

REPORT OF PROCEEDINGS BEFORE

**COMMITTEE ON THE INDEPENDENT COMMISSION
AGAINST CORRUPTION**

**REVIEW OF REPORT OF THE INSPECTOR OF THE INDEPENDENT
COMMISSION AGAINST CORRUPTION REGARDING OPERATION
HALE**

At Sydney on Monday 14 March 2016

The Committee met at 10.00 a.m.

PRESENT

Mr D. F. Tudehope (Chair)

Legislative Council

The Hon. T. J. Khan
Reverend the Hon. F. J. Nile
The Hon. L. J. Voltz

Legislative Assembly

Mr R. Hoenig
Mr K. J. Humphries
Mr A. J. Marshall (Deputy Chair)
Ms T. Mihailuk
Mr C. S. Patterson
Ms K. Smith
Mr M. O. Taylor

CHAIR: Welcome, ladies and gentlemen. Thank you for attending this second public hearing being held as part of the Joint Committee on the Independent Commission Against Corruption's review of the report of the Inspector of the ICAC regarding operation Hale. My name is Damien Tudehope. I am the Chair of the Joint Committee and the Member for Epping. With me today are my colleagues from the Legislative Assembly, the Deputy Chair, Mr Adam Marshall, the Member for Northern Tablelands; Mr Kevin Humphries, the Member for Barwon; Mr Chris Patterson, the Member for Camden; Mr Mark Taylor, the Member for Seven Hills; Mr Ron Hoening, the Member for Heffron; Ms Tania Mihailuk, the Member for Bankstown; and Ms Kathy Smith, the Member for Gosford. Also joining us are Committee members from the Legislative Council, the Hon. Trevor Khan, Reverend the Hon. Fred Nile and the Hon. Lynda Voltz.

Before commencing the substantive part of today's hearing, the Committee resolved this morning in relation to an issue which was before the Committee on the previous occasion relating to the audio transcripts of the telephone intercept of various conversations which had been obtained by the Australian Crime Commission and passed on to the Independent Commission Against Corruption. We have today, having obtained the Crown Solicitor's advice in respect of those audio transcripts, resolved that that material together with tabs 1 to 8 of the Commissioner's submission will not be published generally. The substance of the Crown Solicitor's advice is that this Committee is precluded by virtue of section 64 (2) from receiving that material and publishing it.

Section 64 (2) of course provides that this Committee should not be involved in the reinvestigation of any material which was before the Independent Commission Against Corruption. I anticipate that in the fullness of time parts of the Crown Solicitor's advice will be published as a part of this Committee's report. It will become significantly clearer when you see that advice, but save for the time being that the Crown Solicitor was absolutely clear that this Committee has no role to play in the reinvestigation of the substantive matters which were before the Independent Commission Against Corruption which has been styled Operation Hale.

We are entitled, of course, to investigate the processes and procedures that ICAC adopted. To the extent that it is necessary to reference material which was before ICAC in investigating those practices and procedures we are entitled to look at the substantive material which may or may not have been before the ICAC for the purposes of looking at that process. The same of course applies to material which was before the Inspector. To the extent that the Inspector was required to rely upon or receive material which was before the ICAC, that material was before him, but this Committee has no role to play in using that material, which would have the effect of reinvestigating the substantive matter. So for the purpose of the deliberative decision of the Committee this morning, it will not be published at this time.

Moving forward, today we will be hearing from the Inspector of the Independent Commission Against Corruption, the Hon. David Levine, QC. He is assisted by Ms Susan Raice, his principal legal advisor. Thank you for appearing today and making yourselves available. I remind everyone to switch off their mobile phones as they can interfere with the Hansard recording equipment. For the benefit of the gallery, I note that the Committee has resolved to authorise the media to broadcast sound and video excerpts of its public proceedings. Copies of the guidelines governing coverage of proceedings are available. Please note that any filming is to be as unobtrusive as possible and should not disrupt Committee proceedings or focus on Committee documents. In addition, filming of individuals in the public gallery should be avoided.

DAVID LEVINE, AO, RFD, QC, Inspector of the Independent Commission Against Corruption, Office of the Inspector of the Independent Commission Against Corruption, affirmed and examined:

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

CHAIR: I now declare the hearing open. I welcome the Inspector of the Independent Commission Against Corruption, the Hon. David Levine and Ms Susan Raice, the Inspector's principal legal advisor. Thank you for appearing before the Joint Committee today to give evidence. Before we proceed, do you have any questions concerning the procedural information sent to you in relation to your appearance as witnesses and the hearing process?

Mr LEVINE: No.

Ms RAICE: No.

CHAIR: Thank you. Inspector, in the event that you may require any of these proceedings to be held in camera, it is open to you to make that application. I advise members of the public that they may be asked to leave the room if an in camera application is made and has to be determined by the Committee. Inspector, you have indicated to me that you wish to make an opening statement. When the Commissioner made her opening statement I requested that she limited it to between five and 10 minutes. Are you able to limit your opening statement to that sort of period?

Mr LEVINE: No. This is the first occasion on which I have found it necessary to make an opening statement. I will speak as quickly and as articulately as possible but I cannot guarantee 10 minutes.

CHAIR: Are members of the Committee happy for the Inspector to make an opening statement?

The Hon. TREVOR KHAN: I would just ask that he not speak too quickly.

The Hon. LYNDA VOLTZ: How long is the opening statement?

Mr LEVINE: I have no idea—not more than half an hour.

Ms TANIA MIHAILUK: Let us just do it.

CHAIR: Righto. Let us proceed. I certainly note that the Commissioner on the first occasion that she made an opening statement spoke for a considerable period. In view of the amount of publicity attached to your role, let us at least commence.

Mr LEVINE: On 4 December 2015 I delivered to Parliament my report into Operation Hale. I was informed there would be a meeting of this Committee and that I would be asked to give evidence. Through circumstances beyond my control, and I suspect circumstances beyond the control of the Committee, the hearing dates then fixed were vacated. Subsequent hearing dates were again vacated as far as I was concerned for the reasons set out in the media release issued by the Committee on 15 February. I was then informed that my attendance was required today and that the Independent Commission Against Corruption [ICAC] personnel would be giving evidence on Friday, 18 March. As has been stated, the Commissioner gave some evidence on 11 February. Thus, Mr Chair, I welcome the opportunity to get a word in, as it were, in this Committee hearing and the word I wish to get in is "debacle".

Who in their most vivid dreams or their worst nightmares would have envisaged something as mundane and as prosaic as a pizza delivery in the late afternoon of 31 May 2014 at Willoughby—nearly two years ago—would bring together in Parliament members of this Committee, the ICAC, the Inspectorate, the public and the press because of a collision between that pizza delivery vehicle and the vehicle being driven by the girlfriend of the son of a Deputy Senior Crown Prosecutor. In relation to that collision I add that as far as I am aware as at today no fault has been found in the conduct of that young lady who was the partner of the son of a Deputy Senior Crown Prosecutor. Who would have imagined that in the nearly two years since the driver of that pizza delivery van set forth on his business that the consequences would have taken parties through every court in the State to the highest court in the land and would have resulted in the finding that the ICAC had no jurisdiction to

embark upon an inquiry into a referral by the Australian Crime Commission that alleged there had been an attempt to pervert the court of justice by the three people involved?

Who could have contemplated that the pizza vehicle's journey and the consequences that bring us here today would have led to the most demeaning but nonetheless occasionally amusing bloodletting war between the two major media groups in this country? Who would have rationally anticipated that the pizza vehicle collision on 31 May 2014 would have led to the establishment following the ICAC's defeat in the High Court of an independent panel constituted by a former Chief Justice of that court and an eminent Senior Counsel, a requirement that the Inspector file a report to Parliament collaterally to the report delivered to the Premier by the independent panel, amendments to the legislation, a second report by the Inspector, which is the nub of the matter that has regrettably engaged the attention more of the media, until today, in public than that of Parliament? That report was delivered on 4 December last year and generated on the same day a statement by the ICAC on its website, followed by a lengthy letter of 15 January 2016 from the Commission to myself, which has been presented to Parliament, the delivery to Parliament of written submissions of 9 February and the answers by the ICAC to a lengthy series of written questions from this Committee.

At the outset let me make it perfectly clear that I warrant my report to this Parliament of 4 December 2015. In the light of the observations I propose to make in relation to what purport to be responses by the ICAC, I remind the Committee of what I trust will be seen as the candour I adopted in the composition of the report and the methodology adopted in its preparation. I have kept no secrets from anyone about my conclusions in this matter or the way I went about reaching them. I will say this: Even if the doctrine and principles and practice of procedural fairness were applied at the purest level, and I make no admissions as to any deficiency on my part in this regard, the outcome would still be carved in granite. It is to be borne in mind that what the situation here involves is one component of the Executive overseeing another component of the Executive. The first arm of the Executive, the Inspector, has a duty to make reports and recommendations to Parliament. Further, the course of correspondence included in the report, which I invite you to reread, makes it clear that the ICAC could have been under no misapprehension that its conduct was under examination for the purposes of reporting to Parliament. Its replies may fairly be considered either non-responsive or evasive.

One of the consequences of the sorry history of Operation Hale is the realisation of a widely held fear about the ICAC, namely that a person may be indicted, tried, convicted and subject to non-curial punishment after secret hearings, in this instance found by the highest court of the land to have been conducted without jurisdiction. It can now be stated that by reason of idiosyncratic procedures, forensic tactics, deliberate manoeuvrings or simply the lack of courage, the content of the alleged telephone intercepts was never played to Ms Cunneen and, save for leaks in the media, has never been made known to her. That simple act of procedural fairness, I take it, would have been reserved for a melodramatic attempt at a shaming and shameful exposure in the public hearings which the High Court prevented ICAC from conducting. The availability of such procedural and evidentiary manoeuvrings and shenanigans—in relation to which if there was a rule book its author would be one Rafferty—I will be remarking upon further when I come to report to the Premier about the ICAC generally.

An area for reform by what I have described as this debacle will involve examining whether there is a better way for a decision to investigate to be reached by the ICAC, which matters should be the subject of investigation, what criteria are to be applied to that exercise? The appointment of people for finite terms with appropriate levels of good sense, common sense, discretion, legal, political and social sensitivity to the high offices within ICAC must also be considered. Operation Hale especially points to the need for a strong oversight body which should, at all times, be apprised of every matter that has been dealt with by the ICAC and which will have to have, in some form, a flow of information concerning all decision-making events, deliberations and actions of the oversighted entity.

An elected Parliament must be, and must be seen to be, strong and fearless in the steps it takes to provide for the investigation, exposure and prevention of corruption in public affairs. In 1988, this legislature passed the Independent Commission Against Corruption Act [ICAC Act] dealing with these matters, creating the Commission whose function was, or was certainly anticipated to be, a proper, fair and lawful conduct of the jurisdiction given to it by the elected representatives of the people of this State. It can now be seen that after 27 years, the ICAC has failed to discharge—in the instant inquiry especially—the duty and burden imposed upon it by the legislature, particularly, in my view, by reason of the absence of supervision and oversight by an Inspectorate properly resourced, funded, staffed and empowered. There has thus been realised the incipient risk at the time of the enactment of the legislation, in my opinion, an obsession with the power given by the

Parliament to the ICAC rather than the proper and fair exercise of that power for the noble ends embodied in the legislation.

The response of the ICAC to the report of the 4 December last year was constituted by the documents to which I have referred. The ICAC has had the benefit of the Commissioner having given some oral testimony earlier. Before turning to the ICAC's attempts to present a case, as it were, in response to my report—attempts which I candidly consider to be as flawed as they are jejune—I make the following matters quite clear. I do not propose to engage with the ICAC in debate before this Committee or elsewhere on purely matters of law. I have received legal advice on various issues which I consider to be correct. The ICAC no doubt considers its legal position to be correct. Unless Parliament, advised by its Clerks or law officers of the Crown amends the legislation, the appropriate forum for the resolution of conflicting issues of law is, of course, a court of law. I do not propose to be the initiator of proceedings which cannot as a general principle be progressed in a vacuum or be hypothetical. The resources of the State, in so far as they are expended upon the operation of this Inspectorate, will not be thrown away by any such exercise. It may be that the melancholy spectacle for the resolution of legal issues will be initiated by a litigant with the resources to have access to justice on whatever the legal issue might be.

In relation to matters of fact and my conclusions about them with which the Commission is troubled, they are and will remain no more than unresolved matters of fact. If they have to be proved—the ICAC has successfully avoided any necessity to do so, as has the media—they will be proved or not proved in an appropriate forum which is not constituted by this Parliamentary Committee nor by the media, nor by the perpetuation of exchanges between myself and the Commission.

It is to be borne in mind that at the time of the writing of the report, the following sources of information were available to, and availed of, by me: the ICAC; Ms Cunneen; Ms Tilley, the driver of the vehicle; the Australian Crime Commission; and the Deputy Registrar of the Local Court. Of the information from those sources I would venture to suggest that 95 per cent came from the ICAC itself. Additionally, I was under the impression as at the time of the delivery of the report, that the ICAC had provided me with all information other than the contentious material concerning telephone intercepts. That material, in transcript form only, I obtained consequent upon my receipt of legal advice and by applying to the Australian Crime Commission.

Shortly stated, my request of the Australian Crime Commission was in terms to the effect that would it be kind enough to provide me, for the conduct of my investigation into Operation Hale, with the same material that it provided to the ICAC. That led to the provision of the transcripts only. Through circumstances unknown to me, what is said to be the content of the transcripts has been leaked to the media but without critical information, it would appear, as to timing, dates and other circumstances of the alleged impugned communications between Ms Cunneen and her tow-truck driver and panel beater. No information has been made available to me by the ICAC, by the Australian Crime Commission or anyone else of any lawfully intercepted telephone communications between Ms Cunneen and anyone else at a relevant time, apart from those with the tow-truck driver and the panel beater.

I turn to the Medianet press release of 4 December 2015, issued by ICAC with astonishing rapidity, at 3.43 p.m. after the delivery to the Parliament of my report. As I have stated above, it is not my intention to engage with the ICAC in a tit-for-tat debate about every alleged flaw, wart, factual deficiency, legal error, "mis-understanding" or "non-understanding". But I must draw attention to this statement in the ICAC's media release, under the heading "Factual errors":

The Inspector, on his own admission, did not seek confirmation of Ms Cunneen's 'information' from the Commissioner. Had he done so, the Commissioner would have been able to comprehensively refute these statements.

I will repeat that:

Had he done so, the Commissioner would have been able to comprehensively refute these statements.

A clearer statement of the Commissioner's adversarial position can hardly be imagined: All that the Inspector had said on the subject of conflict of interest was wrong or false. Having read that uncompromising denial it therefore came as a surprise to me to read the contents of that part of the letter of 15 January 2016 commencing on page 7 under the heading "Conflict of interest". To my mind what there was written is far from a "complete refutation" but more of a defensive confirmation.

That any fair-minded person would be induced to having reservations about the integrity of the unequivocal denial in the media release would be reinforced by what I consider to be one of the most extraordinary statements made in the letter of 15 January, on page 8:

During my 15 years as a judge of the District and Supreme Courts there were relatively few occasions when Ms Cunneen appeared before me as a Crown Prosecutor. There were no applications made to me to disqualify myself for apprehended bias on the grounds of a close personal and/or professional relationship with Ms Cunneen.

Standing alone or in its purported context it is simply an incomprehensible statement. I view it as having been made out of desperation and not out of the exercise of reason. Traditionally in relation to the conflict of interest the mere existence, in my opinion, of a professional relationship without the intrusion of any level of personal relationship can be the basis for a person in the position of the Commissioner having nothing to do with the matter—to put it starkly. No matter what the Commissioner seeks to say, there was a professional relationship. Notwithstanding what is at best her "equivocal" position in relation to there being a personal relationship, she not only makes the quite odd statement I have quoted above, but also in the actual conduct of the matter chose to delegate to an interstate Senior Counsel the task of conducting not only the public hearings, which in the end she had no jurisdiction to conduct, but also to examine one or two of the other witnesses in the private hearings. If there was no issue in her mind at all about conflict of interest, whether based on a strong or a weak personal relationship, or a strong or a weak professional relationship, why did she take the steps that she did?

I add that in relation to the "personal" aspect of the relationship said by the Commissioner to be only and at best distantly professional, frankly the information given to me by Ms Cunneen was of such a benign and trivial nature that I thought it could hardly be false and could hardly be denied. To use the words of the media, the Commissioner's "backflip" from the challenging phrase in the media release to her more lengthy explanation amounts to no cogent answer at all.

Opinions expressed about the strength or weakness of the evidence in Operation Hale: Is it seriously being suggested that I was not in a position to express any such opinion by reason of the fact that I did not have all of the material, or even on the material I did have? I know as a matter of fact I did not have the audio tapes of the two conversations with the panelbeater and tow-truck driver. Is there nothing else that ICAC failed to provide me with? In any event, this is the simple and very important proposition: I am the Inspector of the ICAC and have no difficulty, in fact, I would find it impossible to perform my function under the legislation without exercising the unquestioned liberty I have to express opinions on the material available to me in performance of those duties. It is very hard to report and "make recommendations" without doing so.

As to the notice to produce and subsequent search warrant, my position is that I accept the advice of counsel—all of which I have handed to the ICAC. Trite though it is to say submission does not mean consent and the factual material provided by the ICAC as to the circumstances of what occurred at the home of Ms Cunneen is eloquent of the correctness of that statement. A notice to produce simply cannot be used as an alternative to a search warrant to enter private premises, the more so when any invitation to enter on the ICAC's own asserted version of the facts was induced by reference to a penalty applying for non-compliance.

If there was no question of conflict of interest identified from the word go, why was no search warrant issued first thing under section 40 of the Act by the Commissioner herself? Nothing in the Commission's letter of 15 January in relation to the referral of the material to the Department of Public Prosecutions [DPP] on a rational basis can be persuasive that what was done was lawful, fair, or otherwise than a gross invasion of privacy beyond jurisdiction. Section 53 of the Independent Commission Against Corruption Act is remarkably clear. The protestations of propriety on the part of the commission as to what it did must be rejected.

Save for one other matter, the balance of the letter from the Commissioner dated 15 January falls into the "tit-for-tat" category and I will not condescend to demean these proceedings today by dealing with them in that fashion. The exception is the reference to a suggestion contained in a letter to the press by my predecessor Harvey Cooper, AM. So flawed is my report I should voluntarily withdraw it. That suggestion is expressly supported by the Commission. This suggestion is without merit. There would or could be three consequences if the suggestion was adopted. Firstly, more attention would be given to that which was withdrawn. Secondly, the Inspector or anyone else, either adopting the same approach and methodology, or if at all possible more assiduously attending to what the ICAC asserts his duty to be, could, thirdly, result in the same engraved outcomes.

Mr Cooper's suggestion must be considered in the context that he conducted his Inspectorate uniquely. Eleven audit reports between 1 March 2009 and 11 June 2013 were delivered to the Parliament. No

investigation or section 77A report was delivered by him. Each of the audit reports concludes by the reference to and the ticking of the boxes of statutory compliance by the ICAC. The Committee is invited to read those reports, note their format and form its own view in relation to my predecessor acting as an "auditor" rather than an "inspector". Indeed, Mr Cooper's predecessor, Mr Graham Kelly, the first Inspector, filed two audit reports in June 2007, one in June 2008 and a section 77A report in September 2008 concerning certain allegations against the Hon. Peter Breen, MLC. The most serious finding that Mr Kelly made in that matter was "sloppiness" which led to mistakes in search warrant applications. There was no finding of maladministration or misconduct. I have no doubt that the then Commissioner, the late Jerrold Cripps, took it all on the chin.

The matter that brings us here today, and will bring us here on Friday, and brought us here on 11 February, is thus a first; a section 77A report by the Inspector relating to one operation, the first time, not in the 27 years of the existence of the ICAC, but in the 11 years of the existence of the Inspectorate. The matter that brings us here today is concerned with power. What Operation Hale is concerned with in my opinion is the abuse of that power in circumstances of fundamental and relative triviality. The particular component of the power of the ICAC that must never be overlooked is that it has power over the body that gave birth to it, namely the Parliament of New South Wales. Let us not forget that in Operation Spicer and Operation Credo 10 Members or former Members of the Parliament await its finalisation after some years. That is a matter of concern to those people and to the Parliament but I acknowledge that directions issued by the ICAC before the end of last year explain the delay on the basis of the intervention of the High Court in "Cunneen". Nonetheless it provides for an interesting exercise in issues of proportionality.

This Committee and this Parliament I am confident, as will be any reasonable member of the community, have the strength not to be played by the ICAC in the matter of Operation Hale or any other operation. To me as Inspector, the whole exercise following the defeat in the High Court has been to try to exploit and thus abuse the powers that the Commission believes it has to achieve, for a reason unknown, the outcome which tragically appears to have been achieved; namely, on an absolutely unproved basis, to attack the reputation of a senior member of the legal profession in this State. There being no reasonable explanation for this whole grotesquerie, one is left with but dangerous speculation: something upon which I firmly refuse to embark as to why, in the first place, the unwise decision—remember what Mr Ipp said—was made on receipt of information from the Australian Crime Commission and secondly, the vigorous pursuit, in secret, of a person of whom it might reasonably be said was doing no more than what an ordinary member of the community as a mother would do upon learning of a motor accident involving her son's girlfriend.

Operation Hale, whatever it has been about, would simply have not been the kind of conduct the Parliament had in contemplation in 1988, in my view. Serious corrupt conduct in public governance and systemic corrupt conduct is what the ICAC should be about. It should be accountable for what it decides to investigate, how it investigates and the consequences of its investigations. There is thus the need for a more intense level of oversight right from the beginning.

There was recently published in *The Canberra Times*, on 1 March 2016, a piece by Professor Adam Graycar in which he said:

Corruption is the trading of entrusted authority, for personal gain, which distorts the making of public policy or the implementation of public policy.

Mr RON HOENIG: Can you read that definition again?

Mr LEVINE: The quote is:

Corruption is the trading of entrusted authority, for personal gain, which distorts the making of public policy or the implementation of public policy.

He goes on to say:

It's not a public official getting a bunch of flowers, a box of chocolates, a bottle of wine, or a ride in a helicopter. These things are not crimes, and are not corruption. They are code of conduct violations.

It is a statement, in my view, remarkable for its aptness and common sense. What the professor says provides an unhappy contrast to the conduct of Operation Hale, especially in the context of initial decision-making which failed to reflect a sense of proportion and ordinary good sense. I add that in Operation Hale, ICAC failed because it could not lawfully consider the corruption issue and ICAC failed also in the disciplinary/code of conduct aspect.

The State must be strong in the fight against corruption, and it will be so if it is equally strong in ensuring that the body entrusted with the investigation, exposure and prevention of corruption is infected by nothing but the most honourable motives, the fairest of dealings and the highest level of propriety in the conduct of its business. This will ensure that the ICAC enjoys the respect it must have to thrive fairly and effectively.

A strong oversight body will avoid the charge that ICAC's power has prevailed over its purpose to the point of there being in ICAC almost a craving to sacrifice on the altar of its self-perceived authority individual rights, liberties and reputations. Thank you, Mr Chair.

CHAIR: Thank you, Inspector. I now propose to adjourn for 10 minutes to give us an opportunity to gather our thoughts.

Mr RON HOENIG: We can keep going.

The Hon. LYNDA VOLTZ: Why do we need to adjourn?

CHAIR: I propose to adjourn to give the Inspector time to get his breath.

(Short adjournment)

CHAIR: Thank you, Inspector, for the opening statement which you have made. Members of the Committee, does anyone have any questions for the Inspector?

Mr RON HOENIG: Inspector, you were formerly a judge of the Supreme Court and before that a judge of the District Court?

Mr LEVINE: Yes.

Mr RON HOENIG: You served as a justice of the Supreme Court with Justice Latham?

Mr LEVINE: No.

Mr RON HOENIG: Do you have any personal animosity towards Justice Latham at all?

Mr LEVINE: No.

Mr RON HOENIG: The opinions you are expressing in the report are your professional observation and assessment from a dispassionate observation of what you have seen?

Mr LEVINE: Wrapping all that up, yes. One can be dispassionate but that does not mean one is not subjective. Subjective reactions can be induced by what is produced by other people. I had subjective reactions to the letter of 16 January, obviously, no matter who the author was.

Mr RON HOENIG: The Australian Crime Commission forwarded to the Commission the telephone intercepts with a suggestion of a possibility of a perverting of the course of justice. The Commission received those. You expressed, if I can use the word, surprise that it was actually forwarded to the ICAC in the first place?

Mr LEVINE: Yes.

Mr RON HOENIG: Because the suggestion contained a possibility that it fitted within the definition of perversion of the course of justice under section 312 of the Crimes Act, it could have been referred to the NSW Police, could it not?

Mr LEVINE: I believe that was one of my first suggestions as to what should have happened.

Ms TANIA MIHAILUK: That is not for ICAC to do that, that is for the Crime Commission to do that directly.

Mr RON HOENIG: You do not know why it was—neither do we—referred to the ICAC?

Mr LEVINE: I do not know what operated in the minds of the Australian Crime Commission in referring whatever it was it referred to ICAC.

Mr RON HOENIG: They having received the matter themselves their procedure would be that they would have to decide whether they conducted some preliminary investigation or refer it to some other agency themselves: they would do that all the time, would they not?

Mr LEVINE: I would think that as a matter of course they would have to conduct some form of preliminary investigation to determine where it is going to go, yes.

Mr RON HOENIG: It is quite apparent when you see the transcripts, as we have, and we have had the advantage of listening to the telephone intercepts, that it required some investigation by someone?

Mr LEVINE: Well, working backwards, on the information I had, on the information that ICAC had, it did not require investigation by ICAC. My position has always been, based upon the limited information I have as to what is alleged to be the impugned conduct, that this is so trivial it is a matter for the police or the Department of Public Prosecutions [DPP]. The conclusion I reached, and still have, is it really should have stopped before it started with ICAC.

Mr RON HOENIG: I am asking these questions to understand ICAC's procedures. I am aware of the prescription in section 64 (2) to ensure that I do not offend the prescription. A suggestion that a Deputy Senior Crown Prosecutor, whether it had substance or not, conducted themselves in a way that fitted within the definition of section 312 of the Crimes Act, is not trivial though, is it?

Mr LEVINE: I disagree. The highest you can put is a suggestion and it may.

Mr RON HOENIG: Yes.

Mr LEVINE: It is not my function as is clear under the Act for me to form any judgement as to the guilt of a person of corrupt conduct. I do not form that. That is ICAC's job. Whether ICAC should do that job or should have done that job might be part of my function.

Mr RON HOENIG: I am not asking in terms of whether that is your function and I am not asking for the purposes of the Committee making a determination. I am just looking coldly at the telephone intercepts themselves. Do you agree that it warranted the investigation by someone in the executive branch, whether it be the police or ICAC? It cannot be the Director of Public Prosecutions [DPP] as they do not have an investigative function.

Mr LEVINE: If all that was available was the transcripts, they would have warranted being put fairly close to the bottom of a pile of stuff to be examined by someone.

Mr RON HOENIG: See, whether it is fair or not, and I might personally be inclined to your view, but if you look at the courts' approach—for example, the Court of Criminal Appeal's approach in Einfeld—certain people are regarded differently by the law than just an ordinary mother in the same circumstances, aren't they?

Mr LEVINE: Yes.

The Hon. TREVOR KHAN: That was a matter investigated by the police, wasn't it?

Mr RON HOENIG: Yes, it was. So, the matter having come to the Commission, should they have gone beyond just referring the telephone intercept to someone else or should they have embarked upon, in terms of their procedure, at least a preliminary investigation?

Mr LEVINE: I have answered that.

Mr RON HOENIG: Well, I did not follow you. You will have to be clearer.

Mr LEVINE: They are entitled to conduct a preliminary investigation. In my view the preliminary investigation should have had an outcome that led either to the police or to the DPP as a disciplinary matter. It was almost, to use the language from when I was at the bar, "legless".

Mr RON HOENIG: Just on the telephone intercept alone, there would have been no basis to refer it to the DPP. It could not have gone to them for disciplinary proceedings. As it stands on its own it is not worth much. So you would agree that in terms of procedure they needed to make some other inquiries before they referred it off?

Mr LEVINE: I will accept for the purposes of the argument that the only telephone intercepts we are concerned with are with the tow-truck driver and the panel beater. They were not disciplinary matters. So that leaves the police.

Mr RON HOENIG: Ultimately the High Court decided in Cunneen that the alleged conduct was not within their jurisdiction and did not fit within the definition of corrupt conduct under the Act. But prior to the High Court determining that issue, it was not an unreasonable determination by the Commission that it was within their jurisdiction, was it?

Mr LEVINE: It was not an unreasonable determination to conduct a preliminary inquiry as to whether it was within their jurisdiction and, if so, what they should do with it—I agree.

Mr RON HOENIG: So having then embarked upon a preliminary investigation—and for that purpose I am not referring to the compulsory examinations; I am referring to their preliminary investigation—they collected what I term, although this might not be the right term, some uncontroversial evidence: statements from various witnesses to the accident, hospital notes and all that sort of stuff. They did that.

Mr LEVINE: I assume they did.

Mr RON HOENIG: They then chose—which is the serious issue that you refer to—to utilise these notices which are virtually like subpoenas with "forthwith" written on them to obtain material from Ms Cunneen, Mr Wyllie and the other people. From my experience in criminal investigations, and I have seen this on hundreds of occasions and you probably more than me, the police are able through the telephone companies to extract via their computer systems the call charge records [CCRs] of all the text messages, calls and reverse call charges from any subscriber providing a serious criminal offence has been committed. Are you aware of that?

Mr LEVINE: I take your word for it, because it has been 11 years since I retired and I have only just learnt how to use an iPhone.

The Hon. TREVOR KHAN: After this is over, you can show me.

Mr RON HOENIG: I want you to assume for the purposes of the evidence that law enforcement agencies are able to obtain from telephone companies, without troubling the people they are investigating, text messages and telephone call records. Invariably, in criminal investigations analysts produce charts as to who has called who and who has texted who. If you were to pursue investigations whereby you wanted to obtain that information, that would seem to be a more appropriate and efficient use of resources and a less obtrusive way to obtain that material, would it not?

Mr LEVINE: I do not know. I would want to know why I want to pursue those investigations.

Mr RON HOENIG: What I am getting at is in respect of their procedure, which I intend to ask them about, why would they want to issue a notice and seize people's mobile phones and turn up with a notice or even a warrant when they could access that material electronically without anybody knowing?

Mr LEVINE: You will have to ask them and I would be very interested to see their response. The question is why would they want to do that in relation to Ms Cunneen based upon what I understand to be a conversation—two conversations with a panel beater and a tow-truck driver?

Mr RON HOENIG: No doubt—

Mr LEVINE: This Committee should not be used to try Ms Cunneen. I say that quite seriously.

Mr RON HOENIG: That is not the purpose of me asking you those questions.

Mr LEVINE: Well it is getting dangerously close to it.

Mr RON HOENIG: Mr Levine, often in my former profession I had to go to the line without crossing it. I generally know where it is.

The Hon. LYNDA VOLTZ: You have stated about the notice to produce forthwith, "It is the view of this Inspectorate that a notice to produce forthwith is contrary to the law."

Mr LEVINE: Yes.

The Hon. LYNDA VOLTZ: Do you also oversee PIC, the Police Integrity Commission?

Mr LEVINE: Yes.

The Hon. LYNDA VOLTZ: Do you know if they use notices to produce forthwith?

Mr LEVINE: Now I do, yes.

The Hon. LYNDA VOLTZ: Would you also say their notices to produce forthwith are contrary to the law?

Mr LEVINE: I am unwilling to answer that because, one, I have not seen them and, two, I suspect there might be a difference in legislation. If they are identical in form, if there is no difference in legislation or power then obviously they would be tainted in the same way, yes.

The Hon. LYNDA VOLTZ: You also had advice from Blackburn, QC, dated 22 October?

Mr LEVINE: Yes.

The Hon. LYNDA VOLTZ: That refers to judicial authority from 2009 concerning the Australian Crime Commission using notices to produce forthwith?

Mr LEVINE: Yes.

The Hon. LYNDA VOLTZ: It is hardly a new invention by the ICAC, is it?

Mr LEVINE: I presume not. It was a new invention to me.

The Hon. LYNDA VOLTZ: When you have been overseeing the PIC Commissioner, you would regularly write to him outlining your concerns and complaints, which he would then respond to?

Mr LEVINE: No, because the relationship with PIC was entirely different. First, less busy, more—I am trying to think of the word.

The Hon. TREVOR KHAN: Productive, perhaps?

The Hon. LYNDA VOLTZ: Thanks for your assistance, Trevor.

Mr LEVINE: More harmonious.

The Hon. TREVOR KHAN: That is a better word.

Mr LEVINE: I had no occasion—Ms Raice will correct me—to conduct an audit in relation to notices to produce that might have produced a notice that would have raised my eyebrows. Yes.

The Hon. LYNDA VOLTZ: But you would write to him regularly about areas of concerns and complaints and he would respond to them?

Mr LEVINE: Well, whenever I wrote to him about areas of complaints, he responded. The level of regularity depended upon the amount of business.

Mr RON HOENIG: It is your view and that of Blackburn that proceeding to seize the phones by way of turning up with a notice is unlawful? The advice you received is quite equivocal.

Mr LEVINE: I will not give an answer to that. I accept the correctness of Mr Blackburn's advice.

Mr RON HOENIG: Thank you. So the correct way of obtaining material is to satisfy a judge, magistrate or registrar that there are reasonable grounds for the issuing of a search warrant should you wish to search and seize material. That is the way the law requires it to occur.

Mr LEVINE: Or in the case of the Commissioner, she has her own power to issue a warrant. So presumably she can satisfy herself or be satisfied by members of her staff, under section 40 of the Independent Commission Against Corruption Act, that there are grounds for her to issue a search warrant.

Mr RON HOENIG: Generally speaking, law enforcement officers are required to go to the judicial arm to get search warrants, and that is part of a protection mechanism, is it not, for individual citizens?

Mr LEVINE: Whenever law enforcement officers are required to get any form of warrant, under judicial fiat, yes.

Mr RON HOENIG: They have to satisfy the judicial officer or appropriate person usually by material contained in an affidavit that there are reasonable grounds?

Mr LEVINE: Yes.

Mr RON HOENIG: In respect of the structure of the Act, do you think it is appropriate that a Commissioner, who is actually part of the executive branch, should be able to issue their own warrants?

Mr LEVINE: Well, is it efficient, I suppose. I prefer to take that on notice, if I may. Section 40 was obviously enacted for a reason. I would have to go back to see if it was the subject of debate or anything.

Mr RON HOENIG: According to Blackburn's advice, they unlawfully obtained the phones of Ms Cunneen and those members of her family and those associated with it, and then several days later they went to see a registrar at Newtown court.

Reverend the Hon. FRED NILE: A week later.

Mr RON HOENIG: A week later they went to see the registrar at Newtown Court.

Mr LEVINE: Was it Newtown? I thought it was the Local Court.

The Hon. TREVOR KHAN: Yes, at Newtown.

Mr RON HOENIG: The Local Court at Newtown. I do not know why they went to Newtown—why they could not have gone next door—to obtain a search warrant. They disclose in their application that they already had the phones that were produced under objection. The basis of wanting the search warrant was that, because they were produced under objection, the evidence they obtained could not be used against people whose phones they had extracted the material from.

Mr LEVINE: For prosecution.

Mr RON HOENIG: Yes, for prosecution.

Mr LEVINE: They had already decided upon a prosecution, right at the beginning?

Mr RON HOENIG: Yes, and that is quite significant.

Mr LEVINE: They were pretty quick.

Mr RON HOENIG: When a search warrant is issued—you and I know that but the general public might not—it gives the officers of the executive branch enormous powers.

Mr LEVINE: The search warrant is the great protection. No, I will stop and say this: You are looking at it the wrong way around. The greatest liberty is that the Englishman's house is his castle. The search warrant prevents that right from being unlawfully abused by any branch of government.

Mr RON HOENIG: And it authorises any branch of the government to break in and to break up and search a person's entire castle, so to speak.

Mr LEVINE: Whatever is contained in its terms is authorised.

Mr RON HOENIG: The question is: why would the registrar issue a search warrant to obtain things—to give the executive branch that enormous power—that they were already in possession of?

Mr LEVINE: That is the \$64,000 question you ask of ICAC, not me.

Mr RON HOENIG: You conduct the inspection. Do you know?

Mr LEVINE: I do not know what was in his mind. I know that he did.

Reverend the Hon. FRED NILE: They were trying to protect themselves retrospectively.

Mr LEVINE: There are conflicting views—Reverend the Hon. Fred Nile just reminded me—as to whether the search warrant validates what is said to be the illegal seizure, or operates only in the future.

The Hon. LYNDA VOLTZ: Are you still saying that it is an illegal procedure?

Mr LEVINE: Not the search warrant.

The Hon. LYNDA VOLTZ: The notice to produce forthwith.

Mr LEVINE: Yes.

The Hon. LYNDA VOLTZ: Despite the fact that the Police Integrity Commission and the Australian Crime Commission have been using them?

Mr LEVINE: Burglary is not lawful merely because—

The Hon. TREVOR KHAN: Multiple people do it.

Mr LEVINE: —multiple people do it.

The Hon. TREVOR KHAN: You had best have a look at the transcript of the Commissioner of the Police Integrity Commission.

The Hon. LYNDA VOLTZ: I have had a look. Thank you for your assistance. If you would like me to get it out and quote it I am happy to do that.

The Hon. TREVOR KHAN: Absolutely, as long as you—

CHAIR: I just make this observation: What happened in the Police Integrity Commission has nothing to do with this Committee.

Reverend the Hon. FRED NILE: Hear, hear.

CHAIR: We are inquiring in relation to the use of a notice to produce by ICAC.

The Hon. LYNDIA VOLTZ: To the point you have raised, the Inspector—who is an inspector for both bodies—says it is unlawful and it has been used by a number of agencies.

The Hon. TREVOR KHAN: The Commissioner in PIC did not even know that they were issuing notices to produce requiring forthwith. That is why we got the letter—it came as a surprise to them.

Mr RON HOENIG: Once the Commissioner had extracted the text messages, in combination with the telephone—

CHAIR: Just be careful about where this goes.

Mr RON HOENIG: I am being careful. Once they had extracted the text messages, together with the telephone intercepts, it was open to them, in terms of procedure, to make an assessment and refer it. Shouldn't they have done that if they formed a view about it?

Mr LEVINE: I think my answering that would contravene your own decision as to what is exposed about the material obtained from the Australian Crime Commission, so I decline to answer it on that basis.

Mr RON HOENIG: The timing is important. At some point the Commissioner went off to see the DPP with some material for an assessment to be made by the DPP in relation to what was the principal thing that caused them to investigate it.

CHAIR: I take it that that is a statement of fact.

Mr RON HOENIG: In terms of whatever procedure they may have—

Mr LEVINE: That is the meeting of which no notes were kept.

The Hon. TREVOR KHAN: It was on something like 31 May.

Mr LEVINE: Yes.

Mr RON HOENIG: Whatever procedure they chose to follow, at the time the matter was referred to the DPP to the time that they had obtained the material from the telephone, they were no further advanced, were they? Shouldn't they have then just referred the matter and that would have been the end of it, at that stage?

Mr LEVINE: What matter?

Mr RON HOENIG: The matter which they were investigating or conducting a preliminary investigation. At some point this organisation, as it embarks upon whatever exercise, has to decide whether or not to take the matter beyond their preliminary investigation and determine what to do with the matter. For example, if they were investigating the activities in respect of some organisation and they had conducted a preliminary examination and it was time to decide whether to refer it or whether to conduct their own inquiry, what is the procedure that they should follow as to what they should pursue or what they should refer to a law enforcement agency for criminal charges?

Mr LEVINE: That question should be directed to them, but they will come up, principally, with the elusive concept of public interest.

Mr RON HOENIG: They will also say, I anticipate—I do not want to put words into the Commissioner's mouth—that they had a statutory right and statutory obligation and it is their interest to investigate corrupt conduct and to expose it publicly, and all that sort of thing. But those things do not happen in a vacuum. There is a public interest, is there not, to decide whether people should be charged or not charged for their wrongdoing?

Mr LEVINE: There is. But what troubles me—and what I thought was one theme of my over-30-minute opening address—

Mr KEVIN HUMPHRIES: 37.5 minutes.

Mr LEVINE: I am sorry for that. With respect to public interest there must be some criteria established by which, even at a preliminary inquiry stage, the Commission can say, "Yes, the public interest is engaged on the following bases," or, "No, the public interest is not engaged, for the following reasons." It is a little trite in my experience of reading some of ICAC's stuff to just say it is in the public interest.

Mr RON HOENIG: Judges make decisions all the time as part of their judgment, either on the admissibility of evidence that has been unlawfully obtained, for example, or the sentencing of offenders as to what the public interest is. Why should not the legislature trust a judge who is a Commissioner to decide what is in the public interest?

Mr LEVINE: First, it does not because she is not a judge.

The Hon. LYNDA VOLTZ: No, but she is a judge who is now a Commissioner.

CHAIR: But she is not acting as a judge.

Mr LEVINE: No, she is not a judge, and this is a very important point—

The Hon. LYNDA VOLTZ: We know that she is a former judge.

Mr LEVINE: She is not a judge.

Mr RON HOENIG: Let the Inspector speak. What he is saying is very important.

Mr LEVINE: It is very important and it will be the subject of a recommendation for reform from me. The Independent Commission Against Corruption (Commissioner) Act 1994—what is known as the Barry O'Keefe pension legislation—should be repealed and all the terms and conditions of the Commissioner's appointment be contained in the ICAC Act itself. The Commissioner of ICAC cannot hold a judicial commission. It is clear in the ICAC Act. She is not a judge. Indeed, a person can be Commissioner without ever having been a judge. So forget that she is a judge, she is a Commissioner.

CHAIR: Mr Hoenig, can I give Reverend the Hon. Fred Nile an opportunity?

Mr RON HOENIG: Yes.

Ms TANIA MIHAILUK: Yes, and I would like to say something as well.

Reverend the Hon. FRED NILE: Thank you very much for attending the hearing and also your report. There was a question earlier as to whether you had some bias or lack of objectivity. I am very concerned about the future of ICAC. I have always supported ICAC. In my mind I have been trying to separate if there are errors of judgment were they more in the mind of the Commissioner than ICAC as an institution, and therefore is there any evidence of prejudice or bias by the Commissioner as an individual which has directed this whole fiasco of ICAC?

Mr LEVINE: I cannot answer that. First, I have no personal prejudice against Megan Latham. In fact, my position is fairly described as quite neutral, neither one way or the other. My negative responses were induced by the product over her signature of various documents from the organisation of which she is Commissioner. Whether she was the author of them I do not know. Other documents are authored by the solicitor or other office holders down there, and whether they can influence her thinking or each other's thinking, I do not know what goes on down there.

I agree that there should be an anti-corruption body or a pro-integrity body. But my point I have been trying to make today is it will only be as good as the respect in which it is held and that respect will be earned when people know that it is under constant supervision. That is all I can say.

Reverend the Hon. FRED NILE: Are you saying you are not certain or you cannot comment on whether there was malice or prejudice by the Commissioner against Ms Cuneen herself?

Mr LEVINE: No, I am not going to.

Reverend the Hon. FRED NILE: That was driving the whole case.

Mr LEVINE: No, I cannot.

CHAIR: I do not think the Inspector can answer that.

Mr LEVINE: I cannot answer that.

Ms TANIA MIHAILUK: Inspector, I just wanted to touch on your powers as an inspector. Obviously, you had available all full records of the Commission and I imagine you had access to all the transcripts in relation to the intercepts?

Mr LEVINE: I have no complaint in relation to Operation Hale. I got everything—

Ms TANIA MIHAILUK: Right. Not the tapes themselves?

Mr LEVINE: —from ICAC except the telephone intercept stuff.

Ms TANIA MIHAILUK: The Telecommunications (Interception and Access) Act [TIA] stuff. But you are entitled under section 68 of the TIA to have access to that.

Mr LEVINE: According to my legal advisor I do not have the route.

Ms TANIA MIHAILUK: I would have thought from that Act you can. As an inspector you do have access, should you wish, to those tapes.

Mr LEVINE: I agree with you that I should have. There are two schools of thought; ICAC says no, I should not, and I received advice that if the purpose for which I require them is a permitted purpose under the Commonwealth legislation, then I can approach the Australian Crime Commission [ACC], who may give it to me.

CHAIR: Which you did.

Mr LEVINE: Which I did.

The Hon. LYNDA VOLTZ: And they did.

Mr LEVINE: No, they did not.

Ms TANIA MIHAILUK: They gave you the transcript, yes?

Mr LEVINE: But not the audio.

Ms TANIA MIHAILUK: Did they give you a reason why they did not give you the audio?

Mr LEVINE: It might seem ridiculous but I will not answer that in public. I do not want to.

Ms TANIA MIHAILUK: It is just out of interest for the purpose of the inquiry.

Mr LEVINE: I can answer it. They did give me a reason.

Ms TANIA MIHAILUK: Under 57C and 57F of the ICAC Act you are able to bring out any witness that you see fit in your investigation or proper audit of the operation itself. Did you feel the need to perhaps question the Crime Commissioner's decision to provide that information to ICAC directly, as opposed to the police?

Mr LEVINE: I can imagine the reaction I would have got from the Crime Commission, frankly. I could have set myself up as a royal commission and cost the State of New South Wales hundreds of thousands of dollars, and issued subpoenas, et cetera.

Ms TANIA MIHAILUK: Inspector, that is the crux of the issue here, I would have thought in many respects, as to why the Crime Commission provided this material to ICAC. I would have thought that would be an issue for you also in auditing this operation.

Mr LEVINE: No, I am sorry, I am not following.

The Hon. LYNDA VOLTZ: Why did you not ask them?

Mr LEVINE: Why did I not ask who?

The Hon. LYNDA VOLTZ: The ACC.

Mr LEVINE: But I did. After I was rejected by ICAC I got counsel's advice to say the way you do it is X. I followed X and I got it from the ACC.

Ms TANIA MIHAILUK: That is the transcript you are talking about, is it?

CHAIR: Yes.

Ms TANIA MIHAILUK: No, we are talking about understanding why they chose to hand over the material they obtained through their intercepts to ICAC.

The Hon. LYNDA VOLTZ: Rather than to the police.

Ms TANIA MIHAILUK: That is right.

Mr LEVINE: An answer to that would fall within the ruling.

The Hon. LYNDA VOLTZ: Would fall within the ruling of what, section 64 (2)?

Mr LEVINE: About what information this Committee is going to make public.

The Hon. LYNDA VOLTZ: We are asking you did you ask the ACC why they chose to refer it there rather than the police.

The Hon. TREVOR KHAN: How does this arise out of the report? I will take a point of order: How does this arise out of the report? And how does it—

The Hon. LYNDA VOLTZ: Well—

The Hon. TREVOR KHAN: Let me finish my point of order—and how does it arise within the exercise of the Inspector's functions? It seems to me that he has to report on the activities of ICAC, not on the activities of the Australian Crime Commission. What we are being directed to is going down a burrow which is—

CHAIR: I think the concern of the Inspector is that to give an answer to that question would involve disclosing some factual material which I have already ruled is not the province of this Committee.

The Hon. LYNDA VOLTZ: Can I say this to the point of order: Point one of the recommendations within the Inspector's report is about the ICAC's sense of proportion in what was referred to it. I do not think it is unreasonable for the members of this Committee to ask whether the Inspector actually went to the source of the original information and complaint and asked why a decision was made rather than referring it to NSW Police to refer it to ICAC. I cannot understand how on any level that is not within his report and it refers to any of the information that is held downstairs.

Ms TANIA MIHAILUK: Further to the point of order; that is what section 57F reads:

- (1) The inspector has power to do all things necessary to be done for or in connection with, or reasonably incidental to, the exercise of the inspector's functions.

CHAIR: Inspector, if you think that we need to traverse material that is within section 64 (2) to answer that question, we will take it in camera.

Mr LEVINE: I would like the question articulated a little better.

Reverend the Hon. FRED NILE: What is the question?

The Hon. LYNDA VOLTZ: The question is: Did you ask the Australian Crime Commission why they referred the matter to the Independent Commission Against Corruption rather than the NSW Police Force?

Mr LEVINE: That question I can answer.

CHAIR: Are you content with that question, Mr Khan?

The Hon. TREVOR KHAN: Yes, I am content with the Inspector answering that question. An issue may again arise with the next question.

Mr LEVINE: My answer is no, I did not. If you are going to ask me why then we are in strife.

The Hon. LYNDA VOLTZ: Within your report you raise the issue that there was a close personal and professional relationship between Ms Cunneen and the Commissioner. Did you ever put that to the Commissioner? If not, why not?

Mr LEVINE: The answer is no. The answer to the second part is what I said, that as far as I was concerned that there was a professional relationship was almost unarguable and the personal aspects were so trivial as to be undeniable.

The Hon. LYNDA VOLTZ: What do you mean by "the personal aspects were so trivial"? Could you elucidate?

CHAIR: I think—

The Hon. LYNDA VOLTZ: No, I am asking the Inspector.

CHAIR: I think the answer is reasonably clear.

The Hon. LYNDA VOLTZ: Could you elucidate?

CHAIR: The trivial nature of the personal relationships alleged.

Mr LEVINE: Yes, they were ordinary actions of human interactions when she visited the next-door neighbour of Ms Cunneen.

CHAIR: Ms Latham, I think.

Mr LEVINE: They saw each other.

The Hon. LYNDA VOLTZ: How does that become a close personal relationship?

Mr LEVINE: And the information was that they had enjoyed each other's society or socially whilst they were together as Crown Prosecutors.

Reverend the Hon. FRED NILE: You are just repeating those words.

The Hon. LYNDA VOLTZ: You are saying it is trivial. You say in your report it is a close personal relationship. I am asking why you never put that to the Commissioner.

Mr LEVINE: Because I could not imagine any basis on which it would be an issue.

The Hon. LYNDA VOLTZ: The Commissioner indeed thinks it is an issue, but you never tested it with her, did you?

Mr LEVINE: She has had the opportunity to reply and her reply is to my mind totally disingenuous.

The Hon. LYNDA VOLTZ: She says that she happened to see someone once or twice and wave to them and she worked with them a long time ago for three months. You said in your report that that is a close personal relationship, but you never tested it.

Mr LEVINE: It does not matter.

The Hon. LYNDA VOLTZ: Let me ask you this: Did you meet with Ms Cunneen?

Mr LEVINE: Yes.

The Hon. LYNDA VOLTZ: How often did you meet with Ms Cunneen?

Mr LEVINE: Twice.

The Hon. LYNDA VOLTZ: Did you also have telephone conversations with Ms Cunneen?

Mr LEVINE: No—I do not know, emails.

The Hon. LYNDA VOLTZ: Would you like to take it on notice?

Mr LEVINE: I would not be able to—

The Hon. LYNDA VOLTZ: Emails would be easy to trace, would they not?

Mr LEVINE: Emails, I think.

The Hon. LYNDA VOLTZ: What was the nature of the email correspondence between you and Ms Cunneen?

Mr LEVINE: Complaining about leaks to the press mainly and the other day complaining about ICAC's fighting costs issue in litigation.

The Hon. LYNDA VOLTZ: What about at the time of your writing the report? Did you have any email correspondence with Ms Cunneen then?

Mr LEVINE: I cannot remember.

The Hon. LYNDA VOLTZ: Did you provide her with a copy of the report before it was released?

Mr LEVINE: No.

The Hon. LYNDA VOLTZ: Did you put any of the allegations to her?

The Hon. TREVOR KHAN: What allegations? Do not just read off questions Mr Lynch is giving you; you have to do better than that.

The Hon. LYNDA VOLTZ: I ask the Hon. Trevor Khan to withdraw that comment. I am looking at a copy of the Inspector's report.

The Hon. TREVOR KHAN: The Hon. Lynda Voltz is putting allegations. You have to put a sensible question.

CHAIR: Mr Khan, through the Chair, please.

The Hon. LYNDA VOLTZ: Let us put some sensible questions. Did you ever put to Ms Cunneen what might have been the basis of the original referral?

Mr LEVINE: Are you asking that in reference to a particular part of my report? If so, could you direct me to it?

The Hon. LYNDA VOLTZ: In regards to whether it was in proportion or not. Certainly, when you have spoken—

Reverend the Hon. FRED NILE: Where is it in regards to the Inspector's report?

The Hon. LYNDA VOLTZ: Let us go to section 1 of the recommendations where the Inspector talks about the proportion of ICAC's actions. When you spoke on at least two occasions to Ms Cunneen, did you inform her that they were not relying on witness statements alone?

Mr LEVINE: I thought you were asking about the report.

The Hon. LYNDA VOLTZ: Yes, that is right because you are saying that ICAC's actions were not in proportion.

Mr LEVINE: You do understand, Ms Voltz, that Ms Cunneen is not my client?

The Hon. LYNDA VOLTZ: I do understand that, but you spoke to her on at least two occasions.

Mr LEVINE: Yes and I listened to her on at least two occasions.

The Hon. LYNDA VOLTZ: Did you not ask her any questions?

Mr LEVINE: Of course I asked her questions.

The Hon. LYNDA VOLTZ: What was the nature of the questions you asked Ms Cunneen?

Mr LEVINE: I cannot remember.

The Hon. LYNDA VOLTZ: Did you speak to anyone else in the Executive of Government regarding this matter?

Mr LEVINE: That is a pretty wide question. I suppose I spoke—

The Hon. TREVOR KHAN: Staff members perhaps?

The Hon. LYNDA VOLTZ: It is pretty clear who the Executive of Government is.

The Hon. TREVOR KHAN: Actually it is not.

Mr LEVINE: No you had better identify—

The Hon. LYNDA VOLTZ: The Executive of Government is covered by the Constitution.

Mr KEVIN HUMPHRIES: It is about 1,500 people, actually.

Mr RON HOENIG: It could be the Commissioner of Police, really.

The Hon. LYNDA VOLTZ: Of the Government—did you speak to the Attorney General or any former Attorneys General in regard to this matter?

Reverend the Hon. FRED NILE: Attorneys General would not know.

Mr LEVINE: I think—I do not want to give false or misleading information to this Committee—Operation Hale and the name of Cunneen might have come up in a conversation I had with the Premier about the whole of ICAC and when I was going to get reports done and things like that.

CHAIR: You are preparing another report in relation to the ICAC generally. When do you expect to have that report available?

Mr LEVINE: My answer to that from now on is that every time I am asked it will be delayed by a week.

CHAIR: I will not ask again. You have foreshadowed reasonably wide-ranging criteria for recommendations in relation to changes to the ICAC Act.

Mr LEVINE: Yes.

CHAIR: Can I take it that most of those changes relate to oversight?

Mr LEVINE: Yes.

CHAIR: If I were to ask you about perhaps strengthening the oversight that your office has in relation to the ICAC, what suggestions would you make in relation to the matter in which the Inspectorate should be further empowered in relation to the manner in which it oversees the activities of the ICAC?

Mr LEVINE: One matter that I will certainly be raising, and which I could raise without the intervention of the Premier but I will raise with him as part of it, is this. Might I get back to my Police Integrity Commission relationship? Between the PIC and my Inspectorate, the PIC either fortnightly, every three weeks or monthly, depending upon the amount of business, sends me a document that identifies one, every matter that is current before PIC and two, the stage at which it happens to be. That should apply between ICAC and the Inspectorate of ICAC.

The advantages are obvious. I can glance through a list and it can range from why on earth are you wasting your time on X, or this is a big matter and I will conduct a complete audit. That is a very important bridge that should be established. I have not hitherto asked the Commissioner of the Independent Commission Against Corruption because I have never been able to get around to doing it. I think if it has the imprimatur of the Government or the Parliament there would be a better chance of achieving it.

CHAIR: In relation to that, you make some reference to your relationship with the ICAC Commissioner. On any view of it, it is not good. Certainly the correspondence that passes between you and the Commissioner appears to be toxic.

Mr LEVINE: It is acrimonious, yes.

CHAIR: I am not asking you to attribute blame. If you were to fix that how would you do it?

Mr LEVINE: I always try to communicate politely and firmly, but it does not seem to work.

Mr RON HOENIG: The inference I draw, if it is fair or not I was going to ask the Commissioner, is there seems to be a resistance to oversight?

Mr LEVINE: That, if I might say, is an understatement.

Ms TANIA MIHAILUK: I do not agree with that.

CHAIR: That is clear from your opening statement.

Mr LEVINE: That is why I made the point today about this Operation Hale business being the first.

Mr RON HOENIG: The first what?

Mr LEVINE: The first intervention by the Inspector by the filing of a report about a particular operation.

The Hon. LYNDA VOLTZ: Only with regard to ICAC. It is not the first with regard to other commissions, is it? It has happened before with the Police Integrity Commission, hasn't it?

Mr LEVINE: We are only talking about ICAC and Operation Hale.

The Hon. LYNDA VOLTZ: That is great, and I said it is the first in regards to ICAC, isn't it?

Mr ADAM MARSHALL: That is what he said twice.

The Hon. LYNDA VOLTZ: That is great because I was asking the Inspector to clarify that.

Mr KEVIN HUMPHRIES: First of all, thank you for your report. It is noted and appreciated in reminding not just the Committee but everyone here that the unintended consequence of ordering a pizza should not end up in parliamentary inquiries and High Court cases. A sense of proportion, I totally get that, thank you for being honest and candid. That leads to questions that will come up on Friday. It is what is not said in the reports and that is a sense of judgment or lack of judgement by ICAC and the Commissioner and a lack of proportion and priority that is alluded to. Apart from the gross invasion of personal liberty and abuse of power, all questions for me are leading to the fact that there are issues of competency here that need to be raised further, particularly around the issue of priority or personal agenda. I do not expect you to answer that. Is there something we are missing? Some of the correspondence and some of the commentary in this space may allude to other issues that this Committee is expected to second-guess. Can you comment on that?

Mr LEVINE: After today the one thing you will not be missing is what I consider to be one of the more important points I have made: that Operation Hale was the first of its kind in 11 years. From its inception in 1988 and commencement of operations in 1989, until 10 or 11 years ago when the Inspectorate was established, ICAC functioned without supervision otherwise than by this Committee. It is an interesting social exercise to ask what do you remember most of ICAC over the last 21 years? There are usually three names mentioned: two were former Premiers and one is a vigorous litigant. The responses, as has already been mentioned, it must be known, and no other conclusion can be reached, that there is a sullen resentment to oversight when for four years there has been nothing but standardised audits and four or five years before that standardised audits and one minor inquiry. Who can remember the names of the Commissioners going back to 1988?

Mr KEVIN HUMPHRIES: They will remember the pizza delivery, will they not, and that is the sense of proportion I am alluding to.

Mr RON HOENIG: I remember Barry O'Keefe too; he got stood aside by the Supreme Court for bias.

The Hon. LYNDA VOLTZ: I think they remember Barry O'Keefe pretty well.

The Hon. TREVOR KHAN: Inspector, you refer in your report to two media releases, one on 30 October announcing the public inquiry and a further one on 20 April 2015.

Mr LEVINE: Yes.

The Hon. TREVOR KHAN: That was the 622 word one. Are you aware that those media releases were removed by ICAC from their website?

Mr LEVINE: I think I am, yes.

The Hon. TREVOR KHAN: Did you ever seek an explanation as to why, with all the material and media releases on the website, the ones relating to Operation Hale were taken down?

Mr LEVINE: No, I never actually sought an explanation from the Commissioner or from ICAC as to why they were taken down. I made an assumption that—I did. My right arm on my left says I did.

The Hon. TREVOR KHAN: Do you want to take some further advice?

Mr LEVINE: Apparently I did and I got one response saying that the reason one of them was taken down, the one I called the "indictment", was "no longer relevant".

The Hon. TREVOR KHAN: If that is the answer given to the inquiry, that it is no longer relevant, is that again indicative of the refusal to accept or reluctance to accept oversight of ICAC's actions?

Mr LEVINE: It could be. Anyone can have a view about that. It might be indicative of oversight in fact working. If we jump up and down, as I did, about both, certainly the indictment press release, if at the end of the day it worked and they had to take it down, their explanation was, "it is no longer relevant," that is pretty lame. The explanation is: we lost, it is over, done. As to the first one announcing the public hearing might I, Mr Chair, just say had there been in place the chain of information that exists between Police Integrity Commission and the Inspectorate I would have known in advance. I would have known from the word go that they had commenced an Operation Hale, rather than the first thing I find out about it is reading in a newspaper report of a press release.

The Hon. TREVOR KHAN: It is the case, is it not, Inspector, that the following day, 31 October, you wrote to ICAC expressing the view that this was a matter more appropriate for the police than for ICAC to be investigating?

Mr LEVINE: That is after the first press release?

The Hon. TREVOR KHAN: Yes.

Mr LEVINE: Is that when I did it? Right. Okay.

The Hon. TREVOR KHAN: This goes to what Mr Hoenig was asking you further about the position prior to the High Court decision. Would you agree with me that in a sense the High Court backed the position that you had expressed months earlier, that is that this was not the sort of thing that ICAC was set up to investigate?

Mr LEVINE: It might be that some parts of some of the judgements might indicate that, but with respect I think the judgement of the High Court in Cunneen and ICAC will provide work for academics indeed for generations.

The Hon. TREVOR KHAN: Finally I go to the issue of Mr MacSporran. I think he used the term he "received his commission"—is that the term?—

CHAIR: Yes.

The Hon. TREVOR KHAN: —on 2 October. In your report on page 60 you refer to a course of conduct that occurs after Mr MacSporran is appointed. That includes that a series of compulsory examinations are undertaken on 28 and 29 October. Are you able to indicate your view as to the appropriateness of persons other than the Commissioner who is going to undertake the public hearing undertaking the compulsory examinations? Is it appropriate for other people to be doing that?

Mr LEVINE: Yes, I am troubled by it. That is probably based upon my being a traditionalist in terms of judicial or quasi-judicial functions and a distaste I have for decisions by committee. X examines A, Y examines B, F examines G, Queensland silk examines the star witness and then a report is issued. Who inputs what? I do not know.

Mr RON HOENIG: It is a bit like joint judgements of the Court of Appeal, isn't it?

Mr LEVINE: Well, in my day they were abundantly clear as to who has contributed what.

The Hon. TREVOR KHAN: Let me go further in terms of this exercise. If Mr MacSporran was appointed on 2 October, is that the point in time at which you would be entitled to conclude that the Commission and the Commissioner had come to the view that there was either a bias or a perception of bias?

Mr LEVINE: That is the question I ask: Why appoint him if there was no concern about the question of conflict of interest? One answer might be—because it had nothing to do with conflict of interest—it always looks good when we bring someone from interstate to deal with one of our own. We have done it in trials and appeals. This is another question of proportion and an unexplained component of the conflict of interest situation as far as I am concerned.

The Hon. TREVOR KHAN: Because what we are talking about is on 28 and 29 October, the day before the issue of the media release with regards to there being a public inquiry, the Commissioner is undertaking at least some of the compulsory examinations. I take it that that is the essential problem that you direct your attention to.

Mr RON HOENIG: No, it was an Assistant Commissioner doing that.

The Hon. LYNDA VOLTZ: And I thought we were not going to deal with that stuff.

The Hon. TREVOR KHAN: That is in his report—page 60 of the report.

Mr RON HOENIG: I thought I saw some of the evidence where it was the Assistant Commissioner doing it.

The Hon. TREVOR KHAN: No. If you look—

Mr LEVINE: The Commissioner did conduct some of them.

Mr RON HOENIG: Some. Not all of them.

CHAIR: Three.

The Hon. TREVOR KHAN: If you look at the third paragraph on page 60, you do not have to go anywhere else apart from that. In your view, if there was bias or a perception of bias from 2 October, after the High Court decision, what was the capacity of the Commissioner to reinject herself into the decision-making of ICAC on such things as the referral of the material to the DPP?

Mr LEVINE: The frank answer is: She shouldn't have, in my view.

Mr RON HOENIG: In relation to that sort of stuff, I am troubled by the exercise of the disciplinary function. We are talking about a Crown Prosecutor appointed under the Crown Prosecutors Act with tenure and independence. The whole basis of those office holders—public defender or same—is that they have the opportunity if they see something wrong to speak out and be able to do it imperviously. I suppose some might speak out; some might speak to a journalist. But the concept of going through somebody's private phone, the material produced and sticking journalists' names in the search—

CHAIR: I will ask you not to answer; I do not think you should answer that.

Mr RON HOENIG: —how does that relate to disciplinary conduct in terms of ICAC's procedures?

Mr LEVINE: I think this has got nothing to do with the Commonwealth.

CHAIR: Do you want to answer that question, bearing in mind section 64 (2)?

Mr LEVINE: I would certainly love to answer the question, but I will not if the Committee has—I thought I had answered it by saying that what happened in the end was the most egregious invasion of privacy—

CHAIR: We can review the transcript of that later on if you want to elucidate on that answer further later. I have no problem with you re-asking that question, Mr Hoening, if you want to put that to the Inspector again later and perhaps elucidate another answer.

Mr RON HOENIG: Do you want me to do it now?

CHAIR: No. After you have had a look at the transcript, if you need further explanation in relation to that material if you want to—

Mr RON HOENIG: No. I have seen the material that the Commissioner produced to the Committee. I am just trying to reconcile. They have to make a determination under their Act about what is disciplinary or what is not. I am just looking at their procedures. How do you come to a disciplinary process for a Crown Prosecutor? How do you go through that because that is part of their justification for referring the matter to the DPP?

Mr LEVINE: It depends what you refer, of course.

Mr RON HOENIG: There is not much scope to discipline a Crown prosecutor unless they have offended under the Act. I cannot tell from the Act that she has offended under the Act, so I just want to know what the procedure is as to how you get to a disciplinary referral.

Mr LEVINE: You had better ask the Commissioner.

Mr RON HOENIG: I will. But if I do not ask you first, I do not want to catch her on the hop. I want to make sure that she is coming armed.

Mr LEVINE: I am not embarrassed to say you have asked me. I am not prepared to give an informed answer at this stage. I can give an informed view as to its outcome. But how she did it—

CHAIR: Well, we have had the outcome.

Mr LEVINE: —as to section 53 is a matter for her to justify.

Mr CHRIS PATTERSON: In your opening you stated—and you have made it abundantly clear on more than one occasion because you did not want it lost on us—that this was the first instance we have had oversight in the past 11 years compared to general audits. Your words were, and I am happy to be corrected, with that came sullen resentment of the oversight. The Chair asked about the relationship between the Inspector—yourself—and the Commissioner. Again, I am happy to be corrected. I am not trying to put words in your mouth, but the word "acrimonious" was used. The point of all of that is two-fold. First, do you believe the relationship between yourself and the Commissioner can be repaired? That is not always the real world so, if not, how does that impact on the workings of ICAC moving forward?

Mr LEVINE: Yes, to the first part, with provisos. The relevant correspondence is in some form or other. I suggested we have a meeting, which was ignored. When the Commissioner was reminded, it was denied that I had suggested a meeting, so I sent her a second copy of the letter and a meeting was rejected on the basis of—and I say this without having her reply with me—in effect, "Well, what was the meeting going to be about? There is no agenda, nothing." My subjective reaction was, well, if that is your view, we are not going to have a meeting because obviously we were not going to achieve anything if she could not think of any conceivable subject of a meeting. The resolution of that, getting back to the yes part of my answer, might require anything from a formal meeting in a boardroom to, for goodness sake, why do we not just go out and have lunch, to be frank. The second part will, to a great extent, depend upon how successful I am in pushing the oversight role—I anticipate this will be vigorously opposed—to commence right from the beginning based on knowledge of what they are doing from the beginning. Based upon how well that has worked with the PIC, I cannot see any reason it would not work as successfully with the ICAC. The situation is not incurable. It will not be easy but I think there can be an outcome.

CHAIR: That oversight from the very beginning would extend, of course, to whether there should be a public hearing in relation to a particular matter?

Mr LEVINE: Every step that is taken, yes, will be overseen.

CHAIR: In that regard there may be significantly more resourcing necessary for your office. Is that right?

Mr LEVINE: Yes.

CHAIR: What do you anticipate would be the structure of your office as a result of that additional resourcing?

Mr LEVINE: There will have to be an additional assistant, inspectors and probably legal officers and some increase in support services. I have not got as far as thinking that through because, amongst other reasons, it concerns money. I have never considered that my problem. That is your problem, as it were.

Ms TANIA MIHAILUK: You do not need that to go forward in terms of being able to work with the Commissioner in the future. You said you need to have a meeting or a lunch to resolve the acrimonious relationship.

CHAIR: I think there are two things. There is repairing the relationship between the individuals and a new oversight arrangement.

Ms TANIA MIHAILUK: I would have thought the repairing is the first—

The Hon. TREVOR KHAN: That is putting it down to a relationship issue. That has not been what the evidence—

Mr KEVIN HUMPHRIES: That is not the point. That is right.

Mr RON HOENIG: The other point is, whether your office is resourced or not, the difficulty is that whilst your role is an important oversight role, the horse has usually bolted by the time it comes to you, which is one of the things you have referred to in your opening statement. I wonder whether the re-creation of the Operational Review Committee that was taken out of the legislation, or something similar, may be appropriate. I say this: If it was not for whom the person was in this inquiry who had the knowledge and resources to be able to mount the legal challenge, then nobody may ever really know that.

Reverend the Hon. FRED NILE: They do not have the resources to do that. That is the problem.

The Hon. LYNDA VOLTZ: Does she not, Fred? How do we know that?

Reverend the Hon. FRED NILE: That is the problem.

Mr RON HOENIG: More resources than my clients, for example, used to have—

Reverend the Hon. FRED NILE: The Inspector made reference to it, that she was in trouble and needs extra money.

CHAIR: Mr Hoenig is asking a question. We do not need the commentary.

Mr LEVINE: I am sorry, the commentary—

The Hon. TREVOR KHAN: Overwhelmed.

Mr LEVINE: —has overwhelmed the question. What was your question?

Mr RON HOENIG: Even if you were more adequately resourced, by the time a complaint has come to you the horse has bolted; it is usually too late. I wonder whether or not in addition to your role there needs to be something similar to the initial statutory protection of the Operational Review Committee, which would be some sort of oversight prior to them embarking upon their processes?

Mr LEVINE: I know nothing of that body to which you have just referred, but it is not necessarily true that when someone comes to the Inspector the horse has bolted. The person can come to the Inspector, in my view, at any time, but that leads to another area that has to be cleared up, and that is the immense power ICAC has to suppress and stop people talking about it. I have people ringing in trepidation that their first phone contact is in breach of a suppression order issued by the Commission.

Mr RON HOENIG: Which goes back to one of the issues you raised in your opening. That is, people should not be frightened of the organisation; they should welcome it and support it and be happy to talk.

Mr LEVINE: And they will respect it more if they know the deal they are going to get is a fair deal and they will not be ambushed with trickery and shenanigans, and all that. That is my view.

Mr RON HOENIG: There is something else that troubles me. Ultimately the Commission referred the matter to the Director of Public Prosecutions to determine whether or not any action should be taken in respect of proceedings. A Victorian prosecutor advised them and a decision was made to no bill it. Despite what happened in between, that is the Commission's function, is it not? There was nothing wrong with the Commission doing that, was there, if that is all it did?

The Hon. TREVOR KHAN: That is a big caveat.

Reverend the Hon. FRED NILE: Referred it for prosecution.

Mr RON HOENIG: Is it not the Commissioner's statutory responsibility to form a view that it should be referred to the DPP?

Mr LEVINE: She can refer it to the DPP and she did so, as I understand it in this case, because she could not proceed any further because of the intervention of the High Court. With what she got, she handed it to Lloyd Babb, who said, "I'll hand it the Solicitor-General", who said, "I will hand it to the Victorian DPP."

Mr RON HOENIG: A lot of what this Commission does gains a fair bit of media coverage, sometimes sensational media coverage. I know it is part of the executive branch and not part of the judicial branch, but it would be far more helpful, judicious and fair if everybody did not worry about the media and did their job.

Mr LEVINE: That gets dangerously close to a major issue as to whether a body like ICAC should operate in secret—like the one in South Australia fundamentally does—or partially in secret and partially in public. From observing it, through my connection over the last two-plus years, I have seen that the media is only concerned with the sexy cases. If you read about what ICAC has been doing you will see that they have been doing great work—

CHAIR: Absolutely.

Mr LEVINE: —in the most boring, uninteresting areas like information technology contractors issuing phoney invoices over three years to three universities to the value of \$188,000. There was the Ausgrid matter, which is a lay-down misere. That has been dealt with. I have not interfered or complained about that. And there are other matters.

CHAIR: I apologise for—

The Hon. LYNDA VOLTZ: I have to make a point. Between the drills and the bagpipes, it is getting very—

Reverend the Hon. FRED NILE: It is a Commonwealth Day function.

Mr ADAM MARSHALL: Thank you, Commissioner, for appearing this morning.

Mr LEVINE: I am Inspector.

Mr ADAM MARSHALL: I am sorry, Inspector. I want to take you to the memorandum of understanding [MOU] between the Inspector and the Commissioner that currently exists. Is that MOU between the individuals that occupy those positions or the positions themselves?

Mr LEVINE: It is between the individuals that occupy the positions. It was renewed when we were both appointed.

Mr ADAM MARSHALL: And it would be renewed again should any new occupant come to either of those positions.

Mr LEVINE: Yes.

Mr ADAM MARSHALL: Clause 4.2 of the MOU talks about regular meetings between the individuals to address some of the issues which we have been touching on. Clearly in your 2014-15 annual report you report that there were no meetings whatsoever. You have elucidated on that in some of your evidence today. What concerns me, and what I am interested in, is what recourse there is when either party refuses to play its role in accordance with 4.2 of the MOU, and what should we do, or, if there is no recourse, what can be done to ensure that that MOU is fulfilled by both individuals. Clearly when it is not fulfilled—as it has not been in this case—it can be a recipe for problems.

Mr LEVINE: I am not sure of the precise terms of that clause.

CHAIR: Do you have the MOU there?

Mr ADAM MARSHALL: No; I wrote down the numbers without bringing the document with me.

CHAIR: It is a clause which requires you to have a meeting. I think it is three times a year.

Mr LEVINE: No, that was changed. I believe that was changed to make it more general—that we would meet from time to time, when required.

Mr ADAM MARSHALL: "Periodically", I think, from memory, was the word used.

Mr LEVINE: Yes. I think we were in agreement that to be bound to monthly meetings was unnecessary. The reality is that the period has extended over a couple of years without any meetings.

Mr ADAM MARSHALL: In response to a question from my colleague Mr Patterson, you have said already that those meetings and that constant contact is integral to both roles fulfilling their functions properly. What can be done to ensure—you have an MOU and that is a key part of it—that that actually does happen and you do not have an instance—it does not matter who the individuals are—where one individual or both decide not to meet? For me that is an untenable situation.

Mr LEVINE: I agree. We might as well not have an MOU. I do not have an MOU with the Commissioner of the Police Integrity Commission. I cannot think—without having the actual document—of anything of value that would have been achieved had the MOU been followed. That says a lot about the MOU as being almost not worth the paper it is written on—which, generally, can often be the whole purpose of writing an MOU.

Mr ADAM MARSHALL: If you want to take this question on notice that is probably the best way to go. I invite you to comment on the value of that MOU, particularly that clause, and whether the outcomes that it seeks to achieve could be achieved better by another means.

Mr LEVINE: I am happy to do that.

Mr RON HOENIG: You made some reference to the doctrine of procedural fairness in your opening. I think when we conducted public hearings with respect to the annual report, it was pointed out to us that the Commission conducts investigations and there is no requirement within the legislation for that to apply. Is that a legislative omission? For example if the police conduct an investigation they are bound by the Law Enforcement (Powers and Responsibilities) Act [LEPR] and common law requirements to provide protections and procedural fairness. Those do not apply to Commission investigations, as we have been reminded. Does there need to be some sort of legislative intervention? Would you like to take that on notice?

Mr LEVINE: It could be characterised as a legislative omission by reference to the fact that in the PIC Act it is expressly included.

Mr RON HOENIG: Thank you for that. The other thing I wanted to ask you about is something I have made reference to in other public hearings about this because it troubles me. It seems to be implied in some of the things referred to in your opening. I am a purist—that there is not just a doctrine of procedural fairness but there is a presumption of innocence and proof of guilt beyond reasonable doubt determined by the judicial arm of government. As a matter of practice, as distinct from a matter of law—this was something that the former

Chief Justice referred to in his report—if somebody gets referred to by the executive branch as being guilty of corrupt conduct they are instantly branded as being corrupt. If that gets referred to the DPP and there is no evidence to charge them—not only are they found not guilty; there is no evidence to charge them—or alternatively it is not even referred to the DPP, forevermore they are regarded as "the corrupt so-and-so". There is something wrong somewhere, is there not?

Mr LEVINE: I agree. I agree entirely. This is the foundation for a lot of the communications. I cannot think of the person's name, but it does not matter because the complaint is not uncommon: "Hey, listen, Mr Inspector, I had to go through X hearing in operation Y in the ICAC and either there was no finding of corruption against me or there was but the criminal proceedings failed. I have been trying to get a job and I have failed on 80 occasions because my prospective employer googles me. And what comes up? The ICAC finding of corruption, not the acquittal."

Mr RON HOENIG: So, what is the solution?

Mr LEVINE: A solution may have to be that ICAC will have to develop an exoneration protocol. I will leave it at that.

CHAIR: Will you address that in your subsequent report?

Mr LEVINE: Yes.

Mr CHRIS PATTERSON: I think it has been raised.

CHAIR: Does anyone else have any further questions? Inspector, I have to say it has been an interesting morning and thank you for being so frank and forthright with the Committee. Depending on what the Commissioner says I take it you may be willing to come back and potentially address us some more if necessary following our meeting with the Commissioner? Hopefully that is unnecessary.

Mr LEVINE: Yes, I will be happy to. Can I just say this, and I know this Committee will avoid it; we do not want back and forth, back and forth.

CHAIR: No, I agree with that.

Mr LEVINE: And we do not want this business to develop into Strike Force Emblems or Operation Prospect that goes back to the last century that still has not been resolved.

The Hon. LYNDA VOLTZ: Trevor and I do not.

The Hon. TREVOR KHAN: We had enough of that last time.

Mr LEVINE: I think the time for Operation Hale to be finished is now. But that will not preclude all the matters that have been raised.

CHAIR: I think they are all process matters that have exercised the mind of the Committee. I think having had an opportunity to obtain the Crown Solicitor's advice in relation to the ambit of section 64 has been worthwhile and certainly crystallised the views around this table about where we can and cannot go. There is no intention of this Committee to re-investigate the process of Operation Hale and the decisions of the Commissioner. But we are interested in the processes of ICAC, which you have addressed significantly this morning.

Thank you everyone for your attendance today. This concludes our public hearing again. I would like to place on record my thanks to the witnesses who appeared today, thanks to the Committee members for their contributions and thank you to the parliamentary staff and the Deputy Clerk, who is with us today as well. These people are terrific, they do lots of excellent work.

(The witnesses withdrew)

(The Committee adjourned at 12.32 p.m.)
