 64 and 65 (circulated as paragraphs 66 and 67 in the Chair's draft report) put.

Ms Voltz moved that paragraphs 64 and 65 (circulated as paragraphs 66 and 67 in the Chair's draft report) "However, in the Committee's view, there may be potential for the ICAC to focus more on the admissibility of the evidence used to make corrupt conduct findings to further reduce delay. As noted above, where inadmissible evidence is provided to the ODPP, it has the potential to delay ODPP advice on ICAC briefs of evidence. If there were more focus on this issue at the outset, delay could be minimised. The ICAC has experienced investigators and legal staff who are amply qualified to make determinations about the admissibility of evidence. It would be helpful if, in making corrupt conduct findings in its reports, the ICAC was required to specify whether, in its opinion, the finding is made on the basis of admissible evidence capable of supporting a criminal conviction or on inadmissible evidence. The Committee makes the following recommendation" be deleted.

Amendment put and agreed to.

The recommendation circulated as recommendation 1 in the Chair's draft report put.

Ms Voltz moved that the recommendation circulated as recommendation 1 in the Chair's draft report "That in making a corrupt conduct finding, the ICAC be required to state whether, in its opinion, that finding is made on the basis of admissible evidence capable of supporting a criminal conviction, or on the basis of inadmissible evidence" be deleted.

Amendment put and agreed to.

The Committee also agreed to consider the matters raised by paragraphs 64 and 65 (circulated as paragraphs 66 and 67 of the Chair's draft report), and the recommendation circulated as recommendation 1 in the Chair's draft report at a later date, when further evidence is available.

Paragraphs 64 to 66 (circulated as paragraphs 68 to 70 in the Chair's draft report) put and agreed to.

Paragraph 67 (circulated as paragraph 71 in the Chair's draft report) put.

Ms Voltz moved that paragraph 67 (circulated as paragraph 71 in the Chair's draft report) be amended by deleting the words "on 17 February 2016" and inserting instead the words "at the time of printing".

Amendment put and agreed to.

Mr Khan moved that a foot note be inserted after the words "at the time of printing" in paragraph 67, as amended, and that the text of the footnote read "17 February 2016".

Amendment put and agreed to.

Paragraph 67 (circulated as paragraph 71 in the Chair's draft report), as amended, agreed to.

Paragraphs 68 to 75 (circulated as paragraphs 72 to 79 in the Chair's draft report) put and agreed to.

Recommendation 1 (circulated as recommendation 2 in the Chair's draft report) put and agreed to.

Paragraphs 76 to 101 (circulated as paragraphs 80 to 105 in the Chair's draft report) put and agreed to.

Recommendation 2 (circulated as recommendation 3 in the Chair's draft report) put and agreed to.

Paragraphs 102 to 104 (circulated as paragraphs 106 to 108 in the Chair's draft report) put and agreed to.

Paragraph 105 (circulated as paragraph 109 in the Chair's draft report) put.

Ms Voltz moved that paragraph 105 (circulated as paragraph 109 in the Chair's draft report) "However, the Committee is concerned that while the Inspector met once with ICAC IT staff for training and once with ICAC staff for a 'meet and greet' in the 2013-2014 reporting period, the Inspector did not report any meetings with the Commissioner. The Committee is also concerned that in his most recent annual report for the 2014-2015 reporting period, the Inspector notes that 'there have been no meetings between the Inspector and the Commissioner or any other ICAC executive or senior officer during the reporting period'" be deleted.

Amendment put and agreed to.

Paragraph 105 (circulated as paragraph 110 in the Chair's draft report) put and agreed to.

Paragraph 106 (circulated as paragraph 111 in the Chair's draft report) put.

Ms Voltz moved that the second sentence of paragraph 106 (circulated paragraph 111 in the Chair's draft report) "Given these matters were raised again in the Inspector's 2014-15 annual report, the Committee also intends to raise this issue at its hearings to review the 2014-15 annual reports of the ICAC and the Inspector of the ICAC" be deleted.

Amendment put and agreed to.

Paragraph 106 (circulated in the Chair's draft report as paragraph 111), as amended, agreed to.

Paragraphs 107 to 131 (circulated as paragraphs 112 to 136 in the Chair's draft report) put and agreed to.

Paragraph 132, circulated as paragraph 137 in the Chair's draft report, put.

Ms Voltz moved that the last sentence of paragraph 132 (circulated as paragraph 137 in the Chair's draft report) be deleted.

Amendment put and negatived.

Paragraph 132 (circulated as paragraph 137 in the Chair's draft report) agreed to.

Paragraph 133 (circulated as paragraph 138 in the Chair's draft report) put.

Ms Voltz moved that the first sentence of paragraph 133 (circulated as paragraph 138 of the Chair's draft report) be deleted.

Amendment put and negatived.

Paragraph 133 (circulated as paragraph 138 in the Chair's draft report) agreed to.

Paragraph 134 (circulated as paragraph 139 in the Chair's draft report) put and agreed to.

Paragraph 135 (circulated as paragraph 140 in the Chair's draft report) put.

Ms Voltz moved that the words "and it can sometimes be helpful, and it is entirely proper, to refer to a specific matter to do so. A narrow interpretation of section 64(2) of the ICAC Act would hamper the work of the Committee just as the activities of the NCA Committee were curtailed" be deleted from paragraph 135 (circulated as paragraph 140 in the Chair's draft report).

Amendment put and negatived.

Paragraph 135 (circulated as paragraph 140 in the Chair's draft report) agreed to.

Paragraph 136 (circulated as paragraph 141 in the Chair's draft report) put.

Ms Voltz moved that the first sentence of paragraph 136 (circulated as paragraph 141 in the Chair's draft report) be deleted and that the words "On 7 August at a public hearing" be inserted at the beginning of the second sentence to that paragraph.

Amendment put and negatived.

Paragraph 136 (circulated as paragraph 141 to the Chair's draft report) agreed to.

Paragraph 137 (circulated as paragraph 142 to the Chair's draft report) put and agreed to.

Paragraphs 138 and 139 (circulated as paragraphs 143 and 144 to the Chair's draft report) put.

Ms Voltz moved that paragraphs 138 and 139 (circulated as paragraphs 143 and 144 in the Chair's draft report) be deleted.

Amendment put and negatived.

Paragraphs 138 and 139 (circulated as paragraphs 143 and 144 in the Chair's draft report) agreed to.

Paragraph 140 (circulated as paragraph 145 in the Chair's draft report) put and agreed to.

Paragraph 141 (circulated as paragraph 146 in the Chair's draft report) put.

Ms Voltz moved that paragraph 141 (circulated as paragraph 146 in the Chair's draft report) be deleted.

Amendment put and negated.

Paragraph 141 (circulated as paragraph 146 in the Chair's draft report) agreed to.

Paragraph 142 (circulated as paragraph 147 in the Chair's draft report) put.

Ms Voltz moved that the final sentence of paragraph 142 (circulated as paragraph 147 in the Chair's draft report) be deleted.

Amendment put and negated.

Paragraph 142 (circulated as paragraph 147 in the Chair's draft report) agreed to.

Paragraph 143 (circulated as paragraph 148 in the Chair's draft report) put.

Ms Voltz moved that paragraph 143 (circulated as paragraph 148 in the Chair's draft report) be deleted.

Amendment put and negated.

Paragraph 143 (circulated as paragraph 148 in the Chair's draft report) agreed to.

Paragraph 144 (circulated as paragraph 149 in the Chair's draft report) put and agreed to.

Paragraph 145 (circulated as paragraph 150 in the Chair's draft report) put.

Ms Voltz moved that paragraph 145 (circulated as paragraph 150 in the Chair's draft report) "The Committee therefore recommends that the ICAC Act be amended to clarify that the Committee may ask questions relating to particular conduct or investigations in undertaking its oversight role, where such questions are for the purposes of monitoring and review, but only in circumstances where the ICAC has reported to Parliament or elected not to proceed with an investigation" be deleted.

Amendment put and agreed to.

Recommendation 3 (circulated as recommendation 4 in the Chair's draft report) put.

Ms Voltz moved that recommendation 3 (circulated as recommendation 4 in the Chair's draft report) "That the NSW Government amend the *Independent Commission Against Corruption Act 1988* to clarify that the Committee may ask questions relating to particular conduct or investigations in undertaking its oversight role, where the questions are for the purpose of monitoring and reviewing the ICAC's performance of its functions, and where the ICAC has reported to Parliament or elected not to proceed with an investigation" be deleted.

Amendment put and agreed to.

Resolved, on the motion of Mr Patterson, seconded by Revd Nile:

- a. That the Committee adopt the draft report as amended and signed by the Chair for presentation to both Houses, and authorise the Secretariat to make appropriate final editing and stylistic changes as required.
- b. That once tabled the report be published on the Committee's webpage.
- c. That the Chair issue a media release announcing the tabling of the Committee's report for dissemination by the Committee Secretariat.

6. ***

7. Next Meeting

The Committee adjourned at 1:28pm until a date and time to be determined.