REPORT ON PROCEEDINGS BEFORE

COMMITTEE ON THE INDEPENDENT COMMISSION AGAINST CORRUPTION

INQUIRY INTO PROTECTIONS FOR PEOPLE WHO MAKE VOLUNTARY DISCLOSURES TO THE ICAC

At Jubilee Room, Parliament House, Sydney on Monday, 7 August 2017

The Committee met at 9:50

PRESENT

Mr D. Tudehope (Chair)

Mr R. Hoenig
Ms T. Mihailuk
Reverend the Hon. Fred Nile, MLC
Mr G. Provest
Mr M. Taylor

The CHAIR: I now declare open this session of the inquiry into the protection of people who make voluntary disclosures to the Independent Commission Against Corruption [ICAC]. The purpose of today's hearing is to examine the adequacy of the current law in protecting people who make voluntary disclosures to the ICAC. This morning the Committee will hear from witnesses from the Information and Privacy Commission New South Wales and the Acting Ombudsman. The Committee will then break for morning tea, after which we will hear from the Parliamentary Inspector of the Corruption and Crime Commission of Western Australia and the Law Society of New South Wales.

After lunch we will hear from the Director of Public Prosecutions, Mr Lloyd Babb, and the South Australian Independent Commissioner Against Corruption. After a short break the Committee will hear from the New South Wales Inspector of the Independent Commission Against Corruption, Mr Bruce McClintock. I thank all witnesses for making themselves available to appear today. I note the Committee has authorised the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines covering the coverage of proceedings are available.

ELIZABETH TYDD, NSW Information Commissioner and Chief Executive Officer, Information and Privacy Commission New South Wales, sworn and examined

ROXANE MARCELLE-SHAW, Director, Investigation and Reporting, Information and Privacy Commission New South Wales, affirmed and examined

The CHAIR: Before we proceed, do you have any questions regarding the procedural information relating to witnesses and the hearing process?

Ms TYDD: No, thank you.

The CHAIR: Would you like to make a brief opening statement?

Ms TYDD: Thank you. The opportunity that the Committee has presented me with today is appreciated. The current inquiry relates to a discussion paper of November 2014 on prosecutions arising from the Independent Commission Against Corruption [ICAC] investigations. In that report ICAC reported to the Committee that a large number of complaints and information that it received were made by public officials who were not authorised to report to the ICAC. The ICAC submitted that these individuals may have been at risk of breaching secrecy or confidentiality law. Additionally, ICAC made submissions in relation to another class of persons, private individuals who provided information voluntarily, and noted that they may be at risk of civil liability arising from contractual or employment undertakings. The report noted the operation of the Independent Commission Against Corruption Act where those protections were available in relation to situations where ICAC had exercised its powers and also noted the legislative provisions arising in the Queensland Crime and Corruption Act, which provides those protections to persons disclosing on a voluntary basis. The Committee recognised that this issue warranted further examination.

Although information may be provided voluntarily by an individual in pursuing that matter, in a related or subsequent investigation questioning may be undertaken prior to the accusatorial judicial process. In this voluntary phase of questioning an individual may seek to decline to answer questions. The issues of reasonable excuse may then arise. As Information Commissioner, these submissions do not further ventilate the issues of the investigatory process, particularly those involving corrupt conduct and the applications of protections arising under the Evidence Act. Rather, to assist the Committee, these submissions deal with the functions of regulatory or investigative bodies generally and the identification of barriers to the effective exercise of those functions through a particular focus on prevention and the receipt of complaints.

Turning firstly to the functions of regulatory or investigative bodies, in circumstances where investigative bodies are required to focus on harm minimisation or a preventative approach, complaints and information provided to those bodies may provide insights not only in respect of the individual issue and the subject matter but also in respect of identifying and highlighting systemic issues where a proactive approach may be beneficial or warranted. Examination of complaints in that context can inform a preventative and harm minimisation approach through the development of advice and guidance. Legislative provisions that support an intelligence-led approach to the performance of those functions may well also be served. However, there are additional features that the Committee could consider in its examination of these issues.

In summary, they would include the context in which that function is performed. Those contexts range from legislative regimes in which offence provisions are highlighted and those that might rely upon less coercive powers. Accordingly, legislative provisions should be calibrated to the overall purpose of the regulatory or investigatory body and the overarching objective of that legislative regime. Additionally, the process advanced in fulfilment of those functions may also inform the Committee's deliberations. For example, that process may be at the assessment, investigative or the inquiry stage. Likewise, the class of individuals afforded any proposed protection might also inform the Committee's deliberations. Consideration of existing provisions that are available to office holders as distinct from private individuals might also assist the Committee.

Likewise, examination of existing statutory provisions operating may also assist the Committee. In particular the threshold test of seriousness and an honest belief in good faith contained under the Public Interest Disclosures [PID] Act and also aligned with the Government Information (Public Access)—GIPA—Act and the Government Information (Information Commissioner)—GIIC—Act may be informative. An understanding of the seriousness of an allegation or complaint may inform consideration of that allegation to assist in contemplating any protections for the discloser or the reporter. Relevantly, the PID Act injects the test of seriousness into the threshold requirements to be able to benefit from the protections provided. I also noted in my submissions that there are additional threshold requirements for information disclosed to the Information Commissioner.

The GIIC Act establishes offence provisions, and therefore the test of seriousness is recognised through the legislative regime. Statutory protections in the PID Act set out that the discloser must hold an honest belief on reasonable grounds that the matters disclosed show or tend to show that those reported matters are defined within the PID Act. Other statutory protections go to protect public officeholders. They are also usually predicated on the requirement to act in good faith. Protections are available for civil, criminal and personal liability under both the GIPA and GIIC acts for actions taken in good faith together with the statutory threshold that the action was for the purpose of executing the Act.

Turning to the issue of identifying barriers to the effective exercise of those functions, in examining the questions of barriers to the effective exercise by an investigatory body, the inquiry might be informed by evidence including data, case studies and any reports. Following consideration of the evidence, the absence of protections may be identified as a barrier to making complaints and providing information to investigative authorities. That evidence might also include the class of individuals for whom the absence of a protection might be determined to be a barrier.

In conclusion, the Committee may wish to have regard to evidence establishing that the absence of protection presents barriers to the effective exercise of functions by an investigative body, the context in which the regulatory or investigative function is conducted, the process or stage of that inquiry or investigation being conducted by that investigative body and have regard to the assessment stage as opposed to an investigative or inquiry stage, the existing protections that might be provided under statute in those particular stages, the class of individual to be afforded the proposed protection and the appropriateness of any threshold tests necessary to attract the protections, again bearing in mind the context in which the information gathering or investigation is undertaken. Thank you for the opportunity to make an opening statement. I hope that contextualises the submissions I have provided.

The CHAIR: Thank you very much. Does anybody have any questions for the Information Commissioner?

Mr RON HOENIG: Anybody who has an honest and reasonable belief that the organisation they are part of is engaged in serious corrupt conduct should be able to, without any ramifications, make a complaint to the Independent Commission Against Corruption. Those ramifications would relate to either breaches of any law or contractual arrangements. Is that a fair provision?

Ms TYDD: That describes the assessment provided in the PID Act under existing legislation for public officials. That is a general description of how that legislative regime may operate. There are of course the requirements of "serious" and, in respect of the Information Commissioner's role, the allegations must concern an offence under a Government information act—and there are offences provided under the GIPA Act—so a test of seriousness is also injected in that regard.

Mr RON HOENIG: Are there people who have suffered repercussions as a result of having made complaints or provided information to other organisations?

Ms TYDD: I can speak in relation to the operation of the GIPA Act and the GIIC Act directly. In those circumstances, there are protections that apply to the class of person that is a public officeholder that would in fact protect them against prejudicial action. That exists under the GIIC Act. Those protections apply when the powers under the GIIC Act are being utilised. That goes to the issue of stage that I referenced earlier whereby, under that Act, formal investigations may be in process and during those phases those protections may have application. Calibrating according to the stage may also be possible according to the existing legislation that is overseen within the Information and Privacy Commission [IPC]. However, that calibration is extremely important and may well be better calibrated to the issues of seriousness and the class of individual.

The CHAIR: For the purposes of the Acts you have oversight of, you are saying the provisions work well. Do I understand that correctly?

Ms TYDD: The experience to date is that those protections exist. I have not had cause to ensure that those provisions are utilised during my term as Information Commissioner, but they are certainly found in the GIIC Act and have ready application to the protections at this Committee is considering.

Mr RON HOENIG: Would you say that those protections are a deterrent?

Ms TYDD: I certainly think that they would operate as a deterrent, because they are quite clearly worded and quite clear in their intent.

Mr RON HOENIG: Although you acknowledge that nobody has offended against those provisions.

Ms TYDD: In the course of my holding this office, that is correct.

Mr RON HOENIG: You are probably the ideal person to ask this of, because you are not from the organisation in question. You made reference to the Queensland provisions, but how do you prevent people making vexatious complaints and complaints where people have another agenda? An organisation like the Independent Commission Against Corruption wants to have reported to it instances of corrupt conduct so it can investigate them. How do you stop vexatious complaints? Do you have a penal provision like Queensland does that deems vexatious complaints a criminal offence, or do they just eat into the resources of the organisation?

Ms TYDD: If I might answer that question with reference to the legislation administered through the IPC, the effective balancing of attracting a protection is only in prescribed circumstances—the threshold tests. The protections apply to a class of officers, that is, public officers, who may make a disclosure and hold an honest belief on reasonable grounds—so it is a subjective and objective test—that must be demonstrated prior to attracting those provisions. There is authority through case law that has examined those provisions under the GIPA Act and GIIC Act, but particularly the GIPA Act, in relation to consideration of that subjective and objective test—so reasonable grounds and honest belief.

The CHAIR: You would not get the protection unless you had fulfilled that?

Ms TYDD: Correct.

The CHAIR: In your experience have we ever tested where the limits of that are?

Ms TYDD: There are a number of cases where the tribunal has considered that and I would be happy to provide the Committee with a list of those cases as they relate to the GIPA Act offence provisions following my appearance.

The CHAIR: If you were recommending any amendments to provide protection for people to make voluntary disclosures, those voluntary disclosures would have to be on the basis that there was honest belief on reasonable grounds before they would get that protection?

Ms TYDD: Those safeguards appear to operate quite widely in some legislative regimes. The one I can speak about with some degree of authority is the GIPA Act and the GIIC Act. They are the threshold tests. Likewise, the test of seriousness of the conduct complained of.

The CHAIR: That is one aspect of the making of a complaint. An alternative consideration is the person who makes the complaint to get the benefit of an indemnity in circumstances where they are in fact involved in a criminal offence themselves. What do you say about that? Should that person be able to get an indemnity when they may have been involved in criminal activity themselves?

Ms TYDD: The concept, if I might speak to the issues that I have a capacity to address and the other legislative regimes that are before the Committee are not within my area of expertise, of attracting the honest belief so there is the notion of acting for a purpose that in the GIPA language is the public interest as opposed to what we might be seen as an individual's interest would be part of the test that is considered. Now the public interest test is quite well enshrined in the GIPA Act and it requires a balancing of a number of factors but the action must be taken in the public interest. That test is analogous I hope to the situation the Chair is describing where someone might be acting for personal interest.

Mr RON HOENIG: The reason that the Chair and I are pursuing this is because section 10 of the ICAC Act states:

> (1) Any person may make a complaint to the Commission about a matter that concerns or may concern corrupt conduct.
>
> (2) The Commission may investigate a complaint or decide that a complaint need not be investigated.

Effectively, there is no threshold test. If you look at the number of complaints that the organisation receives it must be allocating huge resources just to sift through many complaints which, from our own knowledge, are made by people who do not have an honest and reasonable belief but are simply utilising it for other purposes.

The CHAIR: I would appreciate insight in relation to that and also your insight as to whether that would act as a disincentive to someone to make a complaint in fact an assessment was going to be made as to whether they were culpable for making the complaint in the first instance. If you were to take the view that a person who makes a complaint may be the object of some penalty for making the complaint if it is vexatious, does that deter people from making complaints?

Ms TYDD: I am unable to speak with great authority on that but from a conceptual basis, the combination of factors within a legislative environment can also provide a deterrent effect. Provision of information by an investigative authority—the IPC has recently provided fact sheets informed by legal advice to set out the threshold requirements so that individuals who might make a complaint are directed towards those resources that inform them of the protections only being available to them in certain circumstances. Now that

informed decision making may have the effect that the Chair is describing in terms of a deterrent but it also may have the effect of ensuring that when a matter comes to an investigative body it comes in on all fours. That sort of active provision of advice in a transparent and consistent way may well meet the dual objectives that this Committee is considering.

Reverend the Hon. FRED NILE: At the end of your submission you talk about threshold test objective factors such as motivation. Do you think there should be an amendment to raise the motivation of the person in making the complaint in the threshold test? How would you do that?

Ms TYDD: A legislative prescription of that, I agree, would be a challenging circumstance. If I could offer that generally investigative bodies undertake a process of initial assessment that looks at the sorts of matters that I have discussed with the Committee today in terms of the context—whether or not with the seriousness would an offence provision be enlivened. The reasonableness of the belief that is held by the person making the report and that test of reasonableness may well enliven some of the factors that the member has raised. That test of reasonable business is one that is supported by a body of judicial reasoning and that may well have a bearing on that assessment.

Reverend the Hon. FRED NILE: When the issue of motivation is raised does that then raise the issue of the person making the complaint not to solve some issue but out of vindictiveness against another member in that organisation?

Ms TYDD: I have addressed the issue of context from a legislative context but that context may also extend to the situation the member is describing as to the reasonableness or otherwise of the actions. Likewise, whilst it is not prescribed it does appear in other legislation, consideration of the public interest is also one that may be available to the Committee for further consideration. Certainly the public interest as opposed to an individual's interest may well have a bearing on an assessment of motivation.

Reverend the Hon. FRED NILE: Therefore, the Committee should give consideration to an amendment along those lines?

Ms TYDD: The Committee's role in examining these issues would be informed by the evidence before the Committee as to a demonstrated need for an amendment. That would be information that I would expect would come to the Committee during the course of this inquiry.

Reverend the Hon. FRED NILE: Have you had evidence of a person making a complaint on the basis of vindictiveness against another staff member? For example, they may be the chairman and they are making a complaint about the deputy chairman.

Ms TYDD: The exercise of statutory functions of the offence provisions for an offence of the Government Information (Public Access) Act, as provided under the Act, do not contemplate those circumstances; they deal with government information. In those circumstances, in exercising those statutory functions, I cannot recall being presented with that scenario.

Mr GEOFF PROVEST: Are you currently dealing with many cases?

Ms TYDD: To enliven the offence provision?

Mr GEOFF PROVEST: Yes.

Ms TYDD: There have not been a great number of matters reported to the IPC that are reported either through the PID Act, which provides for offences, or that have been referred to the IPC or that have caused us to utilise powers of inquiry. They are very few in number.

Mr GEOFF PROVEST: They are very few. Do you see thresholds moving as community expectations or various case law gets handed down?

Ms TYDD: That is possible, and I think the injection of the subjective and objective test would allow for that movement to occur, particularly through judicial consideration.

Mr GEOFF PROVEST: So in a perfect world I'm getting the impression that you believe with your current involvement that there is sufficient legislation and sufficient regulation and it seems to be working well?

Ms TYDD: Yes.

Mr GEOFF PROVEST: Correct me if I am wrong, but I am getting the strong impression that you believe you have sufficient powers and your systems are working.

Ms TYDD: There are two sources of statutes that the IPC would draw upon in this context. One is the PID Act and the other is the GIIC Act, the Government Information (Information Commissioner) Act. Both of

those Acts provide protections according to the thresholds that I've articulated. In terms of the operations of those protections, as I provided earlier, I have not seen a situation where those protections have been tested and found wanting.

Mr GEOFF PROVEST: Thank you.

Reverend the Hon. FRED NILE: You suggest the Committee should consider a threshold requirement of seriousness before a person can make a voluntary exposure. How would that operate?

Ms TYDD: Within the GIIC Act and GIPA Act's environment the test of seriousness is injected by the creation of offences. So there are offences created under the GIPA Act of, for example, deliberate destruction of records that occurred in the course of a GIPA Act application process. So the seriousness injects to the creation of offence provisions, and that informs our determination.

The CHAIR: Thank you, Commissioner. You have already indicated that you are happy to give us some examples of cases which relate to the purpose being the public interest as opposed to individual interest and I appreciate those, but if there are any other questions that the Committee may wish to enter, are you happy to provide additional responses in writing?

Ms TYDD: Absolutely. Thank you, Chair.

The CHAIR: Thank you very much.

(The witnesses withdrew)

JOHN DENISON McMILLAN, Acting NSW Ombudsman, affirmed and examined

The CHAIR: Professor McMillan, would you care to make an opening statement?

Professor McMILLAN: Yes, thank you. I thank the Committee for the opportunity to appear. I will say a few words about the Ombudsman's submissions and then address four issues from the other submissions. Firstly to our submission: there are two main points. One is that as a matter of public policy a person who voluntarily discloses information to a statutory oversight body such as the Ombudsman or ICAC should not suffer detriment for that action of voluntary disclosure. More specifically, the person should be protected from civil or criminal liability, disciplinary action, reprisal action or other detrimental action for the act of voluntary disclosure. Statutory oversight bodies rely upon members of the public to make voluntary disclosures. It is a crucial part of the intelligence we rely upon. Any threat of recrimination will hamper or dissuade people from making voluntary disclosures. Indeed, it is why some people who make public interest disclosures about corruption either do so anonymously or request anonymity.

The other point in our submission is that the scope of the protection for voluntary disclosures in the ICAC Act is not, in our view, as extensive as that in some other New South Wales and other state statutes. In general terms, the protection in the ICAC Act applies only where the Commission has exercised its statutory powers to obtain or require information. By contrast, the protection in the Ombudsman Act applies more broadly to any person who makes a complaint to the Ombudsman. We also received complaints under the Community Services (Complaints, Reviews and Monitoring) Act, and it applies more broadly still to any person who provides information, documents or evidence to the Ombudsman. Consequently, our submission is that there is a case for broadening the scope of the protection in the ICAC Act.

I will briefly address four points in the submissions. Firstly, while the scope of this inquiry is about voluntary disclosures, some of the submissions discuss the broader question of the use that can be made of any evidence given to an inquiry in response to a summons. It is important to keep those matters separate as quite different legal processes and protections apply in respect of each category of evidence. For example, in both the Ombudsman Act and the ICAC Act, there are different sections applying to voluntary disclosures and coercive disclosures of information.

Secondly, another point at which different issues overlap is that some submissions argue that a person should not be granted a blanket immunity from criminal and civil liability by the action of making that voluntary disclosure to an oversight body. In my view, that is an uncontentious proposition. To avoid confusion, it needs to be stressed again that all I and some others propose is that a person should obtain immunity from legal processes in respect of the act of voluntary disclosure. But a voluntary disclosure does not prevent the operation of normal legal processes that may result in adverse consequences if there is other or broader evidence of a person's wrongful actions. The Public Interest Disclosures Act draws that distinction. The objects clause in the PID Act section 3 subsection (2) states that:

> Nothing in this Act is intended to affect the proper administration and management of an investigating authority or public authority.

Thirdly, a couple of the submissions stressed that a person should not be protected if they make a vexatious, false or misleading disclosure of information. That, too, is an uncontentious proposition. In my view, it is also in practice a bit of a non-issue. The legislative exclusion of vexatious or malicious behaviour from the scope of an immunity provision will usually state that a person is not protected if they knowingly or purposely provide false information. But it would ordinarily be very difficult to prove beyond reasonable doubt that a person has intentionally provided false information. It is likely too that a prosecuting authority would be reluctant to run a prosecution under a provision of that kind.

So consequently the more practical and effective way of dealing with vexatious or troublesome complaints is through the intake assessment processes of the oversight body. The Ombudsman and other bodies routinely deal with complaints of doubtful veracity or questionable motivation. We filter them out and ensure they do not cause any damage and occasionally we counsel complainants about the importance of probity in how a complaint or voluntary disclosure is framed.

Fourth and finally, a number of submissions focus on the scope of the protection that is available under the Public Interest Disclosures Act or whistleblower protection provisions for voluntary disclosures of corrupt conduct or maladministration. That protection is important in this discussion not least as the PID Act endorses the principle that voluntary disclosures should be protected. However, the protections in the PID Act are not alone sufficient, particularly in New South Wales. The protection is only available for public officials who make disclosures that meet the requirements of the PID Act. I note that Victoria has a broader protection for any

person. But, more importantly, the protective provisions in the PID Act are geared towards the objects and operation of the PID Act. Protection should also be available for any person who approaches an oversight body, such as ICAC or the Ombudsman, with information that they believe is relevant to the functions of the oversight body. That concludes my opening statement. I hope that that assists the deliberations of this Committee.

Mr RON HOENIG: There is a difference with an Ombudsman who is a bureaucratic watchdog who conducts all its affairs not in the glaze of publicity who is able to weed out vexatious complaints. There is no reputational damage other than if you finally report and publish a report. As far as the Commission is concerned it operates effectively not just as de facto convictions but also the investigation process can be in the full gaze of publicity. So the test has got to be different, has it not?

Professor McMILLAN: Not in respect of voluntary disclosures. You are correct that the Ombudsman conducts investigations in private—the statute requires as much. The ICAC can conduct investigations in public but the information that is disclosed through the public processes is information that is given in response to a summons to somebody, ordinarily to attend and give evidence. My submission is focused on the information that comes in as an act of voluntary disclosure to ICAC and goes into its assessment or triaging processes, as they are often described. ICAC, like other organisations, has to operate under statutory secrecy provisions as to the disclosure of that information.

So I see no risk in extending the coverage in the ICAC Act to voluntary disclosures, as in some other statutes. I acknowledge there is an issue about the reputational damage caused to people by evidence that is given in hearings, but I think it is a matter that is best addressed in other ways with which the Committee will be familiar.

Mr RON HOENIG: To obtain a protection should that person have an honest and reasonable belief when they make their disclosure?

Professor McMILLAN: Yes, and it is reasonably standard that a qualifying phrase such as "honest and reasonable belief" is part of the immunity provision. That phraseology is used, for example, in the Public Interest Disclosures Act.

The CHAIR: You could not get a prosecution you would think.

Professor McMILLAN: In practice though it is rare to see—I am not aware off the top of my head of any prosecution for a person having maliciously given false information.

Mr RON HOENIG: I suppose once they make their complaint, for example to the Commission, the Commission as it goes through its assessment process does all that in secret. So probably nobody has access to it. The only knowledge, I suppose, is if it is part of the assessment process, the organisation contacts the affected person, even on a preliminary basis, to obtain information and they then probably distil somebody has made a vexatious complaint. So ultimately there is no consequence for somebody making complaints where they do not have an honest and reasonable belief. So apart from all the difficulties of proving beyond reasonable doubt, you would never get the evidence even to consider it.

I suppose you would like it too, but I would like to deter the resources of the organisation being utilised in dealing with vexatious complaints—we see it all the time. Some councillor stands up in the council and says to the mayor, "I am going to refer you to the Independent Commission Against Corruption" and that will be the story in the local paper, and he writes a letter and probably has no honest or reasonable belief but is doing it for political purposes, and the reputational damage has occurred, and no-one knows anything until three or six months later when a letter comes back saying the Commission declines to investigate it.

Professor McMILLAN: Just two points. One, as a matter of public policy some of our legal and official processes would be conducted in public—parliamentary debates, local council debates, ICAC hearings, court hearings—and a consequence of that public policy choice is that some people's reputations are unfairly damaged. We provide absolute privilege to comments made in those forums, and that is a challenging issue.

The second point is that even bodies such as my own that receive information privately and conduct investigations privately have to grapple with that issue at the transactional level when we notify agencies of complaints that we have received. A complaint against an agency is usually a complaint about failure on the part of some person in that agency and, not uncommonly, we will receive an outraged reaction from an agency when they are notified of a complaint that we receive. That is where professional experience in counselling comes in and reassuring the agency that this is part and parcel of having an accountability framework but also that the risks and the damages can be minimised by the way that we conduct our processes.

The CHAIR: How many complaints does the Ombudsman's office receive a year? Have you got that information?

Professor McMILLAN: We receive close to 40,000 complaints and notifications a year and we conduct, I think, about 5,000 of those as formal investigations. Of course, we have a very broad jurisdiction that includes the community services area. For example, the public interest disclosure area is probably the more directly comparable area. The agencies received disclosures directly and so did the eight or so investigating authorities—the Ombudsman, the Independent Commission Against Corruption and the Auditor-General. In total in the last reporting year the agencies and investigating authorities received 685 disclosures under the Public Interest Disclosures Act and about 88 per cent of those allege corrupt conduct.

The CHAIR: And what were the ones that proceeded to investigation?

Professor McMILLAN: A small percentage—and I am drawing on memory here but ICAC examines all the matters it receives, and it receives into the hundreds, but I think it only takes about 3 per cent through its formal investigation processes, and a much small number of course go to public hearings.

Mr RON HOENIG: But somebody who complains to the Ombudsman about a problem that impacts upon them that might involve bureaucratic error or wrongdoing or may actually involve bureaucracies that include unfair treatment of the complainant, as part of that process if you are identifying error as part of the investigative process the bureaucratic organisation just might fix it. It is all done, nobody is publicly accused of wrongdoing other than when you ultimately prepare your report, so you effectively are free to solve problems that people have?

Professor McMILLAN: Yes.

Mr RON HOENIG: Which is a completely different function to the ICAC function?

Professor McMILLAN: That is right. I have always argued in favour of private inquiry and public reporting. This goes on to a slightly different debate and I accept that New South Wales has made the public policy choice that hearings by ICAC can be conducted in public.

The CHAIR: We are aware of it.

Professor McMILLAN: My own private stance is always that evidence that alleges wrongdoing should generally be received in private. I am in support of aspects of investigations being conducted in private, particularly the opening hearings in which you are defining the scope of the issue, you are alerting the community to what you are looking at. But when you get down to the stage of receiving evidence that alleges wrongdoing, then my private preference is strongly in favour of conducting that in private but then reporting in public.

The CHAIR: You make a distinction between a protection for the actual making of the disclosure and not necessarily an indemnity for the conduct. Is that in answer to the suggestion that someone makes a voluntary disclosure of their own corrupt conduct to seek some protection for that actual wrongdoing?

Professor McMILLAN: Correct. The Committee will be aware that the Ombudsman's Office was involved in a long and complex investigation called Operation Prospect on which I reported last year. The Committee may be aware that I did a supplementary report to the Parliament earlier this year and one section of that report directly discusses that issue. I said there is confusion in the mind of some people or, rather, there is confusion in the public criticism of the Ombudsman on the part of some people who claim that they were wrongly investigated because they had made disclosures under the Public Interest Disclosures Act. I explained in a section of that special report to the Parliament that making a complaint under the Public Interest Disclosures Act gained protection against any reprisal action for the fact of that disclosure but it does not stop the Ombudsman's Office in this investigation from investigating your other conduct as a police officer or public official in the matters under investigation.

There is a review of the Public Interest Disclosures Act underway in New South Wales by the joint committee that oversights the Ombudsman and other bodies. A submission made to that committee is that the Public Interest Disclosures Act should be clarified further to make it clear that the mere act of making a public interest disclosure does not prevent an agency—

The CHAIR: So you have to give a warning?

Professor McMILLAN: —from taking reasonable management action in respect of the person. Often public interest disclosures are made by people, for example, engaged in employment disputes in an agency as well.

The CHAIR: Should you have to give a person who is making that public interest disclosure a warning that if in fact the information involves investigation of conduct which in fact may implicate them, that that information would be able to be used?

Professor McMILLAN: Generally you cannot use the information provided in the disclosure but that information of course may alert you to other information. To give an example, in the Prospect inquiry we received extensive evidence over 80 days of hearings alleging wrong conduct by others and as I have noted publicly some of that has resulted in referrals to the Director of Public Prosecutions. We could not use the evidence that was provided in the public hearings but a common approach in these matters is that a person is invited, for example, in a separate statutory declaration or affidavit, to endorse the evidence they have made earlier. Or commonly you receive information and you then go looking for other corroborative information about the issues.

The CHAIR: But when you get that corroborative information, that information itself is not the subject—

Professor McMILLAN: Is not immunised; it is not immunised.

The CHAIR: It is not immunised, so by virtue of the fact that a person makes a voluntary disclosure and then subsequently gives potentially—under the Independent Commission Against Corruption Act it might be perceived as a coerced statement or whatever, which is protected but the corroborative behaviour of course is not. Should the person who makes the initial disclosure be warned that that might be a consequence of making that?

Professor McMILLAN: As the Committee would be aware, in the criminal justice process gaining immunity from prosecution requires a very high level sign-off, usually by the—

The CHAIR: Attorney General.

Professor McMILLAN: The Attorney, yes. Of course, the other mechanism that is used in criminal investigations is the induced statement where a person gives a statement under inducement in which they confess to a crime and none of the information in the induced statement can be used but again the prosecuting authorities may have other information on which they can rely for the purpose of prosecution.

Reverend the Hon. FRED NILE: In your earlier remarks you gave the impression—and I think it was correct—that there is more protection in the Ombudsman's Act than in the Independent Commission Against Corruption Act for people who make disclosures, is that correct?

Professor McMILLAN: Yes.

Reverend the Hon. FRED NILE: Similarly in other States there is greater protection as well. Should our Independent Commission Against Corruption Act be amended to incorporate those protections and can you provide a draft amendment that we can look at?

Professor McMILLAN: There are a couple of draft amendments in submissions that are before the Committee that provide a good template. I stopped short of trying to undertake a drafting exercise here but two broad and I think good models to look at are, one, in what I refer to as the Community Services Complaints Review and Monitoring Act 1993—and it is referred to in our submission. It provides protection for anybody who makes a complaint or in respect of any information, evidence or documents given to the Ombudsman for the purpose of that Act.

A second provision that I think provides a good model for further analysis is the provision in the Queensland legislation that establishes the Crime and Corruption Commission in which it says that action cannot be taken by reason only of a person making a complaint providing information, so it is a broader provision than the Independent Commission Against Corruption Act.

Mr RON HOENIG: Have you come across examples where reprisal actions have been taken against people who have made public interest disclosures?

Professor McMILLAN: I have noted at the end of my submission but somewhat elliptically that we had two matters before us in which there was an allegation that an employee of an organisation had suffered detriment as a result of providing information directly to the Ombudsman. I was elliptical in the description there because they were matters currently under investigation. But that is an example. The answer to your question is yes.

Mr RON HOENIG: Is it some widespread practice or are the statutory provisions acting as a deterrent, which would be novel, or is it just an academic exercise?

Professor McMILLAN: It is not a widespread problem but it is an issue. Can I draw the attention of the Committee to the annual report that the Ombudsman prepares on the oversight of the Public Interest Disclosures Act. The latest report was in February 2017.

The CHAIR: Which report is it?

Professor McMILLAN: The title of the report is "Oversight of the Public Interest Disclosures Act 1994: Annual report for 2015-2016." The report is in February 2017. One chapter of this report was on an audit that we undertook of agencies specifically on that issue of reprisal action. We report the statistics that only about 2 per cent of the public interest disclosures made to New South Wales agencies over a two-year period involved an allegation of reprisal. In total numbers, about 36 people had alleged that they had suffered reprisal. That is just the allegation.

Mr RON HOENIG: Out of those what percentage would have been—

Professor McMILLAN: It is not a large percentage but the next statistic is the more interesting one. This is at page 24 of the report. We drew attention to the annual People Matter Employee Survey that the New South Wales Public Service Board conducts. It has a large response rate of nearly 128,000 public sector employees. Twenty-two per cent of them said they were not confident that they would be protected from reprisal.

The CHAIR: That prevented them from making the complaint in the first instance?

Professor McMILLAN: They were not commenting there about the absence of a statutory protection provision; they were talking more about the organisational dynamics that if I complain about my colleague over here I am not convinced that my career will not suffer. But it draws attention to the fact that it is an issue in the mind of many people who make—

The CHAIR: I do not know if you can dispel that problem, can you? The Deputy Chair and I sat on an inquiry relating to emergency services workers. There was evidence there that there were bureaucratic impediments to the making of complaints and also evidence of potential reprisals for the making of a complaint. That was often a detriment to making the complaint. How do you dispel that?

Professor McMILLAN: Partially in relation to that particular problem in the emergency services, in the submission that the Ombudsman's office made to the inquiry currently under way in New South Wales into the Public Interest Disclosures Act we recommended there is a need for a new provision which extends the protection beyond voluntary disclosures to any official who in the normal course of their duties forwards on information. There is a whole range of people who are internal auditors, managers and financial administrators who see information and they have a duty within their own organisation to report it upwards. Indeed, the Independent Commission Against Corruption Act includes a statutory duty to refer corruption allegations to ICAC. There is no protection for the public officials who are just doing their duty. We said that is another gap in the protective framework that should be addressed. I do not know that it is a large problem but the example of the emergency services indicates that it is a problem.

Mr RON HOENIG: That 22 per cent statistic could well and truly be a psychological concern rather than a real one?

Professor McMILLAN: Correct.

Mr RON HOENIG: In an investigation the Commission only reported recently the evidence was that two people who suspected corrupt conduct passed it on to a supervisor on two separate occasions and nothing occurred. They then did not go to the most senior person in the organisation and pass those suspicions on because they were concerned. There was no evidence that justified that concern but they had passed it on and they felt there may well be reprisals although there was no evidence of it. That is why I raise it anecdotally in terms of that statistic.

Professor McMILLAN: But can I say one of the strengths of the Ombudsman legislative model to my mind is that when anybody rings the office and says, "I want to report information. Do I face any risk in doing so?" we say, "No. We can reassure you that we have strong blanket protection for people who make complaints and provide information and do so voluntarily." If somebody rang ICAC and said, "I'm a member of the public and I want to provide information to you. I am happy to put my name. Is there any risk involved?" you would probably have to say that there is an issue about the legislative scope of the protections that exist in the Act and so the guarantee is not as strong. Treated as a matter of psychology you can see the psychological reaction.

Mr RON HOENIG: Alternatively, my name may be splashed across the front pages of the newspapers because I have seen other people's names splashed across those pages. That is the difference between your organisation and the Commission.

Professor McMILLAN: Correct but if, for example, I was advising somebody privately I would probably say to them why do they not provide their allegation of corruption to the Ombudsman's office and then

it is under a statutory obligation if it thinks the corruption threshold has been passed to move it on to ICAC. Generally, we do not encourage the receipt of matters that we cannot handle; we get enough. But that would be a safer route to get protection under the current legislative framework.

The CHAIR: Under your Act?

Professor McMILLAN: Yes.

Mr RON HOENIG: That is an interesting point, because if somebody suspects corrupt conduct in a public sector organisation it is within your jurisdiction to investigate, is it not?

Professor McMILLAN: Correct. And if we think it may cross the corruption threshold we refer it on to ICAC. Sometimes they will refer it back to us. But that is quite a strong beneficial feature of the interacting legislative framework.

Mr RON HOENIG: You do interact?

Professor McMILLAN: Correct.

Mr RON HOENIG: Do they refer matters on to you?

Professor McMILLAN: I am sure the answer is yes. Well, I do not think they have a referral provision. I can get back to the Committee on this. My guess is that they would tell the person, "We are not going to take it any further as a corruption matter, you can take it to the Ombudsman." I do not think it would be referred but I may be wrong in that.

Mr GEOFF PROVEST: In your opening address you spoke about public officials but I think you referred also to Victoria's model. Could you explain that a little?

Professor McMILLAN: In the New South Wales Public Interest Disclosures Act there are strong protection provisions for voluntary public interest disclosures but the two limitations are that they apply only to public officials who make disclosures under the Act and, secondly, that the public official must have an honest and reasonable belief that the information they are providing exposes corruption, maladministration or waste of public funds. There is a good submission before the Committee from the Independent Broad-Based Anti-corruption Commission in Victoria. It administers the public interest disclosures Act in Victoria and it draws attention to the provision which provides protection under the PID Act for any person who makes a disclosure of information.

It is interesting: My impression—and I know the Committee is meeting by telephone later with Mr O'Brien and that is a matter that it can explore—from its submission is that it probably relies more on the PID Act to provide this protection for voluntary disclosures than I think is—I think it is important but I think it is desirable to have additional protections.

Mr GEOFF PROVEST: That being as it may, the protection for public officials seems to differ from that of general members of the public. Are you promoting a one-size-fits-all level of protection rather than this stepped level of protection?

Professor McMILLAN: I would. At the end of the day as a matter of legislative drafting it is probably necessary to have an Act like the PID Act that applies across the whole of Government with protections and then have protections written into the acts of the actual oversight bodies and of the Ombudsman, Information Commissioner and ICAC. That will mean that you get quite a lot of overlap between the protective provisions but, at the end of the day, I think it is important that all the gaps are closed.

The CHAIR: I have one question alluding to an issue that Mr Hoenig raised earlier. In respect of the problem of reputational damage and the mere making of an allegation, do you think the provisions in the ICAC Act—and I assume they apply to your Act—are sufficient for dealing with people who disclose material that they receive in their capacity as an employee of an organisation like the Ombudsman or the ICAC, which subsequently may have the impact of getting into the public arena?

Professor McMILLAN: So whether—

The CHAIR: We are dealing with a cohort of people who seek protection for the making of the allegation by the officer. What about the persons who receive the information? Are there sufficient protections for the public to ensure that they do not disclose information which they receive?

Professor McMILLAN: As to the protection under the Ombudsman scheme, the real protection is the doctrine of natural justice that the Ombudsman is under, both a statutory and a common-law obligation not to make any report that adversely damages a person's reputation without giving them an opportunity to comment.

There is some protection under the ICAC Act, of course. In respect of public hearings, natural justice provides no protection at all. It may provide protection in respect of the final report—at least of the nuanced reporting in the final report—but not in effect of the fact of the disclosure.

The CHAIR: If employees of the Ombudsman or ICAC are triaging complaints and someone then discloses to a member of the public—potentially a media outlet—the substance of a complaint they have received, how would you deal with that?

Professor McMILLAN: If an employee—

The CHAIR: If the complaint appeared in public, via the media.

Professor McMILLAN: Firstly, if a disclosure came from within my office, I would be doing a very thorough inquiry as to whether one of my employees had broken the secrecy provisions. We have very strict secrecy provisions. If they were, I would be referring it off to the DPP. If I thought somewhere in the chain of investigation an official elsewhere may have leaked inadvertently or deliberately disclosed, then we look at complaints and matters that we take up on an own-motion basis and I would be looking very closely at that. If it were in another agency, I would probably be asking for an appointment pretty promptly with the head of the agency to examine how this had happened. In short, I would treat it as a very serious issue, that information.

The CHAIR: Do you think the powers afforded to you in relation to investigating that are sufficient?

Professor McMILLAN: Yes. The only qualification I would make on that is—and this is at the end of the Prospect era—in a complex investigation of that kind there would have been some advantage in having public hearings just to set the scene, not to deal with the allegations. We have no statutory function but we dealt with it in other ways. I used the reporting powers to the Parliament. I made progress reports to the Parliament to dispel it. There is almost always another way that you can deal with it.

Reverend the Hon. FRED NILE: How long did Operation Prospect take?

Professor McMILLAN: Four years from commencement to end.

Reverend the Hon. FRED NILE: That would be something quite unique. There has never been one, as I understand it.

Professor McMILLAN: It was unique. As the report said, we conducted over 80 days of hearings, assembled over a million pages of documents, 130 witnesses, the most extensive procedural fairness process I have ever seen—and bear in mind, as I always say, it was a dispute that had already been running for about 12 years and had been investigated, but not successfully, by others. The good news is it is largely out of the media proper. Rarely is anything now said about that. I regard that as a sign of confidence in the investigation report.

The CHAIR: That is a significant legacy of yours.

Professor McMILLAN: I will not claim any personal—

Mr RON HOENIG: I do not know any of the details but I imagine, given the nature of the allegations you were investigating and given certain people complaining about that, they would not have liked for them to have been aired publicly either.

Professor McMILLAN: Correct.

The CHAIR: Thank you, Professor. If we have any additional questions to ask—

Professor McMILLAN: Yes, I would be pleased to handle them.

(The witness withdrew)

(Short adjournment)

MICHAEL JOHN MURRAY, Parliamentary Inspector, Corruption and Crime Commission of Western Australia, before the Committee via teleconference, sworn and examined

The CHAIR: Good morning. Thank you for your submission to the inquiry into protections for people who make voluntary disclosures to ICAC. Before we commence, do you have any questions as to the process of this Committee?

Mr MURRAY: No. You have my submission. I presume it is not necessary to go over that again?

The CHAIR: That is correct. Would you like to make a brief opening statement in which you can draw the Committee's attention to any specific issues referred to in your submission. Your evidence is being recorded via teleconference so I ask you to speak clearly and slowly for Hansard.

Mr MURRAY: No problem. The thing that attracted my attention was the notion that the desirable level of protection from any liability or proceedings and publicity could only be obtained, according to the suggestion in the term of reference, as a blanket proposition applicable to all who appeared voluntarily to disclose information to ICAC for the purpose of its functions. That seemed to me to have an undesirable element that it was a blanket remedy across the board beyond that which might be arguably necessary to be available. It seemed to me that if you were concerned with the protection of people, until it was established that there was a liability and a need to have them dealt with, you needed to focus upon the protection that was required and make it available without, as I thought might emerge from the application of the proposition within the term of reference, precluding later action to make people amenable to the processes of the law when it was ultimately discovered that they were guilty of some misconduct which required prosecution or other proceedings for it to be resolved.

I thought if the concern in relation to that was a desire to protect people from reputational harm and things of that sort until it was discovered that they deserved to be exposed in that way, then there were other means of doing it. The most obvious one being that the hearings and processes of investigation to which these people had voluntarily exposed themselves could be dealt with privately, except in the circumstances where ICAC or an equivalent body thought that it was necessary in the public interest to advance the proper performance of their function to have some part or all of the processes in which they were engaged conducted in public. In other words, what seemed to me to be the appropriate outcome is very much, although it is not perfectly written in our legislation, the process itself that applies in Western Australia.

My proceedings and my activities by way of investigation or inquiry are by our Act always in private, unless I consider that there is a need to report to the Parliament and therefore publicise the outcome of those processes. For me it is not a fallback position; it is a position which applies by force of the statute until, by way of final report to the Parliament, I determine that it is necessary for the proper performance of my function to expose an individual who has been found to have been guilty of corruption or other punishable misconduct in some form to the accountable process of publicity so that what they have done is generally known.

Insofar as the Corruption and Crime Commission is concerned, their process is a little more relaxed, if I can use that term. It is probably not the right word. I referred in my submission to sections 139 and 140 of the Corruption, Crime and Misconduct Act which is our governing statute. Section 139 simply provides for the fallback position so far as the Commission is concerned that generally speaking except as provided in section 140, any of their examinations are not open to the public. And there is provision made for people to be properly represented and for those sorts of people to attend. The crucial point arises under section 140 subsection (2), which provides that the Commission may open an examination to the public if—and this is the operative phrase about which there can be argument, I think, and I will speak about that in a minute.

> The Commission may open an examination to the public if, having weighed the benefits of public exposure and public awareness against the potential for prejudice…

—and you see that the term "prejudice" is very general—

> …or privacy infringements, it considers that it is in the public interest to do so.

No change has yet been made to our legislation, but it has been suggested that there might need to be more particularity in relation to that generally stated consideration. One can argue over the words—lawyers love to do that. But in the end what the legislation is driving to is that you provide protection to people even in circumstances where you open the processes to the public unless the necessity for public awareness and public exposure outweighs the considerations which would generally lead you to hold your hand in relation to persons

appearing and providing information in relation to reputational and other aspects of their involvement. I am sorry. That was rather long-winded. I did not mean it to be.

The CHAIR: That is okay.

Mr MURRAY: But I think that was the central focus. And putting it very shortly, what seemed to me to be the case was that although it was rather an intrusion for somebody like me to say so, there did not seem to be the need to achieve what was behind the term of reference, that is to go so far as a blanket solution. But it could be properly dealt with fairly and appropriately by allowing the ICAC, as is allowed to our Corruption and Crime Commission, the capacity to make a properly informed discretionary judgement.

The CHAIR: Can I ask you to turn your mind to a different aspect than the protection of reputational damage, although others might want to ask you about that? An aspect of the inquiry relates to the actual person who makes the voluntary disclosure to the ICAC.

Mr MURRAY: Yes.

The CHAIR: It appears that the current provisions as has been represented to us do not give that person sufficient protection and that the only protections afforded to persons who make statements to the ICAC are those who do so in circumstances where they make an induced or coerced statement. Should a person who makes a voluntary disclosure to ICAC receive the same level of protection as a public interest disclosure?

Mr MURRAY: I would have thought so. I think that there is little distinction in relation to—let me put it this way. I do not think a greater level of protection should be afforded to an informant simply because he or she, perhaps seeing the writing on the wall, comes forward voluntarily.

The CHAIR: Yes.

Mr MURRAY: In other words, I think that the need for the level of protection should apply across the board to those who are informants in one way or another in the processes of investigation.

The CHAIR: And I assume from that that a person should not be able to obtain an indemnity from prosecution necessarily because they have made a voluntary disclosure?

Mr MURRAY: That would be my view.

Mr RON HOENIG: Or a benefit.

The CHAIR: Or a benefit of any description in circumstances where they have potentially been involved in corrupt conduct merely because they have made a voluntary disclosure?

Mr MURRAY: That is it in a nutshell.

Reverend the Hon. FRED NILE: In your view should there be greater protections for people who make voluntary disclosures to the New South Wales ICAC?

Mr MURRAY: No. In my view the level of protection should be related not to the voluntariness of their appearance but to the circumstances surrounding them and what their involvement and level of involvement is ultimately found to be and to the, I would say as in relation to Western Australia, overriding consideration of the degree to which privacy considerations should be overwhelmed in the case of particular individuals by reference to the public interest in public accountability.

The CHAIR: What about the suggestion that by not giving someone a protection for making a voluntary disclosure you may discourage people from actually making disclosures?

Mr MURRAY: Yes, I picked up on that and I am glad you raise it. The experience that I have had—and I have been in this job since my retirement from the bench really, over a period of about five years—observing the work of a number of Commissioners in heading up the Crime and Corruption Commission, is that the public benefit of letting someone know what you are doing will bring forward those who might not otherwise want to come. The fact that they can come forward in the context of what is under the statute the fallback position of private involvement, in my experience in fact increases their comfort and capacity to come forward. But the point then is for a final resolution of those privacy issues to wait and see what the nature of the involvement was and apply it to the overall consideration of the public interest to which I have referred.

Mr GEOFF PROVEST: One of the issues I would have, in terms of the legal interpretation of the voluntary disclosure, if I was guilty of doing something and I made a voluntary disclosure, I have been found guilty of that and subsequently went through the court system, would that voluntary disclosure be taken into consideration by the sentencing judge? My knowledge of the law in other crimes is that that a plea of guilty to begin with is often taken into consideration.

Mr RON HOENIG: The answer is yes.

Mr MURRAY: Indeed, the answer is very much yes, and particularly if the nature of your voluntary involvement in the process is one that brings to account others who have not come forward. Do you see what I mean?

Mr GEOFF PROVEST: Yes.

Mr MURRAY: So that you would get a benefit which is greater in the criminal processes of the law and the sentencing process if you are not only participating voluntarily in accepting such guilt as you may have but if you are also helping the system to uncover the criminality of others.

Mr RON HOENIG: I noticed in the letter that you wrote to us you referred to the provisions in the Western Australian Act. You indicated that examinations are not open to the public unless the Commissioner considers it is in the public interest to do so and you say that the public examination is discretionary. You then said the Commission should always err on the side of privacy in regard to whether examinations should be public or private. You then made the point that "in my view, publicity of that kind is more likely to dissuade informants from coming forward voluntarily".

Mr MURRAY: I thank you for that too, I think that is a valuable point to bear in mind, that if the general view is that the system operates so that all those who get involved in its activities find themselves on the front page of a newspaper, you will discourage people coming forward in droves. That is really putting it clumsily.

Mr RON HOENIG: I think you have put it just like I did to the witness before you, which happened to be the State Ombudsman when I was comparing his function of conducting his inquiries not in public compared to the Commission that operates in public, as to whether that deters people from coming forward.

Mr MURRAY: I think it is a clear point. The other thing I might say is that both the Commissioner, who was a colleague of mine on the bench, the Hon. John McKechnie, and I will often publicly report to achieve proper accountability, without exposing by infringement of the privacy of particular individuals, those who might have been involved. One example that springs to my mind is a case where within the Commission there was a little drug ring at one stage and that was exposed and dealt with. The people who were involved in that and committed those offences were put before the courts and in each case they argued, and the court agreed, that a protection order should be placed in the proceedings to prevent them from public exposure in relation to those criminal processes, and it was thought, apparently, by the courts not to be necessary for that to be carried forward in a public arena in that way.

So when I reported and when the Commissioner reported through to the Parliament that this had been dealt with, the important point was that it had been discovered, it had been properly investigated, there was full accountability, but there was no need, and it would have been wrong I think, for us to do other than was done by the courts and to leave private the identity of the individuals who had been involved. Does that little illustration help?

Mr RON HOENIG: It does. You referred the Chairman earlier on to the provisions of section 140 of your Act in relation to the potential for prejudice or privacy infringements being one of the discretionary considerations. Does the prejudice also refer to the prejudice for a future criminal trial?

Mr MURRAY: I think it does. Indeed, later provisions of the Act deal with the interface between the activities of the Commission and my activities and the ordinary processes of the criminal law. They are separately expanded upon. But what I had in mind when I made the observation about the use of the words "the potential for prejudice" is that there it is used in relation to prejudice to the individual and there is the general observation that the Commission may weigh against that the benefits of public exposure and public awareness. That is clear reference I think, although people have argued how wide it all is, but I think it is a clear reference to the sort of accountability outcome which the proper work of an integrity agency ought to be directed towards. Do you see what I mean?

Mr RON HOENIG: I do.

Mr MURRAY: I apologise for the clumsiness of my illustrations but I have tried to indicate that if you have a fall-back position of privacy, then it does not preclude the abandonment of that when the exercise of discretionary judgement shows that you need to have public exposure to secure the outcome of public accountability of the process.

Mr RON HOENIG: Which you can do by public reporting, can you not?

Mr MURRAY: Yes. As I endeavoured to illustrate, sometimes you can achieve that degree of public accountability which should give people the comfort of knowing that the agencies are working effectively by simply saying so and saying what inquiries produced that result without at the same time exposing individuals where private harm would be great without that increasing demand of public benefit.

Mr RON HOENIG: Should protections be available to those who have an honest and reasonable belief? Is that a sufficient test to overcome your concerns?

Mr MURRAY: No, I would not have thought so.

Mr RON HOENIG: Why?

Mr MURRAY: If you are talking about an honest and reasonable belief that they were going to be provided with protection, that seems to me to be an irrelevant consideration.

Mr RON HOENIG: No, I am talking about an honest and reasonable belief in the material that they are actually providing, say, to the Commissioner?

Mr MURRAY: Oh, that it is true?

Mr RON HOENIG: Yes?

Mr MURRAY: No, I would have thought that is a given. I do not think that can be a consideration which relates to the question of whether or not privacy should be extended.

Mr RON HOENIG: No, I am sorry; we are at cross-purposes.

The CHAIR: I think there are two categories of people we are dealing with here. There is the category of person who potentially is involved in corrupt conduct themselves who makes a voluntary disclosure?

Mr MURRAY: Yes.

The CHAIR: And Joe Citizen who comes along and makes a voluntary disclosure.

Mr MURRAY: Yes.

The CHAIR: Now in respect of Joe Citizen who comes along, knocks on the door of ICAC and says, "I have information which I believe would require you to conduct an inquiry", should that person be given protection under the Act from consequences, either criminal or civil, arising from the evidence that they give if the evidence that they provide to the Commission is honestly and reasonably held?

Mr MURRAY: Well yes, I think so. I would not use the phrase "honest and reasonable" in that context though. If they come as a bystander, an informant, without involvement themselves, then they should have the assurance that the system that we have in Western Australia and I think elsewhere in most places provides that they will not have their privacy infringed.

The CHAIR: Or any other consequences of giving that evidence surely?

Mr MURRAY: That is right.

The CHAIR: Maybe their employment will be impacted?

Mr MURRAY: Exactly, yes. So for all of those reasons it is important that they should have that assurance and they would do so. The more acute question is leaving open to the integrity agency the capacity to deal publicly with somebody who is involved when it appears necessary that that involvement be aired publicly. Does that make the distinction? In other words, I would say that there is no basis upon which an ordinary person who is simply an informant who observes something and comes forward and is prepared to tell about it would have their privacy infringed without their consent.

The CHAIR: Or other processes taken against them?

Mr MURRAY: Quite.

Mr RON HOENIG: Just going back to that because it was not something that I envisaged until you said it and now I understand what you mean about the problem of publicity. If somebody comes forward to inform an integrity organisation about serious corrupt conduct, if they wish to maintain their privacy, should it be a matter for them to maintain their privacy?

Mr MURRAY: No, because I think it still needs the independent judgment of the agency itself as to whether their belief in fact entitles them to it.

Mr RON HOENIG: So they have an honest and reasonable belief that serious corrupt conduct is taking place and they go to the integrity agency and provide them with that information. Are they entitled to maintain their privacy unless they consent?

Mr MURRAY: I would say it need not be provided as an entitlement as such but the practical answer should be yes and that practical answer of yes is achieved by the fact that, they offer ground, unless a contrary decision is ultimately made which affects them, then they are going to be dealt with in privacy.

The CHAIR: Thank you, Inspector, you have been very helpful. If the Committee has further questions, would you be happy to provide further answers to those questions in writing?

Mr MURRAY: Yes indeed. I am at your disposal.

The CHAIR: Thank you very much and thank you for your time this morning.

(The witness withdrew)

PAULINE WRIGHT, Chair, Public Law Committee and President, Law Society of New South Wales, affirmed and examined

ANDREW CHALK, Deputy Chair, Public Law Committee, Law Society of New South Wales, sworn and examined

The CHAIR: Do you have any questions about the process? You have both been here before, so you are familiar with the way we operate.

Ms WRIGHT: Yes.

The CHAIR: Would either of you like to make an opening statement in respect of the subject matter of the inquiry?

Ms WRIGHT: Thank you, Chair. I would like to thank the joint Committee on the Independent Commission Against Corruption for providing the Law Society with this opportunity to speak to you today. The Law Society, as you would be aware, made a written submission to the Committee earlier this year, largely informed by the work of our newly created Public Law Committee of which I am Chair and Andrew is Deputy Chair. In preparing that submission we looked at the existing legislative protections for those who provide information to the New South Wales Independent Commission Against Corruption. We noted that currently the Independent Commission Against Corruption Act 1988 only provides protection from criminal and civil liability to people who provide a statement of information or documents to the ICAC where the ICAC has exercised its power under the Act to require or obtain the information or documents. Those protections do not operate where people have voluntarily disclosed information to the ICAC about corrupt conduct of which ICAC is not aware and not at that time currently investigating.

We understand that in limited circumstances there may be protections for voluntary disclosures made by public officials under the Public Interest Disclosures Act but, as we noted in our submission, there may be cases where members of the community who are not public officials—for instance, lawyers in litigation—may become aware of suspected or actual corruption which is relevant to the mandate of the ICAC. Those people would not benefit from the protections under the Public Interest Disclosures Act 1994. If they were to share the information they had with the ICAC they would risk incurring civil liability arising from contractual or employment undertakings, for instance. We formed the view that the Independent Commission Against Corruption Act should be amended to offer protection to a person who makes that kind of voluntary disclosure to the ICAC whether or not that person is a public official.

We made a number of suggestions in our submission for consideration in developing such a protection. We felt, firstly, that the new provision should be in similar terms as protection for public officials under section 10 of the Public Interest Disclosures Act. This would require that the person providing information should have an honest belief on reasonable grounds that information disclosed shows or tends to show that a public authority or another public official has engaged, is engaged or proposes to engage in corrupt conduct. Secondly, in light of the scope of comparable provisions in other jurisdictions, the protection from liability for voluntary disclosures under the Independent Commission Against Corruption Act should be extended to provide protection for criminal liability. We also recommended or suggested that the Committee give consideration to whether an amendment to the Independent Commission Against Corruption Act is necessary to ensure that all people who voluntarily provide information to the ICAC with an honest belief on reasonable grounds of corrupt conduct are protected from detrimental action.

It should be noted that under the Independent Commission Against Corruption Act, which may not be the case in other jurisdictions, the public interest and protection of public trust in the processes of the State are paramount considerations. Everything under the Independent Commission Against Corruption Act is predicated on it being for the public interest. That may be a point of difference. That is my initial statement. We welcome any questions.

The CHAIR: Let me ask you about a lawyer who breaches his client's privilege and discloses information he has received from a client. Is it your submission that that lawyer ought be afforded protection?

Mr RON HOENIG: No. They cannot make that submission.

The CHAIR: I think that is the submission.

Ms WRIGHT: If that is the way my submission came across that is not the point that we were making. It is more that in the process of litigation, for instance, a solicitor might through the process of

discovery come upon information and when they join the dots they realise that there may be some corrupt activity going on in the other party's case and they feel it is so serious that they ought to provide that information.

The CHAIR: You would not be recommending that the lawyer's obligation to their client in terms of the privilege they had with respect to the activity of their own client could be the subject—

Ms WRIGHT: I do not think so—

Mr RON HOENIG: It is absolutely fundamental. Even if a client confesses to his solicitor or barrister, it is subject to legal professional privilege and cannot be disclosed.

Ms WRIGHT: That is right—

Mr RON HOENIG: It cannot be "think". Your submission should be far firmer than that, I would have thought, coming from the Law Society.

Mr CHALK: One example might be where documents are obtained under a subpoena or through discovery, as Ms Wright mentioned, they are subject to an implied undertaking to the court that they will only be used for the purposes of the litigation. It may be that information that is derived from those documents alerts not just the lawyer but also their client to matters that indicate corruption that has taken place. That information cannot be disclosed to ICAC.

Mr RON HOENIG: If a document is obtained conditional upon an undertaking to the court how can you say that the undertaking to the court could be ignored for the purposes of making a disclosure? An undertaking to a court has the same force as an order of a court, does it not?

Mr CHALK: It does.

Mr RON HOENIG: You would need to go back to the court if that is what you wanted to do, would you not?

Mr CHALK: That is the current option. But a private disclosure to ICAC in circumstances where that disclosure, as was mentioned previously, it were a public servant doing it would be protected. There are instances where that might be the appropriate course.

Mr RON HOENIG: Could you give me an example of how a solicitor might come into the knowledge of information that should be reported but cannot be? If it is not legal professional privilege and it is not undertakings, what other scenario would prevent a solicitor from disclosing or reporting corrupt conduct?

Mr CHALK: Information, for example, disclosed on a without-prejudice basis by a third party. There could be many scenarios that do not involve their own client's privilege or where the client would be happy to waive any privilege which we agree would be required if it existed.

Mr RON HOENIG: Is that getting the client to waive privilege to supply information to an integrity agency against the client's interest?

Mr CHALK: No, it would not necessarily be against the client's interests. It may involve conduct by third parties, other parties, where the client is completely innocent of any wrongdoing but where there is effectively a contractual liability on the client—and for that matter extending to their lawyer—not to disclose.

Mr RON HOENIG: You obtain information from a third party that forms part of the preparation of your case, which ordinarily would be subject to privilege until you use the document or the material. To report that material, you would need your client to waive privilege in respect of that material to enable you to report it. Is that what you are saying?

Mr CHALK: Yes, but the issue is obviously not limited to the client. It may be in the client's interest that it be reported.

Mr RON HOENIG: You also do not want to create a situation in which the law puts upon a solicitor an obligation to report which might be inconsistent with the interests of their client in litigation. It may not be in the client's interest to have it reported until the outcome of the litigation.

Mr CHALK: I think we would agree with that, but that is not the suggestion. In fact—

Mr RON HOENIG: Every time the Parliament legislates it is a blunt instrument which always has unintended consequences that are often significant. That is the reason I am putting all these questions to you.

Mr CHALK: The situation at the moment is really one where the Law Society believes there is a disincentive for people who are not covered by the Public Interest Disclosures Act or who are not being compelled by ICAC to come forward and report.

The CHAIR: Would it be misconduct for a solicitor who became aware of a corrupt practice in the course of a transaction that they were involved in to not report it to ICAC?

Mr CHALK: They would have a duty not to participate in any corruption but, equally, they are obliged to protect their client's confidence.

The CHAIR: If they became aware of a potential scheme involving corrupt conduct during the course of a transaction, like a property transaction or whatever, would it be misconduct for them not to make a disclosure to an agency like ICAC?

Mr RON HOENIG: Probably would.

Mr CHALK: Are you happy for me to answer?

Ms WRIGHT: Yes.

Mr CHALK: If the information came to them as a result of their retainer, they are obliged to maintain the confidentiality but they would also effectively be obliged to cease to act for that client. The duty to maintain the confidentiality would be ongoing, but they could not continue to act for that client in those circumstances, as I understand it.

Ms WRIGHT: Unless of course the client waives the privilege, in which case the solicitor could then report it.

The CHAIR: We have become a bit bogged down on this issue.

Reverend the Hon. FRED NILE: I have a general question: Should protections for voluntary disclosure differ for public officials, or should public officials and the general public be under the same rules?

Ms WRIGHT: In my view, the same rules should apply. If someone makes a disclosure in good faith on reasonable grounds as the result of a honestly held belief and it is in the public interest, in my view that should be the threshold and they should be protected no matter what station they hold.

Mr RON HOENIG: What about wrongdoers? Should they be protected if their disclosure is about protecting their own interests?

Mr CHALK: That is obviously a more difficult one. Speaking from my own experience here, I heard the evidence of the Inspector and we have been in situations where people have been approached, bribed, solicited or offered—these are not public officials—and have wanted to do something about it, but when you advise them you have to give them the risks that they are exposed to. In my experience, most of them are still prepared to make the disclosures but they often do so knowing that they will be, at least in theory, at risk of defamation and at risk of breaching their conditions of employment and sometimes contractual conditions in the case of accountants and auditors. Having these types of protections, we believe, will actually serve as an encouragement for people who are not directly involved to come forward and make the disclosures.

Mr Hoenig, as to your comments, could people who have been connected with corruption choose to belatedly jump on the bandwagon, so to speak, and avail themselves of the protections? That is clearly a risk. That is something that would need to be considered, but it is a protection that is essentially already there within the Public Interest Disclosures Act with the qualifications in that Act. One distinction I would perhaps draw between the New South Wales scheme and the Western Australian scheme is that, unlike in Western Australia, there is a much greater emphasis in New South Wales not on the privacy of individuals, whether they be informants or perpetrators of corrupt conduct, but on the public confidence in the integrity of our systems of Government. That focus has led to a preference for matters to be conducted in public.

The CHAIR: Let me ask you about that. You heard the Inspector say that a potentially greater deterrent to people making voluntary disclosures is the fact that they may end up in a public inquiry and have the evidence that they are giving in a public inquiry. He had a distinct preference for having a private inquiry because that then mitigated the potential exposure of them in public and was probably a greater facilitator of making a voluntary statement in the first instance. What do you think of that proposition?

Mr CHALK: I certainly respect to the Inspector's position, but these matters usually start with somebody feeling annoyed or aggrieved that something they have seen take place is wrong. The initial approach is necessarily confidential. The risk, of course, is that at some stage they may be compelled to give that confidential disclosure in evidence in a public forum. Yes, people know that is the risk that they may take.

Equally, though, there is a risk—and it arises from duties of procedural fairness—that if a disclosure is made privately and the whole system is one that emphasises privacy, that you can have retaliation once the person who is the subject of the complaint becomes aware that somebody has blown the whistle. They go searching for the leakers and the informants and while that whole process is private, the witnesses do not have the protections that they know come from the light being shone on the issue. So those considerations do counterbalance the Inspector's comment, and that is before you get to the wider public interest of people within the community who believe where there is potential corruption going on that it will be exposed in a way that they can see the workings and the evidence of what is going on.

Ms WRIGHT: So there are benefits in having that open and transparent system—there are benefits to the witnesses flowing from that and there is also the benefit of the public confidence in the process, which is a paramount consideration under our Act.

Mr RON HOENIG: If a person provides very serious information to police as a law enforcement authority—for example, information relating to the murder of someone—they can be assured that the police will go to their graves before they disclose that information. If you complain to the Ombudsman and tell the Ombudsman something, you will be assured that if you want to maintain privacy and confidentiality that the Ombudsman will do so. If you complain to the ICAC, you have no such guarantee. The point the Chair was making in his questioning, and the issue the Inspector in Western Australia was trying to get across in his submission, was that currently there is a deterrent to people coming forward. Now that deterrent may not relate simply to the provisions of protected disclosures, it may relate to the loss of privacy and confidentiality.

Mr CHALK: I think these issues go to the heart of the philosophy behind the ICAC Act in New South Wales as against Western Australia.

Mr RON HOENIG: And every other State.

Mr CHALK: I understand that analogy. A similar one might be, for example, the difference between a coronial inquiry and a criminal trial.

Mr RON HOENIG: In a coronial inquiry if there is a reasonable prospect of conviction, a coroner has to stop and refer the matter to the Director of Public Prosecutions. Coronial inquiries only take place when no-one is going to be charged as a result of the death. So invariably when a coroner starts the inquiry there is no prejudice flowing to anyone in terms of criminal proceedings, although someone may end up being charged because of admissible evidence. That is a different situation altogether, is it not?

Ms WRIGHT: It probably is but I think what we have to ask ourselves is why it is that people want their confidentiality to be protected in these circumstances. Usually it is because they can see that there may be consequences to themselves such as retaliatory employment threats and those sorts of things. That is what they are afraid of. If we can build in a guarantee that they are not subject to those sorts of problems, then their fear of giving evidence and their desire for confidentiality is actually taken away.

Mr RON HOENIG: Should there be a requirement then that those people have an honest and reasonable belief?

Ms WRIGHT: Yes, that is our submission. That is the balance. You cannot say, "I want the protection but I should be allowed to say what I want." Because when you have an open and transparent system, as we do in New South Wales, the potential for reputational damage for the person complained about is enormous. In our view there has to be that test of the honest belief on reasonable grounds.

Mr RON HOENIG: Should there be sanctions if they do not have an honest and reasonable belief?

Ms WRIGHT: There would be. In our view, for a start, someone would have a private ability to sue them for defamation. There would be a number of ways that that person could be held liable if they came in without that honest belief and without reasonable grounds—for instance, mischievously or vindictively.

Mr RON HOENIG: I suppose that depends upon the Parliament reforming defamation laws so that people could afford to take them.

Mr CHALK: It could also extend to perjury, for example, which, depending on how the disclosures are made, would not require any—

Mr RON HOENIG: Or it could be public mischief but, as the Ombudsman pointed out to us, no-one ever gets charged.

Mr CHALK: Yes.

The CHAIR: Thank you both for appearing before the Committee this morning. It has been a vigorous but helpful discussion. If the Committee has any additional questions would you have any objection to answering them in writing?

Ms WRIGHT: Not at all.

(The witnesses withdrew)

(Luncheon adjournment)

LLOYD ADAM BABB, Director of Public Prosecutions, sworn and examined

The CHAIR: We are resuming the inquiry into voluntary disclosures to the Independent Commission Against Corruption. We have before us the Director of Public Prosecutions, Mr Lloyd Babb. I thank Mr Babb for being with us this afternoon.

Mr BABB: My pleasure.

The CHAIR: Mr Babb, you have been here so many times. I take it you have no issues with the processes or procedures of this Committee?

Mr BABB: No, I do not.

The CHAIR: As I ask everyone, is there an initial statement by way of articulating the essence of your report that you would like to provide to the Committee?

Mr BABB: No. I have put it in written form and I am appearing to answer questions that you might have.

The CHAIR: There are two forms of potential disclosure to the ICAC. One is by Joe Citizen who becomes aware of material which may give rise in his or her mind to a belief that there has been corruption. Alternatively there is another category of person that potentially has been involved in corrupt activity themselves and wishes to make a voluntary disclosure to the ICAC about that corrupt conduct. Is there a difference in respect of which those persons who make voluntary disclosures to ICAC should be treated?

Mr BABB: Yes. And this was the essence of my concern in my letter to the Committee. I would think that it would be appropriate to make clear that there is no obligation to maintain secrecy in relation to public servants that might otherwise have such an obligation or people who may feel that they have an obligation because of their employment contract or the like. That is a very different thing to the broader possibility of giving civil, criminal or disciplinary indemnity to someone just because they disclose corrupt conduct. One of my real concerns would be someone who has engaged in corrupt conduct and protects themselves by disclosing it and getting some protection from any further action as a result.

Mr RON HOENIG: That is precisely what the Inspector of the West Australian Corruption and Crime Commission told us.

Mr BABB: Yes. I am not surprised. I could not imagine anything more harmful to the public's perception of the criminal justice system than to think that you could avoid liability by self-disclosing in those circumstances.

The CHAIR: The second category of people, the person who makes an allegation who is not involved necessarily in corrupt conduct themselves, should they be given any protection? Say, for example, protection against the civil liability of defamation in respect of a disclosure which they have made to the ICAC?

Mr BABB: I am not an expert on defamation and whether it might apply in that limited disclosure to the ICAC, but as a general principle I think the disclosure of corruption is a very important public issue in the interests of justice. And anything that encourages disclosure, say for example, making sure that there was no obligation or perceived obligation to remain silent about knowledge of corruption, would be a positive thing. I have read the other submissions that have been put into this Committee and people have said that it is ambiguous, that section 109 (5), for example, only applies to public servants but does not apply to people who are not public servants.

On reflection, I would agree with that interpretation. There may be need for some clarification. I think the ICAC initial submission itself was suggesting that something that clarified that there was no obligation to maintain secrecy would be desirable. That is a different thing to indemnification in relation to civil, criminal or disciplinary action, which could be a broader concept that might cover someone who was disclosing their own involvement in corruption.

Mr GEOFF PROVEST: So you think you could get over those secrecy provisions with some of these?

Mr BABB: Yes. I think so. I was just having a look at some of the other jurisdictions. Most of them seem to focus on removing the obligation to maintain secrecy as opposed to indemnifying people.

Mr RON HOENIG: On that wrongdoing question in a master-and-servant circumstance where the servant is compelled to participate in a fraudulent act by their master and the consequences of not cooperating or reporting is losing their employment, for example, should they be protected? Because as a matter of law, they are participating in a common purpose but their positions are not equal. So if we were to take your view and Mr Murray's view in a pure way, that would exclude them. What is the solution?

Mr BABB: I would have thought that that would be a good example of where the law might protect that person anyway, ultimately, and a prosecution might not proceed.

Mr RON HOENIG: So that person, I suppose, could be protected with an induced statement but they are never going to come forward unless they are protected.

Mr BABB: Yes.

Mr RON HOENIG: And you could not say as a matter of theory they have a defence if they know what they are doing is wrong if it is in fear of the consequences.

Mr BABB: Sure. I think that is a reasonable point. Thinking up examples or ways it arises and raises challenges.

Mr RON HOENIG: But how do you legislate that sort of reasonable point? My limited experience as a member of this Parliament is that every time Parliament legislates it is a blunt instrument with unintended consequences and there are usually serious unintended consequences, not minor ones. I suppose that is our problem, as I just raised in an example.

Mr BABB: I can see your point. It raises an issue.

Mr RON HOENIG: The other thing that concerns me are the vexatious complaints that the Commission gets where people do not have an honest and reasonable belief. Anecdotally, we know about it that someone in a local council, a counsellor in opposition, stands up and accuses another counsellor of being corrupt and announces in the local newspaper, "I am referring this matter to ICAC," and then writes a letter. They never have an honest or reasonable belief but are doing it for other reasons. How do you stop that? That sort of person should not be given protection either.

Mr BABB: No.

The CHAIR: They should not be given protection.

Mr BABB: No. I don't think they should.

The CHAIR: This really fits into the category of person who—should they be protected in circumstances where they may be sued for defamation, if in fact they are making vexatious claims. How do you protect one who makes an honest belief or do the words "good faith and reasonable belief" have to be factored into a qualification about the trigger for an indemnity into the disclosure you make?

Mr BABB: The protections currently do have requirements in relation to good faith. Of course, indemnities and undertakings go through an assessment of the veracity of claims and apply rigour to that process.

Reverend the Hon. FRED NILE: In your submission to us under the heading "Submission" you have "Legislative provision permitting the taking of induced statements by the ICAC", which you are supporting. What is the difference between induced statements and currently what happens in ICAC where they require people to give evidence against their will?

Mr BABB: An induced statement is something that is very similar to the compulsion protection, which at the moment where you are compelled, the evidence that you give cannot be used against you in subsequent proceedings. Similarly, an induced statement enables investigators to get a version of events from a witness with a promise made at the commencement of the statement that anything recorded in the statement will not be used in criminal proceedings against that person. In terms of protection, it does not indemnify you from subsequent prosecution in that if other evidence was available against you—say, for example, someone who is disclosing their own corruption—it does not bar subsequent prosecution but simply removes that piece of evidence from the evidence that could be led against you.

Reverend the Hon. FRED NILE: So is the term "induced statements" used in the law? Is that a legal term?

Mr BABB: It is, yes, and it is a tool used in mainstream prosecution by the NSW Police.

Reverend the Hon. FRED NILE: I know the police use it. It has not been used in the normal prosecutions or by—

Mr BABB: In reality, a person who commenced a statement by saying "I am making this statement pursuant to a promise that has been held out to me by the investigator that this will not be used", it would protect the person from that statement going in.

Reverend the Hon. FRED NILE: Should they use those technical words though—"induced statement"?

Mr BABB: No, the more important thing is the noting in the statement of the promise that has been held out and what the nature of that promise was. The term "induced statement" is simply a summary of what it is; that is, you are inducing someone to talk by way of the promise that is made to them.

The CHAIR: I just want to go back to the example that Mr Hoenig gave of the person who has been involved in potential corrupt activity, scared of losing their job, goes home, cannot sleep at night and then says, "I've got to go and tell someone about this". He is clearly involved or potentially involved in a corrupt scheme and open to prosecution as part of that corrupt scheme. I think you suggest that that is a difficult area for that person to be. Should we explore whether there is any avenue where we can perhaps continue to obtain statements from that person without diminishing the power of ICAC? The example arises, and in your business you would see them fairly often, where a co-conspirator agrees to give evidence on the basis that he gets an indemnity. Is there a similar sort of process that ICAC could adopt to allow them to give co-conspirators an indemnity as part of an inducement to get the evidence which they need to get the principals involved in the corruption?

Mr BABB: Section 49 of the ICAC Act enables ICAC to apply to the Attorney General for an indemnity or undertaking.

The CHAIR: Can you give indemnities or is it only the Attorney?

Mr BABB: Only the Attorney.

The CHAIR: I just wonder how that mechanism would work because the ICAC could not make a decision about whether to seek the indemnity until it has heard the evidence, obviously.

Mr RON HOENIG: They could certainly take an induced statement though. So you do not need a legislative change for them to say it is an induced statement.

Mr BABB: No. It is certainly possible to do it without it being legislatively prescribed for. I just think having it in the legislation would bring it front and centre in terms of using it.

Reverend the Hon. FRED NILE: That is what I was getting at: to make it clear what we are talking about.

Mr RON HOENIG: We are looking at this—at least on my part—to create a vehicle to encourage people with honest and reasonable belief of corrupt activity, particularly serious corrupt activity or maladministration, to come forward to report and be protected. One of the problems with our legislation, as Mr Murray pointed out to us, compared to, say, the Western Australian legislation, or as pointed out to us in relation to the Queensland legislation, is that there is no guarantee of privacy once somebody comes forward. If somebody comes forward to a police officer to provide them with information then that person, as an informant, is guaranteed protection.

If they do not wish to give a statement or if they do not wish to participate in any way in relation to a prosecution it is unlikely that they would be compelled to or you would compel them to, but in these circumstances under the ICAC Act once they come forward, even if they want privacy, if they decide to go through an investigation process their privacy is out the window, is it not? A submission to us was that that is why in their legislation even though there is discretion for public hearings, the default position and the preferred position is for them not to be public hearings for that reason.

The CHAIR: Just to clarify that, what it is effectively saying is that it is just as big an impediment to making a voluntary disclosure, the fact that you are going to be involved in a public hearing and having your name all through the newspaper and whatever, whereas police prosecutions do not work the same way in relation to people who are police informants necessarily who do not want to give evidence to the police.

Mr RON HOENIG: Something that is not directly related to this inquiry is if we can create a legislative framework that makes it easier for you and quicker for you to prosecute people who have committed crimes.

The CHAIR: That would be handy.

Mr GEOFF PROVEST: From a layman's point of view, I have been told on a number of occasions it is the way ICAC collects their evidence, that a lot of that evidence collection makes it inadmissible in a proper court of law, which explains why the investigators on your side have to go back and sift through all that evidence and see what they can and cannot use.

Mr RON HOENIG: He does not have any investigators. He has not got an investigative function, that is his problem.

Mr GEOFF PROVEST: Well, they have to go through the evidence gathered to see whether or not that can be used down the track. I know, speaking on behalf of some of the communities out there, they sense a great deal of frustration at (a) the length of time and (b) some of the results that come out. So anything we do with these whistleblowers or disclosure things, to my way of thinking on this Committee, would be to enhance your side of the operation to satisfy the wider community concerns.

The CHAIR: I think we have probably articulated what is in your submission.

Mr GEOFF PROVEST: I think we have heard more from the Committee members.

The CHAIR: The primary focus has been on the proposition you make that persons who are involved in corrupt activity should not be given protections, if they want to make a voluntary disclosure, by way of any relief against civil or criminal liability.

Mr BABB: I think it is important they not be indemnified in any way.

Mr RON HOENIG: And if there is a discretion that discretion cannot apply when they first disclose.

Mr BABB: No.

Reverend the Hon. FRED NILE: Are there any other areas we should look at that you want to mention before you go?

Mr BABB: No, I thought that the collection of submissions you received that I read seemed to give you the right sort of direction.

Mr RON HOENIG: We have a wider oversight role, Mr Babb. While we have you, is there is anything else you would like to tell us for future reference? That is what Reverend the Hon. Fred Nile is getting at.

Mr BABB: No. I have made different submissions at different times about things that I have thought needed to be done and I always feel at liberty to do that.

The CHAIR: Thank you very much for your time. If we have any further questions and we need to get something in writing from you, will that be fine?

Mr BABB: I am happy to respond. Thank you.

(The witness withdrew)

BRUCE THOMAS LANDER, Commissioner, Independent Commissioner Against Corruption, South Australia, before the Committee via teleconference, affirmed and examined

The CHAIR: Thank you for agreeing to participate in a discussion with us via teleconference. Generally we ask people who give evidence to our Committee whether there are any inquiries in relation to the process that our Committee adopts in relation to conducting these inquiries. I assume you have appeared before parliamentary inquiries before and are familiar with the procedures?

Mr LANDER: Yes.

The CHAIR: Generally we ask witnesses who give evidence whether they would like an opportunity to summarise the submission they made in their report or whether there is anything additional they would like to say in respect of the material contained in their report. Would you like to provide an opening statement to the Committee?

Mr LANDER: No, thank you.

The CHAIR: I will commence the questioning. As to the position of people who make voluntary disclosures to the Independent Commission Against Corruption in New South Wales, a submission has been made to us that there appears to be a gap in that people who make a voluntary disclosure seem to have fewer rights and privileges than persons who make statements induced as result of inquiries being conducted by the ICAC. What is the position in South Australia in respect of people who make voluntary disclosures?

Mr LANDER: In South Australia section 50 of the Independent Commissioner Against Corruption Act provides that there is no obligation on such persons to maintain secrecy or other restrictions on their disclosure of information in cooperation with the Independent Commissioner Against Corruption or any assessment, investigation or referral under the Act. There is a bill presently before Parliament, the Public Interest Disclosure Bill, which will provide that anyone who makes a report to the Office of Public Integrity, provided they are a public officer, will obtain the status of a whistleblower and therefore the associated immunity from civil or criminal suitable prosecution. When that bill passes I think public officers at least who make reports to the Office of Public Integrity in South Australia, which I preside over as well as the Office of Independent Commissioner, will be fully protected.

The CHAIR: That Act, when passed, will give public servants some protection but will not necessarily give Joe Citizen protection in the same way?

Mr LANDER: That is exactly right. Joe Citizen will have the protection under section 50, which is the protection that he or she need not maintain secrecy or other restrictions like I mentioned, but they will not have the status of a whistleblower under the Public Interest Disclosure Bill. That is because I think it is thought that Joe or Jane Citizen are not persons who are likely to suffer victimisation for making complaints about persons in public administration.

The CHAIR: Do you perceive any difficulty in respect of those persons who make potentially vexatious claims to an organisation like yours?

Mr LANDER: No. We get plenty of vexatious claims, unfortunately, and quite trivial claims, but I do not think this is likely to encourage more vexatious claims. Those people do not seem to need a lot of encouragement.

The CHAIR: I am more concerned about the secrecy provision. If there is no obligation to obtain secrecy in respect of the complaint they have made to ICAC it potentially gives rise to almost an encouragement to make a vexatious claim.

Mr LANDER: But Joe or Jane Citizen is not likely to be in a position where they have secret information. It is more likely that a public officer is going to have that secret information and they are the persons who have to be released or have to have the statutory protection of being covered in case they provide that information to ICAC.

Mr RON HOENIG: Can you explain again why a normal citizen does not need as much protection as a public official?

Mr LANDER: It is unlikely that a normal citizen would be subject to the same sort of victimisation that a public officer might be subject to if that public officer has made a report about someone in his or her department. It is more likely that those persons would suffer victimisation. If it is Joe Citizen we do not think that that person could be subject to any sort of victimisation.

Mr RON HOENIG: I follow you. Thank you.

Mr LANDER: But that person is actually covered for victimisation in a statutory sense under the Independent Commissioner Against Corruption Act as well.

The CHAIR: Potentially there are two categories of people who make disclosures to organisations like yours. Firstly, there are those who made an observation about behaviour and are of the view that it ought be investigated. The second might be the person who is in fact involved in corrupt activity themselves. Should it be the case that a person involved in corrupt activity should be given the protection of release from civil or criminal liability in respect of a voluntary disclosure?

Mr LANDER: Probably not. If they made a disclosure about themselves, for example, they probably should not be entitled to any sort of immunity for outing themselves. If they were to make a disclosure about the conduct of a person with whom they were associated as well they should not be subject to any immunity. But the Public Interest Disclosure Bill would not give a person immunity in those circumstances. A person who made a report about their own conduct which was corrupt conduct would not be entitled to immunity for having made that report.

Mr RON HOENIG: What about in the circumstances—and it stumped the New South Wales Director of Public Prosecutions—that often when investigating corrupt conduct of public officials there are people in a master and servant relationship. A junior person is required to do what he or she is told to do. If he or she reports the corrupt conduct which he or she has participated in and had done that in fear of losing his or her job, should there be a protection for that person even though they are involved in the common purpose?

Mr LANDER: It would depend, I suppose, upon the extent of their involvement and the reasons why they became involved. In those circumstances the Director of Public Prosecutions could probably offer an immunity to that person from prosecution on the basis that they cooperated in an investigation and prosecution of the person about whom the report is made. On the face of it you would not want to give a carte blanche immunity to persons of that kind without knowing exactly what their involvement was and the reasons for it.

Mr RON HOENIG: Whilst at the same time you are trying to encourage those people to come forward?

Mr LANDER: Exactly. The reason why I think most public officers should have cover both against secrecy and immunity is because in South Australia the Act provided that when I was appointed I had to give directions and guidelines to all public officers in South Australia as to their reporting obligations. The directions that I have given require all public officers in South Australia to report any conduct that they reasonably suspect raises a potential issue of corruption or serious or systemic misconduct or maladministration. It seems to me that if all public officers have a statutory duty to make a report then they should be at the same time covered in relation to the report they have made. At the same time I would except from that a person who is reporting his or her own corrupt conduct.

Mr RON HOENIG: You made some reference earlier to vexatious complaints. It must eat into your organisation's resources having to deal with the number of particularly vexatious complaints or complaints by people who do not have an honest and reasonable belief.

Mr LANDER: It does. We get a lot of complaints that are clearly vexatious and probably even more that are trivial or frivolous and do not require any sort of investigation at all. That does take up resources in assessing those complaints and reports and advising the complainant or reporter that the matter will not be investigated. Even more draining on resources are the persons who come back complaining about our failure to investigate these trivial or frivolous complaints. We get a lot of persons recontacting who complain endlessly about the fact that we will not investigate the matters that they have complained of. In fact, I think the person who is most often accused of corruption in South Australia is me for failing to investigate these trivial complaints.

The CHAIR: Do you not have an Inspector?

Mr LANDER: Yes, he is called a reviewer in South Australia.

Mr RON HOENIG: How do you deter those types of complainants? Should there be some sanction?

Mr LANDER: I do not think you can impose a sanction on some of these people. The only way to deter them is to end correspondence with them, say that you have looked at their recontact, you are still not going to investigate it and you do not intend to correspond with them again.

The CHAIR: Then they can take it up with the reviewer.

Mr LANDER: They can. Up until recently the reviewer did not have that power to do that but since 1 July he has had that power. I do not think he is looking forward to meeting many of these people though.

Reverend the Hon. FRED NILE: I note in the last section of your submission you state that you think section 343 of the Queensland Crime and Corruption Act 2001 is to be preferred to the South Australian provision to which you have already referred. What are the advantages of that section in the Queensland Act?

Mr LANDER: I think subsection (2) of the Queensland section 343, because that gives an immunity from any civil liability and disciplinary action in relation to a complaint made. Our section 50 does not give that immunity. As I said, the immunity that is given to our people will be in the Public Interest Disclosure Bill, not in the Independent Commissioner Against Corruption Act.

Reverend the Hon. FRED NILE: You would support us putting an amendment into our Independent Commission Against Corruption Act to include that provision?

Mr LANDER: Yes, I would. I think that section 343 has two advantages. Firstly, it releases a person from maintaining secrecy or restriction in subsection (1). In subsection (2) it gives an immunity effectively from civil liability, including defamation and disciplinary action, but it does not give an immunity from criminal liability. I think that is appropriate.

Mr GEOFF PROVEST: The NSW Information Commissioner has suggested that the Committee may wish to consider a threshold requirement of seriousness before a person who makes a voluntary disclosure to ICAC is protected. What is your view of that statement?

Mr LANDER: I am not quite sure of what is meant by "assessment of seriousness". What is serious to some complainants' reports is not serious to anyone else. Complainants who are members of the public often see the action about which they are complaining in a very serious light because they see themselves as victims of public administration. It would be very difficult, I think, to make an objective assessment of the seriousness having regard to subjective qualities in relation to the reports themselves.

Mr GEOFF PROVEST: That is a good point.

The CHAIR: As there are no further questions, the Committee thanks you for your time. It has been very helpful speaking with you. We will follow the progress of your bill—what was it called?

Mr LANDER: The Public Interest Disclosure Bill.

The CHAIR: Are you happy to answer any further questions in writing?

Mr LANDER: Of course.

(The witness withdrew)

(Short adjournment)

BRUCE ROLAND McCLINTOCK, Inspector of the Independent Commission Against Corruption, Office of the Inspector of the Independent Commission Against Corruption, affirmed and examined

The CHAIR: We now have with us the new Inspector of the ICAC. Inspector, I do not think you have made a submission to the inquiry.

Mr McCLINTOCK: No, I did not. For some reason I was not aware that the Committee was inquiring into this and when I got the invitation to give evidence in June/July it came as a surprise to me. I do not know how I missed it because even before I was appointed Inspector I made it my business to follow what the Committee is doing, for obvious reasons.

The CHAIR: There is no criticism of you. You have appeared here often enough to know what the processes are. You have got no questions about the processes?

Mr McCLINTOCK: None at all, Mr Chair.

The CHAIR: Would you like to start with a few opening observations?

Mr McCLINTOCK: The first part of my opening statement is this: As you said, Mr Chair, this is my first appearance since my appointment as Inspector of the Independent Commission Against Corruption. I want to thank the Committee for the faith it showed in me in deciding not to exercise the power of veto that the Committee has under section 64A of the Act. I hope that that faith in me is repaid. I look forward to working, in effect, with the Committee in my capacity as Inspector over the five-year term that I have and, of course, consistent with my duties as Inspector under the legislation.

The CHAIR: Can I just say before you move on, we will not ask you anything today but the Acting Inspector prior to you issued a report recently into Operation Vesta. We will be conducting an inquiry to ask him to further elaborate on some of the recommendations that he has made pursuant to that inquiry. We would be grateful if you would cast your eye over that material because we would at some stage like to hear from you in relation to those recommendations that he has made.

Mr McCLINTOCK: Absolutely, Mr Chair, I am happy to do so. I should say one thing about that. That inquiry involved an investigation into the Kazals and a man called Kelly. Some years ago I advised one member of the Kazal family, Charif Kazal, and also Mr Kelly. That would be probably three years ago. I have a current brief from another member of the Kazal family who is not the subject of that report. So I could not comment on any of the findings about the actual investigation, but the recommendations going forward do not give me any problem at all and I am more than happy to do so.

The CHAIR: We would probably not ask you about the inquiry itself but the recommendations do interest us somewhat, as does his previous report. It may have just been his ordinary annual report which he spoke to and made recommendations to us, but there are some live issues. Notwithstanding that amendments have taken place to the ICAC Act there are some additional things that he is recommending which we would appreciate your views on.

Mr RON HOENIG: Some of those recommendations do not occur in a vacuum. We just need to make sure we do not put the Inspector in a difficult position.

Mr McCLINTOCK: I am very conscious of the conflict issues and there are steps I have taken on my appointment to make sure that there are no problems. For example, I take the position that I will not do or cannot do any work against the State of New South Wales. Now I am experienced in managing conflicts. I can approach the abstract question: Is this a good idea, which is the recommendation, without any problems at all.

The CHAIR: How does it operate when you do disqualify yourself from doing it? Is someone delegated?

Mr McCLINTOCK: All that happens, because I am a barrister and because solicitors call me up and say, "Are you available to do this piece of work?" I take the view in relation to the State of New South Wales that I simply say, "No, I will not do work against the State of New South Wales" because while I am independent statutory officer—that is not accurate strictly—I am, in a loose sense, an employee of the State of New South Wales and it would be inappropriate.

Equally, if the New South Wales State Crown Solicitor called me up and said, "Can you do a case for the Attorney General?" I would say, "No, I can't". Likewise obviously over the years I have appeared at ICAC. I have been counsel assisting at ICAC back in the 1990s and ICAC is never going to offer because I am Inspector

now and they know, but if a private solicitor offered me a brief at ICAC I would just simply say no. I have taken the view also—although this has not come up and I would not like you to spread this around town—but my career as a barrister is far closer to its end than it is to its start and as the years go by I imagine the potential for any conflict will—

The CHAIR: But pursuant to the Act though, if you disqualify yourself from hearing, who then deals with the subject matter of a complaint you are dealing with?

Mr McCLINTOCK: There are provisions under the legislation for appointment of an Assistant Inspector, which can be done—

The CHAIR: You just request that?

Mr McCLINTOCK: I would request that and also Mr Nicholson, who was the Acting Inspector after Inspector Levine retired, had previously been Assistant Inspector. The legislation enables the appointment of an Assistant Inspector with the concurrence of the Inspector and so if it was necessary for me to step aside, I would—

The CHAIR: Request the appointment of an assistant.

Mr McCLINTOCK: I would talk to Department of Premier and Cabinet no doubt and request the appointment of an assistant Inspector and that would enable the issue to be dealt with. You mentioned the annual report. I have to produce the annual report for 2016-17 and indeed do so within a couple of months. It is a slightly unusual position to be in because, of course, it is the period 1 July 2016 to 30 June 2017 and of course that was when I was not Inspector; it was Inspector Levine and Acting Inspector Nicholson. I am going to consult with both of them and deal with, in as much detail as I can, the events that have happened in that year, but it will be a slightly unusual situation for me dealing with that.

The CHAIR: I agree. Turning to the subject matter of our hearing today, perhaps you would like to give us some initial observations?

Mr McCLINTOCK: I have to say that I think the proposal is, in general terms, extremely sensible. I was actually surprised when I read the materials and then went back to section 109 of the Independent Commission Against Corruption Act to realise that there was not some form of protection like has been proposed in the legislation already. There are many other bodies in New South Wales—and have been for many years—which have protections like that. For example, the Health Care Complaints Commission, which has now been superseded by the Federal legislation, has a provision that exempts anyone who provides information to the Health Care Complaints Commission from any liability, criminal, civil or administrative, provided the disclosure is in good faith. As I said, I was quite surprised when I realised that there was not such a provision in the Independent Commission Against Corruption Act and I think, quite strongly, that there should be such a provision in there. One can debate about how exactly it is worded and what exactly it protects.

In that connection I should say—and I could not pick this up on a quick flicking through the various submissions that have been put in—there is, in one respect, a protection for disclosures to the Commission and that appears in the Defamation Act. Section 27 of the Defamation Act creates a defence of absolute privilege, the same privilege that protects you when you are speaking in Parliament or even in this Committee of course, for disclosures to ICAC. That means that no-one under any circumstances can be sued for the content of a disclosure to ICAC for defamation. That does not mean obviously that there are not other forms of liability that could be imposed but it is section 27 of the Act and schedule 1 of the Defamation Act. I actually brought copies, but it is clause 19 of schedule 1, which says: "Without limiting section 27 (2) (a)-(c), matter that is published" to or by ICAC, to or by the Commissioner, to or by the Inspector, to any officer of the Commission or officer of the Inspector, and so on, is covered by absolute privilege, so you can never be sued for it. As I said, I was a little surprised not to see that picked up. It is an absolute protection and means that under no circumstances, even if there is malice, bad faith and so on, can someone be sued for it.

The CHAIR: Is that appropriate?

Mr McCLINTOCK: That is the issue, Mr Tudehope. It is a policy question that, in a sense, is better for Parliament to answer than any individual. Let me put the pros and the cons. In favour of an absolute protection like that is the fact that it means that, just as members of Parliament and people in court, which are the classic places where absolute privilege applies, they can speak absolutely fearlessly, tell the complete truth without any fear of there being any adverse consequences for them. Obviously you know better than me that there is a very strong reason for having that in Parliament

Mr RON HOENIG: And in the courts.

Mr McCLINTOCK: And in the courts. I might say that provision has been in the Defamation Act since the creation of the commission in 1989 when the Independent Commission Against Corruption Act first came into force. That is the pro in favour of an absolute protection. On the other hand, there is no question that bodies like ICAC and indeed like the Health Care Complaints Commission—

The CHAIR: Attract heaps of these complaints, which take up a significant amount of resources.

Mr McCLINTOCK: Absolutely, and they can do very great damage. It is a commonplace, not in Macquarie Street, but in local councils, for example, where you get one councillor making an announcement that they are going to go to ICAC.

The CHAIR: And that gets reported in the paper.

Mr McCLINTOCK: Absolutely. That is the argument against, that the bad faith complaints should not be protected.

Mr RON HOENIG: How do you deter that? We heard today from the South Australian Commissioner, Mr Lander, that it drives them crazy and utilises huge resources. It is the same in Queensland, we heard from their Inspector. How do you deter that? There needs to be a consequence when someone supplies information to these bodies that have restricted resources when they do not hold an honest and reasonable belief.

The CHAIR: Which is also hard to prove, that they do not hold that belief.

Mr McCLINTOCK: There is no question it is hard to prove. You probably know the statistics for the number of complaints made to ICAC as compared to the number of investigations it initiates. It is something like one in 10. It may even be less. That does not mean that all the other nine out of 10 of the 150-odd complaints they get every year are all in bad faith, although no doubt some of them are. It is a commonplace of bodies like that. Without mentioning them, since I was appointed, which is a little over a month ago, I have come across two that would clearly fit within the category of vexatious, I suppose, to use a phrase from somewhere else.

The issue is whether it is better to allow every complaint to be made without restriction and allow the crazy ones, the bad faith ones, the ones that have no basis in fact to be weeded out by ICAC itself. There is no right or wrong answer to those things. It is all a balancing question of what one thinks. I am inclined to think myself that it is probably better to allow ICAC to do the weeding out because you do not want people when they have come across an example of what they think might be corruption to hesitate and think that I might be exposing myself to some form of liability. That is a personal view. As I said, there is no right or wrong answer about that, but that is what I think.

On the other hand, the factors that you have mentioned are the reason why in other areas like health care, to stop people complaining about doctors—doctors themselves are as subject or probably more subject to mad complaints than any other group in society, including lawyers.

The CHAIR: I am sorry to interrupt you. The Committee has something it needs to attend to.

Mr McCLINTOCK: I will wait outside.

(Short adjournment)

The CHAIR: You were dealing with defamation and the tension which exists between public policy and getting people to give evidence in relation to ICAC. It was your view that ICAC is best served by weeding those vexatious complaints out themselves rather than seeking to discourage the making of vexatious complaints.

Mr RON HOENIG: We heard today from the Acting Ombudsman, Professor McMillan, who I must say was very impressive.

Mr McCLINTOCK: He is very impressive. I have known him since he taught me at law school many years ago.

Mr RON HOENIG: He not only reminded me but also educated me. The Ombudsman has a wide function and also gets complaints in relation to corrupt conduct. In view of the legislative changes where the Commission has to focus on serious and systemic corruption, it should have a mechanism anyway. A lot of it is stuff they could think of triaging out that is not vexatious but might be wrong conduct, for example, or possible wrong conduct. It could just go from them to the Ombudsman rather than them saying that they do not propose to investigate it. At least it would stop either complaints to the Inspector or other complaints about the Commission.

Mr McCLINTOCK: Mr Hoenig, ICAC in effect does that already. It has various mechanisms. I might say that it might be more appropriate to address some of those questions to, for example, Mr Blanch. I do not know whether Mr Hall has actually formally taken over as—

Mr RON HOENIG: As at about five minutes ago.

Mr MARK TAYLOR: Just before you left.

Mr McCLINTOCK: I should say this to the Committee: One thing I hope is that the relations between the Inspector, the Commission and the Commissioner are satisfactory going forward.

The CHAIR: I think they will be.

Mr McCLINTOCK: Mr Hall will find no problem with this. I have already met with him and the Assistant Commissioners with a view to discussing things. Just so you know, one thing we have to sort out is the protocol between the Inspector and the Commissioner, a memorandum of understanding, which needs updating and discussion. I am glad to know that Mr Hall—I talked to him in his capacity.

Mr RON HOENIG: The issue that we are interested in is that of the guidelines for procedural fairness for public hearings that have to be prepared.

Mr McCLINTOCK: Yes, all very important issues. Going back to the question you asked me, Mr Hoenig, ICAC has a range of options as to what it can do when it gets a complaint, and every complaint is considered. It can accept it and carry out an investigation. There are investigations that happen, for example, that no-one ever hears about outside ICAC—ones that are dealt with privately and so on. It also has the option of not carrying out an investigation but referring the matter, for example, to the police. That also happens when it realises that the matter is not something that, for example, fits within the definition of corruption. That happens as well. The matter can be referred, for example, to the Commonwealth authorities if it turns out it is not a State matter. That also happens. It can be referred to the Ombudsman. I cannot say of my own knowledge that that happens, but I assume it probably does.

The CHAIR: It happens the other way around, of course.

Mr McCLINTOCK: Of course. Then there is also the decision to take no action whatever. That may be for a range of reasons, only one of which will be that the complaint is vexatious. My impression is that the system is working okay. That impression may change as my time as Inspector goes on. I am very new, but for that reason I do not know that it is necessary to put some kind of good-faith exception or protection in there. That said, it is a balancing exercise. I myself would not have any strenuous objection to it being done. As I said, it is the way it works in relation to complaints about doctors and I understand the rationale for it. It might also be a useful deterrent for the small proportion of complaints that are genuinely not made in good faith. I can understand the Committee taking either view. I do not want to sound as though I am a fence-sitter, because I am not a fence-sitter, but there are arguments both ways.

The CHAIR: I direct you to the potential for different forms of voluntary disclosure. There is the voluntary disclosure you have alluded to already, which is someone who wants to make a disclosure about the corruption that they have identified. As for the person who potentially is involved in criminal conduct themselves and wishes to make a voluntary disclosure in respect of that criminal conduct, would you say that the same protection should be afforded to them?

Mr McCLINTOCK: I think that actually comes down to how you phrase the particular protection. It would obviously be wrong, simply because someone has come forward and confessed, so to speak, to ICAC to say that their criminal liability should simply be wiped away. That would be wrong, and it would be—

The CHAIR: Counter-productive.

Mr McCLINTOCK: Assume it was a conspiracy: It would mean that the first person to the door of ICAC gets the benefit and the others do not, and I do not think that would be the right response.

The CHAIR: That does create the interesting scenario that, if someone is involved in a corrupt conspiracy, they always know that one of their number could potentially run off and make a voluntary disclosure.

Mr McCLINTOCK: May I say that is an excellent point. With respect, it really is. The way I envisage the provision working—I think particularly the Bar Council's submission misunderstood that—is that it is a protection only for the disclosures, so that it is only the fact that you came forward and your act of coming forward is or causes some form of breach of another law or provision. For example, if you were a public servant and you were covered by some form of confidentiality regime—which might even be very technical, someone could assert that by making a disclosure to ICAC you were breaching that confidentiality regime—it would mean that you could not be found liable for that breach. Likewise, you could not be found liable for breaching your contract of employment if, for example, you were an employee of a private company and so on. That is how I apprehended that work.

There are provisions in the ICAC Act for ICAC to recommend that someone not be prosecuted or be indemnified against criminal liability. Again my inclination would be to think that that is a better way of doing it, to leave it to the discretion of the Commission as to whether it decides to make a recommendation of that sort which I think ultimately has to be determined—

The CHAIR: By the Attorney.

Mr McCLINTOCK: —by the Attorney, yes.

The CHAIR: It gives rise to many interesting scenarios. For example, would you have to warn the person who comes forward to make a voluntary disclosure that they are protected only for limited circumstances and it will not necessarily protect them from future culpability relating to a finding of corrupt behaviour?

Mr McCLINTOCK: I suppose they would be in no different position than someone who—

The CHAIR: Who makes an induced statement.

Mr McCLINTOCK: —makes an induced statement, or perhaps even no different position from someone who is being interviewed by the police and the police are obliged to give the standard warning.

The CHAIR: But until this person makes the voluntary disclosure, there may be nothing which has brought the matter to the attention of ICAC to create the induced statement.

Mr RON HOENIG: You would not want to deter, say, two public officials in a master-and-servant relationship—the servant who has done certain things under instruction for fear of losing their job. They are the sort of people whom you would want to come forward.

Mr McCLINTOCK: Yes. Those things tend to suggest to me that the protection should be absolute but limited to the disclosure, not to the underlying crime.

Mr RON HOENIG: That is the difficulty we have when we hear from other agencies—that is, it is fine for other agencies to talk about their issues; we are talking about serious corruption issues and whom the legislature says should be protected. That is the difference between us and, for example, the Ombudsman, the Information Commissioner and similar people.

Mr McCLINTOCK: Yes, it is, and I accept that. It is a difficult one—

Mr RON HOENIG: We are troubled by it.

Mr McCLINTOCK: Let me add to your troubles. It is probably well-known that in competition cartel cases or price-fixing cases, part 4 of the old Trade Practices Act, that the majority, if not all, of the investigations that the Australian Competition and Consumer Commission [ACCC] initiates come from disgruntled company executives who for some reason have fallen out. Without giving any details, I appeared for the ACCC 10 or 15 years ago in a very serious price-fixing conspiracy that would have cost the people of this country—you can see how serious it was because the ultimate civil penalties came to $35 million. It was very

serious. That came from an executive of one of the five companies involved who had been sacked. They had been going along to the meetings in question for 10 or 15 years.

I understand that the attitude of the ACCC to this is to say, "If you come forward first we will go easier on you and we will take into account the fact that you did come forward first." But they then say, "Ultimately, it is a matter for the court what actually happens." There was an example of a price- fixing case involving George Weston and one of the competitors where I think the person who made the voluntary disclosure on behalf of the company may have regretted it later because the fines were very high, but that is how the ACCC does it.

The CHAIR: How does the ACCC know about a conspiracy unless someone has gone to them and said, "I have got something to tell you" and the ACCC would reasonably then say, "We do not know whether we can give you an indemnity until we know what you are going to say."

Mr McCLINTOCK: Exactly. That is what they say. They say, "You tell us and then we will consider what we will do."

Mr RON HOENIG: Because identical prices in a competitive market happen by magic, do they not?

Mr McCLINTOCK: Information-gathering technologies have advanced dramatically. Everyone knows that the Australian Securities and Investments Commission [ASIC] monitors stock market movements to pick up insider trading, and it does so apparently very effectively. It is a bit different when you are talking about price- fixing. The case I was talking about was a bid rigging conspiracy. The product they were selling was sold substantially to government entities and to very large private companies like BHP, that level. The five competitors would get together and say, "It is your turn to bid for this one." The companies would say, "We will bid X million dollars" and everyone else would put in a bit of X million plus $500,000 dollars.

Interestingly, there were examples in the course of the history of this conspiracy where some of them ratted on each other and put in a bid lower, which was then dealt with. It was ongoing and sophisticated, but I should not distract the Committee. The ACCC says, "You tell us and if you are completely frank and open it will be better for you" but they will not say how it will be better for them.

The CHAIR: In those circumstances would it be better for the ICAC to develop a policy position in respect of voluntary disclosures to say effectively these things so that people know what the process is by way of a protocol that ICAC works out and adopts?

Mr McCLINTOCK: I would have thought absolutely, yes.

The CHAIR: So it spells out some of those things you are suggesting?

Mr McCLINTOCK: Yes.

The CHAIR: It might be part of the protocol that if you come to us and wish to make a voluntary disclosure, we cannot assess the indemnities that we will give you until we hear it and the like, so that people are left in no doubt.

Mr McCLINTOCK: Yes.

Mr RON HOENIG: That may be a better solution because my limited experience as a member of this place is that legislation is just a blunt instrument and there are always unintended consequences, which are usually significant?

Mr McCLINTOCK: Yes, unquestionably. Provided you trust the people who are actually running the agency I would have thought it is actually better to leave it to their discretion in relation to dealing with the underlying crime, but that is distinct from the situation of the actual disclosure.

The CHAIR: Disclosure by someone who is not implicated in the corrupt activity themselves where you say it should be self-evident that they would be a protected person?

Mr McCLINTOCK: Yes, I think so. I would not put it as strongly as "self-evident". I myself would have it as it is in relation to defamation. I can readily understand the argument, some of which you put to me, on the other side about it being limited to good faith. My preference would be the first—that is, with the disclosure different considerations as Mr Hoenig and the Chair have put to me apply to the underlying corrupt conduct if the person has actually been involved in the corrupt conduct themselves. But for the person who becomes aware of it and then reports it then that is a different matter—is only aware of it rather than a participant.

Mr RON HOENIG: Assuming it gets left to the ICAC to formulate its own policies, do you see it as your role as Inspector to make sure that those policies are being applied and that things are in place?

Mr McCLINTOCK: I have two roles: to deal with complaints about ICAC; and to audit ICAC's operations. I deal with both functions by providing reports to the Presiding Officers, which in a sense practically speaking means this Committee. The audit function has been neglected. No audits were done in the terms of the Acting Inspector and the previous Inspector—I may have said this in evidence on a previous occasion—and I regard that as very unfortunate. I was responsible for putting the amendments that introduced the Inspector in 2005. When I wrote that report I had strongly in mind that the function of the Inspector was to enhance the good governance of ICAC. That is done by the auditing function, not by dealing with the complaints function—important as that is.

The CHAIR: The audit would deal with this type of practice?

Mr McCLINTOCK: The issue though there would be that the audit power under the legislation is sufficiently broad for the Inspector to ask whether there is a policy along those lines and to ask if there is not such a policy, why there is not one. It would also be broad enough—it is not my role to write it obviously—to check whether the policy was being implemented, and that is the sort of thing that I would conceivably do. I might say, so that the Committee knows this, with the new regime and a new Commissioner and now two Assistant Commissioners, there is one or two things I have in mind that I may do—and it would be inappropriate for me to announce what they are—in relation to auditing.

Generally speaking, I am going to wait until the new regime is in place for at least probably say six months before I turn to thinking about auditing. The new Commissioner and the two assistant Commissioners need time to settle down and work out how they are going to run the place, which unquestionably will be different from how it was run under the previous Commissioners—it has to be because it is a different structure. I have very strongly in mind enhancing the audit role when the new structure is in place and there is something that I can contribute.

Reverend the Hon. FRED NILE: Were there any problems with your role and the previous Inspector's because it is a part-time position?

Mr McCLINTOCK: No. Reverend Nile, I have always been opposed to the Inspector being a full-time position. I actually said so in evidence here, I think, last year. Provided the Inspector is diligent and has the appropriate support, I would have thought that the Inspector can do the things that he needs to do on probably 90 to 100 days a year. That is what I intend to do. If I cannot do it within that time, obviously I will give it as much time as is necessary. The beauty of the role is that I get paid for what I do and if the work is not there, that is a saving. But I am hopeful that it can be done on the present part-time basis. Also you will bear in mind that Mr Levine was both Inspector of the Police Integrity Commission [PIC] as well as ICAC. And so while I understand that the PIC didn't involve terribly much time, something is going to change, I think, under the Law Enforcement Conduct Commission and so on.

There was a very great upsurge in complaints to the Inspector under Mr Levine. And there are still some outstanding, actually quite a few outstanding that I will need to deal with. Some of them cannot be concluded at this stage because some of them involve pending litigation, so it cannot be determined. There is one which is outstanding now that can be determined where I have written to the complainant asking for further information. I hope I can get that out of the way by October or November. But I do not think it comes down to the part-time role. If it does and if I feel that the job can only be done appropriately on a full-time basis I will inform you through one of my reports or at some opportunity when I give evidence. But I hope that does not happen.

Reverend the Hon. FRED NILE: Or the Assistant Inspector be appointed and take on that role.

Mr McCLINTOCK: If it was necessary and if I thought it would—one could do it. The difficulty is that when you have a supervising person like an Inspector, they are in a sense superior to the Commission. They deal with complaints and so on. You have got pay that person something commensurate with what the Commissioner gets. And I will not make comments about the amount of money, but that is a burden on the revenues of the State that I would only wish to have happen if it was absolutely necessary. And the point about it being a part-time position is that if the work is there, you do it. If the work is not there, you do not do it. And so the amount should reflect what the actual work is. But as I said, I am hoping that it will be about 90 or 100 days.

Of course, a lot depends on the support and office arrangements and so on. And I should not worry the Committee about this, but I have been having discussions with the new Inspector of the LECC, Mr Buddin, about office arrangements and so on. We have been talking to DPC about that. Because of the shifting of some of the functions from the Ombudsman to him, he requires high level security which I do not require. So that will necessitate—and because there was one person that was the Inspector of the PIC and ICAC, there was only one

office. It is going to necessitate at least Mr Buddin moving to secure premises. We have been talking to the Premiers about that as well and whether we share them. But again, I am straining a long way.

The CHAIR: That is okay. We are very appreciative of the insights which you have given us into the operation of your office.

Mr RON HOENIG: In regard to the observation that you raised with Reverend Nile of a part-time Inspector, the Premier's Department advised us, and I questioned their advice even though I ended up going along with it, on the three Commissioner model of two part-time Commissioners to prevent agency capture. I have come to the view that they were right. Having two members of the bar as Assistant Commissioners and having a member of the bar as Inspector ensures balance and an outside balance and prevents that agency capture. So I think that is a very good model.

Mr McCLINTOCK: I have got to say this. Those two barristers, the State of New South Wales is very lucky to have them. They are both very able.

The CHAIR: Yes.

Mr RON HOENIG: I would imagine, though, that all that work that the Inspector and your predecessors faced related to some pretty major enquiries and most of those complaints relate to procedural fairness-type questions.

Mr McCLINTOCK: Yes.

Mr RON HOENIG: We are hoping without any further legislative intervention that the guidelines and the functions of the Commission in the future will prevent those complaints and allow them to be either resolved by the Commissioners presiding, if they have public hearings, and they probably allow intervention of the Supreme Court if there is no procedural fairness. So that may lessen substantially the actual complaint on major matters that you are expected to look at, and you can focus on the audit-type functions.

Mr McCLINTOCK: Mr Hoenig, I very strongly agree with you. I gave evidence here last year supporting the model. And I think I said something like what you have said to me. I would hope that if that model is successful it should mean that I rarely have to deal with complaints and I can focus on auditing. And there is no body in the world that does not benefit from someone outside asking whether what it is doing is being done in the best way possible. There is a whole history of this going back to the Government's arrangements that applied prior to 2005 where there was an Operations Review Committee that supervised. It turned out to be unworkable by 2005.

The CHAIR: That is why we have the Inspector.

Mr McCLINTOCK: Exactly. That is why we have the Inspector as a substitute for that.

Reverend the Hon. FRED NILE: But you have time to look at the submissions we have received. There is some very good material in Mr Lander's submission, the Independent Commissioner Against Corruption in South Australia.

Mr McCLINTOCK: Would you like me to put in a written submission?

The CHAIR: I would. In fact, I was going to invite you to do that, to summarise your views that you have put to us this afternoon—

Mr McCLINTOCK: I am happy to do so.

The CHAIR: —and to deal specifically with the two categories of voluntary disclosure.

Mr McCLINTOCK: Do you mind if I make a note? Yes. I would be more than happy to do so. You have probably noticed that I talk too much.

The CHAIR: No, but it may be helpful for you to have a look at the transcript.

Reverend the Hon. FRED NILE: All of the submissions are important. Mr Lander's was important.

The CHAIR: Yes. He was very good in the evidence he gave us.

Mr RON HOENIG: Can I say, Mr McClintock, we were very much influenced by your work in 2005 and the work and your knowledge arising from the work you also did with the Hon. Murray Gleeson. And we went as far as we could possibly go in legislative changes to try and prevent the criticism that the organisation found itself in at the end of last year.

Mr McCLINTOCK: Yes.

Mr RON HOENIG: If those legislative changes do not have that impact then we would be looking to your assistance if some changes need to be made. We are hoping that they are not but we were very much influenced by not only your reports but also the oral evidence that you gave to the Committee.

Mr McCLINTOCK: Thank you Mr Hoenig. We all know how important the Independent Commission Against Corruption is. We all know how important it is that it function effectively but also justly, fairly and efficiently.

Reverend the Hon. FRED NILE: You help to shape the future.

Mr McCLINTOCK: I would be happy to give any contribution I can and deal with any other issues going forward that you want me to. Could I ask this; when would you like that submission?

The CHAIR: Now that we have a Commissioner in place we will appoint a date and hear from the new Commissioner about this issue. I would anticipate that will now take place in September. If the Committee could receive the submission by the end of the month that would be helpful.

Mr McCLINTOCK: That is no problem at all. Thank you.

The CHAIR: That concludes our questions. We appreciate you taking the time to be with us this afternoon.

(The witness withdrew)

The Committee adjourned at 14:00