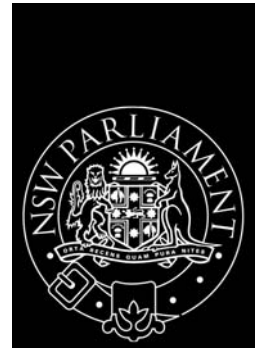


PARLIAMENT OF NEW SOUTH WALES



Committee on the Independent Commission Against Corruption

Proceedings of the 2nd National Conference of Parliamentary
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22-23 February 2006
Parliament House, Sydney

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MEMBERSHIP & STAFF

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	Mr John Mills MP, Member for Wallsend (Chairman of Committees)
	Mr Malcolm Kerr MP, Member for Cronulla
	Mr Paul Pearce MP, Member for Coogee
	Mr John Price MP, Member for Maitland (Deputy Speaker)
	Mr Anthony Roberts, Member for Lane Cove
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TERMS OF REFERENCE

The Committee on the Independent Commission Against Corruption is required under section 64(1)(c) of the Independent Commission Against Corruption Act 1988 to examine each annual and any other report of the Commission and to report to both Houses of Parliament on any matter appearing in, or arising out of, any such report.

64 Functions

- (1) The functions of the Joint Committee are 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,
 - 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.

- (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.

CHAIRMAN'S FOREWORD

The ICAC Committee of the New South Wales Parliament (the Committee on the Independent Commission Against Corruption) was pleased to host the second National Conference of Parliamentary Oversight Committees of Anti Corruption/Crime Bodies on 22 and 23 February 2006.

Following on from the success of the first National Conference in Perth in 2003, this biennial conference has served to continue constructive debate on corruption prevention activities and corruption investigation, not only in Australia but also within the region, and has provided a further opportunity to strategically reflect on the role of Parliamentary oversight committees in the challenge of reducing and eliminating corruption.

This conference sought to locate the work of Parliamentary oversight committees within a national context of corruption prevention initiatives and corruption investigation activities. While oversight committees continue to play an important role in monitoring corruption prevention, close review of the conference proceedings reveals that oversight committees are but one of many layers of the anti-corruption landscape in Australia. It is therefore critical that there is a continuing effort to convene forums of this nature, so as to highlight the wider institutional, legal, political and social environment in which the oversight committees operate.

The conference included an impressive line up of speakers representing the many facets of corruption prevention activities and corruption investigation in Australia. Relevant Parliamentary oversight committees, corruption prevention agencies with their respective commissioners and inspectors, and leading academics in the field were profiled at the conference. Additionally, local government and media representatives took part in the proceedings and added to the broader debate.

Whistleblowing constituted a strong and important focus for the conference. This was appropriate given that in New South Wales the ICAC Committee has commenced a review of the *Protected Disclosures Act 1994 (NSW)*. Indeed, the opening address provided an opportunity to describe the work of the ICAC Committee for this inquiry. Reinforcing the theme of whistleblowing, Mr Chris Wheeler, New South Wales Deputy Ombudsman, spoke about some key issues relevant to the scope of existing legislation in New South Wales. Mr Wheeler highlighted the importance of legislation for the purposes of protecting *all parties* involved in protected disclosures – not only the whistleblowers. In detailing the process of handling protected disclosures and the rules governing agency involvement, the Deputy Ombudsman stressed that legislative requirements need to be supported by proactive management systems and processes that aim to protect all affected parties. In this light, the protected disclosures legislation should be seen as both an opportunity and a mechanism for organisational culture change and continuous management improvement. Dr David Solomon, a later speaker who followed up this theme, discussed existing Australian whistleblowing legislation and its capacity to protect whistleblowers and improve government accountability. Reflecting on recent events in the Queensland health system, Dr Solomon argued for a review of the way whistleblower laws operate to create a more proactive system that enables people to disclose knowledge of serious problems within the public sector while knowing that such disclosures will be treated seriously and acted upon.

The rest of the conference proceedings were divided into discrete blocks of presentations allowing comparisons to be made about the work of other State and Commonwealth bodies and Parliamentary committees with charters to oversight corruption prevention and corruption investigation activities. This included the work of anti-corruption bodies, the impact of media reporting and public education, current research work conducted by academic institutions, as well as papers delivered from the perspectives of local government and from a voluntary group of New South Wales public sector officials dedicated to corruption prevention and education. Individual reports were presented by the Chair and Deputy Chair of the Joint Standing Committee on the National Crime Commission, and the Chair of the New South Wales Legislative Council Privileges Committee. In addition, reports from anti-corruption and anti-crime bodies from New South Wales, Western Australia, Victoria and Queensland provided a state-by-state update on corruption prevention activities and initiatives based on experiences from their own jurisdictions. Corruption prevention is clearly not an activity that rests solely with federal and state governments. Sutherland Shire Council, located in Sydney, also has an internal ombudsman and provided the conference with a description of the anti-corruption framework adopted in a local government environment. A presentation based on an initiative driven by a voluntary group of New South Wales public sector officials called the Corruption Prevention Network detailed information sharing activities dedicated to promoting corruption prevention and education in the public sector. From an academic perspective, Dr AJ Brown gave an overview of the National Integrity System Assessment Project, highlighting the critical role that Australia's Parliamentary oversight committees can play in the nation's integrity systems. Dr Brown's paper raised important and provocative questions about how such committees can most effectively monitor the performance of integrity and anti-corruption bodies, putting forward an argument for a more rigorous and sophisticated performance framework. Dr Rodney Smith presented findings from this project specific to the New South Wales context.

In addition to highlighting critical issues of concern to anti corruption practitioners and observers and a collective sharing of strategies and lessons learned to date, the outcomes of this conference will usefully inform the current review being conducted by the ICAC Committee into the Protected Disclosures Act 1994 (NSW).

The Hon. Kim Yeadon MP
Chairman, ICAC Committee

CATCHING UP ON CORRUPTION: Conference Program



2nd National Conference of Parliamentary Oversight
Committees

of Anti-Corruption/Crime Bodies

22-23 February 2006

Parliament House, Sydney

DAY 1 - Wednesday 22 February 2006

- 8.30 am** **Registration and Coffee**
Theatrette Foyer
- 9.15 am** **Welcome**
Mr Russell Grove
Clerk, Legislative Assembly
- Catching Up on Corruption in New South Wales**
Hon. Kim Yeadon MP, Chairman, Committee on the Independent
Commission Against Corruption
- 10.00 am** **Whistleblowing Legislation in New South Wales**
Mr Chris Wheeler
Deputy Ombudsman
NSW Ombudsman
- 10.30 am** **Morning Tea**
Theatrette Foyer
- 10.50 am** **Committee Updates – Reports from Around the States**
- 12.30 pm** **Lunch**
Jubilee Room
- 1.30 pm** **Dealing with Corruption: The Victorian Experience**
Mr George Brouwer
Victorian Ombudsman and Director, Police Integrity
- 2.00 pm** **Parliamentary Committees and the Fabric of Accountability**
Mr Duncan Kerr SC MP
Deputy Chair
Joint Standing Committee on the Australian Crime Commission,

Parliament of Australia

- 2.30 pm** **Search Warrants**
The Hon Peter Primrose MLC
Chair, Legislative Council Privileges Committee
Parliament of New South Wales
- 3.00 pm** ***Afternoon Tea***
Theatrette Foyer
- 3.20 pm** **Corruption and the Media - Political Journalists, 'leaks' and
Freedom of Information**
Ms Helen Ester
Senior Lecturer, Central Queensland University
PhD candidate, Politics and Public Policy, Griffith University
- 3.50 pm** **Corruption Prevention and Local Government**
Ms Sue Bullock
Internal Ombudsman
Sutherland Shire Council
- 4.20 pm** **Catching Up on the Network**
Mr Chris Ballantine
Chairperson, Corruption Prevention Network
- 4.50 pm** **Close – Day 1**

CATCHING UP ON CORRUPTION

2nd National Conference of Parliamentary Oversight
Committees
of Anti-Corruption/Crime Bodies
22-23 February 2006
Parliament House, Sydney



PROGRAM: DAY 2 - Thursday 23 February 2006

- 9.00 am **Late Registration and Coffee**
Theatrette Foyer
- 9.30 am **Anti-corruption/Crime Bodies**
The Hon Jerrold Cripps QC Commissioner
Independent Commission Against Corruption, New South Wales
Mr Robert Needham, Chairperson and CEO, Crime and
Misconduct Commission, Queensland
Mr Mike Silverstone, Executive Director, Corruption and Crime
Commission, Western Australia
- 11.00 am **Morning Tea**
Theatrette Foyer
- 11.20 am **Inspectors of Anti-Corruption/Crime Agencies**
The Hon James Wood QC
Inspector, NSW Police Integrity Commission
Mr Graham Kelly
Inspector, Office of the Inspector, Independent Commission
Against Corruption
- 12.30 pm **Lunch**
Theatrette Foyer
- 1.30 pm **The ICAC Investigative Process**
Mr Clive Small, Executive Director Strategic Operations
Division
Independent Commission Against Corruption
- 2.00 pm **Whistling While They Work: Clearing the Logjams in
Australian Whistleblower Protection Laws**
Dr AJ Brown
Senior Lecturer, Griffith Law School
Senior Research Fellow, Socio-Legal Research Centre
Visiting Fellow, ANU Faculty of Law

- 2.30 pm **Government, Whistleblowers and the Media**
Dr David Solomon
Adjunct Professor
School of Political Science and International Studies
University of Queensland
- 3.00 pm **Afternoon Tea**
Theatrette Foyer
- 3.20 pm **The Place of Oversight Committees in Integrity Systems:
Some Evidence from NSW**
Dr Rodney Smith
Senior Lecturer, Government and International Relations,
University of Sydney
- 3.50 pm **Towards a Performance Measurement Framework for
Integrity Agencies:
Lessons from the National Integrity System Assessment**
Dr AJ Brown
Senior Lecturer, Griffith Law School & Socio-Legal Research
Centre, Griffith University
- 4.20 pm **Closing Address**
- 4.30 pm **Conference Close**

Welcome to Conference Delegates

Mr Russell Grove
Clerk of the Legislative Assembly

Good morning. I am the Clerk of the Legislative Assembly, a role I have held since September 1990. It is my very pleasant task to welcome new faces and old friends to Parliament House and to Sydney, for this national conference.

The New South Wales legislature is the oldest Parliament in Australia. In fact, we are celebrating our sesquicentenary this year—1856 to 2006.

Parliament House itself is an amalgam of the old and the new.

We have, incorporated within the modern Parliament House, building structures dating back to the early part of the 19th century. The building in which you are now located is a composite of architectures stretching over the better part of two centuries.

I would encourage you to take the time, if, of course, time allows in the conference schedule, to walk around the foyer area and other public areas to view the artworks, architecture and design features, as well as the heritage items on display, which include such memorabilia as the scissors used to cut the Sydney Harbour Bridge ribbon for the opening ceremony, and which were more recently used to cut the opening ribbon for the Sydney cross-city tunnel. As well, in the Jubilee Room, which was originally the Parliamentary Library but which is now our most ornate meeting space, you can read of the history of Sydney's Parliament House, and of the processes involved in the renovation of the building.

The committee system within the Legislative Assembly is vigorous and very active. Legislative Assembly committees have a major role in examining the functions of agencies involved in corruption investigation and corruption prevention.

These committees include the ICAC Committee, which is the host committee for the conference, as well as the Committee on the Office of the Ombudsman and Police Integrity Commission, which oversees a specific police anti-corruption body, the Police Integrity Commission), and the Public Accounts Committee, which has a role in overseeing the work of the Office of the NSW Auditor General.

The Legislative Assembly provides the secretariats for a large number of standing and statutory committees, as well as, from time to time, select committees established to look at particular issues.

An important part of committee work involves the forming of good working relationships with the government agencies that give effect to government policies and programs. This is no where more critical, I think, than in the area of corruption and misconduct by public officials.

One important role of the committees such as the ICAC Committee is sponsoring and hosting of conferences such as this, where Members of Parliament, corruption investigators, those involved in corruption prevention, researchers, and the media, can freely interact and discuss the important issues involved in minimising or, ideally, preventing misconduct and fraud.

I am delighted to welcome you, on behalf of the Speaker, the Hon. John Aquilina MP, and the Deputy Speaker, the Hon. John Price MP, to Parliament House. I hope that, for those of you who are visitors, you find your stay in Sydney enjoyable, and I hope that all will find the conference presentations of interest, and perhaps a little provocative.

Catching Up on Corruption in New South Wales

Hon. Kim Yeadon, MP

Chairman, Committee on the Independent Commission Against Corruption

Good morning everybody. On behalf of my colleagues on the Joint Committee on the Independent Commission Against Corruption (the ICAC Committee), and the Members of the New South Wales Parliament generally, I would like to add my warm welcome to each and every one of you attending the second national conference of Parliamentary oversight committees of corruption and crime agencies.

The first conference was held in Perth just over two years ago, where our host was the Western Australian Parliamentary Committee on the Crime and Corruption Commission. It was an excellent conference, and I can only hope that the presentations at this conference today and tomorrow will match those given in Perth. In fact, there is a link back to the Perth conference in the presentation later today from the Privileges Committee of the New South Wales Legislative Council.

By way of background, the Legislative Council's Privileges Committee has a similar role to those in other jurisdictions, in its oversight of the ethical behaviour of Members and in the protection of the privileges of the House. This role overlaps with corruption agencies oversight committees when there is an apparent conflict between the actions of these agencies and the privileges of the House.

The Chair of the Privileges Committee, the Honourable Peter Primrose, who is also the Vice-Chairman of the ICAC Committee, will speak this afternoon about the current work of the Privileges Committee in developing a protocol concerning the searching of Members' offices by investigatory bodies. It follows a case where a Member of the Legislative Council had material from his office seized in pursuance of a search warrant by the Independent Commission Against Corruption. This arose from a major disagreement between the Legislative Council and the Independent Commission Against Corruption over how to determine what is privileged material. The case has resulted in two completed inquiries by the Privileges Committee in the last two years and is now the impetus for its current inquiry to develop a protocol for such searches.

The connection that I mentioned with regard to the Perth conference in late 2003 is that the search warrant in question was already signed when the then ICAC Commissioner, Irene Moss, and the subject of the warrant, the Hon Peter Breen, both attended the conference as delegates, and in fact, flew back to Sydney together on the same flight. Little did I know then that the matters subsequent to the search warrant would be discussed in a major paper that will be presented later today by my colleague the Hon. Peter Primrose.

The conference today and tomorrow will also address a number of particular themes beyond the sharing of our respective Parliamentary Committee experiences. A major focus of the

conference addresses the theme of whistleblowing or protected disclosures, but other themes include:

- Research into integrity systems;
- The role of an internal ombudsman in local councils;
- The role of the media in the identification and prevention of corruption; and
- Networking among anti-corruption workers.

I have no doubt that this conference will provoke discussion and comment, as well as being an opportunity for us to update ourselves about the work of the various Committees across Australia and beyond.

I would like at this point to extend a warm welcome to the representatives from the Malaysian Integrity Institute, who are attending the conference.

As well, I would like to register the apologies from corruption prevention and investigation bodies in Indonesia, Mauritius and Hong Kong. I will ensure that the proceedings of this conference, which will be collated and released as a report of the ICAC Committee, are passed on to those bodies in our wider region, and I hope that representatives of those bodies will be able to participate in the next national conference of Parliamentary oversight committees of corruption and crime agencies.

I would like now to take the opportunity to indicate some important changes that have occurred in New South Wales regarding corruption prevention and investigation. I note that the remainder of my speech today covers essentially the same subjects that I canvassed in a presentation to the Corruption Prevention Network's 2005 annual conference.

The New South Wales Independent Commission Against Corruption Act 1988 has been amended by the Independent Commission Against Corruption Amendment Act 2005. Until this amending legislation, the Independent Commission Against Corruption Act had, in its primary statutory functions and mechanisms, operated in much the same way for seventeen years.

A significant reform resulting from the amending legislation is the establishment of the Office of the Inspector of the Independent Commission Against Corruption. Nonetheless, the changes made by the Independent Commission Against Corruption Amendment Act 2005 make it clear that the New South Wales Government is generally satisfied that the Commission is serving the needs of the public, fulfilling its statutory obligations and meeting the original objectives of the legislation.

The ICAC Committee has also played a significant role in examining and approving the appointment of the current Commissioner, the Hon. Jerrold Cripps QC, and the current, or perhaps I should say the foundation Inspector of the Independent Commission Against Corruption, Mr Graham Kelly.

Background

At its meeting on Wednesday 10 March 2004, the ICAC Committee resolved to write to the then Premier recommending that the Independent Commission Against Corruption Act 1988 be made the subject of an independent judicial review. That review would conveniently coincide with the completion, in November 2004, of the term of then Commissioner Moss.

The purpose of the review would be to carry out a full independent examination of the provisions of the Independent Commission Against Corruption Act 1988, from the point of view of clarity, fairness and consistency with legal principles. In addition, the review would determine whether the policy objectives of the Act remained valid and whether the terms of the Act remained appropriate for securing those objectives.

It is now commonplace for a review clause to be placed in New South Wales Acts relating to statutory agencies, typically either as a review after a period of 5 years or for a shorter period as a sunset provision for new legislation. The Independent Commission Against Corruption Act 1988 did not contain such a provision.

The Premier acted on the ICAC Committee's recommendation, and on 23 June 2004 announced the appointment of the Honourable Mr Jerrold Cripps QC, Acting Judge of the Supreme Court, to conduct an independent review the Independent Commission Against Corruption Act 1988.

Terms of reference for the review

The terms of reference for the review were to:

1. Review the Independent Commission Against Corruption Act 1988 to determine whether the terms of the Act remain appropriate for securing its objectives, without departing from the Government's intention to retain the Independent Commission Against Corruption as an independent, stand-alone corruption investigation body to ensure accountability in the public sector;
2. Specifically consider as part of that review of the Independent Commission Against Corruption Act:
 - (a) whether the functions of the Independent Commission Against Corruption remain appropriate;
 - (b) the definition of corrupt conduct, and the capacity of the Independent Commission Against Corruption to make findings of corrupt conduct;
 - (c) the jurisdiction of the Independent Commission Against Corruption, including the application of the Act to public agencies, public officials, local government, government businesses, outsourced government functions and Members of Parliament;
 - (d) whether the Independent Commission Against Corruption's powers are appropriate to meet its objectives;
 - (e) the adequacy of accountability mechanisms for the Independent Commission Against Corruption;
 - (f) and any other matters relating to the operation of the Independent Commission Against Corruption Act.

The Honourable Mr Jerrold Cripps, QC was required to report to the Governor by 29 October 2004.

One immediate point to note is that the terms of reference excluded any consideration of changing the Independent Commission Against Corruption's status as a stand alone corruption investigation body by merging it with bodies such as the Police Integrity Commission or the Ombudsman.

Those of you who are familiar with the Independent Commission Against Corruption Act 1988 might ask why the ICAC Committee chose to recommend an independent judicial review of the Act, rather than a review by the ICAC Committee itself, which had a longer and closer association with the legislation.

The ICAC Committee believed there were a number of cogent reasons for an independent review of the Independent Commission Against Corruption Act 1988, including the considerations that:

- A judicial review separates, or disengages, political and partisan considerations from the review process;
- The Commission has been subject to some major changes in functions since the original enactment (e.g. the transfer of powers to investigate police officers by the Police Integrity Commission Act 1996);
- There have been significant changes in the New South Wales community since 1988, particularly with regard to advances in information and communications technology, the development of e-commerce, and the capacity for transparency and accountability in government activities; and
- The provisions of the Independent Commission Against Corruption Act 1988 have been the subject of unfavourable criticism, on matters of legal principle, by the now Chief Justice of the High Court of Australia and by other senior Members of the judiciary.

Putting the reasons for an independent review in blunter language, it could be said the main one was to prevent claims that change was being driven by the self interest of politicians intent on restricting the operation of the Independent Commission Against Corruption Act 1988. As a committee we were also aware of the comparative lack of success that had attended previous recommendations for change put forward by the ICAC Committee following earlier reviews conducted in 1992, 2000 and 2001.

One fairly stark example to bring home this point relates to the appointment of an Inspector of the Independent Commission Against Corruption. This was a recommendation our committee made in its report of May 2000. The Government's response was that there were already adequate oversight arrangements for the Independent Commission Against Corruption and the recommendation was not acted upon. The appointment of an Inspector is now the centrepiece of the 2005 Amendment Act.

Before I go further into the changes, I need to mention that the statutory review was taken over on 11 November 2004 by Mr Bruce McClintock SC, so as to allow Mr Cripps to be appointed as the fourth Commissioner of the Independent Commission Against Corruption, succeeding Ms Irene Moss. Mr McClintock was given a new deadline and completed his report in accordance with that requirement in January 2005.

Events moved quickly. Legislation to implement the majority of Mr McClintock's recommendations was introduced into Parliament on 23 February 2005, passed through all stages, and received the Governor's assent on 14 April 2005.

It is fair to say that during the course of the review, Mr McClintock and his predecessor, the Hon Jerrold Cripps, provided adequate opportunities for consultation to Members, professional organisations, community groups and individuals.

Objectives of the Independent Commission Against Corruption Act 1988

Mr McClintock's first task had been to identify the objectives of the Independent Commission Against Corruption Act 1988, as there was no specific provision for them in the Act. He said the objectives could be found in the reasons that led to the creation of the Independent Commission Against Corruption. He concluded from an examination of such sources as the Parliamentary debates of 1988 that the objectives of the Act were:

- To establish an independent and accountable body to investigate, expose, and prevent serious corruption involving or affecting public administration;
- To confer on this body special powers to inquire into allegations of corruption; and
- To promote the integrity and accountability of public administration.

These objectives have now been inserted in the Independent Commission Against Corruption Act 1988 as Section 2A.

Mr McClintock also concluded that the Independent Commission Against Corruption's mandate is to investigate only the most significant and serious allegations of corruption. This conclusion was welcomed by commentators and it, too, has been formalised as a statutory function of the Independent Commission Against Corruption in section 12A. It is not clear how many of the Commission's past investigations would fail the significant and serious test. Members of Parliament, past and present, no doubt will have their own views on that.

Definition of corrupt conduct

The definition of corrupt conduct contained in sections 8 and 9 of the Independent Commission Against Corruption Act 1988 has been criticised as being broader than the commonly understood meaning of corruption. In the Court of Appeal's decision in Greiner vs The Independent Commission Against Corruption, the Chief Justice described the definition of corrupt conduct under the Act as:

“... misleading and apt to cause injustice. ... The injustice arises because the Act applies ‘corrupt conduct’ to conduct which, in the ordinary meaning of the term, is not corrupt.”¹

Priestly JA made a similar observation.

¹ Greiner v The Independent Commission Against Corruption (1992) 28 NSWLR 125, Mahoney J, dissenting

Following this case, both the ICAC Committee and the Independent Commission Against Corruption recommended that the definition of corruption be simplified and clarified. The proposal favoured by both bodies was to repeal section 9, which would narrow the scope of findings of corrupt conduct.

In 1994, amendments were made to section 9, but not along the lines recommended by the ICAC Committee.

The amendments made by the 1994 Act expanded the Independent Commission Against Corruption's jurisdiction and placed Members of Parliament and Ministers of the Crown in a similar position to public sector employees. This was achieved by providing that a breach of a code of conduct applicable to them could fall within the jurisdiction of the Commission and result in a finding of corrupt conduct, if a substantial breach of the code were found to have occurred.

In 2001, the ICAC Committee conducted a further review of the Independent Commission Against Corruption's jurisdiction and its appropriateness.² It invited submissions on the definition of corrupt conduct. Organisations representing the legal profession in New South Wales submitted that the definition should be brought into alignment with the Common Law.

In its final submission to the 2001 review, the Independent Commission Against Corruption recognised the concerns expressed about the breadth of the definition of 'corrupt conduct' and acknowledged the importance of the definition being:

“as clear and precise as possible”.

The Independent Commission Against Corruption conceded that after twelve years of application, the current definition of "corrupt conduct" was open to being redefined:

“... in such a way as to adequately cover that which is generally regarded to be corrupt, but [to exclude] that conduct that is not ordinarily thought of in that way.”

It was the Independent Commission Against Corruption's view that:

“as far as possible, the definition should capture only the more serious allegations of wrongdoing that may currently fall within the parameters of 'corrupt conduct'.”

At the conclusion of its review, the ICAC Committee supported the proposal for redefining corrupt conduct as proposed by the Independent Commission Against Corruption and made a recommendation for change along those lines. The Government endorsed this view.

The ICAC Committee continued to favour this amendment. We believed that, with an independent judicial review, and in the face of what you would have to describe as an impressive lobby for change, we would get the support of Mr McClintock for a change to the definition on the grounds that it was too wide and complex.

² ICAC Committee (2001). Review of the Independent Commission against Corruption, Stage II: Jurisdictional Issues. November 2001. Sydney, NSW: Parliament of New South Wales.

We were wrong, however. Although Mr McClintock acknowledged that there were long standing problems with the definition, he recommended against substantial change. He also agreed that whilst the definition of corrupt conduct was broad, general and complex he did not consider it desirable to make substantive changes that would alter the Independent Commission Against Corruption's investigatory jurisdiction. He did not accept the definition was "overly broad" or had been applied unfairly (although of course the Greiner case demonstrated otherwise).

It is of concern to me that his view, reached after a short period of deliberation, is contrary to the past recommendations of the Independent Commission Against Corruption itself, the ICAC Committee, the Law Society of NSW and the NSW Bar Association.

As a consequence of the approach taken by Mr McClintock, the amending legislation did not make any substantial change to the definition of corrupt conduct. That definition remains the critical source of the Independent Commission Against Corruption's authority—the broader it is, the greater is the Commission's jurisdiction to investigate.

Mr McClintock made a telling comment in his report when he said that very few submissions had suggested ways in which the definition might be improved. My own feeling is that the chance to rein in the overly broad and complex definition was an opportunity missed. I say that there was no need for the review to search for the way in which that could be done. After all, that is the responsibility of the Parliamentary Counsel, who has the expertise to draft a workable solution.

Serious and Systemic Corrupt Conduct

As noted earlier, the Independent Commission Against Corruption Amendment Act 2005 introduced a new section 12A relating to serious and systemic corrupt conduct:

"In exercising its functions, the Commission is, as far as practicable, to direct its attention to serious and systemic corrupt conduct and is to take into account the responsibility and role other public authorities and public officials have in the prevention of corrupt conduct."

This new requirement goes some way towards establishing a criterion of materiality in selection of those complaints and allegations of wrongdoing and misconduct that are to be investigated. The materiality criterion means matters need to be of significance, requiring serious consideration.

Matters of a petty nature—allegations of petty theft such as paper, stamps, and ink cartridges, or matters of non-criminal maladministration—should now be referred to either public sector management for investigation and administrative determination and penalty, or to police, or to the audit process, rather than subject to the full force of the Independent Commission Against Corruption's scrutiny.

The Independent Commission Against Corruption Act 1988, section 12A, provides a statutory basis for the Independent Commission Against Corruption's Strategic Plan 2003-2007 description of its role as "targeting serious and systemic corruption and corruption

opportunities in the New South Wales public sector.” I expect that the caseload of the Commission will be reviewed with this strategic role in mind. The operating methods—practices, procedures and policies—of the Commission could also be reviewed, to enable more appropriate referral of matters lacking materiality and criminal offences to police or other agencies.

Adequacy of Accountability Mechanisms

An objectionable feature of the present arrangements under the Independent Commission Against Corruption Act 1988 is that it makes no provision for a merits review of the Independent Commission Against Corruption's findings of corrupt conduct.

The absence of such a mechanism was the subject of critical comment in the Greiner case. In his judgment, Chief Justice Gleeson spoke of the many persons whose position in office would be untenable following a public and official finding of corruption. This was particularly grave as there was no right of appeal or procedure for review of the merits of the Independent Commission Against Corruption's findings.

In its submission to Mr McClintock's review, the ICAC Committee was of the opinion that if the Independent Commission Against Corruption's power to make findings of corrupt conduct was retained, a suitable appeals mechanism should be established.

The approach taken by the ICAC Committee in the course of the 2005 review was that the Independent Commission Against Corruption's powers should be restricted to making findings of fact and recommendations rather than findings of corrupt conduct and recommendations. This would have the advantage of leaving reputations intact if court or disciplinary proceedings did not eventuate.

Following the NSW Court of Appeal's decision in the Greiner case, the ICAC Committee examined a number of key issues and reported on these in May 1993³. The ICAC Committee reaffirmed that the Independent Commission Against Corruption is a fact finding investigative body. It also agreed with the major submissions received as part of its review, that the present requirement under the Independent Commission Against Corruption Act 1988, for the Commission to place “labels” of corrupt conduct on individuals, should be removed.

These views were reflected in a submission dated 5 October 1992, forwarded by the Hon Adrian Roden QC, who said the idea that the Independent Commission Against Corruption should make findings of corrupt conduct reflected a confusion between the respective functions of the Commission and the courts.

The Hon Athol Moffitt QC, CMG took a similar view. In his submission of 2 October 1992, he said that a finding by the Independent Commission Against Corruption that the conduct of a named person is corrupt, is akin to the ancient practice of sentencing a person found to have done a public wrong to the public pillory. He said the function of Commission is to act in aid of outside bodies and, where necessary, spur them into action.

³ ICAC Committee (1993). Review of the Independent Commission Against Corruption Act. May 1993. Sydney, NSW: Parliament of New South Wales

A decade later, in a submission to the 2001 review by the ICAC Committee, the Law Society of NSW said that if the Independent Commission Against Corruption's power to make findings is retained, it is incumbent that there be a review process. The Law Society said:

“A formal process of review should be built into the ICAC Act. A formal process of review would, by reason only of its existence, impose a discipline on ICAC in the manner of its investigation and the care with which it conducts its inquiries and makes its findings. ICAC in its present form is virtually unaccountable for the quality and contents of individual reports.”

Another reason posed against continuing the Independent Commission Against Corruption's ability to make findings of corrupt conduct was that the Director of Public Prosecutions may decide not to adopt recommendations by the Commission. The annual reports of the Commission consistently disclose a large number of proceedings that are either awaiting outcome or have failed through insufficient evidence.

The reasons for the refusal by the Director of Public Prosecutions to initiate so many proceedings in relation to briefs prepared by the Commission are not clear, but at least two reasons might be considered:

- First, investigations by the Independent Commission Against Corruption are not criminal in nature and the standard of proof is the civil standard, that is, a decision on the balance of probabilities. This requires only reasonable satisfaction as opposed to satisfaction beyond reasonable doubt, as in criminal matters. The civil standard is the standard that has been consistently applied in the Commission. This may help explain why the Director of Public Prosecutions has decided in many cases involving criminal charges that the evidence has been insufficient; and
- Secondly, evidence upon which the Independent Commission Against Corruption may base its findings is often inadmissible in subsequent civil or criminal proceedings, or in disciplinary proceedings, because of the Independent Commission Against Corruption Act sections 26 and 37. These provisions relate to a person objecting to self-incrimination in respect of the statutory requirement to answer relevant questions and produce relevant documents.

In its report of May 2004⁴, the ICAC Committee identified that, in a sample of 69 persons who were subject to investigation and a finding of corrupt conduct by the Independent Commission Against Corruption over the period 1998-2003, 29 (42%) were subsequently convicted of an offence. In several cases, the successful prosecution related not to any alleged corrupt conduct but to an offence committed during the Commission's investigation (e.g., perjury).

In over half of the cases (40, or 58%), the Director of Public Prosecutions declined to prosecute, or the prosecutions were unsuccessful.

In his report, Mr McClintock argued that the Independent Commission Against Corruption's primary role was to expose the facts and that the outcome of exposing corruption was more important than obtaining criminal conviction of those involved in the corrupt transaction.

⁴ ICAC Committee (May 2004). Regarding the prevention and investigation of misconduct and criminal wrongdoing involving public officials. Sydney, NSW: Parliament of New South Wales.

Nevertheless, there is, in the ICAC Committee's opinion, a strong nexus between findings of corrupt conduct and associated recommendations for the consideration of prosecution action or disciplinary proceedings. Yet in the numerous instances where no action eventuates in respect of recommendations by the Independent Commission Against Corruption, the finding of corrupt conduct remains.

Mr Justice Priestly, in his judgment in Greiner, commented on what he called this "troubling example":

"A citizen acquitted of a criminal charge is ordinarily entitled to the benefit of the longstanding presumption of innocence until proof of guilt; and as guilt in this example would (in the great majority of cases) forever be excluded by the acquittal, the presumption could not be contested. Where then would the Commission's findings stand?"

Justice Priestly said this example was not an improbable one and that, in his opinion, some such case was bound to happen if the Independent Commission Against Corruption Act 1988 continued in its present form. He said the example demonstrated that in one very real sense 'findings' of corrupt conduct by the Independent Commission Against Corruption should be regarded as conditional or provisional only. Yet it seems inevitable, he said, that such findings may gain general currency as final.

That, in fact, now seems to be the common belief in the New South Wales community.

The ICAC Committee's findings and recommendations in its May 1993 report, proposing removal of the Independent Commission Against Corruption's power to make findings of corrupt conduct, were not accepted by the Fahey government or the later Carr governments. We come back therefore to the issue of whether, as maintained by the Committee, there should be provision for a merits review of findings of corrupt conduct.

Various appeal mechanisms were considered by the ICAC Committee in its May 1993 report⁵. The Committee concluded it was not in a position to make an informed decision about the issue. It recommended that the advice of the Law Reform Commission be sought. That advice was not subsequently requested. I believe that the recommended course of action would still be a useful and informative one to take. It would permit the examination of the matter in a careful fashion freed from the artificial pressures of a review deadline.

However, the situation as it now stands is that Mr McClintock was not persuaded to remove the Independent Commission Against Corruption's power to make findings of corrupt conduct or to make provision for a merits appeal process.

Inspector of the Independent Commission Against Corruption

I turn to the key change made following the McClintock report. The need for an Inspector of the Independent Commission Against Corruption has arisen because of the limited scope of the ICAC Committee's jurisdiction. While the ICAC Committee is responsible for monitoring and reviewing the exercise of the Commission's functions, it is prohibited from examining

⁵ ICAC Committee (1993). Review of the Independent Commission Against Corruption Act. May 1993. Sydney, NSW: Parliament of New South Wales, at pages 72-82.

particular decisions made by the Commission. The limited scope of the Parliamentary committee's jurisdiction is generally seen as appropriate, given that committee Members fall within the investigative jurisdiction of the Commission. The result, however, is that there has been no person or body with responsibility for investigating complaints that the Commission or its officers have misused their powers. Complaints to the ICAC Committee concerning the Commission cannot be investigated and the practice of the Committee has been to request that the Commission review its own decisions or actions. The only remaining recourse is for the complainant to take action in the Courts.

Mr McClintock said the Independent Commission Against Corruption itself acknowledged the absence of adequate accountability mechanisms in the Independent Commission Against Corruption Act 1988. It has been said that this need was not diminished by the paucity of complaints about the exercise of the Commission's compulsive powers.

The establishment of the Inspector of the Independent Commission Against Corruption means that there is now a body with responsibility for investigating complaints that the Independent Commission Against Corruption or its officers have misused their powers. The powers of the Inspector are modelled on those of the Inspector of the Police Integrity Commission.

The ICAC Committee has been given an oversight role in relation to the Inspector of the Independent Commission Against Corruption. The Minister introducing the amending legislation advised Parliament that the fulfilment of the Inspector's functions:

“... will be monitored and reviewed by the Parliamentary joint committee on the Independent Commission Against Corruption.”

A problem may present itself in this relationship. The ICAC Committee cannot examine a matter relating to particular conduct either in relation to the Independent Commission Against Corruption, or the Inspector of the Independent Commission Against Corruption. As an Inspector's work will comprise, to some degree, complaints and queries about particular matters, it is unclear how the Committee will monitor and review the Inspector's work without treading on this forbidden territory. This difficulty arises, I suppose, from the effort to make the Inspector accountable while not detracting overly from the independence of the office.

It is likely the ICAC Committee will be obliged to confine itself to the generalised tasks of examining procedures and policies of the Inspector. The prohibition in section 64 of the Independent Commission Against Corruption Act 1988, relating to the functions of the Committee, should perhaps have been worded so as to exempt the examination of, or reference to, particular matters by the Committee when monitoring and reviewing the Inspector's work.

Emphasis on the Investigative Role

The 2005 amendments alter the nomenclature of the Independent Commission Against Corruption Act 1988 to better reflect the investigative role of the Independent Commission Against Corruption. The Commission now conducts compulsory examinations (previously 'private hearings'), and public inquiries (previously 'public hearings'). There are two emphases here, namely that:

- the Commission exercises administrative investigative, not judicial, functions; and
- investigations in private are distinguished from public inquiries.

The Independent Commission Against Corruption is required to consider a number of factors when deciding if it is in the public interest to hold a public inquiry. The Commission must consider:

- the benefit of making the public aware of corrupt conduct;
- the seriousness of the allegation;
- any risk of undue prejudice to a person's reputation, and
- whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

There are several further matters that reflect improvements to the governance and public accountability of the Independent Commission Against Corruption. These are that:

- a person giving evidence at a compulsory examination or public inquiry will be entitled to be told the nature of the allegation or complaint that is under investigation by the Independent Commission Against Corruption;
- the Independent Commission Against Corruption is required to include additional information about its investigations and the time taken to complete them in its annual report; and
- the Independent Commission Against Corruption is expressly required to provide reasons to complainants and reporting officials for not investigating allegations of corruption

Role of the Director of Public Prosecutions

It is clear from the Parliamentary debates relating to the Independent Commission Against Corruption Bill 1988 that Parliament intended that the Director of Public Prosecutions would have responsibility for determining whether to prosecute a matter and to conduct the prosecution. The Independent Commission Against Corruption has a separate investigatory role, and a supportive role with regard to evidence on which a prosecution may be based.

Parliament's intention is clear in sections 13(4) and 74A and 74B of the Independent Commission Against Corruption Act. These sections expressly prohibit the Independent Commission Against Corruption from making a finding or forming an opinion that a person is guilty of a criminal offence or disciplinary offence. The Commission can only recommend that consideration be given for a prosecution for a criminal offence or an action to be taken regarding a disciplinary offence. The Commission is required to assemble evidence that may be admissible in the prosecution of a person for a criminal offence in New South Wales and to provide any such evidence to the Director of Public Prosecutions. The Commission may also offer any observations relating to this evidence that it thinks appropriate. (The Commission may take similar action in referring information or reports to a public sector agency or to the Minister responsible, and may make recommendations for action if the Commission thinks it appropriate.)

Mr McClintock's examination of the Memorandum of Understanding between the Independent Commission Against Corruption and the Office of the Director of Public Prosecutions established a different situation. The Memorandum provided that it was the Commission who made the decision about whether or not to commence criminal proceedings and that Commission actually filed the court documents to commence those proceedings.

Under the arrangement, the prosecution would be subsequently taken over by the Director of Public Prosecutions.

In an effort to overcome complaints about delays in the Office of the Director of Public Prosecutions with regard to finalising action on recommendations by the Independent Commission Against Corruption, Mr McClintock boldly recommended that the Commission be given the express power to institute criminal proceedings—after considering advice from the Director of Public Prosecutions. This change would mean that the Commission could prosecute, even if the Director of Public Prosecutions didn't agree with that course of action.

The Minister's second reading speech on 23 February 2005, on the Independent Commission Against Corruption Amendment Bill 2005, did not support this approach. A proposed new section 116A specified that it was for the Director of Public Prosecutions, not the Independent Commission Against Corruption, to decide if it was appropriate to commence a criminal prosecution. This meant the Commission would be able to initiate criminal proceedings only if the Director of Public Prosecutions advised it appropriate to do so, and the Director of Public Prosecutions would still take over the conduct of the prosecution.

In considering the Bill in the Legislative Council on 6 April 2005, however, the proposed new section 116A was removed. Thus, the situation remains as it was before the amending legislation. Therefore, the Independent Commission Against Corruption may commence criminal prosecutions arising from its investigations. The Director of Public Prosecutions then takes over the prosecution as a matter of practice and the Commission consults with the Director of Public Prosecution before commencing proceedings.

In my mind, I would prefer a more formalised process, restricting the Independent Commission Against Corruption from instituting court proceedings without the concurrence of the Director of Public Prosecutions. The core functions of the Commission are that it is an investigatory body and an educative body—the new Section 2A states:

The principal objects of this Act are:

- (a) to promote the integrity and accountability of public administration by constituting an Independent Commission Against Corruption as an independent and accountable body:
 - (i) to investigate, expose and prevent corruption involving or affecting public authorities and public officials; and
 - (ii) to educate public authorities, public officials and Members of the public about corruption and its detrimental effects on public administration and on the community, and
- (b) to confer on the Commission special powers to inquire into allegations of corruption.

There is no hint here that the Independent Commission Against Corruption has a role of prosecutor.

A Proposal for a Parliamentary Investigator

In the course of his review, Mr McClintock was encouraged by several individual Members of

Parliament to examine the possibility of partially replacing the Independent Commission Against Corruption's jurisdiction over Members of Parliament with a Parliamentary Investigator, who would have responsibility for investigating minor, less serious or systemic complaints. This would avoid the possibility of high profile investigations for relatively minor matters. It would also allow the Commission to use its time and resources in the investigation of serious and systemic allegations of corruption.

The change suggested by those Members has its basis in a concern that allegations, even anonymous ones, can be made against a Member of Parliament solely for political reasons. It is not unusual for a public announcement to be made that the matter is to be, or has been, referred to the Independent Commission Against Corruption. The Commission then investigates the complaint, adverse publicity is generated, and regardless of the result of any investigation, damage is done to the person's reputation.

Mr McClintock was fairly cautious about the proposal for a Parliamentary Investigator, but said "it was worth considering."

The Minister, in his second reading speech to the Independent Commission Against Corruption Amendment Bill 2005, dealt harshly with the proposal, stating that contrary to Mr McClintock's recommendations, a Parliamentary Investigator would not be established and that the Independent Commission Against Corruption would continue to be able to investigate allegations involving Members of Parliament.

There may be the possibility of a marriage of these viewpoints. In my reading, sections 15 and 16 of the Independent Commission Against Corruption Act 1988 allow for the Independent Commission Against Corruption to work with, refer, coordinate and cooperate in any matter connected to the Commission function's. With regard to my—and my colleagues—role as Parliamentarians, I would hope that future allegations regarding the minor misuse of entitlements and other administrative matters associated with our duties will be referred to the Presiding Officers, Clerks, and the respective Parliamentary Committee responsible for Privileges and Ethics for examination, possible investigation and resolution, rather than being so publicly paraded before the Commission, as has occurred in the past.

As a comment in passing, I note that whatever the merits of the proposal regarding a Parliamentary Investigator, there would appear to be a number of differing views about the ambit of the Independent Commission Against Corruption and the definition of 'public officials' under the Independent Commission Against Corruption Act 1988.

Reform of Contempt Laws

The Independent Commission Against Corruption Amendment Act 2005 repeals section 98(h), which prohibits contempt of the Independent Commission Against Corruption by publication. The Minister, in his second reading speech, said provisions of this type were designed to prevent interference with the administration of justice by courts and were inappropriate and impractical in relation to an investigative body such as the Commission. The Minister said the Commission had far greater capacity than the judiciary to enter the public domain to rebut misrepresentations and prejudicial comment.

The new provisions restrict the power of the Independent Commission Against Corruption to refer to the Supreme Court alleged contempts of the Commission. Contempts are now limited to contempts in the face or hearing of the Commission. The effect of the changes will be to relax the prior restrictions on public comments that can be made about the Commission.

This reform was proposed by Mr McClintock and was supported by the Independent Commission Against Corruption. The Australian Law Reform Commission recommended similar reforms in its comprehensive examination of the law on contempt.

In the debates on the amendments in the New South Wales Upper House, the Government took the view that public interest in, and discussion of, the subject matter of a public inquiry conducted by the Independent Commission Against Corruption is likely, in fact, to enhance the Commission's investigation. The merits of the changes to the contempt provisions were not fully acknowledged by the Opposition. This was because of a belief they were a payback for proceedings relating to an alleged contempt by the then Premier, Mr Bob Carr, in connection with statements he made in August 2004 relating to evidence given to the Commission concerning allegations by various nurses against Mr Knowles, the former NSW Minister for Health.

Mr McClintock, in his report, said that matter had brought to light problems in applying the law of contempt to inquisitorial tribunals such as the Independent Commission Against Corruption. The Assistant Commissioner of the Independent Commission Against Corruption, in considering the alleged contempt by the Premier, specifically drew to Mr McClintock's attention problems that he had identified in the Act concerning the certification of contempt of the Commission.

What the Changes Reflect

The moderate and conservative nature of the changes made by the Independent Commission Against Corruption Amendment Act 2005 make it clear that the New South Wales Government is generally satisfied that the Independent Commission Against Corruption is meeting the needs of the public and the original objectives of the legislation.

As I indicated earlier, the changes build on, rather than dramatically alter, the Independent Commission Against Corruption's operations and they endeavour to remove confusion about the Commission's proper role.

There is a strong 'steady as you go' feeling, and this is well expressed in Mr McClintock's reassuring conclusion when he says he is satisfied the terms of the Independent Commission Against Corruption Act 1988 remain generally appropriate for securing its objectives.

In New South Wales, we are unlikely to see further substantive change, unless circumstances arise to reveal hidden and unexpected inequities in the operation of the scheme.

I have been pleased today to stand before you and speak about the work of the ICAC Committee and the significant legislative changes we have initiated. When I look across the statutory models adopted by Australian and international jurisdictions to deal with public

sector corruption and promote integrity in the decision making and actions of public officials, it is clearly evident that there is no 'one size fits all' approach.

Each jurisdiction has taken the significant decision to challenge misconduct by public officials, but the means and mechanisms adopted are specific to the particular circumstances that gave rise to, and continue to challenge, executive governments. I believe that this diversity of approaches is healthy, and allows for the exploration of different legislative frameworks, organisational structures, and different means and methods to identify, combat and deal with bad behaviour. Corrupt behaviour acts to undermine the integrity of our public institutions and the community's confidence in our democratic system of government.

Whistleblowing Legislation in New South Wales

Mr Chris Wheeler
Deputy Ombudsman, NSW Ombudsman

Introduction

I have been asked to talk to you today about whistleblower legislation in New South Wales. To set the scene I want to first talk about the objectives and scope of whistleblower legislation generally and the prerequisites for whistleblowing.

Unlike the other states of Australia, New South Wales actually has two separate pieces of whistleblower legislation for public officials. The primary Act is the *Protected Disclosures Act 1994*, which predictably deals with “protected disclosures” by all public officials. The other is s.306 of the *Police Act* which sets out a whistleblowing scheme for the making of “protected allegations” by police officers.

Whistleblowers perform an essential service in our society. They are uniquely placed to expose serious problems within the management and operations of an organisation. This includes matters relating to systems, competence and resources as well as the integrity of the organisation. The best source of information concerning illegality, corrupt conduct and misconduct within an organisation is from the people who work there.

Looked at in terms of a corporate body’s defences against the illnesses or diseases of corruption, misconduct or serious mismanagement, internal whistleblowers can be seen as pain that draws attention to the problem. Unfortunately, where a disclosure is not handled appropriately and a whistleblower is not adequately protected, the word “*pain*” can apply in more than one sense.

Objectives of Whistleblower Legislation

I think there would be general agreement about the three core objectives of all whistleblower legislation. These objectives should be:

1. to facilitate whistleblowing
2. to protect whistleblowers, and
3. to ensure disclosures are properly dealt with.

Where whistleblower legislation contains an objects clause, it is not uncommon to find provisions equivalent to these three objectives.

Another way of looking at the objectives or purpose of whistleblower legislation, particularly from a government's perspective, is to lay down the rules of the road that apply to whistleblowing – the rules that all the parties to a disclosure must play by. In an area as sensitive, if not potentially explosive, as whistleblowing, the importance of clear ground rules that each party is required to comply with cannot be over estimated.

From a practical perspective this can be seen as the fourth objective of whistleblower legislation which, while it is just as important as the three I mentioned earlier, is not one that needs to be explicitly stated in the objects provision of a whistleblower Act.

If all parties to a disclosure approach the table with good will and in good faith, they are likely to have either the same, or at least complementary, objectives:

- the whistleblower would want to draw attention to what they perceive to be serious problems for the purpose of having them quickly addressed
- the agency would wish to be made aware of serious problems so that they can be appropriately and quickly addressed, and
- any person the subject of disclosure would wish to have the allegations fully and quickly investigated.

On the other hand, if any of the parties has a more self-seeking or even malicious motive, then the parties are more likely to have competing or conflicting interests:

- the whistleblower could be intent on causing maximum discomfort and embarrassment for an individual or for an organisation, or to achieve some personal benefit or avoid some personal detriment
- the agency could be wishing to minimise embarrassment to itself, its management or its staff and to this end to possibly 'shoot the messenger', and/or
- any persons the subject of disclosure could be motivated by the objective of protecting their reputation, possibly no matter what the cost, or to attack the credibility, career or welfare of the whistleblower.

Whistleblowing can therefore be a painful experience for all concerned – for the whistleblower, for the agency concerned, and for any person the subject of disclosure. However, the level of pain experienced by all three parties can be exponentially greater where appropriate rules are not followed. Examples would include:

- a whistleblower going straight to the media without first raising the concerns either internally, or with an appropriate watchdog body – in effect "leaking"
- an agency failing to advise staff as to how to make a disclosure, failing to properly deal with a disclosure, failing to take appropriate steps to protect a whistleblower, or shooting the messenger – behaviour that teaches employees to keep quiet, and
- a person the subject of disclosure taking or instigating serious detrimental action against the whistleblower.

So here we have two issues:

- firstly, setting out fair and reasonable rules that must be followed by each party to a disclosure, and
- secondly, ensuring that each party to the disclosure complies with those rules.

Looking at the first issue, whistleblower legislation needs to set out the rules to be complied with by the whistleblower, by the public official or agency who receives the disclosure, and by persons who may be the subject of the disclosure.

There are a wide range of reasons why people might blow the whistle, which for convenience can be classified under one of the following three headings: public interest type motivations; misguided motivations; and private interest type motivations.

While there can be a wide range of motivations for whistleblowing, at the risk of over generalisation it is probably true to say that whistleblowing generally arises in a situation where a problem that has not been recognised or addressed by those responsible, or at least where there is a perception of a problem that has not been so recognised or addressed. Whistleblowing involves, effectively, going over the heads of ones immediate superior to the management of an agency, or outside the agency to an external watchdog body. This invariably involves the possibility of inter-personal problems in the workplace (often whether or not the whistleblower is identified) and the potential for embarrassment or damage to reputation or careers.

The degree of problem or damage will depend on the level to which the matter is escalated by the whistleblower. The alternatives in order of potential negative impact are disclosures made to:

- internal senior management
- external watchdogs
- external media and Members of Parliament.

The public interest is served by disclosures being facilitated and properly addressed. The public interest is not served by collateral damage to an agency or its personnel, or to the government of the day, over and above that caused by the problem being properly addressed.

It is therefore in the public interest to maximise the former (ie, disclosures being facilitated and properly addressed) while minimising the latter (ie, collateral damage). This can best be achieved through the adoption and implementation of fair and effective rules to be followed by whistleblowers if they want to rely on the protection provided through whistleblower legislation.

These rules should be designed to encourage whistleblowers to initially take their disclosures to the lowest practical level. Further, the objective should be to ensure that a whistleblower does not go public with their disclosure unless they have first taken their concerns to senior management or an appropriate external watchdog body, their concerns have not been properly addressed, and the whistleblower is in a position to be able to demonstrate substantial grounds for believing that their disclosures are substantially true.

Whistleblowing may be in the public interest, provided whistleblowers play by the rules, but the chances of collateral outcomes that are not in the public interest increase significantly if whistleblowers do not play by the rules, eg, the damage that can be caused by selective leaking to achieve a desired politically partisan outcome.

The rules for whistleblowers that should be addressed in whistleblower legislation should therefore include:

- who can make disclosures
- the subject matter and level of seriousness required for a disclosure to be protected under the Act
- whether disclosures can be made anonymously
- to which recipients a disclosure can be made
- an obligation to cooperate with any agency investigation, and
- offence provisions for false or wilfully misleading disclosures.

It is also important that agencies play by the rules, and are seen to do so. Few people will blow the whistle if agencies that receive disclosures are not perceived to play by the rules.

The rules for the recipients of disclosures that should be addressed in whistleblower legislation should therefore include:

- a prohibition on taking detrimental action against whistleblowers
- an obligation to set up appropriate policies and procedures for the receipt and handling of disclosures and for the protection of whistleblowers
- an obligation to protect whistleblowers (which would include ensuring confidentiality where this is both practical and appropriate)
- an obligation to appropriately deal with disclosures (which may include investigations)
- an obligation to provide feedback to the whistleblower, and
- a prohibition on providing inducements for people to either make disclosures or withdraw disclosures they have made.

The rules for any persons the subject of disclosure would include:

- a prohibition on taking detrimental action against the whistleblower, and
- an obligation to cooperate with any agency investigation.

Looking at the second issue - ensuring that each party complies with the rules – this can be problematic, particularly in relation to the protection of whistleblowers. For example:

- it is relatively easy to ensure that whistleblowers comply with appropriate rules, for example by providing that their disclosures are only protected under the Act if certain reasonable steps are taken or requirements are complied with, along with an offence provision for the provision of false or misleading information
- employing agency compliance issues can be best dealt with by placing appropriate obligations in the legislation, provided implementation is closely oversighted by an impartial external body, and
- the compliance issue in relation to the subjects of disclosure is probably the most problematic, requiring both strong legislative provisions and direct management intervention.

Scope of Whistleblower Legislation

It appears to be a widely held belief that the purpose of whistleblower legislation is primarily, if not solely, to protect whistleblowers. In practice, well designed whistleblower legislation should also serve several further purposes.

The scope of such legislation should cover:

1. protecting whistleblowers (eg, from detrimental action taken in reprisal for their disclosure)
2. protecting the rights of persons the subject of disclosures (eg, confidentiality, procedural fairness)
3. providing alternative avenues for persons to make disclosures (ie, both internal and external avenues)
4. ensuring that employees are informed of how to make disclosures that will be protected by the legislation
5. ensuring that appropriate action is taken to deal with disclosures, and
6. punishing persons misusing the legislation

In other words, such legislation should be designed to protect the legitimate rights and interests of all parties to a disclosure and to set out the ground rules for disclosures to be made and dealt with.

Prerequisites for Whistleblowing

There will always be the occasional obsessive or attention-seeker who blows the whistle, as well as the odd 'kamikaze' whistleblower and of course there will from time to time be persons with a strong moral sense seriously affronted by conduct that is clearly wrong who will blow the whistle. However, for the majority of employees to stand up and be counted when they become aware of misconduct or serious mismanagement, there are three almost universal prerequisites:

- first and foremost, they must be confident that they will be protected if they do so – that they will have a good chance of surviving the experience in terms of their employment, legal liability and personal wellbeing
- second, they must believe that blowing the whistle will serve some good purpose – that appropriate action will be taken, and
- third, they must be aware that they can make such a disclosure and how they should go about doing so – who to, how to, and what information should be provided, etc.

Of these three prerequisites, the practical protection of whistleblowers is the foundation on which everything else sits. Potential whistleblowers must believe that they will be adequately protected. Such a belief will be primarily based on:

- their understanding of the nature and level of protections available to them in the legislation and from their employer, and
- their knowledge as to whether other whistleblowers have been appropriately protected.

The Objects of the New South Wales *Protected Disclosures Act*

The three pre-requisites for whistleblowing are reflected in the objects provision of the New South Wales *Protected Disclosures Act* which provides:

“The object of this Act is to encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration and serious and substantial waste in the public sector by:

- (a) enhancing and augmenting established procedures for making disclosures concerning such matters [ie, to facilitate whistleblowing], and*
- (b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures [ie, to protect whistleblowers], and*
- (c) providing for those disclosures to be properly investigated and dealt with [ie, to ensure that disclosures are properly dealt with].”*

The legislative policy behind the *Protected Disclosures Act* is clearly desirable. The exposure of corrupt conduct, serious and substantial waste and maladministration in the public sector is an objective with which no reasonable person could disagree. Such legislation should therefore be interpreted broadly – we advise agencies that when in doubt it is best to assume that a disclosure is protected and to act accordingly.

The Drafting of the *Protected Disclosures Act*

The New South Wales *Protected Disclosures Act* has now been in operation for 10 years. It is a very short Act – there are only 34 sections, of which 11 are formalities or machinery provisions.

While it is a very short Act, unfortunately it is not very well drafted. Even though it only has 23 substantive/operational provisions, the former New South Wales Solicitor General referred on one occasion to *“the generous opacity of the Act”*.

Having reviewed all whistleblower legislation currently in force in Australasia, and the draft legislation for the Northern Territory, I have to say that while the New South Wales Act is not brilliantly designed, in the context of whistleblower legislation around Australia, in my view it is probably the best:

- we don't have the strangely high threshold contained in the Tasmanian and Victorian Acts, and in the Northern Territory Draft Bill, which provide that protection is not available under the Act unless the matters disclosed, if true, would lead to criminal action or dismissal [limiting disclosures to the conduct of specific individuals, which appears to exclude the conduct of public bodies that are not legal entities or any conduct related to inaction or inappropriate procedures or practices] - needless to say, the annual reports of the Tasmanian and Victorian indicate that very few disclosures each year cross that threshold.
- we also don't have the problems of the Western Australian legislation that defines the conduct covered by the Act so broadly that probably every complaint made to the WA Ombudsman would be covered - which would be unfortunate given the criminal

sanctions involved in disclosing the name of the whistleblower or the name of any person the subject of disclosure other than in limited circumstances. [It appears that this problem has been side stepped by a high level legal advising which apparently is to the effect that the protections of the Act are limited to disclosures which specifically request the protections of the Act. I find that somewhat problematic given I can find no such requirement stated or implied in the Act and, as it is beneficial legislation, it is likely that the courts will interpret its protections broadly.]

- apart from our reversed onus of proof in criminal proceedings for detrimental action, we also have a relatively easy evidentiary test that detrimental action is “*substantially*” in reprisal, whereas the Australian Capital Territory, New Zealand, Queensland the Western Australian legislation have a very narrow “*but for*” or “*because*” evidentiary test.
- we also don’t have the problem in the Tasmanian and Victorian legislation which seem to place significant limits on the use of information obtained from a disclosure and its investigation in subsequent criminal proceedings - then of course you have South Australian legislation where there is no criminal sanction.
- another point of comparison is the level of detail and complexity in each Act. Relative to most of the other whistleblower legislation in Australia, the NSW Act has a moderate level of detail and complexity, particularly compared to the Queensland, Tasmanian and Victorian Acts and the Northern Territory Bill - this is a particularly important issue as simplicity and clarity are essential if whistleblowers are going to understand and feel comfortable with the legislation.

Now that I have probably insulted the representatives here today of each jurisdiction outside New South Wales I might move on with my talk.

The Adequacy of the *Protected Disclosures Act*

In an April 2004 Issues Paper we looked at the adequacy of the *Protected Disclosures Act* to achieve its objectives. In that paper we assessed the provisions of the Act to see whether they are adequate to achieve its objects, which mirror the core objectives for effective whistleblower legislation. To this end we considered the major provisions of the Act to identify whether they facilitate the achievement of one or more of the core objectives and whether the Act as a whole incorporates adequate mechanisms to achieve each of the core objectives.

In relation to the first objective, facilitating the making of disclosures, this issue is not adequately addressed in the New South Wales Act. This includes, for example:

- the lack of clear definitions of certain crucial terms, eg, “*serious and substantial waste*” and “*government policy*”
- the inclusion of some provisions that have little or no useful purpose and serve only to confuse, such as the requirement that disclosures be voluntary, or the proscription on disclosures “*made*” frivolously or vexatiously – a motive issue that would be almost impossible to identify in practice
- the absence of any requirement on agencies to adopt and implement an internal reporting system for the purposes of the Act (which is currently a discretionary matter)
- the lack of a specific provision in the Act authorising anonymous disclosures (the present position is that we read the Act to imply that disclosures can be made anonymously), and

- the scope of the conduct covered by the Act not specifically including public health and safety issues and environmental damage as in most other Australasian jurisdictions.

In relation to the objective to protect whistleblowers, while our Act contains significant statutory protections (including a reverse onus of proof in criminal proceedings for detrimental action), NSW is the only jurisdiction in which a whistleblower who has been the subject of detrimental/reprisal action has no rights in the Act to seek damages.

Another key failing of the Act is that there is no statutory obligation on senior managers and/or CEOs to protect whistleblowers, or even to establish procedures to protect whistleblowers (obligations which are imposed in five of the other seven Australasian jurisdictions). Further, the New South Wales Act (unlike the Acts in five other jurisdictions) does not make provision for injunctions or orders to remedy or restrain breaches of the Act.

The *Protected Disclosures Act* almost completely fails to address the third core objective of ensuring that disclosures are properly dealt with. For example, there is no requirement on agencies to adopt and implement procedures for assessing and investigating (or otherwise appropriately dealing with) disclosures, to notify whistleblowers of progress or the outcome of investigations, or to allow for oversight of agency dealings with disclosures by an independent external body. This last issue means that little information is available in NSW as to how many protected disclosures are being made to agencies generally, or whether such disclosures and the people who made them are being dealt with properly by the receiving agencies. In the two previous reviews of the *Protected Disclosures Act* carried out by the Parliamentary Committee on the Office of the Ombudsman and the Police Integrity Commission, recommendations were made that the Act be amended to provide for such an external coordinating/monitoring role. To date these recommendations have not been acted on by government.

The conclusions we reached in that Issues Paper were that the Act as it is currently drafted is inadequate to achieve two of its three core objectives.

Of course the bottom line in each jurisdiction is that we have to work with the legislation we have been given.

Legislation Alone is Not the Answer

Achievement of each of the three prerequisites for whistleblowing has in practice both a legislative component and a management component. In relation to the effectiveness of the legislative component:

- on the negative side, in relation to the overall protection of whistleblowers through prosecutions for detrimental action, and in particular successful prosecutions, whistleblowing legislation in Australia has unfortunately been largely 'missing in action', and
- on the positive side, whistleblower legislation does have a strong deterrent effect and can provide important guidance by setting rules that the various parties to a disclosure are required to comply with.

While an effective whistleblower Act is an important prerequisite to ensure that disclosures are properly dealt with and that whistleblowers are properly protected, no matter how well a whistleblower Act is drafted, by itself it is not enough. For example, while the criminal provisions in a whistleblower Act can be a 'big stick' as in the NSW Act, experience tells us that this stick is generally hard to pick up and unwieldy to use. Of the nine whistleblower Acts in Australasia (including the two in NSW), there have only been prosecutions under the NSW Acts - and all four were unsuccessful. It is therefore important that agencies adopt a pro-active management approach and have procedures and practices in place to protect whistleblowers on an administrative level.

It should make little difference to the management of an agency whether a disclosure meets all the technical requirements of a whistleblower Act or not. Provided it is a *bona fide* disclosure, it should be dealt with the same way in terms of protecting the whistleblower and responding to the disclosure. If a disclosure is in the public interest it should be dealt with the same way in terms of protecting the complainant and responding to the disclosure.

Responding to disclosures and properly dealing with and protecting whistleblowers is a management issue and a management obligation. Internal disclosures, like complaints and suggestions from the public, should be treated as a tool to identify and address organisational problems. A genuine whistleblower should be seen as providing management with an opportunity for improvement.

A proactive management approach would include:

- adopting and implementing an effective internal reporting system which assists in the creation of a climate where the staff will feel confident that they can make disclosures without fear or reprisal or disadvantage
- demonstrating a strong commitment from senior management to properly deal with any *bona fide* disclosure, including an explicit statement of management support for whistleblowing in general and whistleblowers within the agency in particular
- demonstrating an organisation-wide commitment to properly deal with any valid disclosures, including a strong commitment to and acceptance by all levels of management of the right of staff to make disclosures and of the need to properly investigate disclosures and act on those that are sustained, and
- implementing a mentoring program or arrangement whereby a senior member of staff is given responsibility to provide advice, guidance, assistance, counselling, support, etc, to the whistleblower.

This is not to say that legislation is unimportant. While it should make little difference to the management of an organisation whether a disclosure is made under whistleblower legislation or not, in practice, experience shows us that this is not the case. Management are far more likely to deal with whistleblowers and their disclosures appropriately if there is a clear legislative obligation on them to do so.

As I have indicated previously, this is not a one-sided issue – there should be a corresponding obligation on staff to make their disclosures in accordance with the procedures and practices established by or under the law for receiving and dealing with such disclosures. This requires a significant staff education effort that should commence with the staff induction process and be subject to periodic reinforcement.

Conclusions

The core objectives that should be addressed in whistleblower legislation are:

- to facilitate whistleblowing
- to protect whistleblowers
- to ensure disclosures are properly dealt with.

Whistleblowing is in the public interest and the public interest is therefore served by disclosures being facilitated and properly addressed. However, the public interest is not served by collateral damage to an agency or its personnel, or to the government of the day, over and above that caused by the problem being properly addressed. It is therefore in the public interest to facilitate disclosures and ensure they are properly addressed, while minimising any collateral damage. This can best be achieved through what is effectively a fourth objective of whistleblower legislation – to lay down fair and reasonable rules that all parties to a disclosure must play by. In the absence of such ground rules, experience shows that whistleblowing often results in situations that become very messy for all concerned.

The other requirement for effective whistleblower legislation is that there are mechanisms in place to ensure that each party to a disclosure complies with those rules. These mechanisms can include conditional statutory protections, statutory obligations, direct management action and oversight by an impartial external body.

In terms of the New South Wales *Protected Disclosures Act*, while the objects of that Act reflect the three prerequisites for whistleblowing, in our Issues Paper we set out our view that the Act:

- completely fails to address the objective of ensuring disclosures are properly dealt with
- is barely adequate in addressing the objective of protecting whistleblowers, and
- is inadequate in addressing the objective of facilitating disclosures.

Having said that, we do recognise that legislation alone is not the answer. What is also essential is a proactive management approach by agencies. This requires a change in the culture of the staff and management of most agencies away from the traditional aversion to what they see as ‘dobbers’. Changing this culture is a huge task. We do what we can to assist agencies through our *Protected Disclosures Guidelines* and our advisory service for people who deal with disclosures, and with the Independent Commission Against Corruption through the provision of some training - but this is not enough.

Hopefully the current review of the New South Wales *Protected Disclosures Act* by the ICAC Committee will address this issue, and the government will see its way clear to implement any recommendations the Committee may make.

Report from Western Australia

Mr John Hyde MP

Chair, Joint Standing Committee on the Corruption and Crime Commission,
Parliament of Western Australia

I am delighted to see people who were with us in Perth two years ago and *Selamat Datang* to our visitors from Malaysia.

Our Corruption and Crime Commission is the 'baby' in Australia as it was set up on 1 January 2004. It was set up, as we have discussed at previous events, in an atmosphere where our previous body was not only seen to be a lame duck but to be secretive, to be arrogant, to not have too many runs on the board and was unable to articulate to the public, parliamentarians and other stakeholders the actual good work that it was doing at the same time. So in that sort of context, that is how we benchmark our new Corruption and Crime Commission.

As I said at a previous conference here, and in Perth, we keep waiting for the sky to fall in or to find out what the Corruption and Crime Commission is doing wrong but nothing seems to happen. It enjoys incredible public support and it enjoys amazing bipartisan support. It is traditional for the public and the media to want to see convictions, but we keep trying to educate and say that convictions are not the be all and end all of corruption preventing, let alone a corruption catching body. The high profile convictions are there and, as I will explain in this report, their deterrent effect is quite remarkable.

We have a committee system of just four members, two government, two opposition. That is what the Corruption and Crime Commission Act stipulates. When we were trawling our way around Australia looking for a new model for a corruption body and an oversight committee, we went to Queensland and government members felt quite chuffed that they had given up majority ownership of committee decisions, that is, there had to be bipartisanship in a decision in Queensland. We thought that was a wonderful idea and we thought it would show a quality in the government that we would give up having a majority of members. We thought it was quite horrendous having quite so many members on a committee, so we made it lean, not mean and no Greens, so two government Labor, two Liberal. I was one of the big pushers of this idea of having a very small committee. Joining me this term was my Labor colleague Margaret Quirk MP. Unfortunately, when you have only got four members of a committee somebody can fall under a bus or have another disaster hit them such as being made a Minister; fortunately, Margaret missed the bus but was made a Minister, and she was the only one of the four of us who was a lawyer. We are about to get a non-lawyer. So I am rather quite chuffed that, without making any Vice President Dick Cheney jokes about lawyers, we actually will not have lawyers on our committee. So when we innocently ask really dumb questions of the high profile lawyers, people such as the Corruption and Crime Commission's Executive Director Mike Silverstone, who is here, will think we are coming from a position of innocence because we do not have LLB or anything else after our names.

It is one of the issues we are going to be looking at in our review of the legislation. We have to review the Corruption and Crime Commission legislation by next year and the issue of the

size of the committee may be discussed. Whereas I do favour the smaller committee, if a tragedy such as a bus hitting me, or even better, if I decided to pack my swag, put a knife in my backpack and go up to the north of Thailand and tap rubber trees or something, we would then have no corporate knowledge on our committee. By having a smaller group in a committee, you really do have more involvement because you cannot carry any freeloaders if you are just a committee of four, but given parliamentary life, the turnover and the things that happen, that issue of losing corporate knowledge all of a sudden is something that will certainly play in the back of my mind when we do come up for the review.

Mr Silverstone, the Commission's Executive Director, is going to elaborate on many of the nitty gritty of the Corruption and Crime Commission tomorrow, so I will not do that. I will merely try and sing its praises and, as a government member or an independent chair, hope that it rubs off on us.

We are suggesting a number of amendments to our legislation. We still believe, as the previous speaker did, that our legislation is the best. Because our legislation is only from 2004, and we did have the ability to look at legislation from around Australia, we think that in terms of contemporary legislation it is some of the best empowering legislation. I guess being the only left wing Labor Government of the seven Governments in Australia, it is quite remarkable Western Australia has given so many incredible powers to this corruption fighting body, but we have. They have not misused them and it has proved incredibly effective.

There are changes that the Committee does want to make to enable the Corruption and Crime Commission to conduct joint task forces with Western Australian police and other law enforcement agencies into organised crime. Organised crime is an area that was given to the Commission that the previous body did not have. We also need to amend the definition of organised crime, which is currently unsatisfactory and unworkable, and because there are lawyers involved, they can tell you exactly why. Of course, people in the street can tell you what organised crime means but, unfortunately, the moment you get into the courtroom problems occur.

The other major problem in the legislation is the legislative requirements in relation to contempt. We had a minor setback late last year in an organised crime issue, which I guess many of us in the Western Australian anti-corruption industry feared would happen and hoped that the judiciary may be lenient and perhaps more forgiving of bad legislation, but no, they were not.

In saying that we are satisfied and we are happy with the progress of the Corruption and Crime Commission, I will speak on a couple of specific issues. One of the joys of being a parliamentary committee where the body you are overseeing is not required to deliver operational details to you is that they do, and it is more than a need to know basis. Even under the previous legislation and body, the relationship that existed, and in this area of oversight, the legislation can say something but it is the protocols and the precedents that become established due to the relationship between the committee and the commission. So we get a lot more operational information than the legislation entitles us to but, more importantly, it helps us not only to do our oversight role well but be able to look ahead and I think be more effective, not just in terms of giving advice but in terms of seeing what future problems may arise, not only in the relationship, but also in the prevention of corruption.

As I alluded to last December here at the parliamentary committees' conference, we had just had the issue of our Acting Commissioner at the Corruption and Crime Commission being charged with having divulged information to a person, the person being the Clerk of the Legislative Council. The Clerk has since been charged with some 50 counts of stealing and other issues.

Listening to the Hon. Kim Yeadon MP earlier about whether or not there should be a separate body looking at parliament and officers, in Western Australia we are absolutely delighted that the Corruption and Crime Commission can rock up into parliament unannounced, do whatever things it is that anti-corruption bodies do, with little gadgets or anything else, and be able to charge people with offences when alleged wrongdoing may have occurred.

The issue of the Acting Commissioner which I alluded to previously and the reason why that became very important in Western Australia, was that it was revealed very quickly. Under the legislation our Corruption and Crime Commission is not able to investigate its own Commissioner or an Acting Commissioner. A problem emerged that the Acting Commissioner, Ms Moira Raynor, who was not involved in the case of the clerk, Mr Marquet—but he had been a long time friend—when the Commissioner mentioned to Ms Raynor that Mr Marquet was under investigation and was dying of an incurable disease, she decided to go off and visit him and was bugged advising him that it is probably not a good idea to talk on a mobile phone because they can sometimes be bugged. So whereas she did not have exact operational details, she was not, as an Acting Commissioner involved in that case, when the Commissioner became aware that she had done this against his advice, he went to the Parliamentary Inspector. The Parliamentary Inspector very quickly came to the oversight committee and within 40 minutes we went into the parliament and revealed exactly what had happened.

I think the success of the Corruption and Crime Commission in Western Australia has been this transparency. In many ways it is over-transparency. We have got great leadership from the Commission in not only its dirty linen but nearly all the activities that it is doing or nearly all its activities are being made public.

Even though I am a government member, a Labor member, it sometimes appears almost as if the Corruption and Crime Commission's good perception is stage managed. In the lead up to this conference today we have had two or three very good wins for the Commission, all involving either former Labor chief of staffs, members of parliament or apparatchiks, but the public is impressed with the fact that the Commission is doing its job and the public also seems to be impressed with the fact that the government has empowered a corruption body that catches even government sympathisers. So it kind of plays against the fears that some people have of a corruption body that may be experienced elsewhere in the world and Australia, that a body becomes too powerful and bites the hand that feeds it, but the transparency is the win and it is also the deterrent.

I also raise the issue at this point because I got a text message at three a.m. Sydney time this morning. Unlike Western Australians and Malaysians who operate in a sensible time zone, Eastern Staters with inferiority complexes try to get up three hours earlier, and so I received a text message at a sensible WA hour, midnight, when today's *West Australian* came out to say that the headline was "Police Minister Is The 'Godfather'", and this referred to a throw-away line in a Corruption and Crime Commission hearing last year which resulted in a former Labor-associated councillor being rightly convicted of a local government fraud. It

was a throw-away line about the third person at a meeting with two friends having a barney. The Police Minister is an Italian, the convicted councillor is an Italian, the other non-charged gentleman is an Italian. I know nothing of the operational details surrounding this issue, but it was obviously a throw-away line. The two friends of the Minister were having a barney and it could not be resolved and so a Commission lawyer at a public hearing had asked who “the Godfather” was who met with the two gents. Now the local paper, for whatever reason one year later, is trying to make either something more or something much more of a throw-away line in a Commission hearing.

I am using that as an example because the other thing that seems to me to be happening here lately is you had a man who must have been a saint—he must be on the verge of being beatified—who died recently. Perhaps the media in Western Australia does not reveal the whole truth, but this person Kerry Packer appears to have walked on water, cured the sick, enabled the lame to walk, it is absolutely amazing. One of the things in the fall-out from Kerry Packer's death is just how bitter and damaged he was because he was named wrongly in the royal commission as Goanna. He was named as Goanna and this was terrible and caused him the utmost trouble in his life. He still somehow remained one of the richest men in Australia, enjoyed an incredible life, came back from the dead a number of times, but being named, either wrongly or rightly, in a transparent royal commission, in the end did not affect his life greatly. By being named in a transparent, open royal commission or an open hearing, as has been our Police Minister as well, is not such an ill that it should be banned. So the benefits of transparency for those of us who are in public life or who are making a stack load of money, the benefits of anybody being able to be named in that situation, even if you are innocent, does outweigh the potential downside of such a scenario. I just wanted to draw in Godfather and Goanna in the same breath there.

The other situation we have is a Parliamentary Inspector. Having visited New South Wales and Queensland, we thought our parliamentary inspector would just be totally run down with work, that every true whistleblower, every aggrieved person, every unstable person would be just banging on the door and he would need ten lawyers assisting him, eight maids a-milking, and everything else. What we found is that he has had very small workload. Part of the reason for that is that the Corruption and Crime Commission, as it is encouraging across all Western Australian public agencies, is actually itself dealing with internal complaints and complaints about its operation. So, in the situation where a person goes to the Commission concerned that 'Martians are running our road traffic authority and that nobody seems to be taking this seriously', the Commissioner deals with the complaint in a way that the aggrieved person feels they are being listened to. The actual complaints about the process are very minor.

The real reason behind the success of the Corruption and Crime Commission has been its open relationship with the media. Being a former journalist and looking at today's *West Australian*, I see there is just that one throw-away line in an open hearing of our Commission and the *West Australian* has been able to misunderstand, or intentionally make a pretty big racial slur of a headline and a whole full page story; and the Commission has been able to garner a good relationship with the media, regardless of what they publish. I am not drawing those two things together by saying that the Commission has leaked that or anything like that. The *West Australian* reporters are obviously there in all open hearings and because the Police Minister had been on the same council as somebody who has now been convicted of electoral offences but still faces corruption charges, every tabloid newspaper that publicly avows it hates a government and wants to throw as much dirt as it can would be there looking

for things. The Commission has established a very good relationship, not only in doing open hearings but in keeping the media briefed on what it is doing. As a parliamentarian and somebody who has been a journalist, journalists change over even more than those of us who are victims of factional disputes in parliamentary parties. There may be an ongoing case or a hearing about something from a year ago but young journalists have no corporate knowledge of that. The Commission professionally and courteously explains the bleeding obvious to people every time there is a change of journalists. So in saying that the Commission has a good relationship with the media, it is those little operational issues that create the relationship, and when the media phone in with an outlandish request, statement or rumour, the Commission is not running for cover or making no comment, it actually is saying something or giving something back. I think this whole issue of transparency builds confidence in the organisation.

I just want to briefly touch on the issue of open hearings. One of the criticisms of our former body was that it did not have open hearings. The Corruption and Crime Commission has held a number of open hearings and I will allude to the one concerning the former local government councillor who was convicted on 9 February 2006 on thirteen counts of serious electoral vote rigging. The open hearing happened last year. So we have actually gone from a Commission open hearing, to a wrongdoer being convicted in a very short period of time, so that the community not only sees justice being done but it sees it being done very quickly. As a media person, it was just quite wonderful to watch this open hearing with Commissioner Hammond and our then prosecutor Patty Chong asking this local government councillor if he had been involved in any fraud. We have postal voting in council elections in Western Australia. She asked whether he might have done something wrong. There were denials all the way along. There was a day of denials. Then they turned the videotape on—while this councillor and some of his henchmen had been going down suburban streets, getting letters out of letter boxes, filling in the votes and so on, there was 'Tree cam' or something similar that recorded it all beautifully in high definition video. So when this came to trial, his protestation of innocence had changed. More importantly, it may be just one conviction, but the ripples that have gone through local government are quite profound. The publicity that was achieved from an open hearing is a much better deterrent than endless workshops, briefings, and conferences that could have been held with the 144 local councils that we have in Western Australia. The combination of an eventual successful prosecution with prevention has proved very effective. I would also argue it again has the spin-off of the community, parliamentarians, and other stakeholders having confidence that the anti-corruption body is doing its job without fear and without favour.

One of the problem areas we are going to have to address is the appointment of Acting Commissioners or Acting Parliamentary Inspectors. We have got a venerable, erudite, witty and sometimes entertaining Commissioner in former Justice Hammond as our Commissioner, and some of us believe that he will go on ad infinitum. But as the Moira Raynor issue, and the sudden resignation of our own Premier shows, you do actually have to have in position a legislative framework and precedence for rapid appointment of people in acting positions.

Our legislation and standing orders are defective in that area. Those of us on the committee assumed that it would be just like in New South Wales and Queensland and that the Premier and Cabinet of the day would suggest somebody, a committee would go and have a cup of tea with them, when everybody is happy with their bona fides, the person would be appointed. Unfortunately, our arm of executive government did not really believe that the committee had any fulsome role in appointments, that we could on a dark night be handed a

tiny bit of paper with a name on it and in a nanosecond we could say yes or no, and that was our role.

We ethically believed that there was an important role for the committee, and we were searching for legal advice or anybody who would try and tell us that that is what happens elsewhere and what we thought it meant and what we intended the legislation to mean really happened. So this went on and on. The executive arm of government was not going to back down; we were not going to back down. Initially, I was in a conciliatory mood and the other members of the committee were not. After a couple of months I became more Bolshevik about it and was going to go to the trenches on this issue. Fortunately, the other members of the committee thought, "No, let's accept the need to make an appointment now and then get in place a precedent or an understanding with the executive arm of government on future appointments". That is, "Yes, it is the role of the executive arm to nominate a person, but in order for the parliamentary oversight committee to give a view, as the legislation requires, on the suitability of that person, we are entitled to actually meet them, perhaps talk to them and perhaps have a look at their curriculum vitae". As of course happens in NSW and Queensland.

There is another problem in dealing with people in the legal system—which is not perhaps as accustomed to probing and oversighting as other systems. Daring to check somebody's curriculum vitae—or somebody having a curriculum vitae—when they are going for a senior position like this is unheard of. It seems many things in the legal profession are done by character, by reputation, and some of us who are not lawyers would say done on a nod and a wink. So I think transparency in appointments is one of the areas we are going to work harder on and we are trying to learn from the other Australian States to improve our legislation that way.

The general comment I make is that after two and a half years it is not a false honeymoon period that our Corruption and Crime Commission and the oversight of this corruption body in Western Australia is enjoying. It has been a sustained period, even with what you would normally think of as setbacks such as having your Acting Commissioner charged.

Maybe it is a Western Australian penchant, as with high profile football captains not being in the vicinity of a booze bus and not being in your warm driver's seat attached to your now abandoned car near the booze bus, but the Commission dealt with one of its own staff members who was in a similar situation regarding alcohol, car use and deceptive behaviour, albeit not during the company's time. The CCC made it public very quickly and the person resigned or was stood down very quickly. So there is a perception within the CCC of integrity at a much higher level than perhaps if you were a local government environmental officer 3000 kilometres from Perth. There is a much higher level of standard expected and shown through example that is being demonstrated to the community.

I think that after more than two and a half years, it is not a honeymoon, it is a result of a lot of hard work by the corruption body to be transparent. Transparency is not just opening the blinds at night. It is actually empowering journalists, perhaps would be whistleblowers and others, with understanding how an organisation works, so you can objectively and realistically decide if it is doing anything wrong. The Commission has been empowered that way and I certainly believe the community in Western Australia has been empowered that way. Thanks very much.

Recent Developments in Civilian Oversight in Queensland

Mr Geoff Wilson MP
Chairman, Parliamentary Crime and Misconduct Committee
Parliament of Queensland

Introduction

In this paper, I will first briefly detail the oversight regime in Queensland, before discussing some recent developments of interest.

As most of you will know, Queensland has had an anti-corruption body, initially in the form of the Criminal Justice Commission (or CJC) since 1990, implementing recommendations of the Fitzgerald Commission of Inquiry in the late eighties. The CJC was subject to oversight by a Parliamentary Committee – the Parliamentary Criminal Justice Committee – also a recommendation of Commissioner Fitzgerald.

Under the *Crime and Misconduct Act 2001*, the CJC was merged with the Queensland Crime Commission from 1 January 2002 to establish the Crime and Misconduct Commission (or CMC).

That Act also established the Parliamentary Crime and Misconduct Committee (or PCMC) which is principally responsible for monitoring and reviewing the CMC.

The Committee is assisted in this role by the Parliamentary Crime and Misconduct Commissioner.

The Crime and Misconduct Commission

The key responsibilities of the Crime and Misconduct Commission are:

- to combat and reduce the incidence of major crime (that is, organised crime, criminal paedophilia and other serious crime); and
- to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector.

The Crime and Misconduct Commission also undertakes a number of ‘supporting functions’ in the areas of research and prevention, intelligence, witness protection, and the civil confiscation of proceeds of crime.

These multiple roles distinguish the Crime and Misconduct Commission from its various counterparts in other states.

The Crime and Misconduct Commission's role in respect of major crime is to supplement the ability of the Queensland Police Service to deal with major crime, particularly where the usual investigative powers available to police prove ineffective.

The Crime and Misconduct Commission has responsibility for:

- ensuring that complaints or information involving misconduct in the public sector are dealt with in an appropriate way; and
- building the capacity of public sector departments and agencies (referred to as units of public administration (UPAs) to prevent and deal with misconduct.

A key principle underpinning the Act is the devolution to UPAs of responsibility for preventing and dealing with misconduct.

The Crime and Misconduct Commission undertakes the initial assessment of complaints to determine how they should be dealt with – the more complex of those matters that raise a reasonable suspicion of official misconduct are dealt with by the Crime and Misconduct Commission, while the remaining matters are referred to the relevant UPA to be dealt with. The investigation of matters referred to UPAs may be subject to monitoring and or review by the Crime and Misconduct Commission.

In the case of complaints against police, the Police Commissioner has primary responsibility for dealing with police misconduct (that is, lower level misconduct by police officers) and responsibility for dealing with matters involving official misconduct referred by the Crime and Misconduct Commission. Again the investigation of such complaints may be subject to monitoring or review by the Crime and Misconduct Commission.

The Crime and Misconduct Commission is led by the 'Commission' which is comprised of a fulltime chairperson (currently Mr Robert Needham), who is also the CEO, and four part-time commissioners. One of the part-time commissioners must be a lawyer with a background in civil liberties and the others must have qualifications or expertise in public sector management, criminology, sociology or community service experience.

The Parliamentary Crime and Misconduct Committee

The Crime and Misconduct Commission is subject to a number of oversight mechanisms, the primary one being the Parliamentary Crime and Misconduct Committee. The Committee has the following functions:

- to monitor and review the performance of the functions of the Crime and Misconduct Commission;
- to report to the Legislative Assembly where appropriate;
- to examine the reports of the Crime and Misconduct Commission;
- to conduct a review of the activities of the Crime and Misconduct Commission at the end of the Committee's three year term; and
- to issue guidelines and give directions to the Crime and Misconduct Commission where appropriate.

How does the Committee on a practical level monitor and review the Crime and Misconduct Commission?

- holding regular in camera meetings with the Chairperson, Commissioners, and Assistant Commissioners of the Crime and Misconduct Commission;
- in preparation for those meetings, considering comprehensive confidential reports from the Crime and Misconduct Commission in relation to its activities;
- receiving and considering complaints against the Crime and Misconduct Commission and its officers;
- reviewing Crime and Misconduct Commission reports and conducting inquiries into specific or general matters relating to the Crime and Misconduct Commission;
- requesting responses from the Crime and Misconduct Commission on issues which arise (via complaints, the media or other means);
- considering confidential minutes of meetings of the Commission and its executive group;
- where necessary, referring matters of concern to the Parliamentary Crime and Misconduct Commissioner (or to the Queensland Police Service or Director of Public Prosecutions) for investigation and report;
- conducting (either itself or through the Parliamentary Commissioner) audits of various registers and files kept by the Crime and Misconduct Commission concerning the use of its powers; and
- examining the Crime and Misconduct Commission's performance against its performance measures.

The Committee also has a role in the appointment of commissioners of the Crime and Misconduct Commission. In any appointment (or reappointment) of a Chairperson or a part-time commissioner of the Crime and Misconduct Commission, the responsible minister must consult with the Committee. Moreover, any such nomination requires the bi-partisan support of the Committee before the nominee can be appointed.

The Parliamentary Crime and Misconduct Commissioner

The position of Parliamentary Commissioner commenced in April 1998 (then known as the Parliamentary Criminal Justice Commissioner) as a result of a recommendation of the third Parliamentary Criminal Justice Committee in Report 38 tabled in Parliament in May 1997.

The principal role of the Parliamentary Commissioner is to assist the Committee in enhancing the accountability of the Crime and Misconduct Commission.

The Parliamentary Commissioner may only act at the direction of the Committee and reports only to the Committee. In broad terms, the Parliamentary Commissioner is the 'agent' of the Committee, and has no 'own motion' power.

The Committee may require the Parliamentary Commissioner to:

- audit records and operational files of the Crime and Misconduct Commission;
- investigate complaints against the Crime and Misconduct Commission and its officers;
- investigate allegations of a possible unauthorised disclosure of confidential information;
- verify the Crime and Misconduct Commission's reasons for withholding information from the Parliamentary Crime and Misconduct Committee;

- verify the accuracy and completeness of Crime and Misconduct Commission reports to the Parliamentary Crime and Misconduct Committee; and
- perform other functions that the Committee considers necessary or desirable.

Any direction to the Parliamentary Commissioner requires the bipartisan support of the Committee (this means a majority of the members which does not consist wholly of Government members).

Unlike the Committee, the Parliamentary Commissioner has power to access all Crime and Misconduct Commission documents and records, including operational material. The Parliamentary Commissioner can hold a hearing to obtain information, with the prior authorisation of the Committee (a bipartisan majority is required), if all reasonable means of obtaining the relevant information have been exhausted.

The Parliamentary Commissioner is obliged under the Act to conduct an annual review of the intelligence holdings of the Crime and Misconduct Commission and QPS. No direction is required from the Committee in this regard. The report of this review is provided to the Crime and Misconduct Commission chair, the Commissioner of Police, and the Parliamentary Crime and Misconduct Committee.

Some Oversight Mechanisms in More Detail

Meetings with the Crime and Misconduct Commission

In addition to Committee meetings (usually held at least once every sitting week), the Committee holds separate meetings with the Chairperson, Commissioners and senior officers of the Crime and Misconduct Commission on a regular basis, usually every two months.

These meetings are held in camera and provide an opportunity for candid and open discussions. The Committee has found these meetings very valuable for open communication between the Committee and the Crime and Misconduct Commission. (The first meeting with the CMC for the term of the current Parliamentary Crime and Misconduct Committee was held in public.)

To assist with the meeting process the Crime and Misconduct Commission provides the Committee in advance with a detailed briefing paper on its activities since the previous joint meeting. The Committee also receives and considers minutes of internal Crime and Misconduct Commission meetings. The Committee asks questions in relation to matters contained in the briefing paper or minutes, or indeed on any other relevant matter that has come to its attention. In recent times, the Committee has had the Crime and Misconduct Commission also provide a copy of the briefing paper directly to the Parliamentary Commissioner.

Complaints against the Crime and Misconduct Commission

Complaints about the Crime and Misconduct Commission or its officers usually come to the Committee in two ways – directly from members of the public or from the Commission itself.

Considering complaints about the Commission and its officers assists the Committee in its oversight role by providing a valuable insight into the Commission's operations and activities. The Committee does not have jurisdiction over any organisation other than the Crime and Misconduct Commission and so cannot itself consider original allegations of official or police misconduct. Further, the Committee is not able to substitute its own decision for that of the Crime and Misconduct Commission in a particular matter.

The Committee examines complaints to assess whether the Commission or any of its officers has acted inappropriately. The Committee will where appropriate make recommendations to the Crime and Misconduct Commission. Analysis of complaints, even where specific allegations against the Commission are not substantiated, can assist the Committee to identify procedural or systemic deficiencies and to take action to have the Commission deal with problem areas.

Most complaints come to the Committee directly from members of the public. The Parliamentary Crime and Misconduct Committee only accepts complaints in writing in order to efficiently identify and consider complaint matters and to prevent misunderstanding or misinterpretation as to the relevant facts or circumstances.

Under Section 329 of the Crime and Misconduct Act 2001 the Chairperson of the Crime and Misconduct Commission is obliged to advise the Parliamentary Crime and Misconduct Committee of conduct by officers of the Crime and Misconduct Commission, where the Chairperson suspects that the conduct may involve "improper conduct" by a Commission officer. Knowledge of such conduct might come to the Chairperson either internally or from a complaint made to the Commission. At present, the Committee receives frank and prompt advice from the Crime and Misconduct Commission Chairperson concerning conduct of Commission officers which the Chairperson suspects may involve "improper conduct".

In the year 2004-2005, the Committee received 44 complaints against the Commission or Commission officers, including matters referred by the Commission itself.

Audits of the Crime and Misconduct Commission

The Committee has in recent times adopted the practice of giving a series of 'rolling references' to the Parliamentary Commissioner to conduct audits of the Crime and Misconduct Commission. Generally, an audit reference is given in respect of each financial year. These audits substantially involve an examination of the exercise of coercive powers by the Crime and Misconduct Commission. The Parliamentary Commissioner, but not the Committee, has the ability to access the relevant operational files and other records of the CMC in this regard. The Committee has found this a very useful oversight mechanism. Any issues which arise have been positively responded to by the Commission.

The Parliamentary Commissioner reports back to the Committee. Whilst the audit reports of the Parliamentary Commissioner need to be kept confidential, given their contents, the Committee has reported publicly on the overall conclusions and outcomes contained in the audit reports. The Committee reported on two recent audits in October 2005.

Strengths and Weaknesses of the System from an Accountability Perspective

Strengths

- Internal accountability in the Crime and Misconduct Commission's decision-making processes through the involvement of part-time commissioners who bring a range of experience and expertise.
- The Committee is a statutory Committee that continues until the reappointment of a new Committee after an election (thus the Committee continues its roles during the period after any dissolution of Parliament). This ensures continuity of oversight.
- The Committee's role in the appointment of the Crime and Misconduct Commission chairperson and commissioners and of the Parliamentary Commissioner – bipartisan support of the Committee is required.
- An ability to direct the Crime and Misconduct Commission to investigate a matter with a corresponding obligation on the Crime and Misconduct Commission to investigate and report the results to the Committee (though this power has never been exercised).
- The power to issue mandatory guidelines to the Commission (again this power has never been exercised).
- A statutory obligation on the chairperson of the Crime and Misconduct Commission to inform the Committee of any suspected improper conduct of a Crime and Misconduct Commission officer.
- An ability to direct the Crime and Misconduct Commission or QPS to investigate and/or report on any matter of concern regarding the activities of the Crime and Misconduct Commission or its officers.
- The ability to direct the Parliamentary Commissioner as 'agent' of the Committee to report and investigate into a particular matter.
- The ability of the Parliamentary Commissioner to access all Crime and Misconduct Commission records, including material that is not available to the Committee.
- The Committee's ability to receive and consider complaints against the Crime and Misconduct Commission and Crime and Misconduct Commission officers.
- Arguably the strengths in the 'system' are also attributable to how the Committee in practical terms performs its oversight role – there is no statutory prescription in this regard.

Possible Weaknesses

- It might be argued that a 'Commission' which includes a number of part-time commissioners (rather than a single commissioner) could be inefficient – decisions must await a meeting of the Commission, time and resources are absorbed in this process.
- It has not proved to be a problem in the case of the Crime and Misconduct Commission, which meets every two weeks. Urgent matters are dealt with at specially convened meetings which can take place via teleconference. There is however an advantage in having a number of commissioners – availability of part-time commissioners to act as chairperson or undertake the role of the chairperson in matters of potential conflict) or where there are a number of major inquiries under way.
- It might be argued that a perceived weakness is the fact that the Parliamentary Commissioner can only act upon direction from the Committee (contrast the NSW

and WA Parliamentary Inspectors who can act on their own motion or upon complaints received). In Queensland it is the Committee that undertakes primary responsibility for the handling of complaints against the Crime and Misconduct Commission. The Committee can determine to ask the Parliamentary Commissioner to investigate and report to the Committee. However, if matters of concern come to the attention of the Parliamentary Commissioner, he can write to the Committee recommending action including a possible referral back to the Parliamentary Commissioner for investigation.

- The nature of the oversight arrangement – whereby the Committee considers complaints, is responsible for directing the Parliamentary Commissioner in the performance of his functions, and is involved in the appointment of commissioners of the Crime and Misconduct Commission and the Parliamentary Commissioner – means that the Committee is more actively aware of the operations of the Crime and Misconduct Commission. The disadvantage may be an increased workload of the Committee, but an advantage is a better feel for and understanding of the day to day operations of the Crime and Misconduct Commission.
- On a broader level an issue which the Committee is presently grappling with is the possible dilution of its oversight role as a result of the devolution process. As more matters are referred back to UPAs and the QPS (bodies over which the Committee has no jurisdiction) there is a lessening of the Committee's ability to oversee the handling of misconduct matters generally. In instances where a matter is referred back to a UPA and the Crime and Misconduct Commission has no further involvement in the matter, the Committee appears to be limited to a consideration of the Crime and Misconduct Commission's action in referring the matter back to the UPA and perhaps the appropriateness of the Crime and Misconduct Commission's decision to not monitor or review the UPA's consideration of the matter. The handling of matters by UPAs will not generally be subject to direct scrutiny by the Committee or the Parliamentary Commissioner.

Recent Developments of Interest

I wish to turn now to two recent investigations by the Crime and Misconduct Commission which are of some interest, particularly to the elected representatives here today. Both involved investigation of allegations against members of the Legislative Assembly.

The Palm Island Bribery Allegation

In early 2005, the Crime and Misconduct Commission conducted an investigation into statements allegedly made by the Premier of Queensland during a meeting with councillors of the Palm Island Aboriginal Council at Palm Island in February 2005. The statements related to the waiving of a council debt of \$800,000. It was alleged that the Premier offered to waive the debt if the councillors accompanied him that day to the opening of the Palm Island Community Youth Centre. The concern was that the offer by the premier might have amounted to a bribe, and thus of course a criminal offence.

On 24 March 2005 the Crime and Misconduct Commission published its report titled *Palm Island Bribery Allegation Report of a Crime and Misconduct Commission investigation into an offer made by the Premier of Queensland to the Palm Island Aboriginal Council*.

Given various definitions in the legislation, the jurisdiction of the Crime and Misconduct Commission in respect of members of Parliament is limited to conduct which, if proved, could amount to the commission of a criminal offence. This has been the position since the Crime and Misconduct Commission's predecessor was established in 1989. The appropriateness or propriety of the conduct of elected officials falling short of criminal conduct has been left to be determined by the Parliamentary or the electoral process.

In early 2005, the Crime and Misconduct Commission had reported upon an investigation involving actions of a minister and of various public servants, arising from a visit to the indigenous community of Palm Island.¹ The Crime and Misconduct Commission in its report correctly concluded that it did not have jurisdiction regarding the actions of the Minister (as there was no evidence that a criminal offence had been committed).

However, it was of concern to the Committee that the Crime and Misconduct Commission in its report expressly posed the question²:

Did the minister behave improperly either by having Mr Foster and Mr Yanner accompany her to Palm Island or by allowing the false press statement to be issued?

The Committee raised with the Commission the appropriateness of addressing the question of whether the minister "behaved improperly", where, as was the case, that did not involve any criminality. This was not a matter within the Commission's jurisdiction.

The better approach is exemplified in a report of the Crime and Misconduct Commission, tabled later the same month, on its investigation of claims of bribery against the Premier of Queensland. The allegations arose from an offer made by the Premier to the Palm Island Aboriginal Council. Again, the Crime and Misconduct Commission's jurisdiction was limited to an investigation of conduct which, if proved, could amount to a criminal offence.

On this occasion, the Commission in its report, having concluded that the offer could not amount to a criminal offence, then observed regarding its jurisdiction³:

It must be pointed out that the question of whether the offer could constitute a criminal offence, and therefore official misconduct, is quite different from the question of whether the Premier's action was in a political, practical or moral sense a wise one. The CMC has no jurisdiction to comment on the latter question, nor does it wish to make or imply a view for or against the Premier.

Crime and Misconduct Commission's investigation into allegations that a minister gave false evidence at an estimates hearing

Many more interesting and vexing questions arose from an investigation conducted later in 2005 by the Crime and Misconduct Commission into a complaint made by the Leader of the

¹ *Palm Island Airfare Controversy*, Crime and Misconduct Commission, March 2005. The report is available at <http://www.cmc.qld.gov.au/library/CMCWEBSITE/PalmIsland.pdf>

² At page 38.

³ *Palm Island Bribery Allegation: Report of a CMC investigation into an offer made by the Premier of Queensland to the Palm Island Aboriginal Council*, Crime and Misconduct Commission, March 2005, page 44. The report is available at <http://www.cmc.qld.gov.au/library/CMCWEBSITE/FullBeattiereport.pdf>

Opposition. The complaint alleged that the then Minister for Health, Honourable Gordon Nuttall MP, gave false answers to questions asked of him by a member of an estimates committee of the Legislative Assembly during committee hearings in June 2005.⁴ The Leader of the Opposition complained to the Queensland Police Service and the Commissioner of Police in turn referred the matter to the Crime and Misconduct Commission.

Again, the CMC had jurisdiction only if the alleged behaviour, if proven, could amount to a criminal offence. The Queensland Criminal Code contains the following provision:

False evidence before parliament

(1) Any person who in the course of an examination before the Legislative Assembly, or before a committee of the Legislative Assembly, knowingly gives a false answer to any lawful and relevant question put to the person in the course of the examination is guilty of a crime, and is liable to imprisonment for 7 years.

If a minister (or indeed anyone else) were to knowingly give false answers while appearing before an estimates committee, and if the various elements of the provision were satisfied, such conduct could amount to an offence against that provision.

As the Crime and Misconduct Commission noted in its report on the matter, the conduct would also support a finding that the minister had committed a contempt of Parliament (within the meaning of section 37 of the *Parliament of Queensland Act 2001*).

Thus, there arose an interesting situation where a complaint had been referred to the Crime and Misconduct Commission which alleged conduct which could amount to both a contempt and an offence.

As you all appreciate, matters of contempt are for a Parliament to consider. There is another interesting legislative provision in Queensland, this time in the *Parliament of Queensland Act 2001*.

Section 47 of that Act provides:

47 Other proceedings

(1) If a person's conduct is both a contempt of the Assembly and an offence against another Act, the person may be proceeded against for the contempt or for the offence against the other Act, but the person is not liable to be punished twice for the same conduct.

(2) The Assembly may, by resolution, direct the Attorney-General to prosecute the person for the offence against the other Act.

Issues regarding the various elements of the offence provision included whether the hearing in fact amounted to an 'examination', whether the minister knowingly gave a false answer; and whether such an answer was in response to a question that was both 'lawful and relevant'.

⁴ *Allegations concerning the Honourable Gordon Nuttall MP*, Crime and Misconduct Commission, December 2005. The report is available at <http://www.parliament.qld.gov.au/view/publications/documents/other/Nuttall.pdf>

At this stage, the lawyers were being kept very busy and it became apparent that these were matters on which legal opinions were to differ. Advice of Senior Counsel on various issues was being sought not only by the Crime and Misconduct Commission, but also by the Minister, the Premier, and the Speaker and Clerk of the Parliament.

Most of the resultant opinions were attached to the report of the Crime and Misconduct Commission. Not surprisingly, given both the complexity and novelty of the issues involved and the predilection for the legal profession to produce divergent views on the same legal point, the resultant opinions differed markedly in some respects.

The Crime and Misconduct Commission noted that some of the other legal opinions had reached different conclusions to those reached by its counsel. As mentioned, all of the opinions that were available to the Crime and Misconduct Commission were attached to its report. The Crime and Misconduct Commission acted upon the opinions it had obtained, stating in its report⁵:

This report does not canvass the various opinion; the contents of each speaks for itself. Suffice to say that the CMC, after careful consideration, has accepted, and relies on, the opinions [it has obtained.]

It is fair to say that the Crime and Misconduct Commission was alive to issues of parliamentary privilege that arose. The first step it took was to obtain a joint legal opinion from two Senior Counsel as to whether either the investigation or the prosecution of a member of the Queensland Parliament for an alleged breach of section 57 of the Criminal Code offended parliamentary privilege. In the event, Counsel answered 'no' to both questions.

The Crime and Misconduct Commission then sought further advice from senior counsel on an aspect of the criminal code provision, seeking advice as to whether the questions put to Mr Nuttall — the answering of which had been alleged to give rise to the commission of an offence - were 'lawful and relevant' within the meaning of that section. Counsel answered 'yes'.

The question also arose as to whom the Crime and Misconduct Commission should report, if appropriate to do so. Section 49 of the *Crime and Misconduct Act 2001* provides that the Crime and Misconduct Commission, when it decides that prosecution proceedings should be considered, may report on its investigation to the Director of Public Prosecutions or "other appropriate prosecuting authority".

What was the effect of section 47 of the *Parliament of Queensland Act* referred to above? Should the Crime and Misconduct Commission refer its report directly to the Director of Public Prosecutions or should the report be directed in the first instance to the Attorney-General for consideration by Parliament?

Counsel for the Crime and Misconduct Commission advised 'to the Attorney for consideration by Parliament'. Again, the Crime and Misconduct Commission followed the advice it had obtained.

In relation to the matter itself, the Crime and Misconduct Commission concluded that, on the basis of the evidence identified in the investigation, prosecution proceedings should be

⁵ Ibid, page 2.

considered. In accordance with the advice it had received and accepted, it therefore furnished its report to the Attorney-General.

In the report, the CMC stated that it was so doing “*for her to bring it before parliament for its decision as to the course that should be followed.*”⁶ In its report, the Crime and Misconduct Commission continued:

Parliament may direct the Attorney-General to prosecute the minister for the offence created by section 57 of the Criminal Code. Alternatively, if Parliament concludes that the more appropriate course is to deal with the matter as a contempt of parliament, it may direct that the matter be dealt with in accordance with Part 2 of Chapter 3 of the Parliament of Queensland Act.

The Crime and Misconduct Commission did not itself publish its report – it provided it to the Attorney-General on 7 December 2005. In the event, the Attorney-General tabled the report in the Parliament on the same day. (Parliament was not in session, having finished its scheduled sittings for the year at the end of the previous week.)

Hon Nuttall resigned from the ministry on the same day.

Also on that day, in a move that attracted criticism from the Opposition and commentators, the Commissioner of Police made public his own opinion, which was to the effect that there was insufficient evidence to prosecute under the Criminal Code. Also on that date, the Legislative Assembly was recalled to consider the matter.

When the House assembled on 9 December 2005, Hon Nuttall provided a personal explanation to the House. He apologised for any answers that misled the estimates committee and stated that he did not deliberately mislead the estimates committee. He stated⁷:

... I wish to unreservedly apologise to the House for anything in my answers at the estimates committee hearing that misled either the committee or this parliament. I accept that the committee had a legitimate expectation that I, as minister, would approach answering its questions with a greater degree of care and accuracy. I accept that my answer to the question was careless. It was not deliberately or knowingly false or misleading..... I did not intend to mislead the committee and I did not deliberately mislead the committee. At no time did I knowingly give a false answer to a question relevant to the estimates committee proceedings. Once again, I express to this House that I am truly sorry for any conduct at the estimates committee which resulted in misleading the committee.

The Premier then moved a motion by which the House in summary:

- noted the reports by the Crime and Misconduct Commission and the Commissioner of Police
- noted the Member’s resignation from the ministry and his apology
- dealt with the conduct as a contempt

⁶ Ibid, Page 45.

⁷ Queensland Legislative Assembly, *Parliamentary Debates (Hansard)*, 9 December 2005, page 4719.

- accepted the resignation and apology as the appropriate penalty.⁸

An amendment moved by the Leader of the Opposition proposing that the House refer the Crime and Misconduct Commission report to the Director of Public Prosecutions for consideration was defeated. The House, on party lines, passed the Premier's motion.

Following these events, there has been media speculation that the government might move to amend the Criminal Code provision.

One point worth making, and which was perhaps not in the forefront of some minds, is that, whilst the conduct being considered was that of a member of the Legislative Assembly (and according to the Crime and Misconduct Commission a matter for the Parliament), this was not the only characteristic which made that conduct a matter for the Parliament. The conduct involved answers given at proceedings of a committee of the Legislative Assembly. The criminal provision would be applicable if the answers that were being impugned had been given by a person other than a member of the Legislative Assembly. Also such a circumstance would have still involved a possible contempt of the House – and thus a matter for the House to consider.

The controversy has been recently re-ignited. Just last week, Hon Nuttall raised a matter of privilege in the House. He was highly critical of the Crime and Misconduct Commission's report. He tabled an opinion he had obtained from another senior counsel. Like some of the counsel before him, counsel on this occasion reached different conclusions from those reached (or adopted) by the Crime and Misconduct Commission. The opinion also raised concerns regarding aspects of the Crime and Misconduct Commission's report. Mr Nuttall announced in the House that he would write to the Parliamentary Crime and Misconduct Committee, the Premier, and others, requesting:

- referral of this matter to the Parliamentary Crime and Misconduct Commissioner for investigation;
- a judicial review of the Crime and Misconduct Commission's investigation and processes that led to the report of December 2005;
- a full review of the *Crime and Misconduct Act 2001*;

⁸ Ibid. The full motion reads:

..... *That, notwithstanding anything contained in standing and sessional orders—*

- 1. the House notes the Crime and Misconduct Commission's report—the report—on its investigation into allegations against the Honourable Gordon Nuttall MP tabled by the Attorney-General and Minister for Justice on 7 December 2005;*
- 2. the House notes the report by the commissioner of the Queensland Police Service on these matters;*
- 3. the House notes the resignation of the member for Sandgate as a minister and a member of the Executive Council on 7 December 2005;*
- 4. the House notes the ministerial statements made today by the Honourable the Premier and Treasurer and the Honourable the Attorney-General and Minister for Justice about the matters the subject of the report;*
- 5. the House notes the member's statement and apology to the House today about the matters the subject of the report;*
- 6. the House determines under section 38 (Decisions on contempt) of the Parliament of Queensland Act 2001 that the member's conduct be now dealt with by this parliament as a contempt; and*
- 7. the House accepts the member's resignation as a minister and a member of the Executive Council and the apology made today to the parliament as the appropriate penalty in accordance with section 39—Assembly's power to deal with contempt—of the Parliament of Queensland Act 2001.*

- an inquiry into the operations and conduct of the Crime and Misconduct Commission with recommendations regarding its future structure and role; and
- referral to the Members' Ethics and Parliamentary Privileges Committee to consider matters of privilege arising for all members.

The Parliamentary Crime and Misconduct Committee is yet to consider those matters and as you will appreciate it is not appropriate for me to canvass in what manner it might do so.

Looking Ahead – Some Possible Challenges

I will close by briefly mentioning what lies ahead for the Committee. One of the statutory responsibilities of the Committee is to conduct a review of the activities of the CMC close to the end of the Committee's term. Consistent with the standard term of the Queensland Legislative Assembly, and notwithstanding the possible vagaries that can arise given we do not have fixed terms, this review is known more or less colloquially as the Three Year Review.

This is a wide-ranging review, examining all the functions of the Crime and Misconduct Commission, as well as the relevant legislation. The current Committee will commence its Three Year Review very shortly, calling for submissions in early March 2006, with public hearings to follow, probably in June 2006.

At the time of the last Three Year Review, the Crime and Misconduct Act 2001 and the Crime and Misconduct Commission were both relatively recent creations. The then Committee took the view that not enough time had passed since the commencement of the act and since the merger to fully examine the changes wrought by that act, including the merger itself, as well as the new statutory emphasis on devolution and capacity building. One expects that these areas will be the focus of more attention by the current Parliamentary Crime and Misconduct Committee in its review.

The Joint Standing Committee on the Australian Crime Commission

**Senator the Hon. Ian McDonald,
Parliamentary Joint Committee on the Australian Crime Commission**

Good afternoon, ladies and gentlemen. It falls to me and my colleague Mr Duncan Kerr MHR, who is the deputy chairman, to represent the Parliamentary Joint Committee on the Australian Crime Commission at this conference today. Actually, my representation has to be vicarious as I do not formally become part of the Committee until next Tuesday, but as a practising lawyer many years ago and previously a member of the joint statutory committee overseeing the National Crime Authority, I am delighted again to have the opportunity to be involved in the fight against organised crime and corruption in Australia through the Parliamentary Joint Committee on the Australian Crime Commission.

The last conference of parliamentary oversight committees of anti-corruption and crime bodies was held in Perth two and a half years ago. Unfortunately, the Parliamentary Joint Committee on the Australian Crime Commission was not able to be represented on that occasion, but from the report on that conference I believe that it was a very worthwhile event. I am sure that this conference will be equally successful and useful.

The purpose of my presentation today is to provide you with an update of recent activities of the Parliamentary Joint Committee on the Australian Crime Commission, while Duncan Kerr this afternoon will give a paper looking at the major challenges, but given that we were not represented at the last conference, and some of you may have had little background on the Commonwealth's role in all this, I think it is probably appropriate for me to spend just a few minutes, acknowledging that I am the only thing that stands between you and lunch at the moment, on the background to the Australian Crime Commission and the Committee.

The Australian Crime Commission came into operation on 1 January 2003 and combined the operations of three existing organisations, the National Crime Authority, the Bureau of Criminal Intelligence and the Office of Strategic Crime Assessments. The role of the Commission is to lead the fight against organised crime in Australia, and it does this in three ways: by collecting, analysing and disseminating criminal intelligence; by conducting investigations and intelligence operations; and by participating in joint operations and tasks forces with partner agencies.

The Australian Crime Commission's latest annual report indicated that as at 30 June 2005 it had a staff of some 574 people, which include 157 police and task force staff on secondment to the Commission. The Commission's head office is in Canberra and it has regional offices in Sydney, Melbourne, Brisbane, Perth and Adelaide. Its budget for the current financial year is some \$76.3 million.

The day-to-day operations of the Australian Crime Commission are managed by a chief executive officer, Mr Alastair Milroy, who reports to the board. The board comprises the Commissioner of the Australian Federal Police, who also chairs the board, the Secretary of

the Attorney-General's Department, the Chief Executive Officer of the Australian Custom Service, the Chairperson of the Australian Securities and Investments Commission, the Director General of the Australian Security and Intelligence Organisation, the Commissioner or head of the police force in each State and Territory, and the Chief Executive Officer of the Australian Crime Commission (as a non-voting member).

A key aspect of the board's role is to determine the priorities of the Australian Crime Commission, and it is worth emphasising here that the makeup of the board is such that it is not just a creature of the Commonwealth Government, because the heads of the police forces of each State and Territory are on the board, it is obviously a national Australian Crime Commission.

In turn, the Australian Crime Commission board reports to an Inter-Governmental Committee on the Australian Crime Commission, which is made up of the Commonwealth Minister for Justice and Customs, who is the chair, and all State and Territory police Ministers.

The Australian Crime Commission has a wide range of investigatory powers, including, where authorised of course, searches, controlled operations, surveillance activities, telecommunication intercepts and assumed identities. Additionally, the Commission has power to conduct examinations and to order production of documents and things. These are significant additional powers, because the normal privilege against self-incrimination does not apply to the Commission and witnesses can be compelled to give evidence. Like a royal commission, these coercive powers enable it to take initiatives which are outside the scope of legally acceptable criminal investigations, but the Commission's use of its powers depends on the determination of the board. It cannot act without that prior authorisation. So the Commission is not another police force and it is quite different from the Australian Federal Police which investigates Commonwealth criminal offences. The Commission's work is focussed on nationally significant criminal activity and it takes a much broader and strategic approach.

So what roles over the Australian Crime Commission does the Parliamentary Joint Committee on the Australian Crime Commission have? Section 55 of the Australian Crime Commission Act sets out the duties of the Committee and they are: to monitor and to review the performance of the Commission of its functions; to report on any matters relating to the Commission or connected with the performance of its functions to which in the opinion of the committee the attention of Parliament should be directed; to examine each annual report of the Commission; to examine trends and changes in criminal activities, practices and methods, and to report any change which the Committee thinks is desirable to the Commission; and also to inquire into any question referred to the committee by either House of Parliament. Significantly, the Committee may not undertake any intelligence operations or investigate criminal activities itself or even reconsider the findings of the Commission in relation to a particular operation or investigation.

As a joint committee, the Parliamentary Joint Committee on the Australian Crime Commission comprises five Senators and five Members of Parliament from the House of Representatives. The usual makeup of the joint committees is five members from the Government, four members from the Opposition and a member from the minor parties or an independent.

It is noteworthy that in the hurly burly of national politics the members of the Parliamentary Joint Committee on the Australian Crime Commission have traditionally taken a bipartisan approach to their work, with the result that the Committee's reports, and the recommendations they contain, are usually unanimous. I believe that this reflects very well on the members of the Committee and is the reason that its work is treated with respect by the Government and by the public.

It is important, I think, to realise that the Parliamentary Joint Committee on the Australian Crime Commission is separate from the executive government. While it certainly does have a co-operative relationship with the Minister for Justice and Customs, it does not work at the direction of the Commonwealth Government.

Apart from its key roles of monitoring the Australian Crime Commission as required by the Act, the Parliamentary Joint Committee on the Australian Crime Commission also investigates other key matters of interest as opportunities arise. These inquiries can be self-generated or they can be referred by Parliament, or may be suggested by the Minister for Justice and Customs. Where possible, the Committee holds public inquiries. It calls for submissions by advertising the inquiry and writing to interested groups and individuals around Australia. Public hearings are usually held in the major centres around Australia and the final report on each inquiry is tabled in both the Senate and the House of Representatives.

Each year the Parliamentary Joint Committee on the Australian Crime Commission conducts a thorough examination of the Australian Crime Commission's annual report. Other major inquiries that the committee has undertaken in the last two years include a report on cyber crime, which was tabled in March 2004. The Committee also reported on trafficking of women for sexual servitude. The original report of that was tabled in June 2004, with a supplementary report tabled in August last year. The Committee has also reviewed the Australian Crime Commission Act 2002, a report that was tabled just last November. The Committee has just commenced an inquiry into amphetamines and other synthetic drugs in Australia and that will be the main focus of the Committee over coming months.

Whilst the Parliamentary Joint Committee on the Australian Crime Commission's reports into the Australian Crime Commission's annual report, the trafficking of women, and cyber crime have all made valuable contributions, the Committee believes that its review of the Australian Crime Commission Act 2002, which was completed only three months ago, was one of its major investigations during its time.

The Parliamentary Joint Committee on the Australian Crime Commission's review of the Australian Crime Commission Act 2002 enabled the Committee to assess at a strategic level the continuing relevance, effectiveness and accountability of the Australian Crime Commission and the wide powers that it does wield in the national interest.

The terms of reference of the review included the Parliamentary Joint Committee on the Australian Crime Commission itself, since as a creature of the Australian Crime Commission Act 2002 it was logical that the review should encompass an evaluation of the Committee's work. As the Committee could not very well review itself, Professor James Davis, an emeritus professor of law at the Australian National University, was asked to undertake an independent assessment of the Committee's activities and its continuing relevance. The inquiry was advertised nationally in August and some 27 submissions were received from interested parties and public hearings were held at which 43 witnesses gave evidence. The

final report was tabled in the Senate on 10 November 2005. Basically, the Committee found that the Australian Crime Commission was a robust and dynamic organisation which had achieved its key objectives. Things can always be improved, and the Committee's report contained eighteen recommendations relating to regulatory and legislative change, accountability, and integrity issues, as well as matters of staffing, resources, and the Commission's examination process and procedure. The Committee believes that if the proposed changes are adopted by the government, the Australian Crime Commission will be an even more effective organisation than it is at the present time.

Ladies and gentlemen, I guess as I say that lunch will fast disappear from the tables if we do not get there. I am sure you will be relieved to know that I will not be discussing that report in detail. Suffice it to say though that it is seen as the most important inquiry that the Parliamentary Joint Committee on the Australian Crime Commission has undertaken in recent years.

Finally, what did Professor Davis say about the Parliamentary Joint Committee on the Australian Crime Commission itself? His assessment was included as Appendix 3 to the report on the Australian Crime Commission Act 2002, and I quote from his conclusions. He said:

It is my view that the statutory charter of the parliamentary joint committee as contained in section 55 of the Act continues to be as appropriate to the current ACC as it was to the original National Crime Authority in 1984. It continues to be essential that parliament maintains a watching brief over the activities of such a powerful body as the ACC, and since parliament as a whole cannot realistically maintain the watching brief, its role is fully and completely played by its surrogate, the parliamentary joint committee. Furthermore, the committee has demonstrated by its activities over the last few years that, with the exception of the question of scrutinising the exercise of the ACC's special investigative powers, it remains effective in fulfilling the role and maintaining oversight of the Australian Crime Commission's operations, together with initiating policy changes that flow from the committee's longer term view of the fight against organised criminal activity.

Ladies and gentlemen, I hope that does give you an insight into the work of the Parliamentary Joint Committee on the Australian Crime Commission and the Australian Crime Commission, and the work that they each do. I do thank you all for the opportunity to update you, and I look forward to learning a lot during the afternoon and tomorrow morning on the work of your various committees right around Australia. Thanks very much.

Dealing with Corruption: The Victorian Experience

Mr George Brouwer
Victorian Ombudsman and Director, Police Integrity

The genesis of the Office of Police Integrity in Victoria is to be found in a series of so-called gangland killings that erupted in recent times and which created quite a bit of public consternation, which was aggravated by allegations of police involvement with the criminal underworld. This was further compounded when two witnesses about to give evidence in a trial were murdered in their homes and around the same time sensitive police information reports found their way into the media and into the criminal underworld.

The Government was faced with all sorts of calls for a royal commission, bodies of inquiries and everything else you might want to think of, and quite a bit of controversy erupted for a number of months. The Government finally decided to evolve a police anti-corruption body out of the then existing Police Ombudsman function, which was part of the Ombudsman's Office, which had always been concerned with complaints against police in a fairly rudimentary way, but which now was going to be strengthened in order to give this new body the powers of a standing royal commission and also additional powers.

If you look at the history of police corruption in Victoria, you will find a coincidence between the origins of the colony in 1853 to the present day which coincided roughly with the existence of the police force in Victoria for the same amount of time. You'll find that there have been in total about 20 royal commissions and bodies of inquiries looking into police corruption and related matters over the period. So you are really looking at a situation of a royal commission or some like body investigating allegations once every ten years on an average.

The outcome over the century and a half has really been a recurrent pattern of all sorts of interesting findings being made, of recommendations for structural reform being made and nothing much happening in the aftermath. Nothing much happened because largely the weakness in royal commissions is that they are set up with often limited or carefully thought out terms of reference; they are short-lived and then, once they have gone out of existence, the impetus for ongoing reform tends to disappear fairly quickly either through political cowardice or industrial compromise and all sorts of other factors that are usually part and parcel of what some might call vigorous community debate.

In the light of this experience, the Government decided to short-circuit the route which had been taken in some other States where you had a pattern of, in more recent times, royal commissions being set up and then being followed by recommendations for the setting up of permanent anti-corruption bodies. This has been the pattern we have witnessed in Queensland, New South Wales and Western Australia.

The Office of Police Integrity (or OPI, as it is called) is fairly new. It is the latest in a series of developments that have characterised dealing with these kinds of issues in this country.

Now the development of the Office resulted in a rather peculiar effect that, when the Office was being equipped with very extensive powers, which are equal to the powers which have been given to similar bodies interstate, which are equivalent and even more extensive than the traditional royal commission powers, you still had for quite some time some sections of the community, including academics, calling for the setting up of a royal commission. It took a while for people to realise that they had a standing royal commission in Victoria now for the first time and that things were starting to happen. It was a shock for the police force, which in Victoria had not been accustomed to having such a rigorous outside oversight body monitoring it. Particularly in the initial period - and bearing in mind we were only set up on 16 November 2004 - we met with a great deal of hostility from within certain ranks of the police force, although we had full support from the Commissioner and the upper echelons of the force.

The history of police corruption will form part of a longitudinal study which I have decided to embark on. It will analyse not only the past patterns of corruption in the community and link it to the kind of circumstances that have produced these kinds of eruptions of corruption, but, more importantly, will be a kind of foundation for the development of risk indicators to deal with corruption issues on an ongoing and systemic basis.

In the past - and the same can be said of other States in Australia - you will find that whenever you have had a fashionable product, which is in demand by sections of the community but which the laws of that community describe as illegal or illicit and unlawful, a profitable market develops around these kinds of dynamics. You only have to look at the history in Victoria where you have had illegal brothels spawning particularly acute incidents of corruption, the abortion issue, the SP bookmaker issue, the "sly grog" issue and now, in our day and age, drugs, as being one of those fashionable products about which the community tends to send out rather morally ambiguous messages.

On the one hand, you have a manifestation of drugs for recreational purposes being consumed by thousands of young people in venues all over Melbourne, as you would have also here, I am sure. On the other hand you have the community saying to the police, many of whom are also part of youth, that they must find and do everything possible to stamp out this evil practice. Be it at the rave parties around Melbourne, be it in board rooms or be it amongst whatever classes of society where recreational drugs are part and parcel of the so-called modern lifestyle, it is not surprising that these morally ambiguous messages also put a lot of pressure on any attempt, and particularly on those involved in the forefront of such attempts, to try to deal with what is a very vexed social issue.

In Melbourne, the profitability of some of the drug trade has been quite astounding. It has generated millions and millions of dollars in funds that are sloshing around and has put the elements of the criminal underworld in a fairly strong position to try to find partners or others to facilitate their way forward.

For this reason, when the Office was established, I put it to the Government that the objects that I should be given should be as broad as possible. Two objects have now been enshrined in legislation and indicate that it is my function to deal with the detection and the prevention and the prosecution of corrupt activities, but also to make sure that the highest ethical and professional standards are maintained in the police force. I am able to deal with serving police members and also with those who have retired. I can call up before me any person - not just police, but any member of the community - who may have an involvement with

corrupt activities or with the police or with lots of other contingent relationships that might be involved there and to have them be coercively examined in what is an inquisitorial process. My proceedings can be in camera or they can be in public. I have also been given the power to enter any public premises without a warrant in order to seek and seize information and I have been able to apply for a warrant to enter any other premises where I suspect evidence may be available that would help in our inquiries.

People appearing before my hearings are compelled to answer and privilege against self-incrimination no longer applies. The only privilege that still applies is that of legal professional privilege. I am a bit doubtful about that privilege in itself when you look at the involvement of some members of the legal profession in the Melbourne context who seem to be perhaps transgressing the boundaries of what you would call proper legal ethics into a different kind of world. Legal professional privilege nevertheless is a handy shield for them to mask the relationships they have with certain underworld figures. Apart from that we have the complete freedom to try to get whatever information we need in order to establish the truth.

If a person appearing before us refuses to answer or is prevaricating or is behaving in a way which is trying to undermine the questioning process, I am able to arrest that person on the spot and have that person taken to the Supreme Court for the Supreme Court to determine whether that person is in contempt of my proceedings. The Supreme Court then has to make a determination as if it were a contempt of the Supreme Court itself. The Supreme Court can then decide whether that person is to be detained indefinitely or impose some other penalty until the contempt is purged.

The accountability for use of these powers is overseen by what is called a Special Investigations Monitor. Here again we have quite a different model compared to the kinds of models that have been discussed this morning. The Special Investigations Monitor is a retired judge - in this case a judge from the County Court - who is a statutory officer in his own right and who is there to monitor my exercise of the powers I have just indicated to you. The oversight, unlike a lot of parliamentary committees oversight, is a real-time oversight. That is, whenever I issue a summons or whenever I use my coercive powers I advise at the same time the Special Investigations Monitor of this fact. When people appear before me in secret hearings, or in public hearings for that matter, the proceedings are video-recorded and a copy of that video is sent as soon as practicable to the Special Investigations Monitor. His function is to make sure that there is no abuse of powers on my part in the way I have exercised them; that due process is observed and that requirements such as relevance and a fair hearing are complied with. He cannot intervene in any of my investigations or in any of my processes, but he can make recommendations to me in order to suggest that I should perhaps change a particular procedure or I should be more explicit about what people might be told about, et cetera, and it is up to me whether I want to implement that or not. He can report to the Parliament in any case about the exercise of my powers and I can report to the Parliament about the same exercise of my powers and the Parliament is then to judge what it thinks is the proper way of the matter being handled.

The relationship I have found very fruitful because, particularly in the formative processes of the office, we have had a very frank dialogue. I have basically said to the Special Investigations Monitor that the Office is open to him. He can come in if he wants to look at any files. If he wants to get any background information, I am happy to make all of that available. So we have a very free-flowing, open relationship where he is able to satisfy

himself that our assurances about why we have gone down a certain track can be sustained or otherwise.

So, as you can see, this is quite a different model from what seems to be prevailing in most of the other jurisdictions.

When I do investigations it is up to me whether I wish to issue a public report and all of my reports that I choose to make public I can table directly in the Parliament. I do not have to go the Minister or the Premier, I do not even have to notify the Premier or the Minister or the Chief Commissioner that this report will appear in the Parliament, and in fact sometimes when I produce a report in the Parliament the first time that the Premier or Minister knows about it is when they receive it in the Parliament together with everybody else. I do not have to do this: I can also in certain circumstances give Ministers an advance copy of my final report, but only the final report; never a draft report.

The benefit of having the flexibility of operating in camera as well as operating in public is that we can gear to the requirements of each particular case by considering what might provide the best outcome in order to establish the truth while minimising harm that might otherwise flow to individuals.

We had our first public hearing recently, a few weeks ago. It was a two-day hearing and there was extensive discussion as part of the hearing, which was open to the media, about whether the hearing should be private or in public and secondly, whether certain names should be suppressed or not. It was an interesting comment, because the issue of transparency is important, that the journalists who were involved and witnessed the proceedings felt that it was seldom that such transparency was shown compared to sometimes what happens in our traditional adversary system. It was an interesting insight into what they were thinking on that score.

I should now perhaps explain to you, because there are a few things I want to say before we run out of time, about the Ombudsman's function. Under the legislation that was set up, I am both the Ombudsman operating under the Ombudsman Act and I am Director, Police Integrity acting under the Police Regulation Act, which I will just describe to you in very general terms. The two organisations, the Ombudsman and the Office of Police Integrity, are quite separate organisations. The only common element is me really, but my two deputies operate quite independently and have their own staff. The oath that I take before the Parliament is quite different as Ombudsman and as Director, Police Integrity and people are appointed under the different legislative provisions.

On the Ombudsman side we have the usual traditional Ombudsman powers and we also are responsible for implementing the Whistleblowers legislation. On the police side I have indicated to you that I have extensive powers to look at any matter relating to police corruption and serious misconduct. I can deal with issues in each jurisdiction on my own motion or by way of complaint. On the Ombudsman side elected officials are exempted from the jurisdiction of the Ombudsman, except that under the Whistleblowers legislation, which I administer as Ombudsman, elected officials, including members of Parliament and elected councillors, can be investigated by me for corruption and misconduct, but I can only do so if I receive a complaint. I cannot investigate on my own motion under the Whistleblowers legislation.

The powers of the Victorian Ombudsman are again very extensive. I have not undertaken a comparative analysis of the other States' powers, but they are basically also royal commission powers and, apart from looking at administrative actions, it is very broadly defined legislation, which can include acts of omission as well as acts of commission. I can also make recommendations to the Government and the Parliament on laws and regulations where conduct that could be seen to be unfair nevertheless happened in accordance with such legislation and regulations in force. I can point out to the Parliament that the substantive law should be changed in order to avoid these kinds of injustices. We do not have enough time to go into the details, but it is a fairly wide-ranging remit that I have been given as Ombudsman.

The Victorian Whistleblowers legislation has, in my view, some real difficulties. It is very commendable in its intent, but the complexities of the legislation I think are such that, in many ways, it can become fairly unworkable. It also runs the risk, because so much legalism in a sense is involved in the interpretation of highly complex provisions, of misleading people who want to be whistleblowers.

Under the Victorian legislation there are some very high thresholds that have to be overcome and there is a two-stage process. When a person makes what he or she considers to be a whistleblower disclosure the Ombudsman has to be satisfied first that it is truly a protected disclosure within the criteria laid down by the legislation and then whether it is also a public interest disclosure within the criteria of the legislation. Meanwhile, the person is in limbo until those determinations are made. It happens quite regularly, where a person lodges a whistleblower complaint, that I have to say to that person that, because of the provisions of the Victorian legislation which relate to serious misconduct, corruption or misconduct resulting in termination or dismissal, et cetera, or serious injury to public health or words to that effect, that there is not enough, that the person has not produced enough supporting information to sustain the threshold criteria established by the legislation. Although that person is protected up to that point under the Act, psychologically it can be quite upsetting and problematic because the person may have gone out on a limb and now feels full of uncertainty about what may happen next. I can offer to investigate his complaint under the broader Ombudsman jurisdiction and most of the time whistleblowers take me up on that, and of course that Act also can provide protection against retaliation, except not as emphatically perhaps as the Whistleblowers legislation.

The other problem I think with the whistleblowers legislation is that you wonder whether we have proliferated too many provisions grafted on to or related to already existing provisions. If you look at the functions of an Ombudsman you can basically say that the primary function of an Ombudsman would be able to accommodate disclosures that may be called whistleblower disclosures. Under the Ombudsman Act people come forward and make disclosures to me which amount to corruption, which amount to gross and serious misconduct and other heinous kinds of practices. On the one hand that is proffered under the Ombudsman Act but another person who may then make the same or similar allegation and say "I want to be a whistleblower" would then be covered under the whistleblower legislation. So to me there seems to be a little bit of discontinuity in the way the legal remedies and set-ups are working out.

I have already triggered off a review of the Freedom of Information legislation, which is an equally problematic bit of legislation in many ways, and I am at present thinking seriously and having discussions about advancing proposals to review the Whistleblowers legislation. There are people, some of whom are here in this audience, who will be able I hope to help us

in that way, seeing that nationally already - and I think A J Brown is going to talk about that - there are moves afoot to try to get more sense into this whole set-up, Australia-wide.

The reason why it is important is that if the community is truly interested in trying to deal with corruption in a systemic as well as individual way, the kind of lawyers-play mechanisms that so often confront them should be minimised. I think we should have something which is much more user friendly and does not drag people down into a morass of uncertainties and all sorts of legal sophistries.

Just coming back to the police force for a minute, I am able to investigate any aspect of police practices and procedures and methodology that I think need to be looked at and I am able to trigger off any of these own motion investigations, as I mentioned, without getting the approval of the Chief Commissioner.

The strength of this own motion power is that - and many royal commissions have pointed this out time and time again - it is not really about getting a few scalps, it is not about getting runs on the board, but it is to try to change the culture and practices of the force where the corruption problems are being generated. One of the programs, which is a fairly innovative program, is what we call the Corruption Prevention and Leadership Analysis Program where one of our people will go into a police station anywhere in Victoria, spend about a month in that station - publicly, not under cover - working with the police force and picking up workplace practices, management and leadership styles, internal and external relationships, and the vibes, either in the tea room or in more formal meetings on the day-to-day culture of what a police station is like.

At the end of that period initial recommendations are developed in order to try and see if the management weaknesses and failures and the leadership failures might be dealt with progressively. The management of the police station is asked to attend a meeting in front of all the other constables and ranks in the police station and union representatives in order to discuss their perceptions. A certain time element is allowed, say, three months or six months, for the management of the station and of the police force to put their house in order and then we come back and have a look and see how radically things have changed or not changed. We have done about three of them already and, interestingly enough, they have met with tremendous support from the lower ranks, who felt let down by certain levels of management or senior management, and as a result we are now getting other people coming forward in order to point us in the right directions about where the pressure points might be.

What we have found - and again something that has been identified by many royal commissions - is that although corruption is an exotic topic and everybody seems to have some problems in defining it, at the root of it really is bad management. If you get good management and leadership you find that corruption is minimised. This is the pattern that we are coming across very strongly and this is the pattern which has also been thrown up by the longitudinal study to which I referred earlier. By the same token too, for every bad level of management there is another level of management above it. I think we should not lose sight of the fact that you do not have these little pockets operating in isolation and again we had a recent event where together with the Ethical Standards Department of the Victoria Police we - a combined effort - raided a major police station in Melbourne and we arrested three police. Criminal charges are being considered and at present we are going through the process where station members are being called before a hearing in order for them to be given the opportunity to indicate what went wrong. The things that we have found are

symptomatic of a general malaise that seems to have prevailed at the station. It is meant to have an educational effect. It is meant to support the younger police who are coming into the force lest they be contaminated by the kind of environment they find themselves in and it is pointing out to other stations the need for good management and leadership.

On the question of contamination, when we did an investigation into what is called the BART case in Victoria some years back, which was a window shutters operating scam perpetrated between the police and some private operators, we found that on an average it only took six weeks for a healthy police station to become infected when an officer from a diseased station, if I can use simplistic terms, was transferred into the healthy police station. Six weeks for that officer to start contaminating some of the other officers in the station to become part of the scam, so you are not talking about long lead times, you are really talking about the need to make sure that the leadership, management and structural principles and the cultural perspectives are changed if you really want to deal effectively, in our view, with the kind of corruption issues that I think are besetting all of us.

Thank you very much.

Parliamentary Committees and the Fabric of Accountability

Mr Duncan Kerr SC MP
**Deputy Chair, Joint Standing Committee on the Australian Crime
Commission, Parliament of Australia**

Thank you for the opportunity to speak at today's conference.

Introduction

In the fifteen or so minutes I have today, I would like to discuss the concept of a 'fabric of accountability' covering anti-corruption agencies. In particular, I want to look at the role that we, in the Parliamentary scrutiny committees play in the system.

I base these comments on the perspectives I have gained from my experience as a lawyer, a former Minister for Justice and a long time member of the Parliamentary Joint Committee on the Australian Crime Commission. I have been a member of this committee since its commencement, and before that was a member of the oversight committee for the National Crime Authority. Over time, the issues that I will touch on today have become increasingly pressing, particularly in the current law enforcement environment.

I begin by asking the question: as committees charged with the task of overseeing and scrutinising the various crime and corruption commissions around the country, what exactly should we look for, would we know it if we saw it, and would we find it if it is occurring? In other words, are we effective?

In answer to the first question, what the Parliamentary Joint Committee on the Australian Crime Commission should look for is at least partly circumscribed by its duties under the Australian Crime Commission Act. The Parliamentary Joint Committee on the Australian Crime Commission is specifically precluded from undertaking an intelligence operation, conducting an investigation into a matter relating to a relevant criminal activity, or from reconsidering the findings of the ACC in relation to a particular Australian Crime Commission operation/investigation. The Parliamentary Joint Committee on the Australian Crime Commission 's work is accordingly focused on the legislative, structural and organisational issues surrounding the ACC – and less the ACC's methodology, competence or ethics in individual matters.

The answer to 'would we know it if we saw it, and would we find it if it is occurring?' must be 'sometimes'.

However, I think there are two areas in which the Parliamentary Joint Committee on the Australian Crime Commission must recognise weaknesses in its effectiveness. The first is the difficulty of dealing with a very old problem: entrenched, systemic corruption. The second is

a new one: the challenges posed for scrutiny committees by emerging cross-jurisdictional law enforcement.

Detecting Corruption

Let's look at the capacity of Parliamentary committees to investigate corruption in law enforcement agencies.

There is a range of corrupt behaviour that would not necessarily come to our attention. The Parliamentary Joint Committee on the Australian Crime Commission has very limited access to operational information and the opportunity to detect irregularities is extremely limited. Further, the Committee does not necessarily possess the time or expertise to 'tease out' the information which it does receive in order to identify matters which require further investigation. In fact, the clear lesson of royal commissions such as that conducted by Justice Wood here in NSW is that to be effective, anti-corruption investigators must have access to the full range of investigative tools, including surveillance, telephone interception, and controlled operations. Clearly these are well beyond the capacity of any Parliamentary committee.

The Parliamentary Joint Committee on the Australian Crime Commission must therefore rely on building relationships with the specialist agencies that do have these capacities. These include the Australian National Audit Office which oversees the ACC's detailed financial arrangements. As the Auditor General was declared in 1997 to be an Independent Officer of the Parliament 'to protect the independence of the Office and express a closer working relationship to the Parliament',¹ he is well placed to provide assistance to a Parliamentary committee.

The Parliamentary Joint Committee on the Australian Crime Commission also receives regular briefing from the Commonwealth Ombudsman, (currently Professor John McMillan) who investigates complaints that are made about the ACC and can initiate investigations into matters referred by the ACC itself, or by other individuals or organisations. The Ombudsman is required to provide an annual private briefing to the Committee about the Australian Crime Commission's involvement in controlled operations, as well as inspecting the Australian Crime Commission's records under the Telecommunications Interception Act 1979 and the Surveillance Devices Act 2004.

We have identified a need at the Commonwealth level for a further agency to pursue long term investigations into the integrity of Commonwealth law enforcement agencies. Legislation to create this body, to be called the Australian Commission for Law Enforcement Integrity (ACLEI), is scheduled for introduction into the Parliament this session. On current indications, it will have coverage of the Australian Crime Commission and the Australian Federal Police.

¹ Wanna, J, Ryan, C. and Ng C. Synopsis of *From Accounting to Accountability: A Centenary History of the Australian National Audit Office* Canberra 2001; viewed on website <http://www.anao.gov.au/WebSite.nsf/96cb85c8e5a9297bca256bed0017c9ff/3d3a3db0c647bd634a256d28000667d1> 13 February 2006

What emerges from this picture is that the Parliamentary Joint Committee on the Australian Crime Commission must not overstate our own capabilities. What we are good at is legislative, financial and policy scrutiny, and –through our inquiries – providing a forum for public debate. A big part of this is ensuring the cohesiveness of the overall fabric of accountability: the coverage, strengths and weaknesses of each agency.

It is for this reason that in its report on the Australian Crime Commission Act last year, the Parliamentary Joint Committee on the Australian Crime Commission recommended that the Parliament change our jurisdiction to become a new Parliamentary Joint Committee on Commonwealth Law Enforcement. This would give us the capacity to take a bird's eye view of overall accountability. We would not only supervise the operations of the Australian Crime Commission, but also the Australian Federal Police and other Commonwealth law enforcement agencies. We would also be able to work more effectively with the supervisory bodies such as the Commonwealth Ombudsman and the future ACLEI.

Law Enforcement Across Jurisdictions

This leads me to the second issue, which is the emerging cross-jurisdictional nature of law enforcement itself. This exists at a number of levels: operations, policy development and intelligence.

Operational

At the operational level, the Australian Crime Commission works closely with police from all jurisdictions. Last year, 157 police were seconded to the Australian Crime Commission. Other state and federal police work alongside the Australian Crime Commission in taskforces.

In many cases Australian Crime Commission staff rely on state legislation to authorise its operations. While on secondment, the officers are both members of the Australian Crime Commission and their original agencies. This has significance for the management of performance and for matters of discipline.

The Commonwealth Ombudsman pointed out in a submission to the Committee last year,² that the secondment model gives rise to practical difficulties. Not the least of these is the need for the secondee to be fully aware of which agency's powers he or she is relying on at any given time and that they are working within the agency's practices and procedures.³

The Ombudsman told the Parliamentary Joint Committee on the Australian Crime Commission that his reporting function in relation to overseeing the Australian Crime Commission's access to cross-border law enforcement powers was limited.⁴ He pointed out that his only jurisdiction lies in the examination of the use of telephone intercepts and surveillance devices. Otherwise he can only proceed by way of an 'own motion' investigation – as he did in relation to controlled operations.

² Prof John McMillan *Submission 4 to the Review of the ACC Act 2002* (2005) p.5

³ *Ibid.* p.4.

⁴ *Committee Hansard*, 11 Oct 2005, p. 25

While the Ombudsman reported that he had found nothing which would suggest that the ACC is doing anything inappropriate, he observed that there is still the capacity for the ACC to use the state regimes in controlled operations to take advantage of the sometimes less onerous state accountability requirements. He observed that this was an 'accountability gap' which requires closing.

Policy and Intelligence

The increasingly complex – and necessary – cross jurisdictional law enforcement activities are matched in policy and intelligence.

At the policy level, there are a range of peak bodies, used by executive governments to coordinate laws and agency cooperation. These include the Heads of Commonwealth Law Enforcement Agencies (HOCLEA), the Australian Police Ministers' Council, (APMC) and the Standing Committees of Attorneys General – which delights in the acronym SCAG.

The intelligence role is undertaken by the ACC itself as well as AUSTRAC – the Australian Transaction Reports Centre and CrimTrac. CrimTrac was established in 2000, and maintains a national database to support police in identifying suspects. It relies on the co-operation of all jurisdictions to provide the information for its database.

Implications for the Parliamentary Joint Committee

The agency we oversee is cross-jurisdictional and it is important that the PJC can work in a similar way. At present, this does not occur.

Let me illustrate with three practical examples of why this is needed.

The first relates to the use of coercive powers.

A key factor that differentiates agencies like the Australian Crime Commission from police organisations is their access to coercive powers. These coercive powers include the power to compel witnesses to attend hearings and to answer questions, and the power to demand the production of documents.

A matter that is of increasing concern is the potential for the close working relationships, and inter-agency secondments, to result in a blurring in the distinction between agencies such as the Australian Crime Commission and police.

These agencies are not courts: they are far more inquisitorial and secretive in nature. They do not make findings of guilt or innocence, nor are their inquiries bound by the rules of evidence. The powers have already been extended in ways probably not contemplated even ten years ago. This is in part because of the spectre of terrorism which has emerged as a significant force – affecting our criminal law, and the way that criminal intelligence is approached.

The increasing availability of coercive powers has the capacity to make them part of mainstream law enforcement rather than the extraordinary powers they are, and should remain.

I believe it is essential that committees charged with scrutinising the activities of agencies with these coercive powers, co-operate closely to monitor how these powers are used, and to detect emerging bad habits in which agencies take 'cooperation' beyond appropriate levels. Second, at the policy level, the effectiveness of agencies such as CRIMTRAC require effective inter-governmental working relationships if they are to work. If governments and their agencies won't share information, these national agencies are effectively hamstrung. Our Committees can play a valuable role in providing the political push to make sure that barriers such as these are overcome.

Third, there is an increasing phenomenon that I sometimes refer to as 'legislation by COAG' (the Council on Australian Government the peak intergovernmental body in Australia). Bills are presented to Parliament and we are told that we cannot change things because 'it's all been agreed to by COAG' or some similar national body. As a former Justice Minister, I appreciate the practical effectiveness of the mechanisms involved here, but I also see this as usurping Parliament's role.

I consider that our committees can do much to deal with this issue at an early stage by discussing, even at an informal level, the emerging developments in criminal law enforcement.

Conclusion

So what do I have in mind regarding these issues?

Both the Commonwealth and state Parliamentary scrutiny committees collect considerable amounts of information. However, unless there is some way of co-ordinating and sharing that information, each of us will only have a percentage of the whole. The Parliamentary Joint Committee on the Australian Crime Commission has sought in the past to hold discussions with similar bodies in the states, with a view to exploring exactly the kind of problems I have outlined. Putting it tactfully, I can only say that there was a complete lack of interest in anything beyond the borders of individual jurisdictions.

The Parliamentary Joint Committee on the Australian Crime Commission is at the apex of the Australian Crime Commission's accountability mechanisms. Its role is to examine inter-jurisdictional arrangements and agencies to plug Professor McMillan's 'accountability gaps'. This means that the Parliamentary Joint Committee on the Australian Crime Commission needs to examine issues at a systemic level, and that includes those of the jurisdictions in which they operate. It would be surprising if an exchange of information between state and Commonwealth oversight bodies was not of equal mutual benefit.

The Parliamentary Joint Committee on the Australian Crime Commission travels to most states and territories quite frequently for hearings. We should take opportunities created by these visits to meet with our state counterparts. This conference offers us an excellent

starting point to establish these relationships. With a little co-ordination, this could be rapidly extended.

The range of methods available to commit criminal acts has expanded immensely in the last 30 years, and as technology develops, so does the ability to use it dishonestly. The capacity to obtain effective criminal intelligence and detect criminal activity must keep pace with these advances.

This can only be achieved where there is public trust in the institutions which carry out this work; this is wholly dependent on the integrity and accountability of these institutions. Continuing dialogue between the responsible bodies in each of the jurisdictions will support the maintenance of integrity and accountability, and enable those bodies to discharge their obligations more effectively.

The Execution of Search Warrants on Members' Offices

Hon Peter Primrose MLC
Chair, Privileges Committee
Legislative Council of New South Wales

Introduction

As noted by my colleague Kim Yeadon in his introductory remarks earlier today, in 2003 a case arose in New South Wales in which a search warrant was executed in the office of a member of the Legislative Council by the Independent Commission Against Corruption (ICAC), which led to two inquiries by the House's Privileges Committee. Following the conclusion of those inquiries, a further matter has been referred to the Committee concerning a wider issue raised by the case - the need for the development of appropriate protocols for the execution of search warrants in members' offices. The issue of searches of parliamentary offices by external anti-corruption agencies is relevant to every Australian Parliament, and the two inquiries and current matter which are the main subject of this paper will I hope provide useful background for any similar situations which may arise in other jurisdictions. However, before examining those issues, a brief note concerning the dual nature of the Committee's role is appropriate.

Conflict between the exercise of statutory investigatory powers and the requirements of parliamentary privilege is but one of the areas in which the Committee's role can intersect with that of an agency which is subject to parliamentary oversight. A second area arises under the Independent Commission Against Corruption Act 1987, whereby the Committee has certain responsibilities relating to a code of conduct which applies to members of the House, a breach of which can lead to investigation by the ICAC. In this respect, NSW is unique among Commonwealth jurisdictions so far as I am aware, in that breach of a code of conduct adopted by resolution of the House can lead to investigation by an external statutory body. Although this aspect of the Committee's role is not the subject of the present paper, it is relevant given that the investigation which involved the execution of the search warrant resulted in findings by the ICAC based on the framework provided by the code of conduct. The Committee will be pursuing its statutory function of reviewing the code of conduct later in 2006, which may also be of interest to participants in today's proceedings, and I am happy to provide further information on that aspect if required.

Execution of the Warrant

Turning to the specific matter referred to above, the search warrant was executed on the office of a cross bench member of the House, the Hon Peter Breen, in the course of an investigation concerning the member's use of parliamentary allowances and entitlements, for

the purpose of determining matters relating to “corrupt conduct”.¹ Under the purported authority of the warrant, the executing officers seized various documents, Mr Breen’s laptop computer, and two hard disc drives, and downloaded certain files from Mr Breen’s personal drive on the Parliament’s IT network.

Although Mr Breen was not present during the search, the Deputy Clerk of the Legislative Council was notified of the proposed search shortly before the ICAC officers’ arrival at Parliament House. Further, both prior to and during the search, the Deputy Clerk advised the officers of the need to ensure that material connected with proceedings in Parliament not be seized, and the officers indicated that they had no intention of violating parliamentary privilege. In that regard, section 122 of the Independent Commission Against Corruption Act 1988 expressly preserves parliamentary privilege in relation to the freedom of speech, debates, and proceedings in Parliament.

After the warrant had been executed, however, concerns arose that some of the documents taken by the ICAC may have been subject to parliamentary privilege, or may otherwise have been unlawfully seized. Those concerns were communicated to the ICAC Commissioner by the President of the House. In response, while asserting the lawfulness of actions taken by the ICAC, the Commissioner advised that certain interim procedures would be implemented for the handling of the seized material, until the question of the ICAC’s access to the material could be clarified. Under those procedures, the seized computer equipment was to be returned to the Clerk of the House, while the other seized material was to be retained by the ICAC, but not viewed or opened, until the issue had been resolved.

Following the implementation of these interim measures, the House agreed to a motion by Mr Breen referring an inquiry to the Privileges Committee on the matter.

First Privileges Committee inquiry

The terms of reference for the inquiry required the Committee to consider whether any breaches of the immunities of the House, or contempts, had occurred in the execution of the warrant, and what procedures should be adopted to determine whether any of the seized material had been immune from seizure by virtue of parliamentary privilege. The determination of those issues involved consideration of various complex, technical questions, which are briefly outlined below. However, it took place in the context of a conflict between two important public interest considerations which has resonance for all jurisdictions, and which is a type of conflict that parliamentary committees providing oversight of investigatory bodies need to carefully consider in their work. That is, on the one hand, as an anti-corruption body, the ICAC has the task of investigating the conduct of public officials in accordance with its statutory functions. If it fails to adequately investigate allegations against members of Parliament the public interest is not served. On the other hand, if an

¹ Under the *Independent Commission Against Corruption Act 1987*, “corrupt conduct”, as applied to a member of Parliament, includes (but is not limited to) a “substantial breach of an applicable code of conduct”. One of the clauses of the code of conduct which applies to members of the House requires that the public resources to which members are granted access (which would include allowances and entitlements) be used in accordance with any guidelines or rules about the use of those resources.

investigatory body ignores or minimises the importance of the established rights and immunities of Parliament and seizes documents without regard for the freedom of communication between citizens and their elected representatives, the public interest is threatened in a different way. The conflict between these competing considerations underpinned the Committee's inquiry.

As to the first issue raised by the terms of reference, breach of immunity, the relevant immunity is the immunity of proceedings in Parliament from impeachment or question in external forums, which is enshrined in article 9 of the Bill of Rights.² The usual context in which the immunity is invoked is the courts (where for example it prevents the use of evidence of "proceedings in Parliament" to impugn the accuracy of statements made therein), but it was not disputed during the inquiry that the immunity is also capable of applying to the actions of the ICAC. However, the application of the immunity to the context of the execution of a search warrant (a question on which there is no direct judicial authority) was the subject of dispute.³

The nub of that dispute was that the ICAC argued that the mere search and seizure of material relating to "proceedings in Parliament" cannot amount to an "impeaching or questioning" of those proceedings, while the majority of the evidence received by the Committee was that the effect of article 9 includes the prevention of the seizure of such material where an impeaching or questioning of "proceedings in Parliament" necessarily results. The Committee ultimately adopted the interpretation supported by the majority of the evidence, having considered the relevant authorities and policy arguments on both sides. On that basis, it concluded that, in the case involving Mr Breen, at least one of the documents seized under the warrant was within the scope of "proceedings in Parliament",⁴ and that the seizure of that document constituted a breach of article 9. It did not, however, find that any contempt had occurred, as it did not appear from the evidence that the ICAC had acted with a sufficiently improper intent, although the Committee warned that any subsequent attempt by the ICAC to use documents falling within the scope of proceedings in Parliament in their investigations would amount to a contempt.

As to the remaining items which had been seized under the warrant, the Committee recommended that their status should be determined by the House itself, in accordance with a particular procedure which was set out in the Committee's report. The key elements of that procedure were:

- The seized items were to be returned by the ICAC to the House, and inspected by the member, together with the Clerk of the House, and officers of the ICAC.
- Any items claimed to be privileged were to be identified (by the member and the Clerk).
- The ICAC was to have the right to dispute any claim of privilege, and the member was to have the right to provide reasons in support of any disputed claim.

² Article 9 applies in New South Wales by virtue of section 6 and Schedule 2 of the *Imperial Acts Application Act 1969*.

³ See Standing Committee on Parliamentary Privilege and Ethics (now the Privileges Committee), *Parliamentary privilege and the seizure of documents by ICAC*, Report 25, December 2003.

⁴ A transcript of interview which had been used to prepare a speech to the House.

- Any dispute which was to arise as to the status of particular items was to be determined by the House (in accordance with a definition of “proceedings in Parliament” drawn from the Commonwealth *Parliamentary Privileges Act 1987*).
- Any items which the House determined were not privileged, or in respect of which a claim of privilege was not made, were to be released to the ICAC (and thus available for the purposes of the ICAC’s investigation).
- However, any items which the House determined were within the scope of “proceedings in Parliament” were to remain in the custody of the Clerk until the House otherwise decided, with a copy to be made available to Mr Breen.

In recommending that procedure, the Committee noted that it differed from the procedure which has been adopted in similar cases in the Senate, in which an “independent arbiter” has been appointed to review seized material and make an assessment as to whether any had been immune from seizure. In particular, in contrast to the Senate procedure, the Committee’s procedure included steps to enable the particular documents in dispute to be identified at a relatively early stage (documents which may prove to be only small in number), and provided for the question of immunity to be assessed by the House (rather than an arbiter).

Further, the Committee specified that the procedure was designed to provide a workable solution to the issues arising in that particular case, without compromising either of the public interest considerations at stake (the ICAC’s right to investigate the conduct of public officials in accordance with its statutory functions, and the need to uphold the established rights and immunities of Parliament), and was not intended to be a precedent to be followed in future cases. However, the Committee acknowledged the need to address the wider issues raised by the case by making a second recommendation to the House, for the establishment of a separate inquiry on the development of protocols for the execution of search warrants on members’ offices in future.

Following the tabling of the Committee’s report, the procedure recommended for resolving that case was adopted by the House, with some modification. The initial stages of the procedure were then implemented, including the identification of documents claimed to be privileged, the disputing of the claim by the ICAC, and the provision of reasons in support of the claim. At that point, however, rather than determining the validity of the claim forthwith, the House referred a second inquiry to the Privileges Committee, to determine which of the disputed documents fell within the scope of “proceedings in Parliament”.

Second Privileges Committee inquiry

As with the earlier inquiry, the second inquiry raised questions of a complex and technical nature, the application of which has ramifications for other jurisdictions. Further, as with the first inquiry, the central issue raised by the inquiry was the subject of dispute. In this case, the issue was the extent of “proceedings in Parliament”.

It is generally accepted that, where a document has been brought into existence for the purpose of transacting parliamentary business (i.e. business in a House or committee), it is within the scope of “proceedings in Parliament”. Beyond that point, however, the authorities are less clear-cut, and the ICAC argued for a restrictive interpretation. The Committee,

however, took the view that, even where a document was not brought into existence for such a purpose, it is still within the scope of “proceedings in Parliament” if has been subsequently used, or even retained by the member for that purpose. This could include, for example, a document provided to a member by a constituent, which in itself does not attract the definition of “proceedings in Parliament”, but which if retained by the member for the purpose of raising an issue in the House will come within the scope of article 9. That interpretation is supported by various authorities which are referred to in the Committee’s report, including *O’Chee v Rowley* (1997) 150 ALR 209, in which it was held that the retention of a document by a Senator was “an act done... for the purposes of or incidental to the transacting of [parliamentary business]” within the meaning of the federal *Parliamentary Privileges Act*.⁵

Applying that reasoning to the documents in dispute, the Committee found that, while none of the documents had been brought into existence for the purposes of transacting parliamentary business, some appeared to have been used for those purposes, and all had been retained by Mr Breen for such purposes. The Committee therefore recommended that the documents were within the scope of “proceedings in Parliament” and that the claim of privilege relating to the documents should be upheld. The House subsequently adopted that recommendation, following which the privileged documents were retained by the Clerk of the House, until a later order by the House required their return to Mr Breen. That action concluded the matter involving Mr Breen. As to the ICAC’s investigation, however, a report of the investigation was released in 2005 in which no adverse findings against Mr Breen were made, including no findings of “corrupt conduct” or of any breach of the code of conduct.

The Current Inquiry – Development of Protocols

Although the claim of privilege in the Breen matter was finally upheld by the House in 2004, the recommendation arising from that matter for the establishment of an inquiry on the development of protocols was not implemented until 2005. The catalyst for action on the issue was an approach by the ICAC Commissioner concerning the need for an appropriate protocol for the purposes of the ICAC. The matter was referred to the Privileges Committee by the House. A similar inquiry was later referred to the Legislative Assembly’s Standing Committee on Parliamentary Privilege and Ethics. The terms of reference for each inquiry require the Committee to examine and report on “appropriate protocols for the execution of search warrants on members’ offices by law enforcement agencies and investigative bodies”, with particular reference to certain matters.

In developing suitable protocols on this subject, the central issue to be addressed is that, in contrast to the procedure in judicial proceedings, in the context of the execution of a search warrant there is no opportunity for claims of privilege to be raised, and even if potential claims are identified, there is no competent authority present during the search to determine their validity (given that the executing officers themselves are not competent to make such a determination). As the Senate’s Committee of Privileges observed in 1999 in support the development of a suitable protocol for the federal Parliament:

⁵ See Standing Committee on Parliamentary Privilege and Ethics (now the Privileges Committee), *Parliamentary privilege and seizure of documents by ICAC No. 2*, Report 28, March 2004.

the execution of a search warrant means that documents immediately fall into the hands of those seeking them, the law enforcement authorities. In the absence of some process whereby the question of parliamentary privilege can be raised, the recipient of a warrant has no opportunity to raise the question whether material should be produced to those seeking it. It is for this reason that the proposal for special procedures in respect of search warrants has been suggested.⁶

Aside from this basic question, other types of questions have been examined including matters such as whether there is a need for external scrutiny before an agency decides to apply for a warrant in respect of a member's office; whether there is a need for prior notice to the Clerk, Presiding Officer, or member; what requirements should be observed for the handling and custody of documents where a claim of privilege is made; and what procedures should be followed to determine such claims to ensure that all relevant issues are taken into account. In seeking appropriate solutions to such issues, the prior experience of other comparable Parliaments has been of assistance. In that regard, the Committee's first report on the Breen matter included an overview of precedents and procedures from a number of other jurisdictions, but there have significant developments since then. These include the formalisation of a protocol for the execution of search warrants by the Australian Federal Police in premises occupied by members of the federal Parliament, which was previously only in draft form. That protocol is the result of lengthy consultation between the agencies concerned, is comprehensive in its scope, and as such provides a useful model for other jurisdictions.

Whatever approach is ultimately recommended by the Committee, however, will be informed by the principles explored in the Breen matter, although the particular solutions adopted in that matter may not be replicated in all respects. In particular, the Committee will be concerned to ensure on the one hand that investigatory agencies are not unnecessarily impeded in the execution of their functions, so that public confidence in the accountability of public officials, including parliamentarians, is maintained. On the other hand it will be concerned to protect the operation of the parliamentary immunity, without which the Houses and their members cannot perform their constitutional functions on behalf of the electorate. The underlying purpose of that immunity was described in evidence to the Committee in its first inquiry on the Breen matter as: "to enhance deliberative democracy and responsible government by some measure of immunity granted to the parliamentary conduct of members, particularly against threats or reprisals from the Executive." As the Committee has found:

Representative democracy can flourish only when citizens can communicate freely with a member of Parliament and in the knowledge that the actions of members in the conduct of proceedings in Parliament will go unchallenged by outside interference or intimidation.⁷

⁶ Senate Committee of Privileges, *Execution of search warrants in senators' offices*, 75th report, March 1999, paragraph 1.10.

⁷ Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and the seizure of documents by ICAC*, Report 25, December 2003, p. ix.

Corruption and the Media—Political Journalists, 'leaks', and Freedom of Information

Ms Helen Ester
Central Queensland University

This paper looks at leaks and whistleblowing from the perspective of political journalists, in particular those working in the parliamentary round. It presents one aspect of a wider thesis about parliamentary democracy and political journalism that underpins my research as a PhD candidate with the Department of Politics and Public Policy at Griffith University in Queensland. This work draws on empirical data gathered from interviews with journalists in 25 of the 30 mainstream bureaus that constitute the 150-200 journalist members of the Federal Parliamentary Press Gallery (FFPG). It is based on a view that parliamentary democracy and the parliamentary journalism round share a co-genesis – that mature representative democracies and principles of press freedoms are, if you like, twin outcomes of the same gestation that binds parliamentary reporters and parliamentarians together in a never-ending contest over information. Further I would argue the health of this interrelationship is a bellwether for the well being of key traditions in Westminster derived democracies.

In the 2005 Deakin lecture series, one of the longest serving members of the FPPG, Michelle Grattan describes it this way:

It is an old message that media and politicians are both natural adversaries and in a parasitic relationship. Their interests are often at odds. Sometimes they are openly at war, constantly they are engaged in a struggle of wits. What's interesting is how this traditional conflict and cooperation plays out in new circumstances (Grattan, 2005:2).⁸

The topic of leaks and whistleblowing highlights important aspects of this many faceted struggle. This paper expands on an article commissioned by the Australian National University's *Democratic Audit of Australia* (DAA) and posted on their website in September 2005. One of the fundamental democratic principles the *Audit* monitors is 'Representative and accountable government: for example, what level of corruption is there in Australian government'.⁹ My article contributed to the discourse in this area after two Canberra gallery journalists faced jail sentences charged with contempt of court during the pre-trial proceedings of a senior public servant who had allegedly breached Section 70 the Commonwealth *Crimes Act* for the 'unauthorised communication' of government documents.

⁸ Grattan, M (2005) *Gatekeepers and gatecrashers* unpublished transcript the 2005 *Deakin lecture series*, May 2005

⁹ Australian National University, Political science program, *Democratic audit of Australia* accessed February 2006 at <http://democratic.audit.anu.edu.au/>

Gerard McManus and Michael Harvey from News Ltd's *Herald-Sun's* gallery bureau wrote a story based on 'unauthorised' information about a government decision not to increase war veterans' pension entitlements by a recommended \$500m. The leaker's action was not 'whistleblowing' in a strict legal sense, because the information did not involve an illegal action by government, but rather alerted the public to a negative policy decision (Bryan, 2005).¹⁰

The journalists were offered indemnity in return for giving the name of their source to the court, and their point blank refusal to do so inevitably led to the charge of contempt and the prospect of two years jail. This is not ideology at work. Practical, functional reasons lie behind the Journalists' Code of Ethics (MEAA, 2006)¹¹ prescription against the naming of confidential sources.

If the job of a free press is to monitor government by reporting issues important in the public interest it follows that leakers and whistleblowers of confidential information have to be able to trust journalists to protect their identity. The type of 'unauthorised information' in their interrelationship encompasses the full gambit from government inspired 'strategic' leaks, to documents that would inform the public about issues of significance to them, to exposing 'illegal' or criminal activities by governments or their agencies. From a journalistic point of view information is information and the need to protect a source occurs irregardless of the lines drawn between the criminality of leaking unauthorised policy information, the more heroic sometimes semi-sanctioned act of exposing government corruption and the cynical leaking of secret material for political gain. It is a bit of a lottery and precedents suggest the chances of journalists being charged are low.

This conference would recall that the last time a journalist faced prosecution was thirteen years ago in 1993 when *Sydney Morning Herald* journalist Deborah Cornwell refused to reveal her police source to the NSW Independent Commission Against Corruption. She was subsequently convicted and sentenced to 100 hours community service. At the previous Parliamentary Oversight Committee conference held in Perth Dr Stephen Tanner also discussed other precedents (Tanner, 2003).¹² Cases such as jailing of West Australian journalist Tony Barrass who copped a seven-day sentence for refusing to name a source in 1989 during litigation involving the tax office and the 14-day sentence served by Joe Budd of Brisbane's *The Courier-Mail* in 1992 because he would not identify a 'high ranking public servant' during a defamation case.

¹⁰ Bryan, 2005 *Gerard McManus and Michael Harvey* filed by Bryan on Monday 29 August 2005, accessed February 2006 at:
<http://www.ozpolitics.info/blog/?p=182>

¹¹ MEAA 2006 Media Entertainment and Arts Alliance (MEAA) Code of Ethics accessed February 2006 at:
<http://www.alliance.org.au/content/view/17/60/>

¹² Tanner, S (2003), in Report No. 7 36th Parliament 2003 Appendix Eight – P.53 – 62 Paper delivered by Dr Stephen Tanner, Senior Lecturer in Journalism, Murdoch University, Western Australia - the National Conference Of Parliamentary Oversight Committees Of Anti-Corruption/Crime Bodies 2003, accessed February 2006 at: <http://parliament.wa.gov.au/web/newwebparl.nsf/iframewebpages/Committees+-+Reports>

In 2005, and on the public service side of the ledger in the McManus and Harvey case, part one of the drama has just ended with a senior public servant's career in tatters. Mobile phone records that showed the public servant made calls to McManus were included in the evidence against at his trial where a jury returned a guilt verdict at the end of January this

year. The judge eschewed the maximum penalty (also a two year jail sentence) releasing this white-collar criminal on a 12month good behaviour bond. In the meantime, the journalists' case is in the hiatus of an appeal process. However their fate does not look dire following the Attorney-General Philip Ruddock's sudden intervention during the week of their trial. Victorian County Court chief judge Michael Rozenes stayed the contempt proceedings pending the appeal following Ruddock's submissions to the County court to exercise its discretion and take account of 'the Government's view that imprisonment would not be an appropriate penalty for the journalists' (Lawyer's Weekly, 2005).¹³ It is reasonable to speculate that Ruddock's last minute intervention could be related to other matters such as the journalists' employment at Rupert Murdoch's New Ltd or to the Iraq war of occupation that Australia is waging alongside other members of the American led coalition in the name of liberty and democracy –jailing our own journalists at this time is not a 'good look'.

Howard's 'Leak squad'

Ruddock's robust support in the *Herald-Sun's* McManus and Harvey case is certainly ironic as their plight is a result of the ardour of his government's campaign to hunt down and prosecute leakers. Secretary of the Prime Minister's department, Peter Shergold famously spelt out the seriousness of the government's intent when he declared in late 2004 that 'if some people seem surprised that I have called in the police to deal with leaks, they shouldn't be—I always have and I always will' (Shergold, 2004).¹⁴ An example of the seriousness of the government's intent was the 2004 Australian Federal Police (AFP) raid on the *National Indigenous Times* in a search for incriminating evidence about the leaker of 'unauthorised' information about the future of the Aboriginal and Torres Strait Islander Commission (ATSIC):

Police spent around two hours at the paper's office, and also searched the editor's house and car and removed six documents including a Cabinet submission. (AM, ABC Radio, 12 November 2004).

The *Herald Sun* and the *National Indigenous Times* cases show the Howard government's anti-leaking campaign is as uncoordinated as it is arbitrary. Both cases involve administrative policy matters on topics of direct relevance to each publication's audiences. It is hard to fathom what sort of guidelines could justify a direct assault on the *National Indigenous Time's* editor, but not on the home, car and office of the editor of the *Herald Sun*, or explain why only the *Herald-Sun's* journalists ended up facing contempt of court charges.

¹³ Lawyer's Weekly, 2005 - *Ruddock goes in to bat for journalists*, 11 November 2005 accessed February 2006 at:

<http://www.lawyersweekly.com.au/articles/86/0C038486.asp?Type=53&Category=853>

¹⁴ Shergold, P cited in Grattan, M *Government crackdown on leaks bad for democracy* the *Age* 31 August 2005

Federal Secretary of the Media Entertainment Arts and Alliance (MEAA), Chris Warren has described the charging of McManus and Harvey as 'a train wreck that was waiting to happen'. It is his view that the Howard government 'had clearly decided to crack down on leaked information' and the Government should have foreseen [that] 'the inevitable consequence of this is that journalists will go to jail' (Warren, 2005)¹⁵.

Cost and cost-effectiveness do not appear to be a major concern. In a Senate debate in June 2005 Opposition Senator Kim Carr, revealed there have been 'close to 120 separate references to the Federal Police' for unauthorised disclosures by public servants and that the Australian Federal Police's (AFP) so-called 'leak squad' spent 32,000 staff hours costing 'nearly \$200,000' (Carr, 2005).¹⁶ The results are hardly value for money. The AFP told the *Age* newspaper's Michelle Grattan that as of the end of May 2005 from well over 100 referred cases 'there are six investigations' and that from June 2000 to June 2005, 'eight people were charged, six convicted, and two cases were still on foot'.¹⁷ Conference participants, Adjunct Professor in the School of Political Science at the University of Queensland, Dr David Solomon, also notes the AFP 'rarely find a culprit' (Solomon, 2006).¹⁸ Apparently the anti-leaking campaign would not pass Economic Rationalism 101 - and therefore its rationale must lie elsewhere in the realms of ideology and atmospherics. Both public servants and journalists alike know their work emails, mobile and other telephone calls are logged. Neither journalist nor public servant can have telephone discussions without permission through a chain of media officers to the Prime Minister's press office. Chief political correspondent in the FFPG Sun Herald bureau, Kerry Anne-Walsh describes this command and control system as 'an octopus' that reaches over 'the gallery, the parliament and the public sector' (Walsh, 2004).¹⁹ It may well not be safe to communicate with journalists (and vice versa) from non-government or private devices. In 2004 leaked information about baby-bonus payments prompted the government to set up a security review of the responsible Department by the Australian Security and Intelligence Organisation (ASIO) and the Defence Signals Directorate (DSD) (Australian Senate 2005).²⁰ The involvement of intelligence agencies is likely to have a powerful psychological effect, especially since the new laws have extended the boundaries well beyond the previously assumed privacies.

¹⁵ Warren, C (2005) cited in Merritt, C *Jail the price for keeping a pledge* in *Australian Media* section 25 August 2005, accessed August 2005 at: <http://www.theaustralian.news.com.au/printpage/0,5942,16373319,00.html>

¹⁶ Carr, K (2005) Senator Kim Carr, 2005 in *Public Service Amendment Regulations 2004 Senate Official Hansard no.8 Thursday 16 June, 2005* p 38 ff accessed February 2006 at: <http://www.aph.gov.au/hansard/senate/dailys/ds160605.pdf>.

¹⁷ Grattan, 'Government crackdown on leaks bad for democracy'

¹⁸ Solomon, D (2006) *Whistleblowers, and governments, need more protection* Australian National University, Political science program, *Democratic audit of Australia* February 2006 at <http://democratic.audit.anu.edu.au/>

¹⁹ Walsh, K A (2004) unpublished transcript of interview with Ester, H, June 2004

²⁰ Senate Estimates Finance and Administration Portfolio 15 February, 2005 Sections 4.1 and 4.29 accessed 07 September 2005 at: http://www.aph.gov.au/senate/committee/fapa_ctte/estimates/reports/2005/add_0405/c04.htm

In addition there are legislative proposals to bolster the anti-leak campaign. They are contained in the *Public Service Amendment Regulations 2004* (temporarily disallowed in June 2005 before the government majority was in place). The amendments appear designed to create open-ended catch-all sanctions. For example the then Minister for State, Senator Abetz explained the government had decided against 'defining in detail by reference to subject matter, the types of information that should be protected' but to focus 'on the consequences...the disclosure *might* cause' (my emphasis). And should an employee want, to get unauthorised policy information out into the public arena, he/she they would have what seems like a Hobson's choice of reporting this to their employer, 'or indeed to the Public Service Commissioner' (Abetz, 2005).²¹

Degrees of Concern

There is a high level of concern about the capacity for a climate of intimidation to undermine principles of open government and robust public discourse. In the landmark Bennett²² case Justice Finn warned that unqualified sanctions on public service employees contravened the implied constitutional freedom of political communication (Holland and Prince, 2004).²³

Bennett v President, Human Rights and Equal Opportunity Commission involved a public servant with the Australian Customs Service who as President of the Customs Officers Association who (COA), made comments in the media about matters such as a single Border Protection Agency.

Bennett refused an order to stop talking to the media, even after he was charged under Public Service Regulations and suffered a salary cut and change in duties. When the Human Rights and Equal Opportunity Commission (HREOC) declined to investigate, Bennett went to the Federal Court where Justice Finn described Reg 7(13) as 'draconian' noting that such regulations were designed for a colonial era and were out of place in modern democracies where excessive government secrecy is a major issue. In Justice Finn's view, Reg 7(13):

...impedes quite unreasonably the possible flow of information to the community— information which, without possibly prejudicing the interests of the Commonwealth, could only serve to enlarge the public's knowledge and understanding of the operation, practices and policies of executive government (Federal Court of Australia, 2003).²⁴

Long serving gallery journalist (and trustee of many leaks including a Federal Budget) Laurie Oakes of TV *Network 9* and the *Bulletin* Magazine has expressed similar concerns:

²¹ Abetz, E (2005) Senator Eric Abetz, *Public Service Amendment Regulations 2004 Senate Official Hansard no.8 Thursday 16 June, 2005* p 38 ff accessed February 2006 at: <http://www.aph.gov.au/hansard/senate/dailys/ds160605.pdf>.

²³ Holland, I and Prince, P (2004) *Public servants speaking publicly: The Bennett Case*, Research Note 31, February 2004, Federal Parliamentary Library Information and Research Services

²⁴ Federal Court of Australia (2003) *Bennett v President, Human Rights and Equal Opportunity Commission*, December 2003 [s003] FCA 1433.

Democracy cannot work if journalists only report what governments want them to report. It is the threat of leaks that keeps politicians honest. Well, relatively honest. They are much more reluctant to lie or act improperly if

they know they could be found out — that there is a risk some whistleblower will disclose it to the media. A society where government has tight control of the flow of information — that is, control of what the public is allowed to know — is not a democratic society. Leaks, and whistleblowers, are essential to a proper democratic system (Oakes, 2005).²⁵

Commonwealth Public Service Commissioner Andrew Podger's parting remarks in August 2005 expressed concern about a downward spiral in the public service-journalist interrelationship and expressed the view that 'its links with the media and the public subject to much closer control':

Communications are at the heart of politics, and the enormous increase in the power of the media has required a sophisticated response by politicians and particularly by those in government. This includes careful control to ensure consistency and to influence the agenda, as well as to present the government and the key politicians in the best possible light (Podger, 2005).²⁶

Controlling the Rat-pack or Starving the 'Chooks'?

Overt strategies of ultra-control of all sources of information are a global trend in most modern democracies where the response to new media technologies has created new tools for both politicians and journalists in their struggle over the public information agenda. Although it can be argued that in the art of intimidation and control, new digital technologies are more symbolic than practical tools, the journalistic view is that they are both.

The empirical data I gathered from interviews with from Federal Parliamentary Press Gallery journalists in 2003-2004 contain a constant theme about the advent of new media technologies and in particular, their capacity to generate an avalanche of sources of information, usher in the 24-hour news cycle and escalate pressures on the politician-journalist relationship in two significant ways. First they have increased the rate at which news content must be garnered. Given that each news day generates a fixed amount of information, news is now spread more thinly over a greater multiplicity of information platforms. Second these technologies encourage and facilitate control mechanisms to 'manage' these flows in an increasingly anarchic media-scape.

Their views are confirmed by the work of media researchers and scholars such as Dr Peter Van Onselen who shows digital technologies are harnessed 'by hired consultants and spin-

²⁵ Oakes, L (2005) cited in Bryan, 2005 *Gerard McManus and Michael Harvey* filed by Bryan on Monday 29 August 2005, accessed February 2006 at: <http://www.ozpolitics.info/blog/?p=182>

²⁶ Podger, A (2005) cited in *FoI and Leak Link* in *New Matilda* accessed November 2005 at: <http://www.newmatilda.com/policytoolkit/policydetail.asp?PolicyID=148> and www.newmatilda.com

doctors to strengthen and expand control of the news agenda by the executive arm of governments' (Van Onselen and Errington, 2004 and 2005; Van Onselen, 2005).²⁷

Associate Professor in Government and International Relations at the University of Sydney, Professor Rodney Tiffen in 2004 also notes that:

Strategies regularly deployed to manage the media have frequently been carried out 'casually and sporadically and slowly' but at present they are done 'professionally, systematically and immediately with huge amount of resources' and intensity and there 'has never in history been anything to parallel this effort' (Tiffen, 2004).²⁸

Geoff Kitney, (now an overseas correspondent) worked in the FPPG for over 20 years and in 2003, as Head of Bureau of the *Sydney Morning Herald* expressed the view that the 'increased efforts by governments to control the political news agenda stem from a fear of the greater danger of not being in control' (Kitney, 2003).²⁹

There is an overall picture of continually being blocked or manipulated; Note some FPPG interviewees have changed bureaus and/or positions since these interviews were recorded.

'The Government is the most I've ever come across. Hawke ran a pretty tight ship and set up the National Media Liaison Service and PM Keating continued it - their job was to get the government's spin throughout the media. But the present government not only has totally unhelpful press secretaries, they have got people to watch press secretaries to make sure that the same message is being put out by everyone, every minister, every back bencher' 2004, Tony Wright, National Affairs editor Bulletin Magazine

'... the Gallery (must) work harder at getting access, getting the confidence of people who aren't part of the Government information control mechanism... to find out what's really going on' 2003 Geoff Kitney, Head of Bureau Sydney Morning Herald

'..Governments (not just the present one) cottoned on to the way you can drown people with information to make it hard to sort out what is real information and what is just rubbish. That's certainly done quite deliberately and strategically. Not all the time, but when we are likely to be distracted by dealing with some big issue ...the more means

²⁷ Van Onselen, P (2005) in *Keeping track of voters* interviewed by Terry Lane host of *The National Interest* Australian Broadcasting Corporation, Radio national broadcast on Sunday 23 January 2005, accessed, May 2005 at:
<http://www.abc.net.au/rn/talks/natint/about.htm> and

Van Onselen, P and Errington, W (2004) *Voter tracking software: the dark side of technology and democracy*, a paper prepared for the Australian Electronic Governance Conference. Centre for Public Policy, University of Melbourne, Melbourne Victoria, 14th and 15th April, 2004

²⁸ Tiffen, R (2004) *The media: Under (spin) doctors' orders* in *Australia Policy Online* posted 21-10-2004 accessed August, 2005 at: <http://www.apo.org.au/>

²⁹ Kitney, G (2003) in Ester, H (2003) *Unpublished interviews, Federal Parliamentary Press Gallery 2003-2004*

there are for transmitting information, the more they enjoy using them to try to pull the wool over our eyes..' 2003, Karen Middleton Head of Bureau the *West Australian* (now with SBS TV)

' Under previous governments you would get briefings by senior staff members who would tell you, off the record information' 2003 Dennis Atkins, Head of Bureau *The Courier Mail*

'The major issue is lack of access, lack of good useable access, ranging from insufficient press conferences to difficulty getting access to good information from the public service or even ministerial advisers....' 2003, Louise Dodson, Head of Bureau *Age* newspaper

'..a (major) issue is deliberate disinformation such as the 'children overboard' incident. We have to totally re-examine what officials say to us and put it through a different filter' 2003 Ross Peake Head of Bureau, the *Canberra Times*

And relations between government and media were described by *Age* chief political correspondent Michelle Grattan in her 2005 Deakin lecture *Gatecrashers and Gatekeepers* as 'particularly hard-edged and distrustful', and that 'today the media regard the politicians as quarry to be hunted and government views the media as cattle to be herded'.

Freedom of Information

Freedom of Information (Fol) laws are linked into the intricacies of the journalist-politician-public servant relationship discussed above, because an absence of effective Fol effectively forces political journalists to be over-dependent on oral, and/or 'brown-envelope' leaks. Comparative research results from the work of Johan Lidberg and Alec McHoul on *Freedom of Information and Journalistic Content in Western Australia and Sweden* show the presence of effective, workable Fol laws in Sweden give 'journalistic tools, to a much larger extent than their Western Australian colleagues, [the Swedish laws] allow them to independently seek and obtain information that can verify or contradict official versions on most levels of society, from politics to the private sector', and:

The most important conclusion of this study is that it shows the Swedish journalists to be less dependent on what Ericson et al define as the 'deviance defining elite' (1987, 345-367). This is illustrated in the study by the WA journalists' greater dependence on oral sources for their information (Lidberg and McHoul, 2002).³⁰

Lidberg and McHoul's extensive qualitative and quantitative data included results to show that 40.5 per cent of the news stories examined in Swedish newspapers relied on paraphrasing of primary documents acquired from government agencies as their main source;

³⁰ Lidberg, J and McHoul, A (2002) *Freedom of information and journalistic content in Western Australia and Sweden* an unpublished paper presented to the 2002 *Public Right to Know (PRK2) conference* Australian Centre for Independent Journalism, University of Technology, Sydney

while in Western Australian the main source of primary data (36.6 per cent) was paraphrased from oral sources.

Lidberg has subsequently extended this study to a project that measured 'to what extent, if any, are the promises made by FoI legislation borne out by the practice in the countries of study?' Lidberg found 'that there is a consistent gap between the promise and the practice of FoI in the countries of study and that FoI has deteriorated into dysfunctionality'. This comparative work puts Australia in an international context and the results show an urgent need to address the issue of FoI at the most senior levels of the media.

Lidberg chose to compare Australia with Sweden, America, South Africa and Thailand because:

Sweden and the US are mature liberal democratic systems with high levels of economic prosperity - and the 'parents' of most other FoI systems.

Australia is a mature democracy with a mix of the Westminster and federal political systems, a strong economy, a relatively old FoI system (the federal FoI Act was passed in 1982), but with a very shaky FoI track record (Waters, 1999).³¹

South Africa is a young, emerging democracy with social issues and big divides in prosperity and a newcomer to the FoI 'family', and 'interesting as its Official Information Act in part applies to the private sector'.

Thailand is one of only three south East Asian countries that at the time of Lidberg's study, had FoI laws (the other countries were Japan and South Korea), 'a semi-mature democracy' with issues relating to press freedoms and a lower level of prosperity compared to the US, Sweden and Australia.

A shameful FoI score for Australia

The results of Lidberg's index show Australia has the greatest gap between government promises regarding FoI and the reality for anyone seeking to use the laws.

Out of a maximum possible score of 68 Sweden was the highest at 63, followed by South Africa and USA at 31, Thailand at 18 and Australia at 12 (Lidberg, 2005).³² (Full Table at Appendix 1). Assessment of Lidberg's results need to take into account that his work predates a significant catch-up effort achieved by *The Australian*, in particular the work of FoI editor Michael McKinnon.

For instance in a single addition of the newspaper on 16 February 2006 the FoI 'tool' unearthed stories about: Scams involving the Uniting church and the Salvation Army and the operation of the Federal government's Job Network scheme, the controversial Industrial Relations laws and information contradicting the government's claim that economic impact models were not used and the Defence department's poor track record in equipping combat troops with sub-standard clothing and other equipment. As well as the significant achievement on February 03, when the High Court used the principle of government

³¹ Waters, N (1999) *Print Media Use of Freedom of Information Laws in Australia* Sydney: Australian Centre for Independent Journalism University of Technology Sydney

³² Lidberg, J (2005) *Freedom of Information Banana Republics and the Freedom of Information Index* paper presented to the Journalism Education Conference, Griffith University, 29 November to 2 December 2005

accountability to grant Michael McKinnon leave to be heard in the long-running saga of attempts to get access to Treasury Department tax data on higher tax burdens faced by Australians and/or projections of revenue-collections increases from bracket creep.

Wither Critical Expertise?

The parliamentary round is in many ways no more demanding than any other journalistic round – police, business, local council, sport or even fashion rounds all demand high levels of insider knowledge, sources/contacts and trustworthiness. But the stakes are much higher

for journalists tracking the genesis of laws that govern the public and private sectors of the nation (or State/Territory). It also requires in-depth critical expertise across a number of portfolio areas, and navigation tools for the labyrinth of party politics. If FoI laws are not effective tools for journalists in this round then it follows that there will be high levels of 'leak-dependent' journalism. This in turn naturally places a premium on trustworthiness that can only come with serving time. In a somewhat trivial reference to this process the older more experienced members of the gallery are dubbed 'GOD' journalists in Margaret Simons book of observations about the pack-at-work (Simons, 1999).³³

There is a deep-seated concern amongst many Federal parliamentary Press Gallery journalists about the hollowing-out in age and experience in the FPPG. Journalists with more than five years experience make frequent reference to a trend toward 'event reporting' away from analysis by younger journalists sent to Canberra by head office for periods as short as one or two years. As part of my research demographic data is being collected to test this anecdotal data in the 2003-2004 interviews.

Interviewees also refer to the development of a professional culture in the parliamentary round where the gallery is no longer regarded as a peak job, but as a stepping-stone in a career to somewhere else. It's a process that de-values the traditions of the fourth estate, and the reason why political journalism.

Tony Wright National Political Reporter, the *Bulletin magazine* summed up this common concern this way:

'When I first came here in 1989 it was probably the end of that era where journalists would have killed to come to Canberra to report the big picture - to report federal politics. These days there are a small group of people who have been here for a very long time. They have the corporate memory that was once held by quite a lot more people, or a higher proportion of people. This is followed by a slightly smaller group, who have been here as long as I have, or a bit longer- then there is a great gap to the majority of people who come here as young journalists...They will spend a year or two or even less, here and then head off and be replaced' 2004 Tony Wright National Political Reporter, the *Bulletin magazine*.

³³ Simons, M (1999) *Fit to print – Inside the Canberra press gallery*, UNSW Press Sydney.

Conclusion

Federal politics in Australia is going through a cycle characterised by negative trends in attitudes, policies and media management strategies towards principles of open governance once considered as inherent to mature representative democracies. Policies directed against leaks and whistleblowers and ineffective Freedom of Information laws present a direct challenge to the healthy operation of political journalism. The link between high levels of journalistic critical expertise and an informed public has always been highly contested - it goes with the territory as part of the co-genesis of representative democracy and a 'free press'. However events in recent years illustrate a serious deterioration in the interrelationship between parliamentarians, public servant and press gallery journalists. One major new element is the advent of new 21st century digital technologies when combined with a conservative agenda, move the contest out of kilter and away from transparency and accountability.

Appendix 1 Lidberg 2005 Table

Table 1 The FOI Index	Sweden Score	Sweden Comment	SA Score	SA Comment	US Score	US Comment	Australia Score	Australia Comment	Thailand Score	Thailand Comment	Overall Analysis
The Promise (Max score 68)	63	<p>Very far-reaching promise</p> <p>FOI system part of constitution</p> <p>Extensive legal protection of sources</p> <p>All information perceived public and accessible within days at very low cost</p> <p>No processing costs</p> <p>No agencies exempt from Act</p> <p>Act does not apply to private sector</p>	31	<p>Relatively ambitious legislation</p> <p>FOI system explicitly backed by constitution</p> <p>No legal protection of sources</p> <p>Most information perceived public within 30 days</p> <p>Processing costs</p> <p>No agencies exempt from Act</p> <p>Act applies to private sector</p>	31	<p>Relatively ambitious legislation</p> <p>FOI system backed by constitution</p> <p>No legal protection of sources</p> <p>Most information perceived public within 20 days</p> <p>Processing costs</p> <p>Several agencies exempt from Act</p> <p>Act does not apply to private sector</p>	12	<p>Very low legislative ambition</p> <p>This Act is not on the users' side. This is clearly illustrated by the 'conclusive certificate' function which effectively allows a minister to block most requests</p> <p>The evaluation showed that this Act was never meant to work. It cannot deliver on its aims and objectives in its current form</p> <p>12 agencies exempt under the Act</p> <p>Very high processing costs</p>	18	<p>Very low legislative ambition</p> <p>Act delegates much of the interpretation to the 'Information Board' consisting of the Permanent Secretaries to the most influential departments</p> <p>The Act is very non-specific on key issues such as turn around time and processing costs</p> <p>1 agency exempt</p> <p>No legal protection of sources</p> <p>Act does not apply to the private sector</p>	<p>One important reason for Sweden's high score is the extensive legal protection for media whistleblowers.</p> <p>The US and SA scores are close to 50% and must be regarded as a pass.</p> <p>Two things stand out: Sweden's source protection regime and that the SA Act applies to the private sector.</p> <p>The Australian and Thai FOI systems fail the test. These two legislations were never meant to work, not even in theory. They promise little and deliver nothing.</p>

Corruption Prevention in Local Government

Ms Sue Bullock
Internal Ombudsman, Sutherland Shire Council

Introduction

It is my pleasure to be able to speak to you today about Sutherland Shire Council's strategies for "Catching up on Corruption" through the Office of the Internal Ombudsman.

I will be briefly discussing the Office of the Internal Ombudsman in the context of the Sutherland Shire, the history of the Office, the development over the years of the role of the Office of the Internal Ombudsman, the advantages of the role in terms of good governance and corruption prevention, and our future objectives.

Appointment of an Internal Ombudsman

An Internal Ombudsman was appointed to Sutherland Shire Council in November 1999. This occurred in the context of the General Manager identifying the need for such a role and also as a result of a community consultation process. Council's Strategic Plan, "Our Shire, Our Future", identified through the community a wish to have a person to whom they could go to receive a 'fair go' and who could provide a safeguard against maladministration by the Council. The Strategic Plan highlighted open, accountable and participatory decision-making. Sutherland Shire Council was the first Council in New South Wales to establish an Internal Ombudsman position, the second in Australia (first in Manningham, Vic) and it is believed to be the fourth in the World. Currently, in New South Wales there are other Internal Ombudsmen at Warringah Council, Ku-ring-gai Council, Auburn City Council, Tamworth Regional Council with consideration of appointment of an Internal Ombudsman currently progressing at Coffs Harbour and Parramatta City. It is understood that some Councils are giving consideration to having a Regional Internal Ombudsman.

The Office of the Internal Ombudsman exists in the context of Sutherland Shire Council having 215,000 residents with over 72,365 dwellings. Council provides over 50 different services and has a gross annual expenditure of over \$135 million. Sutherland Shire Council is the second largest Council in New South Wales in terms of population.

Office of the Internal Ombudsman

Since 1999, the role of the Internal Ombudsman has developed, leading to the establishment of the Office of the Internal Ombudsman which comprises the Internal Ombudsman, two Assistant Internal Ombudsmen (part-time) an Internal Auditor and a Corporate Probity and Policy Manager.

Role of the Internal Ombudsman

The role of the Internal Ombudsman and the two part-time Assistant Internal Ombudsman includes providing independent evaluation of complaints for example by staff, Councillors, Shire residents, Members of Parliament or other interested persons or organisations, about poor administration/ maladministration by staff, Councillors* (*in an administrative capacity) or delegates of Council. The Internal Ombudsman operates under Guidelines adopted by Council which deal with matters such as the Internal Ombudsman's authority and power including own motion power, refusal to investigate matters, requirements for reporting, publication of reports and contact with the media. We aim to address any maladministration or misconduct issues that may arise out of a complaint with the overall aim, as noted earlier, to improve administrative decision-making and accountability to make Council more corruption resistant and improving the long-term integrity and ethical decision-making processes of Council.

The Internal Ombudsman does not investigate a complaint when the matter is still progressing through Council or senior management have not had an opportunity to address the issue. Furthermore, the Internal Ombudsman will not usually investigate if there is an alternative means of redress, such as to a Local Court or to the Land and Environment Court. If the matter has not been complained of within one year of the action or inaction giving rise to the complaint, or the complaint is frivolous or vexatious, it will not be investigated. The Internal Ombudsman aims to quickly and informally resolve a complaint or concern, but this may not be possible and a matter may proceed to investigation.

CASE STUDY 1

Waste Management: A Protected Disclosure complaint was received in relation to possible corrupt conduct and inappropriate work practices by two (2) Council staff in the Cleansing Services Unit. Workplace Video Surveillance was authorised by a Magistrate under the terms of the then *Workplace Video Surveillance Act 1998* and the *Workplace Video Surveillance Regulation 1999*. The matter was required to be notified to the Independent Commission Against Corruption (ICAC) under Section 11 of the *Independent Commission Against Corruption Act 1988* because of the concern of possible corruption. The ICAC referred the matter back to the Internal Ombudsman to investigate. Interviews were conducted with nine (9) staff members and various Council documents, policies and procedures were examined. No corrupt conduct was found, however, inappropriate work practices were identified which, if left unchecked, may well have provided a trigger for corruption. These practices included misuse of Council equipment, portraying Council in a poor light, breaches of Council's Code of Conduct, breaches of the Occupational Health and Safety Policy and Management System. Loss of revenue to Council was also identified. Recommendations were made including the establishment of a Policy and Procedures for collection of waste by the Cleansing Services Unit, development of audit procedures with the assistance of Internal Auditor, further training to be provided by the Corporate Probity and Policy Manager and refresher training to be provided to Managers in relation to, for example, the Performance Management System, Council's Counselling and Disciplinary Policy was applied to some staff.

CASE STUDY 2

Customer Response Policy:

The Office of the Internal Ombudsman, working with Compliance Officers, wrote to the General Manager seeking to invoke Appendix C of the Customer Response Policy – Dealing with Difficult Customers. Staff from the Compliance Unit were concerned with a customer:

- (a) who was aggressive and abusive in dealing with Council staff and Councillors; and,
- (b) who continuously raised the same issue with Ward Councillors, the General Manager and the Internal Ombudsman as well as staff within the Compliance Unit, resulting in a number of CRMS documents being raised to address the same/similar issues.

The Customer Response Policy at Appendix C, allows the General Manager to limit access to Council resources in circumstances where a customer is *“continually aggressive, rude or abusive, creating an occupational health and safety risk to staff or Councillors... and ...where a customer continues to raise the same issues after Council has clearly documented the response.”*

The General Manager wrote to the customer advising that a procedure had been implemented to specifically deal with the customer’s issues and that any future contact, with Council by the customer, would be assigned to one specific Council Officer.

This was the first time that the Office of the Internal Ombudsman assisted a Council Unit in relation to invoking the Customer Response Policy - Appendix C. There have since been further instances in which the Office of the Internal Ombudsman has been requested to provide other areas of Council with advice/assistance in relation to Appendix C of the Customer Response Policy, resulting in Council resources being allocated more effectively and efficiently.

Feedback from staff council-wide is that the input of the Office of the Internal Ombudsman in relation to this issue has been most valuable in assisting staff to deal consistently and fairly with Council’s customers who are ‘difficult’ in that they might be aggressive, make multiple, identical requests from different Council staff and hence are resource-intensive.

CASE STUDY 3

Protected Disclosure: A statement was provided to the Office of the Internal Ombudsman from a Sutherland Shire Council employee, as a Protected Disclosure.

This statement outlined a number of allegations relating to the management of a Council business unit in relation to close family members of senior management in addition to allegations of intimidation of staff and lack of transparency in recruitment and selection processes.

Arising out of the investigation into the Protected Disclosure complaint, but not part of the original Protected Disclosure, were a number of issues which were also investigated involving activities which had OH&S concerns, concerns about use of alcohol, misuse of Council facilities, loss of Council revenue, breach of the Code of Conduct and intimidation and bullying.

Role of the Internal Auditor

The Internal Auditor has the responsibility of undertaking an independent and objective evaluation of the adequacy and effectiveness of Council's internal controls. The Internal Auditor ensures Council's assets are safeguarded and there is an efficient and economical use of Council Resources.

The Internal Auditor also deals with process improvement, ensures the reliability and integrity of information, ensuring compliance with policies, plans, procedures, laws, regulations and controls.

The Internal Auditor reports to Council's Internal Audit Review Committee, which determines the Internal Audit Review program on an annual basis.

CASE STUDY 4

Internal Auditor:

The following example shows how the Internal Auditor works cooperatively with Council's business units and external agencies, to improve internal controls and workplace efficiency.

- The Manager, Children's Services contacted the Internal Auditor concerned about some possible discrepancies in amounts received by Council for the Federal Government's Child Care Benefit (CCB) subsidy;
- The Internal Auditor reviewed the data/documentation and deemed that, in order to understand the extremely complex procedures required by the Federal Government's Family Assistance Office (FAO), a meeting with the FAO staff was required. As such, a site visit was organised with Children's Services staff invited to attend as a learning/training opportunity;
- The site visit highlighted a number of operational, structural, procedural and administrative issues being experienced by both parties - SSC and FAO;
- The main issue was associated with the FAO payment estimation methodology which created a major grievance for Sutherland Shire Council to monitor and reconcile;
- The Internal Auditor proposed an alternative methodology to the FAO (which has been verbally agreed to) to overcome issues at both sites, effectively streamlining processes, making reconciling easier, reducing administrative effort and removing grief for both parties;
- In the course of the review, Children's Services' staff were involved to enable them to acquire a better understanding of the FAO processes in the context of Sutherland Shire Council operations.

This case illustrates the ability of the Internal Auditor to initiate change, working with external parties and Council. The input of the Internal Auditor enabled the improvements of procedures which were ineffective and inefficient with reduced controls and possible loss of revenue for Council.

Role of the Corporate Probity and Policy Manager

The Corporate Probity and Policy Manager has responsibility for strengthening the ethical work practices and standards of Council, reducing the opportunity for corruption and fraud within Council through education programs for staff and Councillors, ongoing policy development and review, for example, revising Council's Code of Conduct, Conflict of Interest Policy, fraud and corruption control, in addition to advice on ethical and probity issues. The Corporate Probity and Policy Manager also has the role of the Protected Disclosures Co-ordinator under Council's *Whistleblower's Policy* and the operation of a confidential Ethics Hot-Line.

CASE STUDY 5

Corporate Probity

As a result of education and training by the Corporate Probity and Policy Manager on the Code of Conduct and the Gifts, Benefits and Hospitality Policy. The level of declarations of gifts and benefits has increased. There is greater awareness of staff and Councillors of the need for consideration of what a gift or benefit means in terms of corruption risks. The following provides an illustration of gifts, benefits and hospitality that were offered during the six-month period July – December 2005:

Declined

- Two tickets to Bledisloe Cup from supplier valued at \$300.00 were offered to a Director. The offer was declined because of the actual/perceived conflict of interest that acceptance of this gift could influence decisions on the awarding of contracts.
- Assessment of parking infringement complaint that the infringement should not proceed, resulted in a decision based on merits of the case. Director then received \$20.00 lottery gift pack from the complainant as a thank you gesture. The gift was declined because of concern that it could be perceived that a member of the public had 'bought off' the Council staff to stop a parking infringement.
- Staff member invited by regular supplier to a special, "one-off" show out of Sydney. The offer was declined because of perception that the supplier was exercising undue influence on Council staff.
- Director invited by a consultant to Council to a Christmas Harbour Cruise valued at approximately \$100.00. Director declined the invitation because of concern that acceptance to attend the cruise would create a perception of a favoured relationship with the consultant who was most likely in the future to be a tenderer for the work with Council.

•

Accepted

- Manager won a \$200.00 gift voucher and an 'IPOD' shuffle (valued at \$150.00) as part of a competition and business card lucky draw whilst in attendance at a work-related conference. Prizes were accepted and kept by the person.
- Multiple staff from a Council Unit were invited to a networking afternoon with a Council supplier including lunch, valued at \$100.00 each. Invitations were accepted.

- Multiple Xmas Hampers and baskets received, some from regular suppliers to Council. All were accepted with most being distributed amongst staff attending staff functions or were donated to charity.

Triple Governance Track

The activities of the Office of the Internal Ombudsman encompass the “Triple Governance Track” based on a tripartite model of prevention, education and investigation which at the same time aims to embed a fraud risk management strategy across Sutherland Shire Council. This model honours Council’s Management Plan commitment to the community *“We will promote sound, legal and honourable practice in the conduct of Council business.”* The integrated approach of the Triple Governance Track assists in reducing the conditions which allow unethical work practices and corruption to occur, whilst at the same time focussing staff, Councillors and delegates of Council on accountability, transparency and good administrative practice. The work of the Internal Ombudsman through the Triple Governance Track, demonstrates to the wider community that Sutherland Shire Council is an organisation which does not accept unethical work practices and/or corruption.

Let me explain more about what the Triple Governance Track means in practice.

- **Prevention** activities include internal audit (innovative and performance audits), policy review and development for example, Stock Control and Stock Take Audit, Cash Handling Procedures, Leisure Centre Memberships, Procedures for purchase and sale of motor vehicles.
- **Education** activities include training on corporate probity, accountability, legislation, a rolling programme of policy development / review and generally improving organisational culture, taking greater responsibility for an open and efficient organisation, for example, Code of Conduct review and training for Councillors and staff, Conflicts of Interest Policy review and training and other fraud and ethics advice and training.
- **Investigation** activities include addressing matters raised by the community or Sutherland Shire Council staff and Councillors, relating to poor administration and misconduct issues of a major, serious or sensitive nature which are undertaken in a fair, transparent and effective manner, for example, misuse of Council resources, loss of revenue for Council, breach of the *Local Government Act 1993*, Council’s recruitment and selection processes, breach of occupational health and safety standards, nepotism, conflicts of interest, poor performance management and Alcohol and Other Drugs Policy breaches. Recommendations are made following investigations to improve practice and procedures such as: in relation to Council’s corruption prevention strategies; selection and recruitment process; application of Council’s Counselling and Disciplinary Policy; recommendation for refresher training, for example, in relation to Council’s Code of Conduct, performance management training or commendation of good work.

The Current Situation

The following tables provide a picture of the increase in matters being handled by the Office of the Internal Ombudsman since its inception in 1999. Also provided are details of the type and number of matters received.

Table 1 - Snapshot Internal Ombudsman Matters to 2003

Formal Complaints	Received	Telephone Resolution	Finalised
November – December 1999	17	17	-
January – December 2000	104	28	63
January – December 2001	99	25	86
January – December 2002	95	39	98
January – December 2003	106	72	69

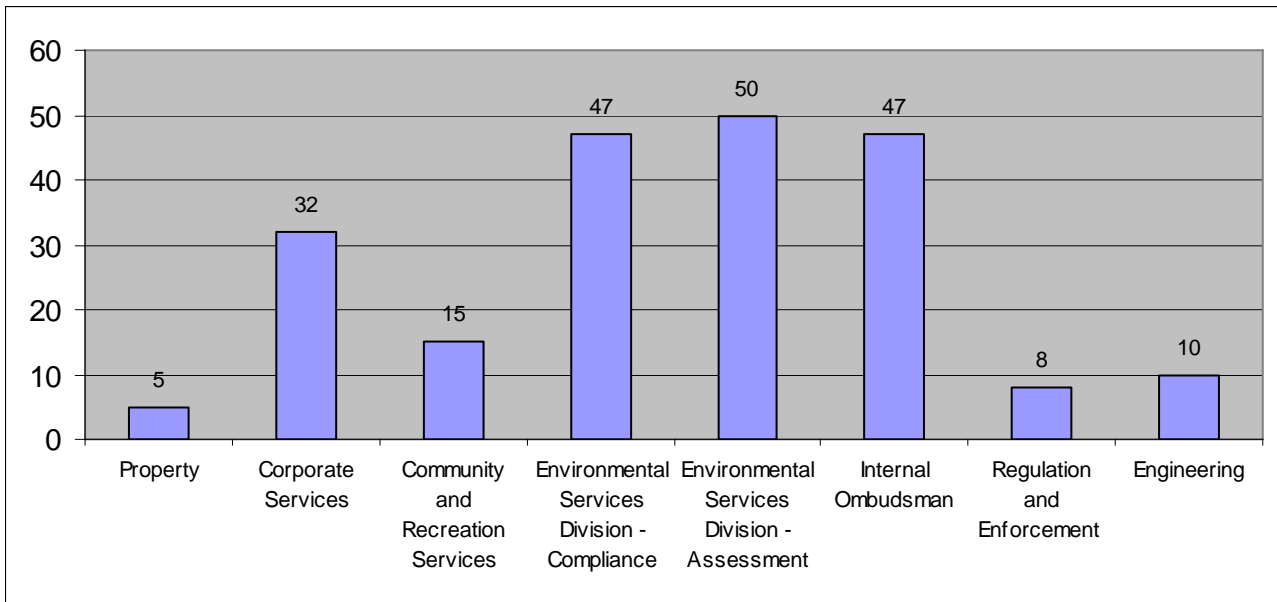
Table 2 - Snapshot Internal Ombudsman Matters from 2004 to date

Table 2 reflects the inclusion of the position of Corporate Probity and Policy Manager within the Office of the Internal Ombudsman. Telephone resolutions from this point onwards have included probity advice.

Formal Complaints	Received	Telephone Resolution / Probity Advice	Finalised
January – December 2004	204	71	89
January – December 2005	223	82	214

Who was Complained About?

The chart below depicts the number of concerns raised against each of Council's business units during 2005.



A total of 214 complaints were raised and finalised during 2005.

It should be noted that Council’s Environmental Services Division’s Compliance and Assessment Units, by their very nature, have contentious issues that impact on the community and are therefore subject to a higher amount of community scrutiny.

The Internal Ombudsman matters referred to in the above table relate to direct request for advice on, for example, on probity, policy and/or administrative conduct issues. The Internal Ombudsman, along with other Divisions of Council are providing comment on the ICAC Discussion Paper on “Corruption risks in NSW development approval processes.”

The Internal Ombudsman Model as an Agent for Corruption Prevention in Local Government

It is a shared premise by Internal Ombudsman in Local Government that the Internal Ombudsman Model is a highly effective way, at the local level, of improving mechanisms of administrative decision-making, conduct and probity in Local Government. This was a position put to the previous Minister for Local Government by a working group consisting of John Warburton, Internal Ombudsman - Warringah Council, Gaven Beck, Internal Ombudsman – Ku-ring-gai Council, Michael Quirk, Internal Auditor – Parramatta City Council and myself.

It is instructive to note that in 2002, the New South Wales Parliamentary Committee, the Public Bodies Review Committee noted:

“... openness and transparency in reporting has now assumed even greater importance in the light of the greater responsibilities that have been delivered to agencies over recent years and the increasing focus on the issue of good corporate governance in the public sector.”

We see that Government concerns at all levels, is to ensure that Council’s are operating in ways which the community considers appropriate, not merely whether they are acting in

accordance with the law. In New South Wales for example, Councils are faced with legal and ethical frameworks which include:

- *Local Government Act 1993* and legislation;
- *Environmental Planning and Assessment Act 1979* and *Regulations*;
- State Government Codes of Practice/Conduct;
- Council's Code of Conduct;
- Council's Policies and Procedures;
- Director-General's Directions;
- Department of Local Government Circulars;
- *Independent Commission Against Corruption Act 1988*;
- ICAC Statements, Reports and Guides;
- *Ombudsman Act 1974 (NSW)* and Ombudsman Statements, Reports and Guides;
- *Public Finance and Audit Act 1983*;
- Australian Standards 8000-8004 at HB400-405 on Probity;
- The Uhrig Report June 2003 "*The Review of the Corporate Governance Statutory Allocations and Office Holders.*"

We have seen, in the NSW context of what happens, when for example, Councils such as Warringah, Strathfield and Tweed Heads fall foul of their statutory and corporate governance responsibilities. A number of probity, legislative and ethical decision-making considerations were not applied as best practice in these cases with the result that, not only might the decisions of Council's been poor or wrong, but were considered to be lacking in transparency with less than sufficient regard for due process. Local Government is very complex. It is expected that Councils act in accordance with the law, exercise prudent financial management, act and be perceived to act with appropriate fairness, openness and transparency and deliver a vast range of diverse services.

Having a Council's Internal Ombudsman provides a service to the local community which is an accessible, quick, fair and economical avenue to resolution of complaints locally. The Internal Ombudsman is able to walk a fine line between being close to the community and Council whilst remaining independent. In this way, as was discussed in the paper prepared by the small working group for the previous Minister for Local Government, the Internal Ombudsman position is close enough for the community to have ownership of the service as a credible complaints mechanism, yet close enough to Council to have a sophisticated understanding of Local Government issues. The Internal Ombudsman position is removed enough through its reporting structures and procedures to maintain independence. The position acts as an independent champion to drive governance/probity/accountability improvements in Councils, for example at Sutherland Shire Council by having an Internal Auditor and a Corporate Probity and Policy Manager under the supervision of the Internal Ombudsman.

With the existence of a Council Internal Ombudsman, this does not remove the powers of oversight agencies such as the NSW Ombudsman and the ICAC to investigate. What it does do, in my view, is to ease the demand on those agencies, and provide a local mechanism to improve administrative decision-making and corruption-free conduct.

By having an Internal Ombudsman with a best practice complaints handling system at the grass roots level, a body of knowledge will develop, as it has done at Sutherland Shire

Council, where staff, Councillors and delegates of Council have become more aware through decisions, Internal Ombudsman recommendations of investigation, audits, policy and training of what is good administrative conduct and corruption prevention strategies. The Internal Ombudsman model is a definite improvement on the current complaint handling systems of many Councils which can be ad hoc, inconsistent and often poorly managed. In these circumstances, complaints may be unresolved which lead then to community dissatisfaction and dysfunction.

The work of the Internal Ombudsman provides a normative effect in the decision-making and conduct of Council staff, Councillors and delegates. This is local, inexpensive, accessible and visible. Such local level accessible governance measures when combined with the work of external agencies such as the NSW Ombudsman, Department of Local Government and the ICAC, make powerful tools in achieving good governance outcomes and anti-corruption measures. Thus, far from a duplication of work by having an Internal Ombudsman and external agencies, there is a mutually advantageous relationship with the local Internal Ombudsman dealing with complaints and governance issues quickly with local knowledge and independence. The Internal Ombudsman drives governance, probity, anti-corruption measures through investigation of complaints, recommendations for improvement, policy review and development and training. At Sutherland, for example, the Internal Ombudsman with the Corporate Probity and Policy Manager drove the review of the Code of Conduct and its implementation in line with the Department of Local Government's Model Code of Conduct. The Internal Ombudsman provided the model for the Conduct Committee reviewing Councillor Conduct in terms of establishing an panel of independent Conduct Committee members to be drawn from and chosen by the Internal Ombudsman on a case-by-case basis. The Internal Ombudsman, again with the Corporate Probity and Policy Manager, devised Council's Statement of Business Ethics which was adopted by Council and provided to all people and organisations who do business with Council.

There has been an increase in the number of Council's appointing Internal Ombudsman and intending to appoint Internal Ombudsman. In this context, there needs to be, in my view, amendments to the *Local Government Act 1993* and other relevant Acts, to recognise and define the role of an Internal Ombudsman, referring to standards of independence with accountability and to provide statutory protections in relation to the *Defamation Act 1974*, Section 12 of the *Local Government Act 1993*, the *Freedom of Information Act 1981* and the *Privacy Protection of Personal Information Act 1998*. In this regard, the Internal Ombudsmen at Warringah Council, Ku-ring-gai Council and the Internal Auditor at Parramatta City Council and myself from Sutherland Shire Council have recommended that a working party be formed to assist the Minister for Local Government and the Department of Local Government to develop an Internal Ombudsman model for New South Wales Councils.

In conclusion, Sutherland Shire Council is at the forefront of addressing its corporate governance responsibilities. The Office of the Internal Ombudsman has not only enhanced Sutherland Shire Council's administrative and corruption prevention mechanisms, but has achieved savings through its investigations, internal audits, governance measures, policy development and review and training. For example, during the past year, the Internal Ombudsman identified and made recommendations for rectification in relation to misuse of Council resources, loss of revenue to Council, breaches of occupational health and safety procedures and other Council policies and developed processes for dealing with difficult customers who have caused an inefficient use of Council resources. Poor performance of

staff was identified with recommendations made for improvement strategies and at the extreme, recommendations for management decisions taken which have resulted in staff departing Council.

In conclusion, it is my view that the mechanisms to improve administrative conduct and reduce corruption are enhanced in Local Government by having an Internal Ombudsman who, with local knowledge is accessible, can deal independently, quickly and fairly with complaints about Council with recommendations and outcomes which improve Council's administrative decision-making and anti-corruption measures, including for example, restorative action, policy development and review and training. The Internal Ombudsman's position is therefore another mechanism, which can work with external bodies, whose aim is also to improve administrative decision-making, probity and governance measures and the reduction of corruption.

Catching up on the Network

Mr Chris Ballantine
Chairperson, Corruption Prevention Network Inc

“Lets help each other”. That’s the key to what the Corruption Prevention Network is about. People involved in preventing fraud and corruption using a range of mediums and forums to exchange information and ideas.

The Corruption Prevention Network began in 1994 in Sydney, Australia as a grass roots response within New South Wales public sector organisations to help tackle the persistent corruption problems being uncovered by the Independent Commission Against Corruption (ICAC) and to address the weaknesses identified by the Audit Office of New South Wales in the area of fraud control. We had to:

- Develop corruption resistant systems
- Address problems with organisational culture and attitudes.
- Conduct effective internal investigations of fraud and corruption matters

Weren’t we all facing the same sort of problems? So a few officers of NSW public sector organisations took the initiative:

“We need to pool ideas and resources. We need to discuss corruption prevention strategies. We need to think out aloud together” was their sentiment.

The first incarnation of the Corruption Prevention Network was thus formed – “The NSW Public Sector Corruption Prevention Committee”.

It’s a long sounding name but essentially a semi-official and totally voluntary body of concerned public officials who were involved in fraud and corruption investigation and prevention. The Audit Office of New South Wales, the New South Wales Ombudsman, New South Wales Police and the Independent Commission Against Corruption (ICAC) were all enthusiastic, respecting the independent nature of the group and providing ex-officio representatives for the Committee. The main business of the Committee was organising annual conferences and quarterly newsletters.

All good things must change and grow and so did this body. In 1999 the scope of the Committee was broadened to address other emerging needs such as:

- Connecting not only with public officers operating within the jurisdiction of the State of New South Wales, Australia but including the private sector, the Commonwealth and people interstate – even outside Australia.
- Making activities as practical as possible to practitioners in fraud and corruption investigation and prevention.
- Networking with other groups with similar aims and objectives, in order to capture additional benefits from our limited financial and time resources.
- Using the latest information and communication technologies to achieve our aims.

We're now the "*Corruption Prevention Network*". The Corruption Prevention Network today is an incorporated body which comprises an organising committee of twenty odd volunteer

individuals. About 200 people from about 170 separate organisations participate in the broader network. In addition to the annual conference and newsletters, the Corruption Prevention Network operates:

- An **Internet – based email list** (the Corruption Prevention Forum) which provides a borderless, real-time link between participants and is the Corruption Prevention Network's primary medium for rapidly disseminating information.
- The quarterly **newsletter** is distributed via our email list and includes corruption prevention news and information. Recent articles have included corruption/fraud reporting hotlines; data mining; publication and resource list; risk management; managing conflicts of interest and avoiding investigation pitfalls, amongst many other topics.
- Lunchtime and evening **discussion groups** on special interest issues and hot topics. These sessions attract up to 50 participants and have covered such topics as data mining and analytics; fraud control; corruption prevention, global practices fighting corruption; conducting fraud investigations; professional standards and conduct; changing government and ethics; ICAC history and the way forward. Leading public and private sector corruption/fraud prevention practitioners have presented papers at these sessions. Copies of the papers are on our website.
- A **website** at www.corruptionprevention.net which has been developed as a free on-line information source. The website is accessed world-wide with hits at times reaching about 6000 a month. There have been interesting ethical dilemmas posed to the Corruption Prevention Network and it has been our practice not to provide answers to specific questions but rather to provide the enquirer with the resources to make the decision themselves.
- Financial and time contribution to the Transparency International sponsored **National Integrity Systems Assessment** (NISA) research project.
- **Strategic linkages** with a number of related organisations and groups (such as Transparency International) with the objective of aligning and integrating activities, where appropriate.
- Providing a **point of contact** and reference for academic research being undertaken on corruption-related topics.
- **Annual one-day theme conferences** have been held in Sydney since the inception of Corruption Prevention Network – ten years. These conferences have been well received by corruption prevention practitioners, representatives of anti-corruption/crime agencies and academics. The 2005 conference attracted 160 participants. Themes for the conferences have included organisational culture; "mates rates" – gifts, kickbacks, bribes; identity fraud; ethics in business and society; the role of the media in curbing corruption and electronic business risks. Copies of conference papers are

available on the Corruption Prevention Network website:
www.corruptionprevention.net.

- **Anti-Corruption Cartoons** were commissioned by Corruption Prevention Network during 2005 and are available as a gratis resource for corruption prevention practitioners subject to acknowledgement of the Corruption Prevention Network and the artist.
- **Annual Corruption Prevention Network Awards** for encouraging excellence in corruption prevention. These awards were initiated in 2004 to recognise and encourage excellence in corruption prevention. Each year the Corruption Prevention Network will designate a particular aspect of corruption prevention as the focus for awards for that year. The awards are open to all organisations with categories for the Commonwealth public sector; state (NSW) public sector; local government sector; not-for-profit sector; and, the private sector.

The focus for the 2004/2005 awards was on systems that organisations have in place for receiving information about corrupt or potentially corrupt activities within their organisation. During 2005 awards were presented to the Australian Taxation Office, TransGrid and Sutherland Shire Council. The theme for the 2005/2006 awards is directed towards improving organisational culture that encourages integrity and minimises the risk in an organisation of corrupt conduct. Information sheets and application forms for these awards are available with copies of this paper.

- **Big Issues Grapppler (BIG)** is a software tool developed by the Corruption Prevention Network during 2004-2005 from a concept developed by the New South Wales Roads and Traffic Authority. BIG is a universal decision making tool that deals with risk, governance, transparency, due diligence, ethics, probity, reality and documentation. BIG brings structure to making the big decisions. This resource is available from the Corruption Prevention Network website at no cost to users.
- **Other Activities** Corruption Prevention Network committee members are called on from time to time to participate on expert panels and in discussion groups with agencies such as the Audit Office of New South Wales, New South Wales Ombudsman and the Independent Commission Against Corruption. The Chair of the Corruption Prevention Network has appeared before an OECD panel on transnational bribery, for example.

The Independent Commission Against Corruption

The Hon Jerrold Cripps QC
Commissioner
Independent Commission Against Corruption
New South Wales

In 1988 the New South Wales Parliament passed the Independent Commission Against Corruption Act. During the 1980's a number of scandals involving parliamentarians, the judiciary and public officials had, in the opinion of the Parliament, diminished public confidence in the processes of democratic government. It was recognised also that corruption in public administration frequently promoted economic inefficiency.

The Independent Commission Against Corruption is concerned only with the conduct of public officials and those whose conduct could adversely affect the honest or impartial exercise of official functions by public officials.

At the present time the Independent Commission Against Corruption has jurisdiction over 130 public sector organisations employing in excess of 300,000 people (being approximately 12% of the New South Wales labour force). It also has jurisdiction over 160 New South Wales local councils comprising approximately 1,800 councillors and more than 40,000 council employees. As well it has jurisdiction over New South Wales universities and New South Wales boards and committees (of which there are estimated to be something in excess of 1,000).

The legislation authorises the Independent Commission Against Corruption to make findings of corrupt conduct and to express opinions and recommendations associated with its investigations.

However, it is not permitted in its report to express an opinion that a specified person is guilty of or has committed a criminal or disciplinary offence and it may not make any recommendation that a specific person be, or an opinion that a specific person should be, prosecuted for a criminal or disciplinary offence.

It must be fully understood that the Independent Commission Against Corruption does not function, and it was not intended to function, to replace other law enforcement agencies. It is directed by the Parliament to promote integrity and accountability of public administration by investigating and exposing corruption and to making recommendations as to how to prevent corruption and to educate public authorities concerning corruption and its detrimental effects on public administration and on the community.

Although it took some time for some people to accept, it is now fully understood that the Independent Commission Against Corruption is an inquisitorial body discharging administrative functions. It is not a court of law, nor is it an administrative body intended to function like a court of law. Investigations, education and corruption prevention strategies are the means by which it is able to discharge its primary function. A consequence of this is

that, for example, investigations are primarily concerned with the exposure of corruption and that function is more important than obtaining criminal convictions of those involved in corrupt practices—as is recognised in the legislation itself.

In recognition of the role of the Independent Commission Against Corruption the Parliament last year accepted Mr McClintock's SC recommendation that the old terms such as public hearing and private hearing should be replaced with the words compulsory examination and public inquiry.

In order to discharge its functions the Parliament has given the Independent Commission Against Corruption extensive coercive and intrusive powers such as compelling the giving of evidence and the production of documents and other material and, as well, authorising the use of listening devices and intercepting telephone conversations.

When the Independent Commission Against Corruption came into existence some 17 years ago the Premier of the day, Mr Greiner, said in the second reading speech that in the long term he expected the primary role of the Commission to become "more and more one of advising department and authorities on strategies, practices and procedures to enhance administrative integrity" and he thought that because prevention of corruption was the long term objective the educative and consultancy functions of the Commission would be more important than its investigative functions.

Experience over the years has established that that has not been the case. Investigations and prevention strategies are, of course, mutually complementary and many of the prevention strategies derive from the findings resulting from an investigation. In that sense investigation and prevention roles of the Independent Commission Against Corruption are themselves directed to the diminution of corruption. Investigations are particularly important because, generally speaking, investigations are concerned with and identify what has in fact gone wrong rather than with what might go wrong.

The broad definition of corruption in the legislation covers, in theory at least, a wide range of activities. These, or at least some of them, have been referred to by Mr Yeadon in his opening address yesterday and it has caused some people to be concerned that the definition of "corrupt conduct" is too wide and Sections 8 and 9 of the legislation (which define corrupt conduct) should be reframed. However it must be steadily borne in mind that although dishonest and partial behaviour may meet the definition of corrupt conduct in Section 8 of the Independent Commission Against Corruption Act, Section 9 provides that findings of corrupt conduct cannot be made unless the conduct complained of could amount to a criminal offence or disciplinary offence.

Like many people, and before I became Commissioner, I had heard it said that the type of conduct attracting the attention of the Independent Commission Against Corruption went far beyond what ordinary people would describe as "corruption". In one sense, and in theory at least, this may be so. But when I was undertaking the inquiry for the government before my appointment as Commissioner I invited a number of organisations including; the Bar Council, the Law Society, and the Council of Civil Liberties (to name but a few) and who had expressed concern about the width of the definition, to furnish me with instances of when the Commission had made a finding of corrupt conduct where ordinary people would not describe the conduct as corrupt. I received no examples of it and, I think, none were given to Mr McClintock who continued the inquiry after my commission was revoked. It was for

that reason that I had formed a tentative conclusion that, complicated though the definition appeared to be there was no demonstrated need to change it.

On my understanding, the Independent Commission Against Corruption always claimed a discretion to determine what complaints it should investigate and what it should not (other than matters referred to it by Parliament in respect of which it had no discretion). The recent amendments have directed the Commission's attention to serious and systemic corruption directing the Commission to discharge its functions along the lines that, so far as I have been told, it had always done.

When the legislation commenced there was a general presumption that investigations of corrupt conduct should be conducted in public. As time went on Parliament appeared to take the view that what it described as "the public interest" should prevail over the general presumption and the legislation as it stands today makes it plain that without limiting the factors that the Independent Commission Against Corruption should take into account when determining whether or not it is in the public interest to conduct a public inquiry the Commissioner is to consider:

- (a) The benefit of exposing to the public, and making it aware, of corrupt conduct;
- (b) The seriousness of the allegation or complaint being investigated;
- (c) Any risk of undue prejudice to a person's reputation (including prejudice that might arise from not holding an inquiry); and
- (d) Whether the public interest in exposing the matter is outweighed by the public interest in preserving the privacy of the persons concerned.

As I have mentioned, the Independent Commission Against Corruption may hold compulsory examinations (which were formerly private hearings) and it has the power to place restrictions on the publication of evidence received in compulsory examinations and public inquiries.

Since the legislation was passed the Commissioner or Assistant Commissioner has an obligation when conducting a public or private hearing to state at the outset the general scope or purpose of the public or private hearing. The recent amendments provide that at compulsory examination and at a public inquiry a person required to attend must be told before or at the commencement of appearance "the nature of the allegation or complaint being investigated".

Although Parliament has decreed that failure to give the advice referred to above does not invalidate or otherwise effect the conduct of the compulsory examination or public inquiry the Independent Commission Against Corruption, of course, takes the view that these are Parliamentary directions which must be observed no matter how awkward that may be in a given case.

I agree with Mr Yeadon's comment that the most significant amendment last year was that which created the Office of the Inspector of the Independent Commission Against Corruption. I do not propose to deal with aspects of the inspectorate in my talk because Mr Yeadon referred to parts of it yesterday and I note Inspector Kelly is to address you this morning.

However, I will briefly outline why I thought, when I was inquiring into the Independent Commission Against Corruption and still think now that I am its Commissioner, that the establishment of the Office of the Inspector is as it should be. I have already referred to the

extensive powers of the Commission. These include not only, as I have said, the coercive powers to require production of documents and to require evidence to be given in circumstances where the common law entitlement to object on the grounds of self-incrimination does not apply but it also may use listening devices to record private conversations and it may intercept telephone conversations.

The legislation as it stood prior to the recent amendment provided two mechanisms of accountability. The most significant was the Parliamentary Joint Committee on the Independent Commission Against Corruption—the ICAC Committee—which was established by the legislation and which has wide powers to monitor and review the exercise of the Commission of its functions. However, the legislation in terms provided that the ICAC Committee could not investigate a matter relating to particular conduct or to reconsider a decision to investigate, not to investigate or to discontinue investigation of a particular complaint. Moreover, the Committee could not investigate findings, recommendations, or other decisions of the Commission in relation to investigations or complaints.

The provision was inserted, I am told, for the reason that Parliament thought it inappropriate that it should investigate particular complaints when members of Parliament were subject to the jurisdiction of the Independent Commission Against Corruption.

The other accountability mechanism was the Operation Review Committee, comprising the Commissioner, Deputy Commissioner, the Police Commissioner, a nominee of the Attorney-General appointed by the Attorney General and four people appointed by the Governor to represent "community views", whatever that might mean.

When I was conducting the inquiry, and before I was appointed as Commissioner, Mr Greiner granted me an interview and the function of the Operation Review Committee was discussed. Mr Greiner said he was most surprised to see that the Operations Review Committee included the Police Commissioner (at a time when police officers were subject to the jurisdiction of the Independent Commission Against Corruption) and a nominee of the Attorney General, bearing in mind the function of the Commission was to investigate public officials. Mr Greiner's surprise at the inclusion of these two members of the Operations Review Committee was only equalled, I think, by the surprise he exhibited when I reminded him that it was his eloquence that persuaded Parliament to include them.

The function of the Operation Review Committee is to advise the Independent Commission Against Corruption as to whether the Commission should investigate a complaint or should discontinue an investigation that had begun. Contrary to the perception of its function by some people, it must be steadily remembered that the function of the Operations review Committee is not to rein in an exuberant Commission. On the contrary, its function is, where appropriate, to egg the Commission on to investigate or continue to investigate where it thought it should not do so.

It was stated yesterday that it was not clear whether the ICAC Committee, when reviewing the Inspector's function, could investigate a matter relating to a particular conduct or to the other matters referred to in Section 64(2) of the legislation. In my opinion it cannot and the legislation makes this quite clear. It might be said well then to whom is the Inspector

accountable when the Inspector investigates a complaint concerning a matter relating to particular conduct. I think the short answer has to be, at the end of the day somebody has to be trusted and provided care is taken in the selection of an Inspector, as it undoubtedly was in the present case, the performance of his duty in this regard must be left to him.

Before I became the Commissioner I had formed the view that if an Inspector were appointed with power appropriate to his or her function the lacuna in the ICAC Committee's powers (that it could not investigate matters related to particular conduct) would be addressed as well as it could be addressed. I thought, as did Mr McClintock SC, there would be no need for an Operation Review Committee which, after all, was scarcely able to monitor those aspects of the Independent Commission Against Corruption's functions that needed to be monitored to make the Commission fully accountable. However, to date that has not been the view of the Parliament and until Parliament changes its mind on the matter the Commission will be required to outlay not inconsiderable expense in meeting the requirements of the Operation Review Committee which, in my opinion, is now unnecessary in view of the establishment of the Inspectorate.

As I have previously said the legislation, in terms, provides that the principal object of the Independent Commission Against Corruption Act establishing the Commission is to promote integrity and accountability of public administration by investigating, exposing and preventing corruption and educating public authorities about corruption and its detrimental effects. The legislation describes these functions as the principal functions of the Commission.

Under a heading entitled "Other functions of the Commission" it is provided that the Independent Commission Against Corruption also has the function to assemble evidence that may be admissible in the prosecution of a person for a criminal offence against the law of the state. Such evidence should be given to the Director of Public Prosecutions.

A very common criticism levelled at the Independent Commission Against Corruption is that it has a low success rate in achieving criminal convictions. Others question whether the Commission should have any part in the prosecution of persons for criminal offences other than simply making available what evidence it does have to a prosecuting authority.

One difficulty I had when I was doing the inquiry was that I thought, for a time, that it was the Director of Public Prosecutions that commenced and conducted prosecutions. As Mr Yeadon pointed out yesterday it was clear it was the Independent Commission Against Corruption who made decisions about whether or not to commence criminal proceedings and that the Commission actually files documents commencing the proceedings after which the Director of Public Prosecutions took over the prosecution.

In terms, the legislation requires the Independent Commission Against Corruption to make recommendations concerning persons against whom substantial allegations have been made and to include in its reports recommendations concerning whether or not consideration should be given to obtaining the advice of the Director of Public Prosecutions with respect to the prosecution of persons for criminal offences or the taking of action against a person for specific disciplinary matters.

Because the Independent Commission Against Corruption cannot make a finding of corrupt conduct unless the conduct complained of could constitute or involve a criminal offence or a disciplinary offence there appears to be an assumption that if a finding of corrupt conduct is

made the Commission has failed to discharge its proper duty unless its findings are followed by successful criminal prosecutions or successful disciplinary action proceedings.

As Mr Yeadon pointed out yesterday the Independent Commission Against Corruption makes its findings of corrupt conduct on the civil standard of proof. Moreover the material available to the Commission for the purpose of making findings may not be available to a prosecuting authority conducting criminal prosecutions. The legislation provides that although a person may object to answering questions asked by the Commission on the grounds of a tendency to expose that person to self-incrimination, the questions must nonetheless be answered. However, the legislation provides that if the objection is properly taken those questions and answers cannot be used in subsequent criminal proceedings (except, of course, criminal proceedings that may be taken for lying to the Commission).

Like all bodies discharging statutory duties the Independent Commission Against Corruption is constrained by its budget and the demands of its functions. The legislation makes it plain that the assembling of evidence for subsequent criminal prosecutions is a secondary function. It necessarily must stand behind the Commission's primary functions. If the Commission is able to establish corruption from evidence received under compulsion a question can arise whether the resources of the Commission should be used to secure criminal conviction by unearthing evidence that would lead to the same conclusion as the admission made but which would be inadmissible in criminal proceedings.

It would seem to me therefore that it is unwise for people to attempt to assess the performance of the Independent Commission Against Corruption by reference to the number of criminal scalps.

There have been suggestions that the Independent Commission Against Corruption should find facts but should not make findings of corrupt conduct, bearing in mind the significant damage done to reputations by such findings. This matter was agitated in the early 1990's, Parliament did not see fit to change the law then and it has not seen fit to do so to date.

I do not think that anyone would disagree with the statement that a finding of corrupt conduct, although having no legal consequences, significantly effects a reputation. Even allegations of corrupt conduct adversely affect reputations which is a reason why these matters must be taken into account prior to the Independent Commission Against Corruption determining to conduct a public inquiry.

In Greiner's case, Priestly JA appeared to be concerned that there might be cases (as there undoubtedly would be) where a person is found to engage in corrupt conduct yet is acquitted after a prosecution for an offence the gravamen of which relates to that corrupt conduct.

It must be remembered, however, that if this is a problem it is not a problem unique to the function of the Independent Commission Against Corruption. Tribunals are established to determine fitness of professionals to practice and they may make findings which may appear inconsistent with subsequent acquittals. Yet I have not heard it suggested, to date at least, that for that reason those tribunals should not function as they do. Moreover, I should perhaps mention that if an appropriate case was presented to the Commission for a re-appraisal of its conclusion it has the jurisdiction to entertain the matter. But it would have to be satisfied that applying the appropriate standard and applying the law properly, something has occurred which persuades it that it should no longer maintain the view it had.

But however all that may be, at the end of the day the Independent Commission Against Corruption does what the Parliament directs it to do. Conformably with this approach I express no views as to whether or not, for example, Parliamentarians should be included in the Commission's jurisdiction. It is a matter for the Parliament to determine.

By recent amendment the Independent Commission Against Corruption is directed to confine itself to serious and systemic corruption. The amendments have also provided that the Commission should be including in its annual reports details of its key performance indicators as these objectives are now fashionably described.

When the Independent Commission Against Corruption was established it was provided that people could be held guilty of contempt of the Commission if they engaged in conduct, as for example disrupting proceedings in the Commission or refusing to answer questions, etc.. However, it also provided that a person was liable to be charged with contempt of the Commission if that person engaged in conduct which, had it been directed to a court of law would have amounted to contempt of court. This is a form of contempt the lawyers refer to as "scandalising" contempt.

Conduct can amount to scandalising contempt where it is said to have the tendency to weaken public confidence in the integrity of the court. I do not propose to express any opinion as to whether scandalising contempt of court should remain punishable beyond observing, perhaps, that there is a respectable body of legal opinion that it should not.

However, I am firmly of the view that, (and leaving to the side the laws of defamation) the right of free speech should ordinarily prevail over criticisms of government agencies albeit ill-informed criticisms. After all free speech is not about encouraging people to say what you want them to say. It is about tolerating them saying things you do not want them to say. I was therefore pleased that Mr McClintock recommended, and the Parliament accepted, that scandalising contempt of the Independent Commission Against Corruption is now no longer an offence. I should however say that my view on this matter is scarcely original, it is a view that has been advanced by the Australian Law Reform Commission many years ago, viz. that the doctrine of scandalising contempt should not be applied to administrative bodies.

There is one further matter that I should mention. The Parliament gave the Independent Commission Against Corruption jurisdiction over Ministers of the Crown, members of the Executive Council, and Members of the Legislative Council or Legislative Assembly. However, Section 122 of the legislation provides that nothing in this Act shall be taken to effect the rights and privileges of Parliament in relation to the freedom of speech and debates and proceedings in Parliament.

The doctrine of Parliamentary privilege dates back to Article 9 of the Bill of Rights, 1689 which provides "that freedom of speech and debates or proceedings in Parliament ought not be impeached or questioned in any court or place out of Parliament".

New South Wales appears to be the only Australian state in which the laws of Parliamentary privilege continue to be based mainly on the common law.

Although the Independent Commission Against Corruption has had jurisdiction over Members of Parliament, since 1989 there has been only one occasion when issue of Parliamentary privilege arose and that was when the Commission sought to exercise search warrant powers over a Member of Parliament in the House. This matter was referred to yesterday. As you

were told this led to the Legislative Council Privileges Committee concluding that a breach of immunity of the House under article 9 of the Bill of Rights had occurred, which recommendation was adopted by the House. But no finding of contempt was made.

Leading to the finding that the Independent Commission Against Corruption was in breach of privilege but that no adverse consequences should follow were a number of assertions and counter-assertions concerning the meaning and scope of article 9 which was part of the law of New South Wales and what procedures ought to be followed in the event of a similar occurrence in the future.

I do not propose to use this occasion to advance views held by the Independent Commission Against Corruption, some of which may be seen to be in conflict with views represented by lawyers advising the Parliament. It is my instinctive reaction that questions of Parliamentary privilege should be determined by the Parliament (unless the issue arises where it would not be convenient to do so as, for example, if the issue arose in the course of defamation proceedings) or indeed, during a compulsory examination or public inquiry conducted by the Commission. But it seemed to me that the preferable course, from the Commission's point of view at least, would be to reach some understanding with the Parliament, as to what should be recognised as Parliamentary privilege and how it should be dealt with if the privilege were claimed, bearing in mind that Parliamentary privilege is a privilege of the house not of a particular member and that parliament would recognise that it has granted the commission the jurisdiction to investigate allegations of corrupt conduct by Members of Parliament.

Crime and Misconduct Commission of Queensland

**Mr Robert Needham
Chairperson and CEO
Crime and Misconduct Commission
Queensland**

Introduction

Corruption prevention in Queensland in the past 20 years has been largely shaped by the Fitzgerald Commission of Inquiry.

Opportunities for corruption have and will always exist for politicians, police and public servants, but often those who succumb to these temptations do so in isolation.

This was not the case in Queensland. The Fitzgerald Inquiry in 1987 dramatically uncovered systemic corruption among these groups.

In a blaze of widespread media publicity, the Inquiry disclosed corruption and bribery in the police service reaching all the way to the state's Commissioner of Police. The inquiry also explored allegations of corruption involving sections of government, particularly at ministerial level.

Today, with the assistance of the former Criminal Justice Commission, a direct descendant of the Fitzgerald Inquiry, and its successor the Crime and Misconduct Commission, Queensland has a police service and public sector largely free from the taint of corruption.

However, it would be rash to assume that all the problems revealed by the Fitzgerald Inquiry have been solved. Nevertheless, careful examination of our progress over the last dozen years or so lends weight to my view that there have been significant improvements.

But we would be naïve to think that the dark period in Queensland's integrity history can't re-emerge.

There is no room for complacency.

The lessons learnt from the Fitzgerald Inquiry remain vivid for most senior police officers and senior public servants. They lived through the shocking revelations of the Inquiry and the consequent reform process of the police service and political institutions.

But as new recruits enter the system, there is always the potential for the lessons of the past to be lost on the next generation of police and public officers. Right now, Queensland's public sector and police service are at the operational level dominated by the new generation.

Reflection

The dramatic disclosures of the Fitzgerald inquiry created a climate of public opinion calling for reform of the Queensland Police Service and the integrity climate generally within Queensland.

For the first time in 32 years, there was a change of government.

The new government set up the Electoral and Administrative Review Commission. This, aided by a climate of public opinion in favour of change and a government and opposition both supportive of reforms suggested by Commissioner Fitzgerald, led within a couple of years to legislative reforms for freedom of information and whistle-blower protection.

The Queensland community also embraced the government's creation of the Criminal Justice Commission as an on-going commission of inquiry with a broad anti-corruption jurisdiction, significant investigative powers and a substantial research and oversight role.

The Criminal Justice Commission gained the reputation as a fearlessly independent body.

It had largely an investigative focus, though it was also involved in:

- Corruption prevention
- Organised crime investigation
- Complaints handling
- Research
- Intelligence
- Witness protection
- Police reform, and
- General matters relating to legislature and government.

The Criminal Justice Commission's history of investigations and its evolution through to the current approach is interesting.

Fitzgerald in his Report had recommended that the Criminal Justice Commission should have the discretion to refer trivial or purely disciplinary matters to Chief Executives of Departments or the Commissioner of Police to investigate and take appropriate action.

Despite this, the initial Criminal Justice Act setting up the Criminal Justice Commission required that it investigate every complaint made to it.

This quickly proved to be impractical. By the time the Parliamentary Criminal Justice Committee (PCMC) reviewed the Criminal Justice Commission in 1992, the Act had already been amended to remove that requirement. The Criminal Justice Commission now had the discretion to refer some more minor matters back to the department or Police to deal with.

Later Parliamentary Criminal Justice Committee three yearly reviews track further changes in the approach to how matters were dealt with.

In the 1995 review, the Parliamentary Criminal Justice Committee noted that for less serious allegations the investigation and disciplinary process occurs within the particular agency.

In 1998, the Parliamentary Criminal Justice Committee carried out a thorough review of the need for the Criminal Justice Commission to investigate official misconduct and police misconduct against Queensland Police¹.

The Committee agreed with the Criminal Justice Commission submission that the disciplinary investigations systems within the Queensland Police Service were not to a standard where it would be appropriate to refer all matters of misconduct to the Queensland Police Service to investigate. It did agree with protocols put in place by the Criminal Justice Commission with departments, which allowed departmental investigations in appropriate circumstances.

However, the Parliamentary Criminal Justice Committee explored the issue of where, ideally, the handling of complaints should take place. It quoted with approval the Honourable Justice Wood in his final report into the NSW Police Service where he said:

The best platform for change does not involve the preparation of a new set of rules and regulations and the imposition of a more vigorous regime for their enforcement. Rather it involves the Service setting proper professional standards and then doing whatever it can to encourage its members, in a managerial way, to lift their performance. Unless this is achieved, no system of discipline or complaint management will ever bring about reform. At best it will be a safety net.

The Committee also quoted similar views expressed in a 1996 Queensland Police Service Review and supported a long-term strategy which incorporated these views.

The Criminal Justice Commission was moving in the same direction. Though, at the time there was an element in that body which was more supportive of the concept of regulation by vigorous investigation.

It is interesting to note the comment in the recently released National Integrity Systems Assessment final report, issued by Griffith University and Transparency International, where it was said of the period I have been talking about:

Notwithstanding the introduction of positive ethics approaches (including a world renowned approach to Public Sector Ethics), the focus on established wrongdoing by individuals and early establishment of the Criminal Justice Commission led to an over-reliance on that body to itself raise standards (rather than enforce standards already raised) and far stronger commitments of public resources to the investigatory elements of the integrity system than to standard-setting and preventative elements.

¹ Official misconduct is defined, shortly, as criminal conduct or disciplinary conduct warranting dismissal. Police misconduct is lesser disciplinary conduct.

Devolution

There is now a general acceptance by Queensland Parliament and the Parliamentary Committee and the Crime and Misconduct Commission that the Commission's work needs to go beyond the investigation of corruption into the realm of strengthening the misconduct resistance of the public sector.

This same sentiment is reflected in our Act today. The Crime and Misconduct Act 2001 provides the mechanism for an 'integrity culture' to flourish.

Our Act recognises that a commitment to an ethical climate comes through managers being made responsible and accountable for the culture of their agency and the conduct of their officers.

This is why the Crime and Misconduct Commission sends most of the less serious complaints it receives back to the relevant agencies to investigate while maintaining a monitoring role and while being prepared to take over an investigation if necessary.

The more serious and systemic matters — and those that by their nature call for an independent agency to investigate them — are, of course, still being handled directly by the Crime and Misconduct Commission.

The Crime and Misconduct Commission is now reaching a stage where complaints against police will be further devolved.

In line with our Act, the majority of complaints against Queensland police officers are referred to the service's Ethical Standards Command (ESC) within the Queensland Police Service to handle.

Working with the police, the Crime and Misconduct Commission now envisages devolving responsibility for decision making regarding the handling of complaints from the Ethical Standards Command to the police regions.

This long-term project includes evaluating how well the police service is managing complaints about misconduct and will consider issues such as timeliness, the disciplinary hearings process, disciplinary sanctions and training.

It is interesting to note that interstate integrity agencies have a similar approach to working with police on police complaints and issues. For example, the NSW Ombudsman has had jurisdiction to deal with police complaints in this state since 1979. Bruce Barbour, the NSW Ombudsman, notes in his 2004–05 annual report:

There are many good reasons why NSW Police, like all other government agencies, are required to deal with most of the complaints about their own officers. NSW Police have to take responsibility for the conduct of individual officers and the way their organisation is run. Learning from complaints is one part of managing operations effectively.

As the history I have referred to shows, devolving responsibility for decision making regarding the handling of complaints from the CMC to relevant agencies hasn't happened overnight.

Through necessity, it's been a gradual process adopted by the Criminal Justice Commission with the active support of the Parliamentary Committee.

The Criminal Justice Commission recognised that sustained change could only be achieved by improving the culture and systems that exist within the public sector.

The Crime and Misconduct Commission, with others, continues to provide this same leadership, framework and incentives for public sector organisations to improve themselves.

Integrity Framework

To expect public sector agencies to handle lesser complaints without first ensuring robust integrity systems in the public sector and police service are established and maintained would lead to certain failure of the integrity system which we have worked so hard to achieve.

There are a number of elements that experience has taught us are necessary for the establishment and maintenance of robust integrity systems in the public sector. An 'integrity framework' needs to be present.

What do I mean by an integrity framework? Griffith University's Key Centre for Ethics, Law, Justice and Governance encapsulated it as being a set of institutions, practices and values that promote integrity and inhibit corruption. It includes four groups of agencies:

- public sector agencies — both state and local
- the judiciary
- parliament and its associated agencies, and
- independent agencies such as the Crime and Misconduct Commission itself, the Audit Office, the Ombudsman and the Information Commissioner.

As one of those independent integrity agencies, the Crime and Misconduct Commission is charged with helping to maintain and enhance integrity within Queensland.

But it cannot do it alone.

There must also be a sincere and active commitment on the part of public sector managers and politicians. *This is crucial*. The ethical message must come from the top. Through their actions, CEOs and managers must show staff that they take integrity seriously.

Entrenched integrity is the first line of defence against crime and corruption.

Embedding Integrity

The biggest challenge in corruption prevention for the Crime and Misconduct Commission today is embedding the notion within the Queensland public sector and police service that maintaining high standards of integrity and conduct is core business.

To rise to this challenge, the Crime and Misconduct Commission has broadened its focus. I hasten to add that this is quite distinct from the notion of changing its focus.

Our purpose is clearly set out in the Crime and Misconduct Act, at section 4:

... to combat and reduce the incidence of major crime ... and to continuously improve the integrity of, and to reduce the incidence of misconduct in, the public sector ...

By broadening our focus I mean that the Crime and Misconduct Commission is attending to the full functions and duties set out by our Act.

We commit not only to the 'glamorous' investigative work – the kind that attracts media attention and public interest – but also to the 'unglamorous' work – the kind that involves consistent and steady work in partnership with agencies to improve integrity.

Such work — we call it misconduct prevention and 'capacity building' — rarely give rise to headlines, but is nevertheless vital in achieving an accountable and ethical public sector.

Our commitment has resulted in the dissemination of valuable resources, such as advisory papers, toolkits and training materials to help government agencies deal with different types of official misconduct within their organisation.

We also advise and assist government agencies through various outreach activities, including regional visits. And we use the results of our audits and reviews to help agencies build their capacity to prevent and deal with misconduct.

Collaboration

Another aspect of our broadened focus is our increased commitment to working with other agencies.

Recently, for example, our prevention function led us to collaborate with the New South Wales Independent Commission against Corruption to produce a practical guide on managing conflicts of interest in the public sector. This document has the potential to become a national standard.

We also work cooperatively with agencies such as the Queensland Audit Office, the Ombudsman and the Queensland Police Service to achieve optimal use of resources and to avoid needless duplication.

Proactive Investigations

While the Crime and Misconduct Commission has broadened its focus, this has not made us neglectful of our traditional investigative role, or rendered us any less vigilant.

There will always be a need for an independent body, like the Crime and Misconduct Commission, to investigate the more serious, systemic and high profile allegations of corruption.

Our special coercive powers, not available to the police, make us uniquely suited to investigate serious and complex matters. We focus on matters such as corruption within government agencies, police corruption and sensitive political matters. We also handle any matter where a Crime and Misconduct Commission investigation will promote public confidence. The wise use of public hearings can help in that regard. Years of the best prevention work cannot override the impact one successful public hearing can have on community confidence in the public sector generally and the Crime and Misconduct Commission.

The Crime and Misconduct Commission also uses its investigative role to root out any isolated incidents of corruption.

By uncovering the one-off incidents of serious misconduct in the Police Service or other government or local government bodies, the Crime and Misconduct Commission can stem the potential for these single matters from becoming entrenched corruption and avoid the need in the long-term for another Fitzgerald Inquiry.

For example, just two weeks ago Crime and Misconduct Commission investigators arrested and charged a Far North Queensland police officer for allegedly extorting money from a member of the Mareeba community.

His arrest followed a covert operation over five days and the matter has now been successfully brought before the courts.

Investigations, like this, serve as a deterrent to other officers and stop the slippery slide into systemic corruption.

Just as important is the investigation of incidents that alone might seem relatively insignificant but where a number occurring at the same time and area could indicate a systemic problem. For example, what we call process abuse among police can be symptomatic of a developing problem in an area of policing. The bending of rules by some Police in handling suspects in an investigation can fairly quickly lead to a system where other police are introduced to the practice, with an extension into more serious conduct, such as perjured evidence, close relations with criminal elements, giving out of confidential information to criminals and, if not stopped, to full blown corruption.

This process abuse requires constant vigilance. It was the process whereby much of the corruption discovered during the Fitzgerald Inquiry spread among police officers.

Complaints — Resources

For many in the Queensland community the Crime and Misconduct Commission will always be best known as a complaints-handling organisation. I have no issue with that, provided we do not become a complaints-driven organisation.

What do I mean by 'complaints-driven'? I mean being so preoccupied with receiving and processing complaints that we have no time to attend to our other obligations.

To meet all our obligations under the legislation, we cannot afford to be complaints-driven.

Since 2001 there has been a 60 per cent increase in complaints coming into the Crime and Misconduct Commission. In 2004–05 alone, we received almost 4400 complaints.

(I should add that we do not think this increase means that misconduct is more prevalent than it was four to five years ago. On the contrary, we believe it indicates increased awareness on the part of public sector CEOs of their statutory responsibility to report suspected official misconduct to us.)

Crime and Misconduct Commission complaints staff struggle to cope with the volume of complaints — especially when many don't turn out to involve official misconduct at all, and very many others are sufficiently minor to be safely handled by the agencies themselves. Our resource limitations are a big challenge for the Crime and Misconduct Commission today and so we must strive to increase our efficiency in this area.

Future

There can be no doubt that corruption prevention in Queensland has evolved over time, adapting to the current integrity landscape.

As always, our performance will continue to be scrutinized by the public, politicians, the media and, of course, our oversight committee, the Parliamentary Crime and Misconduct Committee.

The Crime and Misconduct Commission will again be under the spotlight this year when the PCMC conducts its next three year review into our operations, later this year.

The committee's last review did not highlight any major changes, citing the fact that it was too early to draw firm and considered conclusions following the Crime and Misconduct Commission's formation in 2001.

The Crime and Misconduct Commission as a combined organisation is now four years old and I envisage much discussion about where we are at and what challenges we face.

I see the major challenges facing the Crime and Misconduct Commission today as being:

- the need to find more effective ways to help public sector agencies build an 'integrity culture' in the workplace
- effective monitoring of the way public agencies investigate and resolve matters referred back to them
- the continued wise use of our limited resources, especially in the area of complaints handling
- coping with the impact of ever changing technology on the investigation of crime and corruption, especially in the area of communications.

The Crime and Misconduct Commission will continue to set high standards for the police and the public sector, and for those involved in politics.

By demonstrating our ongoing effectiveness in all these areas the Crime and Misconduct Commission will show both sides of politics and the community that we are an essential element of the Queensland system of integrity, and vital for corruption prevention in our state.

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The Corruption and Crime Commission of Western Australia

Mr Mike Silverstone
Executive Director
Corruption and Crime Commission of Western Australia

Introduction

Thank you for inviting me on behalf of the Corruption and Crime Commission (CCC) to this forum.

Our Commissioner, Kevin Hammond, sends his apologies, however he has a long standing, prior speaking commitment at the University of Western Australia's Summer School of Law.

The role of external oversight by the Parliament of the actions and activities of anti-corruption and crime bodies is of great importance. This oversight serves, in the case of the Corruption and Crime Commission, to ensure that the Commission remains responsive to the Parliament from which it draws its authority to act. In the case of the Corruption and Crime Commission, a Joint Standing Committee chaired by Mr John Hyde MLA performs this oversight role. The Committee is supported and assisted by the prominent Western Australia lawyer Mr Malcolm McCusker, QC as Parliamentary Inspector.

Operating in relative isolation, it is important for agencies such as the Corruption and Crime Commission to maintain regular contact with other anti-corruption and crime agencies in order to share ideas, experiences and if possible resources in order to maintain relevancy and to strive to improve constantly the effectiveness and efficiency of their respective operations.

Being a relatively new organisation – the Corruption and Crime Commission was established at the beginning of 2004 with the Commissioner, an adviser and one staff member – we have benefited enormously from the generous support and assistance of the more established agencies sharing their expertise, experience and even staff.

For that, we are very grateful as the process of establishing an anti-corruption and crime body has been a considerable task.

This is especially the case as the Corruption and Crime Commission dealt with an ongoing flow of about 2400 incoming complaints and notifications annually and undertook current and new investigations. Now with most of our staff onboard, we are in our first financial year of being fully operational.

A broad view of anti-corruption bodies was perhaps well summed up by a recent editorial in *The Australian*. It said "Australia's history of long-serving state administrations shows the voters become annoyed only when the hospitals are inefficient, the schools ineffective, the police corrupt and the trains do not run on time."

While the efficiency of hospitals, effectiveness of schools and train timetables are beyond the scope of the Corruption and Crime Commission, we do handle integrity issues involving police as well as State and Local Government. In that sense, we are closer to Queensland's Crime and Misconduct Commission (CMC) model than the New South Wales' Independent Commission Against Corruption (ICAC) and Police Integrity Commission (PIC) model.

As a thumbnail sketch of the Corruption and Crime Commission, we have:

- 147 staff; and
- an annual recurrent expenditure of \$26 million

In the last financial year 2004/2005 we:

- received more than 2,400 allegations and notifications of misconduct. under our *Act*, State and Local Government agencies have a statutory responsibility to report misconduct to the Commission;
- reviewed more than 1,200 investigations of misconduct by other agencies;
- conducted 4 public hearings and a number of private hearings;
- charged seven people with 43 criminal offences;
- tabled four investigation reports in Parliament;
- conducted four joint agency investigations, and
- delivered 34 seminars across the state on corruption prevention.

At the same time, we increased our long term contracted staff from 16 to 130, upgraded our IT system, introduced an electronic document management system, leased, fitted out and occupied a new building and conducted the Commission's first public hearings.

The Corruption and Crime Commission's early public hearings have attracted much public attention. For example, one set of hearings involved a Ministerial Chief of Staff – five corruption charges and one bribery charge were subsequently laid and that case is before the court. A second public hearing, involving allegations against a former mayor of one of our largest councils, resulted in thirteen charges being laid under the *Local Government Act* as well as four corruption charges, this is also before the courts.

In addition, the Corruption and Crime Commission has had to respond to controversy associated with the conduct of its Acting Commissioner. I'll say more on this later, when addressing the issue of oversight.

The indications so far for 2006 are that the extent of our endeavours, the complexity of matters before us and the pace of our work are steadily increasing.

Before addressing the extent of its powers, oversight arrangements and proposals to amend our legislation, I would like to summarise the history of anti-corruption agencies in Western Australia as it shows the evolution of political thinking that led to the establishment of the current Corruption and Crime Commission and its current powers.

History

In 1988, the Government established the Official Corruption Commission (OCC).

Allegations would be lodged with the Official Corruption Commission, that consisted of three Commissioners, who could refer them to a person or agency empowered to undertake an investigation. However, the Official Corruption Commission had no power to compel anyone to do anything. The Official Corruption Commission acted as a post box or clearing house for allegations of corruption by public officers.

In 1991 the legislation was amended so that the Official Corruption Commission could report any finding of illegality to each House of Parliament. However, it could only present facts, not express ethical or other judgments.

Further amendments to the *Act* followed in 1994 to allow the Official Corruption Commission to conduct preliminary inquiries so it could determine if there were reasonable grounds to refer a complaint on to an agency with the power to investigate it.

The Official Corruption Commission was also granted the power to request information from any person or body with a \$2,000 penalty for non-compliance.

In 1996, extensive amendments to the *Act* created the Anti-Corruption Commission (ACC). This was an independent body not subject to the directions of Government and accountable to Parliament through a Joint Standing Committee.

It could undertake surveillance, utilise telecommunications interception and execute search warrants when authorized to do so by judicial warrant.

The Anti-Corruption Commission only had an investigative and reporting function. It could not determine guilt, lay charges, recommend disciplinary action or hold public hearings.

It received allegations, carried out investigations or referred them to another agency to undertake investigations, and received reports on those investigations.

The results of those investigations could be referred to the police, Director of Public Prosecutions (DPP) for prosecution, or to the relevant department for disciplinary action.

The most significant limitation of the legislation under which the Anti-Corruption Commission operated was the high level of secrecy. It was illegal to even say that a matter had been referred to it. This became something of a joke in the media with reports saying “the matter has been referred to an agency that cannot be named”.

While the Anti-Corruption Commission could write reports, the facts in them had to be agreed to by both the Commission and the party being investigated. Not surprisingly, I understand no reports were tabled in Parliament.

Another weakness was the lack of an independent body to receive and investigate complaints about the Anti-Corruption Commission. While there was a Joint Parliamentary Committee to oversee the Commission, it couldn't review the handling of operational matters.

This added to the controversy surrounding the Commission particularly as its not unusual for those being investigated to attempt to lessen the scrutiny to which they are being subject by complaining about the investigators.

The Anti-Corruption Commission showed that the way in which complaints against anti-corruption bodies are handled is critical for the credibility of the agency, especially as the legitimacy of the Commission was undermined by a lack of transparency resulting in a loss of public confidence.

Clearly, the legislation under which the Anti-Corruption Commission operated was flawed. Eventually, large sections of the public, media and Parliament lost confidence in the Commission.

The Joint Standing Committee made a number of recommendations including that an Office of Parliamentary Inspector be established with extensive powers to audit the operations of the Anti-Corruption Commission, investigate complaints against the Commission and evaluate its procedures.

General concerns were also expressed by the Joint Standing Committee about the secrecy of the Anti-Corruption Commission, the protection offered to individuals being investigated by the Commission, the extent to which the Commission should and could make public the results of its investigations and its accountability.

These recommendations did not, however, find their way into Law.

In the meantime, there was continuing disquiet concerning allegations about a number of police matters that the Anti-Corruption Commission was unable to quell.

As a result, a Royal Commission into the police was established in 2001.

The Royal Commission was granted the strong investigative powers required by such a body and in an interim report tabled in December 2002, recommended the establishment of a Corruption and Crime Commission to replace the Anti-Corruption Commission.

Powers

The Government accepted most of the Police Royal Commission's recommendations including giving extensive powers to the Corruption and Crime Commission.

These include:

- The power to compel witnesses to attend hearings (private or public) and give evidence. The Police Royal Commission proved the importance of public hearings in showing the public that an inquiry had been thorough. The scepticism in the community today demands a high degree of public accountability. I note that ABC Radio reported last year that a survey of Australian opinion leaders found fewer than 20% of respondents trusted the Government to do the right thing and even fewer trusted the business sector. Other powers of the Corruption and Crime Commission include:

- The power to require the production of documents, other evidence and information and to enter and search public premises.
- The power to obtain search warrants from a judge.
- The power to intercept telecommunications and use surveillance devices under judicial warrant.
- The power to authorise the acquisition and use of assumed identities.
- The power to authorise the conduct of integrity testing programmes to test the integrity of any particular public officer or class of public officer.
- The power to authorise the conduct of controlled operations to obtain evidence of misconduct involving authorised persons engaging in what may be illegal activities.

I should add that the Corruption and Crime Commission also has an important corruption prevention and education role which had not been granted to any previous anti-corruption body in the State. Ultimately, this has more potential to improve the integrity of the public sector than the high profile investigations and public hearings.

Organised Crime

Interestingly, the Police Royal Commission also recommended that the Corruption and Crime Commission be empowered to investigate serious and organised crime. Arguments supporting the proposal included:

- An external oversight agency can assist police investigations by the use of Royal Commission-type powers that can compel witnesses to give evidence and produce documents.
- There is a demonstrated link between organised crime and corrupt police officers.
- Cost saving could be achievable by co-locating organised crime investigations with Royal Commission-type powers in the one agency.

However, the Government of the day did not accept that recommendation and instead gave the Commissioner of Police the right to apply to the Commissioner of the Corruption and Crime Commission for the right to exercise so-called exceptional powers in the investigation of organised powers.

These powers are similar to those granted to Royal Commissions and are beyond the powers that police normally operate under and were thought to be an effective tool in investigating organised crime, where codes of silence and sophisticated organisational structures have to be cracked.

The powers that can be granted to police by the Corruption and Crime Commission for offences related to organised crime such as perverting the course of justice, property laundering, firearms and drug offences.

The one application police has made for the use of these powers for the purposes of the content of private hearings by way of examination resulted in what the Corruption and Crime Commission believed were inadequate answers from the witnesses. Unfortunately, charges of contempt laid against the witnesses by the Commission were dismissed by the Court of Appeal.

The Corruption and Crime Commission has since asked for a change in its legislation in this (and other) areas to overcome what we believe are deficiencies.

Police can also apply to the Corruption and Crime Commission to be granted so-called fortification removal powers with respect to specified premises. These powers allow police to order outlaw motorcycle gangs to remove fortifications at their club premises installed to hinder a rapid police entry during a raid.

The Government passed these laws after police complained that by the time they got past the high fences, heavy gates and surveillance cameras, any evidence they may have been trying to obtain could have been removed or destroyed.

Again, the only police application for fortification removal powers granted by the Corruption and Crime Commission is currently being challenged by the Gypsy Jokers in the Supreme Court.

These are some of the challenges faced by agencies operating under new, untested legislation.

Oversight

With the extensive powers granted to the Corruption and Crime Commission, the external oversight of the Commission is important for our credibility in the community.

In 2003, a Legislative Council Standing Committee reviewed the proposed legislation to establish the Corruption and Crime Commission and it is interesting to note that most of the 68 amendments they recommended dealt with oversight.

In particular, there was concern about the role and powers of a Parliamentary Inspector who oversees the new agency and investigates any complaints made against it.

The committee was particularly and rightly concerned that there was a proper balance between the power and accountability of the new body.

The Parliamentary Inspector has complete access to all Corruption and Crime Commission documents, can require its officers to supply information or produce documents, order Commission officers to appear before an inquiry and investigate complaints against the agency with the powers of a Royal Commissioner.

This includes having complete access to any operational details.

The Corruption and Crime Commission has to notify the Parliamentary Inspector whenever it receives allegations against officers of the Commission and the Inspector has the power to take over that investigation. Any complaints against the Commissioner or Acting Commissioner are automatically referred to the Parliamentary Inspector who conducts the investigation.

However, the Parliamentary Inspector doesn't have to wait for a complaint but can initiate his own inquiries, act on the request of a Minister or in response to a request by either House of Parliament or the Joint Standing Committee.

He answers to the Parliament through a Joint Standing Committee which cannot access operational details.

The Joint Standing Committee monitors and reports to the Parliament on the Corruption and Crime Commission and Parliamentary Inspector's exercise of their functions as well as inquiring into and reporting to Parliament on how corruption prevention practices may be enhanced in the public sector.

It consists of four members - generally two Labor and two Liberal made up of two members from each of the Houses of Parliament.

The Corruption and Crime Commission has several meetings a year with the Committee. These meetings are generally open to the media and the public, though may go into closed session if there is a need to do so.

Reporting to a small bipartisan committee that understands the Act and is familiar with the Corruption and Crime Commission's goals and the constraints under which it operates, is a more effective means of reporting than reporting directly to the whole Parliament

As I mentioned earlier, the system of oversight had a high profile test last year when our then Acting Commissioner – Moira Rayner – allegedly tipped off the Clerk of the Houses of Parliament that his phone calls may be being intercepted.

I should explain that the position of Acting Commissioner, then occupied by Ms Rayner, is a part time position and handles cases that the Commissioner is unable to hear for various reasons. The Acting Commissioner generally only deals with those matters referred to her and seldom has much involvement with the Corruption and Crime Commission beyond that.

When the Corruption and Crime Commission became suspicious of Ms Rayner's conduct, as required under the Act, the Commission immediately informed the Parliamentary Inspector who took the matter over. Ms Rayner resigned from her position when informed by the Parliamentary Inspector of allegations concerning her conduct. She also faces Official Corruption and Pervert the Course of Justice charges. This matter is also before the courts.

The Corruption and Crime Commission, under its act, is unable to receive an allegation about the Commissioner or Acting Commissioner. Consequently, it was compelled to pass the allegations concerning possible misconduct to the Parliamentary Inspector; an action which was completely proper and appropriate given Ms Rayner's position within the Commission. In doing so responsibility for addressing the matter passed to the Parliamentary Inspector. The potential impracticalities of doing otherwise are immediately apparent.

In summary, the Corruption and Crime Commission dealt with the matter quickly, as soon as it was aware of it, and its actions were entirely in accordance with the Act.

I conclude by noting that the former Clerk of the Parliament faces charges, which include 50 counts of stealing as a servant, that are currently before the courts.

Review of the Act

The *Corruption and Crime Commission Act* specifies that three years after its commencement, there should be a review of its operation and effectiveness.

That review is scheduled to take place at the beginning of next year and in addition to any matters that the Minister may determine, can include:

- The need for a multi-person Corruption and Crime Commission;
- the appointment of up to two Assistant Commissioners (as opposed to the Acting Commissioner we currently have);
- jurisdiction over private entities executing public functions – the Corruption and Crime Commission doesn't have jurisdiction over a number of private organisations that spend public money;
- that the Corruption and Crime Commission has an investigative crime function;
- has a public interest monitor;
- that the Corruption and Crime Commission performs a witness protection function; and
- takes over the confiscation of proceeds of crime from the Director of Public Prosecutions.

However, a consequence of working with any new legislation is the need for more urgent reforms to our Act that have become apparent as a result of our operations.

The Corruption and Crime Commission has responded to the need for these in a number of ways.

First, it has identified the range of matters of concern in its most recent annual report. Second, it briefed its Joint Standing Committee on these concerns. Third, and more specifically, having concluded that the arrangements around its Organised Crime and Contempt powers were impractical, the Corruption and Crime Commission made a specific formal submission to its Joint Standing Committee.

As a consequence, the Committee has called an inquiry into these matters.

Last, the Western Australian Attorney General has announced a broad review of Justice Legislation, to include the *Corruption and Crime Commission Act*. The Corruption and Crime Commission has made a submission to this review, incorporating its earlier Organised Crime and Contempt submissions to the Joint Standing Committee. Its submission makes eleven recommendations for amendments to the act and proposes amendments to six other Acts.

The recommendations for amendment to the *Corruption and Crime Commission Act* includes amendments to the definition of public officer and misconduct, the provision for an investigative crime function and increased contempt powers, the clarification of the meaning of various elements of the *Act* and addressing various lacunae.

Needless to say the response to these various submissions are matters for both the Government and the Parliament to judge.

The Corruption and Crime Commission views the role of its Joint Standing Committee, in assisting and advising the Parliament on the worth and appropriateness of the various proposals, as central to the proper processes that enable the Commission to achieve the purpose and functions of its *Act*.

Assessing the Commission's Powers

In terms of assessing the powers granted to the Corruption and Crime Commission, I'd like to quote from a speech given by Shirley Heafey, Chair of the Commission for Public Complaints against the Royal Canadian Mounted Police given to the University of Ottawa Faculty of Law in 2003.

Appropriately, the paper was titled *The Need for Effective Civilian Oversight of National Security Agencies in the Interest of Human Rights*.

Ms Heafey listed five key elements when determining if a civilian anti-corruption agency is effective. They are:

1. Independence – is the agency beholden to the police or security force? Is it beholden to the Minister or Government?
2. Powers – Is the process complaint driven or can the agency audit such activities as it sees fit?
3. Information – does the agency have ready access to all relevant information or does the police or security force control what it sees?
4. Resources – are there enough?
5. Reporting – does the reporting mechanism put the issues in the public domain.

I think the Corruption and Crime Commission measures up fairly well against each of these criteria.

However, I note that Ms Heafey's list does not include a reference to the need for oversight of the anti-corruption and crime agencies themselves.

Our Corruption and Crime Commission's experience, built upon 18 years of anti-corruption bodies in Western Australia, is that an effective oversight regime is critical to the promotion of public confidence in such agencies as the Commission. The provision for a parliamentary joint oversight committee and a Parliamentary Inspector within the *Corruption and Crime Commission Act* have enabled the Commission to be held accountable to the Parliament while providing a resource for all Western Australians with specific concerns or disagreements with the Commission and its work.

Cooperation

I'd like to briefly address the issue of cooperation between anti-corruption and crime agencies.

There is increasing cooperation among these agencies. I mentioned earlier our appreciation for the support of our sister agencies during our establishment phase.

The Corruption and Crime Commission believes that much is to be gained from formalising the informal arrangements that already exist.

While some benefits may arise in the exchange of operational information, more is to be gained through arrangements that allow cost sharing in such areas as research and development, corruption prevention and research, professional development of staff, equipment acquisition and so forth.

One example of successful collaboration was the joint approach by the Independent Commission Against Corruption and the Crime and Misconduct Commission towards "Profiling the Public Sector". The Corruption and Crime Commission has recently conducted its own profiling activity, based on the New South Wales and Queensland models. In turn, both New South Wales and Queensland are using the Western Australian survey as the basis for their next round of surveys. This approach has not only saved resources in terms of establishing a survey process but will also provide a valid base for comparative analysis between states.

The Corruption and Crime Commission believes there's room for more of this and would propose a more formal framework for collaboration between anti-corruption agencies in order to promote the effectiveness and efficiency of individual agencies.

Conclusion

The Corruption and Crime Commission was established two years ago on the foundations of two previous commissions. Its powers have their origins to the lessons available from not only its two predecessor agencies, but also from other Australian anti-corruption and crime agencies.

As I noted earlier, the Corruption and Crime Commission is seeking to consolidate aspects of its capacity to act through addressing various issues associated with its *Act*. The Joint Standing Committee has had, and will continue to have, a central role in informing the Parliament as to the appropriateness, or otherwise, of the proposed amendments.

The relationship between the Corruption and Crime Commission and the Joint Standing Committee and Parliamentary Inspector is central to the exercise of authority by the Parliament over the Commission. The Commission has enjoyed a positive start, although not without some controversy. And the oversight arrangements vested in the Joint Standing Committee and the Parliamentary Inspector by the Parliament have been important to this process, especially in terms of building and sustaining the confidence of Western Australians in the Commission's work.

Thank you for this opportunity to talk to you this morning.

Inspector of the Police Integrity Commission

The Hon James Wood QC
Inspector
New South Wales Police Integrity Commission

The position of the Inspector of the Police Integrity Commission derives its authority from the Police Integrity Commission Act 1996. The position has been held, since inception, on a Part time basis by retired Justices of the Supreme Court. My appointment as the third Inspector is for 3 years, the maximum permissible appointment being for terms totalling 5 years.

The Inspector's principal functions as provided by Statute 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 assess the effectiveness and appropriateness of the procedures of the Commission relating to the legality or propriety of its activities.*

The Inspector may exercise the functions of the Office on the Inspector's own initiative; or at the request of the Minister for Police; or in response to a complaint made to the Inspector; or in response to a reference by the Ombudsman, the ICAC, the New South Wales Crime Commission, the Joint Parliamentary Committee or any other agency. The Inspector is independent from direction from the NSW Police and from the PIC, although the office is funded out of the Police budget.

To perform its function, the Office of the Inspector has been given extensive powers to investigate any aspect of the Commission's operations or any conduct of officers of the Commission, although a question does arise as to whether as a matter of statutory interpretation those powers extend to the investigation of former officers of the Commission.

In general terms it is empowered to make or hold inquiries and for that purpose it has the powers, authorities, protections and immunities of a Royal Commissioner including the power to conduct formal hearings. The approach usually adopted has been to restrict the use of costly, time-consuming, formal hearings to cases where a hearing is needed in order to resolve some factual conflict which is critical to the validity of the complaint. There have been very few occasions on which it has been necessary to pursue that course, most cases being capable of resolution upon examination of the file and correspondence with the complainant.

The Attorney General has advised the Minister for Police that the Legal Representation Office has approval to provide legal advice and representation for persons whose testimony at a formal hearing may warrant legal representation.

The Inspector reports to the Joint Committee on the Office of the Ombudsman and the Police Integrity Commission on an annual basis.

As Inspector I have access to the records of the PIC, save for that material which is subject to the restrictions arising under the Telecommunications (Interception) Act 1979 (Cwth). That material is only available to me where dissemination is authorised by the Commissioner of the PIC, in accordance with the Act; and is subject to recording by the PIC so as to facilitate the statutory audit conducted by the NSW Ombudsman. For all practical purposes (although there may be some exception in special circumstances), this has effectively confined my examination to a perusal of the warrant and supporting affidavit, in order to be satisfied that the interception power has been exercised lawfully and appropriately.

Apart from dealing with complaints concerning abuses of power or misconduct of PIC officers, or concerning any decision not to pursue a matter referred to it, the principal function which I perform is to audit the PIC's operations for compliance with the law and for effectiveness. This involves a weekly meeting with the Commissioner to discuss current matters and projects under potential consideration, as well as access to the files for those investigations which are open, so as to follow their progress, and to ensure that the powers given to the PIC are lawfully and fairly exercised. In this regard, I pay particular attention to the justification for the issue of notices under Sections 25, 26 & 38 of the PIC Act, requiring the recipients to produce statements of information or documents, or to appear before the Commission at a hearing. Additionally, I also give careful consideration to approvals for controlled operations and to the use of listening devices.

I have no direct oversight role in relation to the activities of the NSW Police, or individual Police, although I am able to receive and respond to complaints from Police, or from the Police Association, if they have a concern in relation to PIC operations, particularly those concerning themselves. Such complaints have been relatively rare. Most complaints, in fact, relate to decisions by the PIC not to take up the investigation of matters which are referred to it by citizens in relation to the actions of individual Police, or to prosecutions which they assert led to a wrongful conviction.

The majority of the complaints received in fact relate to minor matters, which in accordance with the division of responsibility (the class or kind criteria) between the PIC, the Office of the Ombudsman and the NSW Police Professional Standards Command (PSC) or a Local Area Command (LAC), are better suited for examination, either by the PSC or LAC subject to the supervision of the Ombudsman, or by the Ombudsman directly.

While my management of a complaint does not constitute an appeal or administrative law review, in the strict sense, I do take the view that any complaint against the PIC for declining to investigate a matter, should not be sustained unless it satisfies the Wednesbury test of unreasonableness. In reaching that assessment I take into account, inter alia:

- whether the complaint relates to a category one offence,
- the limited resources of the PIC,
- the state of its current workload,
- the extent to which the complaint may suggest an endemic or ongoing problem that has not been addressed,
- the possibility that it may provide an opportunity for auditing some area of potential interest,

- the fact, if it be the case, that the complainant has a history of complaining, or of otherwise giving the appearance of being vexatious,
- the nature and extent of any investigation by the PSC, or LAC, or by the Ombudsman, and its outcome,
- the age of the complaint, and any subsequent change in policing procedure of relevance,
- the likely impact of the activity,
- the likely resilience of the target to investigation, and his or her rank and influence, such that the use of the PIC's coercive powers may be required,
- whether a unique investigative opportunity is presented,
- the potential for public confidence in the NSW Police and PIC to be adversely affected if an investigation is not made,
- the potential for reform of the NSW Police or enhancement of PIC investigations and intelligence.

This assessment also takes into account the PIC's own criteria in determining priorities for investigation. A question does arise as to the consequences of a complaint being upheld. There is no power for me to compel the PIC to take further action, nor can I make orders that might undo some form of misconduct. The understanding and mutual attitude of co-operation which has been established to date, however, suggests that the PIC would normally accept any finding or recommendation made by the Inspector. Otherwise it does remain open for the Inspector to report to the Minister, the Parliament or the Parliamentary Committee.

I consider it part of my role to review media reports, and independent inquiries, relating to policing issues, so as to raise with the PIC Commissioner areas of possible interest for investigation, or for the development of some wider project, such as that relating to the unlawful use by Police of drugs (Operation Abelia), which might be designed to enhance policing in New South Wales.

In this regard I continue to regard as important the dedication, by the PIC, of some of its resources to undertaking general projects relating for example to management, training and ethical issues which might impact on the Commission's objectives in ensuring the accountability and effectiveness of the NSW Police and in preventing corruption.

I also consider it appropriate, as part of my responsibilities, to review and to assess on an ongoing basis, the effectiveness and relevance of the practices and guidelines which the PIC adopts for its operations and hearings, and to advise on changes or improvements where necessary. The work undertaken by my predecessors has assisted the PIC to develop a comprehensive manual governing every aspect of its operations and management.

One area where I do have some interest relates to those cases which involve an assertion that the complainant was wrongfully convicted. It is, in my view, important that the three agencies (i.e. the Police, the Ombudsman and the PIC) not assume too readily that all relevant issues have been explored at trial, or on appeal and that the fact of conviction dispels all concerns. I do not believe that any such conclusion should be reached without an independent assessment, having regard to the constraints which govern the appeal process, and the dangers of noble cause corruption.

Another area of interest, relates to whether or not the local Area Commands are able effectively to manage those complaints which are referred to them. While I strongly encourage the practice of having minor complaints, particularly those of a service nature, resolved locally on a management basis, in a way which might, in appropriate circumstances, involve mediation or community conferencing, this does require a considerable level of skill and professionalism, as well as a commitment to the Service which is placed ahead of personal associations.

An additional area for mention relates to the question of joint operations, and in particular the extent to which the Inspector can investigate the activities of officers from other agencies such as the NSW Crime Commission, or the Australian Crime Commission, where they work on such an operation with the PIC.

The contemporary view is that the Inspector can only investigate the conduct of the PIC staff who were involved in such an operation, and that there is no jurisdiction to examine that of the officers from other agencies. If so, it gives rise to a potentially undesirable limitation on this Offices' powers to investigate complaints concerning joint operations. The need for such operations is obvious in circumstances where there is suspicion of Police involvement in some aspect of organised crime, or where in a state of emergency concerning terrorist activities, there is a need for the pooling of resources.

Similar jurisdictional issues arise in relation to the kind of inquiry, which is currently the subject of an appeal to the NSW Court of Appeal. It concerns the jurisdiction of the PIC to complete an investigation, and to report to Parliament, in relation to a matter which was initially concerned with the possibility of misconduct by both, or either of, Police and a private citizen. Unless, in such a case, the PIC can report its concluded views after completing the investigation, there is likely to have been a waste of resources, and a question left hanging in the air.

My assessment, after a relatively short term in this Office, is that it has an important function to serve in overseeing the PIC, particularly in being able to provide assistance to the Parliamentary Committee as to whether or not it is achieving its objectives, and in providing a potential means of redress for complainants.

Inspector of the Independent Commission Against Corruption

Mr Graham Kelly
Inspector

Office of the Inspector of the Independent Commission Against Corruption

The following aide de memoire was prepared for the speech given by Inspector of the Independent Commission Against Corruption to the conference.

Key issues:

1. Accountability of Inspector of the Independent Commission Against Corruption;
2. Powers of the Inspector of the Independent Commission Against Corruption;
3. Operations of the Office of the Inspector of the Independent Commission Against Corruption: complaints/policies developed;
4. Audit Function;
5. Relationship with the Independent Commission Against Corruption; and
6. The year ahead.

Accountability of the Inspector of the Independent Commission Against Corruption

- Inspector of the Independent Commission Against Corruption appointed by Governor with advice of the Executive Council for a period of 3 years on a part time basis, effective from the date of appointment, 1 July 2005.
- Inspector of the Independent Commission Against Corruption reports to the Parliament including through the ICAC Committee (the Committee of the Independent Commission Against Corruption). This is a very important process of accountability to ensure that the Inspectorate's approaches and judgments are consistent with public expectations, given that the Committee is not able to examine the work of the Inspector in detail.

Powers of Inspector under the Independent Commission Against Corruption Act 1988

- The Inspector of the Independent Commission Against Corruption's powers derived from Part 5A of the *Independent Commission Against Corruption Act 1988* which was established in 2005.
- The Inspector of the Independent Commission Against Corruption's functions are modelled on those of the Inspector of the Police Integrity Commission.
- The provisions relating to maladministration are modelled on section 11 of the *Protected Disclosures Act 1994*.
- Powers of Inspector of the Independent Commission Against Corruption under section 57B are:
 - to audit the operations of the Independent Commission Against Corruption for the purpose of monitoring compliance with the law of the State. (I have taken a very broad view of what "operations" means – is not limited to operational activity, e.g., surveillance only, but can include activity such as complying with natural justice and procedural fairness requirements, and also includes corruption prevention activities).
 - to deal with, by reports and recommendations, complaints of abuse of power, impropriety and other forms of misconduct on part of the Independent Commission Against Corruption or officers of the Commission;
 - to deal with, by reports and recommendations, conduct of the Independent Commission Against Corruption and/or its officers amounting to maladministration; and
 - to assess the effectiveness and appropriateness of the procedures of the Independent Commission Against Corruption relating to the legality and propriety of its activities.
- The Inspector of the Independent Commission Against Corruption's functions can be exercised on his own initiative, at the request of the Minister, in response to a complaint by any person(s), in response to a reference by the ICAC Committee, or in response to a request by any public authority or public official.
- Section 57B (3) of the Act makes it clear that the Inspector of the Independent Commission Against Corruption is not subject to the Independent Commission Against Corruption in any respect.
- Under 57C (a) the Inspector of the Independent Commission Against Corruption is authorised to investigate any aspect of the Independent Commission Against Corruption's operations or any conduct of the Commission's officers.

- Under 57C (b) and (c) of the Act the Inspector of the Independent Commission Against Corruption is authorised to:
 - have full access to records of the Independent Commission Against Corruption and any information and documents within the Commission's possession relating to the Commission's operations or concerning any conduct of any officers of the Commission ; and
 - obtain any documents from the Independent Commission Against Corruption and have any officers of the Commission answer questions.
 - Under 57C (f) the Inspector of the Independent Commission Against Corruption is authorised to refer matters relating to the Independent Commission Against Corruption or its officers, to other public authorities or public officials for consideration or action.
 - Under 57C (g) the Inspector of the Independent Commission Against Corruption is authorised to recommend disciplinary action or criminal prosecution against officers of the Independent Commission Against Corruption.
 - Under 57D the Inspector of the Independent Commission Against Corruption is empowered to hold or make inquiries and for that purpose has the powers, protections and immunities of a Royal Commissioner.
 - Under section 77A the Inspector of the Independent Commission Against Corruption has power to make a special report to the Presiding Officer of each House of Parliament on any matters affecting the operational effectiveness or needs of the Independent Commission Against Corruption and any administrative or general policy matters relating to the functions of the Inspector.

Legislative Reform Concerning the Inspector of the Independent Commission Against Corruption's Powers

- An issue that I intend to raise in a more formal forum is the possibility of establishing a specific power to refer complaints back to the Commission for reconsideration in light of my observations. I see the current lack of ability to address to this as a shortcoming in terms of being able to serve the public interest.

Operations of the Office of the Inspector of the Independent Commission Against Corruption

Complaints

As at 23 February 2006 my office has received some 24 complaints.

We have also received 3 preliminary inquiries from persons wishing to know further information about the Inspector of the Independent Commission Against Corruption's role and functions, with a view to possibly making a complaint.

The Independent Commission Against Corruption also kept us advised of 1 matter which fell within my jurisdiction but which, at first instance, the Commission dealt with itself. This was consistent with the view that I had taken at an early stage that if the Commission itself received a complaint about itself it should try to resolve it rather than immediately refer the complaint to me. The Commissioner agreed with this approach.

19 of the complaints have come from individuals.

Out of the total number of complaints, 2 have been from women and 22 have been men.

2 complaints have been anonymous. In both cases, complainants identified the fear of reprisal as the reason for being anonymous.

22 of the complaints relate to alleged conduct of the Independent Commission Against Corruption prior to the creation of my role and 2 concern alleged conduct of the Commission and/or its officers since July 2005.

Only 2 complaints have been from persons of an ethnic/non-Caucasian background. I am interested in what this might say about why NESB/ethnic communities don't complain to the Independent Commission Against Corruption.

The time period of conduct complained about ranges from, more than 15 years ago, to as recently as late 2005. The older the conduct of the Independent Commission Against Corruption complained about, the more difficult it is likely to be to find evidence substantiating the complaint. For this reason, as well as usual notions of 'staleness' I give a lower priority to complaints concerning older conduct.

Since the last week of December 2005, on average, my office has received between 1-3 complaints a week. Prior to this we were averaging about one complaint every 2-3 weeks.

An educated guess is that the increase might be due to complainants becoming more aware of my role through various means. We have recently sent out 7200 brochures through various members of Parliament and relevant government agencies advertising the existence of my role and office so it will be interesting to see what impact that might have.

Nature of complaints

As at 23 February 2006:

- 7 of the complaints received have been assessed as not being within my jurisdiction, either because they don't refer to any improper or conduct by the Independent Commission Against Corruption or maladministration by Commission or are straight out appeals from the Commission's decisions with no reference to maladministration.
- 5 allege corruption by the Independent Commission Against Corruption or its officers.
- 11 allege "maladministration". In other words, the bulk of complaints have been about maladministration so clearly it has been important for the Inspector to have this jurisdictional ground available.

Under 57B (4) of the Independent Commission Against Corruption Act 1988, maladministration is defined as:

“action or inaction of a serious nature that is

(a) contrary to law, or

(b) unreasonable, unjust, oppressive or improperly discriminatory, or

(c) based wholly or partly on improper motives.

We've adopted a number of working definitions of maladministration so that we are clear about the grounds on which we will accept a complaint of maladministration. It is important to ensure that the maladministration provisions are not used as an appeal mechanism consistent was that it not part of the Inspector's role.

The definitions adopted by my office are consistent with the working definitions used by the New South Wales Ombudsman.

Policies developed by the Office to support effective complaints management

The policies we have developed so far are:

1. Interview policy: Inspector does not conduct interviews in order to safeguard against "verballing" and also against any conflict of interest/bias in having to decide on issues raised at an interview.
2. Assistance to complainants: Some complainants have difficulty in articulating their complaints and providing sufficient particulars to allow Inspector to effectively assess their complaint. If it is apparent that this is the case, the Executive Officer will, on Inspector's request, interview the complainant to ascertain particulars.

We're looking to develop further policies on other aspects of our activities to ensure effective and efficient use of our resources.

Audit Function

This is the strategic focus of our work and one in which we see potential opportunities for suggesting practical improvement. As mentioned earlier I take a broad view of what constitutes “the operations of the Commission” under section 57B (1) (a).

My office is in the process of developing a business plan for the remainder of this year and the next. A number of potential audit projects will be developed within the context of this business plan. I hope to work with the Independent Commission Against Corruption in identifying particular projects and the methodology to undertake them.

In developing these projects we will also take into account the concerns expressed by the ICAC Committee which have been:

- the timeliness of the Independent Commission Against Corruption’s investigations, including damage to reputations which can occur through an investigation being drawn out;
- the length of time taken by the Independent Commission Against Corruption to refer matters to the Director of Public Prosecutions for prosecution and the process of assembling evidence and the general interaction between the Commission and the Director of Public Prosecutions;
- the quality of investigations including decision making and checking of information by the Independent Commission Against Corruption;
- the affording of procedural fairness to persons who may be the subject of adverse comment by the Independent Commission Against Corruption;
- improvements to practice and use of resources by the Independent Commission Against Corruption; and
- the quality of the Independent Commission Against Corruption's strategic and business plans as a reflection of its work outputs and outcomes.

Relationship with the Independent Commission Against Corruption

Both the Commissioner and I want to have a constructive working relationship. We’ve drawn up a memorandum of understanding to clarify the liaison between our respective staff and to reflect the co-operation that we wish to establish.

The Commissioner informs me that he has instructed his staff to deal with any requests coming from me as in the same manner as they would treat requests from him.

The Commissioner and I meet once a month. At these meetings the Commissioner keeps me informed of activities and developments within the Independent Commission Against Corruption. I advise the Commissioner about the number of complaints received and their ongoing status in general terms.

My Executive Officer has established a sound working relationship with the Deputy Commissioner and requests for material are promptly and courteously attended to by the Independent Commission Against Corruption.

The Year Ahead

Our priorities are:

- identifying and undertaking a number of auditing projects;
- managing complaints effectively whilst ensuring that they don't overwhelm our resources; and
- through our work contributing to the general intention of the New South Wales Parliament to improve public confidence in the performance of the Independent Commission Against Corruption while upholding its independence and the important nature of its work.

Other issues of ongoing interest for us are:

1. Corruption prevention: The Corruption Prevention Division undertakes important work and I am interested in examining its strategic focus.
2. Operations Review Committee (ORC) abolition: This was one of the recommendations of the McClintock report but was not taken up. The New South Wales government is now taking steps to abolish the Operations Review Committee;
3. Business planning: I have examined the Independent Commission Against Corruption's business plans including various Divisional plans. Whilst they are a very good start, I am interested in the establishment of outcome oriented performance measures.

Corruption investigations

Mr Clive Small
Executive Director, Strategic Operations Division
Independent Commission Against Corruption

I have been asked to give particular attention during this presentation to the issue of the “investigation of regulatory agencies where certification and licensing activities cannot be suspended while the investigation takes place”, but I would like to start by making a few broader observations about Independent Commission Against Corruption and its investigations.

With a target population of about 12 per cent of the State’s workforce (around 300,000 people), an increasing number of public-private partnerships, a continuous cycle of corruption and reform, and the continuous swing of the enforcement-prevention pendulum, Independent Commission Against Corruption investigations are undertaken in a complex and ever changing environment.

Further, while the Independent Commission Against Corruption legislation prescribes the exposure and prevention of corrupt conduct as the Commission’s primary objective the community and the government expect (and not unreasonably so) that those who offend will be punished and that means, in appropriate cases, placing them before the criminal justice system as soon as practicable after the Commission’s findings have been made. They also reasonably expect that there won’t be a repeat of the corruption exposed.

While we can never expect to halt or eliminate these conflicts, I believe that we can better manage them by setting balances and integrating competing ideas more carefully. Part of this solution lies in thinking of investigations as having both an enforcement and corruption prevention function.

The enforcement function brings those involved in corruption to justice through:

- exposure;
- interrupting/dismantling their networks;
- criminal prosecution, conviction and punishment (including jailing, where appropriate); and,
- targeting ill-gotten financial gains.

The corruption prevention function operates through:

- the prevention or minimisation of opportunities for continued corruption by
 - exposing the activities of those who offend,
 - examining the systems and processes in the affected organisations and identifying opportunities to improve their capacity to minimise opportunities for corrupt practices;
- general deterrence through the public message that those involved in corruption will be pursued, exposed and brought to justice; and,

- communicating with agencies the lessons learned through investigations.

We also need to develop and maintain a clear understanding of the impact investigations have on organisations and individuals, and potentially the community at large. For example:

- the pressure placed on an organisation/individual by increasing community, parliamentary and media scrutiny;
- an impact on morale – the investigation being welcomed by some staff but considered unfair or unjustified by others;
- an impact on management's leadership, decision-making communication – we cut corners because of budgetary constraints; changed priorities to meet government commitments, community wants or today's headlines;
- different expectations as a result of the investigation to the organisation continuing to operate as before;
- loss of community confidence in the organisation, an individual, the government or services provided; and,
- understanding responsibilities and accountabilities by government departments where they enter into public private partnerships.

These conflicts and impacts are perhaps most dramatic in regulatory agencies where corruption has been identified. These agencies must balance the risks of closing down their regulatory function until solutions are found and implemented against continuing with the function and risking the exposure of continuing corruption.

Two recent Independent Commission Against Corruption investigations into WorkCover NSW, a statutory authority which works to promote workplace health and safety and administers related legislation, illustrate these conflicts and more.

The first, Operation Cassandra, commenced in February 2003 following an approach to the Independent Commission Against Corruption by WorkCover NSW. WorkCover is responsible for accrediting assessors who operate under the Occupational Health and Safety Act. This includes the operation of heavy machinery in the workplace which is hazardous for both operators and other workers in the vicinity and the potential for human, social and economic harm is significant. Certification provides the opportunity for good employment and rewards for those accredited and the potential for significant corrupt profits by those who control the process.

The investigation looked at aspects of safety certification and training in the state's construction industry. WorkCover had elected to outsource the conduct of competency assessments, the central tenant of the safety regime, to accredited assessors. Commission inquiries found there were deliberate and widespread abuses of the competency assessment regulations by at least six accredited assessors. Several thousand Notices of Satisfactory Assessment were issued without the specified assessment procedures having been properly conducted. In some cases individuals had been issued with Notices of Satisfactory Assessment without having undergone any assessment whatsoever. Occupational health and safety induction training certificates were issued where no induction had taken place and training and certification practices designed to ensure the safe operation of cranes and other heavy plant operating near overhead power lines were manipulated.

Almost at the very time Operation Cassandra was concluding, indications of corruption in the issue of certificates of competency by WorkCover's Certification Unit, a sub-unit of the Licensing Unit, were coming to light and the Independent Commission Against Corruption

commenced its second investigation. So what we had now was the corruption of the entire process by two networks operating independently of one another. Corruption of the externally assessed qualification process and corruption of the internally assessed certification and license issue process.

The ability to corruptly obtain certificates was widely known across the industry. Witnesses described how “demand for the false certificates spread by word of mouth at pubs and on constructions sites.” The snowballing effect resulted in a network of distributors. Evidence showed that “Whole companies were fitted out with false certificates for the sake of ‘convenience’.”

The discovery of corruption in the public sector poses a range of core risks, such as,

- what will the Minister say?
- what will I tell the Minister?
- will this impact on the budget?
- will we be sued?
- how big is this problem? and
- on one view at least, most importantly, will I keep my job?

There is also a broader band of different risks that vary according to the organisation involved and the service it provides. For example, WorkCover’s licensing responsibilities have enormous implications not only for the construction industry and its employees, but also for those who are funding and investing in the industry, those who are buying, taxes the government reaps from the industry, and those businesses and individuals who benefit economically and socially from its activities.

Almost invariably, the immediate organisational reaction is to “do something”. At a minimum, you will be seen to be responding. Most often these reactions are tactical and have less than maximum long term benefit to the organisation, the service it provides or those who use or benefit from that service. The short term benefits can be also outweighed by the longer term costs that result from lack of trust and loss of social and economic confidence.

Despite the potential for longer term costs, it is not uncommon for an organisation to respond along the following lines: “Now we know about the problem we can’t wait for the Independent Commission Against Corruption. We have to act.” I call this the high morale ground response. In WorkCover’s case, such a response might have extended from an audit of systems and licenses issued to the immediate cancellation of all licenses and the requirement that those wishing to stay in the industry need to reapply for their license or licenses. After all, “We can’t put or leave people’s lives at risk.”

Notwithstanding the risk to life, the cancellation of all licenses response would have resulted in

- unemployment for possibly many thousands of people in the construction and related industries;
- hardship, both economic and social, for many thousands of families;
- devastation for the construction industry running into the hundreds of millions of dollars, if not billions of dollars;
- the collapse of businesses;
- significant disruption to the state generally; and,
- many innocent people suffering.

And even after all of this:

- how would the other states respond – it was part of a national accreditation scheme?
- how long would it take to re-issue licenses to those qualified?
- What would replace the existing system and how would you know that it wasn't corrupt?
- How would you know that those who were corrupting the present system weren't active in the new system?

The cancellation approach is simply an unrealistic option. The conduct of an immediate audit would seem to be more reasonable. However, it also raises a range of other risks:

- it is not as action oriented – another audit.
- how long will the audit take?
- who will conduct it and how are you going to pay for it?
- what happens if someone is killed or injured by a person working on a fraudulently issued license while the audit is underway?
- what about ongoing insurance claims against work carried out by people employed on the basis of fraudulently issued licenses while the audit is underway?
- What is the organisation's liability?
- what are the political implications?
- how will the audit impact on the investigation by the Independent Commission Against Corruption?
- how do we co-operate with the Independent Commission Against Corruption if they ask us to delay the audit or other action in order that they can complete their inquiry?

And there are a range of options in between, each with their own risks.

A seemingly "reasonable argument" can be made for each of these options and those in between. Almost invariably however, the "reasonable argument" misses the most fundamental questions that are hardly ever asked by organisations about to be exposed:

- "How did this situation occur?"
- "Weren't people's lives at risk throughout the four to five years of corruption and aren't they still at risk through shoddy workmanship?"

It is only once you know the answer to these two questions can you properly respond to the next: What processes/systems can we put in place to ensure the integrity of the new system and to prevent the corruption occurring again over the longer term?

Organisations within which corruption has been identified are not alone in these considerations. The Independent Commission Against Corruption must also grapple with these types of questions and others. Unless there is a thorough and unhindered investigation those responsible for the corruption are likely to:

- escape exposure and criminal prosecution;
- continue their corruption (perhaps in other ways);
- learn from their experiences making future corruption networks more difficult to expose; and,
- are likely to expand their networks because the profits to be made far outweigh the risk of exposure and punishment

It is also likely that:

- without clearly understanding how the corruption was able to occur there is less likelihood of a response that will minimise the opportunities for it recurring; and,
- there can be a loss of public confidence in the organisation, the range of services provided, and the government.

So what is the answer to the fundamental question: How did this happen in WorkCover?

Cassandra, which focused on the external corruption of the process, found six assessors to be corrupt. Though the six comprised less than two per cent of all accredited assessors – six out of more than 400 – they accounted for almost 13 per cent of the total number of Notices of Satisfactory Assessment issued in New South Wales between 1996 and 2003, and more than 20 per cent for the period 2000 to 2003. More than 30,000 Notices are estimated to have been corruptly issued and the assessors are estimated to have profited by around \$4 million. One assessor is estimated to have corruptly profited by around \$350,000 in one year alone. There was evidence that the corrupt conduct extended beyond the six assessors identified.

The outsourcing of assessments meant that centralized controls were weakened and increased the need for a rigorous corruption risk management approach. The approach meant that assessors, and not WorkCover, effectively controlled the flow of the assessment qualifications and hence the Certificates of Competency. In effect, they determined who did and who did not get certificates.

Furthermore, according to WorkCover NSW's own workers compensation statistical bulletins, only the mining industry has a higher level of employee injuries than the construction sector.

The second inquiry, Cassowary found that three of five WorkCover employees working in the Certification Unit had been involved in the corrupt issue of an estimated 4,000 certificates of competency over a four year period. On one day more than 120 fraudulently issued certificates were processed.

Three WorkCover employees (or former employees) and sixteen other people were found to have been corruptly involved as organisers or “middlemen” distributing the false licenses. The partner of one of the WorkCover staff in the Certification Unit was the principal linchpin between the Unit and those who wanted certificates.

WorkCover's internal management systems and processes were found to have “poor risk management at an agency level, inadequate implementation of policies and procedures, and issues relating to staff training, accountability and good line management.”

In both investigations, the fallout from the corrupt activity was not limited to New South Wales, since the certification system was part of a national system.

In fairness to WorkCover, I should point out that when corruption was discovered, the organization quickly reported it to the Independent Commission Against Corruption and co-operated with the Commission's investigation. Furthermore, it has now embarked on a major program of change, consistent with the Commission's recommendations on corruption prevention.

Where corrupt behaviour occurs it is rarely the result of an organisational culture or management philosophy that sets out to harm or deceive. More often it results from an insensitive or indifferent approach to ethical considerations or sense of responsibility or lack of appropriate organisational systems. WorkCover, for example, simply failed to recognize the risks associated with its business and the management decisions it made.

While executives cannot be held responsible and accountable for everything that goes wrong in their organisation, I do believe they can be quite properly held accountable for the integrity and transparency of their organisation's systems, processes and culture. At times, this might well involve telling a government that sets priorities and funds the organisation that the budget does not allow it to be all things to all people.

The high morale ground is legitimate before the event, not after it.

Whistleblowers, and Governments, Need More Protection

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Queenslanders in 2005 discovered that their public health system was chronically underfunded, poorly run and in some cases it provided dangerous and even deadly services for those who turned to its hospitals for attention. Two Commissions of Inquiry (the first shut down by the Supreme Court because of the apprehended bias of its Commissioners) and a wide-ranging administrative inquiry were instituted after a whistleblower nurse, Ms Toni Hoffman, told her local MP about the disastrous surgical exploits of an overseas-trained doctor, Dr Jayant Patel, who had become infamously known to some of his colleagues as Dr Death. The second Commissioner, retired Court of Appeal Justice Geoff Davies QC, published his final report at the end of November 2005. In the course of it, he said the people of Queensland owed a great deal to Ms Hoffman, 'whose decision to speak to her local Member of Parliament about her concerns regarding the activities of Dr Patel and the apparent threat he represented, led to his exposure and this Inquiry'¹. He continued,

Whether Ms Hoffman realised it or not, her disclosure to Mr Messenger MP was not protected by the Whistleblower Protection Act 1994. The fact that Ms Hoffman had to reveal her concerns to Mr Messenger MP, to have those concerns dealt with, and that the disclosure was not protected, reveals the failure of the current system of protecting whistleblowers.²

In the aftermath of the report, most public and media attention focussed on what was wrong with the health system, who was to blame (and to be punished) and how the system could be fixed. The issue of whistleblowing attracted little attention. But that system too had failed the test to which it had been put: Ms Hoffman's first complaints were made directly to Queensland Health, as the law required. But her complaints received scant attention. In his report, Commissioner Davies described and discussed the present system of whistleblower protection in Queensland and made recommendations for its reform and improvement. It appears from the Commissioner's report that this discussion and the proposals he put forward were based primarily on a submission to his inquiry by the Queensland Ombudsman. If adopted the Ombudsman would be given an important continuing role in the supervision and

¹ Queensland Public Hospitals Commission of Inquiry, para. 6.486, p. 466

² *ibid*, para. 6.486, p. 467. The Commissioner does not deal with the issue of whether Ms Hoffman might have been protected in any way by parliamentary privilege, given that the information she provided may have been intended for use in the Queensland Parliament, and was so used. This is not a settled legal issue, though there is a judgment in the Queensland Supreme Court suggesting privilege is not attracted. See Harry Evans, *Oggers' Australian Senate Practice*, 2004, 11th edition, Canberra, pp. 45-6.

administration of the whistleblower protection regime in Queensland. In this presentation, I intend to look at the nature of the existing legislation and the reforms the Commissioner Davies proposed. I will do that after looking at the interests of the media and of governments generally in the whistleblower laws. I will suggest that governments have failed to appreciate that it is in their interests (and those of the people they serve) to have effective whistleblower laws that actually encourage the disclosure of wrong-doing within the public service (and elsewhere). Yes, whistleblowers need better protection than they have presently. But governments stand to benefit from a whistleblower system that exposes corruption and waste.

The Legislation

Queensland was the first Australian jurisdiction to introduce legislation to protect whistleblowers. Following the report of the Fitzgerald Commission of Inquiry in 1989, and in response to its recommendations, the Parliament created the Electoral and Administrative Review Commission (EARC) and the Criminal Justice Commission (CJC). Electoral and Administrative Review Commission was to inquire into the need for various legal, administrative and parliamentary reforms in Queensland and the CJC to supervise the reform of the Queensland Police Service and to have an ongoing role in monitoring complaints of official misconduct. In 1990 'interim' legislation was enacted to provide protection to whistleblowers giving information or evidence to both Electoral and Administrative Review Commission and the CJC.

In 1991 Electoral and Administrative Review Commission produce a report on the need for permanent legislation covering whistleblowers who disclose wrongdoing in the public sector, and to a limited extent, elsewhere. Previously the law in Queensland and elsewhere in Australia made it an offence to disclose official secrets or information acquired by a public servant by virtue of their office, though there were various common law, and sometimes statutory, protections for public servants who revealed, for example, criminal conduct.³

The Electoral and Administrative Review Commission report summarised the countervailing interests that deserve appropriate recognition and protection in the design of a balanced system for encouraging and protecting whistleblowing that is in the public interest, in this way:

- (a) The interests of the public in the exposure, investigation and correction of illegal or improper conduct, and dangers to public health and safety.
- (b) The interests of the whistleblower is being protected from retaliation, and in seeing that proper action is taken on the whistleblowing disclosure.
- (c) The interests of persons against whom allegations are made in good faith which turn out to be inaccurate, or (worse still) against whom false or misleading allegations are made. Most instances of whistleblowing will involve an allegation of personal impropriety, whether it be of conduct that is illegal, incompetent or negligent, against one or more persons. Such persons are liable to suffer not only damage to their personal and/or professional reputations, but also the stress of being subject to investigation.

³ See, Electoral and Administrative Review Commission, Report on Protection of Whistleblowers, October 1991, particularly Chapter

- (d) The interests of an organization affected by a whistleblowing disclosure in not having its operations unduly disrupted, causing unwarranted interference with its pursuit of its business or administrative goals.⁴

These competing interests are recognised in the legislation in Queensland and elsewhere.⁵

What's in it for Government?

But there is a fifth interest that is not specifically acknowledged in the Electoral and Administrative Review Commission report that is of crucial and critical importance: this is the political interest of the relevant government. Governments in the past tried to prevent whistleblowing by public servants, making it improper and even illegal for them to disclose official information without proper authority. They threatened public servants who broke the code of silence with sanctions affecting their continued employment or promotion, as well as the prospect of punishment through the criminal courts.

But there are times when public sector employees are prepared to take the risk, whether for essentially political reasons – as in the (secret) leaking of information in 1975 about the Loans Affair to the Opposition Deputy Leader – or because of genuinely held concerns about public health and safety – as was the case in Queensland in 2005 when Ms Hoffman complained first to the Health Department and then to her MP about the surgical incompetence of Dr Patel. These exercises in whistleblowing can do enormous political damage to a government and may be (as was the case in 1975) irreparable. Leaking or disclosure of official information is now far easier – and more common – than ever before, and technological changes have not made it easier to trace those responsible. The Australian Federal Police are frequently asked to investigate leaks from the Commonwealth Public Service but rarely find a culprit.

Challenging the Ethos and Culture

The law about the disclosure of what happens within the public service is changing – though very slowly – despite the resistance of governments and senior administrators. In 1976 the Report of the Royal Commission on Australian Government Administration (headed by Dr H. C. Coombs) said

While there is no simple solution to the problems of determining what can properly be withheld, the general sentiment and expectations of the community have been changing consistently in the direction of requiring more openness and access to information gathered and held in its administration. (at para 10.7.20)

Those expectations helped produce Freedom of Information laws (no matter how inadequate they have proved in most jurisdictions) following the lead provided by US legislators. In like manner, whistleblower laws were prompted in part by legislative developments in the US.

⁴ *ibid*, p. 223.

⁵ See, Queensland Public Hospitals Commission of Inquiry, para. 6.487.

What seems to have largely escaped notice is that the “expectations” referred to by Dr Coombs were given an effective voice within Australia by Commissions of Inquiry and by the courts, rather than through government or even public service initiatives. The Fitzgerald Report⁶ and the W.A. Inc Report⁷. Both proclaimed the importance of open government and canvassed ways in which that could be achieved. Meanwhile the High Court was exploring and explaining the existence of an implied constitutional right to discuss political affairs that effectively expanded the defence of qualified privilege in defamation proceedings. Most significantly for the purposes of this discussion, two years ago Justice Paul Finn in the Federal Court decided that the regulation central to the laws requiring Commonwealth public servants not to give or disclose, directly or indirectly, to any person any information about public business or anything of which the employee has official knowledge⁸ contravened the (newly) implied constitutional freedom of political communication. The regulation was draconian, unreasonable and invalid.

97 ... I am not satisfied that the regulation is reasonably appropriate or adapted to serving even the end of furthering the efficient operation of Government, let alone in a way that does not unnecessarily or unreasonably impair the implied freedom.

98 Official secrecy has a necessary and proper province in our system of government. A surfeit of secrecy does not...

99 The dimensions of the control it imposes impedes quite unreasonably the possible flow of information to the community - information which, without possibly prejudicing the interests of the Commonwealth, could only serve to enlarge the public's knowledge and understanding of the operation, practices and policies of executive government. ..

101 It is one thing to regulate the disclosure of particular information for legitimate reasons relating to that information and/or to the effects of its disclosure. It is another to adopt the catch-all approach of Reg 7(13) which does not purport either to differentiate between species of information or the consequences of disclosure. It is noteworthy in this that the very breadth of Reg 7(13) has been relied upon by the Commonwealth in association with the penal sanction of s 70 of the Crimes Act 1914 (Cth) as a deterrence to public whistleblowing: see eg Public Service Commission, Guidelines on Official Conduct of Commonwealth Public Servants, 95 (1995).⁹

That is the point I would emphasise in particular: the Commonwealth (and it might be said, all other governments in Australia) used the requirements of secrecy to deter whistleblowing by its servants.

The relevant laws do provide schemes to protect whistleblowers in various stated circumstances. Their primary aim, however, seems to be to contain the fallout from the

⁶ Report of a Commission of Inquiry Pursuant to Orders in Council, Brisbane, 1989

⁷ Report of the Royal Commission into the Commercial Activities of Government and other matters, Perth 1992.

⁹ Bennett v President, Human Rights and Equal Opportunity Commission [2003] FCA 1433

actions of the whistleblowers. Damage control. In terms of those aims for whistleblowing legislation noted by the Electoral and Administrative Review Commission report mentioned earlier, the emphasis is on (b) the interests of the whistleblower being protected from retaliation (c) the interests of people falsely accused of misconduct and (d) the organisation's interest in not being disrupted. The first aim – the interests of the public in the exposure, investigation and correction of illegal or improper conduct – seems to have been neglected, or at best become of secondary importance. As Associate Professor Brian Martin has written

Whistleblower laws put the focus on whistleblowers and what is done to them. An unfortunate feature of this focus is a relative neglect of the original issue about which the employee spoke out. Whistleblower laws do not and perhaps cannot require an investigation into an employee's allegations. During the drawn-out process of assessing whether reprisals have occurred, the original issue is not addressed. For a dismissed whistleblower, "success" usually comes in the form of a settlement, not a reinstatement; success in terms of organisational reform is not part of the agenda of whistleblower laws.¹⁰

And he pointed out that the laws fail to protect whistleblowers who go to the media, saying this

...is a clear indication that the law is oriented to domesticating dissent rather than empowering the whistleblower or putting priority on action against wrongdoers.

Whistleblowers who go to the media aren't concerned (in the first instance, at least) with legislative protection. They want the wrongs they wish to expose, righted. For them, publicity is the only way they believe they will achieve reform or change, or a proper investigation of their complaints. Some may also be motivated by revenge, or the desire to achieve a political end (e.g. to damage the reputation of the government of the day). Very few, other than those motivated primarily by a political end, will have chosen to go to the media as a first option. It is generally the last resort, after the system has failed them. They believe there is no other option open to them. They often fail to realise that the media too will want to check their story before they publish – and that sometimes they will not publish it either for legal reasons (defamation etc) or because it does not stand up. As the legislation recognises, not every whistleblower acts in good faith, or has right and truth on their side. And the media will not always be able to devote sufficient resources to establishing the facts behind the whistleblower's account. But governments do have the resources and they have relevant powers that should enable them to establish the facts – including the compulsive powers possessed by some investigative agencies such as ICAC and the CMC – if they are so minded. They are all reluctant, however, to adopt measures that might actually encourage internal whistleblowing. They have taken no notice of comments Commissioner Fitzgerald made in his report, that should have formed the basis of the whistleblower legislative regime in Queensland and elsewhere in Australia. The Fitzgerald Report includes the following comments¹¹:

¹⁰ Brian Martin, *Illusions of Whistleblower Protection* [2003] *University of Technology Law Review*, 119

¹¹ At page 134

Honest public officials are the major potential source of information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward until they are confident they will not be prejudiced...

It is also necessary to establish a recognized, convenient means by which public officers can disclose matters of concern. What is required is an accessible, independent body to which disclosures can be made confidentially (at least in the first instance) and in any event free from reprisals.

The body must be able to investigate any complaint. Its ability to investigate the disclosures made to it and to protect those who assist it will be vital to the long term flow of information upon which its success will depend.

It is time governments reviewed the way their whistleblower laws operate. They should start by recognising they have much to gain from developing systems that genuinely encourage their officers to come forward with information that will 'reduce public maladministration and misconduct' – as Tony Fitzgerald put it.

What governments needs to realise is that keeping a lid on problems arising from maladministration or official incompetence is no longer a viable option. Problems actually have to be faced and dealt with, before they become headlines. Governments need to move away from managing crises after they occur, to a strategy of prevention.

And that involves better intelligence about what is going wrong. That will not be provided by ministers and senior public servants whose inevitable and invariable concern is to demonstrate that they are on top of their jobs.

It is more likely to come from a system that encourages public servants to blow the whistle on malpractices and mistakes that could bring the whole pack of cards tumbling down. Whistleblowers, potentially, could be the best hope governments have of minimising disasters before they happen.

The prospective political damage a government may suffer from the actions of a whistleblower, and the fact that whistleblowers can normally find a ready alternative and public audience or means of communicating their concerns, provide additional reasons for governments to make laws about whistleblowing that actually encourage whistleblowers to use the official system. The laws should also be structured in such a way as to ensure the system works – they should provide for a proper investigation of problems and contain mechanisms to guarantee that those that are detected are corrected. The system didn't work in the Patel case last year because Queensland Health was part of the problem. Its culture was such that Ms Hoffman was wasting her time raising her concerns with her superiors. Yet the Whistleblowers Protection Act 1994 makes it clear that the only body to which Ms Hoffman could complain was Queensland Health.

Reforms

As Commissioner Davies concluded, the Queensland Act needs to be changed. He adopted the submissions of the Queensland Ombudsman in recommending¹²:

¹² paras. 6.509-6.512, p472.

1. That the Ombudsman be given an oversight role with respect to all public interest disclosures other than those involving official misconduct. The Ombudsman may investigate the complaint or refer it back to the relevant department for investigation, subject to monitoring by the Ombudsman.
2. Anyone may make a public interest disclosure protected by the Act in cases involving danger to public health and safety, and negligent or improper management of public funds.
3. There should be a scale of bodies to which complaints can be made. A complaint should first go to the relevant Department (subject to the role of the Ombudsman). If the disclosure is not resolved in 30 days, the matter can be disclosed to an MP. If the matter is still not resolved (to the satisfaction of the Ombudsman) after a further 30 days, the matter can be disclosed to the media.

In several respects this is an advance over the original Electoral and Administrative Review Commission proposal. The relevant public sector entity – investigating a complaint about its own conduct or the conduct of one or more of its officers – will be forced to conduct a proper investigation, and do so very quickly. If it does not, it would risk intervention by the Ombudsman who would have power to take over the investigation, and, if not properly resolved, it could be made public. At present the reporting requirements that are supposed to ensure that whistleblower complaints are not ignored, are quite toothless. Who is to know if the Department has properly reported the matter in its next annual report, or whether it has dealt with the complaints in a proper way? The imposition of a time-scale, and the prospect that material provided by the whistleblower can be provided (while the whistleblower is still protected under the law against any recriminatory action) to the Opposition in Parliament or to the media, would be a further incentive for the public sector entity or department to act.

Additionally there are several features of the original Electoral and Administrative Review Commission model that were not legislated by the Goss Government that should now be reconsidered because they would greatly improve the whistleblower system. The first was the Electoral and Administrative Review Commission's proposal that whistleblowers were entitled to protection if they reported any conduct that constituted an offence under Queensland law. The second is that where a whistleblower comes across conduct that is a 'serious, specific and immediate danger to the health or safety of the public' disclosure may be made to any person, including the media. The Parliamentary Committee that reviewed the Electoral and Administrative Review Commission's report on whistleblowers objected to neither of these proposals.

It is in the interests of governments, as well as whistleblowers, that there be an effective system that allows people who become aware of serious problems within the public sector (in particular) to disclose them to an agency that will properly investigate them and, if the complaints are shown to be justified, have them rectified. Keeping the problems secret, and unresolved, is increasingly likely to be counter-productive.

Dr David Solomon retired last year as contributing editor of The Courier-Mail, Brisbane. He was chair of the Electoral and Administrative Review Commission in 1992-3; long after

EARC presented its whistleblower report. He is an Adjunct Professor in the School of Political Science and International Studies at the University of Queensland.

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The Place of Oversight Committees in Integrity Systems: Some Evidence from New South Wales

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Abstract

The Final Report of the National Integrity Systems Assessment, *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*, published by Griffith University and Transparency International in December 2005, recommended that Australian parliaments 'establish (or ... rationalise) a system of independent public oversight for all of their core integrity institutions'. The Report suggested that this oversight should be provided by a combination of multi-party parliamentary committees and public advisory committees. How well would this work? This paper assesses this recommendation against some evidence on the current effectiveness of New South Wales parliamentary committees in overseeing integrity agencies. The paper is based on interviews conducted in 2004 as part of a wider study of the New South Wales public integrity system with senior representatives from twenty public sector agencies, six journalists covering integrity issues and four key integrity focused NGOs. The responses highlight six factors that enhance or inhibit the effective work of integrity oversight committees.

New South Wales Parliamentary Committees and Integrity Oversight: Comparing Public Sector Agency, News Media and NGO Perspectives

The Final Report of the National Integrity Systems Assessment, *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*, published by Griffith University and Transparency International in December 2005 made a series of recommendations for improving Australian public sector integrity (Brown *et al* 2005). Among them were several recommendations that focused on the roles of parliament. The most specific was that Australian parliaments should 'establish (or where necessary, rationalise) a system of independent public oversight for all of their core integrity institutions' (Brown *et al* 2005: 94). The Report suggested that this oversight should be provided by a combination of multi-party parliamentary committees and public advisory committees.

How well would this work in practice? Evidence from New South Wales should provide some insights into this question, at least with regard to parliamentary integrity oversight committees, since the New South Wales Parliament has quite a developed and complex system of such committees. As Gareth Griffith (2005) notes, various committees in the system have five different primary oversight roles. These are scrutiny of legislation, of public finance, of government appropriations, of government policy and administration, and of public sector watchdog bodies. The last role is of particular interest for this conference,

although it cannot really be considered outside the context of the wider oversight roles undertaken by parliamentary committees.

This paper presents some evidence about the roles of New South Wales parliamentary integrity oversight committees. The instruments used to evaluate the committees are the perceptions and judgements of three key groups of committee stakeholders—public sector agencies, the news media, and non-government organisations (NGOs). The results suggest that while parliamentary committees are not perceived to be among the leading players in New South Wales public sector integrity work, nor are they generally seen as unimportant or poor performers. Six factors—chance, party, aggression, power, duplication, and role—are identified as affecting stakeholder evaluations of the value and effectiveness of parliamentary committees in integrity oversight work.

Evaluating Parliamentary Committees

Over the past decade or so, a literature on evaluating Australian parliamentary committees has slowly grown. Measuring the effectiveness of committees has proved contentious. Some authors have used simple measures such as the number and length of committee reports (see, for example, Halligan *et al* 2001). Aldons (2000; 2001) has a more sophisticated focus on government responses to committee recommendations, with committees judged effective if more than half are accepted and implemented. Others (for example, New South Wales Legislative Council 2001: 118; Pearce 2005) have questioned the government response approach for failing to measure other benefits and consequences of committees such as exposure of issues, initiation of long-term change and public participation, and for failing to recognise that a government response to committee recommendations is not always required for committees to be effective.

It would be difficult and misleading to evaluate New South Wales oversight committees by focusing solely on government responses to their recommendations. This study has therefore taken an alternative approach, drawing on Nixon's (1986: 418-23) insight that evaluation of parliamentary committees should not impose a single set of pre-ordained outcomes as its measure of success or failure. Parliamentary committees will usually have 'multiple audiences' or 'stakeholders' with different and sometimes competing interests. Evaluations of committee work should therefore take the views of these stakeholders into account. To evaluate New South Wales oversight committees, this study focuses on three key groups of stakeholders—the public sector agencies over whom parliamentary committees exercise oversight (including the key integrity agencies), the news media that report and represent committee work to the public, and non-government organisations that advocate on behalf of the sections of the public.

Different Stakeholders' Interests in Parliamentary Committee Oversight

New South Wales public sector agencies, news media organisations and non-government organisations are likely to have different interests at stake in their evaluations of parliamentary oversight committees. At the broadest level, we might expect the interests of public sector agencies to be opposed to the interests of both the news media and NGOs. Public sector agencies are a part of, and publicly identified with, the state executive, placing them firmly on one side of the age-old conflict between the executive and the parliament.

Public sector agencies and their ministers, after all, are directly or indirectly on the receiving end of scrutiny from oversight committees (see, for example, Trenorden 2001; Gregory and Painter 2003). By contrast, the news media in their fourth estate role and NGOs in their advocacy role inevitably take on the tasks of criticising and opposing the executive. They would therefore be expected to view parliamentary committees as an ally in executive scrutiny.

This broad set of expectations has to be tempered by some more detailed considerations. To begin with, while public sector agencies may not welcome parliamentary and other scrutiny of the integrity of their activities, with its possible negative consequences, they do have an interest in improving their integrity performance (see Smith 2005). To the extent that parliamentary committee activity contributes positively to such improvement through suggested reforms, public sector agencies may evaluate parliamentary committee work more positively.

In addition, some public sector agencies—such as the Ombudsman, Independent Commission on Corruption, the Audit Office and the Police Integrity Commission in New South Wales—are themselves charged with improving public sector integrity. This sets them at odds with the executive, including other public sector agencies and apparently aligns their interests with those of parliamentary committees. The integrity agencies and parliamentary committees might be seen as working together as parts of an integrity network (Smith 2005).

On the other hand, integrity agencies like the ICAC and Ombudsman may see themselves as competing with parliamentary committees over the same ground. In the past year, for example, both the Legislative Council's General Purpose Standing Committee No 4 and the ICAC have investigated aspects of government decisions concerning the Orange Grove retail development in western Sydney. The temptation in such situations might be for the public sector integrity agencies to see themselves as experts and parliamentary committees as blundering amateurs.

This possibility of conflict is arguably heightened by the relationship between key integrity agencies and parliamentary committees. Apart from budgetary constraints, the integrity agencies are relatively free from direct executive pressure; however, they are accountable to parliamentary oversight committees in a range of ways. Some committee members are drawn from the governing party or coalition, whose ministers are responsible for the public sector activity that falls under the scrutiny of integrity agencies. Integrity agencies thus have the power to make life difficult for the governing party or parties represented on the oversight committees (see Kelly 2000). The relationship between the Joint Standing Committee on the ICAC and the ICAC sets up particularly difficult issues of accountability, since the latter's powers and scrutiny cover all members of parliament, and not just the interests of members from the governing party or coalition. The prospect of conflicting interests developing between members of parliamentary oversight committees and public integrity agencies such as the ICAC is clear (Smith 1999; Hatzistergos 2001; Pearce 2005).

If the interests of public sector agencies regarding parliamentary committees are more complex than they might first appear, so are those of the news media and NGOs. While the news media welcome scrutiny of the executive, their interest is in newsworthy scrutiny. Slow and general improvement in public sector integrity through reform, education and internal public sector leadership is not newsworthy; dramatic cases that lead to dismissals and prosecutions are. Indeed, parliamentary committee work that does not lead to these sorts of

dramatic results may itself become the newsworthy story, regardless of the longer term positive effects of such work. For similar reasons, dramatic conflicts between members of the parliamentary committees are potentially of greater news interest to journalists than the outcomes of committee activity, particularly if those conflicts have a partisan dimension.

Advocacy groups may take a pragmatic or even hostile view of parliamentary committees, rather than assuming they share common interests against the executive. The interests of NGOs are specific as well as general. An inability by parliamentary committees to achieve a successful outcome for specific individuals or groups whose causes NGOs have adopted (such as union members treated unjustly by public sector employers, citizens adversely affected by public sector activity, or public sector whistleblowers) may tempt NGOs to view parliamentary committees merely as window-dressing for a corrupt system of government. The same perception might be sparked by committee recommendations for reform whose benefits are not immediately apparent. Once again, the presence of representatives from the governing party on parliamentary committees might be taken as one sign that the committees are not as independent as they appear.

This account of the different interests of public sector, news media and NGO stakeholders in parliamentary oversight committees suggests two expectations. The first is that the committees are unlikely to please all the stakeholders over time. The second is that if they do manage to please all the stakeholders at any particular time, each stakeholder is likely to have a different reason for feeling satisfied.

New South Wales Perspectives: A 2004 Interview and Questionnaire Study

Material from a 2004 interview and questionnaire study of the public sector integrity system in New South Wales allows us to explore some of these expectations. The New South Wales research was conducted as part of a wider research project on Australian public and private sector integrity measures funded by an Australian Research Council Linkage Grant (ARC LP0212038—for further details and the recommendations of the wider study, see Brown *et al* 2005).

Senior officials from all major New South Wales public sector agencies were approached to be interviewed as part of the study, as were all journalists whose work focused on New South Wales politics, and all relevant NGOs. Senior officials from twelve key NSW public sector agencies were interviewed, while eight took the option of responding to a written questionnaire. The interviews were conducted by the author and a research assistant, Ms Shelly Savage, between February and November 2004. The agencies represented included seven integrity agencies, two central coordinating agencies and eleven line agencies. The eleven line agencies ranged considerably in function and size. Six journalists (two each from the two major metropolitan dailies, one from a Sunday metropolitan newspaper and one television journalist) and four senior representatives from NGOs (one major public sector union and three advocacy groups) participated in matching interviews.

While the group of public sector managers, journalists and NGO representatives interviewed for this study do not constitute a statistically representative sample, their collective and individual responses nonetheless provide rich material concerning the evaluation of parliamentary committees by three key stakeholder groups. A number of respondents requested anonymity as a condition of their participation in the study. Because of this,

specific responses reported throughout this paper are identified only by stakeholder type and number (Manager 1, Journalist 2, NGO representative 3 etc). Quotations from interviews have had identifying comments removed (for other details on the general methodology, see Smith 2004).

The interview schedule and questionnaire covered perceptions of New South Wales public sector integrity, assessments of the importance, quality and promptness of a range of integrity actors, the most important types of integrity-related activity, the level of coordination across integrity agencies, areas for improvement and barriers to improvement. Several of the questions specifically drew attention to the role of parliamentary committees in public sector integrity activity. While these questions referred to 'parliamentary committees' rather than 'oversight committees', the answers given by respondents indicated that they understood the question to refer to the various oversight roles of parliamentary committees outlined earlier in this paper.

Stakeholders' General Perceptions of Public Sector Integrity in New South Wales

One indication of the different perspectives of the three groups of stakeholders in this study is found in their perceptions of the state and trajectory of public sector integrity in New South Wales. Asked to respond to the question 'Thinking generally, how well do you think integrity issues are handled in the New South Wales public sector today?', the answers were predictably varied. A few respondents found it difficult to give a clear summary assessment. Nonetheless, fairly clear differences emerged among those who did. Three-quarters of the public sector managers replied 'very well or 'fairly well', compared with just half of the journalists and NGO representatives.

This greater optimism among public sector managers was repeated in response to the question 'How would you compare the handling of integrity issues in the New South Wales public sector now with the situation 10 years ago?'. Sixteen out of eighteen public sector managers believed that it had improved, compared with two of five journalists and two of four NGO representatives. Three of the five journalists thought that public integrity had in fact declined over the past decade.

What lies behind these somewhat differing judgments? Those who see an improvement in the integrity climate point to positive 'cultural change' in the New South Wales public sector (Manager 15), driven by greater scrutiny from a wider range of external bodies such as the ICAC, Ombudsman, Audit Office and specialist bodies, more reporting requirements, greater understanding of ethical issues and better public sector leadership. Manager 5 sums up this sort of view: 'I think in terms of transparency, understanding of standards, compliance with standards, it's superior. It's certainly improved, yes'. Manager 12 identifies similar factors: '[M]y perception is that New South Wales takes [integrity] very seriously. I think we're awash with watchdog bodies of every description. No one moves without someone's having a look at it. We have protected disclosure legislation, and I think people take that quite seriously'.

The five respondents who saw New South Wales public sector integrity getting worse also focused on cultural change and transparency; however, they viewed these in very different ways from the predominantly bright picture painted by public sector managers: 'There are cultural factors in that the whole of our culture has shifted a lot from ideas of public service

altruism, that kind of thing, through to self interest and 'greed is good'. So there's been a cultural shift' (NGO representative 3). Journalist 1 complained of 'a lack of sort of transparency..., a desire to quash anything rather than answer it, and just a real attempt to hide information really. No assistance and you get sort of blatant lies as well'. The key elements driving this change, according to the respondents with a gloomier view of New South Wales public sector ethics, were the dominance of the Labor government after a decade in power and its increasing contractual control over senior public sector officials.

Although the view of New South Wales public sector ethics was clearly more positive among the managers than the journalists and NGO representatives, some respondents on both sides of the public sector insider-outsider divide gave balanced assessments, identifying tensions between progress and setbacks. Manager 2, for example, while giving a generally positive assessment of New South Wales public sector integrity, identifies 'politicisation of the public sector ..., [the] expectation that advice might be ... given in a way that the minister will find palatable to accept' as a 'threat that needs to be closely monitored'. The more negative assessment of Journalist 2 was tempered by recognition of the positive role of integrity agencies: 'I don't want to create the impression that it's all one way. There's an awful culture ... inside the government because it's protecting itself politically, that's what its doing all the time. And therefore its going to necessarily find [integrity] institutions, you know, invasive and threatening and so there's that tension, that's a proper tension that should take place. The Government's tendency and the ministers and their staff, their tendency is to close things down, make them non-controversial, get them out of the papers and move on. And on the other hand you've got these [integrity] agencies.... It really depends on the leadership of those organisations how far they go and what they do. But that's at least a check and a balance in our society and that's better than before'.

One issue on which the optimists and pessimists often both agreed was the danger of having too many bodies charged with integrity functions. The perceived problems included waste and staff fatigue within public sector agencies that have to respond to investigations of the same issue by different integrity bodies, frustration and competition among the integrity bodies over an unclear division of investigatory labour, the waste of scarce integrity resources, poaching of investigative staff by integrity bodies competing for the small pool of personnel with adequate skills, a resultant loss of corporate memory within integrity bodies, the encouragement of cynical 'gaming' among complainants who initiated competing investigations in the hope of one favourable outcome, and confusion among genuine complainants over which body they should approach.

The potential dangers that derive from the relatively complex New South Wales public sector integrity system give an added importance to the issue of defining a clear and appropriate role for parliamentary oversight committees within the system.

Overall Assessments of Parliamentary Committees in Integrity Oversight

What importance do key stakeholders attach to New South Wales parliamentary committees in promoting and protecting public sector integrity? Table 1 shows that parliamentary committees were viewed as important by twelve of the twenty public sector managers and similar proportions of journalists and NGO representatives. Public sector managers most consistently recognised the ICAC, Ombudsman and Audit Office as the important integrity agencies in New South Wales. The journalists focused on ICAC, courts, the police and the

Health Care Complaints Commission (HCCC). The NGO representatives identified the Ombudsman, followed by a group of bodies, including parliamentary committees.

According to Table 1, the stakeholders collectively view parliamentary committees as having middling importance within the New South Wales integrity system. In this regard, the rankings of the three arms of government—Parliamentary committees, the courts and the central executive (represented by the Premier’s Department)—are reasonably similar. They are not generally thought of as having the importance of the bodies that Manager 1 called ‘cutting edge’ integrity agencies like the ICAC, Ombudsman and Audit Office. On the other hand, and perhaps not surprisingly, they are seen as more important by most stakeholders than specialised integrity bodies such as the Police Integrity Commission and the Office of the Children’s Guardian.

Table 1 Assessments of the Importance of Different Bodies to NSW Public Sector Integrity (number of respondents thinking body ‘fairly important’ or ‘very important’).*

	Public Sector Agencies	News Media	Non Government Organisations
Independent Commission Against Corruption	18/19**	6/6	1/4
Ombudsman	18/19	4/6	4/4
Audit Office	18/19	5/6	3/4
News Media	15/20	n/a	3/4
Premier’s Department	14/19	5/6	1/4
Non-Government Organisations	14/20	5/6	n/a
Courts	13/20	6/6	3/4
Parliamentary Committees	12/20	4/6	3/4
Police	10/19	6/6	1/4
Administrative Decisions Tribunal	10/20	4/6	2/4
Police Integrity Commission	5/19	5/6	2/4
Office of Children’s Guardian	3/20	2/6	1/4
Health Care Complaints Commission	2/20	6/6	2/4

Notes:

* Public sector managers were asked ‘Please rate the importance of each of the following agencies or organisations to your own agency when it comes to dealing with integrity issues’. Journalists were asked ‘Please rate the importance of each of the following agencies or organisations when it comes to dealing with integrity issues’. NGO representatives were asked ‘Please rate the importance of each of the following agencies or organisations to your organization when it comes to dealing with integrity issues’. In each case, the response options were ‘very’, ‘fairly’, ‘not very’ and ‘not at all’ important. Respondents could add their own agencies or bodies to the list. Although fifteen were added in total, none was seen as important by more than two of the thirty respondents, so they have been excluded from the table.

** Each set of figures in the table represents the number of respondents who viewed a body as ‘fairly important’ or ‘very important’ out of the total number of relevant respondents. Thus 12/20, for example, means that 12 respondents out of a total of 20 saw a body as at least fairly important. Since respondents were not asked to assess their own agencies, some public sector agency figures are out of a total of 19 rather than 20.

Two apparently anomalous rankings in the table deserve passing attention. The first concerns the Administrative Decisions Tribunal. Its wide powers of administrative review might have suggested greater importance; however, it is a relatively unknown body and its role is often defined as something other than integrity work. The second is the high importance journalists gave to the specialist HCCC. This ranking is perhaps explained by journalistic confusion between newsworthiness and importance (the HCCC and its apparent failures were regularly in the news during 2004).

If the middling ranking of parliamentary committees is cause for disappointment to parliamentarians, a more detailed analysis of the responses might bring greater joy. While neither of the two central coordinating agency managers and only six of the eleven line managers thought parliamentary committees were important, six of the seven integrity agency managers did so, including all five agency managers whose work is directly overseen by parliamentary committees. This pattern seems to demonstrate the classic lines of conflict between the executive and parliament. The central coordinating managers, parts of the core executive, are most likely to dismiss the importance of the parliamentary committees designed to examine the executive's activities. The integrity agency managers, who share responsibility for executive scrutiny with the parliamentary committees, are most likely to see those committees as important.

Table 2 Assessments of the Quality of Integrity Advice, Information and Other Action Provided by Different Bodies (number of respondents thinking body 'fairly good' or 'very good').*

	Public Sector Agencies	News Media	Non Government Organisations
Independent Commission Against Corruption	18/19**	2/6	0/4
Ombudsman	16/19	4/6	3/4
Audit Office	17/19	5/6	3/4
Premier's Department	12/19	3/6	1/4
Police	10/19	5/6	1/4
Parliamentary Committees	9/20	3/5	3/4
Courts	8/20	6/6	1/4
Administrative Decisions Tribunal	8/20	2/6	2/4
Non-Government Organisations	6/20	4/6	n/a
News Media	4/20	n/a	2/4

Notes:

* Respondents were asked 'How would you rate the quality of advice, information or other action on integrity issues that you receive from the following agencies and organisations?'. The response options were 'very good', 'fairly good', 'not very good' and 'poor'. To ensure comparability, only agencies and organizations with a generalist scope have been included in the table.

** Each set of figures in the table represents the number of respondents who viewed a body as 'fairly good' or 'very good' out of the total number of relevant respondents. See notes to Table 1.

Tables 2 and 3 confirm the intermediate ranking of parliamentary committees in the state's public sector integrity efforts. Table 2 records stakeholders' assessments of the quality of integrity advice, information and action provided by integrity bodies. Among public sector managers, the gap between the ICAC, Ombudsman and Audit Office and the rest is even larger than in Table 1. In addition, while public sector managers saw non-government organisations and the news media as important to integrity efforts (see Table 1), they are generally unimpressed with the quality of their advocacy and reporting. Parliamentary committees, along with the police, courts and Premier's Department, fare considerably better. Among the five integrity bodies overseen by parliamentary committees, three ranked the quality of their work as good. This represents a more qualified response than that given for the importance of the committees, perhaps reflecting the tension between the interests of the legislature and the integrity agencies outlined earlier in this paper. Nonetheless, the integrity agency managers were more positive about the work of committees than the line or central agency managers.

The journalists were split on the quality of the integrity work of parliamentary committees, while the NGOs tended to rank their work as good. Most of the journalists' and NGO representatives' judgements on other bodies are also similar to those in Table 1, although the ICAC finds even fewer friends when journalists and NGOs judge the quality of its work (both groups of stakeholders complain of the ICAC's lack of openness and cooperation).

The speed with which integrity bodies respond to problems or requests for action was a concern for most (although not all) respondents in this study. On this score, none of the public sector agencies approaches overall satisfaction and most fall a fair way short of this goal (see Table 3). Parliamentary committees again sit around the middle of the table, with less than a half of the public sector managers and only half the NGO representatives judging them to be speedy enough in their responses to integrity matters. Only two of the five integrity agency managers think parliamentary committees work quickly enough. The journalists are on the whole less critical of the speed of committee activity, perhaps partly because of the apparent propensity of committees to 'leak like sieves' to the news media before their findings are made official (Journalist 5).

Table 3 Assessments of the Promptness of Integrity Advice, Information and Other Action Provided by Different Bodies (number of respondents thinking body 'fairly good' or 'very good').*

	Public Sector Agencies	News Media	Non Government Organisations
Audit Office	16/19	6/6	3/4
Ombudsman	15/19	5/6	3/4
Independent Commission Against Corruption	14/19**	6/6	0/4
Premier's Department	11/19	3/6	0/4
Parliamentary Committees	8/20	5/6	2/4
Courts	8/20	4/6	1/4
Administrative Decisions Tribunal	8/20	2/6	2/4
Police	7/19	5/6	1/4
News Media	8/20	n/a	3/4
Non-Government Organisations	1/20	5/6	n/a

Notes:

* Respondents were asked 'How would you rate the *promptness* of advice, information or other action about integrity issues that you receive from the following agencies and organisations?'. The response options were 'very good', 'fairly good', 'not very good' and 'poor'. To ensure comparability, only agencies and organizations with a generalist scope have been included in the table.

** Each set of figures in the table represents the number of respondents who viewed a body as 'fairly good' or 'very good' out of the total number of relevant respondents. See notes to Table 1.

To some extent, the responses discussed in this section of the paper reflect the idea that parliament represents civil society against the executive, since journalists and NGO representatives were more likely than public sector managers to view the committees favourably. Nonetheless, the differences between the stakeholder groups are fairly small. The strongest suggestion in the responses is that parliamentary committees are not perceived as 'cutting edge' players in public sector integrity work in New South Wales, but nor are they generally perceived as being unimportant, poor and slow performers. The committees sit somewhere in the middle. Such perceptions are reinforced by other questions in the study that prompted respondents to name the three most important integrity bodies, the three most

important types of integrity activity, and the organisations that could do more than they currently do in integrity work. Parliamentary committees and parliamentary oversight barely rated a mention in these contexts, either as centrally important bodies and activities, or as ones most needing obvious improvement.

Such perceptions may be satisfactory to parliamentarians, since they could well view their roles in integrity work as secondary to, and supportive of, those of the frontline agencies like the ICAC, Ombudsman and Audit Office. On the other hand, the fact that parliamentary committees do undertake considerable integrity oversight work in various forms may prompt parliamentarians to want to know how their work could be judged more favourably. The following section of this paper draws on the interview material to identify the factors leading to positive and negative judgements by stakeholders.

Explaining Positive and Negative Assessments of Parliamentary Committees

Six factors seem to underlie most stakeholder perceptions of the parliamentary committees. These can be summarised as chance, party, aggression, power, duplication, and role.

The first point to be made is that the performance of committees is subject to luck of the draw. The membership of particular committees is determined by chance as much as by design. Stakeholder assessments of parliamentary committees were commonly qualified by suggestions along the lines that committees are 'hard to group, because [they form] a mixed bundle' (Manager 15), not just in terms of their functions but their membership. As the representative from NGO 3 put it: 'Parliamentary Committees, [they're] fairly important, but unfortunately they're nowhere near as good as they could be. Sometimes they do things, and they're certainly capable of doing things, but it depends a bit who you've got on them so [they are] a mixed bag'. Journalist 1 expressed a similar view: 'Parliamentary Committees – again, it depends who's on them'. It is hard to eliminate the chance factor. Some committees tend to attract good members because of their prestige or their reputation as a stepping stone towards a ministry. Nonetheless, the quality of interaction between members, even on prestigious committees, cannot be predicted.

While chance might produce good as well as bad committees, none of the stakeholders viewed partisanship in anything but negative terms. Manager 5 put this point baldly: 'Parliamentary Committees, basically they are just political things. Why would you expect a Parliamentary Committee to give you sensible advice? It's the realm of politics, it's party versus party, and they play politics. It's not likely to give you anything more than what is politically expedient. It's got really nothing to do with the substantive issues of what is good administration, what is integrity, and that sort of stuff'. Manager 6 makes a similar point to distinguish parliamentary committees from other integrity bodies: 'You've got independent statutory bodies that are not party political, whereas Parliamentary Committees are'. Stakeholders see partisan loyalties, motivations and conflicts routinely getting in the way of good oversight work. It would be fanciful to wish for an end to party politics in New South Wales. Nonetheless, parliamentary committees could make efforts to counter the common and damaging stakeholder perception that their work is solely or primarily a partisan exercise.

A factor related to partisanship is perceived committee aggression towards public sector agencies and officials. In the eyes of some stakeholders, committees are little more than 'Star Chambers' (Journalist 1) or 'kangaroo courts' (Journalist 4). Journalist 4, a regular observer

of committee work, comments: 'I see them engaging in the most appalling behaviour that can be only described as political sport with witnesses and I don't think that they in most cases value add, if you like, to the knowledge that already exists about a particular issue'. The accountability function of parliamentary committees may require them to press witnesses hard; however, they risk a loss of stakeholder respect if such actions seem to be driven by partisan motives and result in little or no new public information.

Parliamentary committees' lack of power to implement their findings or recommendations is a fourth factor highlighted by stakeholders. Manager 3 sums up this kind of view: 'I don't think Parliamentary Committees are very important All they can do is call ... hearings and usually it's a chance for people to vent. Their recommendations, it's up to government to implement [them] anyway and they're pretty patchy'. The representative from NGO 4 makes a similar point about committees lacking: '... any specific powers I think that's a key point. Someone has to have powers to do something, and where a body doesn't have power I think their importance is diminished'.

Duplication of integrity work being done by other bodies is a fifth factor underlying assessments of parliamentary committees. This type of complaint has already been encountered in comments quoted above. It is often linked to the idea that committees duplicate integrity work to give it a partisan inflection: 'I mean you quite often get replication of what these statutory watchdog agencies are doing, with the Parliamentary Committees. But that's not surprising. The Parliamentary Committees are there, as I've said, for political reasons' (Manager 5). It is also often tied to perceptions that parliamentary committees are amateurs who get in the way of specialist integrity work. Parliamentary committees ought to pause before exploring the same issues as other integrity bodies. There may be good reasons to go ahead with such apparent duplication. If so, they need to be made clear, and they should include a plausible case that the committee's parallel activity will add something that will not be achieved by other integrity agencies.

The final factor is the role that parliamentary oversight committees should play in integrity work. Stakeholders put emphasis on two rather different roles. The first is detailed accountability and the second broad direction setting. The role that is emphasised by different stakeholders depends in part on their view of the relative capacities and skills of the committees and those bodies they are charged with overseeing.

Parliamentary committees currently play out a detailed accountability role in two ways: detailed direct scrutiny of integrity throughout the public sector, and detailed oversight of the work integrity agencies such as the ICAC and Ombudsman. Some stakeholders welcome this detailed accountability scrutiny by committees. Manager 16, for example, responded: 'The Parliamentary Committees, particularly the Parliamentary Estimates Committee, [are] also fairly important to the organisation. Parliamentary oversight committees, such as that Standing Committee on Social Justice Issues, which is looking at [several issues], they're fairly important to the organisation, because not only do they provide for a level of accountability, but they provide a level of check and balance to make sure that that which you are doing, or charged to do, you are in fact doing. So I have no difficulty with those things'. On this view, parliamentary oversight committees are capable of providing valuable detailed input to integrity bodies and other public sector agencies.

Other managers doubt that this is the case. Manager 3, for example, stated, 'I'm just not sure that [the committees] see their role as providing advice on integrity issues. They will

raise issues of public concern but, I mean, their focus isn't so much advising us on integrity issues. It's more the other way around, where we're sort of feeding them information'. On this view, the committees and the integrity agencies fruitfully bring together different types of knowledge, but the committees lack the capacity to provide detailed oversight.

These stakeholders suggest an alternative role for oversight committees, in which they set broad directions rather than engage in detailed examination of particular agencies (see also Hatzistergos 2001: 30). Manager 15, for example, argues that 'The Committee's articulation of the role is the important thing. They should be looking at the direction being taken by the watchdog, whether the emphasis is still correct. Arguably, the Parliament should be looking at the broad range of integrity bodies as a whole, and their interaction'.

Manager 1 saw such an approach as a productive feature of the way her integrity agency related to its oversight committee: 'The Minister is really responsible more for day-to-day accountability of this organisation, whereas the parliamentary committee is taking perhaps a longer term, broader view of our role. They have an ongoing role. Yes. And they are important, but I don't feel that they're quite as close to the cutting edge of our day-to-day business as these other agencies. They have this broader role'.

As suggested earlier in this paper, parliamentary committees may not be able to satisfy all of their stakeholders' interests, no matter which role they choose. The desire by some stakeholders for detailed scrutiny runs counter to the desire by others that parliamentary committees restrict themselves to a broader oversight role.

Conclusion

This paper has shown that the work of parliamentary oversight committees is evaluated in varying ways by different stakeholders. Parliamentary committees operate in an environment in which satisfying one stakeholder's expectations may well mean disappointing another stakeholder. Nonetheless, some overall patterns were found. One finding is that parliamentary committees are not seen as front-runners in the effort to improve public sector integrity in New South Wales. That role is seen as belonging to the full-time specialists--independent watchdog bodies like the ICAC and Ombudsman. On the other hand, parliamentary committees are not overwhelmingly dismissed as unimportant, inept and sluggardly performers of integrity work. About half of the stakeholders judge their activities to be important, of good quality and timely. Integrity agency representatives gave more positive evaluations of committees than other stakeholders, suggesting that in this context familiarity bred respect rather than contempt. If parliamentarians want to improve the more general evaluations of their oversight committees, this study suggests that they might focus on three things: reducing the negative effects of partisanship, avoiding unnecessary duplication with other integrity agencies, and considering whether they want their committees to pursue roles of fine-grained accountability or broader direction-setting.

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Towards a Performance Measurement Framework for Integrity Agencies: Lessons from the National Integrity System Assessment

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Abstract

Australia's parliamentary oversight committees for integrity, anti-corruption and crime bodies are a crucial element of the nation's integrity systems. This paper, which arises from the Australian Research Council-funded National Integrity System Assessment (NISA) project (2002-2005), argues the case for a concerted program of research and policy development to maximise the role of integrity-related parliamentary committees within these overall systems. Although they have grown up in an ad hoc way over time, and are not necessarily constituted in a coherent or logical way in all Australian jurisdictions, these committees now provide a vitally important point of integration for the many different – often competing – sources of opinion and information about how integrity systems are performing. Their sometimes tense, sometimes cooperative relationship with the integrity bodies they supervise, is symbolic of their unique role as 'the watchers of the watchers', while themselves being watched by parliamentary colleagues, media and the public in their exercise of their highly sensitive role. This paper argues the need for an in-depth, cooperative study of how these committees perform their oversight function, in order to maximise the lessons being learned by different committees and develop a more sophisticated, agreed approach to monitoring the effectiveness of the integrity system as a whole. Consistently with the type of ongoing assessment methodology developed by NISA and endorsed by the OECD, the development of a more reliable, ongoing performance measurement framework for integrity agencies is within our grasp. The existing network of parliamentary oversight committees provides the logical institutional 'home' for its development, in a manner that also stands to bolster public confidence in the diligence, propriety and professionalism of the committees themselves.

If individuals should act with integrity, and public office needs integrity, then managerial leadership and institutional design should aim to sustain it. ... No easy cost-benefit analysis justifies this central role of integrity. But I believe integrity anchors personal moral life, is true to the role of office in democracy, and results in better governance and higher quality of judgment and political life.

Dobel, *Public Integrity* (1999: 21)

Introduction

Why do we believe that public integrity matters? More importantly, how do we know when our institutional strategies for achieving 'integrity' are being successful?

While the first question may provoke a long, philosophical inquiry, the second question provides the meat of some very practical, even rough-and-tumble politics and policy making. It is also a question of great, here-and-now public interest. The people of Australia, and each of its constituent states entrust great power to a range of integrity and anti-corruption organisations, and place great trust in them, but what kind of 'cost-benefit' analysis do we then use to ensure these organisations and policies are being effective? In many ways we are often forced to trust to our own good intentions in establishing these integrity bodies, in the manner suggested by Dobel, because no neat 'audit' of the true value of integrity policies is ever likely to be feasible. The issues surrounding what we want them to achieve, and the evidence of whether they are achieving it, usually seem far too subjective, volatile, intuitive and political. Yet the need for answers remains, especially in circumstances where the value or propriety of powerful integrity agencies themselves comes under attack, or internationally when confronted with clear evidence of national integrity failures, notwithstanding such institutions.

At the heart of this minefield, however, we find what appears to be becoming a new institutional constant. Australia's parliamentary oversight committees for integrity, anti-corruption and crime bodies are a crucial element of the nation's integrity systems. The fact they and their staff are meeting in this conference, as they have done before, is testimony of their own recognition of their strategic role (Parliament of Western Australia 2003; Australasian Study of Parliament Group NSW, see Smith 2005b).

Although they have grown up in an ad hoc way over time, and are not necessarily constituted in a coherent or logical way in all Australian jurisdictions, these committees now provide a vitally important point of integration for the many different – often competing – sources of opinion and information about how integrity systems are performing. Their sometimes tense, sometimes cooperative relationship with the integrity bodies they supervise, is symbolic of their unique role as 'the watchers of the watchers', while themselves being watched by parliamentary colleagues, media and the public in their exercise of their highly sensitive role.

Nevertheless oversight committees are currently often the only institutions, in their respective jurisdictions, who have not only the power but a positive public duty to undertake the difficult task of assessing how their jurisdiction's integrity system is performing. Even if they take a narrow, short-term, party-political focus on the immediate political issues surrounding just a single agency, they are still at least partly fulfilling this vital role. More frequently, the committees are looking for longer-term evidence of how their agencies are performing as key elements of a broader integrity system, whose parts are difficult to properly judge in isolation from one another. The question is, do we all know enough about how our different committees are fulfilling this role? What types of information do they gather and use? What does it all mean, and are there ways of rationalising and standardising the ongoing assessment effort in ways that might now benefit us all – and particularly the public at large?

This paper argues the case for a concerted program of research and policy development to maximise the role of integrity-related parliamentary committees within these overall systems. It arises from the Australian Research Council-funded National Integrity System Assessment

(NISA) project, whose final report was launched in December 2005.¹ In undertaking the somewhat gargantuan task of describing and evaluating the main architecture of Australia's integrity systems, it became very clear just what a pivotal role parliamentary oversight committees play. Recommendation 3 of the assessment reflects both their general importance and their positive potential, arguing that all 'core' integrity institutions should be subject to a system of independent public oversight, consisting of (i) a standing multi-party parliamentary committee, supported by staff; and (ii) either a standing public advisory committee, or failing that, an extensive program of public participation when conducting annual or three-yearly parliamentary reviews. The lack of any Commonwealth parliamentary committee with a clear, standing role to oversight and support the functions of the Commonwealth Ombudsman on a routine basis is the most conspicuous example of a gap in this aspect of Australia's national integrity systems.

However it is Recommendation 18 of the assessment that is most relevant here:

Recommendation 18. Parliamentary oversight review methodologies

That Australian parliaments commission a joint comparative study of the methods used by standing parliamentary and public advisory committees in the oversighting of core integrity institutions, with a view to identifying:

- 1. The range of information used by standing committees as indicators of the qualitative performance of integrity systems;*
- 2. Current best practice in the methods used by parliamentary standing committees to monitor the effectiveness of integrity bodies;*
- 3. The resource needs of effective parliamentary oversight of integrity bodies; and*
- 4. Minimum and optimum best practice in the use of direct public consultation and participation in the evaluation and oversighting of integrity agency effectiveness.*

This paper presents the argument in support of this need for an in-depth, cooperative study of how these committees perform their oversight function, in order to maximise the lessons being learned by different committees and develop a more sophisticated, agreed approach to monitoring the effectiveness of the integrity system as a whole.

The first part of the paper outlines something of the challenge posed by the search for more coherent, reliable ways of measuring the performance of integrity agencies and strategies. It highlights the diversity and lack of coordination in current measurement efforts, some weaknesses and strengths in those efforts, and queries whether we do not need a more holistic approach.

The second part of the paper addresses the question, who is institutionally positioned and has the requisite institutional interests to lead such an approach. The answer is that parliamentary oversight committees already have key roles, and key duties in this regard, which make them by far the most logical vehicle to facilitate a more comprehensive and

¹ The author was lead author of the NISA project's draft and final reports, *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems* (Brown et al 2005). This paper covers largely the same ground as Chapter 9 and recommendation 18 of that report. I am indebted to all my colleagues as listed in the report, particularly those from Griffith University and our research partner, Transparency International Australia, for the opportunities afforded to me by the NISA project. The final report is readily available at <http://www.griffith.edu.au/centre/kceljag/nisa>.

reliable approach, often building from their own existing roles and methods – about which too little is publicly known.

In conclusion, I argue that consistently with the type of ongoing assessment methodology developed by NISA and endorsed by the OECD, the development of a more reliable, ongoing performance measurement framework for integrity agencies is within our grasp. The existing network of parliamentary oversight committees provides the logical institutional ‘home’ for its development, in a manner that also stands to bolster public confidence in the diligence, propriety and professionalism of the committees themselves. The only real question is whether we will take this opportunity to maximise the lessons of our parliamentary committees and take a positive step towards greater consistency and transparency in how they perform their vitally important roles, for the greater benefit of public integrity in Australia.

Measuring the ‘consequences’ of integrity systems

By their nature, one of the clearest duties of parliamentary oversight committees is to conduct rational, often regular reviews of the performance of key integrity and anti-corruption agencies. In the search for a framework for how integrity systems as a whole might be assessed, the multidisciplinary NISA team endorsed a focus on three overlapping themes: the analysis focused on the ‘capacity’ of integrity systems, their ‘coherence’, and also on their ‘consequences’, or direct measurable impacts (Brown 2003). These three themes were used as interrelated ‘lenses’ on the structure, operations and effectiveness of Australia’s integrity systems, providing a more objective ‘real-world’ platform for identification of current strengths and priorities for reform.

The strategic value of this approach, and particular the focus on the assessment of integrity system ‘consequences’, was confirmed when the NISA project team was also consulted by the OECD Public Governance Committee as it prepared its report ‘Measures for Promoting Integrity and Preventing Corruption: How to Assess?’ (OECD 2004). This OECD project stemmed from international evidence that the obvious importance of information by which the effects of integrity policies or institutions might be judged, this information is often patchy and partial, and is not integrated in ways that necessarily support conclusive judgements about the performance of single institutions, let alone the system as a whole. The OECD’s surveys of member-countries’ public sector ethics programs provided extremely scant evidence when it came to hard performance assessment information (OECD 2000:69-72). The later OECD project sought to develop clearer frameworks for assessments to fill this gap, and effectively adopted the Australian NISA framework in doing so (Table 1).

Table 1. OECD Integrity System Assessment Criteria & NISA Assessment Themes

NISA Themes (Brown 2003, Brown et al 2005)	OECD Criteria Checklist (OECD 2004:10)	
	QUESTIONS	CRITERIA
NISA Stage 1 – Scoping	Are integrity policy instruments (e.g. legal provisions, code of conduct, institutions, procedures) in place?	Formal existence of components of policy instruments.
NISA Stage 2 - Capacity	Are integrity policy instruments capable of complete functioning (realistic expectations, resources and conditions)?	Feasibility of specific policy instruments.
NISA Stage 2 - Consequences	Did the integrity policy instrument achieve its specific initial objective(s)?	Effectiveness of specific policy instruments.
	How significantly have policy instruments contributed to meeting stakeholders' overall expectations (e.g. actual impact on daily behaviour)?	Relevance, the contribution of specific policy instruments and actions to meet stakeholders' overall expectations.
NISA Stage 2 - Coherence	Do the various elements of integrity policy coherently interact and enforce each other, and collectively support the overall aims of integrity policy?	Coherence of measures, relationship with other elements of the policy.

Information about the 'consequences' or, in the OECD's terms, effectiveness and relevance of any particular integrity or anti-corruption strategy is clearly fundamental to any assessment process. It is also the bread and butter of whatever processes parliamentary oversight committees use to review and monitor their specific anti-corruption bodies. But on a broad canvas, what sort of information is actually available?

To answer this, we need to be thinking in terms of consequences broader than simply those typically picked up by neo-classical performance measurement or other forms of management theory. Because each relevant institution and organisational program within an integrity system has some designated purpose, and is typically supported by at least some allocation of public or private resources, we can usually find some strategy of evaluation or monitoring irrespective of whether the program has been identified as part of this larger 'system'. As a result the assessment of an integrity system does not start from scratch. A wide range of information typically exists to help tell us whether the many individual institutions and governance strategies that make up the integrity system are achieving their desired results and impacts. Table 2 presents and summarises the diversity of existing integrity system measurement activities in Australia, identifying 26 different types of activity across four major different categories of measures: implementation measures, activity & efficiency measures, institutional effectiveness measures, and outcome measures. Much of the detailed description of the various sources of performance information on Australian public sector integrity programs is available in a separate report to the OECD (Brown et al 2004).

Table 2. Integrity Policy Assessment 'Measures' in Australia (from Brown et al 2004)

Category	Description & Sub-categories	Examples described in Brown et al 2004
1. Implementation measures	<i>Measures directed toward major, one-off or occasional initiatives — including institutional reforms — to ensure agreed actions have been implemented</i>	
	1.1. Central review	<i>Cth, NSW, Qld</i>
	1.2. Central research	<i>Cth, NSW, Qld</i>
	1.3. Best practice case studies	<i>Cth, Qld</i>
	1.4. External investigation	<i>Frequent</i>
	1.5. NGO/university review	<i>Various</i>
2. Activity & efficiency measures	<i>Measures directed towards more routine, ongoing activities, such as the day-to-day operations of integrity bodies or ethics officers, to ensure that agreed systems are functioning, and providing basic value-for-money</i>	
	2.1. Caseload reporting	<i>Cth</i>
	2.2. Accessibility	<i>NSW</i>
	2.3. Training reporting etc	<i>-</i>
	2.4. Performance audit	<i>Cth, NSW</i>
	2.5. Productivity review	<i>Cth</i>
3. Institutional effectiveness measures	<i>Measures directed towards evaluation of the overall performance of particular integrity agencies, or justifications for the creation of new ones, and tend to be more qualitative and political</i>	
	3.1. External investigations	<i>Cth, NSW, Qld</i>
	3.2. Law reform bodies	<i>Cth</i>
	3.3. Royal commissions	<i>Cth, Qld, Tas, WA, NSW, Qld</i>
	3.4. Parliamentary committees	<i>Cth, NSW, Qld, WA</i>
	3.5. NGO/university research	<i>Various</i>
4. Outcome measures	<i>Measures directed to the substantive outcomes of integrity activities, to ensure these activities are positively enhancing ethical standards, corruption resistance, public trust, and the quality of democratic life.</i>	
	4.1. Central ethical standards / corruption risk research	<i>Cth, NSW</i>
	4.2. Agency ethical standards / corruption risk research	<i>WA</i>
	4.3. University research/review	<i>-</i>
	4.4. Integrity recognition	<i>Vic, NT, ACT, NSW</i>
	4.5. Integrity testing	<i>-</i>
	4.6. Caseload outcomes	<i>Cth, Qld</i>
	4.7. Public trust: public agencies	<i>-</i>
	4.8. Public trust: integrity agencies	<i>Cth, NSW, Qld</i>
	4.9. Public trust: general	<i>-</i>

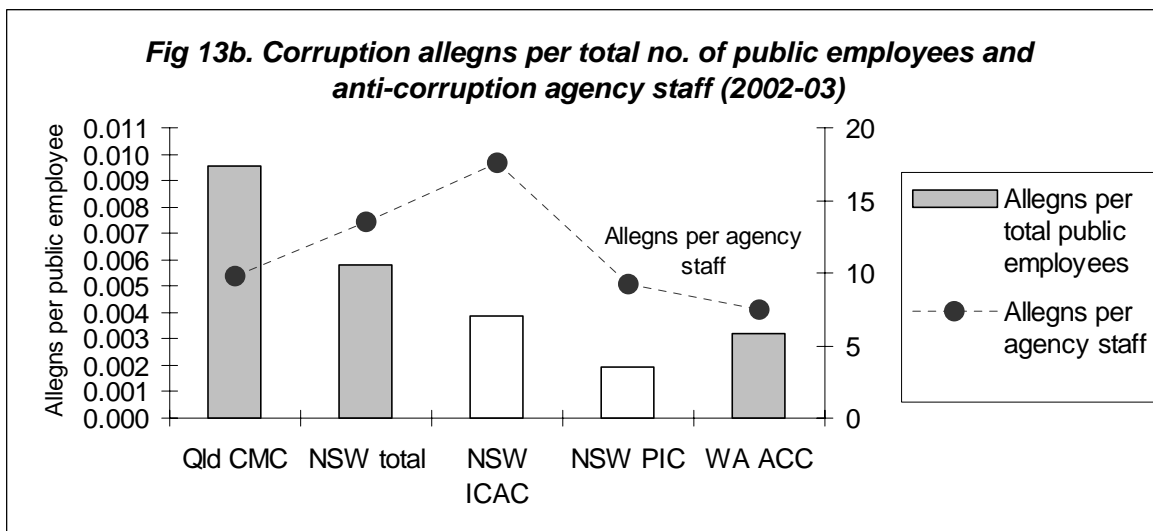
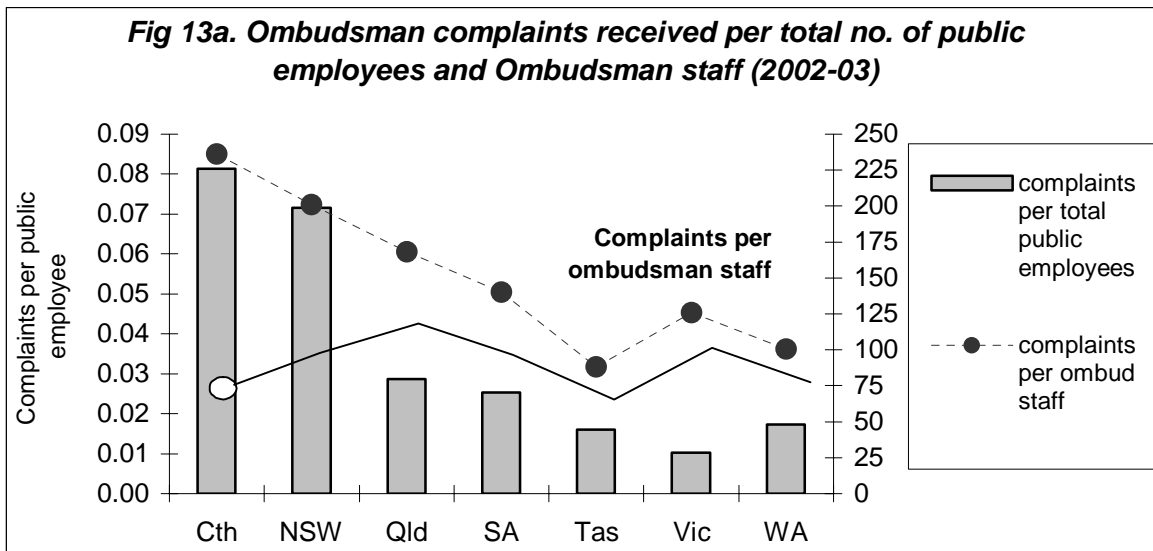
There is no doubt from these many sources of existing information, that Australia's integrity systems have many and varied real impacts — they do have consequences. The main problem confronting policymakers is whether it is possible to integrate this information into a more holistic, overall picture of the performance of integrity systems.

That this would be desirable is beyond doubt. Indeed it was the whole rationale of the OECD project, and internationally is the 'holy grail' of integrity policy for any government confronted with credible evidence that integrity institutions are stressed or failing, but few methods for putting that evidence in context in ways that support long-term rather than knee-jerk responses. The desire for a more coherent framework for collecting and reconciling such information is not simply an academic ideal – if it was, we could rest now, as we could safely conclude that as in many areas of governance or public policy, it is simply not feasible to integrate all available information on the direct consequential impacts (or outputs) of integrity systems into a single perfect 'model' for monitoring their behaviour — not in the same way, for example, that diverse economic indicators are combined to evaluate the changing health of the economy. Nevertheless, our analysis revealed existing performance measurement regimes to be fragmented and uncoordinated to an unnecessary and undesirable degree by comparison with other very complex and no less contestable areas of public policy.

This issue is a significant challenge for Australia's integrity systems. The degree of fragmentation, lack of coordination, and often lack of truly useful purpose in current data gathering means that most prominent evaluation efforts are forced to remain ad hoc, and are often still scandal-driven. Much of the NISA assessment confirms that integrity institutions and practices are not immune from institutional politics, but rather subsist in a real-world policy and political environment. The politics that necessarily travels with parliamentary oversight committees is typical of this fact. However there are also other issues. Reporting by agencies is often driven by their perennial need to justify existing or requested resources. Internal evaluations are often fragmented, depending on the specific agency driving the research — anti-corruption bodies tend to survey the public sector on issues of corruption perception and risk, whereas public service commissions tend to survey on awareness of positive codes of conduct and adherence thereto, without clear links between what are actually two sides of the same coin. Evaluations by government are often knee-jerk or ex post facto justifications for financial or political decisions already made. Unlike many more routine areas of public policy, there is little standardisation across any of the different types of evaluation that currently go on.

Perhaps the single clearest example of weakness in this area is the limited state of activity and efficiency performance measures for core integrity agencies, of the kind that parliamentary oversight committees supervise. Like all public agencies, core integrity institutions and programs have a variety of published activity and efficiency measures (category 2 in Table 2 above). For core investigative agencies, these reveal notional case-handling 'efficiencies' such as presented in Figure 1 below, which compares the number of cases handled by ombudsman's offices and anti-corruption commissions in 2002-2003, relative to the size of jurisdiction (measured in total public sector staffing) and number of staff in these agencies.

Figure 1. Core integrity agency casehandling efficiencies (Figure 13 in Brown et al 2005)



In Figure 1/13a, the columns and left axis show the number of complaints received, relative to size of jurisdiction. The dotted lines and right axis show the varying caseloads of these agencies per staff-member, showing variation in the case-handling efficiency demanded. Ombudsman’s offices may be handling anywhere between less than 100, and over 200 matters per staff member. However at present, there is little consistency in the compilation of this data, sufficient to support meaningful comparative analysis. The figures are influenced by whether the ombudsman accepts only written complaints, or also in-person and phone complaints, as well as its profile and the extent to which the ombudsman’s office acts as a clearinghouse for other agencies. The caseload per staff member may again depend on how many cases are actually investigated, rather than simply processed — the additional line shows the cases that the Commonwealth Ombudsman elects to investigate per staff member, giving an indication that efficiencies may not be so variable.

Figure 1/13b shows similar data for the four major independent anti-corruption bodies, two of whom were in NSW (with their total also shown separately). The Queensland CMC dealt with more corruption-related cases as a proportion of its catchment than the other states, but its staffing perhaps meant it was better able to cope than, for example, the NSW ICAC, which

has suffered staff reductions. However these figures also suffer limitations in consistency. There is also no Commonwealth parallel to the state figures assembled in Figure 1/13b, because there is effectively no independent Commonwealth anti-corruption body, and significant uncertainty around the way in which the reporting of 'corruption' is subsumed within procedural definitions of 'fraud', rather than vice versa. These issues, which remain quite topical, are dealt with at length in chapter 5 and Recommendation 1 of the NISA report.

At present, this basic activity and efficiency data is the most comprehensive available on routine agency performance, yet it provides limited insights of any real value. Variations in definitions, methods and data-collection limit its usefulness as a measure of good or bad practice. Australian governments require the collection and publication of such data, but do not appear to use it to assess anything other than (possibly) efficiency against past performance, which is itself subject to many variables. The data does not seem to even play a role in official debate over the resourcing of agencies, another issue in its own right (see Brown & Head 2004). This is surprising given the importance of public confidence that the resourcing of integrity agencies is adequate, and the evidence that current institutional configurations and resources are often a creature of historical accident.

A major opportunity exists to turn such data to more useful effect, albeit with substantial research and policy development needed to rationalise, standardise and expand the basic activity and efficiency measures applying to integrity bodies. Standardisation is crucial before effective comparative analysis (one of the simplest evaluative tools) can be used to judge the relative performance of like bodies, and promote the identification and transfer of best practice. Expansion is needed to identify meaningful qualitative performance indicators, where this is possible. Such a revamped approach to performance evaluation may appear expensive and time-consuming to agencies with limited budgets, but compared to most areas of public policy in which comprehensive benchmarking is now regarded as unavoidable — e.g. health and other social services — such an overhaul is, in reality, the minimum that should reasonably be required. The need for strategic investment in the redevelopment of core agency activity and efficiency measures is itself one of the subjects of a NISA recommendation (Recommendation 17: public review of integrity resourcing and performance measurement).

On a more positive note, however, there are a number of areas of growing strength in the way in which more substantive performance measurement information is being compiled. One is the use of **evidence-based tools to monitor effectiveness** of integrity-related strategies and agencies. This is seeing the extensive and repeat use by some core public integrity agencies of evidence-based techniques for gaining thorough, scientific pictures of the take-up of particular ethics measures in organisations, principally through employee surveys drawn from random representative samples. Much of this work was pioneered by the NSW Independent Commission Against Corruption in the 1990s, which along with the Queensland Crime & Misconduct Commission and WA Corruption & Crime Commission now continues this research in the form of Public Sector Profiling and corruption risk assessment surveys. However, the most prominent example is probably now the Australian Public Service Commission's Employee Surveys, complementing self-reporting by agencies with actual data of employee experience, contributing to its annual, legislatively-required State of the Service Report (see e.g. Uhr 2005b; categories 1.2, 4.1 and 4.2 in Table 2).

The particular importance of this work lies in the fact that such social-science based analysis of employee perceptions and experiences can provide a much more holistic and useful barometer of how integrity systems are working than, for example, the use of statistics for numbers of investigations launched, criminal or administrative charges laid, or successful criminal or disciplinary action (category 4.6). The latter statistics can be ambiguous — high numbers can indicate both a successful integrity system, in terms of investigative capacity and strength of the rule of law, and an unsuccessful one in terms of high incidence of offences, low ethical standards, and poor prevention. In Australia, numbers of criminal prosecutions for corruption are generally regarded as low, often provoking questions as to whether the cost of investigative bodies is justified, but paradoxically, this statistic is also a likely a sign of overall success.

While more holistic, research-based evaluation is important, it is also in a state of evolution that could help such research more definitively demonstrate what is being achieved by integrity systems. It is particularly vital that jurisdictions build on their strengths by maintaining such research programs for the long-term, rather than just as special ‘fashionable’ projects. Further, such surveys need to be developed as more than simply an ‘implementation’ measure (to identify whether core agencies’ programs are being implemented by organisations) and also used to develop more substantive measures of ethical standards in organisations themselves. Agencies may do this themselves, but the independence and public reporting that accompanies a program of research coordinated and monitored by core agencies is important to both quality and credibility.

A second strength identified in the assessment is the growing ***use of public feedback, satisfaction and trust measures*** in performance measurement by some elements of public integrity systems. This is seeing the extension of empirical measures of organisational ethical standards and corruption resistance, to empirical monitoring of public awareness and satisfaction with specific integrity services. Such research is used by a variety of core agencies including the Commonwealth Ombudsman, NSW ICAC and Queensland CMC (see Table 2, category 4.8). Some agencies such as the ICAC also have ‘operations committees’ or advisory committees with public participation, a related feedback mechanism.

These measures are significant because whereas the proportion of substantiated complaints or investigations can mean multiple things, as mentioned above, public attitudinal research can provide more objective, longitudinal benchmarks. For example, in the Commonwealth Ombudsman’s third survey of past complainants in 1997, 50 per cent of respondent clients whose complaint the office had exercised a discretion not to investigate indicated they did not find the office’s decision reasonable; whereas in the previous year, only 38 per cent had so indicated. This increase was seen as cause for ‘significant concern’ given the importance of the Ombudsman’s reputation as an independent decision-maker (Commonwealth Ombudsman 1997: 95-99). Conversely in the year 2000, 78 per cent of those whose complaints the office had declined to investigate, still indicated that they would consider using the office in the future — a significant indication of some level of public confidence in the competence and impartiality of the office (Commonwealth Ombudsman 2000: 4).

Many Australian integrity agencies do not use such methods, however. Further, the relatively low response rates of those who do (often around 30 per cent) emphasise that members of the public who are dissatisfied with the integrity system may not regard research commissioned by the agencies themselves to be sufficiently independent to warrant response. Important opportunities exist for extending the use of such approaches, or even

mandating such feedback mechanisms in the work of agencies; developing more coherent and consistent methodologies for their conduct; and exploring more independent means of conducting such research. An example of existing independent, university-based research of direct relevance to this opportunity is provided by the Australian Survey of Social Attitudes. Some key results indicating current levels of public confidence in key institutions are set out below in Table 3, showing responses from 4,270 citizens surveyed nationally in August-December 2003 (ASSA 2003). Respondents are not currently questioned on their confidence in all core integrity institutions, e.g. ombudsman's office or anti-corruption bodies, but the potential clearly exists to extend this type of research into a comprehensive, cost-effective data-gathering program.

Table 3. Public confidence in key institutions, by state (ASSA 2003)

3.1. The courts and the legal system

[V45. How much confidence do you have in... the courts and the legal system?]

	% of respondents								
	NSW	Vic	Qld	SA	WA	Tas	ACT	NT	Nation
A great deal of confidence	3.8	5.8	4.0	1.6	5.0	6.0	6.5	0.0	4.4
Quite a lot of confidence	23.2	29.1	21.2	22.6	22.5	22.2	27.3	20.0	24.3
Not very much confidence	46.0	43.9	49.2	48.9	44.4	46.2	41.6	66.7	46.1
No confidence at all	24.7	18.5	24.6	25.5	27.2	23.9	22.1	13.3	23.3
Can't choose	2.3	2.7	1.0	1.4	0.8	1.7	2.6	0.0	1.9
(N=	1392	1074	695	368	378	117	77	15	4116)

3.2. The public service

[V47. How much confidence do you have in... the public service?]

	% of respondents								
	NSW	Vic	Qld	SA	WA	Tas	ACT	NT	Nation
A great deal of confidence	1.7	1.9	2.4	2.4	1.3	1.7	7.8	0.0	2.0
Quite a lot of confidence	27.9	27.7	28.5	30.3	32.0	33.6	44.2	40.0	29.1
Not very much confidence	50.4	50.5	49.8	48.1	49.7	44.0	33.8	53.3	49.6
No confidence at all	15.9	16.0	16.5	13.8	13.2	14.7	14.3	0.0	15.5
Can't choose	4.0	3.9	2.7	5.4	3.7	6.0	0.0	6.7	3.9
(N=	1386	1073	695	370	378	116	77	15	4110)

3.3. The police

[V51. How much confidence do you have in... the police in my state (or territory)?]

	% of respondents								
	NSW	Vic	Qld	SA	WA	Tas	ACT	NT	Nation
A great deal of confidence	10.8	14.0	14.1	16.8	8.2	16.8	7.9	6.7	12.6
Quite a lot of confidence	54.7	60.9	59.1	58.6	55.0	56.3	72.4	73.3	57.9
Not very much confidence	26.8	18.5	21.4	18.9	28.3	18.5	14.5	13.3	22.7
No confidence at all	6.0	4.7	3.9	3.8	7.4	5.9	5.3	0.0	5.2
Can't choose	1.7	2.0	1.6	1.9	1.1	2.5	0.0	6.7	1.7
(N=	1395	1073	697	370	378	119	76	15	4123)

3.4. Police corruption

[V101. Please tell us how much you agree or disagree with each of the following statements... There is a lot of corruption in the police force in my State (or Territory)]

	% of respondents								
	NSW	Vic	Qld	SA	WA	Tas	ACT	NT	Nation
Strongly agree	10.2	7.5	6.7	4.3	13.0	7.4	5.2	0.0	8.4
Agree	26.3	20.4	17.9	11.2	31.1	13.9	13.0	13.3	21.8
Neither agree nor disagree	38.0	38.8	39.4	41.2	32.4	32.0	40.3	46.7	38.1
Disagree	16.0	22.4	24.9	28.2	16.1	31.1	24.7	20.0	20.9
Strongly disagree	2.1	3.5	4.3	6.4	1.3	4.9	6.5	13.3	3.3
Can't choose	7.5	7.3	6.7	8.8	6.2	10.7	10.4	6.7	7.5
(N=	1407	1076	698	376	386	122	77	15	4157)

Surveys conducted August-December 2003

Table 3 also demonstrates that the value of evidence relating to public attitudes lies not in establishing any immediate, objective benchmark of performance, but in the lessons that can be drawn from changes in confidence over time. Confidence in key institutions seems quite low — nationally around 69 per cent of respondents indicated either ‘not very much’ or ‘no’ confidence in the courts and legal system, and 66 per cent indicated ‘not very much’ or ‘no’ confidence’ in the public service (Tables 3.1, 3.2). However it is impossible to say these institutions are failing; what is more important is whether confidence increases or falls, and how this might be linked to possible causes. Confidence in police is comparatively strong, with less than 28 per cent of respondents indicating ‘not very much’ or ‘no’ confidence, despite the fact that around 30 per cent of respondents also believe there to be a lot of corruption in their police force (Tables 3.3, 3.4).

Table 4 below, from the same source, further highlights the need for a relatively sophisticated and long-term approach to the use of evidence of ‘public trust’ in institutions as a reliable indicator of effectiveness. While public perceptions of integrity-related institutions is an important input into evaluating their effectiveness as individual elements of the integrity system, overall the most important consequences of effective integrity systems may relate to evolving features of civic participation, institutional cohesion and community well-being that are not easily measurable other than in highly qualitative or subjective ways over a long period of time. The best immediate surrogate for these may be a hybrid of public confidence and public trust.

Table 4. Overall indicators of public trust (ASSA 2003)

4a. Confidence in the Federal parliament

[V46: How much confidence do you have in... the Federal parliament?]

Value Categories	N	
1 A great deal of confidence	186	4.5%
2 Quite a lot of confidence	1428	34.2%
3 Not very much confidence	1816	43.5%
4 No confidence at all	592	14.2%
9 Can't choose	150	3.6%
Not asked / missing	98	

4b. Pride in Australian democracy

[V180: How proud are you of Australia in... the way democracy works?]

Value Categories	N	
1 Very proud	521	24.5%
2 Somewhat proud	1130	53.1%
3 Not very proud	277	13.0%
4 Not proud at all	58	2.7%
9 Can't choose	144	6.8%
Not asked/missing	2140	

4c. General levels of trust

[V54: Generally speaking, would you say that most people can be trusted or that you can't be too careful in dealing with people?]

Value Categories	N	
1 Can be trusted	1621	38.9%
2 Can't be too careful	2325	55.8%
9 Can't choose	218	5.2%
-2 Skip/missing	106	

While public confidence and trust are not 'catch-all' indicators of good governance (Bouckaert & Van de Walle 2003), they are, in some respects, the essential focus of integrity systems, based as these values are on the fact that in modern complex societies, human beings are forced 'as far as they can, to economize on trust in persons and confide instead in well-designed political, social, and economic institutions' (Dunn 1988/2000:85-6). The challenge is to develop ways to measure public confidence in the leadership of institutions that more accurately reflect both the value placed on integrity in our society and realistic expectations that it can be achieved. This challenge requires a new methodology for reconciling and integrating existing social science work. For example, we know that in 1976, about 20 per cent of a national sample of Australians answered 'high' or 'very high' when asked how they would rate federal and state politicians on issues of ethics and honesty, but that in 2000, only about 10 per cent answered this way (Goot 2002). In Figure 4a, we also see that around 58 per cent of the Academy of Social Sciences in Australia (ASSA) 2003 respondents indicated 'not very much' or 'no' confidence in the federal parliament generally, similar to other major institutions in Table 3. However this ingrained distrust of political leaders may not be a sign of integrity system ineffectiveness, indeed it may be a fundamental ingredient of an effective one — as Figure 4b shows, the vast majority of respondents (78 per cent) were nevertheless proud of 'the way democracy works' in Australia. The meaning of such figures also depends on whether citizens are inclined towards trusting others in general (Figure 4c).

The opportunity to develop a much more comprehensive evaluation program, including making better use of independent research of this kind, led to another important recommendation in the NISA report (Recommendation 19: evidence-based measures of organisational culture, public awareness and public trust).

This brief tour of different weaknesses and strengths in the current smorgasbord of relevant data further highlights, however, its fragmented and uncoordinated state. Different aspects of existing performance measurement information go to different issues; none in itself provides a definitive measure of the effectiveness of integrity bodies or policies, but in combination it is all relevant, or potentially relevant. This brief review also highlights why neither the normal performance measurement (e.g. Treasury, Finance, estimates) processes of government, nor the increasingly important research activities of integrity agencies themselves are entirely satisfactory methods of monitoring performance. To achieve its purposes, and for the public to have confidence in the judgements being reached about core integrity institutions, such evidence needs to be collected over a long timeframe, with a level of independence from the agencies concerned, integrated with data from other measures to provide a more holistic overview, and put to use in a real world policy context rather than just being left to form an academic picture.

All these issues provoke the question – who is institutionally positioned, and who has the requisite institutional interests, to champion the development of a more comprehensive evaluation framework? This is a question that leads directly back to parliamentary oversight committees.

The Special Role of Parliamentary Oversight Committees

The opportunities identified above provide avenues for standardising, bringing together and supplementing existing routine and often unglamorous data, and putting it to better uses. However, the task of developing it into a more systematic framework for regular, credible and publicly intelligible evaluation of the consequences of integrity systems is a larger, even more important challenge. Until such time as the major sources of information about the impacts of the integrity system are integrated, and larger gaps filled, there can be no truly comprehensive assessment in any single jurisdiction, let alone across jurisdictions. While the search for best practices in integrity system assessment are still in relative infancy as an analytical and academic exercise, there is certainly scope for innovation, particularly in the integration of research to monitor the effectiveness of a wider range of integrity system elements, both positive and enforcement-related.

As in many areas of policy, one explanation for the lack of a more integrated, coordinated approach is the lack of effective institutional champions to promote or guarantee such an approach. The institutional coherence does not necessarily currently exist to support development and implementation of more coherent, evidence-based evaluation frameworks of the kind that are otherwise clearly feasible.

One effective institutional vehicle for this approach would be the development of governance review councils – standing statutory bodies that act as an operational and policy coordination forum for integrity agencies, as well as a coordination point between integrity agencies and government, and a base for more coordinated, consistent research and evaluation. Various formal and informal precedents already exist, from the Commonwealth Administrative Review Council to the Western Australian Integrity Coordinating Group (formed in response to NISA *recommendation 2*).

However while mechanisms for better operational and policy coherence in the integrity system are important, and have their own significance for more consistent and comprehensive performance evaluation, it is unlikely that they could ever fulfil the entire performance measurement mission. It is for logical political reasons that the current leadership in this area – however uncertain and inconsistent over time and between jurisdictions – lies with parliamentary oversight committees. Parliamentary committees receive their own category as a mechanism of effectiveness measurement in Table 2 above (category 3.4). In reality however, they are not merely one category. In the process of fulfilling their functions, oversight committees are already far more likely to draw on and integrate a wide range of information from all other sources, including ‘lay’ political judgements as well as academic and other data. They review integrity agencies’ annual reports, conduct hearings on their performance using reported outcomes, collect public submissions and ‘in camera’ evidence given by the agencies, collect and deal with public complaints against the agencies, and direct parliamentary staff to conduct supplementary research. The committees function not only as a mutual accountability mechanism, but as a – if not the – primary means by which Australian society conducts any holistic evaluation of the performance of key integrity bodies on a regular basis.

A major opportunity for system development exists in their role as integration points for much relevant information regarding the effectiveness of integrity agencies and programs, crucial to popular and policy judgements about their consequences and impacts. While these committees are, on balance, strength of Australian integrity systems, their evaluation methods are not necessarily as clearly structured, transparent, policy-based and consistent as they could be. There is a substantial public interest in jurisdictions working to share not just the broad principles, but detailed methods that are, or could be, involved in integrity agency review to foster a ‘best practice’ model of core integrity agency evaluation. An in-depth comparative study of the different types of information collected and/or used by parliamentary committees when evaluating integrity bodies, is needed as a first step to constructing a more routine, politically acceptable framework (or sub-framework) of performance assessment. By regularising a framework based on this experience, integrity agencies and parliamentarians alike can develop more consistent and potentially less volatile understandings of how integrity performance is to be evaluated from year-to-year.

Conclusions: National Principles for Integrity Agency Evaluation

The development of more regular, agreed methods of monitoring the performance of integrity systems is crucial to achieving smoother processes of institutional adaptation and adjustment, as well as counteracting the influence of ad hoc policy crises, scandals, and officeholders’ shorter-term perceptions of their own self-interest in major integrity system decisions. Fortunately, consistently with the type of ongoing assessment methodology developed by NISA and endorsed by the OECD, the development of a more reliable, ongoing performance measurement framework for integrity agencies is within our grasp.

A range of existing data sources stand ready to be integrated in a more coherent, routine and cost-effective evaluation program. These offer a way of helping ensure that evaluation is lifted above party-politics to the greatest possible extent, providing an assessment framework that while it will necessarily evolve, can be based on similar consistent principles from year to year, and parliament to parliament. Moreover the development of a more coherent framework needs to be done not as an academic exercise, but in a practical manner that

provides a basis for ongoing evaluation and practical decisions about how to keep agencies accountable on one hand, and how to keep their functions, powers and resources up to date on the other. Most importantly, there is significant potential for elements of integrity system 'best practice' to be more clearly identified and shared if this approach is applied as consistently as possible across all jurisdictions. While there will never be total uniformity, the development of a 'model' or 'best practice' integrity agency evaluation process that is based on principles developed nationally, rather than just by one jurisdiction, offers considerable promise.

The existing network of parliamentary oversight committees provides the logical institutional 'home' for the development of such an approach, in a manner that also stands to bolster public confidence in the diligence, propriety and professionalism of the committees themselves. The steps needed to develop a more comprehensive approach are relatively clear. They begin with a systematic comparative study of the different methods already used by oversight committees to evaluate specific agencies. They would naturally involve the engagement of a diversity of committee members in more critical, frank discussion of the utility or otherwise of existing data. They would include engaging a range of experts, interest groups and integrity agencies themselves in the development of a more holistic set of indicators of integrity system health, with which the review and monitoring efforts of committees could be more easily aligned. Most importantly, this work needs to be done on coordinated, cooperative, national basis. The result would be an agreed set of national principles for how integrity system performance should be measured and monitored, reflecting existing best practice but extending current approaches in a new, more comprehensive direction.

The only real question is whether we will take this opportunity to maximise the lessons of our parliamentary committees and take a positive step towards greater consistency and transparency in how they perform their vitally important roles. Such a step would not only provide beneficial guidance to parliamentary oversight committees, their staff, and the agencies they oversight. If we accept that integrity anchors personal moral life, is true to the role of office in democracy, and results in better governance and higher quality of judgment and political life, then a more professional and consistent approach to integrity system performance measurement can also only be for the greater benefit of public integrity in Australia.

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PROCEEDINGS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION

AGAINST CORRUPTION

5:00 P.M., WEDNESDAY 7 JUNE 2006
AT PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council
Ms Gardiner

Legislative Assembly
Mr Yeadon
Mr Mills
Mr Pearce
Mr Turner
Ms Keneally
Mr Price
Mr Kerr

Also in attendance: Mr Faulks, Manager of the Committee, Mr Bjarne Nordin, Senior Committee Officer, Ms Phelps, Committee Officer, and Ms Yeoh, Assistant Committee Officer.

The Chairman presiding.

1. Apologies

Apologies were received from Mr Primrose, Rev. Nile and Mr Roberts.

2. Previous minutes

On the motion of Mr Price, seconded Ms Keneally, the minutes of Wednesday 29 March 2006 were accepted as a true and accurate record.

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Appendix 1 - Extracts from the minutes of the ICAC Committee regarding the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies, 22-23 February 2006, Parliament House, Sydney

This appendix contains relevant extracts from the minutes of ICAC Committee meetings of:

- Monday 23 February 2004
- Wednesday 29 March 2006; and
- Wednesday 7 June 2006

regarding the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies, 22-23 February 2006, Parliament House, Sydney.

PROCEEDINGS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

2:00 P.M., MONDAY 23 FEBRUARY 2004
AT PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

Ms Gardiner
Revd Mr Nile

Legislative Assembly

Mr Yeadon
Ms Keneally
Mr Mills
Mr Price
Mr Roberts
Mr Turner
Mr O'Farrell

Also in attendance: Mr Faulks, Manager of the Committee, and Mr Jefferis, Project Officer.

The Chairman presiding.

1. Apologies

Apologies were received from Mr Primrose and Mr Pearce.

2. Previous minutes

On the motion of Mr Mills, seconded Ms Keneally, the minutes of 18 September 2003 were accepted as a true and accurate record.

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4. National biennial meeting of Australian Parliamentary Crime and Corruption Oversight Committees, late 2005, Sydney

The Chairman indicated that in discussions with other Parliamentary committees at the national meeting of Parliamentary committees involved in the oversight of anti-corruption and crime agencies it had been generally agreed that, subject to a resolution of the Committee,

the next national meeting of Parliamentary committees involved in the oversight of anti-corruption and crime agencies take place in Sydney in late 2005.

On the motion of Mr Mills, seconded Mr Turner:

That:

- (a) in late 2005 the Committee host a national meeting of Australian Parliamentary committees involved in the oversight of crime and corruption investigation and prevention agencies;
- (b) the Committee invite the Committee on the Office of the Ombudsman and Police Integrity Commission, the Legislative Assembly Parliamentary Privileges and Ethics Committee, and the Legislative Council Parliamentary Privileges and Ethics Committee to participate in the arrangements for the national meeting;
- (c) if so agreed, an organising Committee comprising the Chairmen of these Committees be established to provide for the necessary arrangements for the national meeting; and
- (d) the secretariat of the ICAC Committee be responsible for administrative arrangements for the national meeting.

Resolution passed unanimously.

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9. General business

There being no further business, the Committee adjourned at 6:05 p.m..

Chairman

Committee Manager

PROCEEDINGS OF THE COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

5:00 P.M., WEDNESDAY 29 MARCH 2006
AT PARLIAMENT HOUSE, SYDNEY

MEMBERS PRESENT

Legislative Council

Ms Gardiner
Rev. Nile
Mr Primrose

Legislative Assembly

Mr Yeadon
Mr Mills
Mr Pearce
Mr Turner
Ms Keneally
Mr Roberts
Mr Price
Mr Kerr

Also in attendance: Mr Faulks, Manager of the Committee, Mr Bjarne Nordin, Senior Committee Officer, Ms Phelps, Committee Officer, and Ms Yeoh, Assistant Committee Officer.

The Chairman presiding.

1. Previous minutes

On the motion of Mr Mills, seconded Rev. Nile, the minutes of Thursday 1 December 2005 and Monday 12 December 2005 were accepted as a true and accurate record.

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4. Chairman's notes

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2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption and Crime Agencies, Wednesday 22 February 2006 and Thursday 23 February 2006, at Sydney

The Chairman reported that the 2nd National Conference of Parliamentary Committees Oversighting Crime and Corruption Agencies had been held at Sydney, Wednesday 22

February 2006 and Thursday 23 February 2006. Over 50 delegates heard presentations from:

- Mr Russell Grove, Clerk of the Legislative Assembly – Welcome to Parliament House, Sydney
- Hon. Kim Yeadon MP, Chairman, ICAC Committee – Recent changes to the Independent Commission Against Corruption Act 1988 and a report from New South Wales
- Mr Chris Wheeler, Deputy Ombudsman, Office of the New South Wales Ombudsman – Whistleblowing legislation in New South Wales
- Mr John Hyde MLA, Chairman, Committee on the Corruption and Crime Commission – Report from Western Australia
- Mr Geoff Wilson MLA, Chairman, Parliamentary Crime and Misconduct Committee – Report from Queensland
- Senator Ian MacDonald, Chairman nominee, Joint Standing Committee on the Australian Crime Commission – Report from the Commonwealth
- Mr George Brouwer, Victorian Ombudsman and Director, Police Integrity – Dealing with corruption: The Victorian experience
- Mr Duncan Kerr SC MP, Deputy Chair, Joint Standing Committee on the Australian Crime Commission, Parliament of Australia – Parliamentary Committees and the fabric of accountability
- Hon Peter Primrose MLC, Chair, Legislative Council Privileges Committee, Parliament of New South Wales – Search warrants
- Ms Helen Ester, Senior Lecturer, Central Queensland University – Corruption and the media - Political journalists, 'leaks' and Freedom of Information
- Ms Susan Bullock, Internal Ombudsman, Sutherland Shire Council – Corruption prevention and local government
- Mr Chris Ballantine, Convenor, Corruption Prevention Network – Catching up on the Network
- Hon Jerrold Cripps QC, Commissioner, Independent Commission Against Corruption – Report from New South Wales
- Mr Robert Needham, Chairperson and CEO, Crime and Misconduct Commission – Report from Queensland
- Mr Mike Silverstone, Executive Director, Corruption and Crime Commission – Report from Western Australia
- Hon James Wood QC, Inspector of the Police Integrity Commission – Report from New South Wales
- Mr Graham Kelly, Inspector of the Independent Commission Against Corruption – Report from New South Wales
- Mr Clive Small, Executive Director Strategic Operations Division, Independent Commission Against Corruption – The Independent Commission Against Corruption's investigation process
- Dr A.J. Brown, Senior Lecturer, Griffith Law School – Whistling While They Work: Clearing the logjams in Australian whistleblower protection laws
- Dr David Solomon, Adjunct Professor, School of Political Science and International Studies University of Queensland – Government, whistleblowers and the media
- Dr Rodney Smith, Senior Lecturer, Government and International Relations, University of Sydney -- The Place of oversight committees in integrity systems: Some evidence from NSW

- Dr A.J. Brown, Senior Lecturer, Griffith Law School – Towards a performance measurement framework for integrity agencies: Lessons from the national integrity system assessment

A report of the conference proceedings is being prepared.

The Chairman noted that the Parliamentary Crime and Misconduct Committee has advised that it proposes to host the 3rd National Conference of Parliamentary Committees Oversighting Crime and Corruption Agencies, to be held at Brisbane, March-April 2008. This proposal is dependent upon a decision of the successor Parliamentary Crime and Misconduct Committee to be formed after the next Queensland general state election, due before 2008.

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11. General business

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There being no further business, the Committee adjourned at 7:00 p.m..

Chairman

Committee Manager

5. Consideration of Chairman's report: "Proceedings of the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies, 22-23 February 2006"

The Chairman presented his draft report: "Proceedings of the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies, 22-23 February 2006".

The report, have been distributed previously, was accepted as being read.

The Committee proceeded to deliberate on the draft report:

The report was read and agreed to.

On the motion of Mr Price, seconded Mr Mills:

That the draft report: "Proceedings of the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies, 22-23 February 2006", be read and agreed to.

Passed unanimously.

On the motion of Mr Price, seconded Mr Mills:

That the draft report: "Proceedings of the 2nd National Conference of Parliamentary Oversight Committees of Anti-Corruption/Crime Bodies, 22-23 February 2006" be accepted as a report of the ICAC Committee, and that it be signed by the Chairman and presented to the House.

Passed unanimously.

On the motion of Mr Price, seconded Mr Mills:

That the Chairman and Committee Manager be permitted to correct any stylistic, typographical and grammatical errors in the report.

Passed unanimously.

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8. General business

There being no further business, the Committee adjourned at 5:35 p.m..

Chairman

Committee Manager